

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

Decision No. [2019] NZEnvC 123

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s120 of the Act
BETWEEN J K & H E SCHWARTFEGER
(ENV-2018-AKL-000390)
Appellants
AND NORTHLAND REGIONAL COUNCIL
Respondent

Court: Judge J A Smith sitting alone pursuant to s279 of the Act and s285
Submissions: J K and H E Schwartzfeger for themselves
M G Conway and S K Lenin for Northland Regional Council
Date of Decision: 18 July 2019
Date of Issue: 18 July 2019

COSTS DECISION OF THE ENVIRONMENT COURT

- A: Northland Regional Council is to pay to Mr and Mrs Schwartzfeger the sum of \$3,257.05 in payment of their disbursements including legal fee for preparatory advice prior to the hearing and as contribution towards the full costs of these proceedings. The said sum may be enforced in the District Court in Whangarei if necessary.
- B: The Court recommends that the Council reconsider making ex-gratia payment previously offered to the Schwartzfegers' in respect of the 2016 proceedings but makes no ruling to that effect. These orders include the costs of this application.



REASONS

Introduction

[1] This application for costs relates to a successful application for declarations by the Schwartfegers' the Court.

[2] Certain of the orders were conceded at the commencement of the hearing by the Regional Council. However, the Court made further orders that were opposed and also notes that the cost of proceedings had largely been expended before the commencement of the proceedings in any event.

Background

[3] The Schwartfegers' have undertaken several actions in relation to attempts by the Regional Council to collect funding for pontoon jetty placed into the Hatea River in Whangarei. In 2011/2012, discussions took place relating to a wall and agreement was reached for the Schwartfegers' to regularise the position and obtain an appropriate consent in their own name.

[4] The details of this are covered in the Court's previous decision [2016] NZEnvC 096 and I will not repeat that background.

[5] Subsequent to the waivers granted in relation to fees there were several purported rescinding of those decisions and then further waivers granted.

[6] At one stage, the Council allowed objection proceedings to be undertaken and advised in the decision to the Schwartfegers' that there was power to appeal to this Court. This Court by virtue of decision number 096 determined that there was no power to issue such a decision in relation to waivers or power of appeal to this Court.

[7] Nevertheless, the Court noted, as part of its decision, the Court held in paragraph 18 of the 2016 decision:

Whatever may be the legal position, this situation is entirely of the Council's making in:

- (a) Granting the waiver to Mr and Mrs Schwartfeger in unequivocal terms;
- (b) Resiling from that waiver without notice to the Schwartfegers;



- (c) Purporting to appoint a Commissioner to decide an objection in respect of their concerns over the waiver;
- (d) Issuing a decision purporting to give power to appeal to the Environment Court.

At paragraph 23 of the 2016 decision, the Court held in relation to the power of waiver:

These words are broad and appear to provide:

- (a) The charges can be remitted retrospectively or prospectively;
- (b) There is no time limit or constraint over what period they can be remitted for;
- (c) There is no express power to review or change the decision to remit.

[8] Given that the Council subsequently purported to rescind the waiver and seek further payment, the declaration was accordingly necessary. I accept Mr and Mrs Schwartzfegers' position that they faced a Council decision to rescind the waiver and seek payment again. In these circumstances the declaration was reasonably necessary to clarify the position.

[9] Importantly, the Council still argued that it had the power to rescind the waiver and it arguably could have done so after this declaration, notwithstanding its concession on the other points.

Tests for costs

[10] There is no real argument about the tests for costs and the principles are fully and fairly set out in the helpful submissions of the Regional Council:

- a) A party is not ordered to pay costs as a penalty;
- b) A party may be ordered to pay costs as compensation where that is reasonable and just;
- c) Orders for payment of costs are commonly made against party who has put another party to unnecessary cost.

[11] The Court could make an order of costs within its normal comfort range, somewhere between a quarter and one third but the Schwartzfegers' seeks full repayment in respect of their legal costs, in respect of the 2019 proceedings and also some indication in respect of their 2016 costs.



[12] The Council say that there is no basis for such an order. I intend to address this as a two-stage test:

- a) Is there a basis for an award of costs higher than normal;
- b) If so, what is the appropriate quantum.

Higher than normal costs

[13] I am satisfied that the 2016 decision was relatively clear as to the Court's preliminary view on the underlying legal issue. From the paragraphs I have quoted and from the general tenor of the decision, it can be seen that the situation was one entirely of the Council's making and showed a vacillation on the part of the Council in respect of its waiver or remission of fees.

[14] Having granted a remission in unequivocal terms (as is noted in the 2016 decision) it is difficult to see on what basis it could then vary that or rescind its original decision. That the Council would subsequently proceed to do so after the Environment Court decision is deeply concerning and arguably shows a disregard of the Court's original decision.

