IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 203

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declarations under section 311 of the Act
BETWEEN	JAMES AND REBECCA HADLEY
	(ENV-2020-CHC-84)
	Applicants
AND	WATERFALL PARK DEVELOPMENTS LIMITED
	First Respondent
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Second Respondent

Court:	Environment Judge J J M Hassan, sitting alone pursuant to s279(1) of the Act
Hearing:	In Chambers at Christchurch
Last case event:	14 April 2022
Date of Decision:	10 October 2022
Date of Issue:	10 October 2022

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Waterfall Park Developments Limited is ordered to pay James and Rebecca Hadley costs in the sum of $11,077.00

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 5 March 2021, the court granted an application for declarations lodged by James and Rebecca Hadley ('the Hadleys') in respect of tree planting undertaken by Waterfall Park Development Limited ('WPDL') along the western boundary of some land[1] it owns adjacent to the Queenstown Trail.[2]

Application for costs

[2] The Hadleys filed an application for costs on 25 March 2021, seeking an award of $16,782.62 against WPDL. This represents 50% of legal and expert costs incurred.

[3] The Hadleys seek costs on the basis that:

(a) WPDL advanced arguments without substance, as its grounds of opposition were destined to fail because of the nature of the evidence lodged in support; and
(b) WPDL took a technical point in support of its primary position and failed.

[4] The Hadleys submit that an award of costs is appropriate because their only

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1 Lot 4 Deposited Plan 540788.
2 [2021] NZEnvC 18.

recourse to resolve the planting issue was to seek declaratory relief. As they do not have the authority of an enforcement officer, they say that they acted on what they considered was a disregard for the Proposed District Plan ('PDP') provisions in the only way possible for them. Ultimately, they were successful in obtaining the relief sought.

[5] The Hadleys also consider that they should not have been put into the position of making an application for declarations because WPDL has obligations to ensure compliance with the RMA. However, because they could not rely on WPDL to meet its RMA obligations, they brought declaratory proceedings to address the apparent non-compliance. Moreover, as a result of the proceedings, the Hadleys consider that they benefited the community by improving public amenity in the Wakatipu basin.

High Court appeal

[6] On 26 March 2021, WPDL filed a notice of appeal in the High Court against the court's decision. I accordingly directed that the costs timetable was suspended pending the outcome of the High Court proceeding.[3] The High Court's decision was issued on 7 March 2022, with the costs timetable resuming on 24 March 2022.[4]

WPDL response

[7] WPDL filed its response to the Hadleys' application on 7 April 2022.

[8] WPDL submits that an award of costs is not appropriate, because the Hadleys chose to pursue declaration proceedings despite there being other options. It says there was no obligation on the Hadleys to defend the provisions of the PDP, nor was the recourse available to them limited to declaratory relief or

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3 Directions of the court dated 26 March 2021.

4 Directions of the court dated 24 March 2022.

enforcement proceedings. Rather, it submits that it is the Council's responsibility to enforce PDP provisions, and in this process the party in breach incurred the cost of resolving the situation. Accordingly, if the Hadleys had adopted the usual Council-led process, then they would not have incurred costs.

[9] WPDL also submits it was unaware that Queenstown Lakes District Council ('QLDC') did not oppose the declarations, as it took no steps to contact WPDL when it was made aware of the tree planting. Furthermore, as there are a number of rural properties who often plant trees and will not know this is a non-complying activity, WPDL consider the decision will be of considerable assistance to QLDC. Hence WPDL submits that an award of costs is not warranted.

[10] If the court is minded to award costs, WPDL submit that the starting point should be $8,329.30, being 50% of $16,658.60. This is because it was not aware of QLDC's position until 31 July 2020, thus considers it unfair that it pay for costs incurred prior to that date.

[11] WPDL refutes the Hadleys' submission that *Bielby* factors are present because the court would not have undertaken a careful legal analysis of the relevant objectives and policies to determine how the relevant rules were applied if this were the case. Moreover, WPDL submits thar Mr Meehan's evidence reflects the 'real world' view that one purpose of tree planning is to add value to a property, thus it is not unreasonable to consider it as part of a farming activity.

[12] WPDL also submits that because it had the benefit of a resource consent from QLDC in late 2019 that recorded planting some trees was a permitted activity, it was unclear about the application of those rules in the Wakatipu Basin.

QLDC response

[13] In an email to the court on 26 March 2021, QLDC confirmed that it does

not seek costs on the matter.[5]

Hadleys reply

[14] Regarding their obligation to pursue declarations, the Hadleys reiterate that they had a right to take enforcement action to determine the lawfulness of the planting. Moreover, the Hadleys explain that they followed the usual Council-led process by notifying QLDC of the alleged unlawful planting but did not hear further despite following up.

[15] The Hadleys submit that WPDL had other options regarding tree removal available to it following the issue of the notice on 5 May 2020. They also submit that WPDL's assertion that it would have behaved reasonably if QLDC brought to its attention the unlawfulness of the tree planting lacks credibility, because it appealed to the High Court.

