IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 256

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	FLAX TRUST
	(ENV-2016-CHC-4)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent
AND	SPEARGRASS HOLDINGS LIMITED
	s274 party

Court:	Environment Judge J J M Hassan
Hearing:	In Chambers at Christchurch
Submissions:	M G Colson KC and E J Watt for Speargrass Holdings Limited A N Riches for Flax Trust
Last case event:	14 December 2022
Date of Decision:	30 November 2023
Date of Issue:	30 November 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 Resource Management Act 1991, the application by Speargrass Holdings Limited for costs against Flax Trust is declined.

B: Costs are to lie where they fall.

REASONS

[1] On 10 December 2021, the High Court quashed this court's decision in an appeal against a decision at first instance on an application by Flax Trust to vary conditions of a resource consent.[1] The resource consent authorised the formation of an earth bund on land in Birchwood Road in the Wakatipu Basin. This was in a location close to the boundary of land owned by Speargrass Holdings Limited ('SHL') at 88 Speargrass Flat Road. The consent limited the height of the bund to 3 m. However, as built, the bund exceeded 5 m in height. Flax Trust applied to vary the consent to retrospectively authorise that exceedance. Its application was declined and Flax Trust appealed that decision to this court. The High Court reinstated the first instance decision declining the consent variation.

[2] The High Court reserved the question of costs and disbursements incurred in this court and remitted back the determination of these matters.[2]

[3] SHL seeks an order for indemnity costs against Flax Trust. That is an order for payment of $141,229.12, comprising $108,748.88 for legal costs and $32,480.24 for expert witness costs. Flax Trust opposes the application, submitting that costs should lie where they fall.

[4] The litigation history of this matter is lengthy and tortious. Relevantly:

(a) in 2015, Flax Trust made its initial variation application to retrospectively authorise the height breach, that application being

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1 *Speargrass Holdings Ltd v van Brandenburg* [2021] NZHC 3391.

2 *Speargrass Holdings Ltd v van Brandenburg* [2022] NZHC 1261.

declined;

(b) in 2016, Flax Trust appealed that decision and its appeal was allowed by this court;

(c) in 2018, the High Court issued a single judgment on three separate proceedings initiated by SHL. The Court:

(i) allowed SHL's appeal against this court's 2016 decision; and

(ii) declined SHL's applications for judicial review of QLDC's decision not to notify the variation application and for an order under s333 of the Property Law Act 2007 to require removal of the bund;

(d) in 2019, the Court of Appeal dismissed SHL's appeal against the High Court's decline of its judicial review and s333 applications.[3] The Court of Appeal also declined an associated application for stay of this court's reconsideration;[4]

(e) in 2019 this court granted a rehearing of the appeal and 2020, for the second time, granted the variation of the consent to retrospectively authorise the over-height bund;[5]

(f) in 2020, this court also ordered SHL to contribute the sum of $28,200 to Flax Trust's costs. That order was stayed pending resolution of the above-noted appeal to the High Court;[6] and

(g) those 2020 decisions were overturned by the above-noted High Court decisions subject to the noted remission back of any matters as to costs.

Submissions

[5] Counsel address relevant principles and these are well-settled. I return to

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3 *Speargrass Holdings Ltd v van Brandenburg* [2019] NZCA 564.

4 *Speargrass Holdings Ltd v van Brandenburg* [2019] NZCA 684.

5 *Flax Trust v Queenstown Lakes District Council* [2019] NZEnvC 177, *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 84, *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 115.

6 *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 139.

them later in this decision. Submissions cover at some length the history of this matter. I largely leave those matters aside except insofar as they bear on the discretionary judgment I must make. I record however Mr Riches' explanation that Flax Trust has reduced the size of the bund. I now summarise the further points raised in submissions relevant to my consideration of costs.

SHL

Aggravating factors

[6] Mr Colson KC and Ms Watt submit that indemnity costs should be awarded in view of Flax Trust's disregard of the law in how it has conducted its case.

[7] Part of this submission concerns various ways in which counsel submits Flax Trust effectively disregarded observations and findings by the High Court.

