BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 117

IN THE MATTER	of an appeal pursuant to Clause 14 of the First Schedule to the Resource Management Act 1991
BETWEEN	PETER MAWHINNEY (formerly KITEWAHO BUSH RESERVE COMPANY LIMITED AND SUCCESSORS) (ENV-2006-AKL-000519) (formerly RMA 886/98) Appellant
AND	AUCKLAND COUNCIL (formerly WAITAKERE CITY COUNCIL) Respondent
AND	AUCKLAND COUNCIL (formerly AUCKLAND REGIONAL COUNCIL) WAITAKERE RANGES PROTECITON SOCIETY NICHOLAS MAWHINNEY CRAIG STARR ANZAC DEVELOPMENTS LIMITED Section 274 parties

---

DECISION OF THE ENVIRONMENT COURT

A. The application for costs by the Council, against Mr P Mawhinney, is successful. Mr P Mawhinney is ordered to pay $427,139.00, which constitutes 33% of the combined legal and expert witness cost.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

B. The costs award may be enforced in the District Court at Auckland.

C. The application for costs against the Auckland Council and Waitakere Ranges Protection Society are declined.

REASONS FOR THE DECISION

Introduction

[1] This case concerns an appeal filed by Mr P Mawhinney (formerly Kitewaho Bush Reserve Company) ('the Appellant') that relates to the development potential of land within the Dilworth catchment, known as the Dilworth Special Area. The area at the centre of this appeal is situated within the Foothills Environment of the Waitakere Ranges.

[2] We issued a final decision on this appeal in December 2010.[1] This decision was to be read in conjunction with an interim decision issued in 2003.[2] Effectively, our decisions dismissed the reference appeal in its entirety.

[3] The decision did not make directions for the filing of costs applications. However, the Auckland Council (formerly Waitakere City Council) ('the Council') followed the guidelines set out in the Courts Practice Note and filed an application for costs against the appellant, Mr P Mawhinney on 23 December 2010, within the specified 10 day time period.

[4] Subsequently the application for Costs, made by the Council, was adjourned pending the outcome of the High Court appeal. The High Court issued a decision on the appeal by the appellant on 26 October 2011 and the costs application was taken off hold.

[5] Mr P Mawhinney filed a reply to the application, and a further application for costs against the Council and the Waitakere Ranges Protection Society ('the Society') on 6 March 2012. Both the Council and the Society filed memoranda in response to the application on 23 and 22 March 2012, respectively.

---

[1] [2010] NZEnvC 405.
[2] *Kitewaho Bush Reserve Company Limited v Waitakere City Council*, A109/2003.

History of proceedings

[6] This matter has had a lengthy history of proceedings. The original reference appeal was lodged with the Court in 1998. It challenged key elements of the Waitakere District Plan. Originally the Council applied to strike out Mr P Mawhinney.

[7] The Court did not strike out the appellant; instead he was allowed to refine the relief of his appeal. The first hearing on the refined relief took place in 2002 and 2003, prior to the interim decision.[3]

[8] Following the interim decision, the parties were directed to develop a structure plan for the part of Waitakere Forest land that is within the Dilworth stream catchment. The Council developed a draft Structure Plan that sought to achieve a satisfactory outcome for the appellant while having regard to the Proposed Plan. Mr Mawhinney rejected the proposal.

[9] The parties could not reach agreement about the subdivision potential of the land. These refinements were the subject of the hearing in 2006.

[10] In 2007, the Councils planning witness (Mr Peter Reaburn) proposed two versions of the rules for the Dilworth Special Area. We found that further landscaping evidence would be required, and exercised our power to appoint Ms Rebecca Skidmore to provide further landscape evidence.

[11] The 2010 hearing addressed the landscape evidence of Ms Rebecca Skidmore and heard evidence from Mr Peter Reaburn in relation to the applicability of the Waitakere Ranges Heritage Act 2008, in these proceedings.

[12] In total there have been 28 hearing days[4] and the Court has issued an interim and final decision dismissing the appeal.

The applications for costs

Application for Costs against Mr P Mawhinney

[3] Ibid.
[4] Environment Court hearing: 8-12, 15-17 April 2002, 9-11, 14-16 April 2003, 8-11 May 2006, 27-31 August 2007, 3-4 September 2007 and 8-10 March 2010.

[13] The Council filed an application for costs on 23 December 2010. The application was adjourned pending the outcome of the High Court appeal by Mr Mawhinney. The application was taken off hold upon issue of the High Court decision.[5]

[14] The Council claimed that they had incurred costs of $1,149,927.03 (including GST and disbursements) in relation to legal costs directly incurred in preparation for the Environment Court hearings between November 2001 and November 2010. These costs were outlined in schedule 1 to the application dated 23 December 2012.

[15] The Council also claimed that costs in excess of $144,436.36 (including GST) were incurred as a result of expert witnesses preparing evidence. These costs were outlined in schedule 2 to the application dated 23 December 2012.

