IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No. [2024] NZEnvC 077

IN THE MATTER	of applications under ss 316 and 320 of the Resource Management Act 1991
BETWEEN	WELLINGTON REGIONAL COUNCIL (ENV-2020-WLG-036 & 40) Applicant
AND	JULIE MAREE CROSBIE First Respondent ADRIAN NEIL PAGE Second Respondent
AND	NIKAU LAKES BIOSYSTEM LIMITED Third Respondent

Court:	Environment Judge L J Semple sitting alone under s 279 of the Act
Hearing:	In Chambers at Wellington (on the papers)
Last case event:	26 February 2024
Date of Decision:	12 April 2024
Date of Issue:	12 April 2024

DECISION OF THE ENVIRONMENT COURT
AS TO COSTS

A. An order for costs is made jointly and severally against Ms Crosbie and Mr Page in favour of the (Greater) Wellington Regional Council in the sum of $8,016 and in favour of Nikau Lakes Biosystem Limited in the sum of $8,400.

REASONS

Introduction

[1] This matter relates to enforcement orders made by the Environment Court requiring the First and Second Respondents, Ms Crosbie and Mr Page, to cease any existing activities and not start any new activities in relation to 127 Anlaby Road in the Nikau Valley that would interfere with the operation of a domestic wastewater disposal field in that same location.

[2] The proceedings were bought by the (Greater) Wellington Regional Council (the Regional Council) against Ms Crosbie and Mr Page as the owners and occupiers of the land. Nikau Lakes Biosystem Ltd (NLBL) was identified as a Third Respondent as it holds an easement across the land to provide for the disposal of wastewater. It also holds the relevant resource consent for the operation of the wastewater disposal field (WGN120268).

[3] The Court succinctly outlined it findings on the factual position in its decision as follows:[1]

> [14] The affidavits filed by the Council and Third Respondent establish that a drainage system owned by the Third Respondent serving the Nikau Lakes subdivision, contained within and protected by easement over the Property owned by the First Respondent, has been damaged by agricultural (particularly cattle grazing) and other activities (such as removal of toby boxes) undertaken by the First and Second Respondents. For the sake of completeness I record that the grazing of cattle on the easement area was also established beyond reasonable doubt in the prosecution proceedings to which I referred in para [2] (above) and was confirmed by Mr Page at hearing to have been ongoing up to a month or so prior to hearing.
>
> [15] Ms Conwell's affidavit established that domestic wastewater is collecting without adequate treatment on the easement area and discharging from there

1 *Greater Wellington Regional Council v Crosbie* [2022] NZEnvC 233.

> onto the road nearby where it presents a risk to public health. I am satisfied that the cause of this discharge is damage to the discharge field occasioned by the activities of the First and Second Respondents. I am further satisfied that this discharge is a discharge of a contaminant in breach of s 15(2A) RMA and is not allowed by a regional rule or by a resource consent. Further to that, the discharge prima facie puts the Third Defendant in breach of the terms of its resource consent.

[4] Final enforcement orders were granted in December 2022 and the question of costs was reserved.

[5] I was not the judge who heard the application for interim or final enforcement orders, however I have reviewed all of the materials related to those decisions. Among other documents, I have carefully reviewed and considered the application for costs filed by the Regional Council dated 20 January 2023, the application for costs filed by NLBL dated 7 February 2023 and the response to those applications filed by Mr Page dated 15 March 2023.

Applications for costs

[6] The Regional Council has applied for 66 per cent of the legal costs it incurred in progressing the enforcement orders against Ms Crosbie and Mr Page, being around $9,619.11.

[7] NLBL has applied for costs against Ms Crosbie and Mr Page in the amount of $21,820.86 being the full costs of its involvement in the enforcement order proceedings. NLBL notes that of that total sum, $15,274.46 was incurred after the proceedings were lodged. The remaining $6,546.40 relates to work undertaken to try and obtain resolution of the issue prior to the proceedings. I will address that matter later in my decision.

Section 285 Resource Management Act

[8] Under s 285 of the Act, the Court may order any party to pay to any other party the reasonable costs and expenses incurred by that party. The Environment Court Practice Note also sets out guidelines in relation to costs. However, it does not

create an inflexible law or practice.

[9] Relevantly the Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs. The purpose of a costs award is not to penalise an unsuccessful party, but to compensate successful parties where that is just.

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

[11] When determining quantum, the Court has declined to set a scale of costs. However, while there is no scale, costs awards have generally fallen into three categories:

(a) standard costs which generally fall within a comfort zone of 25 – 33 per cent of the costs actually incurred;

(b) higher than normal costs, where aggravating or adverse factors might be present; and

(c) indemnity costs, which are awarded only rarely, in exceptional circumstances.

