

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2023] NZEnvC 177

IN THE MATTER

of the Resource Management Act 1991

AND

an application for interim and final
enforcement orders under s315(2) and
s320 of the Act

BETWEEN

OTAGO REGIONAL COUNCIL

(ENV-2022-CHC-017)

Applicant

AND

BLAIR EDWARD ARMISHAW

Respondent

Court: Environment Judge P A Steven
Hearing: Sitting alone under s309 of the Act
Submissions: T J McGuigan for the applicant
Last case event: 28 June 2023
Date of Decision: 22 August 2023
Date of Issue: 22 August 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s315(2)(c) Resource Management Act 1991, Mr Armishaw is ordered
to pay the Otago Regional Council the sum of \$4,363.57.



REASONS

Introduction

[1] This proceeding relates to an application by Otago Regional Council (‘the Council’) for costs against Blair Edward Armishaw seeking costs relating to the interim and final orders it obtained against him.

Background

[2] The application for interim enforcement orders was lodged with the court on 6 May 2022 to address the discharge of human sewage from his property situated at 1010 Weston-Ngapara Road, Elderslie (‘the Site’). The application was granted on the same day,¹ although the orders were not complied with.

[3] The Council filed a further application pursuant to s315(2) seeking an order allowing the Council to comply with the interim enforcement orders on Mr Armishaw’s behalf due to his non-compliance.² That application under s315(2) was granted on 7 June 2022.³

[4] Amongst other orders made by the court in its 7 June 2022 decision, the Council was able to apply to the court for orders to recover the costs and expenses of undertaking any work as a debt due from Mr Armishaw in terms of s315(2).

[5] Costs in terms of s285 were also reserved in the decision of 7 June 2022. Accordingly, it was always open to the Council to make an application under s285 in addition to the recovery of costs in terms of s315(2), however the two statutory regimes for recovery of costs are distinct as:

¹ *Otago Regional Council v Armishaw* [2022] NZEnvC 72.

² Memorandum of Counsel Requesting Consent to Implement Interim Enforcement Order dated 2 June 2022 at [13].

³ *Otago Regional Council v Armishaw* [2022] NZEnvC 94.

- (a) section 315(2) gives an entitlement to recover the costs of complying with an enforcement order where an application under that section is duly granted by the court;
- (b) the court has a discretion to make an award of costs of proceedings on an application under s285.

[6] An application made under s315(2) would not authorise recovery of costs of the proceedings recoverable on application under s285, and similarly, the costs of proceedings are not recoverable on an application under s315(2).

The Council's application for costs

[7] On 14 April 2023, the Council filed an application for indemnity costs against Mr Armishaw, seeking a total sum of \$20,477.65 (excluding GST). The Council contends that indemnity costs are appropriate for the following reasons:

- (a) the unlawful discharge of human sewage beyond Mr Armishaw's property was a clear breach of the Resource Management Act 1991 ('RMA' or 'the Act') and the Regional Water Plan;
- (b) the Council was obliged to commence these proceedings against Mr Armishaw because voluntary compliance could not be obtained, even though an abatement notice and infringement fine were issued;
- (c) after Mr Armishaw was served with the interim enforcement order, he failed to comply with its terms. The Council was required to obtain consent from this court to comply on his behalf;
- (d) the costs incurred by the Council are solely attributable to Mr Armishaw's disregard for his legal responsibilities.

[8] If the court is not satisfied that indemnity costs are appropriate, the Council seeks a contribution of at least 70% of its costs.

[9] The application states that the costs comprise the following:

- (a) \$3,996.58: for the time Council staff spent in carrying out tasks in relation to the unlawful discharges from Mr Armishaw's property;
- (b) \$12,117.50: for legal fees; and
- (c) \$4,363.57: for costs associated with implementing the terms of the interim enforcement orders.

