IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 184

IN THE MATTER OF	an appeal under clause 14 of Schedule 1 of the Resource Management Act 1991
BETWEEN	A NOAKES and FRUHLING TRUST
	(ENV-2022-AKL-078)
	Appellants
AND	WAIKATO DISTRICT COUNCIL
	Respondent

Court:	Chief Environment Judge D A Kirkpatrick
Hearing:	On the papers
Last case event:	Submissions in reply, 11 August 2023
Date of Decision:	30 August 2023
Date of Issue:	30 August 2023

DECISION OF THE ENVIRONMENT COURT ON COSTS

A: Under s 285 of the Resource Management Act 1991 (**RMA**), Anna Noakes and Fruhling Trust are ordered to pay costs to Havelock Village Limited in the sum of $9,500.00 (incl. GST).

B: Under s 286 of the RMA, this order is enforceable in the District Court at Kirikiriroa/Hamilton.

REASONS

Introduction

[1] This application for costs relates to an appeal lodged by Anna Noakes and Fruhling Trust (**the Appellants**) against certain decisions of the Waikato District Council on the Proposed Waikato District Plan. The background to the issues involved in the appeal is provided in the Court's decision where it granted leave to make certain amendments to the notice of appeal, refused leave to make others and reserved leave for any party to apply for costs.[1]

[2] Havelock Village Ltd (**HVL**) is a section 274 party to the Appellants' appeal. The land it is developing at Havelock may be directly and significantly affected by the relief sought in the Appellants' appeal, particularly as it was sought to be amended.

[3] The subject matter of the Court's decision, being a request for leave to amend the notice of appeal, was an interlocutory matter. However, HVL submitted it would be appropriate to resolve any issue as to costs at present as the Court's finding concerning Havelock Precinct and rezoning matters had been substantively resolved.[2] The Court agreed that it would be inefficient and unfair for HVL to await resolution of the appeal and directed a timetable for cost applications.[3]

[4] There is no application for costs by the Respondent.

HVL's application for costs

[5] HVL seeks an order for costs in the sum of $25,000 against the Appellants, being about 86% of its actual and reasonable legal costs incurred

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1 *Noakes & Fruhling Trust v Waikato District Council* [2023] NZEnvC 076.
2 Submissions in Reply on behalf of Havelock Village Limited in respect of Costs dated 11 August 2023 at [2].
3 Minute of the Environment Court as to Costs Timetable dated 22 June 2023.

in relation to the appeal.[4]

[6] HVL submits that an award of higher-than-normal costs is warranted on the following grounds:

(a) HVL is the successful party that was forced to be involved in the proceeding as the relief sought was a direct challenge to HVL's interests;

(b) the Appellants were advised by HVL about the lack of scope in the original appeal and that it would seek costs if it was successful;

(c) the Appellants failed to explore the possibility of settlement. They incurred additional costs by continuing to advance Variation 3 matters despite the court's conclusion on stormwater topic in its decision;

(d) HVL has made numerous attempts to resolve the proceeding and avoid unnecessary costs.

The Appellants' submissions in response

[7] The Appellants submit that it would be unjust to award costs against them because of the following reasons:

(a) the Appellants were granted interlocutory application for leave to amend their appeal on the provisions of the Proposed Plan;

(b) costs are normally not awarded to any party in recognition of the participatory nature of making such statutory planning documents;[5]

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4 Application for Costs on behalf of Havelock Village Limited dated 13 July 2023.
5 Environment Court Practice Note 2023, Clause 10.7(f).

(c) the management of stormwater in the district generally is a matter of some public interest;

(d) the Appellants negotiated in good faith and compromised on several positions;

(e) the punitive aspect of an award of costs would in this case outweigh the compensatory effect of an award and render an award of costs unjust.

HVL's reply

[8] On 11 August 2023 HVL filed its submissions in reply, opposing the Appellants' position that costs should lie where they fall. It continued to contend that an award of $25,000 is justified on the following grounds:

(a) the Appellants did not conduct themselves appropriately and it is not uncommon for the Court to award costs in relation to plan change proceedings in this circumstance;

(b) two of the proposed amended appeal points of direct interest to HVL were found to be without the scope of the Appelants' submissions on the plan;

(c) the process of dealing with the scope issue imposed unnecessary costs on HVL as a result;

(d) HVL attempted to resolve the matter in an efficient and expeditious manner but the Appellants refused these offers;

(e) HVL clarified errors in the invoices attached to the original application for costs and advised that the actual fees it incurred were $29,065.59.

