

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 227

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN TOTALLY TOURISM LIMITED

(ENV-2010-CHC-0088)

Appellant

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

Court: Environment Judge J R Jackson

Hearing: In Chambers at Christchurch

Date of Decision: 8 July 2010

Date of Issue: 9 July 2010

COSTS DECISION

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that Totally Tourism Limited pay costs of:

- (i) \$1,225.00 to the Arthurs Point Protection Society Incorporated; and
- (ii) \$436.00 to Barry Walters.

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] On 12 March 2010 Totally Tourism Limited ("TTL") lodged an appeal against conditions imposed by a decision of the Queenstown Lakes District Council ("QLDC") which restricted the number of flights its helicopter company could take to and from a site at Gorge Road, Arthurs Point¹.

[2] The notice of appeal was lodged with the court some 14 months out of time and so a waiver was sought. The court directed that any notice of opposition to the waiver application be filed by 21 April 2010.

[3] There is another appeal² on the same decision by the Arthurs Point Protection Society Incorporated ("the Society") and Mr Barry Walters, who is a member of the Society, which was lodged within the correct timeframe. The Society and Mr Walters lodged their notice of opposition on 21 April and so the matter was set down for interlocutory hearing. The QLDC did not oppose the late lodgment of the appeal and said it abided the decision of the court.

[4] The court held a procedural hearing on 7 May 2010. Subsequently the court issued its decision³, refusing the application by TTL for waiver of the time limit for lodging its appeal. The appeal was then struck out in accordance with section 279(4) of the Resource Management Act 1991 ("the RMA" or "the Act").

[5] Costs were reserved, with any application to be made within 15 working days of the date of the decision and any reply within a further 15 working days. On 2 June the Society and Mr Barry Walters lodged an application for costs against TTL and on 24 June TTL lodged submissions in response.

The applications for costs

[6] The Society seeks costs of \$2,448.19⁴; the breakdown of which is as follows:

- Hovell Planning: \$1203.75;
- Streat Design Limited: \$1,244.44.

Lot 2 DP 20925, Block XIX, Shotover Survey District.
 ENV-2009-CHC-3.
 [2010] NZEnvC165.
⁴ GST included, invoices attached.



[7] Mr Walters seeks costs \$872.31⁵, which are legal costs incurred through advice sought from Anderson Lloyd.

[8] In relation to the costs incurred at Streat Design Limited, it appears that Mr Streat is a director of Streat Design Limited (a surveying and planning business) and the secretary of the Society. The Society seeks to claim the costs incurred by Mr Streat in preparing legal submissions and for his appearance at the procedural hearing. The Society says this preparation and appearance at the hearing went well beyond the normal duties of a secretary and prevented him from attending to business at his own company.

TTL's reply

[9] TTL submits that an award of costs in relation to the work incurred by Mr Streat is not justified and inappropriate. In relation to the other costs sought, TTL says that an award of full indemnity costs is also not justified in these circumstances.

[10] TTL argues that Mr Streat is not legal counsel for the Society, but is a member of the Society and so a party to the proceedings. TTL says the Environment Court has stated previously that it is not normal practice for parties to be compensated for time they themselves have spent preparing submissions and evidence⁶.

[11] TTL goes on to say that there is an established rule that lay litigants are not entitled to recover costs where they have acted in person, although they will be awarded reasonable disbursements at the court's discretion⁷. Exceptional circumstances have been held to be those that involve an exceptional public interest⁸. TTL says this is not the case here as Mr Streat has involved himself in the proceedings not out of concern for the welfare of the general public but because he stands to gain personally.

The law

[12] Under section 285 of the Act the court's discretion to award costs is broad. There is no general rule that costs should follow the event. Costs are not awarded as a penalty but in the interests of "compensation where that is just"⁹.



GST included, invoice attached.

Schaeff v Auckland City Council, A12/06.

Re Collier [1996] 2 NZLR 438; *Sandilands v Manawatu District Council* W55/01.

Humphrey v Auckland City Council A098/03.

Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council 2 ELRNZ 138.

[13] The court and its predecessor the Planning Tribunal have established a number of relevant circumstances when considering a significant costs application, which are equally useful when considering whether costs might be awarded at all¹⁰:

- (a) whether arguments are advanced which are 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 it becomes apparent that 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.

[14] TTL has referred to the body of case law which deals with applications by lay people for costs. As discussed above, the rule of thumb is that lay people are not to be indemnified for the work they have done in relation to a case although they may be awarded disbursements at the discretion of the court. There may be exceptional circumstances, where the lay person has acted in the public interest, which justify a departure from the general rule.

[15] However, section 275 of the Act states that a person may be represented by another person and the case law shows it is not essential that that person be a qualified legal practitioner¹¹. In *Barrie v Central Otago District Council*¹² the Planning Tribunal said:

If the Act gives a person a right of audience by representative and the representative is entitled to charge a fee, then that is a cost properly incurred by that person who should not be denied the opportunity to recover it or at least a contribution towards it simply because the person charging it is not a legally qualified practitioner.

[16] Mr Streat is a professional surveyor who offered his services to the Society was paid by them for his representation and has produced an invoice as evidence of this. In *Collier*¹³ it was said that one of the problems with compensating lay people is calculating the expenses. Here that is not an issue as Mr Streat has been paid for the work he has done and the invoice describes the nature of that work which is clearly related to these proceedings.



¹⁰ *DFC NZ Ltd v Bielby* (1991) 1 NZLR 587.

¹¹ *Morgan v Mount Herbert CC* (1980) 7 NZTPA 485.

¹² *Barrie v Central Otago District Council* [1996] NZRMA 272, C/96 page 3.

¹³ *Re Collier* [1996] 2 NZLR 438 at 441.

Consideration

[17] Mr Streat is a professional who represented the Society in these proceedings and was paid for his services. The proceedings were at the procedural level and so it was reasonable for a lay person (in the legal sense) to represent the Society and it is entitled to claim for Mr Streat's representation.

[18] In terms of the *Bielby* factors, it seems (a) and (c) are relevant here. TTL lodged its appeal significantly out of time when it knew there was already another related appeal which, in the 14 months it took TTL to lodge its appeal, had been subject to a number of prehearing conferences and mediation. There was also an evidence timetable in place and the Society had briefed witnesses. As noted by the court in its decision¹⁴, TTL had also failed to comply timeously with the Registrar's instructions and the court's directions which further delayed the process. The relief sought in its appeal also raised a jurisdictional issue with regard to the measuring of noise at notional property boundaries.

[19] In *Banks v Waikato RC*¹⁵ the Planning Tribunal said "...it is appropriate...to compensate parties for costs unnecessarily incurred as a result of proceedings which should not have been brought..." These proceedings should not have been brought. The appeal was excessively out of time with the end result being inefficient use of the court's time and that of a voluntary organisation with limited funds.

Quantum

[20] It is generally accepted that an award between 25-33% is within the court's comfort zone¹⁶. However, this is a guide only since I have the discretion to make an award that I consider reasonable given the circumstances.

[21] In this instance, due to the excessively late filing of this appeal by a party represented by legal counsel and the consequential waste of the court's time and that of the other parties who consequentially became involved, I find it appropriate to go

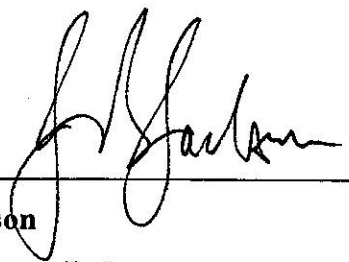


¹⁴ [2010] NZEnvC165, paragraph 27.

¹⁵ *Banks v Waikato RC* A074/95, page 2.

¹⁶ *Emerald Residential Limited v North Shore City Council*, A51/04.

beyond the customary range. I am prepared to award approximately 50% of the costs incurred by the Society and Mr Walters and I will make orders accordingly.



J R Jackson
Environment Judge



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