Costs breakdown

[10] A memorandum filed in support of the application breaks the costs down further:

- (a) \$3,996.58 (excluding GST), which was incurred by staff members carrying out tasks in relation to the unlawful discharges from Mr Armishaw's property;
- (b) \$1,542.62 (excluding GST), which relates to the engagement of Awamoa Sanitation Limited for the purpose of emptying the septic tank on Mr Armishaw's property and providing a portaloos for use between June and December 2022;
- (c) \$721.95 (excluding GST), which relates to work carried out by Foley's (subcontracted by Amalgamated Builders Limited) to ensure the unlawful discharge of sewage ceased; and
- (d) \$2,099 (excluding GST), which relates to plumbing work carried out by Laser Plumbing Oamaru to ensure the new discharge field installed by Mr Mitchell was compliant.

Investigation costs

[11] An affidavit from Mr Andrew Curtis Gibson was also filed in support of the application. That affidavit explains the costs incurred by the Council, including costs associated with Council officers investigating the unlawful discharges from Mr Armishaw's property.

[12] The schedule attached to Mr Gibson's affidavit reveals that the Council

officers' costs involved attendances over a period commencing on 18 March 2022 to 31 May 2022; that is, before either of the enforcement order applications were lodged with the court.

Costs of carrying out works

[13] Costs incurred *after* the court granted the s315(2) application are separately addressed in the affidavit of Mr Gibson. They are covered in items (b)-(d) in paragraph [10] above and total \$4,363.57.

Costs of proceedings

[14] This third category of costs relates to the legal costs incurred by the Council in bringing the proceedings. They are (potentially) recoverable under s285 RMA, as distinct from the costs incurred in exercising a permission granted by the court in terms of s315(2).

[15] As to this category of costs, invoices from Wynn Williams were attached to the affidavit of Mr Gibson. These were for:

- (a) the costs of attendances preceding, albeit related to the application for the interim enforcement order, and related to services provided to the Council up to 31 May 2022;
- (b) the costs of preparing the memorandum requesting consent from the Environment Court under s315(2); and
- (c) the costs “regarding the status of compliance with Mr Armishaw’s property” and in preparing the costs application lodged with the court.

Issues with the Council’s application

[16] The Council’s costs application did not identify the statutory basis upon which the application was made, although it was drafted on the basis that all costs

were sought under s285 and on an indemnity basis. Clarification was sought from the court about that.

[17] As directed by the court, the Council filed a memorandum clarifying the basis for this application.⁴

[18] The Council submits that as a successful party to the proceedings, it has a strong standing to recover its reasonable costs against Mr Armishaw, including the costs and expenses it incurred in implementing the terms of the interim enforcement orders on his behalf.

[19] Counsel explained that costs excluding those incurred by external contractors in the implementation of the s315(2) decision, were sought under s285.

The court's Minute

[20] The court issued a Minute on 26 April 2023 in response to the Council's application and memorandum. The Minute advised the Council to split the application for costs into two separate cost applications, as different considerations would apply to:

- (a) the application to recover costs under s315(2); and
- (b) the application for costs associated with bringing the proceedings under s285.

[21] The court also directed the Council to seek a waiver of time if it intended to pursue an application for costs of the proceedings, as it is beyond the time within which the court expects an application to be made under s285.

⁴ Memorandum of counsel dated 17 April 2023.

The Council's application for a waiver

[22] On 28 June 2023, the Council filed an application for a waiver of time under s281(4) for the application made under s285. In support of the application, the Council filed a memorandum dated 28 June 2023. Counsel submits the waiver application should be granted as the delay was caused by Mr Armishaw's non-compliance and there is no identifiable prejudice that would be caused to him.

[23] The Council further submits that the issue of costs has not finally been determined, and the overall interests of justice weigh in favour of granting the waiver considering the history of the proceedings.

No reply to the application

[24] Mr Armishaw did not file a response to the Council's application or to any subsequent correspondence.

Relevant framework-s315(2)

[25] Section 315(2) states:

If a person against whom an enforcement order is made fails to comply with the order, any person may, with the consent of the Environment Court,–

- (a) comply with the order on behalf of the person who fails to comply with the order, and for this purpose, enter upon any land or enter any structure ...; and
- (b) sell or otherwise dispose of any structure or materials salvaged in complying with the order; and
- (c) after allowing for any moneys received under paragraph (b), if any, recover the costs and expenses of doing so as a debt due from that person.

