**IN THE ENVIRONMENT COURT**
**AT CHRISTCHURCH**

**I TE KŌTI TAIAO O AOTEAROA**
**KI ŌTAUTAHI**

**Decision No. [2022] NZEnvC 118**

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of a notice of motion under section 149T(2) to decide proposed Plan Change 7: Water for Otago (referred to the Environment Court by the Minister for the Environment under s 142(2)(b) of the Act) |
| BETWEEN | OTAGO REGIONAL COUNCIL |
| | (ENV-2020-CHC-127) |
| | Applicant |

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| Court: | Environment Judge J E Borthwick |
| Hearing: | On the papers in Chambers at Christchurch |
| Last case event: | 17 November 2021 |
| Date of Decision: | 30 June 2022 |
| Date of Issue: | 30 June 2022 |

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## DETERMINATION OF THE ENVIRONMENT COURT

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A: An order for costs is made in favour of the Crown against the Otago Regional Council for the sum of $603,898.85 plus GST (if applicable).

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

## REASONS

### Introduction

[1] The Otago Regional Council applied under s 149T(2) of the Resource Management Act 1991, for an order that the Environment Court considers proposed Plan Change 7 to the Regional Plan: Water for Otago and gives a decision on its provisions and matters raised in submissions.

[2] Following the release of the court's final decision[1] approving the plan change provisions, the Otago Regional Council together with the Crown have agreed that an order for costs in favour of the Crown be made. The costs sought are the actual costs and expenses incurred in the disposition of this proceeding.

### The issue of costs

[3] This proceeding concerns a proposal of national significance and is brought to the court under Pt 6AA of the Resource Management Act 1991 ('RMA' or 'the Act').

[4] Section 285(3) of the Act provides that the Environment Court may order any party to the proceedings before it to pay the Crown all or any part of the court's costs and expenses. However, in proceedings under Pt 6AA, s 149T, the court must, when deciding whether to make an order, apply a presumption that costs under subs (3) are to be ordered against the applicant (s 285(5)(a)(ii)) and when deciding the amount of any order, the court must have regard to the fact that the proceedings are at first instance (s 285(5)(b)).

### Disposition

[5] There being no dispute about the matter, I will apply the presumption that

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[1] *Re Otago Regional Council* [2021] NZEnvC 179.

the applicant (Otago Regional Council) pays to the Crown the court's costs and expenses. However, I decline to fix the quantum at the sum agreed on by the parties, that is actual costs and expenses.

*First instance proceeding*

[6] The reasons given by the Minister for the Environment for calling in the plan change and referring the same to the Environment Court for decision, was to allow the Otago Regional Council staff time to focus on developing a new Land and Water Regional Plan and secondly, to avoid delay associated with the Schedule 1 process of the RMA that could complicate the development of that plan.[2] In short, the Minister for the Environment referred the plan change to the court as the Regional Council had capacity constraints.

[7] The added benefit to the Regional Council in the court determining the proceeding is that its costs are limited to those associated with a single hearing, with no right to appeal to the Environment Court on the merits of the plan change.

*Quantifying costs*

[8] The exercise of any judicial discretion must be carried out in a principled way. This discretion extends to the quantification of costs and expenses and applies even when costs and expenses are unopposed. While parties are agreed on the quantum of the costs sought, it is my view that an order for the court's actual costs and expenses (in full) would not be reasonable in this case.

[9] The Environment Court is part of a wider civil justice system, and should take into account more general principles that have been developed by the courts when they are relevant*; per Environmental Protection Agency v BW Offshore Singapore Pte*

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[2] Ministerial Direction of David Parker (Minister for the Environment) to refer the Otago Regional Council's proposed Plan Change 7 – Water Permits to its Regional Plan to the Environment Court (8 April 2020) at CB: Vol 5, Tab 12A.

*Ltd.*[3] In this instance it includes the principle that the costs ordered are to be reasonable in the circumstances.

[10] I am reinforced in the appropriateness of considering *reasonableness* when determining quantum, by s 285(3) which provides that the court may order the Crown be paid the whole or any part of the court's costs and expenses. Thus, under this subsection an order for actual costs (in full) is not inevitable. Secondly, when considering applications for party and party costs, the quantum payable is predicated on the court's assessment of reasonableness (s 285(1)). Finally, I consider s 149ZD of the Act reinforces the relevance of reasonableness when determining quantum. This section concerns the recovery of costs and expenses by other agencies when dealing with proceedings brought under the same part of the Act (Pt 6AA: Proposals of National Significance). Under s 149ZD the costs recoverable are actual and reasonable costs.

