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

Decision No. [2018] NZEnvC 234

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for a declaration under s 311 of the Act
AND	of an application for costs under s 285 of the Act
BETWEEN	SPARK NEW ZEALAND TRADING LIMITED (ENV-2015-AKL-149) First Applicant VODAFONE NEW ZEALAND LIMITED Second Applicant
AND	CLEARSPAN PROPERTY ASSETS LIMITED s 274 party

Court:	Environment Judge JA Smith Environment Judge BP Dwyer
Hearing:	On the papers
Submissions:	M Casey QC for Spark New Zealand Trading Limited and Vodafone New Zealand Limited D Chisholm QC and J Brabant for Clearspan Property Assets Limited
Date of Decision:	5 DEC 2018
Date of Issue:	5 DEC 2018

DECISION OF THE ENVIRONMENT COURT

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

A: In all the circumstance of this case, and in the exercise of its discretion, the Court makes no award for costs in favour of either party, and costs are to lie where they fall.

REASONS

Introduction

[1] On application for declaration before this Court, we concluded that the property arrangements in question before the Court constituted a subdivision within the meaning of s 218 of the Act. The Court, at the request of both parties, reserved the question of costs pending the outcome of appeals from that decision.

[2] The declaration of the Environment Court was overturned in the High Court, and that view was supported on appeal to the Court of Appeal.

[3] In the decision in the High Court, Palmer J, at paragraph [63], noted:

> Under R 20.19(1)(c) of the High Court Rules 2016, I invite the Environment Court to reassess the costs of the proceedings in that court based on the findings of law in this judgment.

Basis of an application for costs

[4] High Court Rule 20.19(1)(c)(1) reads:

> After hearing an appeal, the [High Court] may do any one or more of the following:
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> (a) make any decision it thinks should have been made;
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> (b) direct the decisionmaker:
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> (i) to re-hear the proceedings concerned; or
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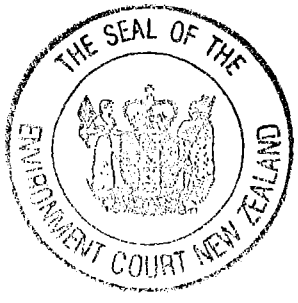
> (ii) to consider or determine (whether for the first time or again) any matters the Court directs; or
>
> (iii) to enter judgment for any party to the proceedings the Court directs; and
>
> (c) make any order the [High Court] thinks just, including any order as to costs.

[5] The High Court did make an order for costs, but in addition made the direction at paragraph [63]. It may be that the direction is intended to be under ss 20(19)(1)(b)(ii) to consider any matters the High Court directs.



[6] Certainly at the time of the High Court decision, this Court had made no decision as to costs, and therefore could not, in a practical sense, re-assess costs. For practical purposes, we understand that the intent of the High Court is that we examine costs applications on the basis that Clearspan was successful rather than the applicants. We proceed accordingly.

Costs under s 285 of the Act

[7] Section 285 of the Act gives an unfettered discretion to the Environment Court to consider costs. It is acknowledged by both parties that an award of costs in the Court consequent on success before a higher Court is not automatic. However, Clearspan go on to submit that the High Court and Court of Appeal determinations that the declarations sought should be refused is a strong factor in favour of an award of costs to Clearspan.[1]

[8] However, even in the costs' application there is a citation from *Auckland Council v Burton*:[2]

> 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 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.

Private interest versus public interest

[9] A key element of Clearspan's application for costs is that this was a commercial move by Spark and Vodafone to limit the activities of Clearspan.

[10] The decisions, at least in the Environment Court, and supported to some extent by the decisions in the Superior Courts, deal instead with the broader issue as to whether s 218 was intended and envisaged to encapsulate the arrangement as a subdivision. In this case, this was by tenants in common, with a series of registered encumbrances and covenants. Whether this constituted a subdivision of the Act was the focus of the decision in the Environment Court and the focus of the decision in the High Court and Court of Appeal.

[1] Clearspan application, paragraph [3.1]
[2] [2018] NZEnvC 100, paragraph [30]

[11] The tension in interpretation between a purposive approach and the wording of the text is recognised in all of those decisions. It would be fair to say that the complexity recognised in the Environment Court was also recognised in the High Court and Court of Appeal as being finely balanced. In the High Court, Palmer J noted (at paragraph [55]):

> ...but there are limits to the capacity of a purposive approach to expand on the text of law. Meaning is ascertained "from" its text and only "in light of" its purpose. I agree that "purposes" here is to help ascertain the meaning of text and not to override or dominate it. The Supreme Court emphasised that the starting point is the text. The Court's view of Parliament's purpose is a cross-check. That can lead to ambiguity being interpretive in line with the Parliament's purpose.

[12] Later, Palmer J noted that the purposive approach of the Act needs to be viewed in the context of the definition of subdivision itself in s 218. This included the use of words such as "mean" rather than "include" and, at paragraph [58]:

> I consider that in choosing to limit its definition of "subdivision" in s 218 to an exhaustive list of specified and relatively certain legal means of subdivision, Parliament did not intend it to capture other arrangements of similar substance and effect which do not fall within those specified meanings. The wider contextual purpose of Parliament in regulating the use of land that can flow from inappropriate subdivision was accompanied by an open-ended definition of what subdivisions are regulated.

[13] That decision of the Environment Court' that concluded "The purpose of the arrangement amounted to a subdivision", was overturned in the High Court.

