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

Decision No. [2018] NZEnvC 154

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for a declaration under s 311 of the Act
BETWEEN	COASTAL RATEPAYERS UNITED INCORPORATED
	(ENV-2016-WLG-000028)
	Applicant
AND	KAPITI COAST DISTRICT COUNCIL
	Respondent

Court:	Environment Judge B P Dwyer sitting alone under s 279 of the Act
Hearing:	In Chambers at Wellington
Date of Decision:	27 August 2018
Date of Issue:	27 August 2018

COSTS DECISION OF THE ENVIRONMENT COURT

A: Costs applications declined

REASONS

Introduction

[1] On 5 July 2016, Coastal Ratepayers United Incorporated (CRU) made application to the Court for declarations in respect of processes undertaken by Kapiti Coast District Council (the Council), namely a review of its Operative District Plan and the notification and processing of a new Proposed District Plan.

[2] CRU sought two declarations, being:

Declaration 1

> The Council, having notified a full review of the District Plan, cannot change the ambit of that review under section 79 without first notifying the provisions which are no longer subject to the review, and/or notifying the existing provisions which it intends to remain 'operative' after the proposed plan is completed.
>
> **Declaration 2**
>
> In withdrawing the coastal hazard and other provisions under clause 8D of Schedule 1 of the RMA, the Council changed the meaning of the remainder of the PDP.

The Council opposed the making of declarations as sought.

[3] The application for declarations was heard by the Court on 23 November 2016. On 3 March 2017 the Court issued a decision[1] (the Interim Decision) declining to make Declaration 1 sought by CRU and deferring a decision on Declaration 2 pending further comment from the parties.

[4] Declaration 2 required the Court to determine whether nine alterations to the Proposed District Plan made by the Council were alterations of the sort which ought to have been undertaken by way of a variation of the Proposed District Plan. In the Interim Decision the Court suggested that declarations to that effect might properly be made in respect of six of the identified changes (referred to as Provisions 2, 4, 5, 6, 7 and 9). The Court deferred the making of a final declaration in that regard to enable the parties to explore the potential for some resolution of the proceedings to be achieved, short of the Court making a declaration which would force the Council to undertake costly variation processes.

[5] The parties were unable to resolve matters as suggested by the Court. Further submissions were filed by the parties and by counsel assisting the Court. On 7 July 2017 the Court issued a Final Decision[2] in which it determined to make a declaration in the following terms:

> **In withdrawing the coastal hazard provisions under Clause 8D of Schedule 1 of the RMA, the Council changed the meaning of provisions 2, 4, 5, 6, 7 and 9 identified in the Interim Decision in these proceedings**

The Final Decision reserved costs and CRU filed a costs application which the Council opposed.

[1] [2017] NZEnvC 31.
[2] [2017] NZEnvC 100.

[6] CRU filed an appeal to the High Court against both the Interim and Final Decisions. On 29 November 2017, the High Court issued a Decision[3] declining the appeal.

[7] This decision resolves the costs application. I apologise to the parties for the delay in issue of the decision which became overtaken by other matters.

The CRU Costs Application

[8] Mr Mitchell (Counsel for CRU) advised that he had acted pro bono in the declaration proceedings. The costs which he sought on CRU's behalf were $6,856.01 in total. The claim involved the following costs incurred by CRU:

- Obtaining an opinion from Queens Counsel reviewing the material before the Environment Court, advising on the merits of the application and reviewing and commenting on draft legal submissions. These fees were $4,500 plus GST;
- A fee charged by Ms K Moody (an academic planner) for preparation of an affidavit in reply ($1,040 plus GST);
- Various disbursements amounting to $485.01 including GST.

Counsel advised that the Applicant does not pay income tax, is not registered for GST and accordingly had no ability to claim credit for any GST component of the costs. Invoices supporting the costs sought were provided.

[9] In making the costs application, CRU acknowledged that it was only partially successful. It concluded as follows:

> 8. There are no aggravating or disentitling features in terms of the matters listed in para 6.6(d) of the Court's Practice Note. The issues to be addressed were identified, and submissions and evidence from the respective parties [the] stayed within those issues.
>
> 9. Against that, the Applicant's costs are significantly lower than might be expected from an application which raised matters of some novelty, complexity and public importance. Much of the work for the Applicant was provided free or on a discounted basis.
>
> 10. The factors referred to in paragraphs 7-9 thus make it a little difficult to allocate

[3] *Coastal Ratepayers United Inc v Kapiti Coast District Council* [2017] NZHC 2933.

> this particular case to any of the Court's usual 'bands'. But if an award is to be made pursuant to the Court's established principles and bands, the Applicant accepts that it should be at the 'comfort' level.

The Council Reply

[10] The Council formally opposed CRU's costs application. It referred to a number of cases in respect of the application of s 285 and the principles applicable to costs awards in the Environment Court. It further referred to the factors known as the *Bielby*[4] factors and the factors relevant to an award of costs identified in paragraph 6.6(d) of the Environment Court Practice Note 2014 (the Practice Note).

