

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 28/2020
[2022] NZSC 63**

BETWEEN TRANS-TASMAN RESOURCES LIMITED
Appellant

AND TARANAKI-WHANGANUI
CONSERVATION BOARD,
CLOUDY BAY CLAMS LIMITED,
FISHERIES INSHORE NEW ZEALAND
LIMITED,
GREENPEACE OF NEW ZEALAND
INCORPORATED,
KIWIS AGAINST SEABED MINING
INCORPORATED,
NEW ZEALAND FEDERATION OF
COMMERCIAL FISHERMEN
INCORPORATED,
SOUTHERN INSHORE FISHERIES
MANAGEMENT COMPANY LIMITED,
TALLEY'S GROUP LIMITED,
TE OHU KAI MOANA TRUSTEE
LIMITED,
TE RŪNANGA O NGĀTI RUANUI
TRUST,
ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED AND
THE TRUSTEES OF TE KĀHUI O
RAURU TRUST
First Respondents

ENVIRONMENTAL PROTECTION
AUTHORITY
Second Respondent

Court: Winkelmann CJ, William Young, Glazebrook, Ellen France and
Williams JJ

Counsel: J B M Smith QC and V N Morrison-Shaw for Appellant
J D K Gardner-Hopkins for Taranaki-Whanganui Conservation
Board

R A Makgill and P D M Tancock for Cloudy Bay Clams Ltd,
Fisheries Inshore New Zealand Ltd, New Zealand Federation of
Commercial Fishermen Inc, Southern Inshore Fisheries
Management Co Ltd and Talley's Group Ltd
D M Salmon QC, D A C Bullock and D E J Currie for Greenpeace
of New Zealand Inc and Kiwis Against Seabed Mining Inc
R J B Fowler QC, J Inns, H K Irwin-Easthope and N R Coates for
Te Ohu Kai Moana Trustee Ltd, Te Rūnanga o Ngāti Ruanui Trust
and the Trustees of Te Kāhui o Rauru Trust
M C Smith, H E McQueen and P D Anderson for Royal Forest
and Bird Protection Society of New Zealand Inc

Judgment: 19 May 2022

JUDGMENT OF THE COURT

- A The appellant must pay costs of \$155,000 plus usual disbursements, to be fixed by the Registrar if necessary. We allow for second counsel.**
- B The costs awards made in the Court of Appeal stand.**
- C The High Court should now determine costs in that Court in light of this Court's judgment dismissing the appeal.**
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REASONS (Given by Ellen France J)

Introduction

[1] In a judgment delivered on 30 September 2021, the Court dismissed an appeal brought by Trans-Tasman Resources Ltd (TTR).¹ The judgment addressed issues arising from TTR's application for marine consents and marine discharge consents to undertake seabed mining within New Zealand's exclusive economic zone. We reserved costs and sought submissions from the parties if agreement could not be reached.²

¹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 [SC judgment].

² At [233]–[235] per William Young and Ellen France JJ, [237] per Glazebrook J, [300] per Williams J and [333] per Winkelmann CJ.

[2] Submissions for the parties have now been received. Those submissions raise the following issues:

- (a) Should we make an order for costs or should costs lie where they fall?
- (b) If costs are awarded, what awards should be made?
- (c) Should the Court direct the Court of Appeal to revisit its costs orders?

[3] We deal with each of the three outstanding issues in turn. In doing so, we note that for these purposes the first respondents have formed three groupings. The first of these groupings, which we refer to as the iwi and fisheries parties, is comprised of Te Rūnanga o Ngāti Ruanui Trust, the Trustees of Te Kāhui o Rauru Trust, Te Ohu Kai Moana Trustee Ltd, Taranaki-Whanganui Conservation Board, Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Company Ltd, and Talley's Group Ltd. The Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) forms the second group. The final grouping, which we refer to as KASM/Greenpeace, comprises Kiwis Against Seabed Mining Inc (KASM) and Greenpeace of New Zealand Inc (Greenpeace).

Should we make an order for costs?

