IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2024] NZEnvC 074

IN THE MATTER	of an appeal under s 325A of the Resource Management Act 1991
BETWEEN	GI FINLAY TRUSTEES LIMITED BETH MARY DANIEL and BARRY CARE DANIEL (ENV-2022-AKL-000189) Appellants
AND	WESTERN BAY OF PLENTY DISTRICT COUNCIL Respondent
AND	PRIORITY TE PUNA INCORPORATED Section 274 Party

Court:	Environment Judge L J Semple sitting alone under s 279 of the Act
Hearing:	In Chambers at Wellington (on the papers)
Last case event:	12 February 2024
Date of Decision:	10 April 2024
Date of Issue:	10 April 2024

DECISION OF THE ENVIRONMENT COURT
AS TO COSTS

A. Costs awarded to Western Bay of Plenty District Council (the Council) in the sum of $80,103.

B. Costs awarded to Priority Te Puna Incorporated (PTP) in the sum of $20,004.

REASONS

Introduction

[1] The background to this matter is set out in some detail in the substantive decision (*GI Finlay Trustees Ltd v Western Bay of Plenty District Council* [2023] NZEnvC 254) and need not be replicated in full here. In short, the Appellants were the joint proponents of a plan change which secured a business/industrial park zoning for their site at Te Puna Road. This industrial park approach was secured by way of a Structure Plan and bespoke planning provisions included in the District Plan. Those provisions included a number of performance standards which required infrastructure upgrades to be completed before the site could be used for industrial activities. If such standards were not met, industrial activity would otherwise require a non-complying activity consent.

[2] Despite this, industrial activity occurred on the site from late 2015 without the performance standards being met and without such activities being authorised by way of resource consent. This led to the issuing of three abatement notices, the last of which was the subject of the current proceedings. That abatement notice required industrial activities to cease on the site by 1 November 2022.

[3] The Appellants originally sought an extension to the date for compliance of one month (to 1 December 2022) which Council declined and it was this decline that was the subject of the appeal. By the time the matter was heard the Appellants were seeking an extension to May 2024. The appeal was declined by the Court and the question of costs reserved.

Application for costs

[4] The Council has applied for 50 per cent of its legal and expert witness costs, being $200,257 in total (a claim of $100,128.50). PTP, a community group which joined the appeal as a s 274 party, has applied for all of its legal costs being $49,208.61 together with a contribution of $800 to its administrative costs, totalling a claim of $50,008.61.

[5] The Appellants filed a reply dated 2 February 2024 submitting that the legal costs for both Council and PTP were unreasonable and unwarranted. The Appellants considered that no order for costs against them should be made, but if one was to be, it would be more appropriate for costs of $37,500 to be awarded to the Council and $5,000 to PTP.

Section 285 Resource Management Act

[6] Under s 285 of the Act, the Court may order any party to pay to any other party the reasonable costs and expenses incurred by that party. The Environment Court Practice Note also sets out guidelines in relation to costs. However, it does not create an inflexible law or practice.

[7] Relevantly the Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs. The purpose of a costs award is not to penalise an unsuccessful party, but to compensate successful parties where that is just.

[8] When considering an application for costs, the Court will make two assessments. The first assessment is whether it is just in the circumstances to make an award of costs. The second assessment, having determined that an award is appropriate, is deciding the quantum of costs to be awarded.

[9] When determining quantum, the court has declined to set a scale of costs. However, while there is no scale, costs awards have generally fallen into three

categories:

(a) standard costs which generally fall within a comfort zone of 25 – 33 per cent of the costs actually incurred;

(b) higher than normal costs, where aggravating or adverse factors might be present; and

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

[10] The decision *Development Finance Corporation of New Zealand Ltd v Bielby*[1] outlined a number of factors that may be taken into account when awarding higher than normal costs:

- Where an argument or arguments are advanced which are without substance;
- Where the process of the Court is abused;
- Where solicitors or counsel have failed to comply with the requirements of the Rules or an order or direction of the Court in respect of procedural matters, especially in meeting prescribed time limits;
- Where the case is poorly pleaded or presented;
- Where it becomes apparent that a party has failed to explore the possibility of settlement when a compromise could reasonably have been expected;
- Where a party takes a technical or unmeritorious point or defence, and fails.

