BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 236

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declarations under sections 310 and 311 of the Act
BETWEEN	ARAPATA TRUST LIMITED
	(ENV-2016-AKL-000252)
	Applicant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge DA Kirkpatrick sitting alone pursuant to s 279 of the Act
Hearing:	On the papers
Date of Decision:	30 November 2016
Date of Issue:	1 December 2016

DECISION OF THE ENVIRONMENT COURT

A: The Auckland Council is ordered to pay to Arapata Trust Limited the sum of $5,000.00 as costs in this proceeding.

REASONS

Summary

[1] Arapata Trust Limited (**Arapata**) seeks an award of costs under s 285 of the Act against the Auckland Council in respect of legal costs incurred on an application for declarations which was withdrawn by Arapata on the eve of the hearing.

[2] The basic facts of the case are not in issue, but the nature of the circumstances and the basis on which the application for costs is contested are such that it is

necessary to consider the events giving rise to this proceeding and the central legal issue raised in it in order to determine whether any order as to costs should be made and, if so, what that order should be.

[3] I am satisfied that the factual position giving rise to this proceeding is clear, undisputed and sufficiently fully set out in the affidavits filed by the parties that I can consider the central legal issue and reach a conclusion on it and then proceed to determine the application for costs in light of that.

[4] The central legal issue is: Does the holder of a current but unimplemented land use resource consent require any further resource consent for the already consented use of land when a new or changed plan provision comes into effect? This issue focuses on the meaning and effect of s 9(3)(a) of the Act. Section 9(3) imposes a restriction on the use of land in a manner that contravenes a district rule (which includes a proposed rule that has legal effect under s 86B of the Act), but subject to an exception in s 9(3)(a) for a use that is expressly allowed by a resource consent.

[5] The exception in s 9(3)(a) is for a use which is allowed by a resource consent, rather than the contravention of a rule. The rules in any relevant operative or proposed plan may change but that use of land is still consented. The notification of a new rule which would otherwise apply to the use under s 86B does not mean that a further resource consent is required.

[6] As Arapata holds a current resource consent to refurbish the existing building and rebuild the roof annex at 83 Albert Street, it does not require any further resource consent to use land in that way or to undertake those activities. It is entitled to an award of costs as compensation for being put to expense in bringing its application for declarations because of the Council's unfounded requirement that it seek a further resource consent.

Background

[7] Arapata owns a four-storey commercial building at 83 Albert Street, on the southern corner with Kingston Street in central Auckland. It acquired this property on 1 July 2015. At that time, the property was :

(a) subject to a Character Overlay under the operative Auckland District Plan

(Central Area section); and

(b) the subject of a submission by Heritage New Zealand Pouhere Taonga (**HNZPT**) that the building be included in the Schedule of Significant Historic Heritage Places in the proposed Auckland Unitary Plan, and a further submission by Arapata's predecessor in title in opposition to that submission.

[8] Sometime after acquiring the property, Arapata reached agreement with HNZPT that the building could be scheduled as a significant historic heritage place in the Auckland Unitary Plan subject to HNZPT's written approval to various works proposed by Arapata. The proposed works included:

(a) refurbishing, strengthening and extending the existing building; and

(b) constructing a further four storeys atop the existing building.

[9] On 31 August 2015 Arapata applied to the Council for resource consent to undertake these proposed works. On 22 October 2015 resource consent was granted by the Council to Arapata to undertake all of the proposed works. The granting of this consent was considered in terms of:

(a) under the operative Auckland District Plan (Central Area section);

(i) Rule 5.5.1 relating to activities in the Central Area subject to the character overlay as defined in Appendix 13;

(ii) Rule 5.5.3 relating to new buildings or additions subject to urban design control; and

(iii) Rule 9.7.1.2(a)(ii) relating to a shortfall of one loading space; and

(b) under the proposed Auckland Unitary Plan (as notified), Rule 3.J.5.1.1 relating to work within 50m of a site and place of significance to Mana Whenua.

