IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 28

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under clause 14(1) of the First Schedule of the Act
BETWEEN	BRIDESDALE FARM DEVELOPMENTS LIMITED
	(ENV-2019-CHC-097)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan
Hearing:	Sitting alone under s279 of the Act
Last case event:	25 February 2022
Date of Decision:	8 March 2022
Date of Issue:	8 March 2022

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 Resource Management Act 1991, Bridesdale Farm Developments Limited is to pay Queenstown Lakes District Council the sum of $20,220.00, as a contribution towards its costs.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

B: Under s286 Resource Management Act 1991, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).

REASONS

Introduction

[1] On 3 December 2021, the court declined the appeal lodged by Bridesdale Farm Developments Limited ('BFDL') in respect of Topic 31 in Stage 2 of the review of the Queenstown Lakes District Plan.[1] Rural zoning was confirmed for the appeal site.

Application for costs

[2] Queenstown Lakes District Council ('QLDC') seeks an award of costs of $33,703.25 against BFDL, representing 50% of the total costs incurred.

[3] QLDC seeks costs on the basis that:

(a) the arguments advanced by BFDL, in particular through the amended relief and provisions that evolved during the hearing, lacked substance and/or were unmeritorious; and

(b) the case was poorly presented and did not comply with proper procedure, which resulted in prejudice to QLDC's ability to meaningfully engage with and respond to the relief sought (i.e. abuse of process).

[4] QLDC submits the relief advanced did not seek to advance or engage with any matter of wider public interest. The relief sought by BFDL was specific and framed in a manner that would enable additional residential development on land owned by BFDL only. QLDC submits this factor distinguishes the appeal from

---

1 [2021] NZEnvC 189.

other plan changes appeals and takes it 'out of the normal run of cases'.[2]

BFDL response

[5] BFDL oppose the application for costs. BFDL submits no justification for an award of costs has been established.

[6] BFDL submits QLDC is effectively relitigating a number of the procedural issues previously raised, in respect of which the court has given consideration and made determinations. Submissions relating to an award of costs should not seek to reopen matters the court has already considered.

[7] BFDL submits the potential grounds for an award of costs can only relate to two procedural issues, being issues raised by QLDC in respect of which the concerns raised were upheld by the court:

(a) the Anderson Lloyd memorandum, which the court addresses at [75]-[78] of the decision; and
(b) the renumbering and amendment of Mr Brown's recommended Policy 7.2.1.7, which the court addresses at [79]-[81] of the decision.

[8] BFDL says it has taken on board the court's critique in relation to the Anderson Lloyd memorandum and Policy 7.2.1.7. However, BFDL submits those actions fall far short of being an abuse of process and note there is no suggestion in the court's decision to that effect.

[9] BFDL submits the 'without substance' threshold is not met. BFDL notes that the court's comments at [75]-[81] of the decision do not suggest that the issues raised were without substance. Rather, the court's critique relates to procedure and the manner in which the issues were presented.

---

2 *St Heliers Capital Ltd v Kapiti Coast District Council* [2015] NZHC 596.

[10] BFDL submits QLDC's application for costs does not contain sufficient and adequate information to establish the basis for determining the extent of legal costs incurred and respond. BFDL submits it is difficult to see how more than two to three hours (at the most) could reasonably have been required in relation to each of the two issues (the Anderson Lloyd memorandum and Policy 7.2.1.7).

[11] BFDL submits that if the court considers the threshold for an award of costs has been met, the requested sum would clearly and obviously constitute a penalty rather than constituting 'just compensation' for additional costs actually incurred by QLDC.

[12] BFDL submits if an award were to be made, a sum in the range of $2,000 – $4,500 would constitute just compensation for additional legal costs actually incurred by QLDC.

QLDC reply

[13] QLDC clarifies it does not seek to isolate and rely on only two particular actions or procedural issues involving BFDL that may justify an award of costs. QLDC's application relies more broadly on the fact that it was the successful party, and that QLDC and its ratepayers should be entitled to a reasonable award of costs.

