IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV 2009-406-144

UNDER	Section 299 of the Resource Management Act 1991
BETWEEN	OPTION 5 INCORPORATED Appellant
AND	MARLBOROUGH DISTRICT COUNCIL First Respondent
AND	STEVE BEZAR Second Respondent

Hearing: 17 November 2009

Counsel: D J Clark for Appellant
M J Radich for First Respondent
M J Hunt for Second Respondent

Judgment: 17 November 2009

COSTS JUDGMENT OF RONALD YOUNG J

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[1] In this appeal the second respondent seeks increased costs from the appellant and first respondent arising from an unsuccessful appeal from a decision of the Environment Court which in turn had allowed an appeal from the District Council relating to the development and review of the Central Business District.

[2] The first respondent has incurred legal fees of some $11,415.00 and the 2B costs for this appeal are $2,720.00.

[3] Some confusion has arisen in the exchange of submissions between counsel on costs relating to the second respondent's application for increased costs. The second respondent has mentioned that up to half of its legal fees are payable by

another party who although a party in the original proceedings did not participate in the appeal.

[4] The confusion arose because it appeared that an order for costs was being sought in favour of a non-party. In fact it is clear that no such order is sought. Who in fact pays the second respondent's actual legal costs is in my view not a matter which is relevant in assessing whether an order for increased costs is appropriate.

[5] Rule 14.6 of the High Court Rules, sub rule (3) provides as follows:

> **14.6 Increased costs and indemnity costs**
>
> …
>
> (3) The court may order a party to pay increased costs if—
>
> (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
>
> (i) failing to comply with these rules or with a direction of the court; or
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> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
>
> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
>
> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
>
> (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
>
> (d) some other reason exists which justifies the court making an order for increased costs despite the principle that the

> determination of costs should be predictable and expeditious.

[6] Firstly with regard to the appellant the second respondent argues that increased costs are appropriate because:

a) the appellant's points of law on appeal were difficult to discern and lacked merit;

b) the Environment Court approach was upheld in its entirety;

c) there was a collateral purpose relating to the appellant's case in that it was attempting to boost its opposition to the case for a development of a business centre outside of the centre of Blenheim;

d) individual property owners had to oppose the Council's proposals without being appropriately consulted or included in the process.

[7] I reject these as grounds for increased costs. I had no difficulty in identifying the grounds of appeal. The fact that the appellant lost the appeal by itself is not a ground for increased costs. While there may have been a potential collateral advantage from the appeal, I am satisfied that the appeal was brought for a proper and appropriate purpose. Finally, as to the individual property owners, that concern relates to the action of the Council rather than the appellant.

[8] Once the Council accepted that the proposal by the McKendry's was "on" the variation, then the consequences identified to individual property owners by the second respondent were inevitable. That by itself though would not justify an order for increased costs.

[9] As to the first respondent against whom costs are also sought there is merit in the second respondent's submission that the Council's conduct did contribute unnecessarily to the timing and expense of the proceeding. As I identified in my judgment:

a) the Council filed no notice raising a preliminary point they wished to raise on jurisdiction;

b) the Council gave no notice that it intended to raise this issue at the management conference;

c) the Council's submissions were seriously late; and

d) the Council's failure to provide reasons for its decision was in my view a serious failure as I identified in the judgment;

e) the Council indicated that it intended to take a neutral view at the appeal. It did not. It took a clearly partial view.

[10] In those circumstances I consider an approximately 50% increase in the 2B costs are appropriate bringing the total amount of costs to $4,000. The appellant and first respondent may consider that an equal sharing of those costs between them would be appropriate. I therefore order costs of $4,000 in favour of the second respondent jointly against the appellant and first respondent.

Ronald Young J

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