[10] In terms of HNZPT's submission requesting the scheduling of the building as a

significant historic heritage place, as at 22 October 2015 that submission had not been the subject of a recommendation by the Auckland Unitary Plan Independent Hearings Panel to the Auckland Council nor of any decision by the Auckland Council.

[11] On 22 July 2016 the Auckland Unitary Plan Independent Hearings Panel recommended to the Council that it accept the submission of NZHPT in relation to the building and on 19 August 2016 the Council notified its decision accepting that recommendation. There was no appeal against that decision.

Dispute and application for declaration

[12] Sometime after the granting of its resource consent, Arapata decided not to proceed with its full proposal, choosing instead to undertake only the works proposed to refurbish the existing building and rebuild the existing roof annex. On 22 September 2016, Arapata advised the Council of its intentions, and asked what the implications of this would be with regard to the existing resource consent, in particular seeking certainty that there would be no need to make an amendment to the resource consent. The Council responded on the same day with the following statement:

> The works which you have described below would be acceptable without a resource consent variation. The refurbishments described below are within the scope of the existing resource consent, and the new additions not going ahead would not have an impact on the existing building's scale or character.

[13] Then on 26 September 2016, the Council advised Arapata as follows:

> Although the works are already consented, the building's exteriors are now scheduled under the PAUP DV [proposed Auckland Unitary Plan - decisions version]. The building wasn't scheduled under the PAUP (notified version) and the operative district plan, so heritage matters were not addressed under the original consent.
>
> As such, the refurbishment and alterations to the building's exterior would trigger the need for a new resource consent for alterations to a heritage building under the PAUP DV.
>
> Heritage consents are exempt from any processing or deposit fees.

[14] Arapata immediately protested that it considered it had dealt with all heritage aspects with the Council and HNZPT. The Council responded later that day as follows:

> Unfortunately, the agreements met [sic] with Heritage NZ or our heritage team does not negate the requirement for a resource consent under the PAUP DV. The rules under the

> PAUP DV have legal effect (as of 19 August 2016) and resource consents are now required under this plan. Although a resource consent has been approved for the works under the operative District Plan and PAUP (notified version), the decision does not expressly provide for alterations to a historic heritage building. We have confirmed this with a principal planner from the practice and training team at Council ...
>
> We understand your concerns and appreciate the work that has been put into this process to date. Due to the minor nature of the work, we don't anticipate that there will be any major issues and the application will be able to be processed in a timely manner (with no fees required to be paid).

[15] On 28 September 2016 Arapata lodged its application for declarations in this proceeding supported by an affidavit of Mark Graeme Kirkland, a principal of Arapata which set out the foregoing facts. Essentially, Arapata sought declarations confirming that it could carry out works at 83 Albert Street pursuant to its resource consent under s 9(3)(a) of the Act.

[16] Arapata also sought an urgent fixture on the grounds, as evidenced in Mr Kirkland's affidavit, that:

(a) it had made representations to its bank that it had all necessary consents to undertake a refurbishment of its building;

(b) it had entered into agreements with a builder to start work on 1 February 2017 and with existing and future tenants as to the timing and extent of the works; and

(c) it needed to conclude its finance arrangements by 31 October 2016 and lodge its application for a building consent by 15 November 2016 to meet its commitments.

[17] The Court put this proceeding on its priority track and allocated an urgent fixture for 12 October 2016.

[18] No notice of opposition was lodged by the Council, but on 10 October 2016 the Council lodged an affidavit made by Karen Glenis Long, a senior planning officer employed by the Council, in response. Ms Long's evidence about primary facts and the sequence of events is consistent with Mr Kirkland's evidence. Relevantly, Ms Long's affidavit also includes the following statements:

(a) at paragraph 3.3, that the Council's confirmation on 22 September 2016 had been made in relation to the scope of the existing resource consent, and at the request of Arapata did not extend to the impact of the proposed Auckland Unitary Plan on its ability to carry out the proposed works;

(b) at paragraph 3.4, that the resource consent had not been implemented;

