BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 217

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals pursuant to clause 14 of the First Schedule of the Act
BETWEEN	TROJAN HOLDINGS LIMITED
	(ENV-2018-CHC-122)
	SKYLINE ENTERPRISES LIMITED
	(ENV-2018-CHC-123)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan
Hearing:	In Chambers at Christchurch
Date of Decision:	21 December 2020
Date of Issue:	21 December 2020

DECISION AS TO COSTS

A: Under s285, RMA[1], Queenstown Lakes District Council is ordered to pay to Trojan Holdings Limited and Skyline Enterprises Limited jointly costs of $40,000.

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

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[1] Resource Management Act 1991.

REASONS

Introduction

[1] Appeals by Trojan Holdings Limited ('Trojan') and Skyline Enterprises Limited ('Skyline') against a decision of the Queenstown Lakes District Council ('QLDC') in the staged review of the Queenstown Lakes District Plan ('PDP') were allowed.[2] The appeals concerned PDP r 12.5.7 and related provisions on 'Identified Pedestrian Links' ('Links Provisions'). The hearing of these appeal points was allocated to Topic 8 of the PDP's Stage 1 appeals.

[2] Trojan and Skyline own Queenstown CBD commercial premises that have, for many years, hosted informal ground floor pedestrian accessways between streets. Under the PDP, in Figure 1 in Ch 12, these were denoted Links 5 and 6 in a network of 'Pedestrian Links'. The force in that was in the application of related development restrictions in order to maintain continuance of this network. In allowing the appeals, the court directed QLDC to delete Links 5 and 6 such as to release Trojan's and Skyline's properties from related restrictions. Costs were reserved.

[3] Trojan and Skyline jointly seek costs against QLDC of $47,509.50 being 50% of total costs incurred.[3] No invoices are supplied.

Trojan and Skyline submissions

[4] Trojan and Skyline submit that the Links Provisions amounted to an unjustified taking of private property for public benefit, at significant economic cost to them as the property owners and without prior consultation or compensation. They note that the court's findings in the appeal endorse the position they put at all stages of the review, including in the hearing before QLDC's independent commissioners.[4] In essence, they say their case that the provisions were a misuse of rule-making powers as a form of de facto designation was upheld by the court.[5]

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[5] They refer to the court's findings to the effect that the Links Provisions stand apart

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2 [2020] NZEnvC 79 ('Decision').

3 Application for costs on behalf of the appellants dated 13 July 2020.

4 Application for costs on behalf of the appellants dated 13 July 2020 at [23].

5 Application for costs on behalf of the appellants dated 13 July 2020 at [11].

from those other types of restrictions in their specific purpose of imposing controls over private land in order to secure rights for public usage of that land.[6] They say they have been targeted "simply because they happened to have provided such links voluntarily".[7]

[6] As to proposed standard 12.5.7.4, which states "in all cases, lanes and links shall be open to the public during all retailing hours", they note the court's observation that "on its face, that performance standard would appear to intrude into statutory and common law on property rights and trespass".[8] They submit that it is unusual for a court to advise a council that a rule and a standard it is seeking to impose faces a risk of being ultra vires and intruding into property law rights.[9]

[7] Trojan and Skyline say a further justification for a costs' order is the inadequacy of QLDC's evidence. In particular, they refer to findings concerning the urban design evidence of Mr Church as being "conclusory" and "not supported by user survey or other data" and leading to a fundamental "gap in underpinning evidence".[10]

[8] As for Link 5 through Trojan House, they note the court preferred Mr Freeman's evidence that the adjacent link (Cow Lane) is the more appropriate. They note the related finding that, at best, Link 5 would provide only marginal utility given its proximity to Cow Lane.