[16] In response to WPDL's submission on the appropriate costs starting point, the Hadleys submit that this submission appears based on the idea that WPDL may have changed its position. They submit this is not credible.

Section 285 RMA and related principles

[17] Under s285 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 confers a broad discretion.[6] However, the High Court in *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* ('*BW Offshore*') highlighted the importance of not being inconsistent, when exercising the discretion, with well-established principles.[7] In particular, as part of a wider civil justice system, the court should take into account more general principles that have

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5 Email from Queenstown Lakes District Council dated 26 March 2021.

6 *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 (HC).

7 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577.

been developed by the courts when they are relevant.[8]

[18] In the exercise of the discretion in s285, the initial enquiry 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.[9]

[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 court considers that just.[10]

[20] The Environment Court Practice Note 2014 provides guidance for that discretion.[11] Clause 6.6(d) also 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.

[21] In *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*,[12] the High Court noted that in practice Environment Court costs have tended to fall into three bands:

(a) standard – 25-33% of actual and reasonable costs claimed;

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8 *BW Offshore* at [19].
9 *Re Queenstown Airport Limited* [2019] NZEnvC 37.
10 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* (1996) 2 ELRNZ 138.
11 *Canterbury Regional Council v Christchurch City Council* C134/08.
12 [2013] NZHC 2468.

(b) higher than normal costs – where aggravating or adverse factors might be present, such as those identified in *DFC NZ Ltd v Bielby*;[13] and

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

[22] *BW Offshore* cautions on the application of *Bielby*, particularly when considering any uplift in costs orders to a higher than usual amount.[14] However, the High Court findings in *BW Offshore* appear coloured by the context of a public body engaged in litigation with a private actor, a situation which does not arise here.[15]

Should an award of costs be made?

[23] WPDL was unsuccessful at first instance and is therefore more vulnerable to an order for costs.[16] WPDL did not conduct an irresponsible case, albeit in a context where the court ultimately declared its tree planting was unlawful. The court undertook a careful evaluation of all of the evidence to determine that. However, for the following reasons, I conclude that an award of costs against WPDL is warranted.

[24] It is just for the Hadleys to receive some compensatory costs, on the basis that they went to the lengths to pursue this matter at both the court and before QLDC to determine the status of WPDL's tree planting. As neighbours of the Trail, they were directly affected by the actions of WPDL. It is reasonable that they would query whether this tree planting was in contravention of the RMA. Accordingly, their pursuit of this application regarding WPDL's activities would ultimately have incurred costs that I consider would be at least partially recoverable

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13 [1991] 1 NZLR 587.

14 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 277.

15 *The Canyon Vineyard Limited v Central Otago District Council* [2021] NZEnvC 195.

16 *Equipment & Support Ltd v Waitaki District Council* ENVC Christchurch C162/99, 30 September 1999.

by WPDL.

[25] The court's substantive decision also concluded that WPDL's tree planting was not compliant with the RMA. This is despite WPDL's obligation to ensure its activities on the Site comply with the RMA.

[26] For the reasons outlined above, I consider an award of costs to the Hadleys is warranted.

Quantum

[27] Having determined that an award of costs is appropriate, I now move to quantum. The costs incurred by the Hadleys total $22,565.24, being:

(a) $32,644.09 in legal costs; and
(b) $921.15 in expert costs.

[28] The Hadleys seek higher than normal costs, 50% of actual and reasonably costs incurred, given the presence of the above-noted *Bielby* factors in this case.

[29] As noted above, WPDL consider that if an award of costs is appropriate, it should not answer for any costs incurred prior to 31 July 2020, on the basis that it was not aware of QLDC's position on the application before then. As noted in *Vodafone New Zealand Limited v Wanganui District Council*, it is implicit that the costs the court may award must be costs arising directly out of the proceedings.[17] Applying this principle, it is not unreasonable to include costs incurred on 29 June 2020, as the invoices demonstrate this was when the Hadleys began preparation of the declaration proceedings. Moreover, WPDL was aware of the application for declaration on this date.

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17 [2010] NZEnvC 434 at [33].

[30] Having considered the proceedings, I consider that a quantum of 33% is appropriate. I agree with the Hadleys that WPDL proceeded with an argument that was not meritorious. In its substantive decision, the court concluded that WPDL's evidence to support its position that the planting would serve a future farming use was speculative.[18] However, I do not consider that these factors alone warrant a higher than usual award.

[31] Rather, I consider an award of 33% is fair and appropriate in this circumstance. While this is at the top of the standard band as per *Thurlow*, it is fairly reflective of the contribution made by the Hadleys in bringing clarity to an unlawful position of WPDL's making. I have rounded the final amount for convenience.

Outcome

[32] Under s285 RMA, Waterfall Park Developments Limited are to pay James and Rebecca Hadley the sum of $11,077.00, as a contribution towards its costs.

[33] 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

18 *Hadley v Waterfall Park Developments Limited* [2021] NZEnvC 18 at [55].