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

Decision No. [2019] NZEnvC 145

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to section 120 of the Act
BETWEEN	BUNNINGS LIMITED
	(ENV-2018-CHC-15)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson
Hearing:	In Chambers at Christchurch
Date of Decision:	29 August 2019
Date of Issue:	29 August 2019

COSTS DECISION

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that the Queenstown Lakes District Council pays the sum of $43,700.00 to Bunnings Limited.

B: Under section 286 of the Act this court names the District Court at Queenstown as the court this order may be filed in for enforcement purposes (if necessary).

REASONS

Introduction

[1] This proceeding concerns an appeal by Bunnings Limited ("Bunnings") against a decision of the Queenstown Lakes District Council ("the Council") declining resource consent to construct and operate a trade supplier activity at 148-150 Frankton-Ladies Mile Highway, Frankton.

[2] By way of decision[1] dated 5 April 2019 the court cancelled the Council's decision and granted consent subject to conditions. Costs were reserved. Bunnings has now applied for costs against the Council.

Bunnings' application for costs

[3] Bunnings seeks a cost award of $291,341.38, representing 80% of legal costs and 100% of expert costs incurred during the hearing stage of the appeal, plus disbursements. Bunnings submits that this is reasonable and appropriate for the following reasons[2]:

(a) Technical and unmeritorious arguments advanced without substance: Council's opposition to the Proposal was based on an unmeritorious (and quite simply flawed) economic argument focused on the adverse effect on industrial land supply. There were also issues with the objectivity and independence of the Council's evidence.

(b) The case was poorly pleaded and presented: Council's approach to the key question of assessing industrial land supply was found by the Court to be unfair and unprincipled (coupled with the fact that it relied on Mr Foy's economic evidence, which was criticised by the Court). The witnesses for Bunnings were subjected to prolonged cross-examination.

(c) Failure to explore possibility of settlement: Council refused a legitimate Calderbank offer, despite Bunnings having modified the Proposal to resolve all the grounds on which the Proposal was originally declined.

[4] Bunnings acknowledges that costs are not usually awarded against the primary decision maker but considers this is a case where the Council failed to perform its duties

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1 [2019] NZEnvC 59 and final decision (which confirmed the conditions) [2019] NZEnvC 77.

2 Application for costs for Bunnings at [5].

properly or has acted unreasonably, as the Council[3]:

(a) Failed to perform its duties properly, and put Bunnings to great expense in doing so. On its own evidence, the Council was already failing to meet its obligations under the National Policy Statement on the Urban Development Capacity...yet the Council chose to focus its efforts on the impact of the Proposal on the Council's ability to deliver on its NPS obligations, conflating the Council's role as decision maker of resource consents with that of policy maker. The NPS and its policies are clear in its direction to local authorities, and clearly distinguish between considerations of policy makers and decision makers. It is evident that the Council's misinterpretation and misapplication of the NPS from the outset drove the Council's position in relation to the Proposal.

(b) Acted unreasonably in refusing settlement after Bunnings had modified the Proposal to resolve the primary issues raised by the Commissioners – urban design and landscape. Instead, the Council sought to oppose the Proposal on economic and associated planning grounds, in respect of which the Commissioners had previously found in favour of Bunnings.

[5] Bunnings submits[4] that the Council pursued an unsupportable case, that it should not have opposed the appeal on grounds of support of industrial land, where even the Council's expert Mr Foy did not originally hold the view that this would create a more than minor effect. The Council's opposition put Bunnings to costs it would not have otherwise incurred, as all outstanding matters leading to the Commissioners' decision to decline had been agreed upon at mediation. It is submitted[5] that the Council's conduct at the hearing further justifies a significant costs award.

Reply for the Council

[6] In reply, the Council submits than an award of costs is not appropriate in this case. It is submitted that the Council has not breached any duty, or defended a vexatious or frivolous decision because[6]:

(a) The Zone and Activity Area provisions that apply to the subject site were recently and extensively litigated. The application of the relevant provisions to trade supply activities was also tested in appeals to the Environment Court and High Court. The Council's duty was to apply its district plan in accordance with the decisions of those

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3 Application for costs for Bunnings at [18].
4 Application for costs for Bunnings at [30].
5 Application for costs for Bunnings at [31].
6 Submissions on costs for the respondent dated 22 May 2019 at [1.2].

courts and the wider statutory and planning framework. It did so.

(b) Bunnings sought consent for a non-complying activity, and failed to obtain consent at first instance. As a result, Bunnings appealed, materially amended its proposal, and was required to convince this Court that consent was appropriate. The costs of that exercise are attributable to Bunnings, and not to the Council. The Council properly engaged in mediation, and appropriately narrowed the issues in light of Bunnings' changes to the proposal. Only where there were real differences between the parties, not capable of a mediated solution, did matters advance to hearing.

(c) The Council's case on appeal was also consistent with extensive expert advice and central government guidance on the application of the National Policy Statement on Urban Development Capacity (NPS-UDC).

