

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 25/2021
[2024] NZSC 151

BETWEEN ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Appellant

AND NEW ZEALAND TRANSPORT AGENCY
Respondent

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

Counsel: S R Gepp, M C Wright and P D Anderson for Appellant
V E Casey KC, V S Evitt and J W E Parker for Respondent
G C Lanning and C J Ryan for Auckland Council as Interested
Party

Judgment: 7 November 2024

JUDGMENT OF THE COURT

- A The respondent must pay the appellant costs of \$35,000 plus disbursements, to be fixed by the Registrar. We allow for second counsel.**
- B The High Court should now determine costs in that Court in light of this Court's judgment allowing the appeal.**
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REASONS

(Given by Williams J)

[1] In a judgment delivered on 11 April 2024, the Court by majority allowed an appeal by Royal Forest and Bird Protection Society of New Zealand Inc (Royal Forest and Bird) in relation to a proposal by the New Zealand Transport Agency | Waka Kotahi (Waka Kotahi) to build a new East West Link (EWL) in

Auckland.¹ At issue were approvals given for the project by a Board of Inquiry (the Board) under the Resource Management Act 1991 (RMA).² The Court reserved costs and directed the parties to file memoranda if costs could not be agreed.³ Royal Forest and Bird, Waka Kotahi and Auckland Council | Te Kaunihera o Tāmaki Makaurau (Auckland Council), as an interested party, have filed memoranda. We note that we decide this matter as a panel of four pursuant to s 84 of the Senior Courts Act 2016 because William Young J is unavailable, having retired.

Background

[2] The substantive proceeding concerned whether the Board was correct to grant Waka Kotahi the necessary approvals to proceed with the EWL in light of the adverse effects the EWL would have on flora and birds.⁴ Royal Forest and Bird argued these adverse effects meant the EWL breaches policies in the New Zealand Coastal Policy Statement (NZCPS) and Auckland Unitary Plan (AUP) such that it cannot satisfy ss 104D, 104 and 171 of the RMA. Waka Kotahi argued the planning documents contained a window through which the EWL could pass, despite its adverse effects; the relevant policies are strong considerations but breaching them does not preclude the EWL from gaining approval. Auckland Council supported Waka Kotahi's position.

[3] Royal Forest and Bird's appeal to the High Court was dismissed.⁵ However, its further appeal to this Court was allowed. The majority did not adopt Royal Forest and Bird's position that the EWL could never obtain consent in light of the relevant policies, as the NZCPS and AUP provide for a narrow exceptions pathway.⁶ The majority considered that the Board's errors were in taking (in substance) an overall judgment approach, misinterpreting the "have regard to" standard in ss 104 and 171,

¹ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 242 (Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ) [SC judgment].

² See *Final Report and Decision of the Board of Inquiry into the East West Link Proposal: Volume 1 of 3 – Report and Decision* (21 December 2017).

³ SC judgment, above n 1, at [182] per Winkelmann CJ, Ellen France and Williams JJ and [366] per Glazebrook J.

⁴ See at [28]–[35] per Winkelmann CJ, Ellen France and Williams JJ.

⁵ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 (Powell J).

⁶ SC judgment, above n 1, at [118] and [144] per Winkelmann CJ, Ellen France and Williams JJ.

conflating s 171 with the AUP policies, and assessing environmental effects in a manner inconsistent with the policies.⁷ We remitted the matter to the Board for reconsideration in line with the terms of the judgment.⁸

The parties' submissions on costs

[4] Royal Forest and Bird now seeks \$49,400 in costs and \$7,232.87 in disbursements from Waka Kotahi in relation to the Supreme Court appeal. It seeks a further \$27,495.50 in costs and \$5,302.54 in disbursements for the High Court proceeding from Waka Kotahi and also, if appropriate, Auckland Council. Royal Forest and Bird does not seek costs from Auckland Council for the appeal in this Court because the two parties reached an agreement to that effect when Auckland Council sought to participate in the proceeding in this Court.

[5] Waka Kotahi submits costs should lie where they fall. Alternatively, Waka Kotahi submits they should be significantly reduced to reflect the level of success Royal Forest and Bird actually achieved and because it would not be just for Waka Kotahi to be left with the sole burden of a costs award due to a side agreement it was not party to nor aware of. Auckland Council, with the support of Waka Kotahi, submits this Court should not determine the costs issues arising from the High Court proceeding as the High Court is best placed to do so. Some specific costs and disbursements are also disputed, as we come to.

