IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 187

IN THE MATTER OF	an application under s 88 of the Resource Management Act 1991
AND	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	D G SCHMUCK
	(ENV-2018-AKL-000351)
	(ENV-2020-AKL-000187)
	Appellant
AND	NORTHLAND REGIONAL COUNCIL
	Respondent

Court:	Alternate Environment Judge L J Newhook
Hearing: Last case event:	On the papers 30 June 2023
Submissions from:	C Prendergast for D G Schmuck G J Mathias and C M Sharp for Northland Regional Council M K Rashbrooke
Date of Decision:	4 September 2023
Date of Issue:	4 September 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s 285 RMA, Mr Rashbrooke is ordered to pay Northland Regional Council the sum of $10,638.11 as contribution towards its costs.

B: Under s 285 RMA, Mr Rashbrooke is ordered to pay Mr Schmuck the sum of $29,397.84 as contribution towards his costs.

C: Under s 286 RMA, these orders may be enforced in the District Court at Kaikohe if necessary.

REASONS

Introduction

[1] This decision concerns applications for costs from Northland Regional Council (**the Council**) and Mr Schmuck against Mr Rashbrooke.

Background

[2] Mr Schmuck owns and operates a small boatyard in Walls Bay, Opua, Bay of Islands. Part of the boatyard activity has occurred under various consents and permits in the Esplanade Reserve, which is between the boatyard and foreshore, as well as on the boatyard land itself.

[3] In September 2017, in anticipation of the expiry on 30 March 2018 of discharge consents under which the boatyard operated, Mr Schmuck applied to the Council, for their renewal. Mr Schmuck later made an application for structures and activities in the Coastal Marine Area (**CMA**). The Council amalgamated the applications.

[4] The Council declined the amalgamated application. Mr Schmuck appealed.[1] Early in the proceedings Mr Schmuck withdrew the part of the appeal relating to his application for structure and activities in the CMA and proceeded only on the appeal in relation to the discharge consents.12

[5] By decision dated 26 July 2019, the Environment Court refused the renewal of the discharge consents as they applied to Reserve on the basis that it lacked jurisdiction to grant renewals. The Environment Court determined that consents could be granted but confined the operation of the boatyard under the discharge consents to the boatyard land.[2]

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[1] ENV-2018-AKL-000351.
[2] [2019] NZEnvC 125.

[6] Mr Schmuck appealed the Environment Court decision to the High Court. By decision dated 20 March 2020, the appeal was allowed. The Environment Court decision was set aside, and the matter was remitted to the Environment Court for further consideration with directions.[3]

[7] On 20 November 2020, Mr Schmuck filed a further appeal.[4] The appeal was in two parts. Part one related to some of the conditions imposed on consents to continue discharge to ground, air, water and the CMA. Part two related to aspects of some of the conditions imposed on the consents for the demolition and reconstruction of the wharf and capital dredging within the CMA.

[8] Mr Rashbrooke is a s 274 party in respect of ENV-2020-AKL-000187 only.

[9] On 7 June 2022 Mr Schmuck applied under ss 116 and 291 RMA for orders providing for the partial early commencement of consents to allow for the replacement of and associated dredging for the floating pontoon and consequential emergency repairs to the existing wharf. By decision dated 29 June 2022, the application for early commencement was granted.[5]

[10] On 30 May 2023, the Environment Court issued a decision[6] approving conditions agreed between Mr Schmuck and the Council, with a qualification about the descriptor in AUT-041365.15.01. The consents and conditions of consent finally approved were attached to the decision. The decision resolved both the 2018 and 2020 appeals.

Costs in the Environment Court

[11] Under s 285 of the Resource Management Act 1991, 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. There is no scale of costs under the RMA. The Environment Court Practice Note 2023 sets out guidelines in relation to costs. However, the Practice Note does not create an inflexible rule or

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[3] [2020] NZHC 590.
[4] ENV-2020-AKL-000187.
[5] [2022] NZEnvC 113.
[6] [2023] NZEnvC 111.

practice.[7]

[12] There is no general rule in the Environment Court that costs follow the event.[8] The Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs unless there are special circumstances in which it would be fairer to depart from that rule.[9] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[10]

[13] When considering an application for costs the Court will make two assessments: first whether it is just in the circumstances to make an award of costs and second, having determined that an award is appropriate, deciding the quantum of costs to be awarded.[11]

