IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002261
[2017] NZHC 678

IN THE MATTER	of the Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991
AND IN THE MATTER	of an appeal under section 158 of the Local Government (Auckland Transitional) Provisions Act
BETWEEN	INDEPENDENT MĀORI STATUTORY BOARD Appellant
AND	AUCKLAND COUNCIL Respondent
AND	AUCKLAND UTILITY OPERATORS GROUP INCORPORATED

CONTD

Hearing: On the papers

Judgment: 7 April 2017

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 7 April 2017 at 4.00pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Contd

DEMOCRACY ACTION INCORPORATED
FEDERATED FARMERS OF NEW ZEALAND INCORPORATED
HOUSING NEW ZEALAND CORPORATION
TRUSTEES OF SELF FAMILY TRUST
KENNETH PALMER
S 301 parties

Solicitors/counsel:
K Anderson, Auckland Council/Buddle Findlay Auckland
Russell McVeagh, Auckland
Franks Ogilvie, Wellington

Introduction

[1] I refer to my judgment dated 7 March 2017.[1] I dismissed the appeal brought by the Independent Māori Statutory Board, and held that the Council and the s 301 parties, with the exception of Dr Palmer, were entitled to their costs and reasonable disbursements. I put in place a timetable for the filing of memoranda in that regard.

[2] Memoranda have been received from Federated Farmers of New Zealand Incorporated and Democracy Action Incorporated. No other party has sought costs.

Submissions

[3] Federated Farmers seeks a relatively modest award of costs. It accepts that the proceedings are properly categorised as category 2 for costs purposes, and it seeks costs on a band A basis. It sets out the various steps it took in relation to the appeal, and claims, in total, costs of $9,366. It makes no claim for disbursements.

[4] Democracy Action seeks costs on a category 2B basis for all steps taken in relation to the appeal, apart from the preparation of submissions. It seeks costs calculated on a category 2C basis in relation to the preparation of submissions. It seeks total costs of $28,209.50, plus disbursements of $751. It has outlined the various disbursements claimed by it. It notes the presumption contained in r 14.15 of the High Court Rules, but argues that, in the circumstances, there is good reason why that rule should not apply. It notes that it appeared before the Auckland Unitary Plan Independent Hearings Panel, and submits that while the Council and all s 301 parties took the same base position, each made different submissions, referred to different evidence and highlighted different matters. It argues that there were various issues which were raised by it which were not raised by other parties, and says that it was the only party representing the general public interest perspective. It also argues that until Auckland Council resolved to accept the recommendations of the Independent Hearings Panel, its staff supported the inclusion of a sites of value overlay and cultural landscape provisions in the proposed Auckland Unitary Plan. It says that it considered that it could not rely on Auckland Council to properly defend the elected representatives' decision. It submits that a generous costs award is

---

[1] *Independent Māori Statutory Board v Auckland Council* [2017] NZHC 356.

appropriate and that it is in the public interest that groups like it should be able to participate in similar proceedings in the future.

[5] The Independent Māori Statutory Board does not take issue with Federated Farmers' application. It does not, however, consider that Democracy Action's claim to costs is reasonable. It argues that Auckland Council was the respondent and that it was the principal party in opposition. It submits that all of the s 301 parties adopted to a greater or lesser extent Auckland Council's submissions. It also argues that the appeal involved matters of public importance, that the legal issues raised were not of particular novelty, and that a statement of facts was agreed by all parties, other than Democracy Action. It submits that costs should be assessed on a band A basis for both claimants.

Analysis

[6] Costs are of course in the discretion of the Court. The discretion is, however, qualified by the specific rules contained in the High Court Rules – rr 14.2 to 14.17.

[7] Of most significance for present purposes is r 14.15. It provides as follows:

> **Defendants defending separately**
>
> The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—
>
> (a) several defendants defended a proceeding separately; and
>
> (b) it appears to the court that all or some of them could have joined in their defence.

[8] As the Court has previously noted, the policy behind the rule is to minimise costs by shortening hearings where a joint defence can reasonably be expected. The rule suggests a policy which requires the Court to exercise some caution in awarding costs, without more, in favour of multiple parties, particularly when there is some overlap or community of interest in the litigation position of the parties seeking costs.[2]

---

[2] *Norfolk Trustee Co Ltd v Tattersfield Securities Ltd* HC Auckland CIV-2004-404-3668, 30 March 2005 at [51].

[9] The authors of McGechan on Procedure refer to relevant authorities dealing with the rule, and detail the principles which emerge from those cases.[3] Some of those principles apply in the present case. The Court should look in a realistic way at whether the parties have common or overlapping interests, and if so, to what extent. It can consider whether the parties took legal advice as to the appropriateness of separate/joint representation, and if so, what it was, and whether it was followed. The Court can consider the extent to which parties did or could have relied upon the evidence or submissions of another.

[10] In the present case, in my judgment, both the Council and the s 301 parties did, to a significant extent, have a common interest.

[11] While Council officers did support the position taken by the Independent Māori Statutory Board, the elected representatives did not do so. Rather, they adopted the recommendations of the Independent Hearings Panel. Thereafter, the Council actively opposed the appeal and it advanced the principal submissions in opposition to it. There was no justification for Democracy Action's suspicions as to the Council's role in resisting the appeal.

[12] Each of the s 301 parties did emphasise different matters, but they did have a considerable community of interest. They did not run separate cases. They did not seek separate relief. The impact on each of them in successively opposing the appeal was identical – the disputed provisions would not be introduced into the proposed Unitary Plan. There was no likely conflict of interest. Personal reputations were not at stake. While Democracy Action did stress various matters it considered were important, I gleaned the distinct impression that it did so not out of any pressing legal need, but rather because of its philosophical objection to the proposed plan provisions.

[13] There is nothing to suggest that Democracy Action took legal advice as to the appropriateness of separate or joint representation. A joint statement of facts was prepared. Democracy Action filed a separate statement in response to aspects of the

---

[3] Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR 14.15.02].

joint statement of facts, but as I recorded in my decision, it did not take issue with the facts recited in the statement of facts; rather it took issue with some of the inferences that could be drawn from the factual detail recorded in the statement.

[14] In the circumstances, I do not consider that there is good reason to depart from r 14.15. In my judgment, the appropriate course is to award one set of costs, on a 2B basis, in favour of both Democracy Action and Federated Farmers. I accept that Democracy Action chose to take a rather more active role at the appeal hearing than Federated Farmers. In my view, it is appropriate to direct that the costs awarded be split as to one third payable to Federated Farmers, and to two thirds payable to Democracy Action. In addition, Democracy Action is entitled to the disbursements claimed by it. Those disbursements amount to $751. I accept that they were properly incurred and there is no challenge to the same by the Independent Māori Statutory Board.

[15] There is no dispute as to the steps taken in the proceeding, and I anticipate that counsel will be able to finalise the quantum of the costs award between them. If there is any dispute, the same is to be referred to the Registrar.

_____

Wylie J