BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 200

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under s 120 of the Act
BETWEEN	WILKINS FARMING CO LIMITED
	(ENV-2018-AKL-380)
	Appellant
AND	SOUTHLAND REGIONAL COUNCIL
	Respondent

Court:	Environment Judge J E Borthwick
Hearing:	In Chambers at Christchurch
Date of Decision:	3 December 2020
Date of Issue:	3 December 2020

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: The application for costs is declined. Costs are to lie where they fall.

REASONS

Introduction

[1] This proceeding concerns an appeal by Wilkins Farming Co Limited in relation to conditions of a water permit[1] granted by the Southland Regional Council.

[1] AUTH-20181529.

[2] The court has issued a procedural decision[2] and two interim decisions,[3] allowing for early commencement of the consent and resolving issues as to consent duration and rates of abstraction. The issue of cut-off rate at which abstraction must be reduced has been put on hold while a catchment-wide review is undertaken. While a final decision is yet to be issued, it is appropriate to deal with costs at this juncture.

[3] Wilkins has applied for costs against the Council of $40,000, being approximately 71% of total costs incurred.[4]

The submissions

[4] Wilkins' submissions are helpfully summarised by the Council as follows:[5]

(a) The Appellant made efforts to reach agreement on the conditions, but the Council failed to engage.
(b) The Council's conduct unnecessarily lengthened the hearing.
(c) The Council made an "unfounded" suggestion that, if the Court was unsatisfied with the Council's proposed conditions, it would need to confirm a shorter term of consent.
(d) The Court disagreed with a number of conditions proposed by the Council.
(e) The Council's evidence was deficient.
(f) Certain Council witnesses did not visit the site in preparation for the hearing.
(g) The appeal was not a test case.
(h) The Council advanced legal arguments without substance.

The Council's engagement with Wilkins prior to evidence exchange

[5] Wilkins contends that the Council failed to engage with it to reach an agreed position on conditions prior to evidence exchange, ignoring requests from Wilkins and eventually putting forward conditions two days before evidence was due. This resulted in further evidence needing to be prepared.[6]

[6] The Council rejects this criticism, noting that it was not afforded enough time, nor did it have the capacity to meaningfully consider and respond to the conditions. It is further submitted that the Council's approach in wanting to consider the draft conditions

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[2] [2018] NZEnvC 245.
[3] [2020] NZEnvC 155 and [2020] NZEnvC 175.
[4] Memorandum of counsel seeking costs for Wilkins dated 6 November 2020 ("Memorandum for Wilkins").
[5] Memorandum of counsel for SRC in reply dated 16 November 2020 at [4] ("Memorandum for the Council").
[6] Memorandum for Wilkins at [17]-[22].

in light of Wilkins' evidence was an appropriate stance to take. Moreover, there was no obligation on the Council to provide draft conditions. Delays on the Council's end were largely in COVID-19 alert levels 3 and 4.[7] The Council submits it engaged in good faith to refine the matters in dispute and Wilkins' criticisms are unfounded.

The Council's conduct at hearing

[7] Counsel for Wilkins says that her own submissions at hearing were focused on the issues in dispute and she opted not to cross-examine the Council's witnesses. By contrast, the Council presented a brief summary of legal submissions first, with its full submissions made after cross-examination which meant two full days of hearing were used.[8] Wilkins says this conduct unnecessarily lengthened the hearing.

[8] The Council says its approach to legal submissions was one suggested by the court and agreed to by Wilkins and that this is both a common and appropriate approach where witnesses are empanelled. It is submitted that the Council's cross-examination was focused on the key issues and was appropriately concise.[9]

The Council's "unfounded" argument regarding term

[9] Counsel for Wilkins says that at the conclusion of hearing, the Council submitted that any extension in the term of consent "must be rejected" if the Council's new conditions were not imposed. It says that this was the first time this point was made and was completely unfounded.[10]

[10] In reply the Council says that it made no such submission, the argument being made by the Council was that the court needed to be satisfied that the appeal was granted on conditions it was lawfully able to impose and if the court was not satisfied the appeal must be rejected.[11] It is submitted that this point was made to assist the court by providing the Council's position on what the outcome should be if the water quality conditions were found to be deficient.