[15] I note in particular that it was the Council that argued that the Court had no jurisdiction to deal with the appeal, notwithstanding that the Council's decision had indicated there was a right of appeal. Moreover, the power of a Council to remit a waiver many years after the event seems so wrong as a principle of law that it is difficult to see that it could be reasonably argued in the Court.

[16] In fact, before this Court, the Council accepted that there was a distinction between those remissions that had already occurred i.e. those that had occurred prior to the date of the rescinding of the waiver and those that were prospective. However, the Council could not point to any law or any provisions in the statute which supported such a distinction.

[17] Overall, I am satisfied in the circumstances that the Council's case was not properly arguable and that its attempt to resile from an unequivocal waiver initially granted created expense and prejudice to the owners in circumstances where they had no choice but to defend their position. The suggestion that the Council sought to resolve



this matter appears to be answered by the subsequent various decisions made by the Council which created yet further confusion as to whether the remission had been made or was subject to further decision of the Council.

[18] Accordingly, I am satisfied that this is one of those cases which makes out a case for payment above normal costs in the discretion of the Court as to the quantum of such costs.

Quantum of costs

[19] Mr and Mrs Schwartzfeger represented themselves. This represented a considerable saving that would have been claimed against the Council for over one day of hearing time. In those circumstances, it must be appropriate that the hearing fees paid to the Court, some \$750, are payable by the Council. Moreover, the saving of that cost, being the legal costs of both preparation, submissions and argument in the Court would have been considerable. Instead the Schwartzfegers' seek the costs of the legal advice they received during the preparation of the declaration of proceedings in the sum of \$2,278 together with disbursements for Court costs and courier fees for filing to a total as follows:

- a) \$2,282.75 relating to the legal fees advising in relation to declarations and their preparation from 2018 to early 2019; and
- b) Filing Court and hearing fees involved in the proceedings together with courier fees to a total of \$974.30.

[20] Looking at the total fees that would normally be expended for a matter such as this, it appears to me that this claim is likely to be in the order of 25-33% of fees if counsel had been involved for the entire proceedings. Moreover, I am satisfied that the legal advice that Mr Schwartzfeger obtained reduced the amount of time that was necessary for this Court to deal with this matter and helped to isolate the legal issues for this case.

[21] In those circumstances, I am satisfied that these payments should be reimbursed in full on the basis:

- a) They are for a modest sum;
- b) They represent monies expended in the pursuit of this declaration before the



Court;

- c) That Mr and Mrs Schwartzfeger represented themselves at the hearing thus reducing the costs significantly.

[22] I keep in mind that there is no rule in relation to the percentage of payments and the decision is an observation and mathematical calculation looking at costs awards made overall. Almost all of these examples relate to parties that are represented throughout the proceedings and therefore in my view are not directly comparable.

[23] In respect of Mr and Mrs Schwartzfeger's personal costs I make no award and I consider reimbursement of their direct expenditure in this way as a reasonable contribution to the overall costs of this matter.

[24] I note that the Regional Council has not indicated its legal expenditures in relation to these proceedings which I suspect is significantly higher than the amount that is being claimed by the Schwartzfegers' in this case. Overall, I am satisfied that it meets the test of blameworthiness in that an issue was pursued by the Council without merit before this Court notwithstanding the Court had given an earlier indication of its view on the topic.

The 2016 fees

[25] I am satisfied, as was the Court, that the Schwartzfegers' filed an appeal before this Court in 2016 because of the notification to them that it was being considered as a s357A objection. The document in question is annexed to the decision of the Court in 2016. That led them to consider that there was properly a power of appeal.

[26] The Council having said there was then resiled from that position and argued that there was in fact none. This Court is of course bound by the legal position and concluded that there was no power to object to or appeal a waiver decision.

[27] This Court can take that matter no further except to commend to the Council that it reconsider whether the ex-gratia payment offered earlier should be repeated to resolve that aspect of the matter. The Court simply records its recommendation but can make no ruling in respect of this matter. The orders for costs include costs in respect of this application.



Outcome

[28] Therefore, the Court orders:

- a) Northland Regional Council is to pay to Mr and Mrs Schwartzfeger the sum of \$3,257.05 in payment of their disbursements including legal fee for preparatory advice prior to the hearing and as contribution towards the full costs of these proceedings;
- b) The said sum may be enforced in the District Court in Whangarei if necessary;
- c) The Court recommends that the Council reconsider making ex-gratia payment previously offered to the Schwartzfegers' in respect of the 2016 proceedings but makes no ruling to that effect;
- d) That these orders include the costs of this application.

[29] This matter is now concluded.

For the court:



J A Smith
Environment Judge

