BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 100

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declarations pursuant to s311 of the Act
BETWEEN	AUCKLAND COUNCIL
	(ENV-2017-AKL-105)
	Applicant
AND	JANICE BUDDEN, MARK GITTOS AND MICHAEL ROWE AS TRUSTEES OF THE LONDON PACIFIC FAMILY TRUST
	Respondent

Court:	Environment Judge J J M Hassan
Hearing:	In Chambers at Christchurch
Date of Decision:	28 June 2018
Date of Issue:	28 June 2018

COSTS DECISION

A: There is no order as to costs. Costs are to lie where they fall.

REASONS

Introduction

[1] This proceeding concerns an application for declaration by the Auckland Council as to the interpretation of certain provisions of the partly operative Auckland Unitary Plan ('AUP').

[2] The court issued three decisions, as follows:

(a) Interim Decision, dated 19 December 2017;[1]

(b) Second Interim Decision, dated 23 January 2018;[2] and

(c) Third Decision, dated 15 March 2018.[3]

[3] In the Interim Decision, it was determined that a declaration should be made in materially similar terms to that put to the court during the hearing (termed the 'finally postulated declaration'). In the Second Interim Decision, the court noted some drafting infelicities in the wording of the finally postulated declaration and proposed alternative wording to address those concerns, inviting further submissions. In the Third Decision, the following declaration was made:

> [53] Therefore, the court declares:
>
> Where a proposed activity:
>
> (a) is on a site located within both the Residential – Single House zone ("SHZ") and the Special Character Areas Overlay – Residential ("SCAR") of the partly operative Auckland Unitary Plan ("AUP"); and
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> (b) is classed as a restricted discretionary activity either under Activity Table D18.4.1 or, due to its non-compliance with a SHZ or SCAR development standard, under Rule C1.9(2) –
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> then the relevant SHZ, SCAR and General Rules (and any relevant objectives and policies) apply, in the processing and determination of any resource consent application for the proposed activity, without the SCAR rules prevailing over or cancelling out other rules.

[4] Costs were reserved, with any application to be made by 28 March 2018.

Application for costs by s274 parties

[5] The HC Trust, Ollerton Trust and James Alfred Farmer, s274 parties to this proceeding ('the s274 parties'), have applied for costs. They seek $55,000.00, being a contribution of approximately 50% of their incurred total costs (including GST and disbursements) of $107,768.27 (including GST) comprised as follows:[4]

1 Interim Decision [2017] NZEnvC 209.
2 Second Interim Decision [2018] NZEnvC 3.
3 Third Decision [2018] NZEnvC 30.
4 Costs have been itemised although no invoices have been provided.

(a) legal costs $93,268.27

(b) expert costs (planner) $14,500.00.

[6] The s274 parties submit that a higher than usual award of costs is appropriate on application of the *Bielby*[5] factors. In particular, they say that the Council has advanced arguments without substance and failed to explore the possibility of settlement where compromise could have been reasonably expected.[6]

[7] In support of this position, they note that the court found the interpretation of the relevant AUP provisions, proposed by the Council in its opening submissions, unsound and contrary to statutory interpretation principles.[7] Specifically, they note that the court found flawed the Council's underpinning assumption that the Special Character Overlay standards represent a "replacement package" for corresponding standards in the Single House Zone.[8] They also note that the court accepted Mr Galbraith's submission that it was unconstitutional for the Council to elect not to apply certain rules of its plan and found that the Council had no authority under the RMA to take such an approach.[9]

[8] The s274 parties further say that the Council's application was not necessary to resolve a genuine ambiguity and uncertainty. Rather, it arose in a context in which certain Council staff refused to accept legal advice about the correct legal interpretation of the AUP. They say they ought not to have to bear the burden of the Council needing to resolve an internal Council dispute brought on by the intractable position of its own policy planners.[10] Consequently they submit they were left with no option but to participate in the declaration proceedings in order to get the Council to apply the law correctly, given the impacts on their property interests, despite their efforts to secure that through several months of discussions.[11]

Application for costs by respondent

[9] J Budden, M Gittos and M Rowe, as trustees of the London Pacific Family Trust ('the respondent'), seeks costs against the Council of up to $29,000.00. It adopts the

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5 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 (HC).
6 Application for costs by s274 parties, dated 28 March 2018, at [3.18].
7 Interim Decision at [53].
8 Interim Decision at [54].
9 Interim Decision at [78].
10 Application for costs by s274 parties, dated 28 March 2018, at [3.19].
11 Application for costs by s274 parties, dated 28 March 2018, at [3.21].

grounds and reasoning set out in the s274 parties' memorandum.[12]

[10] A letter from the respondents to the Council, seeking to reach an agreement as to costs, is attached to the respondent's memorandum. In that letter it is explained that the respondent initially sought costs in the sum of $8,000.00 (with an invoice rendered). It says its estimate of additional legal costs is in the region of $10,000.00-$15,000.00, plus GST and disbursements. It does not provide a breakdown of the additional costs, saying "no precise time records have been kept". In addition, it seeks to recover $4,000 plus GST and disbursements for Mr Putt's costs as an expert.[13]

The Council's reply

[11] The Council's primary position is that no award of costs should be made. In the event that the court finds it appropriate to award costs, it submits that the appropriate starting point would be 30% of the amount incurred, on top of which there should be a further 50% reduction for the circumstances it describes and which we traverse shortly.

