IN THE ENVIRONMENT COURT
AT NEW PLYMOUTH

I TE KŌTI TAIAO O AOTEAROA
KI NGĀMOTU

Decision No. [2023] NZEnvC 185

IN THE MATTER OF	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	REGINA PROPERTIES LIMITED
	(ENV-2021-AKL-000146)
	Appellant/ Applicant
AND	NEW PLYMOUTH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge B P Dwyer sitting alone under s 279 of the Act
Hearing:	On the papers in Wellington
Last case event:	23 February 2023
Date of Decision:	30 August 2023
Date of Issue:	30 August 2023

DECISION OF THE ENVIRONMENT COURT
ON APPLICATION FOR AN AWARD OF COSTS

A: Costs award made $34,000.00

REASONS

Introduction

[1] On 9 February 2023 the Court turned down an appeal[1] by Regina Properties Ltd (RPL) against a decision of New Plymouth District Council (the Council) declining an application by RPL for resource consent (restricted discretionary activity) which sought to undertake additions and extensions (including a fourth storey and a three storey annex) to an existing three storey building known as the GQ building (the Site) situated at Dawson Street in New Plymouth.

[2] In addition to RPL and the Council, the parties to the proceedings included Colin and Margaret Comber, Bill and Diane MacArthur, Larry and Kaylene Stewart, Trevor and Kay Clegg, Bill and Judy Hurlstone, Lyn White, Liz Pease and Leonce Sharrock (the Applicants) who had joined the proceedings pursuant to the provisions of s 274 RMA supporting the Council's decision.

[3] The Decision reserved costs in favour of the successful parties. The Applicants have applied for an award of costs. The Council does not seek costs.

The RPL Application

[4] RPL's proposal was described in these terms in the Council commissioner's decision:

> 1.1 APPLICATION
>
> The applicant has sought land-use consent to undertake substantial additions and extensions to the existing commercial building known as the GQ building and adjacent land, for residential purposes. It is proposed to construct a single residential apartment which would add a fourth story to the existing three-story GQ building and the remaining bulk of the proposed building will adjoin the GQ building to the south. The main elements of the proposal as summarised in the s42A report are as follows:
>
> - Additions to the existing building resulting in a three storied annex

[1] *Regina Properties Ltd v New Plymouth District Council* [2023] NZEnvC 021 (the Decision).

addition to the GQ building as an extension

- In addition to the three- story annex extension the third story of this extension will extend over the existing three- story GQ building resulting in a fourth story to that structure, this is due to the terrace down from Lot 1 DP 10510 to Lot 1 DP 19148
- The fourth/third storey respectively provides for a rooftop apartment including both indoor and outdoor areas and an outdoor pool
- The existing commercial tenancy will be retained ground, first and second floors
- Car parking for the existing commercial facility would be reduced from 13 to 11 car parks including one accessible park, an e charging park and bike parking area.
- A separate two car garage will be provided for the house
- Existing vegetation will be retained where possible including all of the landscaping within Lot 2 DP 10510 and the large palm tree located at the north-eastern corner of the site
- 6 landscaping trees are shown
- Building finishes have not been confirmed but neutral colours are indicated

I was advised that proposal proposes a maximum building height of 15.4 metres above existing ground level within Lot 1 DP 19148 and therefore a maximum infringement of 5.4 metres above the permitted 10 metre height limit for the zone. However, and as the site is not uniform, differing height infringements occur at various parts of the site. The existing consented GQ building is approximately 1.7 metres higher than the 10-metre height limit set for the zone.

(footnote omitted)

[5] It will be gleaned from the above description that the heart of RPL's proposal was to add an additional storey to an existing building which already exceeded the 10m height limit provided for as "permitted" under the operative New Plymouth District Plan (the District Plan). At its highest point the new proposed building would have a maximum height of 15.4m above existing ground level being 5.4m above the permitted height limit.

[6] The Applicants were all persons who lived in residential apartments and houses near the Site. Some of them gave evidence as to the contended effect of the proposal

on their own properties and additionally they called Mr S Brown (an experienced landscape architect) to give evidence in support of their cases.

[7] The Site and the Applicants' properties are located in the Business B Environment Area of the District Plan which envisages (in summary) that the area will be given over to a mix of commercial/business/residential activities. We found as a matter of fact that the area adjoining the Site was primarily residential in character containing mainly two and three storey residential buildings while noting the "anomaly" of a building called the Richmond Estate Tower (30m) which we understood to formerly have been a hotel now converted to residential apartments.

