IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 258

IN THE MATTER	of the Resource Management Act 1991
AND	an application for interim enforcement orders under s320 of the Act
BETWEEN	KAIUMA FARM LIMITED
	(ENV-2021-CHC-121)
	Applicant
AND	MARBERRY ESTATE LIMITED
	First Respondent
AND	M & R FORESTLAND MANAGEMENT LIMITED
	Second Respondent
AND	MARLBOROUGH DISTRICT COUNCIL
	Third Respondent

Court:	Environment Judge J J M Hassan sitting alone pursuant to s279 of the Act
Hearing:	On the papers
Last case event:	13 February 2023
Date of Decision:	28 November 2023
Date of Issue:	28 November 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 RMA,[1] Marberry Estate Limited is ordered to pay $20,900 to Kaiuma Farm Limited as a contribution towards its costs in this proceeding.

B: Under s286 RMA, this order may be filed in the District Court at Wellington for enforcement purposes (if necessary).

REASONS

Introduction

[1] On 21 December 2021, the court made interim enforcement orders under ss 279(1)(b) and 320 RMA against Marberry Estate Limited ('Marberry') and M & R Forestland Management Limited ('M & R'). The orders were made by consent on the application of Kaiuma Farm Limited ('Kaiuma'). They required Marberry and M & R to cease all works (earthworks, tracking, harvesting, river crossings, and related works) at Kaiuma Forest until a further order of the court, or resource consent for such works is obtained. Costs were reserved by agreement.[2]

[2] On 21 December 2022, Kaiuma applied for an order as to costs, seeking $30,158.00. Marberry's position is that costs should lie where they fall. Marlborough District Council ('MDC'), as a party to the enforcement order proceedings, abides this decision.[3]

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1 Resource Management Act 1991.

2 *Kaiuma Farm Ltd v Marberry Estate Ltd* [2021] NZEnvC 198 at [45].

3 Email of A Besier (Tasman Law) to the Registry (27 January 2023).

[3] The background to the making of the orders is traversed in detail in the decision on them.[4]

Submissions

[4] Counsel traverse relevant principles but as these are well settled I focus this discussion on the essence of the parties' respective positions on the merits of the application and quantum.

Kaiuma's application and associated submissions

[5] Mr Ryan KC explains that a decision was made to hold from making the application as it was thought there would be prospects of addressing matters globally at a later stage. That was in a context where the proceedings were adjourned with the making of interim orders, rather than being finally disposed of.[5] In any case, he points out that a delay in filing is not necessarily fatal and, in this case, has not caused any prejudice to be suffered by Marberry.[6]

[6] Kaiuma submits that a costs' order is appropriate, notwithstanding Marberry's ultimate consent to the making of the interim enforcement orders. That is particularly because Kaiuma was put to the cost of making the application as a result of Marberry (and its agent M & R) initially declining to cease works as requested.[7] That request was made in a letter to a consultant to Marberry that in essence called for the works to be halted pending the securing of resource consents pursuant to an application then before the Council.

[7] Kaiuma quantifies the actual costs incurred as $75,395.88, comprising legal

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4 At [7]-[19].
5 Application for costs dated 22 December 2022 at [33].
6 Application for costs dated 22 December 2022 at [40].
7 Kaiuma application for costs dated 22 December 2022 at [41].

fees of $55,442 and expert fees of $19,953.[8] Invoices were supplied.

[8] Mr Ryan submits that an award of 40% of the actual costs of $75,395.88 is appropriate.[9] He notes that, on an originating application (such as an enforcement order application), recoverable costs can extend beyond those arising out of the preparation of the application document. They can encompass a supporting memorandum and affidavits.[10]

Marberry's response

[9] Opposing the application, Ms Everleigh and Ms Barry submit that Kaiuma has not been successful in the usual sense.[11] They explain that it was Marberry that proposed seeking the interim enforcement orders by consent, as a pragmatic way forward to minimise costs to all involved, bearing in mind that there was a resource consent application, incorporating the same activities as would be covered by the order, before the Council in any case. They submit that Kaiuma's allegations, as are traversed in the solicitor's letter that accompanies the costs application, were not tested or accepted by the court.[12]

[10] Marberry disputes the characterisation of the letter by Kaiuma. Counsel point out that the letter did not detail any grounds for its position that the activities were not permitted (such as any alleged breach of permitted activity standards). Furthermore, it did not traverse the primary grounds on which the orders were sought.[13] Counsel submit that Kaiuma essentially put itself to unnecessary expense

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8 Kaiuma application for costs dated 22 December 2022 at [43] and Schedule 3. The total fees appear to come to $22,437.47 not the $19,953.47 that the applicant's table suggests. It is understood that the difference is the first SLR Consulting fee. I have relied on the total as provided by the applicant in Schedule 3.

