BEFORE THE ENVIRONMENT COURT

Decision No: [2017] NZEnvC 101

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal under section 358 of the Act
	BETWEEN	DARRYL BERWYN ELLIS
		(ENV-2015-WLG-000100)
		Appellant
	AND	PORIRUA CITY COUNCIL
		Respondent
Court:	Environment Commissioner K A Edmonds	
On the papers:	In Chambers at Wellington	
Counsel:	S F Quinn for D B Ellis	
	J G A Winchester and H P Harwood for Porirua City Council	
Date of Decision:	7 July 2017	
Date of Issue:	10 JUL 2017	

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR COSTS

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that Porirua City Council is to pay $5,500 to Mr D B Ellis.

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

REASONS

Introduction

[1] Mr Ellis, the sole Director of Groundup Café Ltd, applied for and Porirua City Council (**Council**) granted a retrospective resource consent for the expansion of the existing café GroundUp in Pauatahanui Village, a small settlement very close to the urban extent of Porirua City. The retrospective resource consent application involved an extension to the building, an increase in the capacity of the café to a maximum of 65 patrons (from 35 patrons) and an enlargement of the car park to provide up to 22 car parks (from 10 parking spaces). That consent was not appealed.

[2] Mr Ellis was charged $78,357.36 (GST included) for the processing of the application. Mr Ellis objected to the costs as unreasonable, unjustified and disproportionate under s357B RMA and sought a reduction of at least 50% to the total amount of charges levied. The Council appointed an independent Commissioner (costs Commissioner) to consider the costs objection. That Commissioner accepted the recommendation of the Resource Consents Planner, who had processed the application, to reduce the charges by the comparatively small sum of $777.75 (GST excluded).

[3] Mr Ellis appealed the costs Commissioner's decision and sought the additional charges the Council had required the appellant to pay under s36(3) of the RMA be remitted in whole or part. A reduction of the charges to 50% (approximately $40,000) was sought by the appellant at the hearing.

[4] This Court allowed the appeal to the extent that the total charges payable by Mr Ellis with GST included were reduced to $49,687.72. Mr Ellis had already paid the fixed charge of $4,140.00, and so owed the Council $45,547.72.

[5] With leave having been reserved for the parties to seek costs, the following correspondence was submitted by the parties:

- Memorandum seeking costs on behalf of Darryl Ellis - dated 14 September 2016;

- Reply by Porirua City Council to appellant's memorandum - dated 12 May 2017. (The timing of the reply is because the parties requested and the Court agreed that the costs application should be placed on hold pending the outcome of the High Court appeal by Porirua City Council[1]).

The Parties' positions

The appellant's application

[6] The appellant's application involved the following actual costs (inclusive of GST and disbursements) on the appeal to challenge the Council's invoiced additional charges:

- Legal costs totalling $13,275.96[2]
- Expert planning costs totalling $3,789.25
- Total costs $17,065.21[3].

As is required the appellant submitted supporting invoices for these costs.

[7] The reasons given by the appellant for an award of costs were that the Council in this case imposed too high a fee and did not fairly inform the appellant as to both what the actual costs were or what the future costs incurred were likely to be. The appellant was subject to costs which were clearly not commensurate with the scale and effects of the proposal. The costs were not reasonable and too high, particularly given the nature of the consent and the fact that the appellant was a small business café operator.

[8] The appellant seeks a contribution of approximately 60% toward these costs (being $10,239.13) to fairly and reasonably compensate the applicant for the Council charging an unreasonable fee, which was discounted by 37% by the Environment Court on appeal. Further the appellant submits that these unreasonable costs required the bringing of the appeal to resolve an otherwise unreasonable outcome and the Council failed to adequately explore settlement.

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1 *Porirua City Council v Darryl Berwyn Ellis* [2017] NZHC 784 dated 26 April 2017. The High Court found there were no errors of law made by the Environment Court and dismissed the appeal.

2 The application incorrectly calculated the total legal costs. The correct amount is $13,274.96.

3 In light of note 2 above, the total costs are $17,064.21.

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In addition, the appellant alleges that the Council neglected its legal duty in failing to consider whether the fee charged was in fact fair and reasonable.

The respondent's response

[9] The Council takes issue with the appellant's claims, particularly that the appellant was required to bring the appeal to resolve an otherwise unreasonable outcome. In the Council's view the necessity for the appeal resulted from the appellant's failure to present any case to the independent costs commissioner or accept the Council's reasonable settlement offer.

[10] The Council does not accept that it failed to observe a legal duty. It sees no reason to depart from the established position that costs are not awarded against the primary decision maker. Furthermore, if the Court decides otherwise, there are no factors justifying an award of costs outside of the standard range.