[12] The decision *Development Finance Corporation of New Zealand Ltd v Bielby*[2] outlined a number of factors that may be taken into account when awarding higher than normal costs:

- Where an argument or arguments are advanced which are without substance;
- Where the process of the Court is abused;

2 *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587 (HC).

- Where solicitors or counsel have failed to comply with the requirements of the Rules or an order or direction of the Court in respect of procedural matters, especially in meeting prescribed time limits;
- Where the case is poorly pleaded or presented;
- Where it becomes apparent that a party has failed to explore the possibility of settlement when a compromise could reasonably have been expected;
- Where a party takes a technical or unmeritorious point or defence, and fails.

[13] As set out in *Goodwin v Wellington City Council,*[3] the *Bielby* factors have now come to be applied not just in determining whether higher than normal costs should be awarded but in determining whether costs should be awarded at all and, if so, at what level.

[14] These factors now overlap with paragraph 10.7(j) of the Environment Court Practice Note which provides as follows:

> In considering whether to award costs and the quantum of any award, the following factors are normally considered and given weight if they are present in the particular 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;
>
> 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.

---

3 *Goodwin v Wellington City Council* [2021] NZEnvC 101 at [41].

[15] The Regional Council submits that it was required to bring the enforcement proceedings against Ms Crosbie and Mr Page to ensure compliance with the resource consent and prevent the ongoing discharge of contaminants (untreated wastewater) to ground, with resultant human health risks. It says that against that background it was the successful party, and it is appropriate that it be compensated for at least part of the costs it incurred to obtain the enforcement orders (interim and final). Specifically, it submits that it is unfair for such costs to be entirely borne by the ratepaying community of Wellington Region.

[16] NLBL submits that it is also entitled to costs because it had no choice but to become involved in the proceedings. As the consent holder, NLBL was included in the enforcement proceedings even though it was not its actions that lead to the breaches. It argues that it attempted to resolve the matter directly with Ms Crosbie and Mr Page before the Regional Council became involved but was unable to do so. As such, it was required to defend its position in front of the Court. It says that it too should be compensated for the costs it incurred.

[17] By way of a statement of opposition to costs, Mr Page submits that the enforcement orders are unlawful and that information he has subsequently obtained suggests there are issues with the operation of the disposal field unrelated to his or Ms Crosbie's actions.

[18] Having thoroughly reviewed the materials, I am satisfied that the Regional Council was warranted in bringing the proceedings and that the granting of the interim and final enforcement orders in the terms sought by the Council confirms this. I am also satisfied that NLBL had no option but to be involved in the proceedings. NLBL was placed in the unenviable position of being unable to comply with its resource consent conditions by virtue of the actions of Ms Crosbie and Mr Page. The terms of the enforcement orders therefore constituted a successful outcome for NLBL in the circumstances.

[19] With respect to quantum, the Regional Council argues that a higher than normal award of costs is warranted in this case because Ms Crosbie and Mr Page

advanced arguments that were without substance, failed to meet the procedural directions of the Court, and acted in a way that unnecessarily prolonged the proceeding, adding to the Regional Council's costs.

[20] NLBL also submits that the actions of Ms Crosbie and Mr Page unnecessarily prolonged the proceedings, increasing the legal fees it was required to pay, and that the arguments advanced by Ms Crosbie and Mr Page were without merit.

<u>Arguments without substance</u>

[21] The Regional Council submits that a number of the arguments raised in written materials related to extraneous matters that had no bearing on the enforcement orders sought. By way of examples it says that:

(a) arguments about the delineation of Wetland 4/Culvert Wetland were not relevant to the enforcement proceedings;
(b) arguments about Ms Crosbie and Mr Page being bound only by the easement not by the resource consent had already been rejected in another related proceeding; and
(c) assertions about alternative causes of the damage on the disposal field were not supported by any evidence.

[22] I note that Mr Page represented himself and Ms Crosbie throughout these proceedings. It is not uncommon in cases with lay litigants that some issues will be raised which are only marginally relevant to the proceedings. This is to be expected given the complexity of most Environment Court matters and some latitude may be appropriate in considering these matters in the context of a costs award. That said, it behoves all parties to use their best endeavours to ensure their case is presented as clearly, accurately, and efficiently as possible.

