IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2021] NZEnvC 195

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	THE CANYON VINEYARD LIMITED (ENV-2019-CHC-137) Appellant
AND	CENTRAL OTAGO DISTRICT COUNCIL Respondent
AND	BENDIGO STATION LIMITED Applicant

Court:	Environment Judge P A Steven Environment Commissioner M C G Mabin
Hearing:	On the papers in Chambers at Christchurch
Date of Decision:	15 December 2021
Date of Issue:	15 December 2021

DECISION AS TO COSTS

A: Under s285 RMA,[1] The Canyon Vineyard Limited is ordered to pay Bendigo Station Limited the sum of $7,606.24 as a contribution towards its costs.

B: Under s286 RMA, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).

REASONS

[1] This appeal was against a decision of the Central Otago District Council ('the Council') granting subdivision and land use consent for land at the south of Bendigo Loop Road at Bendigo, and owned by Bendigo Station Limited ('Bendigo').

[2] The Council decision was appealed by Canyon Vineyard Limited ('Canyon') who is the owner of adjoining land to the west. Canyon operates a restaurant, wine tasting facility, a function centre and cinema building on its land.

[3] We note that by its decision, the function centre was occupied by Canyon director Mr Johnston as a dwelling. The Council had granted consent to the creation of 12 lots with land use consent to create a residential building platform on seven of these lots.

[4] The creation of two further lots (and the associated land use consents) for the same had been declined. The development proposed for one lot in particular (Lot 7) was found to be intrusive when viewed from Mr Johnston's dwelling.

[5] However, the adverse effects in relation to the approved development were found to be "no greater than minor" in terms of the open space, landscape, natural character and amenity values enjoyed at the Canyon site.

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[1] Resource Management Act 1991.

[6] Canyon appealed that decision in relation to the development proposed on Lots 4 and 8-11.

[7] On 8 September 2021 the court issued an interim decision,[2] and on 2 December 2021 a final decision,[3] declining the appeal. A timetable was put in place for filing and commenting on a set of draft final conditions and relevant plans. Costs were reserved, although an application was not encouraged. Bendigo has lodged an application for costs, and that application is now considered on its merits.

[8] As noted in our interim decision,[4] after the Council decision, and in response to the Canyon appeal, amendments were made to the proposal to further reduce any adverse visual effects of the dwellings proposed for the lots being contested. Although Canyon did not call any expert evidence at the Council hearing, it engaged a landscape architect, Ms Lucas, to support its case on appeal although in its interim decision we record that we found her evidence to be unhelpful in resolving the issues.

Bendigo's application for costs

[9] Bendigo seeks a costs award against Canyon of $50,708.30, being 33% of its total costs incurred, including the cost of preparing the costs application. Bendigo's total costs comprise:

(a) legal fees and disbursements of $73,956.18; and

(b) expert fees incurred by Rough & Milne Landscape Architects and LandPro of $79,705.34.

[10] Canyon opposes the application and seeks recompense for the necessity of

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[2] *Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 136.

[3] *Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 187.

[4] At [89].

opposing Bendigo's application for costs. The sum of $900 is sought although Bendigo opposes Canyon's application.

Section 285 RMA and related principles

[11] Under s285 RMA, the court may order any party to pay to any other party the reasonable costs and expenses incurred by the other party. That discretion is broad. The court is guided by a body of general principles developed through the case law and recorded in the court's Practice Note.[5]

[12] The court does not as a matter of general practice allow costs to a successful party, unless there are special circumstances by which it would be fairer to depart from that rule.[6] The purpose of a costs award is not to penalise the unsuccessful parties, but to compensate successful parties where that is just.[7] This statutory discretion must, however, be exercised in a principled way.[8]

[13] In determining an application for costs the court will make two assessments.[9] This first assessment is whether it is just in the circumstances to make an award of costs. The second assessment, having determined an award is appropriate, is deciding the quantum of costs to be awarded.

[14] While there is no scale, an award of costs has tended to fall into three broad categories:[10]

(a) standard costs, which generally fall within a comfort zone of 25–33% of costs actually incurred, although in any given case costs awarded might be either above or below this comfort zone;

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[5] Environment Court Practice Note 2014, at clause 6.6.
[6] *Culpan v Vose* (1993) 1A ELRNZ 331, (1993) 2 NZRMA 380.
[7] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385, (1996) 2 ELRNZ 138.
[8] *New Zealand Heavy Haulage Association Inc v Central Otago District Council* EnvC W72/2004 at [5].
[9] *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.
[10] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468; as acknowledged in *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4 at [35].

(b) higher than normal costs, where aggravating or adverse factors might be present such as those identified in *Bielby*;[11] and

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

[15] However, the further scenario is where no costs are awarded at all. This would normally be the position in relation to plan appeals under Schedule 1 or in cases where some aspect of the public interest counts against an award of costs being made.

Environmental Protection Authority v BW Offshore Singapore Pte Ltd[12]

[16] After Bendigo's application was lodged with the court, the court became aware of a High Court decision of *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* ('*BW Offshore*') that had questioned the application of the *Bielby* factors in the context of an award of costs by the Environment Court.