High Court costs and disbursements

[6] We accept Auckland Council's submission that the High Court is best placed to consider issues relating to costs and disbursements arising from the proceeding in that Court. While we understand Royal Forest and Bird's position that further delay and expense is undesirable, the High Court Judge is better placed to assess how the proceeding was conducted by each of the parties in that Court and, therefore, how the costs discretion should be exercised.

⁷ At [168] per Winkelmann CJ, Ellen France and Williams JJ.

⁸ At [181] per Winkelmann CJ, Ellen France and Williams JJ and [365] per Glazebrook J.

Supreme Court costs

[7] Turning to costs in this Court, costs will generally follow the event and reflect a reasonable contribution to actual costs.⁹ That said, the Court may discount costs—for example, where success, in substance, is mixed.¹⁰

[8] In this case, success was mixed. Ultimately, Royal Forest and Bird succeeded in establishing that the Board erred and that the matter should be remitted for reconsideration. However, and most significantly, the majority did not agree with Royal Forest and Bird that infrastructure at the scale of the EWL could never obtain consent in light of the NZCPS and AUP policies—though the exceptions pathway in those policies is very narrow indeed. In light of this, a modest discount is justified.

[9] We also accept Waka Kotahi’s submission that a further discount should be applied as it would not be just for Waka Kotahi to bear the sole burden of Royal Forest and Bird’s costs merely because Royal Forest and Bird elected not to seek costs against Auckland Council. That said, this further discount should also be modest as Waka Kotahi carried the burden of the response to the appeal and the Council’s role was limited by comparison.

[10] We note that while modest discounts apply, we reject Waka Kotahi’s submission that costs should lie where they fall on the basis that Waka Kotahi is a public entity representing the public interest, as opposed to commercial or private interests. While that submission is factually accurate, Waka Kotahi is a Crown entity exercising statutory powers. To adopt Waka Kotahi’s submission in this respect would represent a significant change to the way in which courts generally approach matters of costs in relation to such entities. We do not consider this case justifies such a departure.

[11] A final matter to be addressed concerns whether costs should be awarded in relation to the parties’ participation in the May 2022 hearing for *Port Otago*

⁹ *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [5] and [10].

¹⁰ See, for example, *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [231] per Winkelmann CJ and Ellen France J and [281] per Glazebrook, O’Regan and Williams JJ.

*Ltd v Environmental Defence Society Inc.*¹¹ Waka Kotahi submits these costs should not be awarded because the Court invited Waka Kotahi and other parties to participate given the similarity of the issues in the two proceedings; *Port Otago* was a separate proceeding and parties were given until 21 September 2023 to seek costs relating to that proceeding; *Port Otago* was a plan change appeal, for which costs are generally not awarded; and Royal Forest and Bird was not the successful party vis-à-vis Waka Kotahi when considering the positions each party took in *Port Otago*.

[12] We certainly accept that inviting the parties in one appeal to provide submissions in a separate, unrelated appeal is unusual. But the crossover in issues made such a step sensible and the parties in this appeal took the opportunity to advance their arguments where relevant and to protect their respective positions where they considered it expedient to do so. As the parties certainly would not have been entitled to costs in the context of that appeal, the only opportunity to recover the associated costs is now, after delivery of the judgment in this appeal.¹² Some recognition by way of costs in favour of Royal Forest and Bird, as the successful party in this appeal, is therefore appropriate, though with a modest discount in recognition of the context.

[13] Applying a discount of around 30 per cent to the sum sought by Royal Forest and Bird, costs of \$35,000 are allowed in relation to the 2.5-day hearing in November 2021 and the half-day hearing in May 2022.

Supreme Court disbursements

[14] As noted above, there has been some dispute concerning disbursements. In accordance with usual practice, we refer this to the Registrar to determine.

Result

[15] The respondent, Waka Kotahi, must pay the appellant, Royal Forest and Bird, costs of \$35,000 plus disbursements, to be fixed by the Registrar. We allow for second counsel.

¹¹ *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205.

¹² Although Royal Forest and Bird was a party in *Port Otago*, it too would not have been entitled to costs in the context of that appeal for additional time spent in relation to this appeal.

[16] The High Court should now determine costs in that Court in light of this Court's judgment allowing the appeal.

Solicitors:

P D Anderson and E H F Toleman, Royal Forest and Bird Protection Society of New Zealand Inc,
Christchurch and Wellington for Appellant

Buddle Findlay, Auckland for Respondent

Simpson Grierson, Auckland for Auckland Council as Interested Party