[8] SHL submits that all costs it incurred in the 2020 proceedings are the direct result of Flax Trust's failure to heed the High Court's following obiter observation:[7]

> As the concerns of Speargrass and the Meehans will be fully ventilated in that process, I consider the prospect that a mound as high as the as-built mound would be approved is remote, if non-existent.

[9] In addition, SHL submits that Flax Trust advanced arguments without substance and took unmeritorious points. Counsel note that Flax Trust's case in the 2020 proceeding focused heavily on SHL's actions concerning the topping and trimming of trees on SHL's property. In particular, the gist of Flax Trust's case was that the topping was "unlawful" and meant any adverse effects of the as-built mound were "self-inflicted". SHL submits the High Court's 2021 decision confirms Flax Trust's case was contrary to the binding conclusions of the High

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7 *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [271].

Court in 2018 and wrong in law.[8]

[10] SHL further submits that SHL's argument in the 2020 rehearing that this court was entitled to come to its own view on the amenity effects of the bund was contrary to the High Court's clear findings in its 2018 decision. Counsel refers to the High Court's findings that the dominance and close proximity of the bund to the dwelling on SHL's property has an undue effect on its use for residential living and that this impact is not negated by SHL's obligation to plant and maintain trees on its own boundary.

[11] SHL submits the High Court's 2021 Decision confirms this aspect of Flax Trust's argument was also wrong in law.[9]

Failure to call expert evidence

[12] In addition, counsel points out that, because of Flax Trust's election not to call expert evidence, the costs of assisting the court in those terms were borne entirely by SHL and QLDC.

Flax Trust

[13] Flax Trust submits costs should lie where they fall.

Delay

[14] Mr Riches makes an initial submission that the application, having been made some 10.5 months after the issuance of the High Court decision, should be treated as stale so as to disentitle SHL to costs. He explains that the delay has put Flax Trust to additional expense in engaging counsel and reviewing matters that

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8 *Speargrass Holdings Ltd v van Brandenburg* [2021] NZHC 3391 at [183], [185], and [189].

9 *Speargrass Holdings Ltd v van Brandenburg* [2021] NZHC 3391 at [191].

occurred in 2020 and points out that SHL has not offered any explanation for the delay.[10]

Success

[15] In any case, Mr Riches submits that costs should lie where they fall, given that Flax Trust was not unsuccessful in his court. Counsel submits that position is not altered by the fact that the High Court overturned this court's decision.

Dispute that there are aggravating factors

[16] Without resiling from that primary position, Mr Riches submits that none of the matters raised by SHL justify costs, let alone on an indemnity basis.

[17] Counsel does not accept SHL's characterisation of the High Court's observations as a warning to Flax Trust to not pursue a rehearing. He notes the related observations of this court in the rehearing decision. The court acknowledged that the High Court's observations were helpful and to be given weight but noted that the court is bound by the RMA's statutory directives. In addition to relevant plan provisions and pt 2, the decision records the RMA as requiring consideration of "the reasonably foreseeable environment and the positive and adverse effects of the mound on all parties".[11]

[18] Mr Riches also traverses why the rehearing was justified in light of the High Court's findings and changes in circumstances concerning the growth of the trees.[12]

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10 Counsel refers to *Antunovich v Marine Helicopters Limited* [1995] NZPT 25 and *Woodward v Marlborough District Council* [2001] NZEnvC 324.

11 *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 84 at [452], [453].

12 *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 84 at [458]; *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [241].

Flax Trust's conduct of its case

[19] Mr Riches submits that criticisms of Flax Trust's election not to call expert evidence for the rehearing are unwarranted, in that this was part of running an efficient case where the issues were capable of being addressed without such evidence. Counsel also notes the court's observations in its 2020 costs decision in essence to the effect that Flax Trust was not under a duty to call experts.[13] On the other hand, counsel notes that the court was dismissive of the independence of SHL's witnesses, instead relying on QLDC's expert. He submits that SHL needlessly lengthened the hearing.[14] Whilst noting that the High Court decision effectively quashes this court's earlier costs decision, counsel submit that this court's criticisms of SHL remain valid.

