**BEFORE THE ENVIRONMENT COURT**
**I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2019] NZEnvC 120**

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of an application under s 316 and s 320 of the Act |
| BETWEEN | THE FRIENDS OF SHERWOOD TRUST |
| AND | NGĀTI PAOA TRUST BOARD |
| | (ENV-2018-AKL-000177) |
| | Applicants |
| AND | AUCKLAND COUNCIL |
| | Respondent |

Court: Environment Judge M Harland sitting alone under s 279 of the Act

Submissions: S Grey for The Friends of Sherwood Trust and Ngāti Paoa Trust Board
S Quinn & K Rogers for Auckland Council
C Lenihan for Department of Conservation

Date of Decision: 15 July 2019

Date of Issue: 15 JUL 2019

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**DECISION OF THE ENVIRONMENT COURT ON APPLICATIONS FOR COSTS FOLLOWING DETERMINATION OF INTERIM APPLICATION FOR ENFORCEMENT ORDERS**

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A: The applications for costs by Auckland Council and the Department of Conservation against The Friends of Sherwood Trust are granted as follows:

(a) Costs in the sum of $22,826 are awarded to Auckland Council.

(b) Costs in the sum of $19,451.08 are awarded to the Department of Conservation.

B. The application for costs by Auckland Council against Ngāti Paoa Trust Board is refused.

## REASONS

### Introduction

[1] The Auckland Council (**the Council**) and the Department of Conservation (**DOC**) planned a pest control operation involving a drop of sodium fluoroacetate (**1080**) in the Hunua Ranges Regional Parklands, Whakatiwai and Waharau in September 2018.

[2] The Friends of Sherwood Trust (**Friends of Sherwood**) filed an application for interim and final enforcement orders in the Environment Court seeking to prevent the planned drop. A key concern for Friends of Sherwood was the alleged risk to the water supply for Auckland City obtained from dams in the Hunua Ranges being contaminated by the proposed aerial drop.

[3] On 6 September 2018 at a judicial telephone conference convened on an urgent basis by Judge Smith, the Friends of Sherwood obtained an interim order preventing the drop from occurring until their interim application could be heard by the Environment Court on 13 September 2018.

[4] After the judicial telephone conference, but before the hearing on 13 September, the Ngāti Paoa Trust Board (**the Trust Board**) was granted leave to join the proceedings as a joint applicant.[1]

[5] Prior to the hearing and in accordance with timetable directions, the parties filed affidavit evidence. The evidence comprised three Eastlight folders. There were ten deponents (four for Friends of Sherwood and the Trust Board, three for the Council, two for DOC and one (Dr Sinclair) on behalf of the Public Health Service).

[6] The hearing took place over two days on 13 and 14 September 2018. Ms Grey



[1] The request to join as co-applicant was made by Ms Grey on behalf of Ngāti Paoa on 10 September 2018. Ngāti Paoa was subsequently joined as the second applicant with the consent of all parties.

represented both applicants at the hearing. At the hearing all parties agreed that the affidavits and their annexures should be taken as read and there was no cross-examination of any of the deponents.

[7] On 21 September 2018 the Court issued a decision refusing the application for interim orders,[2] with costs reserved.

**The costs applications**

[8] Applications for costs have been filed by the Council and DOC. The Council seeks an award of costs against both applicants. DOC seeks costs against the Friends of Sherwood, but not the Trust Board.

[9] The applicants oppose the applications.

[10] The Council has incurred legal costs of $45,653.46 defending the application for interim enforcement orders. It seeks a 50% contribution towards its costs, namely an award of $22,826.73. It is concerned is that if costs are not paid by the applicants, the costs incurred by the Council will fall on the ratepayers of Auckland City.[3]

[11] DOC has incurred costs of $44,599.25. It seeks an award of approximately two thirds of its legal costs and full reimbursement of its expert witness' costs and disbursements.