[11] Saliently, costs payable under s 149ZD also respond to the extent to which the benefit of the actions, to which those costs relate, is obtained by the applicant as opposed to the community as a whole. This distinction informs the quantum of costs to be ordered against an applicant and, I find, is an important aspect of the reasonableness of any costs ordered. While costs are not ordered under s 149ZD this distinction is, in my view, a relevant consideration here.

[12] In this proceeding, the fact that there is a benefit to the community as a whole is implicit from the factors cited by the Minister as being relevant to his finding that the proposed plan change is a matter of national significance.[4]

[13] The court's decisions realised those benefits (principally):

(a) for holders of deemed permits, approving a new regime that regulates

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[3] *Environmental Protection Agency v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577 at [19].

[4] Ministerial Direction of David Parker (Minister for the Environment) to refer the Otago Regional Council's proposed Plan Change 7 – Water Permits to its Regional Plan to the Environment Court (8 April 2020) at CB: Vol 5, Tab 12A.

the taking of water between holders of expired deemed permits;

(b) for holders of deemed permits and resource consents, by enabling their continuing access to water and security of water supply over the interim period; and

(c) for the community and tangata whenua, by allowing time for the implementation of Te Mana o te Wai through the appropriate planning instruments.

[14] The evidence was that there are 1,495 water permits in Otago expiring over the next five years, with 821 of those expiring in 2021.[5] This sum includes hundreds of deemed permits that expired on 1 October 2021; those permits were subject to few, if any, conditions.

[15] The coercive nature of rights held under the deemed permits provided impetus for many permit holders to form water user groups and collectively manage access to water. Indeed, the exercise of deemed permits created informal flow regimes between groups of permit holders.[6] However, with no flow and allocation regime in place under the operative regional plan or this proposed plan change, it was highly likely that the interests of these permit holders would be adversely affected if their permits were reconsented in the absence of the same, with costs to the environment and to the economy being very high.

[16] Ultimately, the court approved rules which could sustain flow sharing between holders of the (now) expired deemed permits over the short term, with applications to take and use water being a controlled activity if duration does not exceed six years.

[17] The decision of the court was to ensure controls provide primary sector irrigation, community water supplies, and hydro-electricity generation with a simple, objective and certain methodology allowing for a low-cost consent process

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[5] Gilroy, EiC dated 13 March 2021 at Table 1.

[6] Interim Decision at [125].

for ensuring that the rate of take and volume limits allocated in replacement consents do not exceed consented allocations under the existing permits, as well as reflecting historical use. This way the community was provided access to water and security of water supply over the interim period.

[18] Finally, the plan change objective is to facilitate an efficient and effective transition from the operative freshwater planning framework to a new integrated regional planning framework. The interim planning framework approved of by the court, holds open the space for the community and tangata whenua to determine *how* the fundamental concept of Te Mana o te Wai[7] is to apply in the region.

[19] The above benefits the community as a whole and are distinct from those benefits that accrue to the Regional Council at a time when it was experiencing constraints in its capacity.

*Quantum*

[20] At my request the Registrar provided me a copy of the court's costs and expenses.

[21] Reflecting on how the benefit to the community may be brought to account in an order for costs, I have come to the view that the costs pertaining to the time of the bench (pre-reading, sitting and writing) should not be recovered. Otherwise, all other costs and expenses are recoverable[8] as many of these would likely have been incurred by the Regional Council if it had conducted the first hearing. For those costs and expenses that may be peculiar to the court's own processes (including the production of a transcript and the engagement of audio/visual services),[9] I judge this a fair apportionment given the length of the hearing

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[7] NPS-FM 2020.

[8] Including those of the bench being mainly travel and accommodation costs.

[9] Courtrooms suitable for accommodating parties were not available.

(46 days), the need for open and transparent justice and given also the concurrence of the global pandemic where COVID protocols could have otherwise impacted the scheduled hearing with ensuing delay and party costs.

**Order**

[22] Given all of the above, I order the Otago Regional Council to pay the Crown $603,898.85 plus GST (if applicable).

[23] If there is any disagreement over the quantum payable, parties may revert to me.


**J E Borthwick**
**Environment Judge**