[14] In determining the quantum of costs awards the Environment Court has declined to set a scale of costs. The range of cases that come before this Court is so great and the circumstances of proceedings are so diverse that devising a fair scale would be at least very difficult and likely to have so many exceptions that it could not truly be used as a scale. Nonetheless, experience has shown that many of the Court's awards have tended to fall within four bands, as follows:

(a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;

(b) standard costs, which generally fall between 25 – 33% of the costs actually and reasonably incurred by a successful party (sometimes referred to as the "comfort zone");

(c) higher than standard costs, where certain aggravating factors are present

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[7] *Canterbury Regional Council v Waimakatiri District Council* [2004] NZRMA 289 at [21].
[8] *Culpan v Vose* A064/93.
[9] *Culpan v Vose* A064/93.
[10] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.
[11] *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

as discussed below; and

(d) indemnity costs, which are awarded rarely and in exceptional circumstances.

[15] Section 10.7(j) of the Court's Practice Note 2023 lists six potential aggravating factors that are given weight in the assessments of whether to award costs and what the quantum should be if they are present in a case:[12]

(a) where arguments are advanced without substance;

(b) where the process of the Court is abused;

(c) where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing;

(d) where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;

(e) where a party takes a technical or unmeritorious point and fails; and

(f) whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

Northland Regional Council application for costs

[16] The Council seeks costs against Mr Rashbrooke.

[17] Counsel submits Mr Rashbrooke did not appear willing to reach a reasonable compromise and sought to revert to the decision of the Commissioner. As set out in his memorandum of 28 March 2022, Mr Rashbrooke opposed every aspect of the Council and Mr Schmuck's agreed amendments to the conditions. Counsel submits Mr Rashbrooke's alternative relief was unworkable and at times sought an outcome less favourable than the positions under the Commissioner's decision.

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[12] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

[18] Counsel submits that there are *Bielby* factors present, namely:

(a) Mr Rashbrooke advanced a range of arguments without substance, including arguments relating to criminology and insurance, and matters outside his expertise such as air quality;

(b) Mr Rashbrooke advanced arguments that sought to relitigate previous decisions of the Court, particularly those relating to easements;

(c) Mr Rashbrooke did not conform with the directions of the Court on 11 November 2022 and filed lengthy submissions which introduced new material as if it was evidence;

(d) the above factors resulted in Mr Rashbrooke's case being poorly pleaded or represented. While RMA litigation enables lay persons to run their own cases, and at times allowances can be made for that, it is submitted that it should not result in other parties incurring significantly increased costs.

[19] The Council notes that it did acknowledge that the amendment agreed in the descriptor of Consent AUT.041365.15.01 could be misinterpreted and proposed reverting back to the Commissioner's wording, which has been confirmed in the 2023 decision. However, counsel submits, this amendment was a small issue alongside the other extensive matters raised by Mr Rashbrooke. It did not change the content or effect of the conditions and did not justify the costs incurred.

Mr Schmuck application for costs

[20] Mr Schmuck seeks costs against Mr Rashbrooke.

[21] Counsel submits the inference to be drawn from Mr Rashbrooke's long history of opposing boatyard activities on the reserve and in the CMA and his conduct in this litigation, is that Mr Rashbrooke was set against the boatyard and prepared to argue anything and everything possible to make life as difficult as possible for the boatyard.

[22] Counsel submits the arguments advanced by Mr Rashbrooke were without substance, unnecessarily lengthened case management processes and increased the time and costs incurred by Mr Schmuck:

(a) the appeal related to some of the conditions only and did not challenge the grant of consent. Mr Schmuck and the Council had negotiated agreed amendments which were then circulated to the s 274 parties. In his memorandum of 28 March 2022, Mr Rashbrooke indicated he did not agree with any of the "requests for relief". In forming his opinion, Mr Rashbrooke did not take the opportunity to obtain expert advice, preferring instead to rely on his personal opinions, and those expressed by various Commissioners and decision makers in previous decisions relating to the boatyard. Mr Schmuck submits there was clearly no chance of a compromise;

(b) Mr Rashbrooke's evidence of 22 July 2022 was voluminous, wide-ranging and had very little substance. This evidence led the Court to refer to an "egregious abuse of resource management processes"[13] as one of the reasons for the delay in resolving the appeal; and

(c) Mr Rashbrooke's evidence and submissions referred to and included matters that were out of scope or with little or no relevance to the proposed amendments under consideration.