**Legal principles**

[12] Under s 285 of the Act and relevant to this case, the Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable. This has been described as a broad discretion,[4] for which there is no scale, however case law has outlined that if costs are awarded, they are not awarded as a penalty against an unsuccessful party, but rather they are awarded to compensate a successful party for the costs it has reasonably incurred if the Court considers this is a just outcome.[5]

[13] To provide some guidance to those appearing before the Court, paragraph 6.6 of the Environment Court of New Zealand Practice Note 2014 (**the Practice Note**) outlines

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[2] *The Friends of Sherwood Trust v Auckland Council* [2018] NZEnvC 178.
[3] Application for costs by the Council dated 14 December 2018 at [29].
[4] *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 (HC).
[5] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385; (1996) 2 ELRNZ 138 (PT).

the issues that are relevant to the Court when it considers costs. The issues articulated in the Practice Note are "not a set of inflexible rules", they are a guide only, however the preamble to the Practice Note states that the matters outlined in it "will be followed unless there is good reason to do otherwise."

[14] Paragrapgh 6.6(d) lists five factors that are commonly referred to and given weight if they are present in a case. They are:

(a) Where arguments are advanced that are without substance;

(b) Where the process of the Court is abused;

(c) Where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing;

(d) Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected; and

(e) Where a party takes a technical or unmeritorious point of defence.

[15] Prior to, but also since the promulgation of the Practice Note, to provide some guidance to parties who appear before it, the Court has from time to time referred to three broad categories of costs awards. These should not however be elevated to "expectations" or akin to a "scale" or a "guideline." They are simply general observations by some judges of the Environment Court about the Court's general approach to the wide discretion it has in relation to awards of costs.

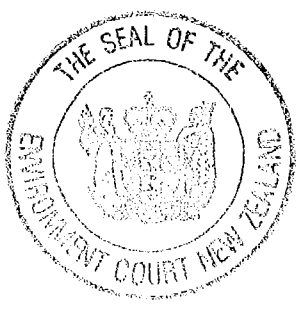
[16] In *Van Dyke Family Trust v Tasman District Council*[6] the broad categories were said to be:

(a) Standard costs- some judges have referred to a "comfort zone" of 25-33 per cent of actual costs incurred;

(b) Higher than normal costs, where aggravating or adverse factors might be present, such as those identified in *DFC NZ Ltd v Bielby*;[7] and

(c) Indemnity costs, awarded only rarely and in exceptional circumstances.

[17] It should be noted that the *Bielby* factors are those which now appear in




[6] [2011] NZEnvC 405.
[7] [1991] 1 NZLR 587.

paragraph 6.6(d) of the Practice Note, so there is an argument that they should be considered as a matter of course in applications for costs in any event.

[18] There is also case law that considers how the issue of costs might be approached in enforcement proceedings, however many of the matters referred to in the decisions can be properly addressed if the factors in paragraph 6.6(d) of the Practice Note are considered. Two additional matters warrant mention however. First, respondents named in enforcement proceedings may have little choice but to engage in the proceedings and defend their position.[8] This is especially so, where interim orders are sought as there is usually a degree of urgency about such applications. Secondly, the Court has been more willing to award costs against an applicant for enforcement orders where the case has been proved to have little or no merit,[9] or where an application for interim enforcement orders fails. [10] The reason for this is likely to be related to the nature of such proceedings and the fact that they often require a more immediate response.

[19] It must also be noted that parties that bring proceedings in the public interest are not immune from being ordered to pay costs,[11] even though this is a matter to be considered and weighed in the exercise of the Court's discretion if it is proved to be correct.

**The grounds for seeking costs**

[20] The Council and DOC followed the approach outlined in paragraph [16 ] above and submitted that higher than "normal costs" should be awarded to them following the *Bielby* approach, because two of the factors set out in that case applied, namely that the applicants' arguments were advanced without substance and their cases were poorly presented. I have already signalled that the basis for an approach which favours a higher award of costs relying on *Bielby*, may be less relevant because the same factors are identified in the Practice Note as being relevant considerations to an award of costs and the quantum of it in any application for costs, but for the purposes of this case that is not a significant consideration.

[21] The nub of the applicants' response to the applications for costs was to claim that

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[8] *Topping v Gibbons Holdings*, Environment Court Christchurch, C121/92. See also *Royal Forest and Bird Society of New Zealand v Innes* [2014] NZEnvC 201.
[9] *Jackson v Phillips*, Environment Court Wellington, W063/08.
[10] *See Wislang v Martin W85/97, 28 October 1997 and Clark v Porirua City Council W54/07, 29 June 2007, Sybeem Holdings Limited v Auckland Council [2012] NZEnvC 9.*
[11] See *Re Royal Forest and Bird Protection Society* A128/99 at [11]. *Coromandel Hauraki Advocates Incorporated v Waikato Regional Council A59/99.*

they were representing important matters of public interest and to highlight that access to justice is important. They also contended that their case was supported by an expert witness (Mr Hilton for the Friends of Sherwood) and therefore not without merit. They claim they have no funds other than those they were able to urgently raise for the interim hearing. [12]

**Analysis**

[22] We now analyse the arguments advanced to support the applications for costs. Where they are relevant, we have referred to the factors outlined in sections 6.6(d) of the Practice Note.

