IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 247

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	KUKU HOLDINGS LIMITED
	(ENV-2021-CHC-104)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge P A Steven sitting alone under s279 of the Act
Hearing:	In chambers on the papers
Last case event:	16 August 2023
Date of Decision:	14 November 2023
Date of Issue:	14 November 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 Resource Management Act 1991, Kuku Holdings Limited is to pay the Marlborough District Council the sum $30,000 as a contribution towards costs.

B: Under s286 Resource Management Act 1991, this order may be filed with

the District Court in Wellington for enforcement purposes (if necessary).

REASONS

[1] The appellant appealed a decision declining an application for a coastal permit to authorise a marine farm (for mussels and certain other species) and resource consent for associated activities in Tawhitinui Bay (U200493) on 1 October 2021.

[2] Friends of Nelson Haven and Tasman Bay Inc and the Director-General of Conservation joined the appeal as s274 parties. Friends of Nelson Haven and Tasman Bay Inc subsequently withdrew its notice on 12 May 2023.

[3] The course of the appeal was not straightforward. The appellant proposed two amendments to its activity during the course of the proceedings.[1] The appellant experienced difficulties engaging a planner.[2] Variation 1 to the proposed Marlborough Environment Plan, which identified where marine farming can (and cannot) occur within the Sounds, was also processing through Schedule 1 Resource Management Act 1991 (RMA' or 'the Act') processes during the course of these appeal proceedings, and the appellant advised it had made a submission.

[4] The appeal was set down for hearing twice. The appellant was successful in seeking an adjournment of the first date due to its inability to engage a planner.[3] After the decision on submissions on Variation 1 was released, the appellant advised it was appealing that decision. It asked for adjournment of the hearing of these proceedings, and also for the consolidation of this appeal and its Variation 1 appeal.[4]

[5] The court declined the application to adjourn the hearing a second time,

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[1] Memos dated 30 November 2001 and 20 January 2023.
[2] Memo dated 12 August 2022.
[3] Minute dated 26 August 2022.
[4] Memo dated 8 June 2023.

and suggested (if the appellant was concerned about prejudice in proceeding before its variation appeal had been determined) the better course of action was for the appellant to withdraw these proceedings.[5] The appellant withdrew its appeal on 3 July 2023.[6]

[6] The Marlborough District Council ('the Council') has applied for costs in this proceeding.

Application for costs

[7] The Council incurred costs of $83,954.08 (GST inclusive). This includes Mr Maassen's attendances since the appeal was filed, together with costs incurred by external experts who had prepared will say statements, participated in caucusing and the preparation of a joint witness state, and prepared statements of evidence. The application was accompanied by invoices submitted to the Council, which the court has considered.

[8] The Council submits that an award of costs that is fair and compensates the Council is the sum of $38,000 (plus GST).[7]

[9] The Council submits its costs were elevated because the Council was not defending its decision (and hence relying on technical reports already obtained though the consent process). The Council says it was responding to what the court has treated as a new application (being materially different in scale and character) through multiple application revisions.[8]

[10] The Council says that the substantially narrower application was promoted following appeal, requiring new evidence and reports. Following conferencing and setting down for hearing, the appellant amended the application again by

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[5] Minute dated 21 June 2023.
[6] Memo dated 3 July 2023.
[7] Application dated 24 July 2023 at [3] and [8].
[8] Application dated 24 July 2023 at [4].

introducing entirely new technology (submerging the proposed lines). The Council submits this required more conferencing, and preparation based on the new material.[9]

[11] The Council submits that the appellant always ran the risk that the outcome of the Variation 1 process could cast a policy shadow over its proposal. Therefore, it is no answer that the appellant has now decided that Variation 1 is the right place in which to advance its interests.[10]

Appellant's response

[12] The appellant says it was blindsided by the hearing panel's decision on Variation 1 submissions. It says that when Variation 1 was notified, the appellant's existing marine farm was provided for in an Aquaculture Management Areas ('AMA') in Tawhitinui Bay.[11] However, the decision determined that there should be no AMAs at all in Tawhitinui Bay. Subject to appeals, when the plan is made operative, marine farming in Tawhitinui Bay would become a prohibited activity.[12]

[13] The appellant says that as soon as it was aware of the decision on Variation 1, it requested an adjournment of the hearing.[13]

[14] The appellant says that the reduction of the number of long lines in its proposal and the submerging of the long lines, were genuine attempts to reduce the effects of the proposal. It submits that it should not face an increased award of costs simply as a result of endeavouring to reduce the effects of the activity.[14] In particular, the appellant says that genuine endeavours to mitigate its activity cannot ordinarily be described as "unnecessarily lengthening the case

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[9] Application dated 24 July 2023 at [5].
[10] Application dated 24 July 2023 at [7].
[11] Aquaculture Management Area, submissions dated 8 August 2023 at [6].
[12] Submissions dated 8 August 2023 at [10].
[13] Submissions dated 8 August 2023 at [13].
[14] Submissions dated 8 August 2023 at [17]-[18].

management".[15]

[15] The appellant also notes that the court has previously said that where a case is withdrawn, the court cannot consider the merits of a party's case, as it was not aired in a hearing.[16]

[16] The appellant acknowledges that the late withdrawal of an appeal after the matter is set down is ordinarily a matter where costs can be awarded.[17] However, it submits that this should not be the case here, as it acted with diligence and speed once the Variation 1 decision was given.[18] It says it could not possibly have anticipated the outcome of the decision in respect of Tawhitinui Bay.[19]