[26] Subsection (3) states:

Any costs or expenses which remain unpaid under subsection (2)(c) may be

registered under subpart 5 of Part 3 of the Land Transfer Act 2017 as a charge on any land in respect of which an enforcement order is made.

[27] Although the court has a discretion as to whether permission should be given to an applicant, upon application made under s315(2), if the application is successful, the recipient of that permission is entitled to recover the costs of complying with the order once the works have been undertaken. Such costs are to be collected as a debt payable to that person, by the person against whom the enforcement order was originally made, without further application.

[28] However, the original s315 application made by the Council sought an order that in terms of s315(2) (relevantly) enabling a further application for an order for recovery of the costs and expenses of undertaking any work as a debt due from Mr Armishaw. The application stated that in the event that debt remains unpaid, the remaining costs or expenses owing may be registered under subpart 5 of Part 3 of the Land Transfer Act 2017 as a charge on Mr Armishaw's property.

[29] The Council's application was granted by the court on the terms on which it had been sought, although strictly speaking, there was no need for a further application. However, that is the context in which the Council's costs application was ultimately lodged with the court.

Section 315(2)(c) RMA

[30] As earlier observed, on the court's reading of this provision it is apparent that the costs and expenses the Council incurred in implementing the terms of the enforcement orders on Mr Armishaw's behalf, are recoverable under s315(2)(c) RMA, as a matter of course.

[31] Section 315 does not confer a discretion on the Environment Court to consider whether the costs are "actual and reasonable", which is a discretion that applies to the court where an application is made under s314(1)(d) (for instance).

[32] Section 314(1)(d) enables an application for order by any person requiring another person to pay money to reimburse any other person (likely to be the applicant) for:

... any actual and reasonable costs and expenses which that other person has incurred, or is likely to incur in avoiding, remedying or mitigating any adverse effect on the environment, where the person against whom the orders sought fails to comply with –

- (i) an order made under s314;
- (ii) an abatement notice; or
- (iii) a rule in a plan or a resource consent; or
- (iv) any of that person's other obligations under this Act:

[33] Despite that, costs were not sought to be recovered under s314(1)(d). Indeed, Mr Armishaw was written to by the Council's lawyers on 27 May 2022 following an inspection by Council officers, at which it was observed that the interim order had not been complied with. That letter advised that:

“the Council will be considering its legal options without further notice ...” including “[o]btaining consent from the Environment Court to implement the conditions of the interim order ...”; and that “... [a]ll costs associated with that process which are incurred by the Council will be recoverable against you”.

[34] That letter adopts the language of s315(2) although Mr Armishaw was not given notice that the Council would also be seeking recovery of the costs under s285, or in terms of s314(1)(d) for that matter.

My consideration on the s315(2) application

[35] I am satisfied that an order made in favour of the Council, allowing recovery of the costs and expenses of undertaking any work as a debt due from Mr Armishaw, is appropriate and should be granted. Notably however, that excludes:

- (a) costs incurred by the Council officers in the investigation carried out before the enforcement orders were sought; and
- (b) legal costs which relate to the proceedings that are only recoverable under s285.

[36] The costs recoverable under s315(2) total \$4,363.57.

Section 285 application

[37] This can be dealt with quite simply.

Is an award of costs warranted under s285?

[38] The Council is the successful party to the application for enforcement orders and therefore has standing to apply to recover its reasonable costs associated with the proceedings.⁵

[39] As earlier noted, the Council's original application blurred the distinction between the costs of proceedings under s285 and the costs associated with implementing the terms of the court's order under s315(2)(c), although that distinction was addressed in counsel's later memorandum filed for the Council.