(c) at paragraphs 4.1 - 4.3, that a combination of the provisions of ss 148(4)(a) (*Auckland Council to consider recommendations and notify decisions on them*), 152 (*Proposed plan deemed approved or adopted on and from certain dates*) and 153 (*RMA provisions relating to legal effect of rules apply*) of the Local Government (Auckland Transitional Provisions) Act 2010 (**LG(ATP)A**), and ss 86A-G of, and clause 10(4) of Schedule 1 to, the Act meant that the historic heritage overlay schedule was in effect, that the building was now scheduled as a Category B historic heritage place and that Rule D17.4.1 (clauses A3, A6, A9, A10 and A12) of the proposed Auckland Unitary Plan (decisions version) now applied; and

(d) at paragraphs 4.9 and 4.10, that there were two key implications of this:

(i) the proposal to refurbish the building now required resource consent, although it did not require such consent at the time of the application for resource consent or the decision granting resource consent in 2015;

(ii) neither the assessment of environmental effects accompanying the application nor the Council's decision on the application included specific consideration of the historic heritage features of the building, including listed matters apparently taken from the assessment criteria in the proposed plan relating to Rule D17.4.1 and the clauses cited above.

[19] On 11 October 2016, the parties advised the Court that they had reached agreement on a settlement with Arapata withdrawing its application, but without prejudice to the issue of costs. On receipt of this advice, the Court vacated the allocated fixture for the next day and made directions to deal with the issue of costs should agreement on that not be able to be reached.

Application for costs

[20] In accordance with the Court's directions, Arapata made its application for costs on 4 November 2016. In its application Arapata:

(a) advised that the Council had offered to process with urgency Arapata's application for an additional resource consent and that such an application had been made on a without prejudice basis on 30 September 2016. Arapata had received advice from the Council that this application would be granted on 11 October 2016, at which time the Court was advised of the position. The second resource consent was granted on 12 October 2016.

(b) submitted that it had settled with the Council on these terms in the interests of expediency, preferring to obtain certainty as to its position and to avoid the cost of a contested hearing.

(c) sought "an appropriate contribution" towards its legal costs in respect of preparing and filing its application for declarations and preparing legal submissions for hearing. A schedule of time records was presented showing a total of $8,662.50 (net of GST) as the charge-out value of the time spent by counsel and an associate preparing and filing the application for declarations and preparing for the hearing. No award was sought in respect of the costs of preparing the application for further resource consent in acknowledgement that those were not the costs of the proceeding.

(d) submitted that it had been put to unnecessary expense because it was wrong for the Council to contend that a further resource consent was required, and that Arapata was forced to incur the costs of making an application for declarations to the Court to address the error of the Council's position given its need to meet its contractual commitments to its bank, builder and tenants on a timely basis.

[21] In response, the Council submitted:

(a) If any party should be awarded costs, it should be the Council because the dispute had been resolved in accordance with the Council's position that a further resource consent was necessary. However, because the dispute

had been resolved without a ruling to determine who was successful, the Council took the position that costs should lie where they fall.

(b) Arapata had applied to the Court unnecessarily, and on that basis the Council would be entitled to make its own application against Arapata on the grounds that Arapata had been unsuccessful and its proceedings should never have been commenced.

(c) Echoing the matters of law set out in Ms Long's affidavit at paragraphs 4.1 - 4.10 (and summarised above at [13]):

i. that the notification of the decisions version of the proposed Auckland Unitary Plan had triggered the application of its historic heritage provisions to the proposed work at 83 Albert Street and the consequent need for an additional resource consent pursuant to s 153 LG(ATP)A and s 86B of the Act; and

ii. that the agreement between Arapata and HNZPT did not and could not avoid the need to obtain the additional resource consent had legal effect.

(d) Arapata's application for declarations had been brought "no doubt" to apply pressure to the Council to change its position and that as a result the Council had been put to unnecessary expense.

(e) With reference to this Court's Practice Note, that costs are not usually awarded against a Council unless it has failed to perform a duty or acted unreasonably or has imposed an unusual restriction which is not ultimately upheld. The Council pointed out that, as the proceeding had been withdrawn, no finding of that kind had been made, nor had any finding as to the factors for an increased award of costs identified in cases such as *Development Finance Corporation NZ Ltd v Bielby*[1] been made.

