IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-000274
[2013] NZHC 2636

BETWEEN	FOWLER DEVELOPMENTS LIMITED Applicant
AND	THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Respondent
AND	THE HUMAN RIGHTS COMMISSION Intervener

CIV-2013-409-000843

BETWEEN	QUAKE OUTCASTS Applicant
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Respondent
AND	THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Second Respondent
AND	THE HUMAN RIGHTS COMMISSION Intervener

Hearing:	8 October 2013 (By way of telephone conference)
Counsel:	S P Rennie and J E Bayley for Fowler Developments FMR Cooke QC, Dr MSR Palmer and LJC McLoughlin-Ware for Quake Outcasts D J Goddard QC, P A McCarthy and A J Wicks for Respondents
Judgment:	10 October 2013

JUDGMENT OF PANCKHURST J
(RE: COSTS AWARD AND A STAY OF DISSIPATION)

Introduction

[1] Fowler Developments Limited and the Quake Outcasts seek costs awards. Memoranda have been filed which, commendably, include a fair measure of agreement both as to approach and the end result. However, there is a difference concerning the appropriate categorisation of the Fowler Developments Limited proceeding (as between category two and category three), and also a difference in relation to the appropriateness of increased costs sought by the Quake Outcasts. I shall deal with the Quake Outcasts application first, as this is the most convenient course.

[2] The Quake Outcasts also seek access to the costs awarded to fund their representation at the appeal hearing in the Court of Appeal on 23, 24 October 2013. The Crown, on behalf of the respondents, are opposed to this and seek a stay in relation to dissipation of the award in advance of the appeal decision. Instead, it is proposed that the amount awarded be held in a solicitors trust account until there is a joint direction from counsel, or an order of this Court. authorising its distribution.

The Quake Outcasts costs application

[3] The Quake Outcasts (applicants) seek costs totalling $109,956, together with disbursements in the sum of $14,538.87 (inclusive of GST). The total costs figure was calculated on a category 3 basis (reflecting the complexity or significance of the proceeding), but with the time allocation for individual steps in the proceeding variously assessed across bands A, B and C. Most time allocations are based on band B (a normal amount of time), but the commencement of the proceeding, inspection of documents and preparation for the hearing are calculated by reference to band C (a comparatively large amount of time).

[4] The Crown accepts that the approach adopted is appropriate save for the step relating to inspection of documents. The applicants' claim six days under band C, whereas the Crown considers one and a half days under band B is appropriate. The net difference is $13,230.

[5] In claiming under band C the applicants asserted that disclosure of documents by the Crown was "unsatisfactory". Initial Official Information Act disclosure was heavily redacted and incomplete. Subsequent disclosure was also problematic. Repeated requests for different categories of documents were made. Some documents were disclosed very late, within the week before trial. Items within the late disclosure were regarded by the applicants as key documents.

[6] These issues resulted in the need to engage Mr Palmer to focus on the evidential aspect of the proceeding. He assessed the available documentation, made requests for further information and eventually pieced together the documentary trail. At a late stage the applicants' filed supplementary and reply affidavits to which were exhibited significant documents obtained towards the end of the process. An example of a disclosure request made on 15 July 2013, one week before the hearing commenced, was adduced in evidence.

[7] The Crown challenged whether the OIA requests could be claimed as a step in the proceeding, as opposed to a step in the commencement of the proceeding already allowed for on a 3C basis. Many of the requested documents were of marginal relevance, were not ultimately relied upon and discovery involved several hundred documents, not several thousand. Hence, it was contended that a 3C award was inappropriate and would probably involve double counting given that the commencement of the proceeding and the preparation of affidavits both resulted in uncontested 3C claims.

[8] I am satisfied that the applicants' 3C claim is appropriate. It became evident during the course of the hearing that the informal discovery process was fraught. My impression was that the documentary record was incomplete in some respects; and the piecemeal manner in which documents were received was reflected in their presentation at the hearing. There was not a single coherent trail of documents, but rather a need to cobble together the factual situation from diverse sources. I accept that the inspection of documents in this proceeding would have required a comparatively large amount of time, as opposed to a normal amount of time.

[9] Costs claimed on the basis set out in the schedule to the applicants' first memorandum are allowed, subject to arithmetical changes (if any) which may be required and agreed between counsel. The disbursements claimed in the sum of $14,538.87, inclusive of GST, are also allowed.

Increased costs

[10] The applicants seek an uplift of 50 percent above scale costs under rule 14.6. In particular, they assert that the proceeding was of such a nature that the time required substantially exceeded the time allocation under band C[1], that the proceeding was of general importance to persons other than the parties and that it was reasonably necessary to bring the proceeding in the interests of all those affected,[2] and that "some other reason" supportive of increased costs exists.[3] The argument was advanced by reference to "two inter-related bases", being the effects of the Crown's unlawful conduct on the one hand, and that this was essentially a class action involving important subject matter on the other. In substance counsel submitted that the applicants were rendered financial vulnerable following the declaration of the red zone and the offers they eventually received, and then had no option but to assume the burden of complex litigation concerning matters of general and constitutional significance.