***Arguments advanced were without substance (Practice Note 6.6(d)(i))***

[23] Counsel for the Council and DOC submitted that the applicants' arguments were without substance because:

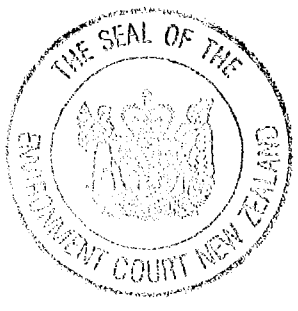
(a) The s 13 submission was an attempt to relitigate the unsuccessful arguments made in the High Court in *Brook Valley Community Group Incorporated v Trustees of the Brook Waimarama Sanctuary Trust.*[13] They submitted that the Environment Court was bound by the High Court judgment, and as a result it was inevitable that this part of the application would fail;

(b) The application for orders was made in the face of clear public policy in support of 1080 drops, including the advice of the Parliamentary Commissioner for the Environment and it had been approved by the Public Health Service;

(c) The alleged breaches of other legal obligations under the Health Act 1956, the Agricultural Compounds and Veterinary Act 1997 and the Wildlife Act 1953 were outside the jurisdiction of the Court.

[24] In response, counsel for The Friends of Sherwood and the Trust Board submitted that:

(a) While the applicants were not successful on the substantive part of their application, serious deficiencies in relation to the consultation undertaken with the Trust Board by both the Council and DOC were revealed because of it;




[12] Memoranda of counsel for the applicants dated 18 December 2018 and 24 December 2018.
[13] *Brook Valley Community Group Incorporated v Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1844.

(b) The application raised a matter of public concern and interest, and because the effect of the Exemption Regulations has been to nationalise decision-making about 1080 drops, there is a loss of access to any public forum apart from the Courts to assess activities such as this which have the potential to cause harm;

(c) The applicants are both representative organisations, representing important public interests;

(d) It is important that there is affordable access to justice and public confidence in the justice system, which might be affected if costs are awarded against the applicants; and

(e) In any event, neither applicant has the resources to pay an award of costs other than funds they have raised to progress matters of public interest.

[25] We acknowledge that the application involved a topic that is of public interest and that The Friends of Sherwood expounded a view of that topic held by some members of the community. We also acknowledge the Trust Board's interest in this matter, while supporting the Friends of Sherwood was also focussed on mandate issues relevant only to Ngāti Paoa. A key part of the Trust Board's case was that even though the Council and DOC may have consulted with the Ngāti Paoa Iwi Trust Board (**the Iwi Trust Board**), the Trust Board was the entity who had the mandate to speak for Ngāti Paoa on this issue and it was not consulted. Despite these acknowledgments however, having such interests does not exempt the applicants from having a costs award made against them. The key consideration is whether the arguments advanced by them were without substance, in the sense here of being legally without substance.

[26] We found that the Council and DOC took considerable care to undertake the process surrounding the drop of 1080 properly. In relation to consultation with mana whenua, we were satisfied that this had been adequate[14] and in relation to those who had the potential to be adversely affected by the operation we were satisfied that the Council and DOC had undertaken an extensive consultation programme [15] and that the information provided to the public about the regulation, planning, delivery and monitoring proposed for this 1080 programme was comprehensive. The detail provided was sufficient to show that the discharge of the 1080 pellets was necessary, would not be


[14] Decision [2018] NZEnvC 178 at [80].
[15] Decision [2018] NZEnvC 178 at [155].

indiscriminate, and was carefully planned. While the documents provided by the Council made it very clear that there are risks associated with the use of 1080, in our decision we found that the methods proposed to manage those risks were appropriate and adopted the necessary precautions.[16]

[27] In the end we found that there was no evidence of a risk of irreparable or serious damage to the applicants or others if the interim orders were not made, as the permission granted included conditions to protect the health of the public.[17]The risk of contamination to Auckland City's water supply from the area covered by the proposed drop, a matter of concern to the applicants and part of their rationale for distinguishing this case from the facts in *Brook Valley*, was simply not made out on the evidence.