[11] As set out in *Goodwin v Wellington City Council* the *Bielby* factors have now come to be applied not just in determining whether higher than normal costs should be awarded but in determining whether costs should be awarded at all and, if so, at what level.[2]

---

1 *Goodwin v Wellington City Council* [2021] NZEnvC 101 at [41].

2 *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587 (HC).

[12] These factors now overlap with paragraph 10.7(j) of the Environment Court Practice Note which provides as follows:

> In considering whether to award costs and the quantum of any award, the following factors are normally considered and given weight if they are present in the particular case:
>
> i. whether the arguments advanced by a party were without substance;
>
> ii. whether a party has not met procedural requirements or directions;
>
> iii. whether a party has conducted its case in a way that unnecessarily lengthened the case management process or the hearing;
>
> iv. whether a party has failed to explore reasonably available options for settlement;
>
> v. whether a party has taken a technical or unmeritorious point and failed;
>
> vi. whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

Is an award of costs warranted?

[13] The Council submits that it is entitled to an award of costs in this matter because it had no option but to progress abatement proceedings to enforce the observance of its District Plan. Counsel cites *Auckland Regional Council v Cash for Scrap Ltd* in which the Court found:[3]

> …enforcement proceedings are not usually commenced for private gain but to protect the public interest in the environment. Therefore, a successful party may be more likely to be compensated for actions that they have effectively been forced to take. In other words, these proceedings were taken to enforce obligations that should have been known, acknowledged, and given effect to by the [person against whom the action is taken].

Council further argue that it would be unfair if the costs of taking action to enforce adherence to its plan fell on ratepayers and not on the party in breach of the plan provisions.

---

3 *Auckland Regional Council v Cash for Scrap Ltd* A5/2007, 19 January 2007 at [17].

[14] PTP argue that they were required to join the proceedings to ensure that their concerns for the environment and the community (because of the ongoing breaches of the plan) were resolved. They submit that had the site "been developed in accordance with the Structure Plan, this case would never have occurred. The community has been bled dry by this process".

[15] I accept that the Council was ultimately required to issue the abatement notice and look to enforce it to ensure compliance with the District Plan. While the Council's previous latitude in allowing activities to establish on the site without a resource consent caused the Court some concern and was the subject of comment in the substantive decision, it is clear the Council had sought to engage with the Appellants over a lengthy period prior to bringing the proceedings.

[16] I am further satisfied that it was, in part, the continued pressure brought to bear on the Council by PTP which culminated in that action, and that PTP's involvement in the proceedings was appropriate given the concerns it held.

[17] Ultimately, the Council and PTP were successful in defending against the appeal and the abatement notice as issued was endorsed. Both parties incurred significant costs in that defence and are entitled to be compensated for that.

[18] With respect to quantum, the Council argues that higher than normal costs are appropriate on the grounds that the arguments advanced by the Appellants were without substance, the appeal was an abuse of process and the Appellants failed to explore reasonably available options for settlement.

Argument without substance

[19] The Council submits that despite accepting its activities were unlawful, the Appellants attempted to argue that the Court should allow its activities to continue indefinitely. I have some reservations about this submission. The Act enables an application to be made to alter a term of the abatement notice and the date for compliance is one of those terms. It is not uncommon for more time to be given for

compliance particularly where a consent is applied for to regularise the unlawful activity that is sought to be curtailed by the abatement notice. As such, the argument being advanced that more time should be granted could be expected from the Appellants, albeit ultimately unsuccessfully in this instance. Moreover, I am not satisfied the Appellants sought an indefinite extension. Rather, they ultimately sought an extension until the resource consent was determined. Again, this is not uncommon.