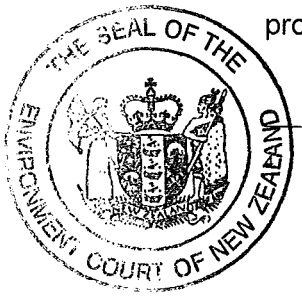
[11] The Council referred to the Court's standard practice spelled out in both case law and paragraph 6.6(c) of the Practice Note that:

> ... the Court will not normally award costs against the public body whose decision is the subject of the appeal unless the public body has failed to perform its duties properly or has acted unreasonably.

The Council noted that the Court had previously determined that this principle is applicable to declaratory proceedings as well as appeals.

[12] The Council noted that CRU's costs application did not contain any reasoning as to why a costs award should be made against it and contended that it could not be said that the errors in process which led to the Court making declarations in respect of the six provisions I had identified constituted a failure on the part of the Council to perform its duties properly or acting unreasonably. It contended that it had acted responsibly throughout the proceedings and noted that CRU appeared to take no issue with the Council's conduct in relation to any of the factors set out in para 6.6(d) of the Practice Note.

[13] The Council challenged the peer review costs aspect of the CRU claim. It contended that it would not be appropriate for a costs award to be made in respect of those costs. Insofar as the claim for CRU's planner's costs was concerned, the Council noted that it was not claiming costs of an independent expert planner who provided peer review planning evidence on its behalf.



[4] *Development Finance Corporation of NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

[14] Somewhat unexpectedly (having regard to the fact that the Final Decision reserved costs in favour of CRU, not the Council) the Council sought costs against CRU. It contended that the proceedings represented a significant cost to the ratepayers of the district and that it was important that it recovered such costs where possible. It noted that it "was successful on Declaration 1, which was the more significant and legally complex of the two declarations".[5]

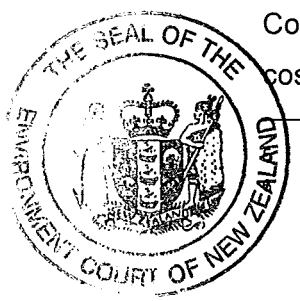
[15] The factors which the Council contended entitled it to an award of costs were that:

- The application for Declaration 1 lacked substance and merit. The Council noted the Court's comments as to outcome of that declaration reflecting "the common understanding of those who practice in the RMA area. It is a logical outcome";[6]
- CRU conducted its case in a manner that lacked specificity and focus and which unnecessarily added to the complexity of the proceedings. It referred to the Court's directions requiring CRU to be more specific as to its contentions;
- The declarations sought were capable of settlement as proceedings on a similar issue to that raised by CRU, brought by another party, had been resolved.

[16] The Council sought total costs of $78,218.41 comprising legal fees ($68,016 and GST of $10,202.41). It noted that this did not include planning consultant's fees nor staff time and that if costs were not recovered they would fall on ratepayers.

Discussion

[17] I do not consider that there is any appropriate basis on which the Court might award costs against the Council. The CRU application does not identify any particular failing on the part of the Council in the conduct of the proceedings before the Court which might entitle it to a costs award against the Council. I consider that there is merit in the Council's observation that Declaration 1 (in respect of which CRU was unsuccessful) was the most significant of the two declarations before the Court. Even if that was not the case, it would be appropriate when considering any costs award to counterbalance the success of CRU on the second declaration



[5] Council submission, para 30.
[6] Interim Decision, para 31.

against its failure on the first declaration.

[18] In light of:

- The absence of any of the aggravating factors identified in *Bielby* and Clause 6.6(d) on the part of the Council;
- The success of the Council in respect of Declaration 1 –

I decline to depart from the Court's normal practice in respect of costs awards against local authorities.

[19] I commence my observations regarding the Council costs claim by noting that there is considerable merit to a number of the contentions advanced by the Council as to the manner in which CRU advanced its case. There were ongoing difficulties in obtaining specificity as to what the proceedings were precisely about and a persistent failure on CRU's part to recognise the distinction between plan review and plan change processes. The ultimate comment in that last regard might be found in the High Court decision where it commented that:

> The fear that the process followed by the Council will deprive CRU and others the opportunity to be consulted and heard about the coastal hazard management provisions of the District Plan is illusory.

In the normal course of events CRU might find itself vulnerable to a costs application as its case in respect of Declaration 1 was well astray and, in my view, of little merit.

[20] However, there is a factor substantially counterbalancing that. That is that the Council processes in respect of the Coastal Hazard Provisions which were at issue in these proceedings[7] have been far from satisfactory. The Council's shortcomings in that regard led to two substantive challenges, one of which settled and one of which (the CRU application) required determination by the Court. The process which it has adopted to resolve a number of queries raised by CRU and others of withdrawing parts of the proposed plan (and which it adopted in respect of the six provisions identified by the Court in Declaration 2) although "legal" has real potential to lead to confusion and uncertainty in the future.

[21] The Council's failures in bringing down the Coastal Hazard Provisions into

---

[7] Which is a different issue to conduct of the proceedings themselves.

the proposed District Plan were the genesis of these proceedings in which CRU was at least partially successful (even if only to a minor aspect). Having regard to all of those matters, I decline to make any costs award against CRU.

Outcome

[22] Both costs applications are declined.

B P Dwyer
Environment Judge