[4] TTR says costs should lie where they fall. A number of reasons are advanced. The primary points made are as follows:

- (a) TTR had some success in that the Court upheld its position in relation to a number of matters. Those matters include, by way of example, the precautionary principle, international law, adaptive management, and the casting vote.³
- (b) The underlying issues were difficult and finely balanced.

³ At [10] (the summary of the Court's decision) and the references therein.

- (c) The litigation had a public interest element. It was, for example, the first time the Court had considered the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act).
- (d) The appeal resulted in principles of significance, for example, in relation to the approach to the EEZ Act and to the Treaty of Waitangi.

[5] We accept the submissions for the first respondents that costs should follow the event in the usual way. To the extent TTR had some limited success, that success can be factored into the sums awarded. TTR brought the appeal to pursue its personal interest in securing access to resources in New Zealand's exclusive economic zone and is not a public interest litigant.⁴ The other matters relied on, such as the complexity and significance of the issues, are common features of cases in this Court.⁵

What costs awards should be made?

[6] The first respondents collectively (after discounts) seek an award of costs of \$220,808 plus disbursements for the two and a half day hearing. That figure is broken down amongst the respective groupings of the first respondents as follows:

- (a) The iwi and fisheries parties – \$155,808 plus disbursements of \$19,583.51. These two figures reflect a discount of 20 per cent on what these parties say would be the expected recovery (\$194,760 plus disbursements of \$24,479.39) had they acted individually on all steps.
- (b) Forest and Bird – \$30,000 plus disbursements of \$2,956.11.
- (c) KASM/Greenpeace – \$35,000 plus disbursements of \$3,705.37.

[7] By contrast, if costs are awarded, TTR submits there should be a significant reduction in the amount sought by the three respondent groupings. TTR relies on a number of matters including the following: the points made above in the context of

⁴ *Environmental Defence Society Inc v King Salmon* [2014] NZSC 167, (2014) 25 PRNZ 637 at [41] per McGrath, Glazebrook and Arnold JJ.

⁵ *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [5] and [11]; and for a recent discussion see *FMV v TZB* [2021] NZSC 145, (2021) 26 PRNZ 37 at [10].

the submission that costs should lie where they fall;⁶ the Court's indication in its substantive decision that a full set of costs for each of the five groupings who presented submissions for the first respondents would comprise over-recovery;⁷ that the scale of costs sought almost equates to five full sets of costs; and the disbursements being claimed are for 12 counsel (seven for the iwi and fisheries parties, three for Forest and Bird, and two for KASM/Greenpeace) when the Court's standard daily rate is based on two counsel appearing for each grouping, the first respondents presented in groupings, and TTR presented its case (including the cross-appeal) with only three counsel.

[8] To reflect these matters TTR suggests a total figure of \$85,000 plus reasonable disbursements based on no more than six counsel. The \$85,000 should overall be broken down between the groupings as follows:

- (a) \$60,000 for the iwi and fisheries parties;
- (b) \$20,000 for Forest and Bird; and
- (c) \$5,000 for KASM/Greenpeace.

Our assessment

[9] The general approach taken by the Court is to make awards of costs which are a reasonable contribution to the costs actually incurred although retaining a discretion to make a higher award if that is considered just.⁸ As cases such as *Environmental Defence Society Inc v King Salmon* illustrate, in determining a reasonable contribution the Court has broadly operated a calculation reflecting a daily rate for preparation time.⁹ That daily rate is calculated by reference to the highest

⁶ Above at [4].

⁷ SC judgment, above n 1, at [234].

⁸ *Prebble*, above n 5, at [10].

