Security for Costs

Wakatipu Environmental Society Inc v Queenstown Lakes District Council [1997] NZRMA 132

This brief article considers the recent decision in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* (the "*Wakatipu* case"), and comments on its implications for public interest litigation. It begins by setting out the principle facts of the case and conclusions reached by Judge Skelton. This is followed by a commentary on key aspects of the case relevant to the liability of public interest groups for costs in Resource Management appeal proceedings. In particular, the commentary considers whether security for costs will be a further impediment to public participation.

The *Wakatipu* case is significant not only because it is the first case to consider an application for security for costs, but because it highlights a fundamental and topical issue. Is the policy of the RMA, to encourage and facilitate public participation representing diverse interests and values, being frustrated by the new powers of the Environment Court to order security for costs? If so, then this situation must be rectified. Not only will it lead to a serious loss of confidence in the RMA, but the quality of decisions will suffer, and enforcement will be further compromised. New Zealand will also be falling short of meeting its obligations under Agenda 21.[1]

"Security for costs" refers to a requirement that plaintiffs pay a specified sum of money to the Court, within a set time. The amount is decided at the discretion of the Judge and is not intended to be a pre-estimate of the amount of costs that may eventually be awarded in the case.[2] A

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1 Agenda 21, Section III.

2 *Attorney General v BCNZ and Bell Booth Group* (1986) 1 PRNZ 457, cited with approval in the *Wakatipu* case, at 142.

Court may stay proceedings until security is given. Alternatively, failure to pay can result in an appeal being struck out.

Background

Section 14 of the Resource Management Amendment Act 1996 amended s 278(1) of the RMA to give the Environment Court and its judges the "same powers that a District Court has in the exercise of its civil jurisdiction." Prior to this amendment the powers of the Court were more limited. In particular, the Court did not have the jurisdiction to order security for costs. As Judge Sheppard noted in *Geotherm Energy Ltd v Waikato Regional Council*[3] such powers could not be assumed. They needed to be conferred by Parliament.

In September 1996 Queenstown Lakes District Council granted Carlin Enterprises Ltd ("Carlin") land use consents to undertake a rural/residental development on rural land north of Queenstown. The development was a non-complying activity and was the subject of submissions in opposition by the Wakatipu Environmental Society (the "Society"). The Society appealed against the grant of the consents, following which Carlin made an interlocutory application (ie., an interim proceeding heard prior to a full hearing of a case) for security for costs against the Society.

The application raised issues under three distinct headings. First, did the Court have the jurisdiction to make the order? This issue required consideration, inter alia, of s 278(1) as amended by the RM Amendment Act 1996. Second, had the statutory threshold had been satisfied by Carlin? This threshold required Carlin to demonstrate that the Society's assets would be insufficient to meet costs awarded against it, if the appeal was unsuccessful. Third, did the circumstances of the case warrant the Court exercising its discretion to order security for costs?

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3 *Geotherm Engergy Ltd v Waikato Regional Council* [1994] NZRMA 139, 143-144.

Jurisdiction

Section 278(1) authorises the Environment Court to exercise all the powers of a District Court in its civil jurisidiction, including ordering security for costs. These powers are contained in Rule 61(1) of the District Court Rules 1992 and, in the case of incorporated societies, section 17 of the Incorporated Societies Act 1908. Both Rule 61(1) and s 17 give the Court discretion to order security for costs when there is reason to believe that the plaintiff will be unable to meet the costs of the defendent, in the event that the plaintiffs action is unsuccessful.[4]

The Court heard argument regarding the meaning of the words "plaintiff" and "defendant". The Society argued that it was not a "plaintiff" for the purposes of Rule 61 and s 17. It relied on a point of Court procedure, and on the decision in *Fraser Island Defenders Organisation Ltd v Maryborough City Council and Another*[5] in which a Queensland Court held that an incorporated environmental group, which appealed against a local planning authority's approval of an application, was not a plaintiff for the purposes of an order for security for costs.

Judge Skelton rejected these arguments and relied instead on the wide definitions of "plaintiff" and "defendant" in the District Court Rules. Rule 3 provides that "... unless the context otherwise requires, ... [the definition of defendant is] a person served or intended to be served with any proceeding.... [The definition of plaintiff is] a person by whom or on whose behalf a proceeding is brought". Applying these definitions, the Judge concluded that the Society was clearly a plaintiff and Carlin was a defendant. Furthermore, *Fraser Island Defenders Organisation Ltd v Maryborough*

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4 Note however that the actual tests to be applied in each case are different. This was an issue relevant to the threshold to be applied, not the extent of the Courts jurisdiction. See commentary below.

