**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-Ā-TARA ROHE**

**CIV-2017-485-803**
**[2018] NZHC 1041**

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| BETWEEN | ENTERPRISE MIRAMAR PENINSULA INCORPORATED<br>Applicant |
| AND | WELLINGTON CITY COUNCIL<br>First Respondent |
| AND | THE WELLINGTON COMPANY LIMITED<br>Second Respondent |

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| Hearing: | On the papers |
| Appearances: | M S Smith and P Milne for Applicant<br>N M H Whittington and A Linterman for First Respondent<br>P J Radich QC for Second Respondent |
| Judgment: | 14 May 2018 |
| Reissued: | 17 May 2018 |

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**JUDGMENT OF CHURCHMAN J**
**(Costs)**

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[1] On 9 April 2018, I dismissed an application for judicial review bought by the applicant against a decision of the first respondent.

[2] I invited the parties to agree costs and, in the absence of agreement, directed them to file submissions.

[3] The parties have been unable to reach agreement and now have filed submissions.

[4] Both the first and second respondents seek costs. The first respondent claims costs and disbursements of $46,344.41 and the second respondent claims costs and disbursements of $54,265.61.

[5] The applicant's submission is that costs should lie where they fall (on the basis the matters involved matters of public interest and the applicant acted reasonably in the conduct of the proceeding) or alternatively that a single modest costs award is appropriate.

**Disputed costs**

[6] The first and second respondents submitted costs calculated on a 2B basis with the exception that the first respondent sought 2C costs in relation to discovery.

[7] The first respondent sought disbursements of $1,045 being "airfares Auckland/Wellington return (x2)", $1,341 being "accommodation" and $207.15 being "taxis".

[8] In opposition to the 2C claim in respect of discovery the applicant submitted that the number of documents ultimately discovered (512) was not sufficiently high to make band C appropriate, particularly in circumstances where, by agreement, no discovery list was completed. It was also noted that a large quantity of discovered material had previously been disclosed to the applicant in response to requests by it to the first respondent under the Local Government Official Information and Meetings Act 1987. Those submissions are well founded and there is no justification for 2C discovery costs.

[9] The applicant also took objection to what was described as the "travel related disbursements totalling $2,593.15" in the second respondent's claim. It assumed these related to costs associated with the junior counsel for the second respondent (Mr Refoy-Butler) travelling to Wellington.

[10] There is no clarification in the memorandum from the second respondent's counsel as to whether or not the claimed costs in fact relate to Mr Refoy-Butler. In fact, there is no evidence as to what they relate to at all. Given that the second

respondent was also represented by senior counsel who was Wellington based, there is no basis for the awarding of travel based disbursements of $2,593.15.

## Legal principles

[11] The starting point in r 14.2 of the High Court Rules 2016 is that, in civil proceedings, costs follow the event. However, there are exceptions to that general principle. Rule 14.7 provides that costs may be refused or reduced where:

> … the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding.

[12] The leading case most commonly cited in support of this proposition is the decision of the Privy Council in *New Zealand Maori Council v Attorney-General.*[1]

[13] A circumstance where a party will not be able to claim the benefit of the principle articulated in r 14.7 is where they have pursued proceedings which could potentially result in a personal financial advantage to them.[2]

[14] There have been a number of cases, including judicial review cases, where the courts have found that the public interest factor in the litigation justified either the non-award of costs or a substantial reduction.[3]

[15] Equally, there are cases where although there has been an element of public interest substantial costs orders have been made.[4]

## Submissions

[16] The applicant submits that the public interest nature of the proceedings is reflected in the nature of the decisions being challenged being decisions to grant

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1 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513.

2 *Buis v Accident Compensation Corporation* (2010) 19 PRNZ 585.

3 *Save Kapiti Incorporated v NZ Transport Agency* [2013] NZHC 3314 (no costs); *Ngai Tai Ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 872 (no costs – all parties obtained benefit from the High Court judgment) and *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 993 (no costs – significant public interest including the intervention of the Attorney-General).

4 *Friends of Houghton Valley Incorporated v Wellington City Council* [2016] NZHC 880 (costs on a schedule 2B basis of $31,889 awarded which included a 25 per cent uplift in relation to a settlement offer made, less a 10 per cent discount for some element of success).

resource consent under special legislation that will allow intensive development of an area of Wellington that is of wide interest to the Wellington public and will significantly impact local infrastructure to the cost of rate payers generally.

[17] The applicants also suggested that the first respondent had recognised internally a need for a review of the subject matter. It was submitted that there was significant public interest in the matter as evident by media coverage and the number of people in the public gallery during the course of the hearing. The latter fact is not one on which I place particular weight.

