BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 119

IN THE MATTER	of the Resource Management Act 1991 and of an appeal pursuant to s 120 of the Act
BETWEEN	LUKE PICKERING
	(ENV-2015-CHC-032)
	Appellant
AND	CHRISTCHURCH CITY COUNCIL
	Respondent

Hearing:	In Chambers at Christchurch
Court:	Environment Judge J E Borthwick
Date of Decision:	9 August 2017
Date of Issue:	9 August 2017

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR COSTS

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders:

(i) the Christchurch City Council is to pay the sum of $3,605.00 to Luke Pickering; and

(ii) Windflow Technology Limited is to pay the sum of $10,815.00 to Luke Pickering.

B: Under section 286 of the Resource Management Act 1991, the District Court at Christchurch is named as the court this order may be filed in for enforcement purposes (if necessary).

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

REASONS

Introduction

[1] This proceeding concerns an appeal by Luke Pickering against a decision of the Christchurch City Council to consent Windflow Technology Limited's existing wind turbine at Gebbies Pass, Banks Peninsula.

[2] The court granted consent subject to conditions.[1] Costs were reserved and a timetable was set for any submissions. Mr Pickering has made an application for costs, dated 2 June 2017, and the court has received responses from the other parties to this appeal.

Applications for costs

[3] Mr Pickering's initial application[2] was for costs totaling $30,890.35 (excluding GST) and included the time he had spent on the appeal, which he estimated to be more than 190 hours.

[4] In a Minute, dated 9 June 2017, the court asked Mr Pickering to clarify which party he sought costs from and to provide any copies of invoices for the costs incurred. It was also explained that lay litigants are not normally awarded costs, except for fees and disbursements they have paid.

[5] Mr Pickering responded, lodging an amended application, dated 23 June 2017. Mr Pickering advises that he seeks costs primarily from the applicant and secondarily the respondent. He gives no indication as to how the costs are to be apportioned.[3]

[6] The amended costs (removing amount sought for Mr Pickering's own time) are comprised as follows:

Expert (Mr Lewthwaite)	$18,052.13
Disbursements (filing fee, printing, travel)[4]	$1,174.79
Total	$19,226.92

[1] Interim decision [2016] NZEnvC 237; Final Decision [2017] NZEnvC 68.
[2] Application for costs dated 2 June 2017.
[3] Amended application for costs, dated 23 June 2017 at [1].
[4] Fee: $511.11; Travel: (72c/km) $193.68; Printing: $470.

Mr Pickering had included his travel costs that were associated with mediation. Any costs associated with mediation are not usually included in any costs' application so I have deducted these from the mileage claimed.

Grounds for the application

[7] Mr Pickering submits it was necessary for him to pursue an appeal because the Council's decision to grant consent did not offer reasonable protection to the surrounding neighbourhood.

[8] He has found the entire process stressful, and needless to say very costly. From Mr Pickering's point of view, he approached mediation in a conciliatory manner and his desire was to reach early, meaningful resolution. During that time, despite requests not to, Windflow continued to operate the turbine without consent.[5]

[9] The need to carry on with the appeal has resulted in considerable financial costs for Mr Pickering and he seeks to obtain fair recognition of these costs.[6]

The Council's reply

[10] The Council opposes the application for costs on the following grounds (summarised):

(a) it is not clear whether costs are sought on an indemnity basis and there is no indication of the appellant's view as to how the costs are to be apportioned;[7]
(b) the court's decision confirmed grant of consent subject to conditions;
(c) significant time was spent attempting to obtain Mr Pickering's views and comments on matters such as the conditions and his inexperience with the court process contributed to delays during the appeal process;[8]
(d) the Council has not neglected its duty;
(e) only costs associated with the Environment Court process are relevant (excluding mediation);
(f) none of the *Bielby* factors apply to the Council's conduct during this proceeding;

[5] Application for costs dated 2 June 2017 at [7]-[9].
[6] Application for costs dated 2 June 2017 at [10], [21].
[7] Council's reply dated 7 July 2017 at [3].
[8] Council's reply dated 7 July 2017 at [6]-[7].

(g) the Council was the only party to call landscape evidence, despite landscape effects being an issue on appeal;

(h) while the conditions of consent are more stringent than those imposed by the hearing commissioners, the consent has been confirmed (and not declined as sought by Mr Pickering); and

(i) the resource consent process involves cost and just as an applicant is entitled to apply for consent, submitters can appeal the grant of it. All parties presented their cases appropriately and costs should lie where they fall.