[17] Because *Bielby* was relied upon by Bendigo in its application, by Minute dated 12 October 2021 the court directed the parties file and serve submissions in relation to the implication of that case to the court's consideration. Bendigo filed submissions dated 27 October 2021. The submissions were helpful in responding to the High Court decision and we are in general agreement with the same.

[18] We do not intend to address all the applicant's contentions raised in support of its application in any detail. Suffice to observe that in the end the *Bielby* factors were not relied upon to justify a 'higher than usual' award, but to overcome the court's indication in its interim decision (effectively) discouraging an application for costs.

[19] Nevertheless, we address (in summary) Bendigo's position as the *BW*

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[11] *DFC New Zealand Ltd v Bielby* [1991] 1 NZLR 587.

[12] [2021] NZHC 2577.

Offshore case in the context of the application made to this court.

BW Offshore case

[20] As counsel for Bendigo notes, the High Court in *BW Offshore* appears to signal a potential departure from the *Bielby* factors in favour of costs principles in the High Court.

[21] The *Bielby* factors are recorded in the Environment Court Practice Note 2014 and are:[13]

(a) the arguments advanced by the party were without substance;

(b) the party has not met procedural requirements or directions;

(c) the party has conducted its case in a way that unnecessarily lengthened the hearing;

(d) the party failed to explore reasonably available options for settlement; or

(e) the party has taken a technical or unmeritorious position.

[22] Counsel's primary submission is that it is problematic to take the High Court (or District Court) schedules as the baseline for what is deemed to be an award of reasonable costs in the Environment Court.

[23] Counsel notes the purpose of the cost principles in the High Court being to provide a consistent predictable outcome based upon identifiable steps throughout the proceeding. However, the absence of a "loser pays" presumption and a scale of costs makes this purpose redundant in the consideration of costs in the Environment Court.

[24] However, counsel qualifies that submission somewhat and states:

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[13] Environment Court Practice Note 2014 at clause 6.6(d).

> That is not to say that setting awards of costs are uncertain. Although the Environment Court has declined a scale of costs, a body of case law has developed which tends to have awards of costs fall within three bands, based on a proportion of actual costs incurred. Furthermore, section 285 of the Act sets out presumptions directed at certainty, in respect of proceedings being abandoned with insufficient notice and consent authority costs and expenses for preparing certain reports. However, none of the presumptions are directed at certainty as between private parties. For these parties, we submit that flexibility has been preferred to predictability as a matter of policy to accommodate the types of case management expected by an expert jurisdiction.

[25] Counsel further notes that the High Court findings in *BW Offshore* were coloured by the context of a public body engaged in litigation with a private actor, which is not the situation arising here.

Bendigo's case for an award of costs

[26] Bendigo addresses the question of whether it is just in all the circumstances to exercise the discretion to award costs at all, particularly as an application was not encouraged by the court in its interim decision to decline the appeal. Bendigo submits that the presence of three of the *Bielby* facts (a), (d) and (e) justify an award in this case, namely that:

(a) the arguments were without substance in that Bendigo was put to additional cost by Canyon failing to properly consider the relevant matters subject to the proceeding and the scope of the proceeding, as outlined in Canyon's notice of appeal, and as agreed between the parties in the Joint Statement of Facts and Issues;

(b) Canyon has failed to explore reasonably available options for settlement, and

(c) Canyon took an unmeritorious approach.

[27] Bendigo cites the recent decision of *Davis v Gisborne District Council*[14] where arguments without substance were defined to be those:

(a) beyond the jurisdiction of the court;

(b) advanced without supportive argument; or

(c) irrelevant to the case before the court.

[28] Although those were the factors present in *Davis*, the decision does not purport to describe a closed list. Other situations recognised by the court and which are of some relevance here include those cases where:

(a) arguments put forward on appeal were exactly the same as those made and rejected at the first instance hearing. See [4], [6]-[8] and [14]-[17], *Warren v Gisborne District Council*;[15] and

(b) too narrow an approach was taken to plan provisions in relation to the protection of the rural resource.[16]

[29] Bendigo further contends that it has sought to genuinely accommodate the concerns raised by Canyon in its notice of appeal, including through court-assisted mediation and presenting further revised proposals (on 12 October 2020 and a further revision on 27 October 2020) and supporting information prior to the hearing of the appeal. These revised proposals were sent to Canyon on an 'open' basis, copies of which were attached to the application filed in the court.

[30] Finally, Bendigo submits that Canyon's failure to seek planning or landscape advice in assessing the revised proposals, despite two versions being presented, was not reasonable, and provides further justification for an award of costs.

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[14] *Davis v Gisborne District Council* [2021] NZEnvC 12 at [17], where the court cited *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council* [2013] NZEnvC 289 at [23]-[30].

[15] *Warren v Gisborne District Council* [2011] NZEnvC 172.

[16] *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4.

[31] Bendigo submits Canyon's "meritless monocular focus on complete invisibility" weighs in favour of the award of costs. Bendigo argues that the prominent location of Canyon's own building in relation to the Bendigo site makes Canyon's dogmatic adherence to its position unreasonable, this being recognised by the court's decision to decline the appeal.

