

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

**Decision No. [2024] NZEnvC 109**

IN THE MATTER

of the Resource Management Act 1991

AND

an application for an enforcement  
order under ss 314 and 316 of the Act

BETWEEN

G H, L M AND P J HENSMAN

(ENV-2023-CHC-013)

Applicants

AND

QUEENSTOWN LAKES DISTRICT  
COUNCIL

Respondent

Court: Environment Judge P A Steven  
Sitting alone in Chambers at Christchurch

Last case event: 24 April 2024

Date of Decision: 13 May 2024

Date of Issue: 13 May 2024

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**DECISION OF THE ENVIRONMENT COURT  
ON DEFERRAL OF COSTS**

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A: The court's decision on the application for costs is deferred. The Council is to notify the court as soon as it receives the High Court decision on its appeal.



## REASONS

[1] The applicants, G H, L M and P H Hensman, seek an award of costs under s285 of the Resource Management Act 1991 (the Act or the RMA) following the decision of the court to grant an application for an enforcement order under s314(1)(b)(i) of the Act.<sup>1</sup>

[2] The applicants seek an award in the sum of \$59,295.26, being all legal and expert witness costs and disbursements incurred in relation to the application.

[3] The applicants say that an award on an indemnity basis is appropriate for the reasons that, in summary:

- (a) the Council failed to abide by its duties under the Act. The court found that the Council presented no valid legal or evidential basis for refusing to sign the s224(c) certificate that the applicants were entitled to receive an order to complete the subdivision;
- (b) the application was required to enforce duties the Council was required to undertake after attempts to resolve issues with the Council by conferring have been unsuccessful, leaving the applicants with no choice but to commence proceedings under the Act. The applicants were facing the risk that the consent would lapse if titles could not be issued within the timeframes specified in the Act;
- (c) significant prejudice to the applicants arises by reason of the Council's failure to abide by the Act;
- (d) there was no genuine reason found by the court to withhold the s224(c) certificate. In particular, the applicant says that the Council did not act reasonably or pragmatically in adopting the stance that it took;

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<sup>1</sup> *Hensman v Queenstown Lakes District Council* [2024] NZEnvC 37.

- (e) there was an aspect of community benefit to the application in light of the evidence given for the applicants that other developers have faced the same issues with the Council's reliance on the subdivision Code of Practice to require work that was never required under the resource consent; and
- (f) the costs incurred were reasonable; the applicants did not engage expert evidence to respond to that filed by the Council despite the Council's view that such evidence refuted the applicants' position as to the need for the disputed works.

### **The Council's position**

[4] The Council has appealed the Environment Court's decision to the High Court. Accordingly, the Council has sought to defer the issue of costs pending determination of the appeal.

[5] In the event that the court declines to do so, the Council has responded to the application, opposing any award of costs in favour of the applicants least of all an award on an indemnity basis.

### **The case for deferral**

[6] *Balfour v Central Hawke's Bay District Council*<sup>2</sup> (*Balfour*) is relied upon as authority for the proposition that the determination of costs should be deferred as the subject matter of the appeal is such that a determination could affect the costs decision. Counsel submits that it would be inappropriate to proceed to give a decision on the question of costs where there are issues of some complexity raised on appeal and the validity of the applicants' arguments depends on the Environment Court decision.

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<sup>2</sup> *Balfour v Central Hawkes Bay District Council* HC Wellington, Miller J, CIV-2005-485-1448, 29 May 2006.

[7] In *Balfour* the High Court had set aside an Environment Court decision to issue an enforcement order due to an error of law which impacted upon the terms of the enforcement order. The decision to award indemnity costs to the Council was also set aside, substituting a costs award to be set on a party and party basis. A passage from the *Balfour* decision is cited in Counsel's memorandum:

[53] For these reasons I would not have interfered with the award, notwithstanding my decision on appeal, had the Environment Court confined itself to an award of party-party costs. That award could be justified on the basis that costs should follow the result, which on any view of it was (and remains following this appeal) a success for the Council. **However, I do not think that an award of costs on an indemnity basis can stand in circumstances where the appellants have succeeded in their principal argument in this Court and the question where the permitted baseline lay was one of some complexity.** It was understandable that the appellants would think they had acquired rights to keep a large number of dogs, and it seems likely that such belief underlay what the Court found to be their intransigence. The award will be set aside. In its stead the Council will have costs in the Environment Court on a party-party basis, to be fixed by that Court in the event of disagreement as to quantum. [emphasis added]

[8] The Council submits that there is overlap between the grounds of appeal and the applicants' arguments in favour of costs which include:

- (a) that the Council failed to abide by its duties in the RMA;
- (b) that the Council's failure to abide by the RMA was significant; and
- (c) that Council did not act reasonably or pragmatically in adopting that stance with respect to the s224(c) certificate.

### **Consideration**

[9] I accept that the applicants' grounds for an award of costs, including as to quantum, engage directly with the grounds raised in the Council's notice of appeal, which are wide-ranging. To that extent, the High Court's determination of the Council's appeal has the potential to impact on a costs decision as occurred in *Balfour*.

[10] Although it may be desirable to settle the issue of costs while the issues are fresh in the court's mind, the court has discretion under Rule 18.10 District Court Rules 2014 to stay that consideration, if that is in the interests of overall justice.

[11] Relevant principles have been set out by the High Court in *Bergman v Bergman*:<sup>3</sup>

[9] The principles relevant to applications for stay pending appeal are well known. The factors generally to be considered in balancing the competing rights are:

- (a) Whether the appeal may be rendered nugatory by the lack of a stay;
- (b) The bona fides of the applicant as to the prosecution of the appeal;
- (c) Whether the successful party will be injuriously affected by the stay;
- (d) The effect on third parties;
- (e) The novelty importance of questions involved;
- (f) The public interest in the proceeding; and
- (g) The overall balance of convenience.

[12] As to these, in favour of the applicants' position:

- (a) the appeal would not be rendered nugatory by the lack of the stay on the costs issue;
- (b) the applicants would be prejudiced by a delay in the recovery of a costs award which on the basis of the application in light of the Environment Court's decision, and the court's consideration of the application, they would be entitled to receive (putting aside the question of quantum).

[13] In favour of the Council's position:

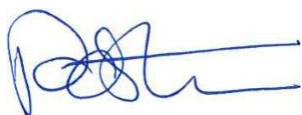
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<sup>3</sup> *Bergman v Bergman* [2014] NZHC 1567.

- (a) there is no reason at all to consider that the Council lacks bona fides in the prosecution of the appeal given the significance of the issues raised on appeal and the desirability obtaining certainty from the High Court in its ultimate determination as to the scope of the Council's jurisdiction in this regulatory context;
- (b) because the High Court's determination on the Council's appeal has the potential to impact on the question of costs, the overall balance of convenience lies in favour of a deferral.

[14] Although there have been cases where the court has decided the question of costs but deferred execution, on balance I have decided not to follow that course of action. Accordingly, I agree to the Council's request for a deferral.

[15] As directed, the Council is to notify the court as soon as it receives the High Court decision on its appeal.



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**P A Steven**  
**Environment Judge**