[23] In this instance Ms Crosbie and Mr Page made a number of assertions that were not supported by evidence or which they knew, or reasonably should have known, had already been rejected in other related proceedings. I find that this put the

Regional Council and NLBL to greater cost in responding to those matters. This expansion of the matters in dispute was exacerbated by Ms Crosbie and Mr Page's failure to comply with the Court's directions which I now turn to consider.

Procedural Directions not met and proceeding delayed

[24] Section 269 of the Resource Management Act 1991 provides that the Environment Court may regulate its own proceedings in the manner it sees fit provided it does so in a way that best promotes the timely and cost-effective resolution of the case before it. The Environment Court Practice Note 2014[4] sets out the case management approach utilised in this regard, part of which involves "court supervision of more complex cases through directions and conferences, timed to occur at critical points in the progress of those cases".[5] The Practice Note goes on to state that "Should a party fail to comply with the Court's directions without reasonable excuse, sanctions such as costs orders, and other steps, will be invoked by the Court as appropriate".[6]

[25] In this instance, Ms Crosbie and Mr Page failed to comply with specific Court directions on two separate occasions. They did not file a Statement of Position on 12 November 2020 as directed and still had not done so when the matter was called in Court on 15 December 2020. They then failed to advise the Court as to which (if any) affidavit authors they wished to cross examine as directed by Court Minute dated 25 February 2021. This left the Regional Council and NLBL (and the Court) without any indication of Ms Crosbie and Mr Page's position in relation to the enforcement proceedings and ultimately lead to several delays in determining the matter, all of which added to the Regional Council and NLBL's costs.

[26] Exacerbating the delays, on 22 March 2021 the Court provided Ms Crosbie and Mr Page with an opportunity to file written submissions responding to the

---

4 The Environment Court Practice Note has since been updated (in 2023) but the 2014 Practice Note applied at the time and is referenced here.

5 Environment Court Practice Note 2014 at [4.2(d)].

6 Environment Court Practice Note 2014 at [4.2].

Regional Council and NLBL position by 16 April 2021. Ms Crosbie and Mr Page chose not to do so.

[27] On 8 October 2021, Ms Crosbie and Mr Page were provided with a further opportunity to file a notice setting out their grounds of opposition by 19 October 2021 and again chose not to do so. Mr Page subsequently filed a Notice of Opposition on 21 January 2022, some 14 months after being initially directed to do so and some three months after the Court afforded a second opportunity. This subsequently led to an oral hearing being required, creating further delay and adding to the costs incurred by the other parties.

[28] It is clear that Ms Crosbie and Mr Page failed to meet procedural requirements and directions throughout the course of this proceeding. No explanation was provided as to why such directions were not met. I am satisfied that this conduct unnecessarily and substantially lengthened the progression of this matter through the case management process with resultant additional costs. In reaching this finding I have taken into account that Mr Page represented himself and Ms Crosbie throughout the proceedings and as such the conduct is somewhat less egregious than had it been carried out by counsel.

[29] That said, as set out in the Practice Note, "all parties, whether or not represented by counsel, have a duty to the Court, at all stages of a proceeding, to work constructively to find solutions and narrow issues (whether of process or of substance)".[7] I find that had Ms Crosbie and Mr Page adhered to the directions and requests made by the Court, matters of process and substance would have proceeded more efficiently and effectively and the costs incurred by the Regional Council and NLBL would have been significantly less.

NLBL Costs pre proceedings

[30] NLBL submits that it has incurred legal costs of $21,820.86 in relation to this

---

7 Environment Court Practice Note 2014 at [1.2(b)].

matter but accept that $6,546.40 of that total was incurred in alternative dispute resolution prior to the proceedings being filed including seeking arbitration via the Law Society. Costs incurred prior to proceedings being lodged including, for example, in relation to a prior council hearing are not recoverable and neither are costs relating to alternative dispute resolution such as mediation. As such, those costs are excluded from consideration in my determination.

Decision

[31] For the reasons set out in this decision, I am persuaded that the Regional Council and NLBL are entitled to be compensated to some extent for the costs incurred in pursuing the enforcement orders. As such, I find that an award of costs against the First and Second Respondents is warranted.

[32] Considering the above findings and the general principles for the awards of costs under s 285 of the RMA, I consider that an award of costs higher than normal is appropriate in these circumstances. For the reasons set out above I consider an award of 55 per cent of the Regional Council and NLBL costs is warranted in this instance.

[33] The Court orders that Ms Crosbie and Mr Page are jointly and severally liable to pay $8,016 to the Regional Council and $8,400 to NLBL.

[34] This costs award may be enforced (if necessary) in the District Court at Wellington.

L J Semple
Environment Judge