BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 146

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	RIVER TERRACE DEVELOPMENTS LIMITED
	(ENV-2020-CHC-6)
	Appellant
AND	CENTRAL OTAGO DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan
Hearing:	In Chambers at Christchurch
Date of Decision:	7 September 2020
Date of Issue:	7 September 2020

DECISION AS TO COSTS

A: Under s285 of the Resource Management Act 1991, River Terrace Developments Limited is ordered to pay Central Otago District Council a contribution towards its costs of $2,600.00.

REASONS

Introduction

[1] This proceeding concerns an appeal by River Terrace Developments Limited against the decision of the Central Otago District Council ('CODC') in respect of submissions on proposed private Plan Change 13: River Terrace Resource Area in the Central Otago District Plan ('PC13').

[2] By way of Minute dated 17 March 2020, the court noted that, due to the nature of the case and amount of opposition, it did not see much benefit in referring the file to mediation. It was, instead, progressed towards hearing.[1] The appellant then withdrew its appeal on 27 May 2020. CODC has applied for costs against the appellant seeking an award of $5,049.11, being 50% of total costs incurred in its preparation for hearing.[2]

The submissions

Timing of withdrawal of proceedings

[3] Counsel for CODC, Ms Macdonald, submits[3] that the appellant left it too late to withdraw its appeal to avoid contributing to its costs. While CODC's experts had not by then commenced preparing for hearing, related costs were still incurred by CODC. It is submitted that it is fair and reasonable that CODC (and ratepayers of the district) be compensated for its costs when acting in the course of its public duty.

[4] Opposing this, counsel for the appellant, Mr Goldsmith submits that the appeal could not be said to have been withdrawn 'late' given the timing of key steps in the proceeding. The notice of appeal was lodged on 24 February 2020. The s274 period ended on 16 March 2020. The withdrawal was filed on 27 May 2020.

[5] Further, Mr Goldsmith says that briefing witnesses and preparing for conferencing involves detailed consideration of the issues at stake. That ultimately led to a reconsideration of the appellant's position and subsequent withdrawal. The appellant submits it acted promptly, proactively and responsibly, resulting in the withdrawal decision being made at a very early stage in the appeal process.

[6] By way of reply, Ms Macdonald submits that the issues at stake on appeal were substantially the same as those in the first instance hearing so the appellant "knew full well what it was getting into when it lodged its appeal".[4] Counsel submits that the appellant's description of a "relatively tight" timeframe is misleading. The appellant had six weeks to consult with experts from the first instance hearing and the issues before

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1 Minute dated 6 May 2020.
2 Application for costs on behalf of CODC dated 24 June 2020 at [18] and [19].
3 Application for costs on behalf of CODC dated 24 June 2020 at [15] and [16].
4 Memorandum of counsel for CODC in reply dated 15 July 2020 at [9]-[11].

the hearing commissioners were substantially the same as those on appeal.[5] Counsel says the appellant ran the risk in undertaking a detailed merits' assessment after the appeal had been lodged and while the other parties were engaged in hearing preparation.

CODC's role in the first instance hearing

[7] Ms Macdonald notes that new counsel (independent from the submission process) was instructed following the lodgement of the appeal. Given the appeal was directed straight to hearing, that meant counsel needed to promptly take advice on the appeal and issues and identify appropriately qualified experts for defence of CODC's decision.

[8] In response, Mr Goldsmith says that choice, or CODC's election to be involved as a submitter at the first instance hearing, was the primary cause of CODC incurring costs. He notes that no other party has sought an award of costs which presumably means those parties' costs were minimal due to their counsel and witnesses being fully up to speed with the relevant issues. Counsel notes the generally accepted principle that an award of costs should relate to costs incurred as a result of actions by the party against whom a claim is made. On that basis, counsel submits that the appellant should not be penalised by an award of costs arising from a course of action elected by the CODC.[6]

[9] Ms Macdonald submits that CODC has a distinctly different role in the proceedings before the court as a respondent and primary decision-maker, meaning it is appropriate that it instruct independent counsel and experts to avoid potential conflicts.[7] Counsel observes that it is the CODC's responsibility to place the best evidence it can before the court. Notably, at the first instance hearing, there was no report on the plan change by either an economist or a strategic planner.[8] CODC considered this would be of assistance to the court. It submits that its roles as a submitter and a respondent in such processes are necessarily independent roles. As such, this should have no bearing on the costs' application.