9 Kaiuma application for costs dated 22 December 2022 at [43]-[44].

10 Kaiuma application for costs dated 22 December 2022 at [30], referring to *Manawatu-Wanganui Regional Council v Farm Holdings (4) Ltd* [2016] NZEnvC 127 at [1], [3], [19]–[20] and [25].

11 Marberry memorandum in response dated 24 January 2023 at [6].

12 Marberry memorandum in response dated 24 January 2023 at [5].

13 Marberry memorandum in response dated 24 January 2023 at [7].

by preparing and filing proceedings without first articulating matters to Marberry.[14]

[11] Counsel submit that, nevertheless, Marberry was prompt and proactive in seeking to minimise costs to the parties.[15] Once it was served with the application for the orders, on 6 December 2021, it took immediate steps to conclude harvesting activities (ceasing those on 8 December 2021). Immediately following this, in early December 2021, Marberry promptly proposed and then prepared court documentation for the purposes of seeking interim orders by consent. In addition, it stopped all remaining repair and upgrade works from 10 December 2021 pending the making of the orders.[16] Counsel explain that, apart from bearing the legal costs of those initiatives, Marberry and M & R had other costs. They moved machinery without completing the works, suffered supply chain disruption and were left unable to honour agreements with contractors who were hired to complete the work.[17]

[12] Marberry maintains that it was entitled to rely on the acceptance of the permitted activity notices by MDC and was not on notice of any alleged breaches of permitted activity standards.[18] Counsel disputes that the resource consent application rendered them unable to undertake the activities that were the subject of the application for enforcement orders.[19]

[13] Counsel for Marberry submit that a further reason why costs should lie where they fall is that Kaiuma has not adequately explained its delay in applying for costs.[20]

[14] Furthermore, counsel submit that the claimed costs are excessive,

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14 Marberry memorandum in response dated 24 January 2023 at [8].
15 Marberry memorandum in response dated 24 January 2023 at [2] and [19].
16 Marberry memorandum in response dated 24 January 2023 at [10].
17 Marberry memorandum in response dated 24 January 2023 at [11].
18 Marberry memorandum in response dated 24 January 2023 at [7].
19 Marberry memorandum in response dated 24 January 2023 at [2], [7].
20 Marberry memorandum in response dated 24 January 2023 at [22]-[23].

extending to costs incurred in the making of the resource consent application that are not fairly attributable to the application for the interim enforcement orders.[21]

[15] Counsel note that the evidence supporting the orders is referenced in those orders and submit that actual costs properly attributable to the application are much less than claimed.

[16] In regard to legal costs, they note that the invoices appear to capture time with respect to the resource consent application, hence not fairly recoverable, including in regard to attendances with Karen Price and the planning consultant.

[17] In regard to experts' costs, counsel note that the second invoice from SLR consulting, for $3,395.67, does not pertain to work in relation to the enforcement orders and is for services rendered after the orders were made. They submit that the Davidson Environmental Limited invoice for $5,462.50 is for an affidavit having at best peripheral relevance. They challenge the relevance of the CKL invoice for $11,095.30 for "planning" as no affidavit of Mr Batchelor's was produced in support of the enforcement order application.

[18] Overall, counsel submit that actual costs incurred would be closer to $44,065.81.[22]

[19] If the court were minded to make a costs award, they submit that this should be at the lower end (less than 25%) of that revised actual cost quantum.[23]

Kaiuma's reply

[20] In reply, Mr Ryan submits that, although the merits of the application were not tested, Kaiuma succeeded in achieving its primary objective, of requiring that

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21 Marberry memorandum in response dated 24 January 2023 at [2].