The legal basis for awards of costs

[11] The Court's power to award costs arises from s285 RMA, which does not impose any constraint upon the discretion to make an award, although any discretion must of course be exercised in a principled way. As is encapsulated in the Environment Court's Practice Note 2014, there is no presumption, as there is in general civil litigation, that a successful party should be awarded costs. What the Court is required to do is to award costs, if at all, on a basis that appears fair and reasonable in the circumstances of the particular case and at a level that represents a reasonable contribution to the costs of the receiving party.

[12] In the judgment of *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 the High Court described (among other things) five factors (although the first and last are materially the same) which can be taken into account in making what is described as significant awards of costs (ie higher than might otherwise be the case). For this Court, with an open discretion and no scale, the factors may also be of assistance in deciding whether to award costs at all. They are:

- Where arguments are advanced which are without substance;
- Where the process of the Court is abused;
- Where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing;

- Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;
- Where a party takes an unmeritorious point and fails.

[13] The Practice Note carries through the *Bielby* factors, with some amplification, into clause 6.6(d):

> In considering whether to award costs, and the quantum of any award, the following factors are commonly referred to and given weight, if they are present in the particular case:
>
> (i) the arguments advanced by the party were without substance;
>
> (ii) the party has not met procedural requirements or directions;
>
> (iii) the party has conducted its case in a way that unnecessarily lengthened the hearing;
>
> (iv) the party has failed to explore reasonably available options for settlement; or
>
> (v) the party has taken a technical or unmeritorious point and failed.

[14] The longstanding practice of the Court, recorded in the Practice Note, is that in general costs will not be awarded against a decision-making body. However, there are exceptions to that as the Practice Note reflects in clause 6.6(c):

> If the decision appealed against would have imposed an unusual restriction upon the appellant's rights, and the restriction is not upheld, costs may be awarded against the respondent Council. **On other appeals, the Court will not normally award costs against the public body whose decision is the subject of the appeal unless it has failed to perform its duties properly or has acted unreasonably.**
>
> (emphasis added)

[15] The Practice Note is of course a guide rather than a prescription.

[16] The Environment Court considers what is reasonable in each case, but awards tend to fall within three bands, as follows:

(a) standard costs which generally fall within 25-33% of costs actually incurred;

(b) higher than standard costs where *Bielby* factors are present; and

(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

Was there a failure to adequately explore the possibility of settlement?

[17] The appellant alleges that the Council failed to adequately explore the possibility of settlement where compromise could have reasonably been expected.[4] The appellant submitted that while the Council did attempt to negotiate the resolution of the appeal and cannot be penalised for failing to reach a negotiated settlement (*D L Newlove Ltd v Northland Regional Council* Decision A74/94), their offer was less than what could reasonably have been expected. The Council's settlement offer was only approximately 50% of the discounted fee determined by the Environment Court to be fair and reasonable. It points to the Court having ultimately decided on a discount closer to the appellant's rejected counter-offer to the Council's offer in support of this allegation. As a result the appellant was forced to incur the costs of the hearing of the appeal (including the costs of its expert witness) in order to achieve the reasonable and appropriate reduction to the fee levied by the Council.

[18] The Council does not accept the appellant's proposition. The Council submitted that its offer, made on a costs avoidance basis, was reasonable in the circumstances. At the time the Council made its offer, an independent costs Commissioner had reviewed the appellant's objection and substantially declined it. The Council did not have the benefit of any further information which substantiated the allegations in the notice of appeal. Also the appellant had not provided reasons for its view that a greater discount was appropriate and the Council, accountable to its ratepayers, could not responsibly revise its offer in response to the appellant's counter-offer.

[19] In addition, the Council submitted that if the appellant Mr Ellis had accepted the Council's settlement offer of $15,000 he would be financially better off today, with the net benefit to Mr Ellis from pursuing his appeal of $11,634.43. The Council based this on the Court's reduction of $28,699.64 to the Council's

[4] The exchange of letters between the Council and the appellant and attached to the costs application were without prejudice save as to costs.

administrative charges and the appellant's costs of running the appeal as recorded in the appellant's memorandum of $17,065.21.

[20] The Council was also of the view that Mr Ellis could not reasonably hold an expectation of an award of costs at the outset of the appeal given the Court's long established principle of not making costs award against primary decision makers, which is now recorded in the Court's Practice Note.

The Council's Actions

[21] The respondent submitted that although the Environment Court overturned the Council's decision, the Council acted appropriately throughout the process. Specifically:

- The Council appointed a highly experienced independent commissioner to hear the original costs objection and met his costs;
- The Council made substantial efforts for the appellant to participate in the first instance hearing, but he declined to do so;
- The costs commissioner diligently considered the objection against the correct legal tests (there is no suggestion otherwise in the appeal);
- On receiving the appeal notice, the Council approached the appellant and made a settlement offer, which, taking into account the appellant's expenses in pursuing an appeal, would have put him in a better financial position if he accepted it rather than proceeding to a hearing;
- The Council acted responsibly during the hearing process.