[22] Arapata lodged further submissions in reply, making the following points:

(a) It did not rely on its agreement with HNZPT and acknowledged that the

[1] (1991) 1 NZLR 587 (HC) at 594-5.

agreement did not bind the Council.

(b) The issue is that it is wrong for the Council to say that a further resource consent is required.

(c) S 9 of the Act governs this situation, and s 86B and the making of decisions on submissions on the Auckland Unitary Plan are irrelevant.

(d) The work to be undertaken is expressly allowed by the first resource consent.

(e) Arapata's settlement with the Council was pragmatic and was made without prejudice to its position.

(f) There is a significant potential adverse effect on others if the Council says that the notification of the decisions version of the proposed Auckland Unitary Plan means that existing consent holders need further resource consents, which may involve significant risk if further consent is then withheld or is made subject to more onerous conditions than the first consent.

The central issue

[23] The central legal issue between the parties may be stated in this way: Does the holder of a current but unimplemented land use resource consent require any further resource consent for the already consented use of land when a new or changed plan provision comes into effect?

[24] Arapata says that the answer to this question is "no" while the Council says that the answer is "yes". Their respective submissions present an argument about the relationship between ss 9 and 86B of the Act. In that sense, the issue has wider importance than its application to the facts of this case: it raises an issue as to the relationship between the provisions in Part 5 of the Act relating to standards, policy statements and plans and those in Part 6 relating to resource consents. It also raises issues about the certainty of both the planning and the consenting process for landowners in respect of their use of land and for consent authorities in respect of the making and administration of plans.

[25] The facts of this case are sufficiently clear to enable the issue to be considered. The submissions of the parties in relation to costs also address the merits of the parties' respective positions on the central legal issue to a degree that shows that, notwithstanding the agreement to withdraw the application for declarations, this issue is not moot. It is important to be clear that this case is not unusual in terms of the nature of the first resource consent and that there is nothing on the face of the documents or raised in any submission to suggest that this consent stands apart from other consents. On that basis I will address this issue as part of this decision on costs.

[26] Section 9 relevantly provides:

> (3) No person may use land in a manner that contravenes a district rule unless the use–
>
> (a) is expressly allowed by a resource consent; ...

[27] Section 86B provides:

> **86B When rules in proposed plans and changes have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if—
>
> (a) subsection (3) applies; or
>
> (b) the Environment Court, in accordance with section 86D, orders the rule to have legal effect from a different date (being the date specified in the court order); or
>
> (c) the local authority concerned resolves that the rule has legal effect only once the proposed plan becomes operative in accordance with clause 20 of Schedule 1.
>
> (2) However, subsection (1)(c) applies only if—
>
> (a) the local authority makes the decision before publicly notifying the proposed plan under clause 5 of Schedule 1; and
>
> (b) the public notification includes the decision; and
>
> (c) the decision is not subsequently rescinded (in which case the rule has legal effect from a date determined in accordance with section 86C).
>
> (3) A rule in a proposed plan has immediate legal effect if the rule—
>
> (a) protects or relates to water, air, or soil (for soil conservation); or
>
> (b) protects areas of significant indigenous vegetation; or
>
> (c) protects areas of significant habitats of indigenous fauna; or
>
> (d) protects historic heritage; or
>
> (e) provides for or relates to aquaculture activities.
>
> (4) For the purposes of subsection (2)(c), a decision is *rescinded* if—
>
> (a) the local authority publicly notifies that the decision is rescinded; and
>
> (b) the public notice includes a statement of the decision to which it relates and the date on which the recision was made.
>
> (5) For the purposes of subsection (3), *immediate legal effect* means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.

[28] "District rule" is defined in s 2 of the Act to have the meaning given to it in s 43AAB where it is defined to mean "a rule made as part of a district plan or proposed district plan in accordance with s 76." That definition is subject to s 86B and clause 10(5) of Schedule 1. It follows that s 86B has an important relationship with s 9(3) because the former provision sets out the basis on which a district rule in a proposed plan may have legal effect under the restriction in the latter provision.

