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

Decision No. [2019] NZEnvC 37

IN THE MATTER	of the Resource Management Act 1991
AND	of an application pursuant to s 149T of the Act
BETWEEN	QUEENSTOWN AIRPORT CORPORATION LIMITED
	(ENV-2011-WLG-41)
	Applicant

Court:	Environment Judge J E Borthwick
Hearing:	In Chambers at Christchurch
Date of Decision:	5 March 2019
Date of Issue:	5 March 2019

DECISION OF THE ENVIRONMENT COURT AS TO COSTS (AND FOR REHEARING AND STRIKE OUT APPLICATIONS)

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that Remarkables Park Limited is to pay:

(i) $19,830.06 to the Queenstown Lakes District Council; and
(ii) $52,371.00 to Queenstown Airport Corporation Limited.

B: Under section 286 of the Resource Management Act 1991, the District Court at Queenstown is named as the Court this order may be filed in for enforcement purposes (if necessary).

REASONS

Introduction

[1] Queenstown Airport Corporation Ltd and Queenstown Lakes District Council seek

costs on an indemnity basis against Remarkables Park Ltd.

[2] The costs sought are in relation to Queenstown Airport Corporation Ltd's opposition to an application by Remarkables Park Ltd for the Environment Court to rehear the final decision on a notice of requirement to amend Designation 2 of the District Plan ("application for rehearing") and second, its application to strike out the same proceeding.

[3] In April 2018, the Environment Court set both proceedings down for a hearing. Issuing its decision in the same month, the court declined Remarkables Park Ltd's application. Having declined to rehear the notice of requirement, there was no need for the court to formally determine the application to strike out. As the matter had been fully argued, we indicated our view on the merits of the strike out, namely that the application for rehearing was an abuse of the court's process.

Queenstown Airport Corporation Ltd application for costs

[4] As the applications were heard together, Queenstown Airport Corporation Ltd (QAC) seeks costs both on the application for rehearing and the application to strike out. QAC's application for costs is supported by invoices from Chapman Tripp and Mr M Casey QC. The costs sought are $116,882.78 (excluding GST) and are on an indemnity basis.

[5] QAC submits that if costs were limited to those for the unsuccessful application for rehearing, then it is entitled to claim between 50 to 75% of costs incurred. It is submitted that this level of costs is substantiated because, amongst other matters, Remarkables Park Ltd (RPL) advanced arguments in support of its application for rehearing that were without substance. RPL pursued the application for rehearing notwithstanding that the High Court had declined RPL's application to adduce further evidence in support of its appeal against the Environment Court's decisions on the notice of requirement. The High Court's findings were, in substance, on the same matters RPL sought to pursue in its application for rehearing. To proceed with the application in the face of the High Court's decision was, as we intimated, an abuse of process.

[6] QAC submits that what RPL should have done, having received the High Court's decision, was withdraw its application for rehearing thus limiting QAC's costs.

Queenstown Lakes District Council's application for costs

[7] The Queenstown Lakes District Council (QLDC) likewise seeks costs on both proceedings. The costs sought are $20,873.75 and include the separate legal representation for QLDC in its corporate and regulatory capacities.

[8] QLDC adopts QAC's submissions as to the grounds for an award of costs on an indemnity basis but again, if the court is not minded to award costs on this basis then an award not less than 75% of costs is claimed. Its application for costs is also fully supported by invoices.

RPL reply to QAC and QLDC costs' applications

[9] RPL opposes any award of costs but says if costs are to be awarded then no more than 20% of costs reasonably incurred is appropriate. Indeed, it submits no costs are justifiable in circumstances where a public body is seeking to acquire private land. That is because a landowner should be fully able to exercise any power to resist compulsory acquisition or to ensure acquisition is only permitted on a reasonable basis.

[10] While s 285 of the Resource Management Act 1991 empowers the court to award full indemnity of reasonable costs incurred, the court has only exercised this power in exceptional circumstances. All of the cases referred to by QAC in support of an indemnity award are distinguishable on their facts.

