Bulletin 5
G476

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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IN THE MATTER of the Judicature Amendment Act 1972 and the Casino Control Act 1990

A N D

IN THE MATTER of the Initial North Island Casino Premises Licence

BETWEEN AUCKLAND CASINO LIMITED

Applicant

A N D CASINO CONTROL AUTHORITY

First Respondent

A N D SKY TOWER CASINO LIMITED

Second Respondent

A N D SALTOUN INVESTMENT LIMITED

Third Respondent

A N D FLETCHER CONSTRUCTION NEW ZEALAND AND SOUTH PACIFIC LIMITED

Fourth Respondent
Intervener

Hearing: 10 August 1994

Counsel: JC LaHatte for Applicant
BR Latimour and IM Gault for First Respondent
P Salmon QC and H Keyte for Second Respondent
S Bryers for Third Respondent
J McKay for Intervener

Judgment: 31 August 1994

JUDGMENT OF ROBERTSON J ON COSTS

Solicitors

Wadsworth North, DX 6919, Epsom for Applicant
Bell Gully Buddle Weir, DX 9, Auckland for First Respondent
Kensington Swan, DX 57, Auckland for Second Respondent
Martelli McKegg Wells & Cormack, DX 112, Auckland for Third Respondent
Chapman Tripp Sheffield Young, DX 89, Auckland for Intervener

I concluded a reserved judgment delivered on 13 July, by saying :

> *"As I am presently advised there is no reason why costs should not follow the event. If it is necessary memoranda may be filed in the matter and I will make further orders in due course."*

In a minute issued on 5 August, I averted to the fact that there was an appeal in respect of my failure to uphold two of the causes of action and indicated that I was anxious that there should be no delay in hearing that appeal because matters had not been completed in this Court. Consequently, I directed that the question of costs be set down for hearing on 10 August unless it had previously been settled. Predictably it had not been resolved and the hearing proceeded. I had the benefit of written and oral submissions from all counsel.

I am of the view that the applicable rules are clear and unambiguous. The principles were discussed by Hardie Boys J in ***Morton v Douglas Homes Ltd (No 2)*** [1984] 2 NZLR 620. The continued adherence to that principle is confirmed by the Court of Appeal in ***Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*** [1991] 3 NZLR 457 at 460 when the President said :

> *"In both Courts the guiding principle has been that, except where there is special reason for awarding costs on a solicitor and client basis, orders should be limited to a reasonable contribution towards the successful party's costs on a party and party basis. This principle is represented in the prescribed scales and has been followed for many years. It reflects a philosophy that litigation is often an uncertain process*

in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs."

I was referred to some decisions of High Court Judges which revisit these fundamental propositions in some considerable detail and have addressed trends and approaches in other jurisdictions. I accept that there may be interesting arguments in support of alternative approaches. In my view any change of approach would require legislative intervention or direction from a superior Court. I am of the view that as a Judge sitting at first instance, my task is to apply the law in its settled state. The current regime in New Zealand is that although the actual costs involved by a litigant can be a factor, they are neither controlling nor determinative of the issue. I do not find helpful lengthy submissions about percentages of actual costs incurred.

This case involved eight days of hearing. It concerned the validity of the grant of a casino licence. It was said by the applicant to have a worth of $60 million; (although I must confess to having some difficulty in understanding where the figure comes from). About $15 million was spent in fees and expenses by various participants in the hearing before the Authority. The successful applicant intends to spend more than $300 million in the construction of the facility. In a nutshell it is a significant case over an important issue.

The litigation team of the three main contending parties were led by silks until a week before the hearing when the applicant withdrew its instructions to its leading counsel. But that issue aside, it is clear that it

was a case which justified senior counsel (and several counsel) being involved for each of the major protagonists.

There were substantial factual issues traversed. Although I had the benefit of some careful analysis of the law on bias, the case finally was decided on its own peculiar facts. Many of the issues which were floated were found to be without an evidential foundation.

There can be no doubt of the importance of the litigation to each party involved. I accept that although there was not the added element of a "public interest" factor, there were substantial issues of policy and approach which demanded careful attention.

An application for an interim injunction had been sought but refused and so there was particular urgency in the substantive proceeding being dealt with at an early stage. That was possible because of the co-operation as between counsel, including counsel for the applicant, notwithstanding its endeavours to have the proceeding adjourned.

I accept that there were a substantial number of pre-trial applications. Extra expense was incurred as a result of the need to obtain further and better particulars and because of some continuing failures to comply with timetables.

When one stands back from the situation there were seven grounds of attack on the processes of the first respondent. In respect of each there was a request to return and hear the process over again. The applicant succeeded on none of those. The only relief I provided was with the concurrence of all parties, a re-definition of the premises in the licence.

On many of the grounds I ruled substantially not only against the legal position of the applicant but held on a secondary basis that even if a claim had been substantiated there were other factors which would have led to relief being denied.

It is not a matter which is capable of being related to the scale. No doubt with tongue in cheek, Mr LaHatte suggested that I was bound to have regard to the ceiling of $5,750 contained in the second schedule. Counsel for the first and second respondents suggested that I should be making orders which almost covered the total costs and disbursements incurred between them which amount to over $800,000.

I am of the view that there is nothing sufficiently out of the ordinary in the circumstances of this case to justify other than a straight forward application of normal principles.

The second respondent contended that there should be an order as well as against the applicant also against the third respondent. It played a very limited part in the hearing. For the first respondent costs were sought only against the applicant. Fletcher Construction which was granted intervener status (and took a minimal part in the proceeding) also sought costs against the applicant.

An interesting matter which emerged in the course of the hearing was the effect of s 76 to 79 of the Casino Control Act 1990, whereby Parliament has provided that the first respondent is to be funded entirely out of levies from casino premises licence holders. It was argued that to the extent that an order was not made in favour of the first respondent against

the applicant for all its costs, the second respondent as a licence holder would end up having to pay those costs in any event. If there is no other source of income that would be the case. But I have no details as to whether the entire amounts paid by all applicants when they applied for licences have yet been used. Further I am of the view that it is not part of the Court's function in determining an allowance for costs to have regard to the funding consequences which Parliament has determined for the first respondent.

The whole of the applicant's case was directed against the acts or omissions of the first respondent. Not surprisingly, the second respondent was at pains to describe itself throughout as being the innocent party caught in these proceedings. To the extent that there was no direct complaint made against the activities of the second respondent, I am of the view that the costs awarded in its favour should be at a higher level than those in favour of the first respondent.

Bearing in mind the restrained and responsible way in which Saltoun involved itself in the hearing, I have concluded that it is not appropriate to award any costs against it. It did not seek costs itself against anybody. It is clear that it involved itself in the matter only because the proceedings were already on foot. Its involvement did not add to the length or complexity of the hearing in any appreciable way.

I am unwilling to make any order for costs in favour of Fletchers. I granted them intervener status as did Temm J in the interlocutory proceeding. I concluded that their involvement was directly related to the position of the second respondent. I do not criticise their appearance and I

was assisted by it. But in my judgment it is not appropriate to award them costs in respect of the application.

Bearing in mind the length of the hearing and its importance, I am of the view that it is appropriate that the applicant should make a contribution to the first respondent's costs in the sum of $84,000, together with costs, disbursements and witnesses expenses as fixed by the Registrar. In addition there should be a contribution to the second respondent's costs of $168,000 together with costs, disbursements and witnesses expenses as fixed by the Registrar.

In respect of this hearing I allow further costs of $1500 to each of the first and second respondent.