[29] I note here that s 153 LG(ATP)A, which is one of a number of provisions in that Act governing the way in which the Auckland Unitary Plan is to be prepared and was cited in the Council's submissions, simply confirms that ss 86A to 86G of the Act apply, with all necessary modifications, to a rule in the proposed Auckland Unitary Plan.

[30] Section 9(3) imposes a restriction on the use of land in a manner that contravenes a district rule (being any rule in an operative plan or any rule in a proposed plan which has legal effect under s 86B), but subject to an exception in sub-paragraph (a) for a use that is expressly allowed by a resource consent. Similar exceptions are made for existing uses and activities under ss 10 and 10A in sub-paragraphs (b) and (c). It is important to observe that while s 9(3) is expressed as such a restriction, the exception to that restriction in s 9(3)(a) is for a use which is allowed by a resource consent, rather than for the contravention of a rule. Even though it is the contravention of a rule that gives rise to the requirement for a resource consent, the consent is for the use of land.

[31] This aspect of s 9(3) is consistent with other provisions in the Act relating to the nature of resource consents. In s 2 of the Act, "use" in certain sections (including ss 9 and 10) is defined to mean, relevantly among other things, "reconstruct ... a structure ... on ... land." The definition does not refer to "use" in terms of any rule in a plan that may apply to it. As defined in s 87A, a "resource consent" is "a consent to do something" that would otherwise contravene one or other of sections 9 or 11 - 15B of the Act. In this context, *to do something* must mean an activity, which for the purposes of s 9 means a use of land and in terms of the definition of "use" in s 2 means some action in relation to that land.

[32] Under s 104, the consideration of an application for resource consent must have regard to "any actual and potential effects on the environment of allowing the activity" and to any relevant provisions of certain planning documents made under the Act and any other relevant matters. While having regard to any relevant planning document will

involve an assessment of the effects of the activity against any relevant provisions of such a document (as required in an assessment of effects on the environment by clauses 2(1)(g) and 2(2)(a) and (b) of Schedule 4 to the Act), it is still the activity that is assessed in terms of the statutory requirements, rather than simply a contravention of a rule.

[33] The first consent granted to Arapata is expressed as a consent to the following proposal:

> To refurbish, strengthen and extend the existing building at the subject site including the addition of five floors with the provision for restaurant space on the ground floor, office activities on levels 1-7 and a penthouse suite on level 8.

[34] The consent document states:

> The resource consents are: Land use consents (s9) – R/LUC/2015/3529 ...

and then lists the rules in the operative and proposed plans which would be contravened by the proposal (as already set out in paragraph [9] above) and the activity status in respect of each rule.

[35] On first glance, it appears from this statement as if the resource consent is limited to those listed contraventions of certain rules. In my opinion that is not the correct way in which to interpret and understand a resource consent and the form of the document is not determinative of its substantive effect. The relevant statutory provisions, as discussed above, do not support such an approach. In reality, those listed rules which are contravened by the proposal do not, by themselves, describe the use of the land. The listed rules are the reasons why resource consent was required, but the reasons for the decision address "the proposed development" in its entirety and the conditions attached to the resource consent (which form part of it[2]) relate to the whole of the works. The use of land is described in the proposal, including the plans and drawings accompanying the application and which are incorporated into the resource consent by general condition 1 which provides:

> Except as amendment (sic) by the conditions that follow, the proposed restaurant and office activity shall be carried out in accordance with the plans and all the information submitted with the application, detailed below, and all referenced by the Council as

[2] The definition of "resource consent" in s 2 of the Act includes "all conditions to which the consent is subject."

[36] The consequence of a land use resource consent being considered as a consent which allows a person to use land in a particular way, as distinct from simply being a consent to contravene a particular rule, is that the rules in any relevant operative or proposed plan may change but that use of land is still consented. On that approach there is nothing in s 86B which would alter the effect of a current resource consent under s 9(3)(a).