[20] I do however accept that the argument regarding the consequences for tenants was unmeritorious. As the Court found, no tenant had made any attempt to find alternative premises and, as such, the argument that businesses would close and people would "lose their jobs and livelihood" lacked substance. This line of argument did not significantly increase the length of the hearing or the Council's costs but was spurious.

[21] With respect to the submission that the Appellants should not have advanced the question of environmental effects (on the basis that such effects would be considered in the resource consent hearing), I do not find this submission to be made out. In the absence of a stay while the resource consent was determined (which the Court had found could not be granted), the Court was required to consider the question of the effects of extending the time for compliance independently of the resource consent hearing.

Abuse of process

[22] The Council argues that the appeal was not a genuine attempt to challenge the time for compliance with the abatement notice but rather was an attempt to "prolong the unlawful use of the property for industrial activities so the appellants could continue to derive rental income". Council says this is evidenced by the fact that no attempts were made by the Appellants or the tenants to find alternative premises in the 14 months between the abatement notice being issued and the hearing, together with the lengthy delays in appealing the Council's decision.

[23] I accept that the process adopted by the Appellants and/or their advisors was specifically intended to prolong the unlawful use of the property. I am satisfied that this amounted to an abuse of process, albeit at the lesser end of the scale.

Reasonably Available Alternatives

[24] The Council submit that the Appellants could have advised their tenants to cease activities pending a resource consent being obtained but chose not to do so. Instead it sought to prolong the non-compliance by progressing three resource consent applications. I am not persuaded that ceasing activities pending resolution of this matter constitutes a reasonably available alternative in the circumstances.

Reasonable Costs

[25] The Appellants have conducted a review of the Council and PTP's legal costs and consider them to be excessive. I have reviewed the invoices and amounts claimed and find them to be fair and reasonable in the circumstances. I note that the Council has accepted that the costs of attendance at mediation should not be claimed in accordance with the guidance in the Court's Practice Note and has reduced its costs accordingly. This is appropriate. I have made a similar adjustment to PTP's legal costs in this regard.

[26] I also note the Appellants' argument that the Council is in some way to blame for the ongoing non-compliance given it "authorised" some activities on site. As we said in our substantive decision:

> While the Court is satisfied that Mr Daniel knew that the activities that were being undertaken on his site were unlawful and that a number of infrastructure matters were required to be dealt with before such activities could lawfully establish, the ambiguous, incomplete and at times inaccurate information provided by the Council has not assisted in the clear and consistent administration of the plan. Nor do we consider that it has contributed to an even-handed administration of the plan which the public at large can depend on.

[27] This did not, however, absolve the Appellants from its responsibility to uphold the plan. The evidence the Court heard was clear that the Appellants knew the activity

was unlawful and that they understood that the correct approach was to apply for a resource consent or a plan change. The Council's prior actions in allowing some activity to occur on site do not serve to shield the Appellants from the payment of costs.

PTP's costs

[28] The Appellants level some criticism at PTP for taking advice from a "Rolls Royce priced firm, when there are plenty of other local and more reasonably priced firms available".

[29] PTP has advised that although it attempted to source a local firm, it was unable to do so as a result of conflicts of interest. I accept that. However, I also note that being a community group does not preclude a party from seeking the most appropriate representation it can afford. I do not find it unreasonable that PTP utilised a specialist resource management practitioner in a national firm to provide advice in this matter. I am further satisfied that the costs incurred by PTP were modest given their extensive involvement in the hearing. To reduce costs Ms Cowley took on the role of advocate, cross examining witnesses and providing submissions. It was clear to the Court how well prepared Ms Cowley was and the extensive effort she and others from PTP had made to participate fully and appropriately in the hearing without the benefit of legal counsel being present.

Decision

[30] Considering the above findings and the general principles for the awards of costs under s 285 of the RMA, I consider an award of 40 per cent of the Council and PTP's costs is warranted. This amounts to $80,103 in respect of the Council and $20,004 in respect of PTP.

[31] This costs award may be enforced (if necessary) in the District Court at Tauranga.

L J Semple
Environment Judge