

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TE TĀMAKI MAKĀURAU**

Decision No. [2024] NZEnvC 008

IN THE MATTER

of an appeal under s 120 of the Resource
Management Act 1991

BETWEEN

BARBICAN SECURITIES LIMITED

(ENV-2022-AKL-214)

Appellant/ Applicant

AND

AUCKLAND COUNCIL

Respondent

Court: Environment Judge L J Semple sitting alone under s 279(1) of
the Act
Hearing: In chambers at Wellington
Last case event: 4 December 2023
Date of Decision: 5 February 2024
Date of Issue: 5 February 2024

**DECISION OF THE ENVIRONMENT COURT ON APPLICATION TO
STAY DETERMINATION OF COSTS**

- A. The application for stay is granted pending the determination of the High
Court appeal.



REASONS

[1] By Memorandum of Counsel dated 28 August 2023, Auckland Council (Council) sought costs against Barbican Securities Ltd (Barbican) in the amount of \$55,415.

[2] In response, by Memorandum dated 4 September 2023, Barbican sought that the Court exercise its discretion to defer a decision on the costs application until such time as its [then] yet to be filed appeal to the High Court was resolved.

[3] Barbican filed its Notice of Appeal to the High Court on 4 September 2023.

[4] At the request of the Registry, the Council indicated by email dated 4 December 2023, that it did not consent to the deferral of the costs application and sought that the matter be determined.

[5] It is common ground that the Court has a discretion as to whether it determines an application for costs now or awaits the outcome of an appeal to the High Court. That discretion forms part of its general power to award costs under s 285(1) of the RMA and, in this case, by virtue of the operation of Rule 20.10(2) of the High Court rules where a decision maker (in this case the Environment Court) may grant a stay in respect of proceedings under appeal.

[6] As set out in *Ngati Kahu ki Whangaroa Co-operative Society Ltd v Northland Regional Council*,¹ and the cases following², while the Court generally prefers to determine costs applications while the hearing remains “fresh in the court’s mind” in circumstances where the relief sought in the appeal bears directly on the grounds advanced in the costs application, the Court may exercise its discretion to defer its determination.

¹ *Ngati Kahu ki Whangaroa Co-operative Society Ltd v Northland Regional Council* A118/2000, 4 October 2000.

² See for example *Waitakere Resource Consents Ltd v Waitakere City Council* A120/2008, 31 October 2008 and *Clutha District Council v Otago Regional Council* [2021] NZEnvC 16.

[7] As Her Honour stated in *Clutha District Council v Otago Regional Council*:

... were the appeal successful, the parties may wish to alter their submission regarding the application for costs as the outcome might ultimately affect any award the Environment Court may make.

[8] Barbican seeks that the Court exercises its discretion to defer on the basis that it would suffer significant prejudice if it is required to respond fully to a substantive costs application now when its appeal may be wholly successful. Barbican says this prejudice is exacerbated given it was successful in several of its defences to the Council's opposition to the appeal before this Court.

[9] Further, Barbican argues that there is limited prejudice to the Council in deferring the decision given the Council is a "large public body, with access to significant funds".

[10] I am not satisfied that the financial position of the Council is a ground on which to suggest that there is limited prejudice in granting the stay. As set out in the Council's application, the costs incurred by the Council fall to the community of ratepayers.

[11] I do, however, accept that if Barbican's appeal is successful, it will bear directly on the primary grounds advanced in the Council's costs application, namely that Council was the successful party and Barbican was unsuccessful both on appeal and at first instance. Specifically, I find that if Barbican is successful in the High Court that will likely alter any submissions it wishes to make on the costs application and might ultimately affect any award this Court might make. I also accept that Barbican will be put to additional, potentially significant expense in responding to a costs application which may be rendered nugatory in the event of a successful outcome in the High Court.

[12] I consider that on balance these factors outweigh the usual preference to determine questions of costs soon after issue of the substantive decision. I am therefore satisfied that it is appropriate to defer determination of the costs application until the High Court has resolved the outstanding appeal.

[13] Parties are to notify the Court within 10 working days of the release of the High Court decision and seek directions as appropriate.



L J Semple

Environment Judge