[32] Bendigo submits Canyon was not entitled to the environment devoid of development or domestication it sought throughout the proceeding and ought to have known its position lacked a planning, landscape or logical foundation.

[33] Canyon refuted each of Bendigo's contentions submitting (in summary):

- its case was always about the visual effects on Canyon's property and while the court found against Canyon, that does not mean that its position was unmeritorious;
- flaws in the visibility evidence from Bendigo were only exposed when on-site assessments were carried out by Mr Johnston and Ms Lucas, after the Bendigo evidence was lodged with the court.

Evaluation

[34] It is correct that Bendigo's original plans were found to be problematic in terms of enabling an evaluation of the visual effects on Canyon.[17] However, this was due to inaccuracies in the LINZ data used to place the land contours onto the development plans.

[35] This was an issue identified by the Commissioner following the court's site visit as he had knowledge of the metadata for the model used by LINZ and relied upon by Bendigo in the preparation of its development plans. The problem with the plans was not identified in the evidence of Ms Lucas as Canyon contends, beyond raising a general criticism that the plans depicting these mitigation

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[17] [2021] NZEnvC 136 at [48].

measures were unclear.

[36] Moreover, having read the correspondence attaching the revised proposals (which post-dated mediation but preceded the court hearing) this was not a complaint raised at that earlier stage of the proceeding.

[37] This correspondence revealed an unhappiness with Bendigo's proposal, although, again, the reasons for that were not expressly stated, beyond expressing a complaint that the effects on Canyon were difficult to assess.

[38] That said, we acknowledge Canyon's point that the evidence originally submitted by Bendigo fell short of the standard expected by the court.

[39] Having given careful consideration to the applications and to the competing legal submissions, we are broadly in agreement with Bendigo's criticisms of Canyon's case. We note that our substantive decision set out many of the reasons for that, including the problems with the appellant's approach to the plan provisions.

[40] Moreover, this is a case where Canyon sought to challenge the Council decision on essentially the same grounds raised at the original Council hearing.

[41] Although we came to the same decision as the Council, that was on the basis of a proposal that had been revised twice after the Council made its decision and those revisions were for the purpose of further reducing visual effects on Canyon.

[42] We consider that it is fair and just that Canyon should make some contribution to the costs of Bendigo, although not in the amount that is being sought in its application.

[43] For the same reasons we decline Canyon's application for an award of costs against Bendigo.

Quantum

[44] Having found that there should be an award of costs, the next question is the quantum of costs. This includes an assessment of the reasonableness of costs incurred and what is a reasonable contribution.

Reasonableness

[45] The consideration under s285(1) of the Act as to the costs that the court considers reasonable, requires a starting point assessment of whether the actual costs said to be incurred are reasonable.

[46] Bendigo submits that it seeks an award of costs that is reasonable when assessed against the *Bielby* factors and is conservative on a High Court approach to costs.

[47] In some instances, comparison with the High Court costs calculations will provide a useful check on reasonableness of costs. Bendigo prepared an indicative schedule of costs in accordance with the High Court Rules based on a Category 2 and 3 proceeding.

[48] In the present case, scale costs in the High Court would range from $27,963.00 (Category 2) to $75,895.00 (Category 3). Adopting these figures as a baseline would place the proportion of legal costs claimed (of $24,405.54) below the Category 2 scale costs.

[49] The observations of Cooke J in *BW Offshore* are relevant to the extent that they provide comfort to this court that the costs sought by Bendigo meet the fundamental test of reasonableness on either measure.Bendigo's claim for legal costs is reasonable when assessed against the *Bielby* factors, and conservative on a High Court approach to costs.

Band of costs

[50] Bendigo acknowledges that costs were higher than they might have been had accurate survey plans been submitted with Bendigo's evidence-in-chief. For this reason, Bendigo seeks costs within what counsel describes as the 'comfort zone' rather than the higher costs which might otherwise be warranted considering the *Bielby* factors present.

[51] While we consider there are *Bielby* factors present, we do not consider the award should be higher than comfort level, least of all at the upper of this range, as the form of Bendigo's initial plans led to difficulties with our assessment and further accurate plans had to be prepared. This warrants a reduction in the quantum Bendigo seeks.

[52] Taking all matters into account, we find that an award of 15% is reasonable and appropriate.

Canyon's application for costs

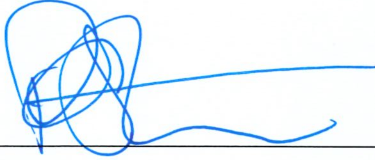
[53] Bendigo opposes Canyon's application for costs of $900. Bendigo submits that Canyon does not set out reasons for why the $900 sought is a reasonable quantum with respect to the authorities on award of costs. We do not consider there should be an award of costs in favour of Canyon. We do not consider Canyon was put to unreasonable cost in replying to the costs' application from Bendigo.

Outcome

[54] Under s285 of the RMA, Canyon is ordered to pay Bendigo the sum of $7,606.24 as a contribution towards its costs.

[55] Under s286 RMA, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).

For the court



P A Steven
Environment Judge