[40] By its decision of 7 June 2022, the court had reserved the issue of costs but had not made any timetabling directions. However, that triggered reference to clause 10.7 of the Court's Practice Note 2023 for guidance as to the default position, which (relevantly) is that an application must be lodged within 10 working days of the date of the issue of the decision.

[41] The court is guided by a body of general principles developed through the case law. The court will make two assessments.⁶ The first assessment is whether

⁵ *Marlborough District Council v Schonberger* [2016] NZEnvC 17 at [12] and [16].

⁶ *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

it is just in the circumstances to make an award of costs. The second assessment, having determined an award is appropriate, is deciding the quantum of costs to be awarded.

[42] The Council's s285 application is out of time as the Council's costs application was received by the court on 14 April 2023, when the application ought to have been made by 21 June 2022.

[43] Where costs are outside the timeframe specified by the court or outside the default timeframe, the court may dismiss the application for costs on the grounds that the application is stale.⁷ However, the court also has discretion to consider applications for costs where there has been a delay in applying and the particular circumstances are required to be considered in a principled way in each instance.

[44] In its application for a waiver, the Council submits that the reasons for delay were based upon:

- (a) the assumption that the application would be considered by the court on a totality basis;
- (b) the reservation of costs in the decision of 7 June 2022, "... Mr Armishaw was placed on notice that the Council would be seeking to recover costs against him..." such that he is not prejudiced by the late application; and
- (c) the problems Mr Armishaw caused in carrying out the work required under the enforcement order.⁸

[45] I do not accept that these are adequate reasons. The costs of the proceedings potentially recoverable on an application under s285 were able to be quantified long before the Council incurred costs in complying with the order. There is nothing in the court's decision of 7 June 2022 (including the reservation

⁷ *Antunovich v Marine Helicopters Limited* A005/95, 4 NZPTD 155.

⁸ Memorandum of counsel in support of application for waiver dated 28 June 2023 at [11].

of costs) that suggests that costs would be dealt with on a totality basis.

[46] I observe that the delay of almost 11 months is too long and may well have caused prejudice to Mr Armishaw. Although he was self-represented, I am not prepared to assume that he was unaware of the Court's Practice Note. regardless, I would not be prepared to treat the ignorance of a self-represented litigant as a reason to allow a late cost application.

[47] Furthermore, it appears that Mr Armishaw was only warned that the Council would seek to recover costs of complying with the interim order granted by the court after the interim enforcement order was made by the court, but before the court's decision on the s315(2) application was given on 7 June 2022.⁹

[48] It is not at all clear to the court whether the Council's delay in bringing the application under s285 was due to a deliberate decision made when the court gave its decision on 7 June 2022; an error or inadvertence. Counsel's memorandum suggests it was a deliberate decision.

[49] However, at the very least, the Council ought to have sought leave of the court prior to 21 June 2022, seeking leave of the court to postpone the making of the s285 application.

[50] Had that occurred, Mr Armishaw would have been on notice that the Council would be seeking *more* than the costs of complying with the terms of the enforcement order made by the court. In that event, the potential for any prejudice to Mr Armishaw would have been largely negated.

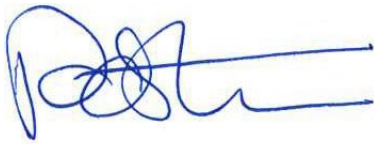
[51] Accordingly, I decline to allow the waiver of time for the s285 application. It follows that the court declines to make an award of the costs of the proceedings in relation to the legal fees of \$12,117.50.

⁹ Letter from Williams dated 27 May 2022.

[52] I note that the remaining costs include costs associated with the Council officers' application for the investigations before the interim enforcement order was lodged with the court. These are likely to be beyond the ambit of an application under s285. However, I only make that as an observation given my decision on the s285 application.

Outcome

[53] Under s315(2)(c) RMA, Mr Armishaw is ordered to pay the Council the sum of \$4363.57. In the event the debt remains unpaid, the remaining costs or expenses owing may be registered under subpart 5 of Part 3 of the Land Transfer Act 2017 as a charge on Mr Armishaw's property.



P A Steven
Environment Judge