[14] QLDC submits BFDL mischaracterises the implications of the modifications to the relief, and the basis on which costs have been sought. QLDC submits the modifications by BFDL to its relief created procedural unfairness issues and materially impacted the case being advanced on appeal by BFDL. The modification had a direct bearing on the strength of the appeal being run (in policy terms) and ultimately departed some way from the initial policy position advanced in evidence. QLDC submits these modifications should not be measured, in the context of a costs application, against the time that the Council may have spent dealing with the modifications. Instead, the impact of these modifications in a wider sense is submitted to be relevant to the exercise of the court's discretion.

[15] While QLDC accepts that the case presented by BFDL had some merit on landscape grounds, as acknowledged by the court's decision, it submits the relief sought ran counter to important strategic policy provisions. In circumstances where BFDL had earlier withdrawn its appeal seeking to relocate the ONL boundary, QLDC was in a position of having to defend the appeal on both landscape and planning policy grounds, for a second time.

[16] QLDC submits it is relevant that BFDL was unsuccessful at first instance, and then again on appeal, which creates a situation where there is potential vulnerability for a costs' award.[3]

Section 285 RMA and related principles

[17] Under s 285 RMA, the court may order any party to proceedings before it to pay to any other party the costs and expenses incurred by the other party that the court considers reasonable. This has been described as a broad discretion.[4] However, in *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* ('*BW Offshore*'), the High Court reiterated the importance of not being inconsistent, when exercising the discretion, with well-established principles.[5] In particular, as part of a wider civil justice system, the court should take into account more general principles that have been developed by the Courts when they are relevant.[6]

[18] In the exercise of the s285 discretion, the initial inquiry is as to whether it is just in the circumstances to make an award of costs. If that is answered affirmatively, the court goes on to assess quantum. [7]

[19] Costs are not awarded as a penalty against an unsuccessful party, but rather to compensate a successful party for the costs it has reasonably incurred if the

---

3 *Flacks v Auckland City Council* A171/02.
4 *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 (HC).
5 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577.
6 *BW Offshore* at [19].
7 *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

court considers that just.[8]

[20] The Environment Court of New Zealand Practice Note 2014 provides guidance for, not a fetter on the exercise of, that discretion.[9] Clause 6.6(b) of the Practice Note provides that, where an appeal under Sch 1, RMA (i.e. a proposed plan or plan change appeal) proceeds to a hearing, costs will not normally be awarded to any party. That reflects the long-established recognition of the importance of not deterring participation in resource management processes through the threat of costs awards.[10] In particular, Sch 1, RMA appeal processes are part of an intended contestable procedure for the formulation of district and regional plans as regulatory instruments for and on behalf of related communities. Their quality and effectiveness as regulatory instruments relies on this process of contestable formulation, including as to the consideration of options to derive the most appropriate plan outcome.

[21] Clause 6.6(d) lists the following factors that are commonly referred to and given weight if they are present in a case:

(a) where arguments are advanced that are without substance;
(b) where the process of the court is abused;
(c) where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing;
(d) where it becomes apparent that a party failed to explore the possibility of settlement where compromise could have been reasonably expected; and
(e) where a party takes a technical or unmeritorious position.

[22] In *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*,[11] the High Court noted that in practice Environment Court costs have tended to fall into

---

8 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* (1996) 2 ELRNZ 138.
9 *Canterbury Regional Council v Christchurch City Council* C 134/08.
10 *BF Offshore*, at [19] referring to *Tairua Marine*, at [42].
11 [2013] NZHC 2468.

three bands:

(a) standard – 25-33% of actual and reasonable costs claimed;
(b) higher than normal costs – where aggravating or adverse factors might be present, such as those identified in *DFC NZ Ltd v Bielby*;[12] and
(c) indemnity costs – which are awarded rarely and in exceptional circumstances.

[23] *BW Offshore* cautions on the application of *Bielby*, particularly in considering any uplift in costs orders to a higher than usual amount.[13] However, as I later discuss, the present case does not call for a higher than usual costs award.

Should an award of costs be made?

[24] BFDL was unsuccessful at first instance and on appeal and is therefore more vulnerable to an order for costs.[14]

[25] Despite the appeal being declined, BFDL put up a largely responsible case. I note QLDC's acceptance that the landscape and planning evidence from BFDL raised valid arguments. However, I consider BFDL should answer in costs in view of some aspects.