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5 Memorandum of counsel for CODC in reply dated 15 July 2020 at [11].
6 Memorandum of counsel on behalf of the appellant opposing costs dated 8 July 2020 at [7]-[9].
7 Memorandum of counsel for CODC in reply dated 15 July 2020 at [6].
8 Memorandum of counsel for CODC in reply dated 15 July 2020 at [7].

The appellant's 'proactive' role

[10] Mr Goldsmith submits that the appellant expedited the process by taking a proactive role and liaising with parties and providing the court with a joint memorandum rather than leaving the resolution of these matters to a pre-hearing conference. He submits that the appellant should not be penalised for minimising procedural steps.[9]

[11] Ms Macdonald submits that an appellant has a duty to pursue its appeal rights in a timely and conscientious manner. As such, the appellant's 'proactive' role should not see it exempt from a potential costs award. Rather, that award should recognise the unnecessary cost CODC has been put to in the course of preparing for hearing.[10]

Section 285 RMA and related principles

[12] 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 is a broad discretion and the court is guided by a body of general principles developed through the case law and summarised in the court's Practice Note.[11] Costs are not awarded as a penalty but "compensation where that is just".[12]

[13] 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:[13]

- 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;*[14] and
- indemnity costs, which are within the court's jurisdiction to award but which are awarded only rarely, in exceptional circumstances.

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9 Memorandum of counsel on behalf of the appellant opposing costs dated 8 July 2020 at [5] and [6].

10 Memorandum of counsel for CODC in reply dated 15 July 2020 at [3] and [4].

11 Environment Court Practice Note 2014, at Clause 6.6.

12 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* [1996] NZRMA 385.

13 *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468; as acknowledged in the High Court in *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4 at [35].

14 *DFC NZ Ltd v Bielby* (1991) 1 NZLR 587.

[14] CODC seeks higher than normal costs, being a 50% contribution.

[15] Mr Goldsmith notes the general principle that it is unusual for a costs' award to be made regarding plan change procedures and that in such a case a high threshold must be met.[15] Quoting the Practice Note, Ms Macdonald submits that this principle only applied where a proposed plan change "…has proceeded to hearing".[16] I also note this presumption is weaker where the appeal concerns a privately promoted plan change.[17]

[16] Counsel for CODC referred me to *Boulder Trust v New Zealand Transport Agency*.[18] There, the court noted that the Practice Note does not override the court's wide jurisdiction under s285. However, it observed that cl 6.6(a) of the Note records the longstanding practice that late withdrawals or late advice of withdrawal of an appeal, will normally result in costs in favour of a party who has been put to unnecessary expense in preparation for hearing.

Consideration

[17] On balance, I consider that justice favours a modest award of costs to CODC but not to the extent it seeks. The appellant's liaison with the court and parties and in response to directions for hearing was for the most part productive and timely. While the withdrawal came well into parties' preparation for hearing, it was prior to CODC's briefs of evidence being prepared and with significant time before the hearing commenced. On the other hand, I acknowledge that the appellant caused CODC to incur costs through its approach. While the appellant responsibly reflected on its position and elected to withdraw its appeal, it caused CODC to incur costs that would not have been incurred if it had elected not to appeal. Further, CODC's position as respondent means it had less choice than others would have in the fact it was inevitably a party to the appeal. I am satisfied that the costs it incurred were in proper fulfilment of its planning authority and respondent responsibilities. It is fair and just that the appellant should make some contribution to those costs.

[18] I find an award in the range of 25%-27% of total costs is appropriate.

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15 Practice Note Clause 6.6(b); *Thomas v Bay of Plenty Regional Council* A60/08.
16 Memorandum of counsel for CODC in reply dated 15 July 2020 at [2].
17 *Hall v Rodney District Council* A093/95; *Land Equity Group v Napier City Council* W046/08.
18 *Boulder Trust v New Zealand Transport Agency* [2015] NZEnvC 84.

Outcome

[19] River Terrace Developments Limited is ordered to pay Central Otago District Council a contribution towards its costs of $2,600.00.

J J M Hassan
Environment Judge