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

**Decision No. [2020] NZEnvC 105**

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of an appeal pursuant to Clause 14 of the First Schedule of the Act |
| BETWEEN | TUSSOCK RISE LIMITED |
| | (ENV-2018-CHC-121) |
| | Appellant |
| AND | QUEENSTOWN LAKES DISTRICT COUNCIL |
| | Respondent |

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| Court: | Environment Judge J R Jackson |
| Hearing: | In Chambers at Christchurch |
| Date of Decision: | 15 July 2020 |
| Date of Issue: | 15 July 2020 |

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**DECISION AS TO COSTS**

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A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that the Queenstown Lakes District Council pays the sum of $5,250 to Tussock Rise 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] This proceeding concerns an appeal by Tussock Rise Limited ("TRL") against the Queenstown Lakes District Council's ("the Council's") decisions on "Stage 1" of its Proposed District Plan ("PDP"). This decision deals with an application for costs by TRL relating to the Council's unsuccessful application for orders under section 279(4) of the Resource Management Act 1991 ("RMA or the Act") to strike out TRL's appeal based on lack of standing.

[2] On 21 June 2019 the court issued its decision[1] determining that TRL has standing and refusing to strike out the appeal. The court reserved costs and TRL has now applied for costs against the Council, concurrently seeking a waiver of time for filing the application for costs[2]. On 2 October 2019 the court granted[3] the waiver of time for filing.

[3] TRL seeks a total cost award of $7,957.08, representing 100 percent of the legal fees incurred while defending the strike out application. The full indemnity costs are sought on the basis that the Council[4]:

(a) acted unreasonably and advanced arguments that were without substance;
(b) failed to accept the argument TRL communicated to the Council prior to the application; and
(c) by making the application to strike out the appeal, it has put TRL to unnecessary expense.

[4] The Council opposes the application for costs and submits that while the Council's application to strike out the appeal was unsuccessful, it did not act in the manner described by TRL. The Council submits there is no basis for the award of indemnity costs or a higher than normal award of costs and argues instead that costs should lie where they fall.

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1 [2019] NZEnvC 111.
2 Application for costs, dated 30 September 2019.
3 Via email directions.
4 Application for costs, dated 30 September 2019 at [3].

**The submissions for TRL**

Arguments advanced without substance

[5] TRL submits the Council's application to strike out its appeal was unreasonable. Counsel notes the court strongly criticised and questioned the validity of the Council's approach to the plan review process concluding the Council's 'staged review' was in reality a plan change[5]. The Council says this criticism has been overstated by TRL, instead submitting that the court identified a "concern" with the Council's approach to the notification of Stage 1 of the PDP but noted that issues as to the validity of the PDP were not for the court to determine in this proceeding[6]. This was strongly contested by TRL's submission in reply which reiterated that the court expressly held that the Council's approach was "contradictory and confused" and would prejudicially impact on landowners such as TRL[7]. TRL submits this demonstrates that the Council clearly acted unreasonably in administering its plan and that the strike out application was essentially a continuation of this unreasonable conduct[8].

[6] Further the Council submits that, irrespective of the interpretation of the court's criticism of the Council's plan review process, those matters are irrelevant to the Council's conduct in the context of the strike out application and should not inform any costs decision. TRL submits the contrasting view that such matters are "of primary relevance as they form the basis of the Council's strike out application" and that the Council's staged review approach "sought to exclude landowners such as TRL from participating in earlier stages" of the review process and the Council in seeking a strike out application was attempting to "enforce this approach"[9].

[7] The Council referred to the notice of appeal filed by TRL which expressly challenged the Council's decision that TRL's submission was not "on" Stage 1 of the PDP[10]. The strike out application was made in response to this challenge on the basis that the relief sought by TRL lacked jurisdiction[11]. The Council explains this stemmed from its own understanding of the preparation and notification of Stage 1 of the PDP and

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5 Application for costs dated 30 September 2019 [12]-[13].
6 Notice of opposition to costs application [14].
7 Submissions in reply in support of costs application [4].
8 Submissions in reply t [4].
9 Submissions in reply [5].
10 Notice of opposition to costs application [15].
11 Notice of opposition to costs application [16].

submits that initiating the strike out proceedings was an entirely reasonable course of action, especially given the court has previously held that allowing an appeal which lacks jurisdiction to progress to hearing would amount to an abuse of process[12].