[11] Counsel stressed that the Crown's unlawful conduct engaged the "other reason" provision (r 14.6(3)(d)) and did not fall foul of the rule that pre-commencement conduct is usually irrelevant in fixing costs.[4] Rule 14.6(3)(b) was not relied upon. The unlawful conduct resulted in the need for the applicants to pool their limited resources to bring a public law claim challenging the actions of the respondents. This context was said to differentiate the applicants from normal litigants bringing civil proceedings to advance some private interest.

[12] Reliance was placed on various relevant circumstances. These included that the applicants were generally of very modest means, being the people most affected

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1 Rule 14.6(3)(a).
2 Rule 14.6(3)(c).
3 Rule 14.6(3)(d).
4 *Paper Reclaim Limited v Aotea International Limited* [2000] 2 NZLR 188 (CA).

by the earthquakes, whose principal asset was their home, the value of which was effectively eliminated upon the creation of the red zone. This development also placed the applicants in a stressful situation, which was exacerbated by a delay of 15 months before the 50 percent of land-value offers were made to them. During the delay the clearance of people from the red zone gathered momentum and the likely loss of essential services become more pressing. Moreover, when the proceeding was initiated the applicants faced a difficult path in obtaining the information required to advance their claims. The transparency envisaged by, and provided for, in the CERA Act did not exist. Hence, counsel submitted that these factors gave rise to "precisely the type of situation" envisaged as some other reason in r 14.6(3)(d).

[13] Turning to the second base of the argument, the nature and importance of the proceeding, the applicants pointed to the "very significant questions of legal and constitutional principle relating to extraordinary powers exercised in extraordinary circumstances" and submitted that the case was one of general public benefit which justified an award of increased costs. Although not truly a class action, the claim was akin to one in that it required administrative processes be put in place to deal with over 40 claimants and this resulted in obvious efficiencies and benefits to the parties, and the Court. While the purpose of the proceeding was to improve the lot of the applicants, counsel argued "there (was) also a larger issue involved, relating to the powers of the executive to interfere with fundamental human rights associated with the home and property". Hence, the argument continued, the successful litigation of an issue of such importance warranted an acceptance that significant costs, beyond those recognised by the scale, had been incurred.

[14] The Crown opposed increased costs:

(a) Despite their assertion to the contrary the applicants relied upon post commencement conduct which was irrelevant, save to the extent that such conduct added to the time and expense of the proceeding.[5]

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[5] *Paper Reclaim Limited v Aotea International Limited* [2000] 2 NZLR 188 (CA) and *Commissioner of Inland Revenue v Chesterfields Pre-schools Limited* (2010) 24 NZTC 24500 (CA).

(b) In any event the Crown's conduct provided no justification for an uplift in costs. Even assuming that such conduct was unlawful, it did not bring about the predicament in which the applicants find themselves. This was demonstrated by a number of factual features.

(c) There is no evidence that the applicants individual financial circumstances have suffered as a result of the decisions declared to be unlawful. The effective cause of any financial loss was the earthquakes coupled with the absence of insurance cover, and consequently EQC cover.

(d) Nor was it correct to categorise the proceedings a class action, since it was brought by a defined group for their own ends and the relief obtained recognised as much.

(e) The proceeding was not one brought in the public interest as envisaged in *NZ Maori Council v Attorney-General (No. 3),*[6] rather, this case was at most one of considerable public interest which raised the issue of public confidence in official decision-making. Nonetheless, it was brought by the applicants to advance their private interests.

(f) The circumstances that there were over 40 applicants, complexity existed and extra time was expended occasioning the need for a three man legal team to conduct the proceeding, were already recognised by the costs award based in significant part on 3C allowances.

[15] Counsel also queried whether a 50 percent uplift would result in an award which exceeded the costs actually incurred, and therefore involve a breach of r 14.2(f). In a subsequent memorandum, however, Mr Cooke confirmed that the claimed costs award would not exceed, indeed would be appreciably less than, the applicants' actual expenditure.

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6 *NZ Maori Council v Attorney-General (No. 3)* HC Wellington CP 4942/88, 28 April 1995 per McGechan J.

[16] Conduct in the course of the proceeding is not relied upon to advance the claim for increased costs. In fact, the proceeding was filed in May 2013 and resolved within three months, largely as a result of the approach and efforts of counsel. To the extent that the applicants were inconvenienced, particularly in relation to the disclosure of documents, this has already been remedied.

[17] Three questions are determinative. Is it shown that the proceeding, or a step in it, required an expenditure of time substantially greater than is recognised under band C? Although r 14.6(3)(a) was relied upon, I am not persuaded that the applicants have met this test.