[28] In our view, there were problems with the applicants' case, which were evident from the outset. These included the matters identified by DOC and the Council in support of their costs applications that:

(a) because of the Exemption Regulations and the binding High Court decision of *Brook Valley*, it was very unlikely as a matter of law that the applicants would succeed with their application for interim orders;[18]

(b) the applicants' submissions that there were apparent breaches of s 69U of the Health Act 1956, breaches of the Agricultural Compounds and Veterinary Medicines Act 1997 and the Wildlife Act 1953 were outside the jurisdiction of this Court.[19]

[29] We agree with the Council's and DOC's submissions that the above arguments advanced by the applicants were legally without substance. The consultation argument raised by the Trust Board does however not come into this category.

***Case poorly presented***

[30] Counsel for the Council and DOC submitted that the case was poorly presented, particularly regarding the evidence that was called. Counsel contended that:

(a) The applicants did not satisfy the burden of proof in bringing the application for orders, and

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[16] Decision [2018] NZEnvC 178 at [63].
[17] Decision [2018] NZEnvC 178 at [131].
[18] Decision 2018] NZEnvC 178 at [107].
[19] Decision [2018] NZEnvC 178 at [156].

(b) There were difficulties with admissibility of most of the evidence filed by the applicants given it was opinion and not expert evidence.

[31] Counsel for The Friends of Sherwood and the Trust Board did not accept the submissions made about the applicants' evidence. She submitted that the application was supported by expert evidence from Mr Hilton, a trustee of the Friends of Sherwood, who she described as a well-qualified wildlife scientist and by Ms Allies, an Environment Officer for the Trust Board.

[32] Although the Environment Court can receive any evidence it considers appropriate to receive and it is not bound by the rules of evidence that apply to judicial proceedings,[20] in a case such as this where interim orders are sought the evidence provided must in our view be probative and reliable. Applying the usual and time-tested rules of evidence about admissibility, particularly in relation to expert evidence is a way of ensuring these objectives are met. It should also be noted that the Practice Note contains a specific section on expert evidence,[21]which together with ss 25 and 36 of the Evidence Act 2006, are very clear about the requirements of experts who give evidence in the Court for the very reason that the ability to express an opinion in Court is a privilege not extended to other participants.

[33] We referred to the evidence provided to us by all parties in paragraphs [13]-[19] of our decision. We noted in paragraph [19] that there were difficulties with most of the evidence filed by the applicants dealing with potentially adverse effects, because it was opinion but not expert evidence and/or there was insufficient information about the context to the alleged adverse effects or historical events and in relation to Mr Graf's evidence, it was not in reply. [22] We noted that the applicants' continued to seek to file additional evidential material at and after the hearing.[23]

[34] Although these matters could be characterised as coming within paragraph 6.6(d)(ii) of the Practice Note, we have decided by a narrow margin not to do so. The applicants did not provide the necessary admissible proof to support their case about adverse effects. Arguably they should have been more alert to what was required, given that counsel and Mr Hilton were involved in the *Brook Valley* case where Churchman J also referred to evidential deficiencies in the affidavit evidence produced in that case to

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[20] s 276 of the Act.
[21] Section 7.
[22] Decision [2018] NZEnvC 178 at [19] and [116].
[23] Decision [2018] NZEnvC 178 at [18].

support an application for judicial review.

***Undertaking as to Damages***

[35] A final matter raised by the Council and DOC and characterised as an aggravating factor was that the applicants failed to provide an appropriate undertaking for damages, as required by s320(b) of the Act.

[36] We dealt with this matter in paragraphs [132] – [140] of our decision. Even though two undertakings were provided, we found that neither undertaking was appropriate on the basis that no information was supplied to support them to enable the Court (or the parties) to establish whether they could be relied on. This was a matter that we determined was highly relevant to the exercise of our discretion.[24]

[37] We agree that the lack of an appropriate undertaking as to damages is also relevant to the costs applications, because without a proper undertaking as to damages it is very rare for interim applications of this nature to be granted. This a matter referred to in the Act as something the Court must consider, however at the outset of the hearing on 13 September there was still no undertaking as to damages filed. One was filed on 14 September and another after the hearing on 18 September, but as outlined both were not appropriate because of the lack of detail accompanying them.