Considerations

[8] Unsurprisingly, the matter at issue before the Court was the effect of the additional building height on neighbours. In the Decision we identified a number of planning instruments and provisions relevant to our considerations in that regard. Ultimately, determination of the appeal primarily came down to consideration of the following Issues, Objectives and Policies of the District Plan:

> **Issue 1: The adverse effects of activities on the character of areas and on other activities:**
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> **Objective 1**
>
> **To ensure activities do not adversely affect the environmental and amenity values of areas within the district or adversely affect existing activities.**
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> **Policy 1.1**
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> Activities should be located in areas where their effects are compatible with the character of the area.
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> **Policy 1.2**
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> Activities within an area should not have adverse effects that diminish the amenity of neighbouring areas, having regard to the character of the receiving environment and cumulative effects.
>
> **Policy 1.3**
>
> New activities that are sensitive to the elements that define the character of the area in which they intend to locate should be designed and/or located to avoid conflict.

Issue 7: Activities that detract from or reduce the amenity of business areas:

Objective 7

To ensure the attractive, vibrant, safe, efficient and convenient character of the business environment is maintained.

Policy 7.1

BUILDINGS, SIGNS and other STRUCTURES should be designed and/or located to avoid, remedy or mitigate adverse effects on the character and visual amenity of business areas.

[9] The Court made the following observation regarding Issue 7 in the Decision:

> [23] In discussing Issue 7 in the Management Strategy, the following observation is made:
>
> > … Some areas remain predominantly residential in use despite an underlying business zoning.
> >
> > Each of these business areas has developed a different character based on the predominant uses of the area, catchment size and the sensitivities of the surrounding areas. BUILDINGS or STRUCTURES that are out of scale, or create a visual distraction, can adversely affect this character. Hence it is important to ensure that development is of a similar visual character in terms of bulk, HEIGHT and location of development to the area in which it is located, or that any significant adverse effects are mitigated
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> (footnote omitted, emphasis added)

[10] As noted above, the proposal constituted a restricted discretionary activity under the District Plan. The relevant matter to which the Council has restricted the exercise of its discretion in that regard is found in Rule Bus 13 in these terms:

> 1) The extent to which the extra HEIGHT of the proposed BUILDING will:
>
> - adversely affect the character and visual amenity of the surrounding area;
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> - have an overbearing effect on SITES within the RESIDENTIAL ENVIRONMENT AREA;
>
> …
>
> (emphasis added)

[11] During the course of the hearing the Court asked the landscape witnesses, Mr Brown and Mr R Bain (for RPL) to identify (inter alia) what they considered to constitute the components of visual amenity. They filed an expert witness statement, dated 10 August 2022 which contain the following statement:

> **2. THE COMPONENTS OF VISUAL AMENITY**
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> RB and SB agree that the effects associated with "visual amenity" comprise:
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> - Visual dominance or over-dominance
> - Loss of outlook and views
> - Loss of open space and spaciousness
> - Encroachment on privacy
> - Over-shadowing

[12] The Court reached the following relevant conclusions regarding these various matters:

> **Conclusions**
>
> [60] Issue 1, Objective 1 of the District Plan seek to ensure that activities do not adversely affect amenity values and existing activities. We consider that the word ensure is strongly directive in nature and requires decision makers to make sure that adverse effects do not happen.
>
> [61] ...
>
> [62] Issue 7 and Objective 7 of the District Plan seek to ensure that the attractive and vibrant character of the business environment is maintained.
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> [63] It is apparent from reading Policies 1.1 – 1.3 and the observation in the commentary on Issue 7 of the District Plan set out in para [23] (above), that although the site and neighbouring properties are in a Business Environment Area, our considerations are directed to the actual character of the area under consideration and adverse effects of this proposal on that character and the amenity values inherent in that character.
>
> [64] The following findings which we have made above are of particular relevance to the outcome of these proceedings:
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> - The area affected by this proposal is primarily residential in character;

- The proposal will have adverse amenity effects through shading on a number of neighbouring properties over and above those of a complying building;

- The proposal will have adverse amenity effects through visual dominance and loss of privacy on 122 Aubyn Street in particular. Those adverse effects are conservatively appraised as being moderate-high in significance;

- The proposal neither maintains nor enhances the residential character of the neighbouring area.

Outcome

[65] For all of the above reasons we find that the proposal is directly contrary to the provisions of the Objectives and Policies which we have identified to the extent that they are relevant to the visual amenity and residential character aspects. Consistent with the decision of the Council's commissioner, we decline the appeal.

(footnote omitted)

[13] The consequence of the Court's findings was that it upheld the decision to decline consent reached by the Commissioner. In fact, our conclusion was even wider in scope than the Commissioner's who had disregarded the overbearing aspect of the proposal based on the view that this was not relevant in the Business Environment Areas of the District Plan but only in the Residential Environment Areas. However, the landscape architects JWS of 10 August 2022 clarified that the overbearing (overdominance) aspect of the proposal is a component of visual amenity. That is a matter to be considered in Business Environment Areas.