[12] The Council notes the settled position that there is no presumption that costs be awarded against the Council simply because its application for declaration was not upheld. We do not need to say more than that as it is well-settled law. It goes on to say why, in our discretion, we should not award costs (or, if we do, we should discount them as they have proposed). In summary, this is for three key reasons:[14]

(a) the proceeding is a test case involving matters important to the public interest;
(b) the proceeding was responsibly brought and responsibly conducted; and
(c) the AUP drafting gave rise to genuine ambiguity which was reflected in the parties' respective positions.

Public interest test case

[13] The Council submits that the proceeding was a test case having the hallmarks identified in *Retro Developments Limited v Auckland City Council.*[15] That is in the sense

12 Memorandum of counsel for the respondent, dated 28 March 2010, at [2].
13 Letter from Alan Webb to Mike Wakefield, dated 15 February 2018.
14 Auckland Council's reply, dated 6 April 2018, at [15].
15 *Retro Developments Limited v Auckland City Council* A156/2005.

that:

(a) it raised new and important questions of interpretation;
(b) it was the first of its kind in the early administration of the partly operative AUP;
(c) the outcome clarified rules in the AUP and how they are to be interpreted in the ongoing administration of the AUP.[16]

[14] The Council observes that the AUP is a significant planning instrument, replacing and combining the Auckland Regional Policy Statement, Regional Coastal Plan, Regional Plans and constituent District Plans into one single combined plan. It notes that it is newly-minted, having become operative in part on 15 November 2016. It points out that its application for declarations highlighted the significant administrative uncertainty which was occurring in the early stages of the AUP's implementation. That was particularly with regard to the processing of resource consent applications for land use activities that touched on provisions within the Single House Zone and Special Character Areas Overlay-Residential.[17]

[15] It also noted the court's acknowledgement of the public interest in assisting the Council, parties and community on such an important interpretation matter.[18]

Proceeding responsibly brought and responsibly conducted

[16] The Council submits that its initiative in seeking a declaration from the court was the responsible course, given the administrative uncertainty it faced. It notes that the court commended the Council for having taken that approach.[19]

[17] It says it conducted its case responsibly. In particular, it refers to its responsiveness to the court's indication during the hearing that it did not support the Council's proposed interpretation. In particular, it pointed out that this led to a collaborative formulation of an alternative form of declaration which reflected the court's preferred approach.[20]

16 Auckland Council's reply, dated 6 April 2018, at [16].
17 Auckland Council's reply, dated 6 April 2018, at [18].
18 [2017] NZEnvC 209 at [3].
19 Transcript pp 5-6; [2017] NZEnvC 209 at [2].
20 Auckland Council's reply, dated 6 April 2018, at [25].

Genuine ambiguity

[18] The Council submits that there was genuine ambiguity in the provisions in issue and its declaration application was the only proper means by which the guidance of the court could be sought such that those ambiguities could be resolved for the benefit of all parties and plan users.[21] In particular, it noted that Declaration B concerned whether the SCAR provisions which are directly inconsistent with SHZ provisions should be read as a "replacement package" and Declaration C raised the issue of whether restricted discretionary activities which infringe SCAR standards should be assessed within the confines of rule D18.8.1(3) or under the broader assessment criteria in rule C1.9(3).

[19] It noted that the court accepted that there was an ambiguity[22] and that the outcome would assist the Council in the administration of its plan for the benefit all plan users.

Costs application by s274 parties

[20] The Council submits none of the *Bielby* factors is present. That is in the sense that it says that the issues raised were properly and responsibly brought before the court and were not easily amenable to settlement. Further, any position that was reached through negotiation with parties (rather than the declaratory proceeding) would have been susceptible to future challenge by any party wishing to implement the AUP in a manner inconsistent with that negotiated position. Hence, it says there was a genuine public interest in obtaining the court's definitive view.[23]

[21] In the alternative, should the court consider an award of costs appropriate, the Council submits that the starting point ought to be the comfort zone, between 25-33% of the actual costs incurred. Taking a midpoint of 30% of costs incurred ($107,768.27), that would amount to $32,330.48. Given the responsible approach of the Council, the genuine ambiguity in the plan provisions and the public interest associated with it being a test case, it would then seek that the court further discount any award by at least 50%. That would bring the total contribution to the s274 parties down to $16,165.24.[24]

21 Auckland Council's reply, dated 6 April 2018, at [36].
22 Third Decision at [34].
23 Auckland Council's reply, dated 6 April 2018, at [42].
24 Auckland Council's reply, dated 6 April 2018, at [44].