[23] Counsel submits Mr Rashbrooke did not meet procedural requirements or directions, and conducted his case in a way that lengthened case management and the hearing:

(a) Mr Rashbrooke filed lengthy submissions which sought to relitigate previous decisions, introduce new material as evidence and/or seek relief outside the scope of the appeal. The submissions lacked focus;

(b) Mr Rashbrooke did not seek expert guidance in respect of his concerns;

(c) Mr Rashbrooke's position was difficult to determine from his submissions, and there was not a clear indication of how his concerns could be resolved;

(d) Mr Rashbrooke was not prepared to move from his preferred position that

[13] [2023] NZEnvC 111, at [12].

all boatyard activities should be confined to the boatyard property. His evidence and submissions gave no indication that he was willing to compromise on the proposed amendments.

Mr Rashbrooke submissions

[24] Mr Rashbrooke opposes the applications for costs.

[25] Mr Rashbrooke acknowledges that he has consistently held the view that boatyard activities should be confined to the boatyard property but submits that others also hold such a view (which I find irrelevant).

[26] Mr Rashbrooke disagrees that he was unwilling to compromise, and that his views were without substance. He states he joined as a s 274 party to support the decision of the Commissioner. He also states his views of three previous processes reflected the stance he took. He submits that in his memorandum of 28 March 2022 and subsequently, he was willing to participate in mediation or other quasi-judicial processes to discuss matters and seek to resolve the appeal. Mr Rashbrooke states the other parties did not afford him an opportunity to do so.

[27] Mr Rashbrooke offered a series of apologies including for blurring the line between submission and evidence in his submissions, being unaware of the need to compartmentalise the focus on conditions of discharge consents versus the wider consent framework and easements, seeking relief outside the scope of the appeal, and the length of his submissions.

[28] Mr Rashbrooke submits Mr Schmuck has overstated his persistence in opposing expansion of the activities of the boatyard onto the reserve. He submits Mr Schmuck has referred to cases to which he was not a party and matters in which he was acting as a member of an incorporated society.

[29] Mr Rashbrooke submits his reliance on his personal opinions was based on the need to protect the reserve and adjacent sea and was supported by previous decision makers who would have had regard to relevant evidence of experts.

[30] Mr Rashbrooke submits the amendment to AUT.041365.15.01 was not a

condition of consent but an amendment to the consent itself. He submits that without his participation in the appeal the reversion of the wording may not have occurred.

Mr Schmuck reply submissions

[31] Counsel submits Mr Rashbrooke's submissions again demonstrate his misunderstanding of the law and the effect of subsequent resource consents gained by Mr Schmuck and/or the boatyard. Counsel suggest Mr Rashbrooke does not seem to understand that subsequent decisions supersede previous consents and provide for activities different from or in different to locations to those originally authorised. Further, counsel suggest, Mr Rashbrooke does not seem to understand that while he may continue to support the Environment Court's 2019 decision, it was quashed by the High Court; it was deemed invalid and no longer has effect.

[32] Counsel submits the information provided is an accurate reflection of Mr Rashbrooke's involvement in matters related to the boatyard. The table indicates cases where Mr Rashbrooke was participating as a member of an incorporated society. Counsel notes that even when Mr Rashbrooke was involved as a member of an incorporated society, he had previously filed a submission in his own name. Counsel further notes that complaints from Mr Rashbrooke to the Ombudsman, the Parliamentary Commissioner, Northland Regional Council, and/or Far North District Council have been relatively common over the years.

[33] Counsel acknowledges a party can run its cases as it sees fit, but failure to take advice can result in a case being put forward which is misconceived or ill defined and can limit the admissible evidence that can adduced. While Mr Rashbrooke can hold an opinion as to appropriate use, counsel submits there can be consequences of holding such a view without revisions or compromise following expert evidence and judicial or quasi-judicial decisions to the contrary.

[34] Counsel submits that in a letter dated 14 February 2022 to Mr Rashbrooke he was given an opportunity to suggest changes to the other parties. Counsel reiterates that none of the documents filed by Mr Rashbrooke gave any indication of a willingness to compromise, they continued to reflect his preference for boatyard activities to be confined to the boatyard property.

Should there be an award of costs?

[35] Having reviewed the applications for costs and the relevant submissions, I find that it is appropriate to award costs against Mr Rashbrooke.