[11] More particularly, RPL submits an award of costs on an indemnity basis is not justified. First, the proceeding stems from the compulsory acquisition of RPL's land and it is unreasonable to expect RPL to pay costs responding to the *acquisition*. Second, the court acknowledged the importance of the re-hearing to RPL, particularly in light of its legitimate expectation that QAC would use its own land for airport purposes and not RPL's. Third, counsel for RPL felt obliged to bring to the court's attention the discussion document entitled "Master Plan Options: Let's start talking about tomorrow".

[12] RPL argues that it was partially successful in the rehearing proceeding as it succeeded in establishing that the discussion document was evidence, albeit not material evidence. Its application for rehearing, therefore, cannot be said to be wholly unmeritorious.

[13] As for the strike out application, the court did not make a final determination but rather gave its indicative findings on the matter. Had it given a determination, RPL would have had a right of appeal.

[14] If the court considers a costs award is appropriate, then only a reasonable contribution should be made. It says QAC's costs are excessive given that the hearing lasted 1.5 days and no expert witnesses were briefed. QAC's representation by Queens Counsel and partner from an Auckland firm was "gold plated". As a check on the reasonableness of counsels' fees, RPL applied the District Court scale to argue that 20% was a reasonable contribution in the circumstances.

[15] As for QLDC, RPL submits that it would have expected the District Council to have remained neutral as to costs given that the proceedings involve the compulsory acquisition of private land. In common with QAC, it submits an award of 20% of costs incurred is reasonable.

QLDC and QAC response to RPL's opposition to costs

[16] As QLDC and QAC raised similar matters in response, it is convenient to address their submissions together.

[17] Counsel point out that the court was not addressing the compulsory acquisition of land but rather a discrete application under s 294 RMA to rehear the notice of requirement and second, to strike out that application. Further, that in order to succeed in an application for rehearing under s 294 of the RMA, RPL must demonstrate there was "new and important evidence" that might have affected the decision. While the discussion document was "new" in the sense that it was not available at the time of the hearing, it is wrong to equate "new" information with a meritorious case. QAC submits that contrary to RPL's submission, counsel was not "obliged" to bring the discussion document to the court's attention. The court was *functus officio.*

[18] Even if the "new" information warranted applying for a rehearing, RPL pursued the application in the face of adverse findings of the High Court on the relevance of the same information to the Environment Court's decision. QAC submits the pursuit of the application falls within the realm of exceptional conduct justifying an award of indemnity costs.

[19] QLDC, more forcefully, accuses RPL of making misleading statements as to the basis of motivation for the application. QLDC argues against any suggestion that a private landowner can behave irresponsibly, by taking ill-considered and fundamentally misconceived actions and thus putting others to needless expense. Further, there is no authority for the proposition that, by reason of the fact that a party is a private landowner, the landowner is protected from higher than usual costs.

[20] It is not even the case that RPL would be indemnified from costs under the Public Works Act were it to object to the taking of land. In *Olliver Trustee Ltd v Minister for Land Information*[1] the Environment Court awarded costs against the objector to the Minister for Land Information. While the confirmation of the NoR may – and this case has – led to QAC giving notice to take land under the Public Works Act 1981 this court is not seized of an application for costs under the Public Works Act 1981.[2] Further, the awarding of costs on an unsuccessful application for rehearing is not without precedent. In *Ellis v Minister of Education*[3] the Environment Court ordered the unsuccessful applicant to pay 75% of the costs claimed by the opposing party.

[21] As for quantum of costs, QAC submits the succinctness of legal submissions does not mean that the issues raised were simple, requiring minimal preparation time. The project is one of national importance. Given the issues at stake and the long litigation history, this warranted retention of senior counsel by both QAC and RPL who were familiar with the proceedings.