The costs application

[14] I do not propose traversing the matters addressed in the costs application in detail. In my view they can be summarised as containing the following determinative issues:

- The Court's decision on appeal largely mirrored the Council commissioner's determination at first instance;

- RPL's case in respect of effects on adjoining properties was founded on too narrow a premise and failed to take into account all of the

components of visual amenity which ought properly be considered under the restricted discretionary activity criteria contained in the District Plan. RPL's landscape witness confirmed in the joint witness statement of 10 August 2022 that the various elements identified in para [11] (above) were effects associated with visual amenity.

[15] The Applicants identified relevant costs of $51,193.61 and sought an award of approximately two thirds of those costs being $34,000. It contended that the claim was based on proceedings which should not have been brought and were presented in such a way as to require parties to incur unnecessary expense.

RPL's response

[16] Again, as I have done with the Applicants, I do not recite in detail the number of the issues raised by RPL in its response. Insofar as the issues identified in para [14] (above) are concerned, I note as follows.

[17] RPL submits that the fact that it ran a similar case on appeal as it presented at council level is not a *"Bielby"* factor which is engaged in this case. As a subset of that proposition RPL contends that in any event this is not a factor which justifies costs being awarded above any "standard" level.

[18] RPL denied that it took an "extremely narrow" approach to interpretation of the relevant District Plan provisions. It submits that its case identified and focused on key landscape and planning issues. It acknowledged, however, that the Court did not prefer its interpretation of the restricted discretionary activity criteria in relation to dominance and privacy but says that does not mean that its arguments were without substance or unmeritorious.

[19] RPL denied that its conduct unnecessarily lengthened the hearing. It contended that the case as presented to the Court focussed on the key issue of effects of the height of the proposed building extension with extraneous matters not in contention and that the case was completed in less than the timeframe estimated by counsel because all of the parties conducted their cases in an efficient and time effective way.

[20] I have assumed what the Applicants were referring to in respect of lengthening the hearing was that the landscape joint witness statement of 10 August 2022 identified components of visual amenity (referred to in para [11] (above)) which extended the criteria for assessment beyond those undertaken by RPL's landscape witness. These were significant to the outcome before the Court and ought to have been identified and conceded earlier rather than coming in through the JWS directed by the Court well into the course of hearing. Arguably that may have reduced hearing time or indeed the need for hearing at all if RPL's advisors had given appropriate weight to these matters in their assessments.

Discussion

[21] The Court's power to award costs is found in s 285 RMA which relevantly provides as follows:

> **285 Awarding costs**
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> (1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the court considers reasonable.

As the Court has regularly noted in that regard, s 285 gives a very wide discretion as to the basis on which it may award costs, the test being whether the Court considers it is "reasonable" to do so in any given case. In undertaking that consideration the Court must not act capriciously but on a principled basis having regard to matters such as precedent set by other cases and guidance from the Court's Practice Note (now 2023).

[22] Costs awards made by the Court commonly fall into one of three bands:

- Standard costs being comfort level or zone costs - 25 per cent to 33 per cent of costs incurred;
- Above comfort level or higher than normal costs; and
- Indemnity costs.

[23] In the leading decision of *Bielby*[2] the High Court identified a number of factors which might justify an elevated award of costs. The factors identified in *Bielby* were:

- Where an argument or arguments are advanced which are without substance;
- Where the process of the Court is abused;
- Where solicitors or counsel have failed to comply with procedural requirements (in summary);
- Where the case is poorly pleaded or presented;
- Where it becomes apparent that a party has failed to explore the possibility of settlement when a compromise could reasonably have been expected;
- Where a party takes a technical or unmeritorious point or defence, and fails.

[24] Over the course of years the *Bielby* factors have come to be applied not just in determining whether elevated costs should be awarded but whether costs should be awarded at all and, if so, at what level. These factors now overlap with paragraph [10.7(j)] of the Practice Note 2023 which provides as follows:

> **10.7. Costs**
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> (j) In considering whether to award costs and the quantum of any award, the following factors are normally considered and given weight if they are present in the particular case:
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> i. whether the arguments advanced by a party were without substance;
>
> ii. whether a party has not met procedural requirements or directions;
>
> iii. whether a party has conducted its case in a way that unnecessarily lengthened the case management process or the hearing;
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> iv. whether a party has failed to explore reasonably available options

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2 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

for settlement;

v. whether a party has taken a technical or unmeritorious point and failed;

vi. whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

[25] There is no information before the Court that establishes that factors (ii), (iv) or (vi) (above) are engaged in this case. The parties' submissions raise the fact of there having been some discussions between the parties and the possibility of a buyout raised but nothing I have considered enables me to elevate such discussions (which I assume were in any event without prejudice) to a determinative factor in this case. Insofar as matter (iii) is concerned I refer to the comments in para [20] in that regard

[26] I will return to items (i) and (v) in due course but before doing so address firstly the fact that the outcome in this case largely mirrored the Council's decision at first instance. RPL contended that this is not a matter which engages any of the *Bielby* factors (nor by implication para [10.7(j)] of the Practice Note). While it is correct that first instance outcome is not so identified, I consider that similarity of outcome goes directly to the issue of the reasonableness of making a costs award.