⁹ *King Salmon*, above n 4.

daily rate applicable under the High Court Rules.¹⁰ In *Prebble v Awatere Huata (No 2)*,¹¹ the Court used a daily rate of \$2,500 but awards made in subsequent cases have reflected a higher rate as the daily rates in the High Court Rules have also increased. Extrapolating from the High Court Rules, \$3,800 reflects an appropriate daily rate. On that approach, the costs award spread over the five groupings in the present case for a two and a half day hearing and preparation would be in the order of \$175,000 (plus usual disbursements).¹² We see no reason for adopting a different approach in this case except that we discount that figure by around 10 per cent to a total figure of \$155,000 plus usual disbursements to reflect, first, the indication in our substantive judgment that full recovery would result in over-recovery and, second, that there were some issues on which TTR's view prevailed.

[10] We add that although counsel responsibly accepted the Court's direction that the argument should be divided between them, counsel would nonetheless have had to be prepared for all of the issues affecting their client to ensure proper representation. Further, any overlap was confined and there is obviously a benefit in ensuring a proper representation of the relevant views on these types of issues.

[11] We see no need to engage with TTR's suggested alternative relativities as between the various groupings but, rather, leave it to the first respondents to allocate the sum of \$155,000 as between themselves.

[12] In terms of disbursements we do not consider it is necessary to confine the number of counsel or to otherwise depart from the orthodoxy which is that the successful party is entitled to recover usual disbursements to be determined by the Registrar if necessary.

¹⁰ See, for example, *King Salmon*, above n 4, at [34] and [46]–[47] per McGrath, Glazebrook and Arnold JJ, discussing the daily rates in the High Court Rules at the time. The current Rules are the High Court Rules 2016.

¹¹ *Prebble*, above n 5.

¹² For these purposes, we consider it is necessary to treat the iwi and fisheries grouping as three, not one, groups. We note that the iwi and fisheries group's submissions proceed on the basis that grouping comprises four separate groups because there are two iwi parties.

Should the Court of Appeal revisit its costs orders?

[13] This issue arises because TTR and the iwi and fisheries parties seek an order that the Court of Appeal revisit its costs orders in light of this Court's costs decision. The iwi and fisheries parties seek an order awarding a single set of costs with certification for second counsel to the joint co-respondents in light of this Court's costs decision and substantive decision.

[14] We agree with Forest and Bird and KASM/Greenpeace that there is no basis for reconsidering the costs awards in the Court of Appeal. The Court of Appeal ordered one set of costs to the iwi and fisheries parties for a complex appeal on a band B basis and certified for two counsel with usual disbursements.¹³ Forest and Bird was awarded costs for a complex appeal on a band B basis for one counsel only plus usual disbursements. The latter approach was applied also to KASM and Greenpeace. Nothing raised would support the view that these awards should be altered and this Court's substantive decision does not support that. Rather, the sums awarded in this Court reflect an assessment of relative contributions and successes in this Court. That assessment does not reflect any broader principles. We make no direction in relation to the costs awards in the Court of Appeal.

[15] We add that it is generally agreed that we should make an order that the High Court, which has not yet awarded costs, should determine costs in light of this Court's decision.¹⁴ We make an order accordingly to this effect.

Result

[16] The appellant must pay costs of \$155,000 plus usual disbursements, to be fixed by the Registrar if necessary, to the first respondents. We allow for second counsel.

[17] The costs awards made in the Court of Appeal stand.

¹³ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

¹⁴ KASM/Greenpeace do not address this issue.

[18] The High Court should now determine costs in that Court in light of this Court's judgments.

Solicitors:

Atkins Holm Majurey Ltd, Auckland for Appellant

Holland Beckett Law, Tauranga for Taranaki-Whanganui Conservation Board

Dawson & Associates Ltd, Nelson for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd and Talley's Group Ltd

Lee Salmon Long, Auckland for Greenpeace of New Zealand Inc and Kiwis Against Seabed Mining Inc
Whāia Legal, Wellington for Te Ohu Kai Moana Trustee Ltd

Oceanlaw New Zealand, Nelson for Te Rūnanga o Ngāti Ruanui Trust

P D Anderson, Royal Forest and Bird Protection Society of New Zealand Inc, Christchurch for Royal Forest and Bird Protection Society of New Zealand Inc

Kāhui Legal, Wellington for the Trustees of Te Kāhui o Rauru Trust