SHL's reply

[20] SHL reiterates that it is misconceived for Flax Trust to rely on arguments it maintained before this court, in view of the High Court's two decisions overturning this court's decisions.[15]

[21] On the point raised as to delay, SHL submits that the High Court's directions remitting costs issues back to this court plainly put Flax Trust on notice and it cannot reasonably complain that SHL has caused "additional expense" or "inordinate delay". As such, counsel submit that there is no prejudice arising.

Principles

[22] Under s285 RMA, a broad discretion is conferred to order a party to pay another's reasonable costs and expenses in a proceeding. There is no scale of costs under the RMA. The Environment Court Practice Note 2023 sets out guidelines

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13 *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 139 at [52].

14 *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 139 at [70].

15 *Royal Forest and Bird Protection Society of New Zealand Inc v Marlborough District Council* W184/96, at page 5.

but not as rules or directives as to practice.[16] There is no general rule in this court that costs follow the event nor any general practice that a successful party is entitled to costs unless there are special circumstances.[17] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[18]

[23] If it is determined that it is just in in the circumstances to make an award of costs, the second stage is to decide on quantum.[19] Awards have tended to fall within the following bands:

(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 as discussed below; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[24] Section 10.7(j) of the Practice Note 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:[20]

(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

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16 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].
17 *Culpan v Vose* A064/93.
18 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.
19 *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.
20 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

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.

[25] An application for costs made outside a specified or the default 10 working day timeframe may be dismissed as stale.[21] That is as an exercise of discretion, considering relevant circumstances in a principled way in each instance.[22]

Evaluation

The application is not disqualified by delay

[26] I am satisfied no undue prejudice arises from the delay in making the application. Rather than the 10.5 months' delay alleged, the true delay is in the order of four months. That is as between 31 May 2022, when the High Court remitted costs to this court for determination, and 21 October 2022 when the application was made. The High Court did not set a timetable. Whilst four months is not an insignificant period, compared to the statutory 10 day default, I find there was no associated significant prejudice. Flax Trust was plainly on notice as to the potential for an application and could readily have made inquiries in any case. Therefore, I do not dismiss the application as stale.

Costs should lie where they fall

[27] Although not having heard the substantive matters, I am assisted by consideration of the relevant decisions and in light of submissions. On that basis,

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21 *Corran School Trust Board v Auckland Council* A077/05.

22 *184 Maraetai Limited v Auckland Council* [2016] NZEnvC 50.

I find none of the factors in s10.7(j) of the Practice Note lists count against Flax Trust.

[28] There is nothing to indicate that Flax Trust advanced arguments without substance, or poorly presented or conducted its case or took a technical or unmeritorious point. Rather, my review of the decisions indicates that it conducted an efficient case and the court found it meritorious. I am satisfied it was not derelict for Flax Trust to have elected against calling expert evidence, as a case was available on matters of lay representation. It was also open for it to rely on expert evidence called by QLDC as the statutory respondent.

[29] Nor is there any indication that Flax Trust abused the process of the court. Rather, it duly applied for and secured a re-hearing. Nothing in the decision suggests it failed to abide relevant directions or otherwise abused the court's process.

[30] As for the remaining matters in s 10.7(j) of the Practice Note, any fault is equally shared. In essence, the parties were at loggerheads because of their conflicting interests and fraught relationship. That context allowed little if any prospect of settlement or significant compromise.

[31] With respect, SHL's analysis of matters by reference to the High Court's findings and observations is somewhat misdirected. It is axiomatic that the roles of the courts are of course different. This court exercises a statutory jurisdiction, hearing matters de novo on the evidence, subject to any directions given by the Higher Courts. The High Court, in its relevant appellate jurisdiction, is supervisory of this court in those terms, but bearing in mind that appeals are confined to questions of law. Hence, it is invalid to characterise a case found meritorious by this court as being improperly brought or unmeritorious by reference to the findings and observations by the High Court on appeal. Rather, the force and purpose of those findings is as part of the exercise of the High Court's appellate role. The fault that the High Court found with the decisions of this court, albeit

of such significance as to overturn those decisions, is not imputable to Flax Trust.

[32] In the overall interests of justice, and in accordance with s285, I find that costs should lie where they fall.

Outcome

[33] For those reasons, and in accordance with s285 RMA, I decline the application, determining that costs are to lie where they fall.

J J M Hassan
Environment Judge