[37] The Council's position, if accepted, would effectively mean that a resource consent only authorises, for the purposes of s 9(3)(a), those contraventions of district rules that might be specifically provided for in the terms of the consent. That approach to the interpretation of s 9(3) would mean that a person undertaking an activity pursuant to a resource consent in such terms would require a further resource consent should there be any change to any relevant rule applicable to that activity at any time in the future. In the event of any change to the operative plan or any review of it by a proposed plan, every holder of a resource consent would need to determine whether any new or changed rule affected their use of land and, if it did, apply for a further resource consent so that the use of land (in terms of its contraventions of rules) would still be expressly allowed under the new or changed rule.

[38] That outcome would impose a significant on-going compliance burden on every person in the district using land pursuant to a resource consent. It would put all such persons in significantly worse position than any person continuing to use land in a similar way but as an existing use under s 10 of the Act and protected by s 9(3)(b). A person whose use of land could occur under existing use rights would not be affected by any new or changed rule because s 10 of the Act specifically allows lawfully established uses to continue regardless of any such rule. There does not appear to be any reason why such a significant difference in the operation or effect of s 9(3) should exist between the exception for land uses which are the subject of a resource consent under s 9(3)(a) and the exception for those which are subject to existing use rights under s 9(3)(b).

[39] Given that an existing use must be "established," that is, in existence, it is pertinent to consider whether there is any basis on which to distinguish between unimplemented consents and those which have been given effect to in terms of s 125 of the Act. There is no distinction drawn on that basis in s 9 of the Act. The ability to

exercise a resource consent is governed by when it commences under s 116 and when it terminates. Subject to any particular conditions of a consent which may limit works to certain times or dates or seasons, a resource consent is a continuing right to do the thing for which consent has been granted. As a continuing right, the legal ability of the consent holder to do that thing is the same whether they have started to do it or not. The only difference relates to termination: an unimplemented resource consent will lapse under s 125 of the Act unless given effect to within a certain period of time, while the duration of a resource consent that has been given effect to is governed by s 123 of the Act. That difference, while important, does not appear to affect the issue in this case either as a matter of principle or in terms of the facts of this case.

[40] Even if the Council's approach were narrowed to apply only to the holders of unimplemented resource consents, it would still mean, as this case demonstrates, that a person who had obtained a resource consent and, on the basis of that consent, entered into binding arrangements with a bank, a builder and tenants, would then be subject to the risk, almost completely beyond their control, of being told they require some further resource consent at any stage of the development up until the original resource consent had been given effect to. Given the many different ways in which the implementation of consents may lawfully occur, or how existing use rights might arise, it is difficult to see how such an approach could be justified in pursuit of the purpose of the Act or on any other principled basis of avoiding, remedying or mitigating any adverse effects of the already consented activity on the environment.

[41] There is also an issue of retrospectivity. The Council's position on the interpretation of and relationship between s 9(3)(a) and s 86B would mean that the rights obtained on the grant of a resource consent would be changed by a future change to the rules in the plan, without any act or omission on the part of the consent holder. A person who had previously been using land lawfully in accordance with a resource consent for such use under s 9(3) would, on the Council's approach and in the absence of a further resource consent, then be acting in contravention of s 9 and thus potentially committing an offence under s 338(1)(a) of the Act.

[42] This would be inconsistent with the principle of interpretation in s 7 of the Interpretation Act 1999 that "[a]n enactment does not have retrospective effect."[3] This principle is said to be based on the essential idea of a legal system that current law

[3] For the purposes of the Interpretation Act, "enactment" includes regulations. Under s 76(2) of the Act a rule in a district plan has the force and effect of a regulation in force under the Act.

should govern current activities.[4] As the principal texts on interpretation explain, the principle is not an absolute rule: it must give way before any express statutory language and may be reduced in its ambit by a purposive interpretation in the context of the statutory regime and its application to the facts of a particular case to do justice or to avoid injustice.[5]

[43] One strong element of the principle against giving an enactment retrospective effect is that the Courts will seek to preserve existing rights where changes to those rights are not the purpose of the enactment.[6] Those familiar with the legislative history of the Act will know that the almost invariable transitional provision in successive amendment Acts has been to provide that the amendments do not affect proposed rules which were notified, or applications or other matters relating to a resource consent that had been lodged or initiated, before the commencement of the amendment Act.[7] But even more pertinent in this case is the protection of existing uses from later district rules under s 10 of the Act,[8] which is a clear example of the principle being given legal effect. As discussed above, the operation of s 86B has no effect on existing uses and there is no clear reason why a resource consent holder under the Act should be in any worse position in terms of s 9 than the holder of existing use rights.