[18] Rather, it seems to me that the applicants rely on r 14.6(3)(c) and (d). As to the former I accept that this proceeding did raise issues of general importance to persons other than the applicants. Although the claim itself, and the relief granted, was fashioned to address the situation of the applicants alone, the manner in which the red zone was created and whether it was competent to make the operative decisions other than under the Act are, I think, matters of more general importance. In brief, this case concerns an election not to use extraordinary statutory powers in a context where fundamental human rights associated with the home and property were at stake. Whether this approach was lawful is, in my view, a matter of general importance to the community at large. Regardless that the applicants were motivated by personal property interests, they had no option but to litigate an issue of constitutional and general importance.

[19] I am also persuaded that r 14.6(3)(d) is engaged in the circumstances of this case. The offer extended to the applicants was delayed to such an extent as to render them particularly vulnerable, further aggravated by the offer itself which did not promote their ability to get on with their lives as had the offers to other property owners. It follows, I think, that "some other reason exists" which warrants recognition by way of increased costs. It is the combination of the importance of the issues and the predicament of the applicants which I find persuasive.

[20] For these reasons I am satisfied that a 33 percent uplift in the award is appropriate. The extent of the uplift is necessarily a matter of overall impression.

A stay of the award

[21] The Crown seeks a stay of the costs award on the basis that the award will be paid to the applicants' solicitors to be held in trust pending an appeal decision, and either a direction from counsel to release the fund or a direction from this Court. Only two of the conventional stay grounds are relied upon: that the Crown's right of appeal in relation to the award itself will be rendered nugatory if the award fund is applied to meet legal costs in the meantime, and secondly, that the balance of convenience favours the Crown's position given that absent a stay the award will be dissipated making subsequent recovery a matter of substantial difficulty, or perhaps impossibility. In short, the argument is that the need to preserve the position in case the appeal is successful trumps the entitlement of successful litigants to have the fruits of their success at this point in time.

[22] The applicants' response was as follows:

(a) Although the majority of the group are in a precarious financial situation, a number of circumstances incline the balance in their favour.

(b) To effectively oppose the appeal the applicants were required to provide further litigation funding. Some members of the group were in extreme difficulty in doing so, particularly as the appeal was set down at short notice. Accordingly, the imposition of a stay would "prejudice the funding of the opposition to the appeal".

(c) The financial plight of those applicants who cannot meet their financial contribution is a ramification of the conduct which gave rise to the proceeding in the first place. Given that this conduct has been found to be unlawful, it would be wrong to allow the Crown to take advantage of a financial situation it has created.

(d) The costs award is a relatively insignificant sum when viewed in the context of the expenditure involved in the Crown's purchase of red zone properties.

(e) The issues at stake are of significant importance (for the reasons already mentioned) and it is in the interests of justice that the applicants are placed to offer an effective opposition to the appeal.

[23] Initially a further ground was advanced, namely that the Crown was effectively in a secured position because it could recover any sums due upon eventual settlement of the property purchases. It is now common ground that this argument is unsustainable. Many applicants have already received payments on a without prejudice basis and, in any event, the Crown's ability to make deductions is agreed to be problematic.

[24] The Crown doubts the contention that the financial plight of the impecunious applicants is the result of the impugned conduct. Counsel stressed the submission that the earthquakes and the absence of insurance cover was causative, rather than the creation of the red zone. I accept this point, at least in part. But the creation of the red zone has at least accentuated the plight of many of the applicants. In addition, the clearance policy and the future implications of that policy render continued residence in the zone difficult indeed.

[25] This is a difficult issue. The Crown is at risk of prejudice if the costs award is dissipated. On the other hand, without access to the award the applicants may suffer prejudice in relation to the effectiveness of their case in opposition to the appeal. In this instance I can see no way to secure an intermediate position which meets these concerns. In my view the potential prejudice to the Crown is the greater. I therefore grant the stay, subject to the obligation to pay the costs award and disbursements into the applicants' solicitors trust account.

Fowler Developments Limited

[26] A stay is not sought in relation to the Company. It has provided security to the satisfaction of the Crown.

[27] The only issue is the level of costs. Fowler's case was classified as a category 2 proceeding in February 2013. However, 3B costs are now claimed in the amount of $47,628, plus disbursements of $3.064.20. This it is said is justified on

the basis that the full complexity of the proceeding only became evident as the case progressed.

[28] The Crown contends that category 2 remains appropriate. A 2B calculation indicates an award of $29,153.50, after disallowance of one item in Fowler's claim. Counsel submits that elevation to category 3 is inappropriate as the Fowler proceeding was framed on a less complex basis and, in any event, the joint hearing made the task of counsel simpler as in the main submissions made on behalf of the Quake Outcasts were adopted.

[29] I accept the Crown's contentions. Not only was the Fowler proceeding simpler in nature, the joint hearing resulted in Fowler's counsel adopting a secondary role. This is not a criticism. It was both effective, and understandable, that counsel for a single party felt able to adopt the submissions of counsel advanced on behalf of a much larger group. For these reasons, I am not persuaded that reclassification to category 3 is appropriate.

[30] Fowler is awarded costs assessed on a 2B basis in the sum of $29,153.50, plus disbursements as claimed.

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