Costs application by the respondent

[22] The Council points out that the respondent had a direct interest in the outcome of the declaration proceeding given that it would have a bearing on the resolution of its concerns regarding the redevelopment of the property at 10 Seymour Street, which is directly adjacent to the respondent's property at 12 Seymour Street.[25]

[23] It is understood that the Council and the respondent have agreed that the Council would pay the respondent $8,000 towards its costs and, as such, the respondent seeks that this be supplemented by what it seeks in its application. The Council's position is that no costs should be awarded to the respondent but, if the court wishes to make an award, it suggests the lower amount of $3,750.00.[26]

[24] Any agreement about costs is not a matter for the court, but for the parties. For the reasons we set out, we do not consider any order for costs should be made.

Consideration

[25] 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 discretion is broadly expressed. The court is guided by a body of general principles developed through the case law and summarised in the court's Practice Note.[27]

[26] As acknowledged by the High Court,[28] 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:[29]

- standard costs, which generally fall within a comfort zone of 25-33% of costs actually incurred;
- higher than normal costs, where particular aggravating or adverse factors might be present such as those identified in *Bielby*; and

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25 Auckland Council's reply, dated 6 April 2018, at [45].

26 First reduction made (30%) to bring the award in line with standard costs and a further reduction being made (50%) due to the nature of the proceeding. See Auckland Council's reply, dated 6 April 2018, at [49].

27 Environment Court Practice Note 2014, at 6.6.

28 Referring to *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4 at [35].

29 *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468.

- indemnity costs, which are within the court's jurisdiction to award but which are awarded only rarely, in exceptional circumstances.

[27] The s274 parties claim the presence of *Bielby* factors and seek a higher than usual costs award. The respondent appears to seek full costs from the Council although the amount sought is only an estimate.

Are costs justified?

[28] This case concerned an application for declaration, where the Council sought the assistance of the court so that it could correctly interpret its plan which would not only benefit the parties involved, but future plan users.

[29] Although these are declaratory proceedings, we find principles that have been applied in other RMA contexts of some relevance here. Costs are not usually awarded against Councils in the context of s120 appeals unless it can be shown that they have neglected a duty.[30] It is even more unlikely that costs will be awarded against Councils in plan appeals and it has been held that a relatively high threshold has to be reached before an award will be made.[31] Regardless of the type of proceeding, a Council has statutory duties and a responsibility to ratepayers which make its role in a proceeding unique. The court is mindful of that role when considering any application for costs against a Council.

[30] An application for declaration is a mechanism which enables a person to seek clarity from the court on a question of law. It has been said that declaration proceedings are similar in nature to enforcement proceedings, making a costs award more likely, but this does not mean that an award is inevitable. The court has acknowledged that costs may not be awarded even if a party is unsuccessful in its application, since the result has nevertheless furthered the understanding of the law.[32]

[31] The public interest element to this application is bolstered by the fact that the interpretation issue at the heart of this case has the novelty of a test case, given the AUP is still bedding in. There is no doubt that the application raised an important question of

30 *Darroch v Northland Regional Council* (1993) 2 NZRMA 637; *Brown v Rodney District Council* W105/99; Environment Court Practice Note 2014 at 6.6(c).

31 *Thomas v Bay of Plenty Regional Council* A060/08.

32 *Hampton v Hampton* [2010] NZEnvC 180 at [6].

interpretation and the court responded to that by seeking the assistance of an Amicus Curiae and having the matter considered by a full bench. We accept the Council's submission that pursuing a negotiated route would not have offered the public interest benefit of a secure court determination on a matter of plan interpretation of wide public importance for the AUP's administration.

[32] In terms of the specific applications, we acknowledge the important contribution made by all parties and, in particular, the s274 parties. We have not lost sight of the fact that the court's observations, prompting the collaborative approach referred to by the Council, were largely in response to the case presented by the s274 parties.

[33] As for the respondent, it had an agreement with the Council about costs and had already rendered an invoice, so it seems inappropriate for the court to intervene. Despite that, the application was very brief, relying on the submissions of the s274 parties, although their circumstances were not identical, and failed to set out clearly what the costs related to, since it had not kept detailed records. For an award of costs to be made, the court requires some evidence of the costs incurred.

[34] While we found that the Council's interpretation of the relevant AUP provisions was unsound and contrary to statutory interpretation principles, its case was responsibly and objectively advanced by its legal team during the hearing and proper concessions were made in response to questions from the court and subsequently.

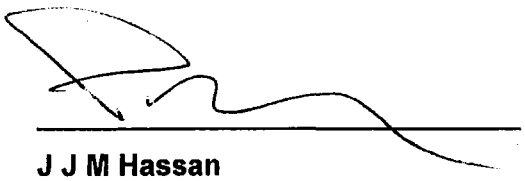
[35] There is clearly a benefit to be derived from applications of this type being brought sooner rather than later, so that any uncertainty is able to be resolved by the court, avoiding the application of mistaken interpretation and potentially avoiding the cost of unnecessary legal action. However, we are aware that other proceedings were underway in the High Court which may have had an impact on the Council pursuing proceedings in this court.

[36] Bearing all of those circumstances in mind, it is by a slim margin that we have determined that a costs award against the Council is not appropriate.

Outcome

[37] Both applications for costs are declined. Costs are to lie where they fall.

For the court:



J J M Hassan
Environment Judge