[9] As for the Skyline building, they note the court's findings that Link 6 would impose physical constraints, as well as considerable costs on any future redevelopment of the site.[11] Furthermore, they note the court's findings as to the lack of "any sound basis for" Skyline having to bear the risk of providing a link simply because of the long history of usage of Skyline Arcade" and lack of evidence to suggest Skyline had any obligation under any condition of consent, easement or other legal instrument to provide such a link.[12] Counsel points out that arguments to the same effect were presented by Skyline throughout the PDP review process.[13]

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6 Decision at [76].
7 Reply submissions for the appellants dated 31 July 2020 at [12].
8 Decision at [77].
9 Reply submissions for the appellants dated 31 July 2020 at [6].
10 Decision at [100].
11 Application for costs on behalf of the appellants dated 13 July 2020 at [27].
12 Decision at [118].
13 Application for costs on behalf of the appellants dated 13 July 2020 at [29].

[10] The appellants note that the court accepted their submissions that r 12.4.6 itself enabled QLDC to consider the provision of pedestrian links in assessing any consent applications for buildings.[14]

[11] The appellants submit that a higher than normal award, at 50%, is appropriate in that QLDC advanced arguments without substance (as identified as a factor in *Bielby*).[15] Furthermore, they submit a higher award is justified by the fact that this is the second occasion both appellants have had to oppose QLDC's attempted to impose such restrictions on their properties (the first being in the 1995 review when the provisions were removed following mediation).

QLDC submissions

[12] QLDC says it has consistently acted objectively and in the public interest to its consideration of the important environmental values that it sought to maintain through this proceeding.[16] QLDC notes that the decision to add Links 5 and 6 was in response to submissions seeking relief and on the recommendation of the hearing commissioners that adding Links 5 and 6 was the most appropriate way to achieve the objectives and policies of the PDP, as required by the RMA.[17]

[13] QLDC says its position was supported by appropriate expert evidence. The key question before the court was which of the options before it was the most appropriate in achieving the PDP's objectives (and implementing policies) for the Trojan and Skyline sites. In coming to its decision, the court considered all competing factors and "notwithstanding the Council's evidence and the decision of the 'highly experienced independent hearing commissioners', came to a different conclusion".[18]

[14] QLDC submits that matters undertaken prior to these proceedings (including mediation) are irrelevant to a consideration of costs. If anything, the fact that the same arguments were traversed, and a different outcome reached by the hearing commissioners, shows that QLDC's position was not without substance or merit.[19]

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14 Application for costs on behalf of the appellants dated 13 July 2020 at [26].
15 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.
16 Costs submissions for QLDC dated 23 July 2020 at [10].
17 Costs submissions for QLDC dated 23 July 2020 at [10].
18 Costs submissions for QLDC dated 23 July 2020 at [11].
19 Costs submissions for QLDC dated 23 July 2020 at [17].

Similarly it submits that the appellants' claims they have been unfairly singled out are without merit[20]. It submits that a control having an economic impact does not mean it is an unusual restriction on the appellants' rights.[21] It acknowledges[22] that r 12.5.7 is different from other building controls but submits this is only a matter of degree. It notes that imposing some control over the exercise of private development rights for public benefit, is not of itself unusual. Other common examples include setbacks or height restrictions. As for the court's observation that QLDC would need to be cautious "in applying standard 12.5.7.4 in the imposition of related consent conditions to ensure they were intra vires", QLDC submits that this does not signal the rule is unusual in that consent authorities must always ensure that consent conditions do not overreach.[23]

[15] QLDC points out that the imposition of the Links Provisions over the appellants' properties was to maintain the existing environment. That was by providing a restricted discretionary activity rule triggered by redevelopment that would not retain the existing accessways.[24]

[16] QLDC submits that it is invalid for Trojan and Skyline to seek to refer to the 1995 plan review. In particular, this is not a case of QLDC "having a second bite at the cherry". It says it would be "extraordinary for costs to be awarded in reliance on events that occurred in 1995".[25]

[17] While acknowledging that the court did not prefer its case, QLDC submits that does not mean the position it advanced was without substance or merit or that any of the *Bielby* factors have been established.[26] It submits that a costs' award is not justified simply on the footing that QLDC's interpretation of the PDP was not accepted.[27] It further submits that the appellants cannot properly maintain QLDC's case lacked an evidential basis or was unmeritorious or without substance.[28] Acknowledging that the court identified a gap in Mr Church's evidence, QLDC submits that does not amount to inappropriateness or blameworthiness on the part of the QLDC.