22 *Kaiuma Farm Ltd v Marberry Estate Ltd* [2021] NZEnvC 198 at [3], Marberry memorandum in response dated 24 January 2023 at [18].

23 Marberry memorandum in response dated 24 January 2023 at [15].

works cease.[24] He maintains that the letter that Kaiuma's solicitors wrote to Marberry was sufficient to imply an intention to take legal action.[25]

[21] Mr Ryan acknowledges that costs awarded under s285 must be costs arising directly out of the proceedings. He submits the experts' costs claimed relate to those who were engaged, i.e. Mr Batchelor (planner, CKL), Mr Davidson (marine biologist), and Dr McConchie (hydrologist & geomorphologist, SLR Consulting NZ Ltd). He submits these are recoverable costs in that they arise directly out of the application for enforcement orders, and were incurred in preparation or in support of the application. As for Mr Batchelor's evidence, he explains that this was prepared in support of the application, but was not filed as the application did not proceed to hearing in view of the agreement reached. Nevertheless, the cost of preparing that planning evidence was incurred.[26]

[22] Mr Ryan acknowledges that the need for a substantive hearing of the interim enforcement order was avoided through Marberry's actions. However, he maintains Kaiuma's position that the costs of seeking the interim orders could have been avoided in their entirety if Marberry had acted on the requests to cease works. Instead their election to carry on necessitated the application.[27] On that basis, Kaiuma seeks 40% of actual costs.[28]

Legal principles

[23] Under s285 RMA, there is a broad discretion to order the payment by one party of the reasonable costs and expenses incurred by another party. The

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24 Kaiuma reply dated 13 February 2023 at [12], referring to *Cameron v Westland District Council* HC Christchurch 2 October 2009, BC200967043 at [33]; *Solicitor-General v Siemer* HC Auckland, 26 February 2010, BC201060458 at [7]; *Sybeem Holdings Ltd v Body Corporate 187087* HC Auckland, CIV-2009-404-7806, 3 May 2011 at [12]; *Carmel College Auckland Ltd v North Shore City Council* HC Auckland, CIV-2007-404-5894, 20 January 2009 at [19].

25 Kaiuma reply dated 13 February 2023 at [2]-[3].

26 Kaiuma reply dated 13 February 2023 at [7]-[9].

27 Kaiuma application for costs dated 22 December 2022 at [21].

28 Kaiuma reply dated 13 February 2023 at [11].

Environment Court Practice Note 2023 sets out guidelines in relation to costs.[29] However, it does not create an inflexible rule or practice.[30]

[24] There is no presumption that costs will follow an event or that special circumstances should exist to justify the award of costs.[31] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful one where that is just.[32] If an award is considered just in the circumstances, the further stage of an assessment is to determine the appropriate quantum.[33]

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

> i. whether the arguments advanced by a party were without substance;
> ii. whether a party has not met procedural requirements or directions;
> iii. whether a party has conducted its case in a way that unnecessarily lengthened the case management process or the hearing;
> iv. whether a party has failed to explore reasonably available options for settlement;
> v. whether a party has taken a technical or unmeritorious point and failed; and
> vi. 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.

[26] None of those factors is present here. However, as I later discuss, I find there are other factors pertaining to interim enforcement orders made by consent that should be considered also and these justify a modest award.

[27] There is no scale but awards of costs in this court tend to fall within three

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29 Environment Court Practice Note, 10.7.
30 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].
31 *Stevens v Dunedin City Council PT Christchurch* C005/95, 3 February 1995 at p 3.
32 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1996) 2 ELRNZ 138; [1996] NZRMA 385.
33 *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

bands, as follows:[34]

(a) standard costs;
(b) higher than standard costs, where certain aggravating factors are present such as those identified in *DFC NZ Ltd v Bielby*[35]; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[28] A common characteristic of enforcement proceedings is that they are brought to stop or require actions to ensure adherence to RMA duties and restrictions. As such, there is a public interest benefit in successful enforcement action that I consider should bear upon consideration of how costs should be allocated.