[11] In the event the court determines costs are warranted, the Council submits that the court should not exceed the usual comfort zone of 25-33% of costs claimed. Only disbursements and witness costs are capable of being claimed. Any costs' award should be met principally by Windflow whose consent and activity were the subject of the appeal.[9]

Windflow's reply

[12] The application is opposed on the following grounds: [10]

(a) Windflow and the Council have both been successful parties; only in rare cases will costs be awarded to unsuccessful parties;

(b) Windflow could have applied for costs but it chose not to do so in order to improve community relations. It's costs to date are well in excess of $100,000;

(c) the final outcome has seen a condition added to the consent in order to mitigate the concerns of the community but this took a full hearing and Mr Pickering has continued to pursue a full decline of the consent;

(d) Windflow has sought to proceed on a rational and evidential basis but it has been hampered by significant delays introduced by Mr Pickering. Mr Pickering was not represented by counsel, consistently sought and obtained delays, resulting in a two year appeal process;

(e) Mr Pickering took issue with the sound limit set out in the relevant planning documents and yet that was beyond the control of Windflow and it was entitled to rely on them;

[9] Council's reply dated 7 July 2017 at [28].
[10] Windflow's reply dated 16 June 2017

(f) Mr Lewthwaite's invoice is dated 30 June 2017 and is stated to be payable by 30 July 2017 so it is not a cost Mr Pickering has incurred;

(g) Mr Lewthwaite's evidence was primarily in opposition to the evidence of Mr Camp for Mr Pickering and Dr Chiles for the Council. He did not undertake independent noise measurements and both he and Mr Pickering challenged the applicability of the New Zealand Standard which the court found relevant and that noise was to be measured and assessed in accordance with its provisions. Mr Lewthwaite and Mr Pickering also challenged the 5 dB penalty for amplitude modulation and this was not accepted by the court;

(h) Mr Pickering challenged the turbine on visual and landscape grounds and was unsuccessful on each;[11]

(i) while Windflow had been operating the turbine without a consent, it stopped operating when the Council said there had been complaints from the public;

(j) Mr Pickering has extended the appeal process with delays in complying with directions and "repeated requests for extensions of time", the longest following the Interim Decision;

(k) Mr Pickering has not pointed to any action of Windflow that has led to considerable and unnecessary costs for him.

[13] For all of these reasons, it is submitted that Mr Pickering's application for costs should be declined in full.

The law

[14] Section 285 of the Act confers a broad discretion upon the Environment Court to order costs, with the sole qualification being that the quantum be reasonable. Costs are ordered in the interests of "compensation where that is just".[12] As with the exercise of any judicial discretion, costs' applications are to be dealt with in a principled manner with no presumption that costs will follow a successful outcome. It is essential that the costs sought are in relation to the Environment Court proceeding.

[15] As previously indicated, a lay litigant who has not retained counsel is not entitled to recover costs other than disbursements.[13] Costs are ordered to require an

[11] [2016] at [79]-[121] and [154]-[159].
[12] *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138.
[13] *Halstead v Christchurch City Council* C013/90.

unsuccessful party to contribute to the costs reasonably and properly incurred by a successful party.[14] There is also a body of principles which has developed in relation to applications against local authorities which I will come to shortly.

[16] As for the amount or quantum of costs awarded, while the Environment Court has declined to set a scale of costs, for consent appeals (at least), costs ordered have tended to fall within three bands. Justice Heath in *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*[15] noted these bands are not dissimilar to the standard, increased and indemnity costs regime applied by the High Court. Thus:

(a) standard costs [I interpose "standard costs" refers to the range of costs where they are ordered. Generally orders have been made within the range of a 25-33% of costs actually incurred. This range is sometimes referred to in the Environment Court's decisions as the "comfort zone"];
(b) higher than standard costs where *Bielby* factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[17] Where the court has awarded higher than standard costs it is usually because there are aggravating factors present such as those identified in *DFC NZ Ltd v Bielby*[16] as follows:[17]

(a) whether arguments are advanced which are 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 a hearing;
(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.

[18] For indemnity or full costs the bar is set even higher. These costs are usually only awarded where there has been a flagrant breach of the Act.

[14] *Hunt v Auckland City Council* A068/94.
[15] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468.
[16] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.
[17] See also Clause 6.6(d) of the Environment Court's Practice Note 2014.

[19] Mr Pickering is not legally represented and so, understandably, he has not articulated clearly which category his application falls into. He appears to seek indemnity or full costs but goes on to state that he is aware the court is unlikely to compensate him in full and that he "would appreciate a fair recognition of these costs if possible, as the court sees fit."[18]

Discussion and findings

[20] I wish to make some general comments before looking at the specifics of the application and replies.

[21] I do not consider the appellant unsuccessful in this proceeding; indeed the converse is true. While the appeal was not allowed to the extent that consent was refused, the end result was tighter wording around the conditions and in particular the restriction of the operating hours of the turbine and its cessation if the verification measurements identified penalisable levels of amplitude modulation or tonality.

[22] Windflow has commented on the length of this proceeding in their submissions. Unassisted by legal counsel Mr Pickering approached evidence as an opportunity to pit his knowledge against that of the experts. This occurs within any jurisdiction subject to an Act that encourages public participation, and the court, having pre-read the evidence, manages this through its directions. Beyond this minor comment, having reviewed the court record, I cannot reproach Mr Pickering's conduct; he is a responsible litigant and any delay in the proceeding caused by the parties is not solely attributable to him.

[23] Windflow also takes issue with the invoice Mr Pickering has provided for the services of his expert Mr Lewthwaite. The invoice is dated 30 June 2017 and is stated to be payable by 30 July 2017 and so Windflow argues it is not a cost that has been incurred. Mr Lewthwaite is an employee of a reputable Christchurch firm. There can be no question that he provided a service to Mr Pickering. The fee charged was reasonable. Given that the date for payment has now past I will assume that it has been paid.