[44] For those reasons, I conclude that a holder of a resource consent for a specified use or activity is not required to obtain a further resource consent for the same use or activity when a new or changed rule comes into effect.

[45] I therefore hold that as Arapata holds a current resource consent to refurbish the existing building and rebuild the roof annex at 83 Albert Street, it does not require any further resource consent to use land in that way or to undertake those activities. The Council was wrong to say, after the grant of the first consent and on the basis of it having notified its decisions version of the proposed Auckland Unitary Plan, that a further resource consent was required. It could not require a re-assessment of the consented use or activities based on a rule which did not have legal effect when the consent was granted and which does not have retrospective effect. It is on this basis that I proceed to consider the application for costs.

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4 Bennion, *Statutory Interpretation*, 2nd ed. 1992, p. 214.

5 See Burrows and Carter, *Statute Law in NZ*, 5th ed. 2015, pp. 619-628; and *Craies on Legislation*, 8th ed. 2004, Chap. 10.3, pp. 389-399;

6 *Maxwell on the Interpretation of Statutes*, 12th ed. 1969, p. 218.

7 See e.g. ss 151 and 160, Resource Management (Simplifying and Streamlining) Amendment Act 2009.

8 Also, before the commencement of the Act, see s 90 Town and Country Planning Act 1977.

Costs

[46] The Court's power to award costs is conferred by s 285 of the Act, which relevantly provides:

> (1) 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.

[47] The discretion conferred by s 285 is broad and a great deal of case law exists as to the principles which apply to the exercise of that discretion. Principles which are particularly relevant to this case appear to be as follows:

(a) There is no general rule in the Environment Court that costs follow the event.[9]

(b) Costs are ordered to require an unsuccessful party to contribute to the costs reasonably and properly incurred by a successful party.[10]

(c) Costs are awarded not as a penalty but as compensation where that is just.[11]

(d) An award may compensate parties for costs unnecessarily incurred as a result of proceedings which should not have been brought.[12]

(e) Costs at a higher level than usual party and party costs may be awarded where particular circumstances justify that, including where:

(i) the process of the court has been abused;

(ii) arguments are advanced that are without substance;

(iii) the case is poorly presented or the hearing is unnecessarily lengthened;

(iv) opportunities for compromise could reasonably have been expected but a party has failed to explore them; and

9 *Culpan v Vose* Decision A064/93.
10 *Hunt v Auckland CC* Decision A068/94.
11 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* [1996] NZRMA 385.
12 *Paihia and District Citizens Assn Inc v Northland RC* (1995) 2 ELRNZ 23.

(v) a party takes a technical or unmeritorious point of defence.[13]

(f) Where wasted costs have been incurred, such as where a hearing has had to be adjourned or a proceeding has been withdrawn at a very late stage, the party who is not responsible for the adjournment or withdrawal may be entitled to costs.[14]

[48] I accordingly approach my decision on this application for costs on the basis that the award should be a reasonable contribution towards costs incurred by the successful party rather than a penalty on the unsuccessful party. In terms of what constitutes success in a proceeding where the case did not proceed to a full hearing, I take into account the central issue between the parties, the approach they have taken to the resolution of that issue and the degree to which the Court can assess the merits of their positions and approaches. In many cases that are discontinued before trial, even where that occurs at a late stage, the basis of the discontinuance is often an agreement which addresses the issue of costs. In some cases, a settlement prior to hearing effectively prevents the Court from assessing the merits.[15] Unusually in this case, the withdrawal of the application for declarations did not resolve the central issue between the parties and they have placed it squarely back before the Court in their submissions on costs. This has meant that the Court has been able to assess the question of costs with regard to the merits of the arguments advanced on the central issue.