[22] As for QLDC's participation in the rehearing, the District Council submits as a public body it is concerned with the interests of the entire community and the consequences of the rehearing application on Queenstown airport, the people and communities in the District.

The law

[23] Section 285 of the RMA confers a broad discretion upon the Environment Court to order costs, with the sole qualification being that the quantum must be reasonable. The Environment Court does not have any rule or practice that costs will follow the event

[1] [2015] NZEnvC 171
[2] Section 24(13) of the Public Works Act 1981.
[3] [2014] NZEnvC 249.

and nor does it have a scale of costs. Costs are ordered not as a penalty, but as compensation where it is just to do so.[4] As with the exercise of any judicial discretion, costs' applications are to be dealt with in a principled manner.

[24] As for the amount or quantum of costs awarded, the Environment Court has declined to set a scale of costs. Where ordered, costs have tended to fall within three bands. Justice Heath in *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*[5] noted these bands are not dissimilar to the standard, increased and indemnity costs regime applied by the High Court. Thus:

(a) standard costs in the range of 25-33% of actual and reasonable costs claimed;
(b) increased costs where *Bielby* factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[25] I emphasis that "standard costs" does not infer costs will follow the event or that there is a scale of costs – by reference to a percentage – if costs are ordered. Rather, "standard costs" is simply an observation that when made, costs have generally fallen within the range of a 25-33% of costs incurred. Recently, Judge Kirkpatrick commented that reliance on percentages of invoiced amounts may give a false sense of precision and an overall award may better reflect, in the round, the justice of the case.[6] I respectfully agree with him. The application of a percentage to a modest claim may, for example, penalise the cost-effective manner in which a successful litigant has pursued their case.

[26] That aside, where the court has awarded 'increased' costs, it is usually because there are aggravating factors present such as those identified in *DFC NZ Ltd v Bielby,*[7] most of which are reflected in the Environment Court 2014 Practice Note at clause 6(6). When considering whether to award costs, and the quantum of costs, weight may be given to circumstances were a party has:

(a) advanced arguments that were without substance;

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[4] *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138 at 147.
[5] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468.
[6] *Double R Developments Ltd v Western Bay of Plenty District Council* [2019] NZEnvC 009 at [22].
[7] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

(b) not met procedural requirements or directions;

(c) conducted its case in a way that unnecessarily lengthened the hearing;

(d) failed to explore reasonably available options for settlement; and

(e) taken a technical or unmeritorious point and failed.

[27] It is within the court's powers to award full indemnity costs.[8] Some guidance is given in the 2014 District Court Rules[9] and 2016 High Court Rules,[10] where it states that indemnity costs may be ordered if (relevantly) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding.

[28] The approach I have taken on this occasion is to determine:

(a) whether it is just, in all of the circumstances to exercise my discretion and order costs in favour of the parties; and if so

(b) to decide quantum.

Issue: whether it is just, in all of the circumstances, to exercise the discretion and order costs in favour of the parties?

[29] As a matter of public policy, I readily accept that costs awards ought not to be used as a device to inhibit litigants from seeking to enforce their rights through the courts and nor should a litigant be penalised for seeking redress from the courts, particularly in circumstances where a requiring authority is exercising coercive powers to designate privately owned land. That said, the ability to award costs also serves the countervailing policy objective including as a check on unmeritorious litigation per *Taylor v Roper* [2019] NZHC 16 at [7]. It is the case that the notice of requirement and its subsequent confirmation may constrain activities that can otherwise lawfully be carried out on RPL's land, but this does not obviate RPL from the general obligation that proceedings are to be responsibly brought and pursued.

[30] RPL failed to satisfy the preconditions to the exercise of the discretion to rehear a decision pursuant to s 294 RMA. While the discussion paper was "new" in the sense

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[8] *Rowell v Nurse* M44/95 (HC).
[9] Rule 14.6.
[10] Rule 14.6.

that it was released after the final decision on the NoR, it was not important evidence. Specifically, the discussion paper was not material to the decision of the court.[11] The alternative layouts are predicated on 5.1 million passenger movements per annum in relation to which QAC is presently constrained from implementing. It is by no means a foregone conclusion that QAC must/will accommodate forecast growth in passenger movements. Importantly, the court found that it was not engaged with a fact-finding exercise about which either of the alternative layouts might ultimately find factor.

