IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2017-442-39
[2017] NZHC 2665

UNDER THE	The Declaratory Judgments Act 1908 and the Judicial Review Procedure Act 2016
IN THE MATTER OF	An application to determine a question of law about the legality of the Resource Management (Exemption) Regulations 2017
BETWEEN	BROOK VALLEY COMMUNITY GROUP INCORPORATED Plaintiff
AND	BROOK WAIMARAMA SANCTUARY TRUST First Respondent
AND	MINISTER FOR THE ENVIROMENT Second Respondent
AND	NELSON CITY COUNCIL Third Respondent

Counsel: S J Grey for Plaintiff
B M Nathan and S Galbreath for First Respondent
N C Anderson for Second Respondent
R E Ennor for Third Respondent

Judgment (On the papers): 31 October 2017

JUDGMENT OF CHURCHMAN J
(COSTS)

Introduction

[1] In my substantive decision on 4 August 2017 I gave judgment in favour of the respondents on each ground.[1] I recorded that there was no reason why costs and disbursements should not follow the event and in the event the parties could not agree, set out a timetable for the parties to file memoranda in that regard.[2] The parties have failed to come to an agreement as to costs.

[2] I gave a further decision refusing an application for a stay and interim relief for the plaintiff on 15 August 2017 (the stay application).[3] I granted the respondents leave to file costs memoranda in relation to that decision. This decision was upheld by the Court of Appeal on 31 August 2017.[4]

Submissions

[3] Each of the respondents have filed memoranda and submitted that costs for each respondent ought to be calculated on a 2B basis. I agree. Judicial review cases are normally allocated a 2B category in the costs regime.[5]

[4] The Trustees of the Brook Waimarama Sanctuary Trust (the Trust, the first respondent) argued that costs ought to follow the event, that it had been put to significant expenses and, despite the urgency with which the matter had been heard, this did not reduce the time and costs spent in preparation. The Trust seeks 2B costs and disbursements of $25,073.14 in relation to the substantive proceeding and costs of $1,338 in relation to the stay proceeding (totalling $26,411.14).

[5] The Minister for the Environment (the second respondent) originally sought 2B costs and disbursements in relation to the substantive proceeding and the stay proceeding of $27,059.41. The plaintiff objected to the second respondent claiming

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1 *Brook Valley Community Group Inc v Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1844.
2 At [122].
3 *Brook Valley Community Group Inc v Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1947.
4 *Brook Valley Community Group Inc v Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZCA 377.
5 Graham Taylor *Judicial Review a New Zealand Perspective* (3rd ed, LexisNexis, Wellington 2014) at [8.23].

the travel costs of counsel flying to Wellington for the hearing. The second respondent no longer seeks recovery of those travel disbursements (totalling $849.88). The total sought by the second respondent is thus $26,209.53 (being $24,195.50 for the substantive proceeding, $1338 for the stay application and $676.03 in disbursements).

[6] The third respondent, the Nelson City Council, seeks costs and disbursements on a 2B basis of $23,723.68 (being $22,634.50 for the substantive proceeding and $1089 in disbursements).

[7] Ms Grey, for the plaintiff, in submissions dated 8 September 2017, opposed any order of costs until the Court of Appeal has heard and determined the appeal from the substantive judgment. Ms Grey cited no principle or authority that a costs award for a substantive proceeding should be postponed until the determination of its appeal, nor could I find any such principle. Accordingly I will proceed to set costs.

[8] Ms Grey also made a series of written submissions, the majority of which contained serious, unsubstantiated and inappropriate allegations against the first respondent regarding the aerial poison drop which followed the decision of this Court.

[9] These allegations are entirely irrelevant to the costs decision. Costs are to reflect how parties acted during the litigation, not reflect events that have occurred as a consequence of orders made in the proceeding.[6] The principle is that a party who fails with respect of a proceeding or an interlocutory application should pay costs to the party who succeeds.[7] This principle will only be departed from in an exceptional case.[8]

[10] Ms Grey also submitted that she was too busy to file a more detailed memorandum and requested further time to "enable a fuller response and supporting

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6 *Diagnostic Medlab Ltd v Auckland District Health Board* HC Auckland CIV-2006-4040-4724, 13 June 2007 at [12]. See also *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188, (2006) 1 TCLR 544 (CA) at [160].

7 High Court Rules 2016, r 14.2.

8 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, citing *Mansfield Dryceaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA) at [27].

affidavit". Ms Grey did not explicitly seek leave to provide further memorandum and none was given. In the seven intervening weeks no further submissions have been filed for the plaintiff.

[11] The respondents, in a joint memorandum dated 11 September 2017, submitted that the plaintiff had had adequate notice and time to prepare its opposition to the costs orders sought. The second respondent also at this time agreed to not pursue the travel disbursements incurred by its second counsel.

Public interest exception to costs award

[12] Ms Grey's strongest argument for the departure from a normal costs award on a 2B basis was that this was a public interest, bona fide case, and that in novel and arguable public interest cases access to justice ought to be prioritised by the Courts. No authorities were cited for the plaintiff.

[13] There exists a line of authority that in a "public interest" case, costs can be reduced.[9] In *Taylor v District Court at North Shore (No 2)* the public interest exception to the normal rule that costs follow the event was held to be available where the case concerns:[10]

> … a matter of genuine public interest, [has] merit and [is] of general importance beyond the interests of the particular unsuccessful litigant. To obtain the benefit of the exception in rule 14.7(c), the unsuccessful litigant must also have acted reasonably in the conduct of the proceeding.