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20 Costs submissions for QLDC dated 23 July 2020 at [10].
21 Costs submissions for QLDC dated 23 July 2020 at [8].
22 Costs submissions for QLDC dated 23 July 2020 at [6].
23 Costs submissions for QLDC dated 23 July 2020 at [6].
24 Costs submissions for QLDC dated 23 July 2020 at [7].
25 Costs submissions for QLDC dated 23 July 2020 at [9].
26 Costs submissions for QLDC dated 23 July 2020 at [12].
27 Costs submissions for QLDC dated 23 July 2020 at [16].
28 Costs submissions for QLDC dated 23 July 2020 at [14].

[18] QLDC is firm that no costs' award is appropriate. However, in the event the court decides to award costs, it submits this should only be in the 25-33% range.

Trojan and Skyline reply

[19] In their reply, Trojan and Skyline largely reiterated their primary submissions. As for Mr Church's evidence, they submit that QLDC understates the true force of the court's findings that "the gap" of "underpinning evidence" in support of the Trojan link was "fundamental". They say the court made similar findings in regard to Link 6 and Skyline, finding the PDP approach both inequitable and inefficient. They note that the court found the evidence overwhelmingly favoured granting the relief sought by the appellants.[29]

Section 285 RMA and related principles

[20] 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. That is a broad discretion. I am guided by a body of general principles developed through the case law and summarised in the court's Practice Note. Relevantly, the Practice Note states that:

(a) where an appeal against a proposed policy statement, plan, or plan change under Schedule 1 to the RMA has proceeded to a hearing, costs will not normally be awarded to any party;[30] and

(b) 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.[31]

[21] Costs' awards in the Environment Court tend to fall into three broad categories, which are not dissimilar to the standard, increased and indemnity costs regime used in that court:[32]

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29 Reply submissions for the appellants dated 31 July 2020 at [14].

30 Environment Court Practice Note 2014 at 6.6(b); *Thomas v Bay of Plenty Regional Council* A060/08.

31 Environment Court Practice Note 2014, at Clause 6.6(c).

32 *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468; as acknowledged in the High Court in *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4 at [35].

(a) standard costs, which generally fall within a comfort zone of 25-33% of costs actually incurred;
(b) higher than normal costs, where particular aggravating or adverse factors might be present such as those identified in *Bielby*; and
(c) indemnity costs, which are within the court's jurisdiction to award but which are awarded only rarely, in exceptional circumstances.

Consideration

Is an award of costs appropriate?

[22] I am mindful of the public policy underpinnings of the court's typical reluctance to award costs to successful appellants in plan appeal proceedings. It reflects an understanding that, as the planning authority, Councils bear a higher statutory duty and burden in plan-making. Inherently, there are matters of judgment and degree in the determination of the most appropriate planning outcome, whether at first instance or in a de novo appeal. As respondents, Councils are subject to significant competing demands on their limited, largely ratepayer backed, resourcing. In terms of those matters, it is important that Councils do not bear an unreasonable risk of costs' awards simply by reason that planning approaches they defend or advance are not favoured in appeal decisions. As such, a higher threshold than for typical resource consent appeal hearings is appropriate.

[23] However, there are particular matters in the mix here that satisfy me that threshold is overcome in this case.

[24] In terms of the Practice Note, the Links Provisions imposed an unusual restriction upon the appellants' rights as owners of Trojan House and Skyline Arcade. As the appeal decision sets out, that was in the fact the provisions, through the addition of Links 5 and 6, target those properties with relatively restrictive development controls that do not apply to most other CBD commercial properties. QLDC makes something of the fact that r 12.5.7 conferred restricted discretionary activity status, in essence a category of consent that can be granted following consideration of specified matters. However, as the findings in the decision traverse, that activity classification still results in a position whereby Trojan and Skyline would be materially disadvantaged, relative to other commercial property owners in Queenstown CBD, in terms of their development prospects and related costs. In those terms, and also as the appeal decision finds, the

Links Provisions are not akin to height limits or set back controls, as QLDC has again argued. Rather, they are fundamentally inequitable.