[8] TRL says that the Council has "continued to act unreasonably after the hearing". It considers that by seeking to defer mediation and any hearing of TRL's appeal until after the decisions on Stage 3 of the PDP were released, the Council was attempting to nullify the effect of the court's decision resulting in a de facto strike out of the appeal[13]. In response the Council says such an allegation is "simply incorrect and disregards the factual context" [14]. The Council considers there was no unreasonableness in their conduct in raising the fact of the notification of TRL's land as part of Stage 3 and requesting an approach to case management that they considered appropriate in the circumstances. Finally, the Council submits that costs can only be awarded in relation to costs incurred in the proceeding[15] and consequently, the submission in this regard has no relevance to the court's decision on costs. I accept this point and consider the allegations about the Council's subsequent conduct no further.

Failure to accept the earlier argument

[9] Prior to the Council making the application for strike out, the parties corresponded to discuss the purported lack of jurisdiction identified by the Council in relation to TRL's appeal. TRL considers its position was ignored[16]. The Council submits that differing views as to jurisdiction is not easily amenable to settlement or mediated outcomes[17]. The Council reviewed TRL's letter but remained of the view that the appeal was not "on" the PDP and a strike out application was sought accordingly. The Council submits this is not a case where the letter should have swayed their approach[18].

[10] The letter referred to sets out TRL's position that the appeal had jurisdiction as it satisfied certain criteria set out in *Re Vivid Holdings*[19]. The Council's submission

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12 Notice of opposition to costs application [17]; *Federated Farmers (Wairarapa Division) v Wellington Regional Council* W013/99.

13 Application for costs [11].

14 Notice of opposition to costs application [21].

15 Notice of opposition to costs application at [20]; *Brownlie v Northland Regional Council* [2017] NZEnvC 33 [10(b)].

16 Letter from counsel for TRL to counsel for QLDC regarding the standing issue (18 October 2018).

17 Notice of opposition to costs application [23].

18 Notice of opposition to costs application [24].

19 *Re Vivid Holdings* Limited [1999] NZRMA 467 [18].

highlights relevantly that the letter did not seek to rely on the *Motor Machinists* "consequential exception", which formed the basis on which the court's decision found that the submission was "on" the PDP[20].

Unnecessary costs

[11] TRL submits that the Council's strike out application has put it to unnecessary cost[21]. Counsel for the appellant submits that had its position on jurisdiction been accepted by the Council before making the application for strike out, all costs associated with the hearing of the Council's application would have been avoided. Its submission in reply elaborates on this view by arguing that it is not appropriate that TRL should bear the costs of defending itself against the Council's application because it successfully opposed the strike out application where the Council was found to have acted unreasonably in carrying out its plan review[22].

[12] The Council rejects the suggestion that its conduct has put TRL to unnecessary costs submitting that the application for strike out was made based on their understanding of the PDP process, was prepared efficiently and was conducted reasonably and responsibly[23]. Further, the Council does not consider the costs incurred by TRL are unnecessary, rather establishing jurisdiction to bring an appeal is an important issue that warrants the court's attention.

[13] The Council submits that it is of relevance that its position on the jurisdictional question was expressly set out in its section 42A report at the first instance hearing and TRL did not challenge the jurisdictional matter at that stage[24]. While it is understood that TRL's purchase of the land was taking place at the time of the hearing (and the previous owner had stated it no longer wished to pursue the proposed rezoning), the first opportunity that the Council had to address TRL's position on the jurisdictional issue was through the court process. Consequently, given that the jurisdictional questions are not easily amenable to settlement or mediated outcomes, the Council submits that its actions in no way resulted in TRL facing unnecessary costs[25].

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20 Notice of opposition to costs application [22].
21 Application for costs at [17].
22 Submissions in reply 7].
23 Notice of opposition to costs application [27].
24 Notice of opposition to costs application [28].
25 Notice of opposition to costs application [28].

[14] TRL disagrees, saying that the submission on the plan change was a challenge and an assertion that TRL had the right to seek a rezoning as part of Stage 1[26]. Further, whilst it is acknowledged that the notice of appeal states that it is appealing "the determination of the Council that the appellants submission … was not part of stage 1" there was no express determination to that effect, only a recommendation by the Council planning officer in his section 42A report that the submission not be considered because it was not on Stage 1. TRL was not notified by the Council of any determination prior to the decisions on Stage 1[27].

**The submissions for the Council**

[15] The Council submits that none of the *Bielby*[28] factors are present and seeks that costs should lie where they fall. Arguing that although the court decided in TRL's favour, the court in making its decision did not adopt the reasoning put forward by TRL who can only be considered partially successful[29]. Further, the Council considers the fact the court determined the application in favour of TRL does not of itself signal any unreasonable motive or intent on behalf of Council, nor that its arguments lacked substance[30].

[16] The Council also highlighted the nature of the proceedings as a relevant factor in considering an award of costs and the different status afforded to local authorities from other parties[31]. While this application was for strike out rather than an appeal it arose from Council's PDP process, a matter which the court has previously accepted as relevant to costs arising from strike out applications[32].