[14] "Genuine public interest" means there cannot be a pecuniary profit for the plaintiff in succeeding,[11] and means the plaintiff cannot be using the proceedings as a "campaign" or "crusade" against a public body.[12]

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9 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1527 citing *Titahi Bay Residents Association Inc v Porirua City Council* HC Wellington CIV 2007-485-1933, 18 October 2007 at [8].

10 *Taylor v District Court at North Shore (No 2)* HC Auckland CIV-2009-404-2350, 13 October 2010 at [9], affirmed by the Court of Appeal in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [11].

11 *McNicholl v Auckland Regional Authority* HC Auckland A 952/85 & 1164/85, 24 February 1987.

12 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [14].

[15] As to whether there was a "genuine public interest" in these proceedings, I adopt the wording of Wylie J in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* where he said:[13]

> In the present case, the proceedings were brought in the public interest, at least insofar as the plaintiffs saw it. They were not brought for personal gain …

[16] Here, the plaintiff's members perceived themselves as acting in the public interest as they saw it. However, like in *Coro Mainstreet*, there had been extensive efforts to liaise and consult by the respondents responsible for the regulations relating to the use of Brodifacoum. Wylie J in that case listed the extensive efforts the respondents had undertaken to liaise with the plaintiff and address its members' concerns. He held that:[14]

> at the end of the day [there was] a blindness by the plaintiff to expert views, particularly those obtained by the Council. There was a degree of obstinacy in the plaintiff's position, albeit that it raised matters of public interest in Coromandel, and of some importance to that local community. Incorporated societies are not immune from costs orders and they go into litigation aware of the relevant High Court Rules relating to costs.

[17] The present case is highly analogous. A "blindness" by the plaintiff and its members to expert views has characterised the entirety of the proceeding and the subsequent application for a stay and interim orders. As an incorporated society the plaintiff is not immune from costs orders, and is aware of the relevant High Court Rules relating to costs.

[18] Recognising the responsible manner in which the proceedings were run, and their public interest element, Wylie J in *Coro Mainstreet* reduced the costs awarded to each of the respondents by ten per cent. He refused to reduce further, recognising that any reduction would fall on rate payers and shareholders.

[19] The Court of Appeal upheld this decision and that a ten per cent costs discount was appropriate to reflect the public interest in the case.[15]

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13 *Coro Mainstreet (Inc) v Thames-Coromandel District Council,* above n 9, at [7].
14 At [8].
15 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665.

[20] In the present case I am not persuaded that the plaintiff ran its case in the most reasonable manner. However I am prepared to offer it the benefit of the doubt.

[21] As indicated above, it has been held that where a body formed to pursue an issue of public interest is carrying on a "campaign" or "crusade" it no longer qualifies as a "public watchdog".[16] The subsequent events which have characterised the dispute between the plaintiff and the Trust seem to me to demonstrate a "crusade" by the plaintiff. However, as I have already indicated, subsequent events to the proceedings should not affect the award of costs.

[22] Therefore, in accordance with *Coro Mainstreet* I will allow a 10 per cent discount on the substantive proceeding costs of the second and third respondents in recognition of the fact that the plaintiff is an incorporated society and was pursuing the judicial review in order to ensure that public powers were exercised in a responsible and accountable manner.

[23] Having obtained a full and reasoned judgment of this Court the plaintiff cannot claim to have been acting in the public interest in immediately applying for a stay of that substantive decision and I make no discount for those costs incurred by the first and second respondent.

[24] The Trust is a charitable body working to establish a sanctuary for New Zealand birds and restore, to as natural state as possible, a functioning ecosystem. The Trust has also proceeded in, and is also representative of, the public interest. I will not make a public interest discount in regards to the costs incurred by the first respondent.

[25] It was marginal whether or not the Trust was the appropriate respondent for this proceeding. The Trust was involved in the judicial review because of its decision to proceed in accordance with the law as it stood at the time. This is not a judicially reviewable decision. Instead, the Trust was reviewed on the narrow basis as to whether there was a factual basis for its assertion that the fence was "predator-

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[16] Taylor, above n 5, at [8.24] citing *New Zealand Climate Science Education Trust v National Institute of Water and* Atmospheric Research Ltd [2013] NZCA 555 at [14].

proof".[17] I held that there was an adequate evidential basis to find that the fence was "predator-proof" as required by law. Having read the notice of appeal this factual decision of the Trust is not under appeal and will not be determined by the Court of Appeal.

Costs awards

[26] I order the plaintiff pay the first respondent the full amount of 2B costs and disbursements sought for the substantive and stay proceedings, being $24,195.50 for the substantive proceeding, $1338 for the stay proceeding and $877.64 in disbursements. The total to be paid is therefore $26,411.14.

[27] The second respondent sought costs of $1338 in relation to the stay and $24,195.50 in relation to the substantive proceeding and, having agreed to remove the travel expenses, disbursements of $676.03. I apply a ten per cent discount to the $24,195.50 sum, arriving at a final figure of $21,775.95. The second respondent is thus entitled to a total costs sum of $23,789.98.

[28] The third respondent seeks $22,634.5 in costs and $1089 in disbursements. Applying the ten per cent public interest discount to the former, the total sum to be paid to the third respondent is $21,460.05.

Conclusion

[29] The plaintiff is to pay the following costs to the respondents:

(a) $26,411.14 to the first respondent;

(b) $23,789.98 to the second respondent; and

(c) $21,460.05 to the third respondent.

Churchman J

[17] *Brook Valley Community Group Inc v Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1844 at [35]–[44].

Solicitors:
S Grey, Nelson for Plaintiff
Duncan Cotterill, Nelson for First Respondent
Crown Law Office, Wellington for Second Respondent
R Ennor, Nelson for Third Respondent