[25] Furthermore, their related standards, on their face, would have intruded into statutory and common law on property rights and trespass. QLDC's argument that consent hearing commissioners regularly consider how to ensure consent conditions remain intra vires does not adequately answer this. Rather, on their face, the standards invite hearing commissioners into error in those terms.

[26] I bear in mind that the existing accessways through Trojan House and Skyline Arcade have been in use by the public for many years. However, on the evidence, that was by informal licence not backed by easement or consent conditions. In essence this is for convenience of the public and at the good will of Trojan and Skyline.

[27] However, the provisions on appeal stand apart in their imposition of unusual controls on the appellants' property rights.

[28] Being satisfied on that aspect of the Practice Note, I am also satisfied that this is a justifiable exception to the norm in view of the paucity of QLDC's supporting evidence. Again, I am mindful of the limits of Council resourcing in plan hearing and the expectation that all parties properly assist the courts.

[29] However, what distinguishes this case is the particular nature of the Links Provisions in their targeting of the appellants' properties in the way I have described. QLDC properly point out that Links 5 and 6 were added by the independent commissioners' decision in response to submissions seeking that outcome. Neither submitter joined the appeal, yet QLDC elected to present a case for retention of those links. Having made that election, it was responsible for ensuring the court had a sufficient evidential basis including in terms of the requirements of s32 for a benefits/costs evaluation of this preferred option over other options. While the independent commissioners were highly experienced, that did not excuse QLDC from its responsibility to ensure its evidence was briefed according to the Code. QLDC's case was significantly based on urban design opinion from Mr Church that we found largely conclusory in nature insofar as Link 5 is concerned. That evidence did not abide the Code.

[30] Overarching this, there were plainly other planning options available to consider in planning terms (including another unchallenged PDP rule that we found the more

appropriate means of achieving the PDP's related objectives). Nor did it responsibly fulfil its role as respondent by calling planning evidence to scrutinise options according to the Code. That scrutiny ought to have been done well before the appeals were heard, but QLDC's planning evidence demonstrated the same narrow focus on the singular purpose of defending the Links Provisions as included in the PDP by QLDC's independent commissioners. I find that QLDC fell well short of its responsibility as respondent in these matters.

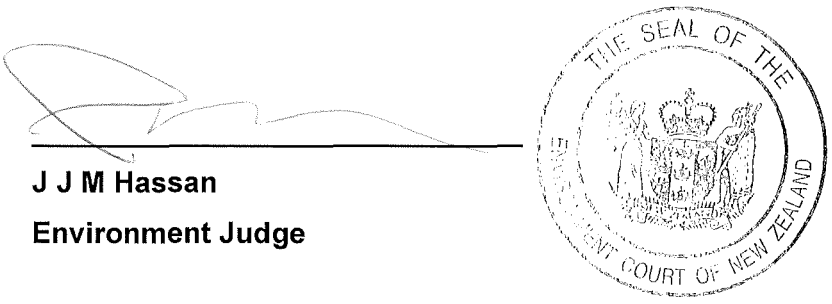
Quantum

[31] Those findings lead me to also find that an award of costs in the second *Bielby* band is appropriate. Specifically, I find the factors above are adverse and aggravating particularly in their consequences for the appellants.

[32] The appellants have not provided invoices in support of their claim. While I find the claim generally within expected bounds, mindful of the evidence and submissions heard, I have discounted the award in those circumstances.

Outcome

[33] Therefore, under s285, RMA, QLDC is ordered to pay to Trojan and Skyline jointly costs of $40,000. Under s286, RMA, this order may be filed in the District Court at Queenstown is for enforcement purposes (if necessary).



J J M Hassan
Environment Judge