[31] Having refused the application for a rehearing, there was no need to decide the interlocutory application to strike out but nevertheless, the court indicated its views on the merits of the application. As Mr Somerville correctly points out, there is no decision of the court and therefore no right of appeal. Given the unfavourable High Court decision, it was unremarkable that QAC would seek to strike out the rehearing proceeding. However, the application was an unnecessary adjunct as the prior determination of the rehearing application was dispositive of all matters in contention. I therefore decline to award costs in relation to the strike out application.

[32] This does not mean the decision of the High Court – refusing to admit the discussion document on RPL's related appeal against the Environment Court's decisions on the NoR – is irrelevant to the question of costs on the application for rehearing. Even if the application for rehearing was responsibly brought prior to the High Court hearing,[12] I do not accept that it was reasonable to pursue the applications against the adverse findings of the High Court. As the High Court held the discussion document was "simply a basis for discussion".[13] With that said, I conclude that it is just in all the circumstances to exercise my discretion to award costs against RPL.

Issue: deciding quantum

[33] I decline to use the District Court's scale of costs as a guideline on the question of whether QAC's costs sought are reasonable. RPL's placement of the proceeding within the Category 2 band – that is a proceeding of average complexity requiring counsel with skill and experience considered "average" – begs the question why RPL, together with QAC, retained Queens Counsel. Both Queens Counsel were assisted by junior

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[11] *Re Queenstown Airport Corporation Ltd* [2018] NZEnvC 52 at [15].
[12] The application for rehearing was filed prior to the High Court's hearing.
[13] *Remarkables Park Ltd v Queenstown Airport Corporation Ltd* [2018] NZHC 269 at [162].

counsel, albeit juniors with differing levels of skill and experience.

[34] While the Environment Court has from time to time referred to the District Court Rules for guidance on the scale of costs (see in particular District Court Rules 2014, r 14.3, 14.5 and 19.22 and Schedule 4) this is not the usual approach. In this case, the reference to the scale of costs is unhelpful where there would be no parity of outcome as between the parties.

[35] Given the importance of the outcome to both RPL and QAC and arguably to the nation, the complexity of issues determined over several years and the prospect that a successful application would probably entail rehearing the NoR in its entirety,[14] the parties' mutual decision to appoint Queens Counsel with detailed knowledge of the proceeding extending over several years was justified. Given the importance to the district generally, the District Council's representation in its different capacities at the hearing was also justified.

[36] While I give weight to the fact that RPL advanced arguments that were found to be without substance and weight to the fact that RPL pursued those arguments in the face of an adverse decision of the High Court – the evidence of QAC Chief Executive Officer Mr R C Keel, led in support of QAC opposition to the rehearing, is also important. Mr Keel provided the contextual setting for the changing forecast growth in passenger numbers explaining the relevance of growth in passenger movements to the airport's master plan. Importantly, he documents the constraints on QAC from progressing other development options identified in the discussion document but not considered by the court. Taking these matters into consideration I decline to award costs to QAC on an indemnity basis for the rehearing application but instead award costs of 60%.

[37] QLDC's claim for costs and disbursements is very modest and the District Council should not be penalized for the efficient and cost-effective way that it has prepared and conducted proceedings. I will make an order for its costs and disbursements on the hearing are to be paid in full.

Outcome

[38] Remarkables Park Limited is to pay:

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[14] *Re Queenstown Airport Corporation Ltd* ?? at [12]

(i) $19,830.06 to the Queenstown Lakes District Council; and

(ii) $52,371.00 to Queenstown Airport Corporation Limited.

J E Borthwick
Environment Judge