[22] The Council referred to its appointment of an experienced and independent commissioner who had not previously been involved in the consent application to hear the objection. That commissioner did not have the benefit of evidence or submissions from the appellant when the commissioner made his decision, with the appellant presenting its case for the first time before the Environment Court at the hearing.

[23] Additionally, the Council submitted that the appellant's decision not to engage in the first instance hearing at all meant that the first time the Council

received reasons for the objection and appeal was initially through the appellant's evidence but substantially on the day of the Environment Court hearing through the appellant's legal submissions and cross examination. If this information had been provided at an earlier stage in the process, it is possible an Environment Court hearing could have been avoided.

Evaluation

[24] I accept that the Council did attempt to negotiate the resolution of the appeal and should not be penalised for failing to reach a negotiated settlement. However, I do not accept the Council's submission that Mr Ellis could not have reasonably held an expectation of an award of costs at the outset of the appeal in the circumstances of this case. The findings of the Court clearly identify inadequate and unreasonable actions by the Council in its handling of the administrative charges.

[25] The possible outcome of a first instance objection informed by the appellant's participation in a hearing is entirely speculative. However, Mr Ellis chose not to take advantage of the opportunity available to put a more detailed case in person or through representation, and to provide evidence in support of it, before the costs commissioner. I take that factor into consideration.

[26] However, the first instance decision-maker was informed by the objection notice lodged by Emma Manohar and Stephen Quinn of DLA Piper on behalf of Mr Ellis. The costs commissioner's decision provides a summary of the reasons given for the objection, with the reasons for the requested reduction of 50% as including:

- Not all costs invoiced are related to the application nor were they occasioned by the application;
- The amounts charged, particularly those for the commissioner, planning officer and the traffic engineer engaged by the Council are unreasonable given the limited scope of the issues to be addressed and the relatively straight forward planning framework under which the decision was required to be made;
- Significant administrative tasks were carried out by the planning officer rather than an administrator at a lesser hourly rate;

- No prior warning was given of such a high level of costs and no estimate provided;
- The economics of the objector's café business cannot sustain the costs levied and the Council must take into account a sense of scale and overall process costs in relation to other similar notified hearings.

The objection was fuller, and particularised some of the concerns in more detail, but the summary does cover the bases in terms of the matters argued on appeal.

[27] Stepping back from the first instance decision-making I found there were several actions and inactions by the Council in its handling of the processing of the resource consent which lead to unreasonable and unfair charges. The deficiencies in the Council's approach resulted in the Court awarding a considerable discount to Mr Ellis on the administrative charges levied by the Council. The Council undoubtedly acted unreasonably in terms of clause 6.6(c) of the Practice Note.

[28] I think that it is appropriate in these circumstances for an award of costs to be made and I now turn to the quantum.

Quantum

[29] The Council submitted there are two issues with the costs claimed by the appellant on which I could and should require further details to ascertain whether they are legitimate. Firstly, the 30 June 2016 Spencer Holmes invoice includes $495.00 ($569.25 incl GST) of time which the invoice describes as *Compliance with Conditions: Correspondence with PCC on compliance with conditions, providing certifications and letters to satisfy PCC.* The Council submitted that compliance issues are not related to the appeal and should not have been included. On the face of it, this invoice does not seem a legitimate cost of the proceedings and accordingly I deduct $569.25. That brings the total cost and the starting point to $16,494.96 (incl GST).

[30] Secondly, the Council submitted that the invoices for legal costs do not include any explanation or information or about what work the invoices involved, and questioned whether the invoices involved settlement discussions. A review of the legal invoices, and also informed by the invoices for the planning expert,

does not reveal anything untoward in terms of the legal costs that might be expected for proceedings of this kind and that would justify my seeking a further breakdown. There were no costs associated with Court-assisted mediation which clause 6.6(g) of the Practice Note indicates should neither be claimed nor awarded by the Court.

[31] The appellant's failure to fully participate in the first instance objection hearing is a relevant consideration to the quantum of a costs award by the Court. That has meant that the award sought is at too high a level notwithstanding the Court's decision on the administrative charges. Alongside that there is the extent of the discount on the basis of unreasonableness and unfairness to the applicant for the charges for the resource consent made by the territorial authority. The Court's decision records considerable concerns with the Council's handling of the resource consent processing and its charging for it which should not be ignored. Weighing the two factors I consider an appropriate quantum to award Mr Ellis to be $5,500.

[32] There will be an order that the Porirua City Council is to pay to Mr Ellis the sum of $5,500 by way of costs. If necessary this award can be enforced in the District Court at Wellington.

K A Edmonds

K A Edmonds
Environment Commissioner