[49] Arapata's grounds in support of its application are set out in summary above at paragraphs [20] and [22]. It has been put to cost in applying for declarations to protect its rights as a consent holder. While it was Arapata which withdrew its application at a very late stage, I accept that it agreed to the settlement proposed by the Council, except as to costs, in order to obtain certainty as to its ability to undertake the works for the sake of its other contractual commitments that could be adversely affected by any delay.

[50] The Council's response to the application is set out in summary above at paragraph [21]. The Council's main ground of opposition may be summarised as being that as the proceeding was withdrawn, neither party was "successful" and accordingly

13 *Development Finance Corporation NZ Ltd v Bielby* (1991) 1 NZLR 587 (HC) at 594-5.
14 *OB Holdings Ltd v Whangarei DC* [2010] NZEnvC 164.
15 *Bridgecorp Holdings Ltd (in rec.) v Hamilton CC* Decision A21/08

costs should lie where they fall. Apparently as an alternative, the Council suggests that it is the successful party because the dispute has been resolved in a manner that is consistent with its position that a further resource consent was required. Linked to this is the Council's suggestion that Arapata brought its proceedings "no doubt" to apply pressure to the Council to change its position in that regard.

[51] These arguments on behalf of the Council might have merit had the Council presented some robust argument to show why the holder of a current resource consent to undertake particular works could be required to obtain a further resource consent in respect of the same works where some proposed rules, previously not in effect, had come into effect. The submissions presented by the Council address this but for the reasons set out above, I do not accept those submissions. I do not consider that this is a marginal issue. No robust argument has been presented to show any basis on which s 9(3)(a) should be interpreted to make the rights conferred by a resource consent subject to future changes to the rules in a plan.

[52] While in some respects the withdrawal of the proceeding on the eve of hearing gives rise to wasted costs, the issue is whether it is appropriate in the particular circumstances of this case for costs to be awarded in favour of the party withdrawing the proceeding, rather than (as would be more common) the party responding. I accept the evidence of Mr Kirkland and the submissions on behalf of Arapata that its agreement with the Council to seek a further consent was done so as to obtain certainty as to its ability to undertake proposed works on its building and in light of its commitments to its bank, its builder and its tenants. I do not accept the Council's submission that the proceeding was brought to put pressure on the Council to change its position: had that submission been supported by some analysis to show that the declarations sought were overly technical or otherwise unmeritorious, then there may have been a basis for it.

[53] For the reasons set out above, I am satisfied that Arapata's position is clearly supported by s 9(3)(a) and that is not altered in any way by s 86B of the Act. In relation to the positions taken on the central legal issue, this case bears some similarities to those where costs have been awarded against a local authority which has acted in a way that unduly restricts the rights of the other party without a reasonable justification for its position.[16]

[16] For example, *Stacey v Auckland Council* [2011] NZEnvC 184 at [8] - [9] and *Canterbury RC v Waimakariri DC* Decision C70/02 at [16] - [24].

[54] I conclude that Arapata is entitled to an award of costs. It seeks an "appropriate contribution" to the cost of the time spent by its counsel and an associate in preparing and filing the application and in preparing for hearing of $8,662.50 (net of GST).

[55] While the case law indicates a "rule of thumb" of a "comfort zone" (rather than any deliberate policy) for awards of costs in the region of 25-33 percent of the actual and reasonable costs and expenses incurred,[17] I am satisfied that a degree of uplift is warranted in this case because the Council pursued an unjustified requirement for a further resource consent notwithstanding that it knew that Arapata held a resource consent for that use of land. In all the circumstances, in my judgement a reasonable award is $5,000.00.

[56] I order the Auckland Council to pay to Arapata Trust Limited the sum of $5,000.00 as costs in this proceeding.

For the Court:

DA Kirkpatrick
Environment Judge

[17] *Emerald Residential Ltd v North Shore CC* Decision A51/2004; *Baxter v Tasman DC* [2011] NZEnvC 119.