(d) The Court disagreed with the Council's case on a number of grounds, principally relating to the validity of the relevant plan provisions, and to the application of the NPS-UDC. In large part, these findings were on grounds not advanced by Bunnings, and not apparent prior to issue of the Decision. It cannot be said that the Council should have anticipated these findings and withdrawn its opposition to the appeal. Further, it cannot be said that the Council breached a duty by failing to come to conclusions that have not been put to it, and which it has not been able to respond to.

(e) Bunnings' application relies on an allegation of impropriety against a Council witness. The Council maintains that counsel for Bunnings failed to properly put these allegations to the Council witness. But that aside, it was one thing for Bunnings to submit in closing there was doubt as to impartiality, relevant to the weight to be given to the witnesses' evidence. It is quite another for it to now submit in support of costs that the witness was so biased that the evidence was entirely without merit, or that the Council breached a duty. Any award of costs against the Council on that basis would be without proper evidential foundation and contrary to natural justice.

[7] The Council relies on a number of well-established costs principles including that: costs are not normally awarded against a primary decision maker when its decision is cancelled on appeal[7] and that principle is strengthened when there otherwise would be no opposition[8] or where there are matters of public interest and effective administration[9]; that it is not enough that the Council's interpretation of a plan was not accepted; that flawed over-zealous protection of values by a Council is not necessarily a breach of its duties[10]; and when a case raises issues relating to the interpretation or application of new legislation[11] or a new district plan provision[12] then costs should not be awarded.

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7 *Darroch v Northland Regional Council* (1993) 2 NZRMA 636.

8 *Auckland Regional Council v Waiheke Island Airpark Resort* (2010) 16 ELRNZ 182 at [68].

9 Ibid at [40] citing *Goodman Fielder Ltd v Commerce Commissioner* [1987] 2 NZLR 10.

10 *Road Metals v Christchurch City Council* C9/07 at [12].

11 *Kerry (NZ) Ltd v Taylor* (1991) 2 PRNZ 393.

12 *Just One Life Ltd v Queenstown Lakes District Council* C142/02.

[8] The Council submits that its defence of the decision at first instance was in accordance with its duty to administer its District Plan on its terms and in accordance with previous decisions of the courts[13]. The court in this case found that the provisions handed down in the two *Queenstown Central Ltd*[14] decisions no longer accord with the policy framework as set by the NPS-UDC and that the provisions of PC19, issued by the Environment Court, had not been "competently" prepared[15]. Further, the court has now ruled that the NPS-UDC "directs a radical change" from the approach to planning described by the High Court in the first *Queenstown Central Ltd* decision[16] (and carried through to the ODP and PDP). It was not therefore, counsel submits, open to the Council to come to those conclusions in the absence of the decision.

[9] The Council rejects[17] that it put Bunnings to unnecessary cost as it attended mediation which significantly narrowed the issues. Even if it had withdrawn its opposition as Bunnings requested, Bunnings would still be required to convince the court that the application should be granted (as it was non-complying) and evidence on effects would have been required. The Council also disputes the allegation that its case in relation to effects on industrial land supply[18] and application of objectives and policies[19] was unreasonable, arguing it did not amount to a breach of duty.

[10] Finally the Council submits[20] that the costs sought by Bunnings are extreme and unjustifiably high, well beyond anything the Council has encountered for a two-day hearing. The Council submits that if the court were to find some costs had been unnecessarily incurred then indemnity costs would still not be justified.

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13 Submissions on costs for the respondent dated 22 May 2019 at [3].

14 [2013] NZHC 815 and [2013] NZHC 817.

15 Submissions on costs for the respondent dated 22 May 2019 at [3.4]-[3.6] but see consideration below for a comment on "competence".

16 [2013] NZHC 815 at [113].

17 Submissions on costs for the respondent dated 22 May 2019 at [4].

18 Submissions on costs for the respondent dated 22 May 2019 at [4.7]-[4.16].

19 Submissions on costs for the respondent dated 22 May 2019 at [4.17]-[4.21].

20 Submissions on costs for the respondent dated 22 May 2019 at [5].

Final reply

[11] In reply Bunnings says[21] that the Council's arguments are "inapposite, factually incorrect, or fundamentally misplaced". Bunnings argues that:

(a) the Council was not faithfully defending its decision, rather this was a situation where the Council had an entrenched, unreasonable position in relation to industrial land supply[22], nor was there any broader public interest[23];

(b) the Council put Bunnings to unnecessary cost: there are numerous examples where declined non-complying resource consents have been resolved without the need for evidence or hearing, the same could have occurred here but for the Council's entrenched position[24];

(c) the Council did in fact advance unmeritorious arguments, Bunnings relies on the court's clear finding in favour of Bunnings including the particular finding that the Council's approach was "unfair and unprincipled"[25];

(d) the basis for the court's decision was not new: Bunnings maintained through the proceeding that the Council's reliance on earlier decision regarding PC19 was misplaced and a key part of Bunnings case was that the proposal would not generate a precedent[26];

(e) the criticism of the Council's case was fair: Bunnings seeks to rely on the court's findings in relation to Mr Foy's evidence and argues that those findings are directly relevant to the issue of costs and there is no natural justice concern[27]; and

(f) finally, the quantum is reasonable and appropriate: the complex, technical and fundamentally unmeritorious arguments advanced by the Council forced Bunnings into a situation where a comprehensive response was required[28].