[18] In relation to the unavailability of the public interest protection from costs where an applicant might financially benefit from success in a proceeding, the applicant acknowledged that there was such a potential benefit in that the membership of the applicant:

> … will not be adversely economically affected by the traffic problems that the development is likely to generate and by their need to contribute through rates to the costs of the new and upgraded infrastructure that the first respondent is proposing to pay to support this for-profit development.

[19] It was said that: "… these are also benefits shared by a wider class of Wellington rate payers, underscoring the public interest factor."

[20] The first respondent, in relation to the "public interest" principle, noted that the applicant was funded by rate payer levied funds. The applicant's submissions said that the costs of the proceedings would be met by donation, however the first respondent claimed that, in order to get the benefit of the public interest principle the applicant:

> … should open its books to the Court and the Council, explain how it funded its own legal costs, and evidence how, in bringing the proceeding, it had the support of its members.

[21] Such a submission sets too high a hurdle for the applicant to meet.

[22] The first respondent sought to compare this case with the decision in *Federated Farmers of New Zealand Incorporated v Northland Regional Council* where costs had been ordered against Federated Farmers on the basis that it represented a substantial

primary sector group and it had bought the proceeding because it was in its member's interests to do so.[5]

[23] The first respondent also claimed that many of the applicant's legal arguments were directed not at the specific council decision sought to be reviewed but at the fairness of the legislative framework established by parliament under HASHAA.

[24] The second respondent submitted that these proceedings did not concern a matter of public interest and said rather that: "… the case reflected the views of a confined set of people, set against this particular development on the Shelley Bay site."

**Separate costs award**

[25] Each of the respondents sought a costs award in their favour.

[26] The applicant's position was, if the Court rejected their primary submission which was that no costs award should be made, then this was a case where a single modest costs award would be appropriate.

[27] The applicant referred to r 14.15 which deals with the situation of defendants defending separately and says:

> The Court must not allow more than one set of costs, unless it appears to the Court that there is a good reason to do so, if, –
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> (a) several defendants defended a proceeding separately; and
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> (b) it appears to the court that all or some of them could have joined in their defence.

[28] Counsel for the second respondent attempted to distinguish the case of *Grey District Council v Blain* where the Court had held that the first and second respondents could properly have joined in their defence by noting that one of the central planks of the applicant's case in the present proceedings was that the first and second defendants were colluding in a manner that was inappropriate.[6] It was submitted that, in these

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5 *Federated Farmers of New Zealand Incorporated v Northland Regional Council* [2016] NZHC 2776.

6 *Grey District Council v Blain* [2014] NZHC 939.

circumstances, it would not have been in order for the parties to have worked together on a common case.

[29] It was also claimed that the interests of both respondents were different. It was claimed that the first respondent had appeared as decision-maker on a relatively objective basis.

**Analysis**

[30] I find that there was a significant public interest element to these proceedings. The legislation concerned is new and this was the first occasion when the Court had considered the correct interpretation and application of s 34 of HASHAA.

[31] I also recognise that the applicant was successful in some of the arguments raised although ultimately, I was not persuaded that the remedy of judicial review was justified.

[32] I accept that there was potentially some private financial benefit to the members of the applicant should the proceedings have succeeded although that does not outweigh the significant public interest component.

[33] I am satisfied that the applicant acted reasonably in bringing these proceedings.

[34] I accept that, in relation to judicial review proceedings the Court will often order an unsuccessful applicant to only pay one set of costs.[7]

[35] I do not accept the second respondent's categorisation of the role played by the first respondent in these proceedings as having appeared: "… on a relatively objective basis to explain to the Court the basis upon which it made its decision."

[36] The first respondent played a role of active contradictor.

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7 See *Independent Fisheries Ltd v The Minister for Canterbury Earthquake Recovery* [2015] NZHC 1353 at [10] and Jonathan Auburn, Jonathan Moffett & Sharland *Judicial Review* (Oxford University Press, Oxford, 2013).

[37] Weighing all these factors together I find that, like the approach taken in *Friends of Marineland of New Zealand Incorporated v Napier City Council,* this is a case where the public interest and other factors discussed above justifies a significant reduction in the scale B costs.[8] It is also not a case justifying two full sets of costs.

[38] I think overall justice can be done if the applicant is ordered to meet the disbursements of the first and second respondents, other than the travel related disbursements of $2,593.15 referred to above, and that a global award of costs in the sum of $40,000 is made to be divided equally between the respondents.

Churchman J

Solicitors:
Morrison Kent Lawyers, Wellington for Applicant
Meredith Connell, Wellington for First Respondent
Morrison Mallett, Wellington for Second Respondent

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8 *Friends of Marineland of New Zealand Incorporated v Napier City Council* [2012] NZHC 1792.