[16] The Council sought an award of costs of $427,139.00 against Mr P Mawhinney in favour of the Council. This would comprise 33% of the total combined legal and expert witness costs that the Council attributed to the Environment Court hearings.

[17] The Council considers that as the unsuccessful party Mr Mawhinney should make a reasonable contribution towards the costs reasonably and properly incurred by the Council as Mr Mawhinney has consistently put the Council to unnecessary cost in these lengthy proceedings.

[18] Furthermore, the Council submits that although costs aren't routinely awarded in First Schedule proceedings, the rule isn't inflexible, and Courts can decide to award costs in plan proceedings if one party is put to unreasonable expense.

[19] The Council submitted a set of reasons why the award of costs was relevant to this application[6]:

(a) No tested evidence was provided to support Mr Mawhinney's case;

(b) Mr Mawhinney contravened a number of court directions;

(c) Mr Mawhinney did not provide a focus to the case, resulting in the Court and the parties being unclear as to the relief being sought;

(d) Mr Mawhinney's 'vacillating intransigence';

[5] *Mawhinney v Auckland Council* HC Auckland CIV-2010-404-63, 26 October 2011
[6] Application for costs, Auckland Council, [6.2].

(e) Mr Mawhinney failed to explore the possibility of settlement;

(f) Any costs that are not paid by Mr Mawhinney will fall on the Auckland Council ratepayers;

(g) The hearing time required in these proceedings.

[20] Mr Mawhinney in reply to the application for costs made by the Council rejected all of the claims made by the Council. In summary, Mr Mawhinney submitted[7]:

(a) The respondent's costs were incurred in an unlawful attempt to have imposed regulations on the subject land ultra vires the procedure set down in the First Schedule RMA. By the unlawful nature of the respondent's case, no cost should be awarded to it.

(b) The great bulk of the respondent's costs were not incurred opposing any proposal put up by the appellant. They were costs incurred unnecessarily and voluntarily by the respondent for their own ends. No cost should be awarded to it on that basis as well.

(c) In the end, the Court determined that the respondent's proposal was flawed. It was the respondent that devised that flawed proposal, the appellant, who opposed it. No costs should be awarded against the appellant on that basis.

(d) Had the respondent been prepared to discuss its proposals with the appellant the flaws may have been corrected.

Application for costs against Auckland Council ('the Council') and the Waitakere Ranges Protection Society ('the Society')

[21] On 6 March 2012 Mr Mawhinney, in response to a direction from the Court to file a reply to the Council's application for costs, filed an application for costs against the Council and the Society.

[22] Mr Mawhinney sought that the Council and the Society be ordered to:

[7] Submissions to Costs, P Mawhinney, [9.37]

(a) pay disbursements of $40,235.00 to the appellant 'jointly and severally'; and

(b) pay costs and disbursements of $23,437 to Anzac Developments Limited.[8]

[23] The application submitted lengthy and confusing reasoning behind the claim for costs against the Council. In summary, Mr Mawhinney claimed that the Council had put forward the flawed proposal, and had the Council been willing to discuss them with Mr Mawhinney, the flaws would have been amended.

[24] Furthermore, he submitted that the proposal put forward by the Council, after the interim decision, meant that he was forced to incur significant disbursements in 'resisting the attack on the land and the land owners/occupiers that the respondents proposals represented'. [9]

[25] The Council responded to the application for costs in a memorandum to the Court dated 22 March 2012. The Council opposed the application for costs on the grounds that:

(a) It had been made too late, and no waiver had been made; and

(b) There are no good grounds for making such an award; and

(c) The quantum of the claims is not supported by any particulars or substantiating evidence; and

(d) Anzac Developments is a struck off company.[10]

[26] Mr Allan, counsel for the Society, filed a memorandum responding to the application for Costs dated 21 March 2012. The Society agreed with the submissions filed by the Council and added:

(a) Costs are not normally awarded to any party in respect of an appeal lodged under the First Schedule to the Act;

---

[8] Submissions to Costs, P Mawhinney, [1.1]
[9] Submissions to Costs, P Mawhinney, [3.2]
[10] Memorandum of Counsel for Auckland Council in response to application for costs by appellant, 22 March 2012, [2.1]

(b) The Society considers that the position adopted by it throughout the proceedings was, in essence, consistent with the outcome of proceedings.

(c) The Society considered its arguments, during the course of the hearing, were at all times, responsible, reasonable, moderate in length and supported by appropriate evidence;

(d) The application made by Mr Mawhinney has been the subject of inordinate delay.

(e) The Society notes that though Mr Mawhinney has sought costs against the Society, the application deals exclusively with the conduct of the former Auckland Regional Council and Waitakere City Council and makes no mention whatsoever of the Society or its conduct.