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21 Reply to submissions regarding application for costs dated 6 June 2019 at [3].

22 Reply to submissions regarding application for costs dated 6 June 2019 at [5].

23 Reply to submissions regarding application for costs dated 6 June 2019 at [14].

24 Reply to submissions regarding application for costs dated 6 June 2019 at [7].

25 Reply to submissions regarding application for costs dated 6 June 2019 at [8] referencing the court's decision at [90].

26 Reply to submissions regarding application for costs dated 6 June 2019 at [9].

27 Reply to submissions regarding application for costs dated 6 June 2019 at [13].

28 Reply to submissions regarding application for costs dated 6 June 2019 at [15].

The Law

[12] Under section 285 of the Act 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.

[13] A body of general principles has developed through the case law. Two fundamental principles are that: firstly, there is no general rule that costs should follow the event (even if a party is successful); and secondly, costs are not to be awarded as a penalty but in the interests of compensation "where that is just"[29].

[14] Awards of costs in the Environment Court have usually been identified as falling within three bands[30]:

(a) standard costs [usually between 25% and 33% of reasonable costs sought];
(b) higher than standard costs where *Bielby* factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances

[15] 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"[31].

[16] Costs are not usually awarded against a primary decision-maker unless it has neglected its duty, acted unreasonably, or where it is clear that the council's decision was vexatious or frivolous[32].

[17] The *Bielby* factors have frequently been referred to by the court when determining an application for higher than standard costs but have also been helpful when considering whether costs ought to be awarded at all. These factors originate from *DFC NZ Limited v Bielby*[33], where the High Court set out a number of circumstances where higher costs could be awarded[34]:

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29 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138.
30 *Bunnings Limited v Hastings District Council* [2012] NZEnvC 4 at [35].
31 *Jefferies v Wellington Regional Council* [2014] NZEnvC 160 at [1] and [10].
32 Environment Court Practice Note 2014 at 6.6(c); *Darroch v Northland Regional Council* (1993) 2 NZRMA 637; *Ballantyne v Papakura District Council* A054/08.
33 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587.
34 These factors have effectively been codified in the Environment Court Practice Note 2014 at 6.6(d).

(a) where arguments are advanced without substance;

(b) where the process of the court is abused;

(c) where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen a hearing;

(d) where a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;

(e) where a party takes a technical or unmeritorious point of defence.

[18] Bunnings seeks an award of 80% of legal costs and 100% of expert costs incurred being higher than standard costs, submitting[35] that four out of five *Bielby* factors are present here.

Consideration

[19] I first must consider whether an award is justified. Costs are not usually awarded against a local authority unless it has neglected its duty or acted unreasonably. Bunnings submits that the Council had an entrenched, unreasonable position in relation to industrial land supply and acted in such a way that meets this higher threshold. The Council says its defence of the decision at first instance was in accordance with its duty to administer its District Plan on its terms and in accordance with previous decisions of the courts. The Council argues that although the court found that the provisions handed down in previous decisions no longer accord with the policy framework as set by the NPS-UDC and that the provisions of PC19 had not been "competently prepared", in the rather specialised sense of that phrase by the Court of Appeal in *R J Davison Family Trust v Marlborough District Council*[36], it was not open to the Council to come to those conclusions in the absence of this decision. Bunnings maintained throughout the Council and court hearings that the Council's reliance on earlier decisions regarding PC19 was misplaced.

[20] An important factor is that the law in relation to the NPS-UDC needed testing and that strongly suggests costs should not be awarded. Against that is the evidence of Mr Foy which brought the Council's economic evidence into centerstage since it was fundamental to accurately assess industrial land supply and the quantity of land

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35 Application for costs for Bunnings at [16].

36 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 (2018) 20 ELRNZ 367, [2018] 3 NZLR 283, [2019] NZRMA 289, at [75].

demanded. We considered[37] Mr Foy incorrectly calculated the amount of industrial land which is potentially able to be supplied and we queried his independence in this case. As recorded in the decision he either took advice from, or at least consulted, an ex-employee or consultant of the Council who (at the time) worked for the QAC which was hardly neutral on the issues before the court. It is on that basis I consider an award is justified on the basis that the Council has neglected its duty although not to the extend contented by Bunnings.

[21] The final question is one of quantum. Bunnings seeks a costs award of $291,341.38, representing 80% of legal costs, 100% of expert costs and disbursements. The Council submits and I agree that the costs sought by Bunnings are unjustifiably high for a two-day hearing and if the court is minded to award costs it should be a lower figure. I also agree with the Council, that while the conduct of one of its witnesses was not truly independent and professional, that does not justify a higher than standard costs award. After balancing all the relevant factors, I will award the appellant 15% of what was sought being $43,700.00.

J R Jackson
Environment Judge

37 [2019] NZEnvC 59 at [90].