5 *Fraser Island Defenders Organisation Ltd v Maryborough City Council and Another* (1987) 23 APAD 279.

City Council and Another should not be followed because Rule 3 gives the words "plaintiff" and "defendant" wider meanings in the New Zealand context. Accordingly, the Court had jurisdiction to hear Carlin's application.

Threshold

The Court referred to a number of cases in which a 'threshold' was considered. This refers to a requirement that the defendant must satisfy the Court that the plaintiff will be unable to pay the costs of a defendant, should the plaintiff lose the appeal. Referring to *Ratepayers and Residents Action Association Inc v Auckland City Council*[6] Judge Skelton noted that different legal tests applied depending on whether a plaintiff was a company or an incorporated society. In the present case, the correct test, contained in s 17 of the Incorporated Societies Act, was whether "there appears by any credible testimony to be reason to believe that if the defendant is successful in his *defence the assets of the society will be insufficient to pay his costs...*".[7] The onus of proof was on Carlin, who established via the Society's uncontested accounts, that it had assets of less than $5,000. The Court was satisfied that costs awarded (if any) were likely to exceed $5,000. Accordingly, Carlin had satisfied the statutory threshold.

The Discretion

Having found that Carlin met the threshold, the Court went on to consider the exercise of its discretion. The principles and factors relevant to an exercise of a Court's discretion to order costs are well established.

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6 *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746.

7 Incorporated Societies Act 1908, section 17 (emphasis added).

Judge Skelton referred to *Hughes and Others v Cooper and Others*,[8] and *Attorney General v BCNZ and Bell Booth Group*,[9] setting in full these principles and factors. The principles most relevant to the *Wakatipu* case include:

(a) The discretion is to be exercised in all the circumstances of the case;

(b) Security for costs should not be used oppressively to shut out a genuine claim by a plaintiff of limited means, but nor should an impecunious plaintiff be allowed to use its inability to pay costs to put unfair pressure on a defendant.

Factors to be taken into account include:

(c) The merits and bona fides of the plaintiffs case, eg; the prospects of success;

(d) Whether an order might prevent a bona fide claim by the plaintiff proceeding; and

(e) Whether the defendants are using the application oppressively to prevent the plaintiff's case from being heard.

In addition to the above matters, the Court considered the public interest aspect of appeal proceedings under the RMA to be relevant. Here the Court referred to the Court of Appeal decision in *Ratepayers and Residents Action Association Inc*, where Richardson J commented that:[10]

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8 *J R Hughes and Others v B J Cooper and Others* High Court, Auckland. 5 July 1996 CP62/95.

9 *Attorney General v BCNZ and Bell Booth Group* (1986) 1 PRNZ 457

10 *Ratepayers and Residents Action Association Incorporated v Auckland City Council* [1986] 1 NZLR 746, 750 (emphasis added).

> Any Court exercising a discretion in the interests of justice in a particular case must have regard to any public interest considerations which the litigation serves. The emphasis on the rule of law reflects our society's insistence on providing controls on the exercise of power.
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> In acting in a responsible way as watchdogs of the public interest community organisations perform a valuable public service. Having in the public interest opened the Court door to the airing of public law questions, *the public interest in having those questions proceed to hearing and determination must be a factor for consideration in deciding whether to order security, and if so, at what figure it should be fixed.*

Applying these comments to the *Wakatipu* case, Judge Skelton noted that it had important public interest implications as it was a resource management appeal against a consent for a non-complying activity. Public participation was encouraged in such cases. He also opined that it is relevant to take into account the fact that orders for costs are not automatic in failed public interest cases. Finally, he commented on the relevance of the strength of the Society's case, and concluded:[11]

> My overall impression at this stage is that the Society has pursued its opposition to Carlin's application in a reasonable and responsible manner, raising legitimate concerns both in terms of its original submission and the present appeal. It is exercising its statutory right of appeal for what are, at least prima facie, valid and sound grounds and is not using its inability to pay costs as a means of putting unfair pressure on Carlin.

On the other hand, the Judge was troubled by Carlin's earlier attempts to pay $50,000 to the Society in return for its agreement to drop the appeal,

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11 *Wakatipu* case, at 144.

an offer declined by the Society. In his Honour's view, this event confirmed the bona fides of the Society. He went on to state: [12]

> [I]t is difficult to escape the conclusion that Carlin has attempted to buy off the Society's appeal and when that failed, to put pressure on it by making this present application seeking security for costs. I do not think this Court should give encouragement to such a practice.