[17] In any event, the appellant says that there were no additional costs incurred as a result of the matter being set down. The steps in the appeal were already complete at that time (with the exception of the filing of a joint witness statement, which occurred a few days later).[20]

[18] The appellant submits that it was faced with an extraordinarily unusual situation that was not of its making. Therefore, this is one of the very unusual situations in which there should be no award of costs. It submits that the Council is responsible for the consequences of the hearing panel's decision on Variation 1 – it had control of that.[21]

The Council's reply

[19] The Council repeated its submission that the aggravating features (with

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[15] Submissions dated 8 August 2023 at [21], referring to Practice Note, at [10.7(j)iii].
[16] Submissions dated 8/8/23 at [22], referring to *Bridgecorp Ltd (in receivership) v Hamilton City Council* A21/2008 and *Box Property Investments Ltd v Auckland Council* [2021] NZEnvC 71 at [36].
[17] Submissions dated 8 August 2023 at [25], referring to Practice Note at [10.7(i)].
[18] Submissions dated 8 August 2023 at [27].
[19] Submissions dated 8 August 2023 at [28].
[20] Submissions dated 8 August 2023 at [29].
[21] Submissions dated 8 August 2023 at [33]-[34].

respect to costs) are the changes to the application, despite Variation 1. All of the amendments chronologically precede the Variation 1 decision.[22]

[20] It opposes the appellant's submission that the independent hearing panel's Variation 1 decision should disqualify the Council from receiving costs in this proceeding. The Council submits that there is no logical nexus between a decision of the independent hearing panel on the variation and the Council's costs in this appeal.

[21] The Council says it did not draw a nexus between the two proceedings other than to say that the nature of the Variation 1 process, and the appellant's participation in it, was the logical arena to test the appropriateness of an extension to the appellant's marine farm.[23]

Costs in the Environment Court

[22] Under s285 RMA, the Environment Court may order any party to pay to any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion. The Environment Court Practice Note 2023 sets out guidelines in relation to costs, and the parties in this case have referred to some of them. However, the Practice Note does not create an inflexible rule or practice.[24]

[23] The purpose of a costs award is not to penalise an unsuccessful party, but to compensate a successful party where that is just.[25]

[24] 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

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[22] Submissions dated 14 August 2023 at [2(b)].
[23] Submissions dated 14 August 2023 at [2(c)].
[24] *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 (HC) at [21].
[25] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

of costs to be awarded.[26]

[25] Clause 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.[27] In this case the Council relies on cl 10.7(j)iii:

> iii. whether a party has conducted its case in a way that unnecessarily lengthened the case management process or the hearing;

[26] With respect to costs on the withdrawal of appeals, the Practice Note 2023 says:

> (i) Where an appeal or application is withdrawn after being set down for hearing, the Court will normally award costs against the appellant or applicant in favour of the other parties in respect of their preparation for hearing.

[27] In determining the quantum of costs awards, there is no scale of costs. However, where costs have been awarded, awards have tended to fall within three bands, as follows:

(a) 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");
(b) higher than standard costs, where certain aggravating factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

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[26] *Re Queenstown Airport Corporation Ltd* [2019] NZEnvC 37.
[27] *Re Queenstown Airport Corporation Ltd* [2019] NZEnvC 37.

Evaluation

[28] I am not able to accept the Council's submission that there is no nexus between this proceeding and the Variation 1 process. The decision on the variation was the act that had triggered the appellant's decision to withdraw when its request for an adjournment was declined following release of decisions.

[29] Once the appellant had received the Variation 1 decision, it could have proceeded with the hearing. However, the appeal would have to be considered against hostile policy framework that was not in force when the appeal was lodged, as the Council has acknowledged.

[30] It is not apparent to the court that proposal to extend the farm is best left to the appeal process (on Variation 1). From the information provided to the Council (at the court's direction on 19 June 2023) the extension was within the AMA at Tawhitinui Bay prior to the decision to delete that in its entirety from the planning map.

[31] I am reluctant to accept the Council's submission that the appellant should have anticipated earlier that the Variation 1 decision would affect the proposal in a negative way.

[32] The decision to delete the AMA had not been anticipated in any of the planning evidence filed with the court, including that filed by the Council.

[33] Accordingly, I am not in a position to reject the appellant's contention that it was blindsided by the decision on the variation removing the AMA from the mapping for Tawhitinui Bay. That amendment triggered application of the hostile policy provisions against which the proposal would have to be considered if the appeal went ahead.

[34] On the same basis, I am unable to accept the Council's contention that the decision is an outcome that could have been predicted. Accordingly, this factor

does not support the Council's case for an award of costs at the level it is seeking.

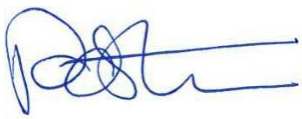
[35] The Council submits that a further aggravating factor is that the application was adjusted repeatedly, and that this caused it to incur unnecessary costs. The applicant claims that the amendments were made to address concerns raised by the Council's experts by reducing the size of (and then later) the effects of the extension, which is a common occurrence in the case management process.

[36] I am not aware of any determination by the court that the amended proposal is essentially a new application, although that was the Council's position on the latest amendment to submerge the lines.

[37] That said, I do accept that the amendments did result in additional cost to the Council; the Council's witnesses had to prepare additional material on more than one occasion.

[38] The Council has applied for costs of a little over 50% of the costs it incurred. While the costs incurred by the Council are higher than normal, they are not unreasonable. However, I do not consider that the circumstances of the withdrawal justify an award of the sum sought by the Council.

[39] Accordingly, I make an award of $30,000.



P A Steven
Environment Judge