[36] Parties are entitled to run a case as they chose however, there is a duty on parties who appear before the court to act responsibly and conduct their case in a reasoned and responsive manner.[14]

[37] In its 2023 decision the Court made a number of statements regarding the submissions, evidence and conduct of Mr Rashbrooke, for example:

(a) "Mr Rashbrooke filed 54 pages of submissions which in significant measure took on the appearance of evidence and in many places did not conform with the directions of the Court …";[15]

(b) "Mr Rashbrooke took an entirely different approach, providing extensive quotes from the enormous quantity of documentation in this matter, focussing in particular on quoting paragraphs from the decision of the commissioner that he appeared to favour.";[16]

(c) "Like many features of the 54 page submission, the Addendum seeks to offer new evidence contrary the directions made by the court …";[17] and

(d) "Regrettably, once again Mr Rashbrooke largely appears to be endeavouring to seek relief outside the scope of the appeal, particularly in relation to the esplanade reserve and the Te Araroa Trail. There are unfortunately many other instances scattered throughout his submissions. Mr Rashbrooke has not himself appealed the consents."[18]

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[14] *Atkinson v Auckland Council* [2011] NZEnvC 301, at [29]-[31]; *Wyatt v Auckland City Council* W108/1005; *Cossens v Queenstown Lakes District Council* [2019] NZEnvC 80, at [22].
[15] [2023] NZEnvC 111, at [18].
[16] [2023] NZEnvC 111, at [22].
[17] [2023] NZEnvC 111, at [24].
[18] [2023] NZEnvC 111, at [51].

[38] The Court had sought to focus submissions, Mr Rashbrooke did not comply with these directions. The volume of Mr Rashbrooke's submissions was excessive. His submissions were poorly focused. He referred to matters and sought relief outside the scope of the appeal. His submissions introduced material as if it were evidence.

[39] While acknowledging that a party should be able to pursue their case to the fullest extent, throughout the process Mr Rashbrooke continued to raise and re-raise concerns. There does appear to have been an over reliance by Mr Rashbrooke on past decisions, some of which had been overturned, and I note circumstances had moved on since. Mr Rashbrooke sought to relitigate issues that were determined in previous decisions. He referred to and brought into play the fraught history of the matter. While that could provide some background information, excessive referencing of the history had little relevant to the issues at hand.

[40] The Council and Mr Schmuck had agreed changes to conditions. They were trying to bring a conclusion to these proceedings which had been ongoing for a long period of time. By challenging the granting of consents rather than conditions Mr Rashbrooke was challenging matters out of scope, and with little practical possibility of being resolved. It should be emphasised that the 2020 appeal was confined to conditions of consent. Mr Rashbrooke did not file an appeal against the granting of consents. I consider costs could have been avoided for the Council and Mr Schmuck if Mr Rashbrooke had signalled with sufficient detail and practicability changes in conditions he might like to have seen to address his concerns. The lack of detail and specific proposed amendments would have made responding difficult for other parties.

[41] Mr Rashbrooke did not appear to make efforts to seek appropriate legal or expert advice which could have kept costs lower. I note that he brought no evidence on technical matters. The actions of Mr Rashbrooke would have created difficulties for other parties in responding to Mr Rashbrooke's submissions, evidence, and in narrowing issues.

[42] The Court acknowledged Mr Rashbrooke's input triggered an

acknowledgement from the Council that an agreed amendment in the descriptor of Consent AUT.041365.15.01 could be misinterpreted.[19] The Council subsequently recommended reverting back to the wording employed by the Hearing Commissioner. I agree with the Council that the amendment was a small issue and Mr Rashbrooke raised a wide range of other matters. I also agree that the identification of this point did not change the content or effect of the conditions. I am of the view that this one matter did not justify the costs incurred by the Council and Mr Schmuck.

[43] I note that if costs are not awarded to the Council, the costs will rest on ratepayers.

[44] I agree that there are *Bielby* factors present here. I consider Mr Rashbrooke's case was poorly pleaded/presented, he conducted his case in such a manner as to unnecessarily lengthen the proceedings, and he advanced arguments without substance in that he sought relief outside of the scope of the appeal.

[45] Mr Rashbrooke's submissions occupied most of the Court's time in considering the appeal. A significant amount of time was spent considering Mr Rashbrooke's lengthy and unfocused submissions. I consider the conduct of Mr Rashbrooke would have contributed unduly to the costs incurred by the Council and Mr Schmuck, because it did add to the time the Court spent on matters.

[46] Mr Rashbrooke did not take the time or make the effort to avoid unnecessary time and costs. Overall, I do not consider he acted responsibly in conducting these proceedings. I therefore consider it is just to compensate the Council and Mr Schmuck.

[47] For the above reasons, I am satisfied that Mr Rashbrooke's conduct has caused the Council and Mr Schmuck to incur significant and unnecessary costs. I consider that it is just in the circumstances that the Council and Mr Schmuck receive a contribution towards the costs they have incurred.