Costs applications - relevant principles

[9] Under s 285 of the RMA, the Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion on the Court.[6] Although the Court's Practice Note 2023 does not create an inflexible rule or practice, it sets out general guidelines in relation to costs.[7]

[10] Costs awards are subject to a broad discretion, but a principled approach to the consideration of relevant factors should be adopted. The following principles are relevant in this case:[8]

(a) an award is imposed to compensate what is just, not to penalise;

(b) orders for payment of costs are commonly made against a party who has put another party to unnecessary cost; and

(c) the factors in *DFC NZ Limited v Bielby* apply to the consideration of costs above the normal range,[9] and

(d) the key purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[10]

Evaluation

[11] The starting point in this matter is that, given the participatory nature of preparing a plan (including hearing any appeals from decisions on

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6 *Thurlow Consulting Engineers & Surveyors Limited v Auckland Council* [2013] NZHC2468 at [31].

7 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].

8 *Re Waiheke Marinas Ltd* [2016] NZEnvC 18 at [11].

9 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587, now set out in the Environment Court Practice Note 2023, Clause 10.7(j).

10 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

submissions on the plan), costs will not normally be awarded to any party to an appeal in relation to a proposed plan or a plan change.[11] However, the Court's normal practice cannot act as a limitation on the discretion of the Court under s 285 where that would be appropriate.[12] There are exceptions, generally where there has been delay or a lack of clarity in the case which resulted in unnecessary and unreasonable costs to other parties.[13]

[12] As concluded in the Court's decision on whether to grant leave to amend the notice of appeal,[14] several matters which were sought to be raised on appeal by the Appellants were outside the scope of the submissions on which the appeal must be based.[15] I find that an award of costs is justified in these circumstances because seeking to include appeal points that were out of scope was not a reasonably foreseeable outcome of the Appellants' submissions.[16]

[13] I agree with HVL's submission that the Appellants failed to sufficiently explore the possibility of settlement. HVL's offers of expert assistance or meetings to resolve issues were refused twice and the Appellants continued to seek to amend their appeal to include additional matters that were out of scope. Their lack of participation in the Council hearing stage acts as another factor in favour of the costs award.[17]

[14] In terms of quantum, the Environment Court makes its own judgment about what is "fair and reasonable" in the circumstances.[18] Standard costs between 25 to 33% are considered within the "comfort zone".[19]

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11 Environment Court Practice Note 2023, Clause 10.7.
12 *Canterbury Regional Council v Christchurch City Council* EnvC C134/08.
13 *Riverside Oak Estate Ltd v Hamilton City Council* [2016] NZEnvC 187.
14 Fn 1 at [75] – [85].
15 RMA, Schedule 1, cl 14(2)(a).
16 *Cephas Group Ltd v Tasman District Council* [2014] NZEnvC 139.
17 *Takapuna Procurements Ltd v North Shore City Council* EnvC A066/04.
18 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1996) 2 ELRNZ 138.
19 *Queenstown Property Holdings Ltd v Queenstown Lakes District Council* [1998] NZRMA 145.

[15] I agree with the Appellants that in the circumstances of this case the total amount of costs sought by HVL is not fair and reasonable. Costs should not be punitive and levels approaching an indemnity should only be awarded in rare circumstances.[20] I am not satisfied that the Appellants' actions in this case are such as to require them to meet near-indemnity costs. As well, a substantial portion of HVL's costs are made up of its legal fees, which are seldom awarded in full.[21]

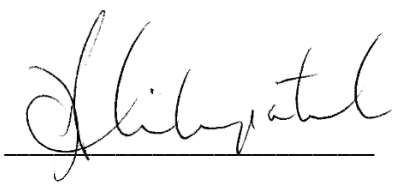
[16] I determine that in this case an award of approximately 33% of the costs incurred by HVL, being $9,500.00, is appropriate. Notwithstanding the nature of the proceeding as a plan appeal, the amendments sought by the Appellants went some way beyond what could reasonably be foreseen from their submissions. The nature of the amendments clearly presented concerns for HVL and justified its participation in opposing the grant of leave for such amendments.

Determination

[17] Under s 285 of the Resource Management Act 1991 (RMA), Anna Noakes and Fruhling Trust are ordered to pay costs to Havelock Village Limited in the sum of $9,500.00 (inclusive of GST).

[18] Under s 286 of the RMA, this order is enforceable in the District Court at Kirikiriroa/Hamilton.

For the Court:



D A Kirkpatrick
Chief Environment Court Judge

[20] *Rolleston v Christchurch City Council* EnvC C072/09.
[21] *Rowell v Wairoa Quarries Ltd* HC Nelson M14/96, 7 September 1996.