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IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. 438/82

212

IN THE MATTER of the Town and Country Planning Act 1977:

A N D

IN THE MATTER of two appeals by way of case stated from determinations of the Planning Tribunal:

BETWEEN AUSTRALIAN MUTUAL PROVIDENT SOCIETY a society duly incorporated under the laws of New South Wales and having its principal place of business in New Zealand at Auckland, Insurance Company

FIRST APPELLANT

A N D TRAVELODGE NEW ZEALAND LIMITED a duly incorporated company having its registered office at Auckland, Hotelier

SECOND APPELLANT

A N D THE WAITEMATA HARBOUR MARITIME PLANNING AUTHORITY constituted pursuant to the said Act

FIRST RESPONDENT

A N D THE AUCKLAND HARBOUR BOARD constituted pursuant to the Harbours Act 1950

SECOND RESPONDENT

A N D THE AVONDALE-WATERVIEW RESIDENTS' ASSOCIATION INCORPORATED

THIRD RESPONDENT

Written Submissions : filed 21st November and 12th December 1983 and 13th February 1984

Counsel : R.P. Smellie Q.C. and I.F. Williams for first and second appellants

E.W. Thomas Q.C. and M.C. Holm for first and second respondents

Judgment : 20 March 1984

JUDGMENT OF CHILWELL J. ON COSTS

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1. This was an appeal to this Court by way of case stated for the opinion of the Court on questions of law pursuant to Section 162 of the Town & Country Planning Act 1977.

2. The building involved in this appeal is estimated to cost in the vicinity of $12,000,000.

3. The hearing occupied two days. It would have taken about a week if counsel on both sides had not tendered legal argument in written form orally supplemented. That method assisted the Court in the efficient disposal of the appeal. In such circumstances the hearing time is not as useful a guide as when the present scale was introduced. Written argument was then employed less than it is today.

4. The issues were several in number. Some were novel and complicated and very many authorities were cited and discussed by counsel.

5. The issues justified the appearance of Senior Counsel.

6. The appellants were entitled to seek the determination of this Court on the stated questions of law. The right to appeal to this Court must carry the obligation to bear costs if the appeal is lost. The costs of losing litigation are a consequence of asserting a right or a claim which is found to be wrong.

7. The Planning Tribunal is a Court of record (Section 128) which itself has the power to award costs (Section 147). In disallowing the appeals to it the Tribunal ordered the present appellants to pay the present first respondent the very modest sum of $400 costs. In its reasons for its decision the Tribunal said :-

> "In the circumstances it is just that there should be an award of costs to the respondent. The Harbour Board did not seek an award of costs, and having regard to the effect which its building would have on the appellants' hotel, we do not consider it appropriate to order them to pay costs to the Board. However, the respondent has successfully sustained its decision against the appeals at a lengthy hearing before the Tribunal. In the circumstances it is just that it should have an award of costs, which we fix at $400."

8. Item 34 of Table C of the Third Schedule to the Code of Civil Procedure refers to :-

"Appeals from inferior Courts (not otherwise provided for); as certified for."

"Inferior Court" is defined in rule 607 as meaning "any Court of judicature in New Zealand" and in Section 2 of The Judicature Act 1908 as meaning and including "all Courts of judicature within New Zealand of inferior jurisdiction to the High Court."

9. The Tribunal is an inferior Court and there is nothing "otherwise provided for" of which I am aware. The appeal is not an action as defined in the Judicature Act 1908. By virtue of items 34 and 38 of Table C and rules 555 and 568 of the Code the Court has a wide discretion to fix costs at any amount.

10. The primary rule is that the successful party is entitled to costs. Rule 556 of the Code provides an example of that rule in the case of trials. The same primary rule is observed by the Court of Appeal within the framework of rule 46 of the Court of Appeal Rules 1955.

11. The first and second respondents suggested, as a guide, that I should consider the appeal akin to a money claim of $250,000 to which items 10, 11, 13, 16 and 17 of Table C would apply i.e. :-

		$
10.	Preparing and filing statement of defence and matters preliminary thereto	150

11.	Preparing for trial etc.	500
13.	Trial at 8% on $5,000 and 3% on $245,000	7,750
16.	Extra counsel : two days	400
17.	Second day	300
		$9,100

and that I should fix costs at $9,000.

12. The first and second respondents also suggested that the award of costs should be paid by the appellants jointly to the first and second respondents jointly.

13. The appellants acknowledged the entitlement of the first and second respondents to costs, accepted the suggestion concerning incidence but objected to the claimed quantum as unjustified on a party and party basis. The quantum suggested by the appellants is between $3,000 and $4,000.

14. Weighing up all the factors involved in the appeal, and, in particular, those referred to in paragraphs 2 to 5 of this judgment, it is my judgment that the claim for an award of $9,000 party and party costs is reasonable.

15. I certify the costs of the first and second respondents jointly at $9,000 plus disbursements as fixed by the Registrar. The costs and disbursements are to be paid to the first and second respondents jointly by the

appellants jointly. I so order.

15th March 1984.

Solicitors :

Appellants	:	Shieff Angland Dew & Co., Auckland.
First and Second Respondents	:	Russell, McVeagh, McKenzie Bartleet & Co., Auckland.