[29] The pattern of cases indicate costs awards are relatively more likely in such proceedings.[36] Typically, costs in such proceedings range between one third and half of solicitor and client costs, with expert witness charges allowed in full.[37] That is higher than is typical for standard costs in appeal proceedings, i.e. between 25-33% of the costs actually and reasonably incurred by a successful party. However, one important distinction, as noted, is that enforcement order proceedings, including when brought by a person other than a local authority, can have a public interest value. Furthermore, there are additional demands in supporting an enforcement order application.

[30] The court can also award costs in respect of interim enforcement orders, although the awarding of costs may be postponed until after proceedings have

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34 *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468 at [34] and *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4 at [35].
35 *DFC NZ Ltd v Bielby,* HC Auckland CP997/89, 20 September 1990.
36 *Van Dyke v Tasman District Council* (2012) 9 BRMB 174 at 176; *Goldfinch v Auckland City Council* [1998] NZRMA 97.
37 *Rowell v Wairoa Quarries Ltd* HC Nelson M14/96, 7 September 1996 at pp 8-9.

been finally determined.[38]

Consideration

[31] Whilst there was significant delay in bringing the application, I accept that this was in a context where the proceedings remained alive, including in an inter-party sense. Nor was the delay a source of significant prejudice to Marberry. Therefore, I do not treat this factor as rendering the application stale.

[32] The fact that the orders were made by consent does not take away from their legitimacy or legal force as orders of the court. In essence, the orders were made on the joint representation that they were both legitimate and appropriate, and that was further supported by the evidence tendered with the application. They serve a public interest purpose in enforcing relevant RMA duties and restrictions, any breach of them constituting a separate offence under the RMA.

[33] In addition to the public interest in fairly allocating costs for the making of the orders, there is also an inter-party fairness dimension insofar as the joint memorandum asked that costs be reserved.[39] Arguments that the application for orders was premature are essentially negated by the fact that the orders were made on the basis of the agreement reflected in that memorandum. Furthermore, whilst traversing a range of matters at some length, the solicitor's letter fairly puts Marberry on notice in its work stop demands.

[34] That leads me to find that a costs order is appropriately made according to the principles I have set out.

[35] I agree with Marberry that there are no aggravating factors warranting any uplift in the costs award. Furthermore, whilst Kaiuma carried the most significant

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38 *Auckland Regional Council v Hastings* EnvC Auckland A129/99, 4 November 1999 at [11].

39 Joint memorandum of counsel dated 20 December 2021 at [8].

share of costs, it was not the only contributor. I return to this matter shortly, in light of my discussion of quantum.

[36] As to the actual costs incurred by Kaiuma, I find force in Marberry's submissions that there would appear to be some unjustified components of claimed actual legal and expert costs.

[37] Both invoices for legal fees for professional services appear to include extraneous attendances, such as engagement with Ms Price and with Mr Batchelor. On that basis, I discount the actual legal costs by 25% of the $55,442.41 claimed, i.e. to $41,581.81.

[38] I set aside the second SLR invoice. Furthermore, I treat only 50% of the costs represented in the invoices from Davidson Environmental Ltd and CKL as recoverable. Both would appear to extend beyond the actual and reasonable bounds of the enforcement order application, to encompass other matters of or in relation to the wider dispute. Hence, I derive a total for experts' costs of $10,762,65.

[39] Hence, I derive actual costs of $52,344.46 as a basis for now determining an appropriate allocation.

[40] Guided by the parties' agreed position on the making of the order and as to reservation of costs, I find that a fairer starting premise is that parties should equally share actual costs incurred. I leave aside the Council as Kaiuma's is the only application and it seeks costs only against Marberry.

[41] All things considered, I determine that Marberry should make a contribution of $20,900 towards the costs incurred by Kaiuma. That represents just under 40% of my derived actual costs for Kaiuma. It does not imply any uplift on a standard contribution. Rather, it is a discount from a starting position of equal contributions, to acknowledge the contribution already made by Marberry to that outcome.

Outcome

[42] Under s285 RMA Marberry Estate Limited is to pay an award of $20,900 to Kaiuma Farm Limited as a contribution towards its costs in this proceeding.

[43] Under s286 RMA, this order may be filed in the District Court at Wellington for enforcement purposes (if necessary).

J J M Hassan
Environment Judge