[26] BFDL's case on relief significantly evolved both in the lead up to and during the course of the hearing. In particular, BFDL introduced significant changes to plan provisions, including in rebuttal planning evidence and closing submissions. That imposed undue costs on QLDC and resulted in prejudice to QLDC's ability to meaningfully engage with and respond to the relief sought.

---

12 [1991] 1 NZLR 587.

13 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577. There is a helpful discussion of this in the decision of Judge Steven in *The Canyon Vineyard Limited v Central Otago District Council* [2021] NZEnvC 195.

14 *Equipment & Support v Waitaki District Council* C162/99.

[27] The modification in closing submissions meant the relief sought was materially different to that which BFDL's planner recommended in rebuttal, QLDC did not have fair opportunity to put matters to its planning witness, and that requested policy was not sufficiently or soundly supported by evidence. I note also that the Anderson Lloyd memorandum was found not to be helpful and was assigned no weight.[15] While I have highlighted these two matters in particular, I accept that it is the effect of the changing relief in the wider sense that impacted on the case being advanced by BFDL, and the ability of QLDC to respond.

[28] Plan change processes are often complex, with multiple parties representing a variety of competing interests. There is commonly a substantial degree of public interest in such processes. The evaluation of options is a mandatory aspect of plan processes and parties should not be penalised for advancing alternatives for consideration, even if their alternatives are not ultimately accepted.[16]

[29] In this case, BFDL's case was not so much concerned with public interest considerations but with advancing BFDL's site-specific interests in regard to its land. BFDL was of course entitled to advance its interests and it is not uncommon for parties to seek to do that, for instance in pursuing advantageous rezoning of their land, in plan change appeal processes. The significance of this personal interest characteristic of BFDL's case is that the presumption against a costs award in plan proceedings is weakened.

[30] I consider this one of the factors that puts this case outside the realm of the normal run of plan change cases.

[31] Parties in any Environment Court proceeding have a responsibility to assist to ensure proceedings are fair and efficient. The belated changes BFDL pursued to its requested relief, including through rebuttal planning evidence and closing submissions that went beyond that evidence, had a direct and I find unfair impact

---

15 [2021] NZEnvC 189 at [78].

16 *St Heliers Capital Limited v Kapiti Coast District Council* [2014] NZEnvC 162 at [15].

on QLDC, in cost and efficiency terms, bearing in mind QLDC's role as respondent in the proceeding. I also note that overall, the court declined the appeal.

[32] QLDC's costs fall on ratepayers and it is in the interests of justice and the public interest that this impost is ameliorated fairly through an appropriate costs award.

[33] For the above reasons, I determine that it is reasonable for there to be a costs award against BFDL, notwithstanding the court's usual practice on plan appeals.

Quantum

[34] The costs incurred by QLDC total $67,406.50 (excluding GST), being:

(a) $44,771.50 in legal costs (excluding fees associated with mediation and preparation of the costs application); and
(b) $22,635.00 in expert costs.

[35] QLDC seeks an award of increased costs, 50% of actual and reasonable costs incurred, given the relevant above-noted factors present in this case. QLDC submits that the presence of each of the *Bielby* factors, individually, may justify a high than usual costs award. QLDC submits that the collective presence of *Bielby* factors in this matter warrants an award sitting in the increased costs category.

[36] Considering the proceedings as a whole, I consider BFDL should answer costs to a modest degree. In terms of the bands noted in *Thurlow,* I find that an award at the higher end of the 'standard' band is appropriate. That is, I find that BFDL should contribute 30% of QLDC's total claimed costs is just and reasonable. I derive that somewhat higher award in the standard band by reason of the aggravating features of BDFL's conduct in these proceedings that I have referred to. Overall, I consider this to be fair and reasonable outcome in the

circumstances. I have rounded down the final amount for convenience.

Outcome

[37] Under s285 RMA, Bridesdale Farm Developments Limited are to pay Queenstown Lakes District Council the sum of $20,220.00, as a contribution towards its costs.

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

J J M Hassan
Environment Judge