**Should we award costs?**

[38] The Friends of Sherwood and the Trust Board say they have no or limited resources. They do not however explain or provide details about the extent of their resources. The only information we have is the undertaking provided by Sandra Jane Condon after the hearing which stated she would "comply with any order that the Court may make for the payment of damages to the extent of $50,000..."[25] however, we found that undertaking was inappropriate as it was unsupported by any information.

[39] A costs award can be made at a meaningful level, even against an impecunious party, when that party has advanced a case which is poorly pleaded or lacking in merit.[26] In this case we have found that except for the argument about consultation concerning Ngāti Paoa, the other arguments advanced by the applicants were legally without substance and the evidence about potentially adverse effects was evidentially

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[24] Decision [2018] NZEnvC 178 at [140].
[25] Decision [2018] NZEnvC 178 at [138].
[26] Te Whare O Te Kaitiaki Ngahere Inc v West Coast Regional Council, (HC), 26/11/2014, CIV-2013-409-1554 at [16], [2014] NZHC 2969; Gibson v Fisher CIV-2006-404-103 (HC) 17 July 2007 at [9].

problematic.

[40] In our view, an award of costs in this case is appropriate, but only against the Friends of Sherwood. Even though the Trust Board joined the arguments advanced by the Friends of Sherwood, in our view their main concern was to do with consultation. This was not an argument that suffered from the same degree of legal or evidential difficulty as the other arguments to which we have referred.

[41] In reaching this decision, we have taken into account the fact the Friends of Sherwood represent a view of some members of the community about the use of 1080 for pest control, however it is just that – one view. And it is a view that was comprehensively met by the evidence from the Council, DOC and the Public Health Service, who arguably also represent the public interest. In this regard, we cannot ignore that the costs of the Council and DOC in this proceeding are also met by the public. As well, we cannot ignore that other responsible and independent public agencies such as the Parliamentary Commissioner for the Environment and the Environment Protection Agency (EPA) in undertaking their public functions have also comprehensively considered, reported on and decided about the use of 1080 for pest control. We mention this, because even if a group represents an aspect of public opinion, when it comes to Court action it must follow the legal process provided to resolve disputes in that arena. Because this case concerned an application for interim enforcement orders which was required to be dealt with as a matter of priority, it was incumbent upon Friends of Sherwood to present an evidentially sound and legally sustainable case to succeed. For the reasons we have expressed above, it fell well short of the mark in this regard.

[42] Although Ms Grey submitted that access to justice is important, her submission that the promulgation of the Exemption Regulations has effectively removed the ability of members of the public who do not support the use of 1080 for pest control from challenging aerial drops such as this, is not entirely correct. Every challenge taken through the Courts either succeeds or fails on the strength of the evidence as it is applied to the law and failing that, the democratic political process is always available for citizens to advocate for a change to the law. We are not persuaded that this case engages any access to justice concerns. Costs are unlikely to have been awarded in this case had it been legally and evidentially sustainable, even if the Friends of Sherwood had not succeeded.


[43] We determine that an award of costs against the Friends of Sherwood is appropriate. We now consider what the quantum of that award should be.

**What should the amount of costs awarded be?**

[44] In all the circumstances but having particular regard to the fact that the High Court had determined a key legal issue that was engaged by the application, the evidential difficulties we have referred to and the fact that this was a case that needed to be responded to as a matter of urgency without an appropriate undertaking as to damages, we consider that an award comprising one half of the Council's and one third of DOC's legal costs is justified and is reasonable. We agree that Dr Fairweather's costs sought by DOC should also be reimbursed. We have reached this decision because the burden of the legal argument fell largely to counsel for the Council, with similar arguments being advanced by counsel for DOC.

**Decision**

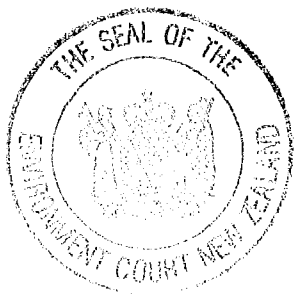
[45] Accordingly, we make the following awards of costs. The Friends of Sherwood are ordered to pay:

(a) The sum of $22,826 to the Council.

(b) The sum of $19,451.08 to DOC costs being:

i) Dr Fairweather's costs of $6,877; and

ii) $12, 574.08 towards legal costs.




**M Harland**
**Environment Judge**