[17] The Council considers the application was somewhat of a test case which posed a complex and important question for Council, submitters and landowners affected by not only Stage 1 of the PDP but future stages[33]. TRL however considers the reality is that the need for such a case was a result of the way in which the Council decided to

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26 Submissions in reply [7].
27 Submissions in reply [7].
28 Referring to *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587.
29 Notice of opposition to costs application [35].
30 Notice of opposition to costs application [13].
31 *Auckland Council v Budden* [2018] NZEnvC 100 [31].
32 Notice of opposition to costs application [37]; *Jacks Point Residential No 2 Ltd v Queenstown Lakes District Council* [2019] NZEnvC 91; *CSF Trustees Ltd v Queenstown Lakes District Council* [2019] NZEnvC 88.
33 Notice of opposition to costs application [41].

initiate and carry out its Plan Review/Plan Change which was criticised by the court[34].

**Consideration**

[18] Section 285 of the Act provides that the Environment Court may order any party to proceedings before it to pay any other party the costs and expenses (including witness expenses) incurred by the other party that the court considers reasonable.

[19] In determining any costs application, the court must first consider whether costs are justified. If costs are found to be appropriate in the circumstances, then the next issue to be determined is the quantum.

[20] A body of general principles has developed through the case law and two of the fundamental principles are that: there is no general rule that costs should follow the event[35] (even if a party is successful); that costs are not awarded as a penalty, rather they are awarded as an exercise of a broad judicial discretion as "compensation where that is just" [36].

[21] The court has a wide discretion to award costs. Awards of costs in the Environment Court have traditionally been identified within three bands[37]:

- standard costs (usually between 25% and 33% of reasonable costs incurred);
- higher than standard costs where *Bielby* factors are present; and
- indemnity costs, which are awarded rarely and in exceptional circumstances.

[22] While the allocation of percentages to the first two bands assists the decision-maker and enables a more consistent approach across the Environment Court, "it is important to remember that there is no magic empirical or mathematical formula; the only stipulation is that the award be fair and reasonable in the circumstances"[38].

[23] The "*Bielby"* factors originate from *Development Finance Corporation of New*

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34 Submissions in reply [8].
35 *Stevens v Dunedin City Council* C005/95.
36 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* (1996) 2 ELRNZ 138 (EC).
37 *Bunnings Limited v Hastings District Council* [2012] NZEnvC 4 [35].
38 *Jefferies v Wellington Regional Council* [2014] NZEnvC 160.

*Zealand Ltd v Bielby*[39]. They have frequently been referred to by the court when determining the quantum for an application for significant costs. They have also been helpful when considering whether costs ought to be awarded at all. The Environment Court Practice Note 2014 is obviously based on that decision where it lists the following factors as being commonly referred to[40]:

(a) the arguments advanced by the party were without substance;
(b) the party has not met procedural requirements or directions;
(c) the party has conducted its case in a way that unnecessarily lengthened the hearing;
(d) the party has failed to explore reasonably available options for settlement; or
(e) the party has taken a technical or unmeritorious position.

[24] I accept that it is unusual for cost awards to be made against a council in a plan change process and that a relatively high threshold is required[41]. The Council argues the strike out application arose from the Council's PDP process and was an entirely reasonable course of action. However, in this case the application for strike out was an extra step designed to remove TRL's right to participate in the process. The consequences of the application (if successful) would have been significant for TRL. I consider this action by the Council meets the higher threshold prescribed.

[25] As I found in the strike out decision, the method by which the Council has conducted its Plan Review/Plan Change, was "contradictory and confused"[42]. The Council, in reliance on that flawed process, still made its application for strike out despite TRL attempting to communicate to the Council that the purported lack of jurisdiction was misconceived. I agree with Mr Gresson, for the appellant, that the strike out application was inherently unreasonable and consider TRL has demonstrated that an award of costs against the Council is justified.

[26] As to quantum, I consider that the Council has either not met the procedural requirements of section 79 RMA as to the review of plans or, if it has, it has done so in a confusing and misleading way as explained in the substantive decision. By bringing the

39 *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587.
40 Environment Court Practice Note 2014 at 6.6(d).
41 Environment Court Practice Note 2014 at 6.6(b); *Thomas v Bay of Plenty Regional Council* A060/08.
42 [2019] NZEnvC 111 [74].

application to strike out it has taken a technical position and incurred greater than normal costs for TRL. I consider an order of higher than standard costs is justified but not full indemnity costs.

**Outcome**

[27] Accordingly, I consider that the Council should pay approximately 66% of TRL's costs which is (when rounded out) the sum of $5,250. I will make orders accordingly.

For the court:

**J R Jackson**
**Environment Judge**