

11/3/85

X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1417/82

85/74

BETWEEN

GORDON HUNTER CRAIG of 527
Beach Road, Murrays Bay,
Real Estate Salesman

Plaintiff

AND

The Body Corporate called
THE EAST COAST BAYS CITY
COUNCIL

Defendant

Hearing: 5 March 1984

Counsel: Holmes for Plaintiff
Worth and Miss Tohill for Defendant

Judgment: 6 July 1984

SUPPLEMENTARY JUDGMENT OF PRICHARD, J. AS TO COSTS

My judgment delivered on 4 April 1984 awarded the Plaintiff \$2,250 as damages "with costs according to scale". The Plaintiff's claim was for \$43,000. When writing the judgment I was not aware that the Defendant had paid the sum of \$2,500 into Court on 30 June 1983. The consequence of the payment into Court and the Plaintiff's failure to recover more than the sum paid in is that R.221 applies:-

"The Judge trying the action may allow the defendant his costs of the action subsequent to such payment".

The usual course adopted in these circumstances is that judgment is entered for the Defendant and there is a consequential direction that the fund lying in Court be paid and applied so that the Plaintiff receives the amount recovered plus his costs and disbursements up to the date of payment into Court but less the amount of the Defendant's costs, witnesses expenses and disbursements after the date of the payment into Court, the surplus, if any, to be refunded to the Defendant. This procedure was approved and followed by North, J. in Welsh v. Rodgers (1952) N.Z.L.R. 601, by Barrowclough, C.J. in Davies v. Manawatu-Oroua Electric Power Board (1966) N.Z.L.R. 294 and by Macarthur, J. in Churton v. Phillips & Anor. (1974) N.Z.L.R. 732.

In Welsh v. Rodgers, the costs allowed to the defendant were based on the difference between the amount claimed and the amount recovered - although North, J. observed that in his experience a defendant's costs had been allowed on the full amount of the plaintiff's claim.

Mr Worth, for the Defendant, submits that the Defendant should be allowed costs, witnesses expenses and disbursements totalling \$2,601.00 as against which the Plaintiff should be allowed to off-set \$250 being \$150 costs on issue and service of writ and discovery and \$100 disbursements. The nett amount of the costs, witnesses

expenses and disbursements payable to the Defendant after deducting the costs and disbursements allowable to the Plaintiff (\$2,351) would thus exceed the amount of the damages awarded to the Plaintiff so that the appropriate order in the circumstances of this case would be that the whole of the moneys in Court be refunded to the Defendant and that the Plaintiff pay to the Defendant the sum of \$101.

The Plaintiff has produced invoices showing that he incurred substantial expenses in obtaining expert evidence as follows:-

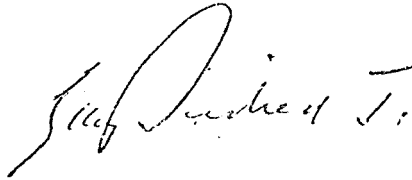
Valuer	\$ 540.00
Town Planning Consultant	919.48
Model maker	544.08
	\$2,003.56

Some of those charges relate to Court attendances and to work done after 30 June 1983, but a considerable amount was done prior to the payment into Court.

This is a case in which the Plaintiff set out to prove, and succeeded in proving, that a local body had neglected to follow correct town planning procedures. The sum he claimed as damages was unrealistic and could not possibly be sustained. Indeed the Plaintiff's own valuer put the figure for compensatory damages at only \$6,750.

Nevertheless, the expert witnesses called by the Plaintiff gave independent testimony which was of great assistance to the Court, as also was the model produced in evidence.

The order as to costs contained in the judgment of 4 April 1984 cannot stand. I am of the view that the present case is quite exceptional and that justice will be served if the parties pay their own costs. In view of the fact that R.231 is not couched in mandatory terms, and in exercise of the discretion under R.555, I make no order as to costs. Accordingly, I direct that of the moneys lying in Court the sum of \$2,250 be paid out to the Plaintiff and \$250 be paid out to the Defendant.



Solicitors:

Messrs Turner Hopkins & Partners, Auckland,
Solicitors for Plaintiff;

Messrs Stevenson & Young, Auckland, Solicitors for
Defendant.