[18] Application for costs 2 June 2017 at [20].

[24] I will consider the application against the Council and Windflow in turn, the first question being whether an award is justified and the second (if necessary) being how much the award ought to be.

Windflow

[25] Pursuant to s 16 of the Act, every occupier of land and every person carrying out an activity on it is to adopt the best practicable option to ensure that the emission of noise from that land does not exceed a reasonable level. The experts advising the City Council and Windflow have assumed the adverse effect of noise is acceptable provided that the wind turbine complies with the guideline noise limits in the New Zealand Standard 6808. We disagreed. Whether the effect of noise below the guideline limits is adverse is sensitive to the receiving environment in which that the noise is experienced.

[26] Background sound levels in this deeply incised Valley are very low relative to the sound levels on the windy ridgeline where the turbine is located. Turbine noise is the dominant noise in the Valley.[19] The turbine noise is clearly audible above background sound, even though the level of turbine noise does not exceed the guideline limits in the New Zealand Standard. The particular character of this noise and its unpredictability has had an adverse effect on general enjoyment of the properties and for some disturbed their sleep.[20]

[27] Windflow's and the City Council's assumption that the effect of noise below the guideline limits is acceptable was inimical to an enquiry into the actual experience of noise within McQueen's Valley. This assumption was challenged by Mr Lewthwaite, the expert called on behalf of Mr Pickering.

[28] Because Windflow (and the Council) relied on expert advice, we do not go as far as to say Windflow neglected its duty. That said, the offer to amend the proposed conditions by providing residents respite from the noise of the adverse effects came very late, on the last day of the hearing.[21] This is a significant improvement on an offer evidently made to Mr Pickering prior to the commencement of the hearing recorded in a

[19] *Pickering v Christchurch City Council* [2016] NZEnvC 237 at [137].
[20] *Pickering v Christchurch City Council* [2016] NZEnvC 237 at [1].
[21] Windflow Closing Submissions at [25]. *Pickering v Christchurch City Council* [2017] NZEnvC 68, Condition 3.

letter from Windflow's counsel to lawyers acting for a second appellant who later withdrew.[22]

[29] Knowing of the residents' concerns, I find that Windflow failed to adequately explore the possibility of settlement where compromise could have been reasonably expected. Given the above, I am satisfied that there are grounds to exercise my discretion and order costs against Windflow.

The Council

[30] For an award to be made against a first instance decision-maker it is not enough that the court did not agree with the initial decision.[23] Because of the important role Councils play and the duties they undertake with the public interest at the forefront, costs are not normally awarded against consent authorities unless its decision is vexatious or frivolous, has little regard for evidence or demonstrates a neglect of duty.[24] The court must be satisfied that the Council has passed the "threshold of blameworthiness".[25]

[31] Mr Pickering has been critical of the Council on a number of levels, mostly concerning matters not part of the Environment Court proceeding. I find the Council has acted responsibly and respectfully in its interaction with Mr Pickering.

[32] That said, the decision of Commissioner appointed by the Council to hear and determine the resource consent application records the Commissioner's unease with the noise and its characteristics. He thought it possible that localised topographical features may make turbine noise more intrusive than what modelling might otherwise indicate. He was also critical of the failure of the Council to independently review Windflow's assessment of noise and its effects.[26] The Commissioner's intuition as to the cause of the adverse effect was sound.

[33] At this hearing the Council engaged an independent expert on the topic of noise. The public's interest is at the forefront of the Council's role but it did not make enquiry into the actual experience of turbine noise within McQueen's Valley. The Council did not appreciate that the New Zealand Standard is a guideline and instead

[22] Letter dated 17 November 2015 from Mr Currie to Tavendale and Partners.
[23] *Gateway Funeral Services v Whakatane District Council* W022/08.
[24] *Brown v Rodney District Council* W105/99; Environment Court Practice Note at 6.6(c).
[25] *Emma Jane Ltd v Christchurch City Council* C020/09.
[26] *Pickering v Christchurch City Council* [2016] NZEnvC 237 at [127].

relied on its expert's advice that the effect of noise below the guideline levels in the Standard is always acceptable. For these reasons I am satisfied that there are grounds to exercise my discretion and that it is fair in the circumstances that the Council recompense Mr Pickering for a share of the costs that he has incurred.

[34] For completeness I note that evidence on the topic of landscape and related amenity values, evidence was given by a landscape witness employed by the City Council. While Mr Pickering did not call a landscape expert he, together with the other s 274 parties, gave evidence concerning the area's amenity (both visual and aural).

Quantum

[35] Given the modest sum claimed I am satisfied that a contribution of 75% costs ($14,420.19) is appropriate here.

[36] I will order Windflow to pay 75% of those costs and the Council to pay 25%.

Outcome

[37] The court makes the following orders:

(i) the Christchurch City Council is to pay the sum of $3,605.00 to Luke Pickering; and

(ii) Windflow Technology Limited is to pay the sum of $10,815.00 to Luke Pickering.

J E Borthwick
Environment Judge