The Court refused Carlin's application to provide security for costs.

Commentary

The following comments highlight some troubling aspects of the case, which relate to public participation in public interest litigation.[13]

First, as regards the jurisdiction of the Court, further issues may arise about the application of District Court Rule 3. At first glance Judge Skelton's reasoning appears persuasive. However, the rule begins with the words "unless the context otherwise requires." It may be argued in future cases that certain resource management public interest appeals are special cases, for which there are good policy reasons for not applying Rule 3. Here precedent from the *Fraser Island* case is relevant, as is Judge Skelton's comment that he found reasoning in that case "attractive".[14] Of more interest are Judge Sheppard's comments in *Geotherm Engergy Ltd*, where he elaborates (pre 1996 amendment) on the policy reasons against the former Planning Tribunal having the power to order security for costs. He notes that resource management cases often involve major development interests

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12 Ibid.

13 For more general commentary, see Grinlinton, D., "Public Participation in the Resource Management Process" (1997) 2 *BRMB* 1-2.

14 *Wakatipu* case, at 139.

being opposed by residential or environmental interests. Such opponents may frequently lack the substantial means required to meet orders for costs. Consequently, relevant factors may be overlooked by the Tribunal, and the quality of its decisions may be reduced:[15]

> [A] power to order the giving of security for costs as a condition of participation might discourage or even prevent some opponents from appealing in Tribunal proceedings.

Judge Skelton interpreted the 1996 amendment to s 278(1) as remedial action, which fixed up a deficiency exposed in *Geotherm Energy Ltd.* It is difficult, from a legal perspective, to argue that this was not Parliament's intention. From a policy perspective however, this amendment is seriously questionable. According to the Courts, applications for security for costs operate as an important check to ensure the merits and bona fides of an appeal. They should not operate to prevent valid and sound proceedings. While it is undoubtedly important to ensure these criteria are met, is the negative threat of security for costs the appropriate way to achieve these objectives, or is it bad policy.

An alternative, more positive approach was recently suggested by the Parliamentary Commissioner for the Environment in her report on public participation under the RMA.[16] The report noted a suggestion that early provision of legal aid could enable participants to be properly advised by legal counsel, thereby reducing the number of cases brought unnecessarily.[17] Following on from this point the Parliamentary Commissioner recommended

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15 *Geotherm Engergy Ltd v Waikato Regional Council* [1994] NZRMA 139, 143, cited in the *Wakatipu* case, ibid, 135.

16 Parliamentary Commissioner for the Environment, "Public Participation Under the Resource Management Act 1991: The Management of Conflict" (December 1996).

17 Ibid, 60.

that resources, including legal aid, would be more efficiently employed at a stage prior to litigation.[18] However, for legal aid to be effective in the manner suggested, issues of resourcing and eligibility would need to be addressed. Eligibility would, for example, need to be extended to corporate and unincorporate bodies, and the current limits on costs awarded against parties on legal aid clarified.

Secondly, in addition to policy reasons against orders for security for costs applying to public interest litigation, there are aspects of the threshold test which greatly disadvantage environmental and citizens groups.

The test requires a finding that the assets of a plaintiff will be insufficient to pay an order for costs, should the appeal be unsuccessful. This test overlooks the manner in which many environmental and citizen groups are funded. It is not unusual for such groups to have few assets. They exist on moderate member subscriptions and donations to meet day to day running expenses. In the event of an award for costs or other extraordinary expenditure they run special fund raising appeals and events. In other words, a lack of assets does not mean that they will not be able to meet costs should they be awarded.

The current threshold test also exposes incorporated societies to the danger of defendants attempting to 'pump up' the costs. The Court is required to look at a defendants likely costs, and make an estimate of what portion (if any) might be recoverable from an unsuccessful plaintiff. In this respect it is interesting to note that Carlin's expenses were estimated, by Carlin's solicitor, to exceed $90,000. Judge Skelton detected an element of duplication in this estimate, and concluded that they were excessive.