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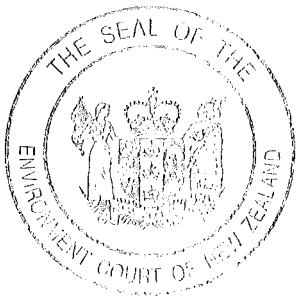
[7] Memorandum for the Council at [14]-[16].
[8] Memorandum for Wilkins at [23].
[9] Memorandum for the Council at [22].
[10] Memorandum for Wilkins at [24].
[11] Memorandum for the Council at [26] and [27].



The court did not impose all conditions sought by the Council

[11] Wilkins notes that the court rejected some of the new conditions proposed by the Council because it "has not raised satisfactory evidence to support imposing the same".[12] The court also disagreed with the Council's attempt to provide a purpose for the management plans, suggesting an alternative approach.[13]

[12] In reply, the Council says that, while some of the Council's conditions were not imposed, others were included despite Wilkins' opposition. It is submitted that the fact that both parties had a measure of "success" in relation to proposed conditions supports costs lying where they fall.[14]

The Council's expert evidence

[13] Wilkins says the Council's expert evidence was deficient (as described in *Yaldhurst Quarries Joint Action Group v Christchurch City Council),*[15] in that it did not support the conditions put forward.[16]

[14] The Council rejects this assertion, submitting that while the court declined to impose some conditions, this does not demonstrate a critical deficiency with the Council's evidence or approach to conditions, especially not to the extent found by the court in *Yaldhurst.*

Experts not conducting a site visit

[15] Wilkins also drew attention to the fact that two of the Council witnesses did not undertake a site visit at all and one only attended after all the evidence had been prepared. Despite this, the Council insisted on new conditions and submitted that the term of consent could not be extended as agreed without them. Wilkins submits that this shows intractability and favours an award against the Council.[17]

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[12] Interim decision at [25].
[13] Memorandum for Wilkins at [25].
[14] Memorandum for the Council at [29] and [30].
[15] *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2019] NZEnvC 36.
[16] Memorandum for Wilkins at [25].
[17] Memorandum for Wilkins at [26].

[16] The Council acknowledges that some of its witnesses did not attend a site visit. However, it considers their expertise (calculation/allocation of groundwater and water quality downstream respectively) did not require a site visit nor detract from the expert opinion offered, nor does it demonstrate an "intractable" approach by the Council.[18]

[17] More generally, the Council rejects any suggestion of being intractable as it engaged with Wilkins following evidence exchange in an attempt to resolve the outstanding issues, many of which were as recorded in the joint memorandum dated 14 July 2020.[19]

Test case

[18] Counsel for Wilkins submits that an award of costs cannot be dismissed or discounted on the basis that this proceeding was a test case. It is submitted that there were no new legal principles, nor was a novel planning approach being tested. While it was the first time the court considered the new Southland Water and Land Plan (pSWLP) provisions and it was important that the court approve a suite of lawful and workable conditions if applied across all irrigators in the region, it is submitted that Wilkins should not be made to wear the costs of establishing those conditions.[20]

[19] The Council considers that the appeal is a test case, as Wilkins was the first applicant to appeal a resource consent with water quality effects made under the pSWLP. The appeal raised difficult issues about how groundwater take and use should be managed in accordance with the pSWLP and the fundamental shift encapsulated within Te Mana o te Wai. As such, the Council gave careful thought to the conditions in light of the framework established by the pSWLP.[21] The Council submits that this context further suggests that costs should lie where they fall.

The Council's legal arguments

[20] Wilkins submits that the Council advanced legal arguments without substance, that none of the cases put forward supported counsels' proposition and its position was

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[18] Memorandum for the Council at [35].
[19] Memorandum for the Council at [36].
[20] Memorandum for Wilkins at [27].
[21] Memorandum for the Council at [43].

unreasonable and untenable.[22]

[21] In reply the Council says there is no finding supporting that assertion and ultimately the court declined to make a finding on whether conditions could be more stringent than activities permitted under pSWLP. In any event, the court did decide to impose conditions that are more stringent than those permitted under pSWLP (for example conditions 11 and 12).

[22] The Council submits it has not conducted itself in a way that passes the "threshold of blameworthiness", nor has Wilkins demonstrated that it failed to perform its duties or acted unreasonably.

The law

[23] Section 285 of the Act confers a broad discretion upon the Environment Court to order costs, with the sole qualification being that the quantum be reasonable. Costs are made in the interests of "compensation where that is just".[23] As with the exercise of any judicial discretion, an application for costs is to be dealt with in a principled manner with no presumption that costs will follow a successful outcome.

[24] The court is guided by a body of general principles developed through case law and summarised in the court's Practice Note. Relevantly, the Practice Note states that the court will not normally award costs against the public body whose decision is the subject of the appeal unless it has failed to perform its duties properly or has acted unreasonably.[24] However, this is not an inflexible position.[25]

[25] In *Pickering* the Environment Court considered when it may be appropriate to award costs against a Council, saying:[26]

> For an award to be made against a first instance decision-maker it is not enough that the court did not agree with the initial decision.[27] Because of the important role Councils play and the duties they undertake with the public interest at the forefront, costs are not normally

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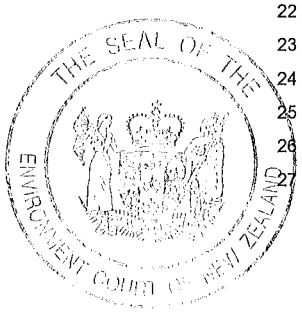
[22] Memorandum for Wilkins at [28].
[23] *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138.
[24] Practice Note 2014 clause 6.6(c).
[25] *Gateway Funeral Services v Whakatane District Council* W022/08 at [2].
[26] *Pickering v Christchurch City Council* [2017] NZEnvC 119 at [30].
[27] *Gateway Funeral Services v Whakatane District Council* W022/08.



> awarded against consent authorities unless its decision is vexatious or frivolous, has little regard for evidence or demonstrates a neglect of duty.[28] The court must be satisfied that the Council has passed the "threshold of blameworthiness".[29]

[26] Counsel also referred me to precedent concerning test cases. Where a case is a test case that raises a novel area of law or interpretation of a new plan, the court has found parties should bear their own costs.[30] In *Retro Developments Limited v Auckland City Council*[31] the following hallmarks were identified as indicating a test case: issues raised require resolution of legislative uncertainty; new and important questions of interpretation raised; outcome of the case has clarified rules in a plan; and the case is the first of its kind under a plan.

[27] As to quantum of costs awarded, while the Environment Court has declined to set a scale of costs, for consent appeals (at least), costs ordered have tended to fall within three bands.[32] Justice Heath in *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*[33] noted these bands are not dissimilar to the standard, increased and indemnity costs regime applied by the High Court. Thus:

(a) standard costs in the range of 25-33%;
(b) higher than standard costs where *Bielby* factors[34] are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[28] More recently this division of the court described the approach to standard costs as follows:[35]

> It is worth emphasising again that "standard costs" does not infer costs will follow the event or that there is a scale of costs – by reference to a percentage – where costs are ordered. Rather, "standard costs" was simply an observation that when made, costs have generally

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[28] *Brown v Rodney District Council* W105/99; Environment Court Practice Note at 6.6(c).
[29] *Emma Jane Ltd v Christchurch City Council* C020/09.
[30] *Kennett v Dunedin City Council* (1992) 2 NZRMA 22; *Just One Life Limited v Queenstown Lakes District Council* C142/04 at [46]; *Royal Forest and Bird Protection Society of New Zealand Inc v Innes* [2014] NZEnvC 201 at [19].
[31] *Retro Developments Limited v Auckland City Council* A156/05 at [11].
[32] *Pickering v Christchurch City Council* [2017] NZEnvC 119.
[33] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468.
[34] Being aggravating factors present such as those identified in *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 and set out in clause 6.6(d) of the Practice Note 2014.
[35] *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2019] NZEnvC 36 at [11].

> fallen within the range of a 25-33% of costs actually incurred. Recently, Judge Kirkpatrick commented that reliance on percentages of invoiced amounts may give a false sense of precision and an overall award may better reflect, in the round, the justice of the case.[36] I respectfully agree with him. For example, the application of a percentage to a modest claim may penalise the cost-effective manner that a successful litigant has conducted their case.

[29] Wilkins seeks an award of 71% of costs incurred, being higher than standard costs.

Consideration

Is an award of costs appropriate?

[30] As a starting point, I generally accept the submissions of the Council.

[31] Secondly, and by way of observation, when seeking costs it is important to consider the judgment as a whole and not, as I think Wilkins does, alight on isolated passages in the judgment ignoring the full evaluation undertaken by the court.

[32] To the extent that the Council's actions can be singled out, it is because it alone supported 4½ conditions that the court did not approve in a set of 50 proposed conditions.[37] The substance of 3½ conditions were not without merit; the court observed that each evidenced good management practice.[38] Only in relation to one condition,[39] was the court unable to affirm, on the evidence before us, the condition's substance or merit.[40]

[33] That said, the court declined to approve other conditions that had been agreed by the parties, instead directing amendments. Many of these appeared to be the result of negotiation and were either not properly informed by expert advice and/or their drafting lacked the necessary qualities of clarity, certainty and enforceability.

[34] Wilkins refers to some of these conditions in support of its application for costs but does not acknowledge that it supported the imposition of the same.

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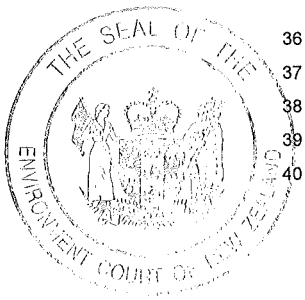
[36] *Double R Developments Ltd v Western Bay of Plenty District Council* [2019] NZEnvC 9 at [22].
[37] Condition 9, part of conditions 10, 13, 14 and 15 were not approved by the court in [2020] NZEnvC 155.
[38] [2020] NZEnvC 155 at [50], [64], [75].
[39] Part of condition 10 (sheep).
[40] [2020] NZEnvC 155 at [62].



[35] For example, the Overseer Nutrient Budget conditions,[41] specifically conditions 39-44, lacked certainty of purpose. The expert witnesses for both parties could not produce a diagram as an aide to understand the conditions' intended operation. Wilkins' own Overseer expert, Dr M Freeman did not support the imposition of them as conditions of consent. It was of these conditions that the court said:[42]

> ...The conditions impose costs on the consent holder for little or no demonstrated advantage. Indeed, the shear complexity of the conditions alone mean they (and the consent holder) will likely be(come) frustrated. Given this, we do not approve them.

[36] Wilkins withdrew its support for conditions 39-44 at the end of the evidence in response to the court's questioning of the witnesses.

[37] By way of a second example,[43] despite the requirements for management plan conditions being well known within the resource management community, and in addition the court giving detailed guidance on the requirements of these conditions,[44] the proposed conditions did not include conditions setting the objective (or outcome) the management plans were to achieve. Instead, the parties supported the inclusion of italicised explanatory text material, which was later removed in response to the interim decision. This was a shared position by the parties and not one that can be solely attributed to the Council when seeking an award of costs.

[38] In the third example, counsel for Wilkins points out that not all of the Council's witnesses had visited the property. She submits this is evidence of the Council's intractable approach.[45] I have checked the transcript references given and note that counsel's original submission was made when discussing an ephemeral river and critical source area that was said to be on the property. Both parties supported the inclusion of certain conditions and a farm environment management plan based on an erroneous assumption that these features were indeed present. The court's questioning of Mr M Wilkins proved this assumption to be false.[46]

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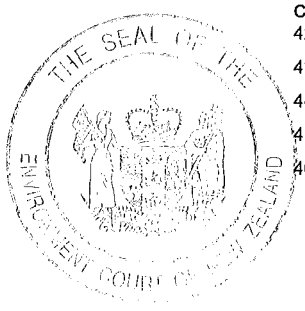
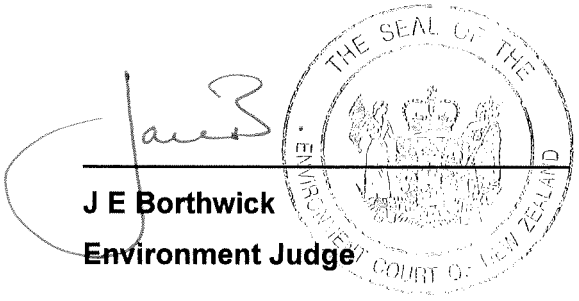
[41] Memorandum for Wilkins at [25], last sentence refers to the court's findings in relation to Overseer conditions 39-44.
[42] [2020] NZEnvC 155 at [117].
[43] Memorandum for Wilkins at [25], second sentence refers to the purpose of management plans.
[44] Minute dated 21 July 2020 at [45]-[47].
[45] Memorandum for Wilkins at [26].
[46] [2020] NZEnvC 155 at [76].



Outcome

[39] Given the above, the application is declined and costs are to lie where they fall.



J E Borthwick
Environment Judge