[14] At [43] of the decision, this Court acknowledged that

> This is a matter of degree and each element when analysed disparately cannot, of itself, support such an outcome. However, neither do they prevent such an outcome... Nevertheless, when combined, the clear intent of this arrangement is to achieve a subdivision under s 218(1)(a)(ii). We conclude the arrangements have derogated from the unity of possession fundamental to tenancy in common, and led not only to partition of the land and creation of new allotment under the RMA, but a disposition by offer of sale.

We cite this to identify that the issue was the legal arrangement used, not the purposes for which that arrangement was used by the parties.

[15] Accordingly, we have concluded that the issues in this case were ones of broader implication, and this is the reason that the Court, at first instance, sat with multiple Judges.

We note Palmer J's comments as to the potential wider impact of this, but in itself the argument was focused around the meaning of s 218 and whether it included arrangements of this type. We conclude that, at all Court levels, it was recognised that this type of arrangement was not exclusively the domain of Clearspan, and might be utilised over a wide range of property transactions.

Should the Court make an order for costs?

[16] Assuming that the Court had concluded, as did the High Court and Court of Appeal, that the arrangement was not a subdivision, would the Court have awarded costs?

[17] Given the broader interest in this matter, we have concluded that this is not a case where it was likely that the Court would award costs in any event. Both parties had financial reasons to argue the application for declaration, and were pursuing it for their own reasons. The issues raised, however, were ones that had broader potential impact.

[18] In the Environment Court, most cases that proceed before us are commenced or maintained by parties who have a financial interest in the outcome, ie resource consent, plan change, declaration all being common examples. The law is thus developed incrementally as those private interests are adjusted through Court decisions. That in itself cannot be a reason for an award of costs.

[19] There is nothing in the actions of either party that can be said to have exacerbated the costs involved. The matter was clearly complex and warranted senior counsel, who argued the matter comprehensively and clearly before the Court.

[20] Accordingly, we have concluded that there is no principled basis on which an award for costs should be made in this case. Awards for costs are the exception rather than the rule in the Environment Court, for the reasons we have just explained. We conclude that the decision, as resolved by appeals, has led to the advancement of understanding of the law, particularly around the important issue of subdivision under s 218.

[21] Given that there is no action by either party that could be said to have exacerbated cost to the other, the matter has been dealt with appropriately. Mr Casey QC, for the

applicants, cites from *General Distributors v Foodstuffs Property*[3] that, where the case had elements of a 'test case', there was a matter to be weighed as a factor in declining an award. This was also adopted in *Hampton v Hampton*[4] and in *Wellington RC v Riddiford*[5] and *Stretton v Bickney*,[6] where factual and legally complex issues required clarification.

[22] We conclude that this application has clarified the law, and we accept Mr Casey's submission that the matter was one of some complexity and finely balanced. In the end, it turned upon the issue of a purposive approach to the Act compared to the wording of the actual criteria cited. Overall, we have concluded that there is no proper basis for an award of costs in this case and that costs should lie where they fall.

Quantum of costs

[23] We go on to consider this out of an abundance of caution, given our primary conclusion that there is no basis to make an award of costs. If we are wrong in that, the Court would then need to turn to the question of quantum of costs.

[24] There are no particular elements of the activities of the applicant (beyond making the application) that fit within the *Bielby*[7] factors recognised as leading to an award of abnormal costs. The Court has previously discussed questions of "comfort zones" in respect of applications for costs, and there has been at least one reference in the High Court to using the scale of costs as a guide.

[25] The claim is for around $180,000, but Clearspan seeks only the standard costs contribution in the sum of 33 percent or $59,597.66, excluding GST, say $60,000 plus GST.

[26] As Mr Casey then points out, this is on the assumption that all the costs claimed are those that can properly be attributable to the defence of the application. Mr Casey notes that the hearing took 1.5 days, and was focused on a relatively narrow issue. Senior property lawyers (4 or 5) were involved at various stages of the process. Charge-out rates for those people are not separately disclosed. In *Bunnings NZ Limited v*

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[3] [2012] NZRMA 192
[4] [2011] NZEnvC 180
[5] EnvC C/015 1997
[6] EnvC A/123 2000
[7] *DFC Ltd v Bielby* [1991] NZLR 587

Hastings District Council,[8] the Court observed that an unsuccessful party ought not to be penalised by another party's choice of "gold plated" representation.

[27] It is difficult for the Court at this stage to analyse the various invoices ($29,000 for the instructing solicitor; Brown Partners – some $78,969; Mr Chisholm QC – some $71,000; and Mr Thomas – some $29,000 (including GST)).

[28] The principles of this case turned upon interpretation of s 218. It is difficult for this Court to conclude that the costs of $180,000 for a 1.5 day hearing, of some complexity, would be warranted. The Court would be cautious in looking at anything beyond half of that figure, so for current purposes we would be looking at something in the order of $100,000 in total (including GST).

[29] The question then would turn as to whether the Court would order its "normal comfort zone" figure. However, given the public interest in subdivision issues, we would have thought that this would significantly reduce any payment to something in the order of $10-15,000. We conclude the Court would reach a conclusion that:

(a) given the clear benefits of the outcome to Clearspan; and

(b) the clarity of the law achieved in respect of s 218,

no award would be made even on this basis, in the exercise of discretion. If an award was made, it is likely to be a relatively small sum in the order of $10,000.00.

Conclusion

[30] For the reasons we have given, based on the assumption that Clearspan had succeeded at first instance, we make no award for costs.

For the Court

JA Smith
Environment Judge

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[8] [2012] NZEnvC 40