Thirdly, aspects of the exercise of the Court's discretion also raise problems. An application for an order for costs is an interlocutory proceeding. The discretion requires the Court to make important judgments

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18 Ibid, 70-71, para 15.

about the merits and bona fides of a case before it has had the opportunity to hear full evidence and argument, and prior to any decision about an award for costs. The pre-emptive nature of these applications, and the associated difficulties, has not escaped the courts. Judge Skelton expressly refers to the difficulty of deciding on the strength of the case and the likelihood of an order for costs, without having heard the case.[19] However, in cases such as the *Wakatipu* case, there is a high risk that an order for security will deny a public interest group from exercising its statutory rights before full argument is heard. It may also deny them the opportunity to recover their costs in the event of a successful appeal. This is because such cases often involve value judgments about the extent and nature of the public interest at stake. Furthermore, because of their financing arrangements, such groups are particularly at risk from the inherent contradiction of security orders. As noted in the *AG v Bell Booth Group* case: [20]

> It is inherent in the whole concept of security, however, that the Court has the power to order a plaintiff to do what it is likely to find difficulty in doing, namely to provide security for costs which ex hypothesi it is unable to pay.

It must also be noted that security for costs represents a kind of judicial double dipping at the expense of public participation. The policy behind the threat of orders for costs is essentially the same as for security for costs. As Judge Sheppard noted in *Penninsula Watchdog Group Inc v Waikato Regional Council,*[21] liability for costs should operate not as a penalty but as an important discipline to encourage participants to limit responsibly the

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19 *Wakatipu* case, at 143.

20 *Attorney General v BCNZ and Bell Booth Group* (1986) 1 PRNZ 457, quoted with approval in the*Wakatipu* case, ibid, 141-142.

21 *Penninsula Watchdog Group Inc v Waikato Regional Council* [1996] NZRMA 218, 221.

exercise of their appeal rights. Furthermore, during full hearings courts have the ability, via judicial comment, to warn parties about aspects of a case that raise the spectre of an award for costs, in a manner, and at a time when parties can respond to protect themselves or justify their conduct.[22] These two points outweigh the merits of subjecting public interest groups to the additional risks associated with orders for security.

And fourthly, a comment about Carlin's attempt to buy off the Society's appeal and its associated application for security. The negative implications of allowing one party to buy off an appeal by a public interest group are similar to those surrounding the purchasing of consents. Both are an impediment to public participation and further examination of the public interest. In the latter case, the Parliamentary Commissioner has recently recommended that the negative implications need to be addressed, perhaps in the form of amendment to the RMA.[23] As regards attempts to "buy off" an appeal,[24] the *Wakatipu* case has sent a strong message that such action will be relevant to a consideration of the legitimacy of a defendant's application for security.

Conclusion

The new powers of the Environment Court to order security for costs will undoubtedly be tested by further litigation. In particular, litigants will test the extent of the Court's jurisidiction and discretion. Thus it may be some time before the full scope of the Court's powers are determined.

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22 See generally *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357, in which Judge Treadwell advised Save the Sounds - Stop the Wash Inc that lengthy cross-examination of technical witnesses was not necessary or helpful.

23 Parliamentary Commissioner's Report, supra, note 16, at 71, para 20, and 72, recommendation 6.

24 Judge Skelton's words, *Wakatipu* case, at 144.

However, at this stage it is possible to conclude, from the *Wakatipu* case, that the Court will not entertain applications for security for costs against legitimate public interest appellants.[25]

This conclusion does not offer such appellants much comfort. The policy behind security orders is essentially negative, and the mechanisms by which it is applied work to the disadvantage of modestly funded public interest groups. Thus such groups now face a kind of double jeopardy. They may be deterred or prevented from bringing an appeal by *both* the threat of a security order, and by an order for costs. Furthermore, the new limitations imposed by security for costs are additional to some serious pre-existing restrictions to public interest participation in resource management appeals. These include the substantial power imbalances that can exist in favour of applicants due to their superior financial resources and information sources.

The Parliamentary Commissioner's report notes that fulfilling the promise of broad rights of participation of the RMA requires adequate resourcing *and* appropriate procedural processes. The Environment Court's new powers to order security for costs are not helpful in securing either of these pre-requisites. In fact, one can not help wondering whether Parliament's latest amendment to the RMA represents a deliberate stacking of the odds against public participation in resource management cases. It is not the role of the courts to attempt to compensate for the negative implications of orders for security, via the exercise of its discretionary powers

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25 In *Lake Okareka Ratepayers and Residents Association Inc v Rotorua District Council* Environment Court, 16 July 1997 A82/97, Judge Bollard declined to order security for costs against a public interest group opposing a tourist development.

or legal interpretation. It is the responsibility of Parliament to reconsider the appropriateness of its latest amendment as it applies to public interest litigation.

Prue Taylor[*]

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