[27] Where an unsuccessful party has effectively chosen to re-run arguments which have previously been declined on a well-reasoned basis in a similar factual matrix at first instance, there is an obviously heightened potential for a costs award. The weight to be given to this factor in any given instance is a matter to be determined by the judge considering a costs application. That proposition is consistent with cases such as *Warren*[3] and *Prime Property Group Ltd*[4] referred to by counsel in this case and should come as no surprise to counsel.

[28] Turning to items (i) and (v) I consider that they are to some extent conflated in this case. I make the point that both Objectives 1 and 7 require decision makers to ensure the outcomes identified by the Objectives are achieved and I refer to the findings made in para [60] of the Decision in that regard.[5] Objective 1 and Policy 1.2

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3 *Warren v Gisborne District Council* [2011] NZEnvC 172.

4 *Prime Property Group Ltd v Wellington City Council* [2022] NZEnvC 125.

5 Refer para [12] (above).

on their face impose a very high standard as to what might be approved in terms of proposals having adverse effects. I refer to the findings contained in para [64] of the Decision in that regard.[6] Even on the basis of RPL's own landscape evidence there were adverse effects on existing residents which the Objective sought to ensure did not happen. The combination of District Plan provisions and factual findings created an entirely predictable and substantial headwind for RPL to overcome even if the Court approached its considerations on the basis urged on it by RPL. The proposal was so obviously contrary to the relevant Objectives and Policies that there was no substance to the unmeritorious arguments advanced on its behalf.

[29] I concur with the submission made by the Applicants in these terms:

> 4. This case is one in which arguments at first instance were essentially 're-run' in the Environment Court, where the Council's decision had been "*coherently and comprehensively reasoned*".[7] It is also one where the appellant has taken too narrow an approach to the plan provisions such that RPL's case was without substance or unmeritorious. RPL failed to make design changes following the Council level hearing and has been unwavering in its position throughout. The narrow approach to the assessment criteria in Rule Bus 13 created a systemic failure to adequately assess the effect that RPL's proposal might have on the amenity of the s274 parties, and the character of the surrounding area.

Outcome

[30] In light of all of the preceding findings I consider that it is inevitable that there should be a costs award in favour of the Applicants.

[31] In determining the quantum of such costs I have considered the conclusion reached in para [65] of the Decision that the proposal was "directly" and (I now add) obviously contrary to the Objectives and Policies of the District Plan to such an extent that arguments were advanced without substance and involved unmeritorious points which failed. Accordingly, I determine that it is reasonable that costs be awarded at the level sought by the Applicants.

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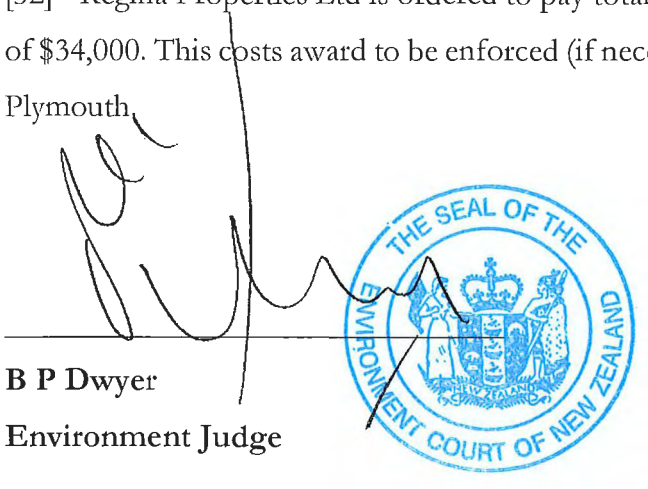
6 Refer para [12] (above).

7 As in *Warren v Gisborne District Council* [2011] NZEnvC 172, where the Court awarded 50% contribution to the other parties costs - stating the appellants should have been aware that their chances of success were slim and that taking the matter to a full hearing was a risk (childcare centre).

Award

[32] Regina Properties Ltd is ordered to pay total costs to the Applicants in the sum of $34,000. This costs award to be enforced (if necessary) in the District Court at New Plymouth.



B P Dwyer

Environment Judge