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[19] [2023] NZEnvC 111, at [18].

Quantum

[48] Having found that there should be an award of costs, the next question is the quantum of costs. This includes an assessment of the reasonableness of costs incurred and what is a reasonable contribution.

Council submissions

[49] The Council provided a breakdown of costs as follows:

(a) $26,881.71 in legal costs;

(b) $5,355.00 as witness costs for Paul Maxwell;

(c) for a total of $32,236.71.

[50] The Council seeks costs from 6 May 2022, when the Court set down an evidence exchange timetable with a view to proceeding to a hearing, up to 25 November 2022 when counsel for the Council filed its submissions in reply. The Court is advised this represents 56.6% of the Council's total costs for these proceedings.

[51] The costs incurred prior to 6 May 2022 relate to the time spent by Council working with Mr Schmuck to reach an agreement and then seeking feedback from Mr Rashbrooke on the proposed amended conditions. Those costs are not the subject of this costs application as, counsel submits, they were the result of productive and pragmatic discussions aimed at resolving the appeal.

[52] Counsel acknowledge that the costs incurred are less than they would have been had the Court not cancelled the hearing. It is for this reason that the Council is only seeking standard costs.

Mr Schmuck submissions

[53] Mr Schmuck has provided a breakdown of costs as follows:

(a) costs and disbursements incurred from the beginning of the appeal: $70,404.44 (Schedule A); and

(b) costs and disbursements incurred from the time Mr Rashbrooke advised that he did not agree with the settlement reached between Mr Schmuck and the Council: $58,795.69 (Schedule B).

[54] Counsel submitted that it is proper that all costs incurred by the appellant fall for consideration in this application (Schedule A). In the alternative, it was submitted that all costs from the time Mr Rashbrooke advised his disagreement with the terms agreed between the appellant and respondent fall for consideration (Schedule B). It was submitted a contribution of 50% - 60% of actual costs is appropriate.

Mr Rashbrooke submissions

[55] Mr Rashbrooke submits the costs presented by Mr Schmuck only partly, relate to costs directly resulting from his participation in the appeal.

[56] Mr Rashbrooke asked that the Court, in determining the quantum of costs, take into consideration that this matter involving public esplanade reserve and the CMA is, and has long been, a matter of considerable public interest, and is now resolved. He submits costs should lie where they fall or be significantly reduced.

Mr Schmuck reply submissions

[57] Counsel confirms all of the costs and disbursements set out in its Schedule B are those incurred as a result of the need to respond to Mr Rashbrooke's views, and his opposition to the agreed amendments.

Evaluation

[58] It was clear by May 2022 (and perhaps a couple of months earlier) that there were considerable differences between the Council and Mr Schmuck on the one hand, and Mr Rashbrooke on the other, which pointed to the need for a hearing. I consider it appropriate point to calculate costs from around the point at which it became clear there were differences that could not be negotiated between the parties.

[59] The Council seeks to recover costs from 6 May 2022, I accept this is reasonable. The Council therefore seeks an award of standard costs from an amount incurred of

$32,236.71.

[60] The Council seek only an award of standard costs and given that is what is requested and that I am of the view that there are *Bielby*/aggravating factors present, I award costs at the higher end of that range, being 33% of costs incurred. The sum I award to the Council is therefore $10,638.11.

[61] Mr Schmuck has provided a breakdown of costs from around March 2022 when he says Mr Rashbrooke advised that he did not agree with the settlement reached between the Council and himself (Schedule B). I accept that this is reasonable. I will therefore determine the quantum from an amount incurred of $58,795.69.

[62] Mr Schmuck has sought an award of 50 – 60% of costs incurred. Considering the proceedings as a while, I consider that a costs award of 50% is just and reasonable. This is to reflect that *Bielby*/aggravating factors that are present. The sum I award therefore is $29,397.84.

[63] Overall, I consider these sums to be a fair and reasonable outcome in the circumstances.

Outcome

[64] Under s 285 RMA, Mr Rashbrooke is ordered to pay Northland Regional Council the sum of $10,638.11 as contribution towards its costs.

[65] Under s 285 RMA, Mr Rashbrooke is ordered to pay Mr Schmuck the sum of $29,397.84 as contribution towards his costs.

[66] Under s 286 RMA, these orders may be enforced in the District Court at Kaikohe if necessary.

For the Court:

L J Newhook
Alternate Environment Judge