(f) There is no established basis in the Application for any award of costs against the Society.[11]

Relevant Law

[27] The Environment Court has a wide discretion to award costs under s 285(1) of the Act which states:

> The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable

[28] Costs in first schedule proceedings are guided by the Court Practice Note which states:

> 4.5.2 *Where an appeal under the First Schedule to the RMA has proceeded to a hearing, costs will not normally be awarded to any party.*[12]

[11] Memorandum of Counsel of the Waitakere Ranges Protection Society regarding costs application, 21 March 2012, [3].
[12] Environment Court practice note, 2011.

[29] The starting point for determining costs in a First schedule proceeding is that costs will not normally be awarded. However the Court must retain its discretion to decide whether or not to award costs according to the circumstances of the case. The practice note acts as a guideline, but it cannot act as a fetter to the discretion under s 285 of the Act.[13]

[30] In *Canterbury Regional Council v Waimakariri District Council*[14], the Environment Court was asked to consider an application for costs in relation to an application for rezoning.

[31] The applicant for rezoning had sought costs against the Regional Council, and the District Council. The Regional Council submitted that no costs should be awarded against it because they were First Schedule proceedings. The Court awarded the costs accordingly noting that 'a practice note is not set in stone'[15]. The decision was appealed to the High Court who reduced the original award of costs, due to the status of the Regional Council as a publicly funded body, but noted that the High Court case of *Development Finance Corporation of New Zealand Ltd v Bielby* [16]provided factors that form a useful framework for considering costs in the Environment Court.[17]

[32] In *Development Finance Corporation of New Zealand Limited v Bielby*[18], the High Court established five relevant circumstances to be taken into account in making significant awards of costs in the Environment Court. These circumstances include:

(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;

---

[13] *Canterbury Regional Council v Christchurch City Council* Environment Court Christchurch, C 134/08, 5 December 2008, at 6
[14] C 173/02.
[15] Ibid at 24.
[16] [1991] 1 NZLR 587.
[17] [2004] NZRMA 289 (HC), 24
[18] Ibid.

(d) Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected; and

(e) Where a party takes a technical or unmeritorious point of defence.

Evaluation

Application for Costs by Auckland Council

[33] In the circumstances of this case, an award of costs against Mr Mawhinney is justified. In the Courts interim decision – the Court stated:

> ...the vacillating intransigence of Mr Mawhinney, has had the effect of thwarting the efforts by the Council to provide, through the statutory process, a means whereby Kitewaho may develop its land in a considered and prudent manner.[19]

This 'vacillating intransigence' has resulted in lengthy hearing time and a poorly focussed, and presented case, which has continually put the Council to unnecessary cost.

[34] Mr P Mawhinney called no expert evidence in support of his case, save for a stormwater engineer in 2003. However, he challenged the Council's experts at every hearing and subsequently, Council witnesses were asked to provide responses to proposals put forward by the appellant.

[35] Mr P Mawhinney has failed to comply with a number of the Court directions, including filing submissions/applications within a specified timeframe and adhering to the directions of the Court for succinct and brief submissions.

[36] Mr P Mawhinney's 'insatiable apetite for RMA litigation'[20] in relation to the land within the Dilworth Catchment along with his 'vacillating intransigence' in advancing his arguments, have put the Council to unreasonable and excessive cost as the Respondent in this case.

[19] *Kitewaho Bush Reserve Company Limited v Waitakere City Council,* A109/2003, [153]
[20] *Mawhinney v Auckland Council* HC Auckland CIV-2010-404-63, 26 October 2011, [19].

[37] For these reasons, the Court is justified in departing from the usual rule of costs in these types of proceedings by awarding costs against Mr P Mawhinney, to the value of $427,139.00, which constitutes 33% of the combined legal and expert witness cost.

Application for costs against the Council

[38] Mr P Mawhinney submitted that the Respondent had put forward the amended proposal which was flawed and eventually refused by the Court.

[39] The interest that the Council had was to defend the plan provisions that had been appealed. The subsequent proposals put forward by the Council were attempts to assist in resolving the matter, which were all at the direction of the Court.

[40] The application for costs made by Mr Mawhinney, was substantially out of time, and provided no substantiated evidence to support the quantum of the claims or a breakdown of how the amounts had been calculated.

[41] For these reasons, the application for costs against the Council is declined.

Application for costs against the Society

[42] Mr P Mawhinney sought costs against the Council and Waitakere Ranges Protection Society.

[43] The application dealt exclusively with the conduct of the Council (both Auckland Regional Council and Waitakere City Council).

[44] The application for costs provided no substantiated evidence for the claim against the Society, and was substantially out of time.

[45] For these reasons, the application for costs against the Society is declined.

Determination

[46] The application for costs by the Council, against Mr P Mawhinney, is successful. Mr P Mawhinney is ordered to pay $427,139.00, which constitutes 33% of the combined legal and expert witness cost.

[47] The Costs award may be enforced in the District Court in Auckland.

[48] The applications for costs against the Auckland Council and Waitakere Ranges Protection Society are declined.

SIGNED at AUCKLAND this 14th day of June 2012.

R G Whiting
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND