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THE REMARKABLES COST AWARD - A NADIR FOR ENVIRONMENTAL PLANNING APPELLANTS?

A casenote on the Planning Tribunal's costs decision in the Remarkables Protection Committee v Lake County Council and Mount Cook Group

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Introduction

Traditionally costs have played an important role in town planning appeals - representing the means of discouraging unfair and unnecessary litigation, and controlling each step in the conduct of the case. By a judicial application, the problems of prolixity and delay in proceedings, and more pertinently the taking of appeals as a matter of course, can be prevented. However a delicate balance must be struck between the reasonable application of costs to prevent abuse of the system and overly stringent awards that actively discourage the initiation of appeals. Under the latter regime, even the most prudent and justified of litigants will be reluctant to hazard an appeal.

After recently reviewing the costs question, the Planning Tribunal issued a new practice note on 19 June 1979, effectively superseding the earlier costs' practice.

Variously interpreted as indicating a movement away from the previous practice[1], and a hardening of attitude by the Tribunal towards unsuccessful appellants[2] (although observing in the latter that the Tribunal had not gone to the extent of saying costs will normally follow the event), the step does appear to significantly alter the general practice regarding cost awards in the sphere of planning appeals. As a general rule, the Tribunal will now award costs against any appellant invoking the appellate procedure unless the appellant succeeds in obtaining either (a) the relief sought by the appeal, or (b) a substantial modification of the decision appealed against.[3]

Alone, this bald statement of approach indicates the Tribunal's adoption of an intransigent stance towards planning appellants. Justified by the admirable desire to prevent the lodging of perverse and frivolous appeals as a delaying tactic, the practical consequence may well be to stifle and

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unduly restrict even bona fide appellants from participation in the planning process.

The Remarkables Protection Committee v Mount Cook Group decision[4] reflects the disquieting application of the Planning Tribunal's current practice note regarding costs. By its substantial award mulcting the Protection Committee in costs, the Tribunal's decision reflects, in practice, a deterrent regime. A severe financial obstacle has been placed before any planning appellant, and particularly so before environmental appellants, who act in the public interest and traditionally have been plagued by insufficient financial support.

The principal object of this paper is to consider the role of costs in planning appeals and the extent to which the Remarkables decision, read concomitant with the practice note, has effected a watershed and a gravitation away from previous costs practice.

I COST AWARD PRECEDENTS

Town and Country Planning Act 1977

Under section 147 of the Town and Country Planning Act 1977[5] the Planning Tribunal has a two-fold discretion to award costs. Subsection one deals with cost awards at the appellate level, where costs as the Tribunal "considers reasonable" may be awarded, and such costs may be apportioned "in such manner as it thinks fit". This provision is coupled with a power in subsection two to award costs where a party defaults, either by failure to prosecute any proceeding at the fixed hearing time, or failure to give adequate notice of the abandonment of any proceeding.[6]

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Although not mirroring the power of the former Boards under section 40(6) of the 1953 Act - a power to award "such costs as it deems just", this discretion is considered to be unaltered, the linguistic distinctions not representing any change in substance.[7]

As a general rule, the Tribunal (formerly Town Planning Boards) did not award costs (costs lay where they fell) unless acts constituting misconduct and placing an increased burden of costs on the other party occurred.[8] Hence costs have been awarded where the appeal was unjustifiably adjourned,[9] where the appellant raised a ground of appeal not taken before the council,[10] or was found to have no right of appeal,[11] and in the instance of a last minute application for its withdrawal.[12] In this light, the current practice note reflects an unprecedented step, and a marked gravitation away from the earlier practice.

Water and Soil Conservation Act 1967

Under the Water and Soil Conservation Act, the Tribunal's position is somewhat different. In considering an appeal against the costs order of a Regional Water Board, it has jurisdiction both to review that award and to determine whether costs should also be allowed on appeal.[13] Regarding appellate costs, section 25(2) prescribes a discretion either to leave costs where they fall, or to direct upon whom they shall be borne.[14]

Under this legislation, costs have been awarded both against an appellant who, putting the applicant for water rights to proof, did not himself call evidence,[15] and also to a successful appellant, despite an absence of the proper conduct on the local authority's behalf.[16] This latter award was justified since the appeal represented the necessary and only means for the appellants to defend their proprietary rights.

By a subtle and gradual circumscription of the general rule, what may be termed a hardening of approach by the Planning Tribunal toward appellants under both Acts has occurred. Where no new question of principle arises on appeal, and the principles relevant to the grant of rights are well settled, a cost award against the appellant is likely.[17] However, where the issues are of much wider import than those usually applying in a water rights application, costs will not be awarded against the unsuccessful appellent.[18] For the future, where an appeal involving essentially a value judgment is unsuccessful, costs will be awarded against the appellant.[19]

Why this anathema against unsuccessful appeals involving value judgments? Surely such appeals are not a sub-class within a broader context of appeals - all planning appeals raising subjective issues, by their nature dictating value judgments in their resolution.

The Planning Tribunal has explicitly recognised the intrinsic nature of its determinations as involving value judgments.[20] Why it then goes on to rail against re-presentation of such value judgements at the appellate level is unclear, although it has been suggested that such a rule may be no more than a restatement, in a different way of the general rule that costs should follow the event.[21] Since the matters raised are by nature subjective, and not black and white, and equally their resolution not reflecting the straight forward and objective application of established legal principles, therefore the consequences attendant upon that determination should not be black and white.

Subjective considerations dictate an individual cost award, specific to the facts of each case. An environmental planning appellant emerges at the polar extreme of an ordinary civil litigant. Propounding essentially the

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intangible - the maintenance of environmental quality, the environmental appellant pursues a particularly unselfish case, with no hint of self interest motivation (acting in the public interest and generally without any proprietary, personal or financial rights to protect). Equally, the subject matter is not readily quantifiable in terms of immediate benefit (an environmental appeal, essentially a preventative measure, to maintain the status quo), and it possesses no apparent financial value. Balancing the competing interests, in a quasi-judicial sphere whose decisions are marked by pragmatic, rather than legal and precedence response, dictates a value judgement.

In sharp contrast, the ordinary civil litigant, and most pointedly in former personal injury actions, is motivated by the purely self interested desire to protect a personal or proprietary right. In general, a tangible right is propounded, a financial value is readily assignable, and the relief sought is characterised by monetary gain or recompense.

A planning appeal is thus distinctive in nature, and inherently imbued with these subjective issues. The general immutable rule that an unsuccessful appellant must pay costs takes no account of such considerations that require an individual cost award, specific to the particular facts of each case.

This developing rigidity is of general purport, increasingly subjecting all unsuccessful appellants to costs liability.[22] Its effect however being particularly damning for environmental appellants, hampered by insufficient financial resources in presenting the appeal, and the nature of the remedy sought (variously mandamus, declaratory judgment, and injunction) providing no possibility of financial recompense.

Administrative Analogy?

The Commission of Inquiry, essentially an administrative

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parallel of the Planning Tribunal[23] equally invokes cost awards. Under the Salmon Report,[24] the Commission's object being "to inquire and report" and never to penalise, the necessary corollary arises that cost awards must therefore be remunerative, and not to penalise.

The costs analogy that Tribunal awards should not be punitive, although undeniably beneficial and of practical appeal in the environmental context, is not readily drawn because of the fundamental distinctions between the two bodies. A Commission requires special instigation (usually at the behest of Parliament) inquiring into and reporting on the specific issue prompting its instigation. By comparison, the Planning Tribunal is of permanent constitution, hearing many and varied appeals, and actually deciding the issues raised. Cost awards at an inquiry in the public interest are essentially remunerative, rewarding a witness and his counsel for assisting the Commission; in planning appeals, costs clearly play a more definitive role, with purely remunerative cost awards often inappropriate. However, rather than being essentially punitive in nature, the partial adoption of a remunerative-oriented stance in cost awards is desirable. The presentation of environmental factors greatly assists the Tribunal in its resolution of the matter. By ensuring the adequate canvass both of the deleterious consequences of the proposed development, and/or the desirability of maintaining the status quo, environmental appellants provide an effective and necessary counterbalance to the not unnatural bias of the development case.

In this light, an environmental appellant's failure should not draw the automatic sanction of costs - win or lose, the canvassing of environmental factors nevertheless assisting the Tribunal's resolution. Thus Tribunal awards should reflect some remunerative element, a recognition of the beneficial role of environmental appellants in the planning process.

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Overseas Survey

Overseas' costs practice in planning is instructive. Largely developed from its English counterpart, New Zealand's legislation has however incorporated much of the philosophy and practice of the United States, and hence reflects a compromise between two polar systems. The Australian experience also may evidence a similarity in approach.

(i) United Kingdom

The United Kingdom planning structure has been characterised as a system " ... marked by its centralised control over location, its undivisable administrative review and its flexibility".[25] Objections are raised initially at the local planning authority level, with a right of appeal to an independent tribunal.[26] Decision making at both levels is subject to the scrutiny and final adjudication of the Secretary of State.[27] A consideration of appeals against local authority decisions, heard by inspectors appointed from central government and usually decided on the parties' written submissions, has prompted the comment that although the planning legislation provides for the establishment of an independent ad hoc tribunal, an administrative decision is generally favoured.[28]

Cost awards both at the local inquiry and appellate level are discretionary, under section 250(5) Local Government Act 1972 (as applied to the Town and Country Planning Act 1971). Under a Ministry Circular[29] however, this discretionary power has been supplanted by the general rule that costs will not usually be awarded except against a party behaving unreasonably, vexatiously or frivolously. The Circular's main criterion of unreasonable behaviour is whether one party has been put to unnecessary and unreasonable expense, either because the matter should never have come to inquiry or where the conduct of one party caused undue trouble and expense. The Circular also exacts a higher standard of behaviour from planning

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authorities, since they ought to know more about the procedure and the strength of the argument on both sides of the appeal.

The position of environmental groups in the planning process is somewhat precarious. In many instances having no positive legal right to be heard at public inquiries, their representation is solely dependent upon the Inspector's discretion. Recent speculation and controversy over third party representation at planning appeals has generated the comment that the effectiveness of planning appeals would be enhanced with third party representation, by ensuring the production of all requisite information at the appeal, and assisting the ultimate decision and conduct of the Secretary of State (or his delegates).[30]

(ii) United States

In direct contrast, the United States' system is " ... marked by local autonomy, judicial review and rigidity".[31] The American Rule that costs lie where they fall, prevails at both the administrative agency (equating with the Planning Tribunal) and judicial (Court litigation) levels in environmental actions. Diverse views have been expressed as to the validity and application of the American Rule, particularly at the judicial stage.[32] Judicial[33] and statutory[34] exceptions have been developed to lessen the stringency of this costs rule.

Environmental litigants, in the absence of specific statutory authorisation of an award, have sought particularly to invoke the private attorney general exception. This exception applied to actions vindicating fundamental Congressional policies, creating a widespread benefit and yet involving a heavy financial burden far outweighing any potential benefit to the individual litigant.

Cognisant of the fact that most environmental and public

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interest litigants advanced a conservationist goal on behalf of the public, usually claiming specific relief, federal courts, broadening its application, began awarding fees in an increasing number of environmental suits. The United States Supreme Court effectively stymied this development however, by refusing to extend the private attorney general doctrine to environmental litigation, and deferred such a step to Congress.[35]

Consequently the position regarding cost awards in environmental actions remains essentially unaltered - costs lie where they fall.

(iii) Australia

In Australia, planning appeals are variously determined by Town Planning Commissioners,[36] the relevant Minister[37] and independent planning tribunals.[38] However, in New South Wales, planning appeals are dealt with by the Land and Valuation Court, and costs, awarded in a like manner as those awarded in a judgment of that court, are discretionary.[39] The Court's practice, in exercising its discretion, has been to award costs to the successful appellant (costs follow the event) unless a special reason exists for adopting a contrary course.[40]

Hence, as a general rule in planning appeals in Australian States, costs follow the event (the rationale being to indemnify the expenses incurred in vindicating the prevailing party's rights, although in practice the indemnity is not complete).

Speculation has however arisen about possible changes in cost awards.[41] Australian law reform bodies, acknowledging that costs indemnity effectively bars judicial recourse for environmental and public interest groups, have recommended that the unsuccessful party to planning appeals should not be liable for the other parties' costs. This readiness to

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abandon the general rule in public interest suits to make judicial proceedings viable would effectively re-enact the American Rule as to cost awards. The rationale behind such proposals is equally germane to independent planning tribunals.

Cost awards by planning appeal bodies overseas reflects a diverse response, with a marked divergence between the United States and other common law jurisdictions. This disparity hinges on the inherent nature of planning appeals, and the appraisal and degree of recognition accorded to the role and value of environmental and public interest appellants to the planning process.

II CURRENT STATE OF EVOLUTION

Practice Note

Superseding the prior practice of the Tribunal, the new practice note has effected a substantial alteration in cost awards in planning appeals. By replacing the earlier rule that costs lie where they fall with the overt policy that costs will generally be awarded against unsuccessful appellants (in the absence of any substantial modification of the decision appealed against)[42] the Planning Tribunal has placed costs on a decidedly punitive plane.

Paragraphs five and six of the practice note reinforce this punitive aspect. Where a party has been required to prove undisputed facts the Tribunal felt should have been admitted by the other party, the former explicitly states such a factor to be germane to the award and quantum of costs. Under the latter, attention is drawn to section 147(2) where costs are awarded to the Crown where a party fails to prosecute a proceeding at a time fixed for its hearing, or to provide adequate notice of the abandonment of

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However, in the limited realm of planning appeals under section 49 T.C.P. Act (concerning proposed appeals, variations on review of a district scheme) and section 26G W.S.C. Act (dealing with Tribunal appeals against classification) which have proceeded to a hearing, this stringency is somewhat relaxed - costs will not be awarded save in exceptional circumstances.[43] Costs similarly will not be awarded against the public body against whose decision the appeal is brought.[44]

Has the abuse of the appeal procedure been so considerable as to justify these intrinsically punitive measures? Certainly it becomes readily apparent that the encouragement of public participation in the planning process as reflected in an individual's statutory right to appeal was not the consideration uppermost in the Tribunal's mind, when formulating this current practice note. What were the reasons behind this overtly deterrent approach?

To the contrary, the Tribunal's intention has been expressed as encouraging public participation in the appellate procedure.[45] Where there has been a justifiable cause for bringing the appeal, the appellant will not be ordered to pay costs, the success or otherwise of the appeal immaterial. However, where the decision appealed against was reasonable and proper, the Tribunal being in no better position to decide the issue, then the appellant's failure will as a matter of course draw the costs sanction.[46]

Is the reasonableness or otherwise of the local authority's decision so self evident? The Tribunal's admirable and completely justified intention may in practice prove futile. Prima facie, the potential financial burden incurred in presenting an appeal, let alone any cost award, would seem to

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provide an implicit sanction, instilling extreme caution before an appeal is lodged. Is this additional sanction, placing a new and different emphasis on costs, necessary?

As a general rule, an appellant's failure will now incur the costs sanction.[47] In that situation costs, for the prevailing party, will follow the event. In stark contrast, where the appellant is the prevailing party, succeeding on appeal, there is no correspondent costs award. The rule states that " ... the Tribunal will as a general practice order an appellant who failed ... to pay costs to the other parties to the appeal ...".[48] The applicant's or respondent's failure will not draw the same automatic costs sanction. Costs entitlement is not implicit for all prevailing parties - only for the prevailing respondent or applicant.

The practice note thus reveals a double sided coin - the deterrent factor that an unsuccessful appellant, as such and as a general rule, will have to pay costs, being made doubly vicious in its practical application by the total absence of any corresponding and balancing factor of costs entitlement.

The Franks Committee in the United Kingdom (1957) regarding cost awards at statutory inquiries, recommended that the successful appellant in planning appeals should be awarded costs. In declining to adopt this recommendation, the United Kingdom Council on Tribunals although persuaded by evidence that such proposals would have a harmful effect on planning administration, qualified its own recommendations by proposing that where there is little or no merit in one objection over another (policy or chance being the determining factor), the unsuccessful objector who had not behaved unreasonably should be awarded costs. The Ministry Circular, while not implementing either proposal, did however allow

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costs to successful appellants in specific situations.

Recognition of the validity of cost awards to successful appellants in planning appeals by such an authoritative committee indicates such proposals as certainly deserving of consideration.

The practice note, it is submitted, reflects a further step along the continuum of restriction and increasing stringency of planning appeals, effectively deterring both the frivolous and bona fide appellants.

Remarkables Decision

The separate costs decision of the Number Three division in the Remarkables Protection Committee v Lake County Council and Mount Cook Group[49] represents the first application of the practice note, and highlights the intentions and practice of the Planning Tribunal. The Protection Committee was challenging a decision of the council, granting planning consent to the Mount Cook Group to develop the Rastus Burn skifield at the western end of the Remarkables range. The Tribunal awarded $8,500 costs against the Protection Committee - the unparalleled quantum[50] of the award merely a reflection of recent cost increases.

A reading of the Remarkables decision concomitant with the practice note, illustrates the practical consequence of not merely mulcting frivolous and unjustified appeals in costs, but furthermore, actively discouraging any initiation of appeals, justified or otherwise. The Tribunal in this sense, has clearly overreached itself, adopting a negative and blatantly punitive stance towards appellants in the planning process. Whilst cost awards under section 147 are admittedly discretionary, the current position may be seen

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as a total denigration of the spirit behind the legislation, and a gravitation away from any environmental considerations.[51]

III THE REMARKABLES DECISION IN DETAIL

Modification

Reflecting the application of the practice note,[52] prima facie it should therefore follow that the Protection Committee had failed to obtain both the relief sought by the appeal, and any substantial modification of the decision appealed against. Does the case itself bear out this interpretation?

In dismissing the Protection Committee's substantive appeal, the Tribunal's decision had effected a two-fold modification of the earlier decision both as to the conditions imposed by the council and consent to depart from the scheme. In holding such modifications were not substantial, the Tribunal was therefore able to make an award of costs. In view of the amendments effected by the decision however, it is submitted it was open to the Tribunal, at this point and without more to hold the practice note as inapplicable, and hence an award of costs not appropriate. Conceivably, policy considerations of the Tribunal, and its appraisal of the planning appeal's function were determinative factors of this potential watershed.

Merits

Explicit recognition of the merits of the Protection Committee's case[53] provided no justification for refusing a costs award against the appellant, and the Tribunal saw

" ... no grounds for treating this appellant differently

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from any other appellant advancing a similar case".[54]

Why not? The appeal involved an environmental issue, by nature a subjective and imprecise concept, neither imbued with any concrete manifestation of benefit, nor of positive development (merely representing an action to maintain the status quo). The Protection Committee with no self interest to protect (no property or commercial interests) acted in the public interest, promoting an issue of national, regional and local importance. Equally, the nature of the remedy sought contained no incentive of financial recompense, let alone gain, from the action.

It has been said that "A judge should be conscious of the felt necessities of the time".[55] Is this consciousness solely economic, taking cognisance of increasing costs and inflation, and irrespective of the acknowledged merits of the case? Similarly, are administrative requirements the "necessities" and not environmental considerations?

Principle Ground of the Decision

The kernel of the decision, and seemingly the sole justification for the award and quantum of costs was the appellant's conduct of its case, whereby the applicant and respondent were occasioned additional expense. Failure to comply with another practice note requiring the provision of evidence briefs in advance of the hearing of an appeal, and post-hearing and mid-appeal preparation of technical evidence were judged reprehensible. Certainly, the Protection Committee, if not already aware of these procedural requirements, ought to have been informed of their existence by counsel. From the decision, compliance with such requirements appears essential, and patently, failure to do so was fatal, even with an explicit recognition of the merits.

Does this constitute the promotion of administrative efficiency and formalised procedural requirements at the expense and sacrifice of consideration of environmental objectives? Certainly what seems like a developing plethora of practice notes structure the right of public participation in planning appeals.

Appellant's Grounds for Costs Exemption

The Protection Committee resisted the cost applications of the other parties on the grounds that it represented a "relevant aspect of the public interest", on a matter of national, regional and local importance, and where a commercial enterprise was the subject of the appeal. Much criticism may be levelled at the Tribunal's 'resolution' of these issues, particularly since barring its cursory remark that careful consideration had been given them, it appears not to have addressed these points at all. Certainly they provided no grounds for special treatment of the appellant.

The definitive character of the public interest in any planning matter was ignored. Under the legislation, any " ... body or person representing some relevant aspect of the public interest ..."[56] has a statutory right to object (recognising the value of such participation to planning decisions).

The Tribunal chose to ignore its earlier recognition of important matters of public interest.[57] The Protection Committee members, not being owners of land affected by the proposal, however possess no other legal avenue through which to advance their bona fide objection - the statutory right of appeal represented their sole recourse.[58]

The new practice note did not inhibit these prospective appellants, the appeal application being lodged prior to the

publication of the practice note. In Woolworths v Dunedin City Council[59] this same fact was held to preclude the application of the new practice note, the award of costs being dealt with under the earlier regime. Prima facie therefore, the same considerations should apply here, but as borne out by the decision, the post-application publication of the practice note was conveniently overlooked. Conceivably, a breach of the Tribunals earlier admonition against pursuing essentially value judgements at the appellate level[60] may have justified the cost award against the appellants. This premise would thus render invocation of the practice note superfluous, and the procedural objection without substance. In the absence of overt recognition of the warning, and indeed in the face of explicit reference to the practice role[61] the former is unlikely to be the grounds warranting the award. Certainly the fundamental nature of the decisional basis, and the gravity of the cost award, would of necessity, dictate an explicit acknowledgment of the actual ground for decision.

Considerations of far wider import than those usually relevant to planning appeals were involved - not merely the self-interest action of property protection,[62] or protection of commercial and business interests, but the wider, more pervasive protection of a unique mountain environment. As here, where the issues raised are of more than local significance, and the outcome will clearly affect subsequent decisions elsewhere, the participants can be seen to argue a particularly unselfish case, certainly not being activated by self-interest. On this ground alone, any cost award against such appellants is inappropriate.

The Tribunal decisions in Woolworths v Dunedin City Council,[63] and Queens Drive Pharmacy Ltd v Lower Hutt City Council,[64] where the unsuccessful appellants, possessing a commercial or property interest in the appeal were required to pay

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costs, and Auckland Regional Authority and Others v Rodney County Council,[65] where public interest appellants relying especially on the preservation of conservational or scenic amenities, and failing against local authority approval of a commercial enterprise, have not normally been sanctioned with costs, were raised as justifying the appellant's costs exemption.

Rightly perhaps, rejecting the latter (where no explanation as to the non-award of costs was given), the Tribunal failed even to address itself to the former. Conceivably, since the Protection Committee possessed neither commercial nor property interests in the appeal, it was open to the Tribunal to hold the self-interest consideration as the basis of costs liability, and reject the costs sanction where public interest was the sole motivation. It did not do so.

Actual Costs Award

Consequently, no reason militated against a cost award. Four factors guided the Tribunal's quantum assessment:

1. Appellants's failure to comply with the evidential practice note.
2. A rejection of the argument that full preparation of the appellant's case was not possible until after the local authority hearing.
3. The appeal causing the re-presentation of applicant's substantial case.
4. Benefit derived by the applicant from the appeal decision (the amendment of consent to include consent to depart from the operative scheme).

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The final cost awards - respectively $3,500 to the Lake County Council, and $5,000 to the Mount Cook Group[66] were determined by a contributory payment towards expert witness expenses, and a party and party award,[67] for legal costs. Although expressly rejecting a total costs indemnity in the present case as tantamount to awarding costs on a solicitor and client basis, its possible justification (albeit in a rare circumstance) was countenanced.[68]

The unprecedented and excessive nature of the total costs liability of the Protection Committee received scant recognition, especially in light of the Tribunal's hollow justification - a realistic appraisal of recent cost increases. Grave concern is engendered by the suggestion of a reduction in the actual costs award, because of the benefit derived by the applicant from the appeal decision. In the absence of this admitted benefit concession, a hiatus characterises the Tribunal's cost award; the quantum presumably being considerably less than the total $41,338.61 claimed, which the Tribunal considered excessive.

"De novo" Hearing

Illucidating on the "de novo" character of an appeal,[69] the Tribunal in rejecting the appellant's contention regarding the preparation of its case (point two above) made it abundantly clear that such an appeal was a re-hearing of the issue (not a new hearing). Although explicitly recognising that the Tribunal is empowered to, and in practice frequently does hear evidence not raised at first instance,[70] this does not permit a prospective appellant to treat the local body hearing as a kind of "dummy run",[71] presenting a limited selection of evidence, and relying on its appeal rights to expand its case. A fine line divides these two states. In

the Remarkables decision the Tribunal clearly felt the initial hearing procedure had been abused, and by advancing further evidence, the appellants had both contravened the evidentiary practice note, and overstepped the mark.

The practical justifications for this interpretation are obvious. The utility of the initial hearing would become farcical, a mere procedural step, if the planning appeal was a "new hearing" of the whole issue - as though no previous hearing had taken place. Time considerations similarly would make such an approach untenable and expensive. A potential disadvantage if the appeal hearing was in fact a new hearing may equally have inspired this interpretation. It had been suggested that objectors at the local body hearing may have neither the time, funds nor desire to re-appear before the Tribunal on appeal, and that consequently the Tribunal would be adjudicating the matter upon a smaller presentation of evidence.[72]

The Act itself, in providing that " ... for the purposes of hearing and determining any appeal (the Tribunal) shall have all the powers, duties, functions ... that the body against whose decision the appeal is brought had in respect of the same matter" [73] certainly lends credence to the "de novo" interpretation.

In light of the "de novo" character of an appeal, it would seem essential that the Tribunal, to ascertain established facts and prevent prolixity, have available to it a record of prior proceedings at the hearing. However, this is not the point. The fact is that no such record is required. Therefore, is it then encumbent upon the Tribunal to take cognisance of the evidence produced at first instance? [74]

Local Authority Hearings

The Tribunal stressed the importance of local authority

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hearings being as full as possible[75] - examining all relevant aspects of the issue and hearing all the available expert evidence.[76]

Practically, is it possible for such hearings to deal with the real business of planning, and leave the appeal procedure merely as " ... an opportunity to resolve unresolved conflicts ..."? [77] Prima facie, no. Current practice of many local authorities is to keep planning hearings as relaxed and informal as possible,[78] and perhaps in line with this, no provision is made for cross examination of witnesses and the testing of evidence.[79] Equally under the 1977 Act, no record of evidence and witnesses heard at the local authority hearing is kept for possible production on appeal.[80]

Widespread misconception of the nature of the planning appeal as being a second step in some sort of judicial process has been noted.[81] The 1970 Report of the Public and Administrative Law Reform Committee, in recommending a right of appeal from the Appeal Board's decision to the Administrative Division of the Supreme Court, emphasised this point. " ... as the hearing at the local body level is so rudimentary ... often the Appeal Board is in fact giving the matter its first judicial consideration ...".[82]

Bearing in mind the appellant's status of an environmental group of limited (particularly financial) resources is it tenable to require the presentation of all the available expert evidence at first instance? Or is the more reasonable course to present a survey of evidence felt sufficient to have the objection upheld? Any bona fide group genuinely upholding environmental considerations will, in the circumstance of a dismissal, and financial resources permitting, go on to appeal, and equally obviously, will then advance any further evidence required to present its case.

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In this light, the Tribunal's rejection of the appellant's contended inability to full (or more fully) prepare its case until after the local body hearing seems overly harsh. The potential sanction of costs incurred in presenting the appeal represents a major disincentive, so surely the fruition of an appeal indicates the bona fide nature of the group - and not, as may be gleaned from the decision, the lodging of an appeal merely as a perverse and delaying tactic.

These questions of course arise on every appeal, and are matters solely within the Tribunal's discretion, but it is suggested that prevalent features in the instant case were not adequately countenanced in the Tribunal's resolution of these issues. It was encumbent upon the Tribunal therefore, to err on the side of leniency.

Application of the Practice Note

In view of its recent introduction, it is submitted the Planning Tribunal adopted an unnecessarily harsh approach in its implementation of the practice note in the Remarkables costs decision. Indeed it was open to the Tribunal to adopt either an alternative approach, or a more palatable (and less punitive) application. That the appeal application had preceded the practice note (which logically would invoke a "first in time" rule was conveniently overlooked, and despite the Woolworths decision,[83] which the Tribunal had rejected the application of the practice note on that very ground. Equally, the "test case" analysis was a viable alternative - that in the circumstances of this case (the first application of the practice note) a less stringent application was more just.[84]

However, the Protection Committee appear the unfortunate recipients of the Tribunal's desire to teach appellants a

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lesson and place a check on the supposedly flagrant disregard of the principles underlying the povision of a planning appeal. The practice note appears as another weapon in an administrative arsenal of the Tribunal, with costs an administrative expedient and environmental considerations comparatively otiose.

From latent ambiguities in the Remarkables decision, one crucial question surfaces: How does the Planning Tribunal fix costs, when there is no scale upon which to rely?

Section 147 gives the Tribunal a complete discretion. Do they have their own esoteric method of fixing costs?[85] Certainly the Remarkables decision provides no clue. A distinct paucity of any prescribed cost scale characterises Planning Tribunal awards. Award quantum, a question solely for the Tribunal, does vary, although prior to the Remarkables decision, not to any substantial degree.[86] In comparison to the likely cost of a planning appeal, the proportion of costs awarded tended to be relatively small, dependent upon the circumstances leading to an award.[87] By stark contrast, the $8,500 Remarkables award is of great moment.

Considering the extensive jurisdiction and on-going influence of Tribunal decisions, the issues canvassed in planning appeals often are of equal if not wider import than those of ordinary civil litigation, involving a one-off resolution of a dispute. Yet no scale of costs regulates Tribunal awards. By comparison, the District Court in exercising its power to award costs, admittedly discretionary, has clearly imposed restrictions.[88] Cost scales are fixed, with witnesses' expenses readily quantifiable. The unsuccessful litigant knows, with certainty, the exact extent of costs liability he is likely to incur.[89]

Since enforcement of Tribunal costs orders, if required,

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is a matter either for the High Court or District Court (depending upon the amount involved) [90] and an expressed willingness by the Tribunal to take some guidance from the Code of Civil Procedure, [91] recourse to those prescribed scales in determining cost awards is suggested appropriate. Presently the inequitous and vulnerable position of environmental and public interest appellants is perpetuated by an indeterminate liability, couched in the arcane and uncertain nature of Tribunal cost awards.

IV POLICY CONSIDERATIONS

Does the Remarkables Decision Implement the Legislation?

Section 147 providing the Tribunal with a discretion as to costs, then at a superficial level, the Remarkables decision has implemented the legislation. However, it is submitted the possibility of such a punitive award was neither intended nor envisaged by the framers of the Act.

Widening public participation rights and promoting explicit recognition and consideration of environmental matters are the twin philosophies to be gleaned from its legislative inception. Introducing the 1977 Bill, the Minister of Works and Development commented "I am fully aware of the present concern for the protection of the environment, and the Bill gives more emphasis to the environmental considerations ... greater opportunities are provided for public participation ... these include an extension of the rights of ... interested parties, such as progressive associations and environmental groups, to be heard by councils and the Planning Tribunal ..." [92]. The extended objection rights provided in the Act [93] bear out this policy

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of encouraging public participation in the planning process.

Such exhortations may in practice prove to be futile; certainly the Remarkables decision has done little to affirm those precepts. In dismissing with impunity the recognised substantive merits of the environmentalists' case (these merits providing no basis for excluding a costs award) the Tribunal appears myopically absorbed with the costs issue. Clearly the award quantum affords scant recognition of the environmental import of the case. Widened participatory rights equally appear evanescent in the face of procedural requirements whose compliance appears a pre-requisite both to effective participation,[94] and to preclude inhibitive cost awards.

The Tribunal's role of actively countenancing the environmental issues[95] in its resolution of the competing interests apparently has been delegated, by default, to environmentally concerned groups[96] - groups the Tribunal, via its increasingly regulative administration, has shown little disposition to recognise or accommodate. This represents a radical departure from the spirit and policy of the legislation, particularly the flagrant disregard if unsuccessful, for the especial considerations of environmental and public interest appellants.

Role of the Planning Tribunal

Regarding the role of the Planning Tribunal, philosophy and fact pointedly diverge. That " ... the Tribunal will fulfil a very important role in environmental planning under the new (1977) Act ..."[97] is patently evident. Potentially prodigious, the intention of promoting environmental planning and the protection of the environment, has succumbed to the actuality of administrative machinery, exerting an influential

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role by discouraging the initiation of environmental action.

(i) Statutory basis

The purely statutory jurisdiction of the Tribunal, widened under the 1977 legislation, is appellate only (not being involved in the planning process as such).[98] The appeal being a hearing "de novo", it follows that every person with a right of objection at first instance has the right to state that case before the appellate authority[99] (although tempered somewhat by comments in the Remarkables decision).

Statutory recognition of an individual's right to participate[100] in the planning process is effected by the provision of administrative review and appeal procedure. This statutory right to object and appeal, recognised as a pre-requisite for the promotion of environmental quality[101] is amplified by the applicant's need to get planning consent before any proposed development may proceed.

The continued availability and viability of this right at both stages of the planning process is crucial to preclude any wane of effective public participation. In practical terms however, the effect of the Remarkables decision is that this right is exercisable only at the local authority hearing; if taken further, the Tribunal adopts a more rigid attitude towards its exercise.

(ii) Assertion of public initiative in environmental management

The absence of early and adequate public consultation and debate has been recognised in the 1981 OECD Report as "... a fundamental weakness in New Zealand's planning

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procedures".[102] Early integration of environmental concerns, and improvements to existing mechanisms to " ... avoid, overlapping and unreasonable procedural delays in the preparation and implementation of development policies ..."[103] were suggested to encourage public participation. While the Remarkables decision prima facie promotes the early integration of environmental concerns (evidenced by the desire that local authority hearings be as full as possible) the reality undermines and stultifies the very concept of integration. Local authority hearings, by their very nature imbued with a developmental bias,[104] merely exemplify the OECD's noted absence of effective integration of environmental concerns. Thus effective integration of environmental concerns at the appellate level is fundamental, yet clearly neither the Remarkables decision nor the practice note have re-asserted the public initiative in environmental management.

(iii) Tribunal membership

Membership provisions under the 1977 Act essentially mirror those enacted in 1953. The Tribunal, constituted by a Chairman, two persons in effect recommended by the Municipal Association and the countries association and one other[105] reflects a distinct absence of any specialist requirement of the members. The Planning Tribunal's role has however changed over those twenty-four years. Originally providing administrative recourse and protection to land owners adversely affected by arbitrary and unreasonable local authority decisions, today the Tribunal, under an increasingly conservationist mandate, deals with appellants who are often public interest groups concerned with wider matters of principle.

Administrative bias is inherent in the membership selection process. Section 131(1)(b) emphasises individuals

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who most likely have worked for local authorities or government, and consequently who will be familiar (and perhaps enamoured?) with bureaucracy. The possibility of an "insider perspective" developing from this single-minded "expertise" (if membership requirements may be so termed) cannot be discounted. Current Tribunal membership, viewed alongside their respective positions prior to appointment highlights this suggested administrative propensity.[106]

Sir Guy Powles has viewed with alarm the development of "pseudo-democratic-bureaucratic structures" in New Zealand. " ... with this proliferation of these appointed semi-bureaucratic authorities, the citizen may be, in effect, losing control of his environment by means of the machinery designed to effect its control".[107]

Current implementation of the T.C.P. Act provides an excellent example. Administrative machinery (Tribunal practice notes) increasingly regulate the appellate procedure, and any possibility of an environmental mandate under the Act influencing the determination of planning appeals is remote. Furthermore, costs increasingly appear an administrative expedient, deterring appellant invocation of the appeal procedure and punishing appellant failure on appeal; legislative exhortations to consider environmental factors in no sense determinative in the cost award. The public, via environmental and public interest organisations, are losing control of their environment, as the Planning Tribunal becomes bogged down in a mire of administrative regulation.

Environmental Planning

The overtly deterrent and punitive nature of the costs award in the Remarkables case, inhibiting any initiation of

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appeals, but particularly so by environmental appellants, raises several disquieting issues in the environmental planning context.

(i) Flexibility

This context dictates a flexibility of approach by the Planning Tribunal. Appellate procedure cannot be formulated as immutable rules, of absolute application. Yet the practice note, by providing that costs, as a general rule, will be awarded against unsuccessful appellants, has done just this. Several illustrations reflect the inappropriateness of such a stance.

The burden of proof concept, whilst basic to legal practice, is wholly inappropriate to the administrative procedures demanded by modern environmental legislation. In one sense, the planning appellant is saddled with the onus of justifying his appeal, but once satisfied, policy and public interest considerations are more appropriate and illuminating than any doctrine of onus probandi. Indeed the Tribunal has explicitly stated no onus of proof rests on either party.[108] Yet Greensill v Northland Catchment Commission[109] and the Royal Forest decision[110] appear in stark contrast. Although in the former, the decision not couched in terms of an onus, the Tribunal denied water rights, due to the applicant's failure to show the taking of water as safe or beneficial. Similarly for appellants; the Tribunal in the latter holding that the appellants would need overwhelming evidence to succeed on appeal. Patently an onus of proof does exist in the planning process; the express denial appearing a glib and superficial statement.

The costs ruling in the practice note, and as applied in the Remarkables case, is totally misconceived in the

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planning context, and most pointedly so since the Act, in exhorting the consideration of environmental factors, dictates a subjective analysis and weighing of competing principles, in each case. Environmental and public interest appellants do not assert tangible economic rights, where damages would be the appropriate remedy, but instead propound the intangibles of environmental conservation, seeking specific non-pecuniary relief (injunction, mandamus and declaratory judgment). The incongruence of one immutable costs principle, of general application across the board, is evident.

The complete paucity of statutory guidelines in this weighing process has been criticised by the Tribunal,[111] yet despite this, the Tribunal has readily assumed the overwhelming benefits of resource development.[112] This assumption seems endemic. The overt policy of the Act (prescribing this balancing process) may well be the progenitor of this bias[113] since in weighing the tangible economic and social benefits against the intangible environmental beliefs, the scales invariably tip in favour of the former. In broader terms, this exploitative bias results from the prevalence of the consumption over the non-consumptive use of resources.[114]

Even rejecting this suggested development bias, the Tribunal's approach to matters of proof, effectively requiring an objector/appellant to prove the environment will suffer, rather than requiring the applicant to show it will not, lends some weight to its contemplation. Patently, in the face of an already punitive and deterrent costs sanction on appeal, the possibility of failure through the operation of any such inherent "tendency" poses a looming prospect for environmental appellants. The Tribunal should not be wedded to immutable rules, particularly those invoking the

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costs sanction and thereby eschew a flexibility in approach - a flexibility that appears positively dictated by the very nature of the issues raised.

(ii) Environmental appellants

Environmental and public interest groups pursuing planning appeals are deserving of special consideration by the Planning Tribunal. Acting in the public interest, their ability to participate, financially, is inhibited by random ad hoc sources of support (often relying on public funding, private foundations and individual contributions) which cannot hope to meet the cost of effective participation on a sustained basis.

Before any Tribunal cost award, prior sanctions impose a heavy burden on environmental appellants. Of initial and paramount consideration is the cost of their own participation in the planning process, do they have the resources, time and capital to even instigate an appeal? Any potential burdens attendant upon the fruition of the appeal represented remote considerations. Conceivably however the Remarkables decision and the practice note may have effected a reversal, and certainly a watershed in this practice, now to some extent dictating greater consideration of the cost implications prior to formally lodging an appeal.

Equally, non pecuniary remedies, while most appropriate in environmental appeals, provide little (if any) incentive to instigating an action. Clearly the public will benefit from an injunction; however only the richest and most dedicated of environmental appellants could or would bear the economic brunt of a protracted appeal. The potential dampening effect of these remedies cannot be discounted.

Although public minded individuals and environmental

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groups are logically the proper agents to defend environment rights, neither the practice note nor the Remarkables decision effects cognisance of their role.

In view of the extended objection rights under section 2(3) of the Act, encouraging public participation, a widening of the cost award exceptions in the practice note is suggested a mandatory measure. Where the legislation relies on appellants invoking "public interest" grounds to effectuate planning policy, at the very least removal of the costs sanction is necessary to ensure the initiation of an appeal, and more positively, where public interest appellate action has been successful, a commensurate cost award therefore should be permitted. The substantial benefits to the public should not depend upon the financial status of the individual volunteering to serve as the appellant, or the charity of public-minded lawyers.

In light of the Planning Tribunal's present intransigent stance towards planning appellants, even the American Rule (that costs lie where they fall) inspires comparative promise: although no benefit accrues to the successful appellant (as is presently the position), however upon failure, no threat of potentially indeterminate liability for the other party's costs arises, each party merely paying its own costs.

V THE FUTURE

Significance of the Remarkables Decision

Is the practice note a mere palliative, alleviating the short term problem of abuse of planning appeals, by totally discouraging any appeals, frivolous or justified,

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and yet without effectively curing the problem? Its application in the Remarkables decision certainly has not allayed public concern and disquiet over the costs question.

Tribunal decisions, being of pervasive and enduring influence (if anything, more significant for the future than the present) thus augur the substantial and alarming significance of the Remarkables decision for future environmental and public interest appellants. Potentially indeterminate costs liability in the partisan and hostile arena of the Planning Tribunal hardly provides a conducive atmosphere for the initiation of planning appeals.

Appellants increasingly will have to pay for their right to participate in planning appeals. However, there is no need to worry unduly about developers or appellants who initiated the first instance hearing, the cost of the exercise merely part of the gamble inherent in any development proposal. Local authorities similarly have no cause for alarm, having recourse to the public purse, and the shield of the practice note, paragraph four (unless having acted unreasonably or perversely). The target of concern must be those appellants, with no proprietory interest in the land, or proposed development, bar the amorphous "public interest", but who choose to exercise their statutory right of participation. The law having recognised the value of such participants to decision making by providing a right to be heard, the actuality ought not to denigrate from this.

Any suggestion that the cumulative effect of these two measures will effectively quash any appellate recourse to the Planning Tribunal is naive. Bona fide environmental and public interest organisations possessing a meritorious case will not be deterred from seeking the avenue of the planning appeal to pursue their legitimate rights of appeal

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against an unreasonable decision. However, administrative and procedural complexities of the Planning Tribunal emphasise the definite need for professional legal advice in the preparation of appeals, an increased sophistication in approach, and perhaps also the invocation of alternative funding sources,[115] as essential to maintaining their viability - prior to any initiation of action. Any belief in the Act's statutory right of appeal, on its face value, being sufficient grounds is patently ill-founded.

What lessons may be learnt from the Remarkables decision? Incorporation of environmental and public interest groups is a pre-requisite to any initiation of action, to prevent personal costs liability. The Remarkables costs order being made against the nine named members of the society, jointly and severally,[116] hence upon exhaustion of Protection Committee funds (as inevitably must occur with a protracted and unsuccessful appeal) each named member will then be personally liable for payment of the costs award. It is indeed anomalous where members of the public, pursuing an environmental action in the public interest, are yet faced with personal liability if unsuccessful, solely because of their vindication of a governmental policy.

Avoidance of a potentially prohibitive cost award, attendant upon appellate failure, otherwise hinges round a strict compliance with the Tribunal's practice note. "Justifiable grounds" must exist for invoking the appeal process, otherwise where the decision appealed against was a reasonable and proper one, the appellant merely seeking a re-hearing of the original argument, the costs sanction will be invoked. Effecting a substantial modification of the decision appealed against, although failing on the appeal itself, will however exclude the application of a costs award.

The appellant must have standing to appeal, and the

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appeal itself must not be frivolous, vexatious or malicious. Non-compliance with these points is likely to draw the sanction of costs, and similarly where one party has been put to proof of facts the Tribunal felt should have been admitted - care must be taken to secure agreement on areas where the facts are undisputed. The varied procedural requirements of the Tribunal will likely hold such failure caused the other party an increased burden in the presentation of its case, and costs will inevitably follow.

Regarding the procedural issues, compliance appears straight forward. But while mere disagreement with the local authority decision obviously is no grounds for an appeal, the justifiability or otherwise of the appeal is not readily apparent. That remains a nebulous and subjective concept, involving a value judgement. The practice note, it is submitted, provides minimal if indeed any guidance on this point, and does little to clarify or ameliorate an appellant's position.

Future for Planning Appellants

Does the Remarkables decision provide peril or promise? For would-be developers, and indeed any respondent in a planning appeal, certainly promise. If prevailing, costs indemnity by the "loser", as a matter of course, provides a positive inducement to success on appeal (except where a substantial modification of the earlier decision was effected), and failure not drawing a costs sanction unless, in the Tribunal's discretion, they are deserving of that sanction.

By comparison, burgeoning financial liability for the appellant from the inception of an appeal, is further accentuated by the peril of a cost award. In the absence

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of any correspondent incentive, the appellant faces either ambivalence upon success (no cost award to positively or negatively alleviate his position) or the inevitable and presently indeterminate costs liability upon failure.

Extreme caution is engendered by the extent of the Remarkables costs award. The costs sanction, traditionally just that, has now assumed vast proportions. By eliminating its earlier discretion in favour of an explicitly deterrent costs award, the Tribunal has taken a retrogressive step, in a planning regime supposedly promoting public participation, by its unwarranted limitation on the right of appellate recourse. Awareness of the growing concern for environmental protection, an acknowledged and integral part of the planning function, must be realised and practically applied by the Planning Tribunal. Failure at the administrative level to perceive and implement these considerations indicates a hardening of approach towards environmental issues, or indeed a total abdication of function. In line with the former, the recent appearance of the contraversial National Development Act 1979 may now be an example of the legislative pendulum starting to swing against extensive and prolonged public involvement in environmental issues.

Post Remarkables Decisions

To date, post Remarkables cost awards of the Tribunal have not proved to be of great moment, award quantum generally adhering to the pre-Remarkables costs practice. Dismissal of the applicant's appeal in Rountree v Minister of Works and Development[117] drew a $612 cost award against the Minister, and in Tutbury v Tauranga City Council, [118] while acknowledging it to be a case where costs ordinarily would be awarded against the unsuccessful appellant, the Tribunal declined to do so, deciding the appeal on a different basis to the local authority

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decision (a straight forward application of the practice note). Equally, recourse to the High Court has not prompted cost sanctions of any moment.[119]

It is germane to note however that the unsuccessful appellants in the majority of these cases have been protecting some proprietary interest. By comparison, in the Kapuni gas decision,[120] although rejecting the application for costs against the Environmental Defense Society, the Planning Tribunal explicitly recognised its disposition to award substantial costs against E.D.B., barring the fact that other objectors had joined its case. The latter, fully justified in pursuing their remedies at the appellate level (being owners of land affected by the development) achieved some degree of success regarding ordinance amendment, and accordingly were not sanctioned with costs. Both appeals being presented together, the Tribunal therefore found no grounds to differentiate between them, and consequently no costs were awarded against E.D.B.

Not unreasonable trepidation is engendered by this decision, the Tribunal's cost award openly inimical to environmental and public interest appellants. Certainly any belief that success on appeal precludes the costs sanction is questionable.[121]

Conclusion

Undue administrative expediency, broaching the fine line between judicial application and overt deterrence, characterises the current role of costs in planning appeals. Admittedly the practice note, by its stringent costs rule,

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has inhibited abuse of the appellate procedure; and equally the Remarkables decision, by its cost award quantum, has castigated environmental appellants for their procedural disregard. However, the 'victory' is a Pyrrhic one. Prospective appellants are not merely occasioned to think carefully about the cost implications of initiating an appeal, but in the face of a potentially deleterious cost award, are actively discouraged from invoking the appellate procedure altogether.

The Remarkables cost award, unprecedented in nature and explicitly punitive in orientation, has thus effected a marked gravitation away from prior costs practice. However, continuity is equally apparent; the decision a further step on the continuum of Tribunal stringency, increasingly subjecting unsuccessful appellants to costs liability. Whatever the analysis, the deterrent factor is clear.

For environmental planning appellants, already occupying a vulnerable position in the planning process, and particularly susceptible to the costs sanction, the decision is alarming. Increasingly sanctioned by inhibitive cost awards, for environmental appellants the decision may indeed reflect their lowest ebb.

Footnotes

[1]Keith Robinson The Law of Town and Country Planning p 291 (3 ed., Butterworths, Wellington, 1981).

[2]Woolworths v Dunedin City Council (1979) B2256.

[3]Practice Note 4, para. 3.

[4](1981) 7 NZTPA 273.

[5]Hereinafter referred to as T.C.P. Act 1977. Similarly, the Water and Soil Conservation Act 1967 will be referred to as W.S.C. Act.

[6]The policy behind this latter provision (an extension of the 1953 Act introduced in 1969) being to curb a growing clause of the appeal procedure. Appeals instituted solely as a delaying tactic and dropped at the last minute nevertheless involve public expense.

[7]"It is correct that there is a difference in wording, but we are of the view that there is little difference in substance, except to the extent that the power under S.147(1) appears to be wider than the power under S.40(6) of the 1953 Act". Woolworths supra n.2.

[8]Summarised in the practice note 3, which appeared as a schedule and memorandum to Brynildsen v Manukau City (1970) 3 NZTPA 260.

[9]Maxwell v Tauranga City (1970) 3 NZTPA 256. Costs being awarded to the Crown where a party failed to appear and his counsel therefore had to seek an adjournment.

[10] Arthur v New Plymouth City (1959) 1 NZTPA 84.

[11] Patrick v Auckland City (1971) 4 NZTPA 26. Appellant there was not affected by the planning decision.

[12] Brynildsen supra n.8.

[13] In Shaw v Bay of Plenty Regional Water Board (1976) 6 NZTPA 158, the Tribunal allowed costs before the Regional Water Board in favour of objectors who were largely unsuccessful before the Regional Water Board, but denied their costs on appeal.

[14] Providing the Tribunal with jurisdiction to hear an appeal against an order for costs made by the Regional Water Board.
- Southland Acclimatisation Society v Southland Catchment Board (1975) 5 NZTPA 188.
- EDS Inc. v Waikato Valley Authority (1976) 6 NZTPA 140.

[15] Wellington Regional Progressive Association v Water Allocation Council (1971) 4 NZTPA 154.

[16] Metekingi v Rangitikei-Wanganui Water Board (1975) 5 NZTPA 340.

[17] Shaw, supra n. 13.

[18] Ibid, 160. The Tribunal accepted the wider scope of the inquiry since the proposed project affected not only water, but the land rights of several appellants, who possessed no other legal avenue of redress.

[19] Royal Forest and Bird Protection Society v Bay of Plenty Regional Water Board (1978) 6 NZTPA 361.

Lane v Rotorua County (1979) B 1654. The unsuccessful appellant, who was held to lack status, was ordered to pay costs on substantially the same grounds.

[20] Metekingi supra n.16.
Royal Forest and Bird supra n. 19, 366 "Every value judgment is largely a matter of subjective personal opinion and cannot be fully explained nor indeed adequately substantiated."

[21] D.A.R. Williams Environmental Law para 460 (Butterworths, Wellington, 1980).

[22] In Saunders v Henderson Borough (1978) B 1108 the unsuccessful appellant for conditional use consent was ordered to pay costs to the owner of the land affected, who had opposed the appeal.
Similarly in Queens Drive Pharmacy v Lower Hutt City (1978) B 1227 and in Woolworths supra n. 2 the appellant's failure on an appeal founded largely on business competition, drew the sanction of costs.

[23] Under s.40(1) of the 1953 Act: "For the purposes of any appeal to the Board the provisions of the Commissions of Inquiry Act 1908 shall, so far as they are applicable and with the necessary modifications, apply as if the Board were a Commission of Inquiry appointed under the Act."
This section was not however re-enacted in the 1977 legislation.

[24] Royal Commission on Tribunals of Inquiry 1966 (U.K.).

[25] Robinson, op.cit. 1.

[26] T.C.P. Act 1971 (U.K.) ss 48-50: planning inquiry commission or independent tribunal.

[27] Ibid, s. 110

[28] B.H. Davis Town and Country Planning Law (A Comparative Study) Victoria University thesis PhD Wellington 1973.

[29]Ministry Circular 73/65, para 23.
Cited in J. Ottaway "Costs and the Local Authority in Enforcement Notice Appeals", Journal of Planning and Environmental Law (U.K.) 1980, 452.
The policy behind this directive involved a pragmatic rejection of a recommendation by the United Kingdom Council on Tribunals, that where there was little distinguishing merit between objectors, and where policy or chance was the determining factor, the unsuccessful objector who had not behaved unreasonably should be awarded costs. Rejection of such awards was based on the impracticality of such discrimination.

[30]P. McAuslan Land, Law and Planning (Werdenfeld and Nicholson, London, 1975).

[31]Robinson, op.cit.1.

[32]By far the majority of academic writers express concern at the inhibitive effect of the American Rule, and variously suggest the application of both statutory and judicial alternatives, particularly the cost award of attorney and witness fees, to environmental litigants (successful or unsuccessful) as essential sources of funding.
- R.L. Matthews "A Setback for Environmental and Other Public Interest Plaintiffs" (1975-76) 55 Nebraska Law Review 283.
- A.T. Wright III "Awarding Attorney and Expert Witness Fees in Environmental Litigation" (1972-73) 58 Cornell Law Review 1222.

One author has however propounded the validity of the American Rule. That it protects the environmental litigant from the threat of potential liability for other parties' costs is unsuccessful - a liability felt to have a deterrent effect on the initiation of environmental actions.
- N.J. Williams "Fee Shifting and Public Interest Litigation" (1978) 64 American Bar Association Journal 859.

[33]Four distinct judicial exceptions permitted the recovery of attorney fees. Where:

1. The party acted in bad faith, vexatiously or unreasonably.
2. Substantial benefit to the public is derived by the action.
3. The litigation created a common or equitable fund which could be charged for the reasonable expenses incurred in the action.
4. Private attorney general exception: a private vindication of Congressional policies of the highest priority.

Cited in F.W. Leadbetter "Alternatives for the Recovery of Attorney's Fees in Environmental Litigation after Alyeska Pipeline Service Co. v Wilderness Society 421 US 240" 16 Natural Resources Journal 1003.

[34]Some examples of statutory exceptions:

1. Citizen suit provisions (authorising citizens to sue on behalf of the public) in the Clean Air Act, Toxic Substances and Control Act, Clean Waste Act.
2. Fee reimbursement for public interest participants in EPA (Environmental Protection Agency) proceedings - EPA Financial Assistance.
3. Fee underwriting as for example in the Toxic Substances Control Act.

However any specific Congressional provision of attorney's fees is incremental in approach, and likely only to apply at the judicial (litigation) level.

[35]Alyeska Pipeline Service Co. v Wilderness Society 421 US 240 (1975).

[36]Tasmania: Local Government Act 1962, ss 718-761.

[37]Queensland: Local Government Acts, 1936-65, s. 33(6).

[38]South Australia: Planning and Development Act 1966-67, s. 19 (as substituted by Planning and Development Amendment Act 1971, s. 10).
Victoria: Town and Country Planning Act 1961, s. 19A (as inserted by T.C.P. Amendment Act 1968, s. 14(1).)
Western Australia: Town Planning and Development Act, 1928-78 (Reprint) s. 44.

[39]Local Government (T.C.P.) Amendment Act 1945, s. 341 (4). Under the Land and Valuation Court Act 1921, s. 18 prescribes a general discretion as to costs.

[40]Droga v Waverley Municipal Council (1952) 18 LGR 160.

[41]Supra, n. 32 "Fee Shifting and Public Interest Litigation".

[42]Supra, n. 3.

[43]Practice Note, para. 2.

[44]Ibid, para. 4.

[45]Infra n. 46. The Chairman stated the Tribunal did not want to stifle meritorious appeals.

[46]The Chairman's reply to a Planning Institute letter which had expressed concern over the effect of the practice note. Cited in Environmental Defense Society (EDS) News 7 (1 & 2) 3.

[47]The Practice Note excludes the rule's application where the appeal decision has effected a substantial modification of the earlier decision. Potentially an apparently reasonable and viable exclusion (of sufficient purport to prevent the general rule becoming exclusive in application, and deterrent in operation), in practice it appears mere window dressing.

[48]Supra, n. 3.

[49]Supra, n. 4. Note however that the Tribunal's decision cannot, at this stage, be regarded as final. Current action on the Remarkables case is two fold:

1. Appeal to the High Court, under s. 162(4) T.C.P. Act on a point of law.
2. Application for review under the Judicature Amendment Act, 1972 (Part I).

[50]Cost awards against unsuccessful appellants have ranged from $100 in Wellington Regional Progressive Association (supra n. 15) to $700 in Steale Properties Ltd v Auckland Regional Water Board (1980) 6 NZTPA 629, and with a protracted appeal, were as high as $1,000 in Woolworths (supra n.2). Distinctively conspicuous, a nil cost award was however accompanied by the warning that future failure on an appeal involving principally a value judgment would likely result in a cost order against the appellant - Royal Forest case (supra n. 19).

[51]Upon its introduction, the Minister of Works and Development commented "I am fully aware of the present concern for the protection of the environment, and the Bill gives more emphasis to the new environmental considerations". These considerations are reflected in ss 3(1)(a) and 4(1).

[52]"Like any other appellant, its right to appeal to this Tribunal carries with it the possibility that it may have an award of costs made against it". Remarkables, supra n.4 282.

[53]Idem.

[54]Idem.

[55]Mr Justice Holmes. Cited in P.M. Salmon "Environmental Law" 1977 NZLJ 518, 527.

[56]Section 2(3)(d).

[57]1. Physical Environmental Association v Thames Coromandel District Council (1978) 6 NZTPA 445. The council was ordered to bear the costs of an engineer's report obtained at the Tribunal's direction, as the subject matter involved important matters of public interest, and which the appellant should not be required to pay as it acted on behalf of the public interest.

2. Woolworths (supra n. 2). The Tribunal equally recognised the representation principle at the polar extreme, where the City Council represented the interests of the community it served.

3. In Southland Acclimatisation Society (supra n. 14) the Tribunal stressed the instrumentality of lodging an objection to raise matters of public interest which the Regional Water Board is required to take into account. Without that first step, there is no right of appeal should the Board fail in its consideration of the public interest.

4. Keam v National Water and Soil Conservation Authority (1980) 7 NZTPA 11. The appellant's entitlement to costs, by carrying the burden of presenting a matter of considerable public interest, was recognised.

[58]In Shaw (supra n. 13) this was recognised as justifiable grounds for bringing an appeal.

[59]Supra n. 2,4.

[60]Royal Forest, supra n. 19.

[61]Supra n. 15.

[62]Metekingi, supra n. 16.

[63]Supra n. 2.

[64]Supra n. 22.

[65](1979) 6 NZTPA 474.

[66]See Appendix A for a further consideration of cost awards.

[67]062, r 28(2): " ... costs to which this rule applies shall be taxed on a party and party basis; ... there shall be allowed all such costs as were necessary or proper for the attainment of justice, or for enforcing or defending the rights of the party whose costs are being taxed".
I.H. Jacob (ed.) The Supreme Court Practice 1979, Vol. 1. (Sweet and Maxwell, London 1979). The principles of party and party taxation were enunciated in Smith v Buller (1875) LR 19 Eq. 475, "It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more ...".

[68]Supra n. 4, 283.

[69]Section 150 T.C.P. Act 1977 (infra n. 72).
Ross v No. 2 T.C.P. Appeal Board (1976) 2 NZLR 206.
Wellington Club Incorp. v Carson, Wellington City and Others (1972) NZLR 698, 701.

[70]Supra n. 4, 284.

[71]Idem.

[72]Locke v Avon Motor Lodge Ltd (1973) 5 NZTPA 17,20.

[73]Section 150(1) T.C.P. Act.

[74] An implicit handsmack for the appellants is evidenced in the decision: " ... the appellant committee were well aware of the applicant's proposals which had been discussed ... over a number of years. The appellant had ample opportunity to prepare its evidence well in advance of the hearing of the appeal ... in making a responsible objection to the applicant's proposals at first instance, we would have expected it to have done so". Supra n. 4,284.

[75] The necessary corollary of this is that there is no automatic right to a new hearing before the Tribunal; there must be grounds for the appeal.

[76] This is implicit from the dismissal of planning appeals where the appeal itself raised no new principle; all relevent principles and issues available at first instance - Royal Forest and Bird decision, supra n. 19.

[77] Mr A.R. Turner's interpretation of an appela, and its function (Chairman of Planning Tribunal) cited in EDS News 7(1&2), 5.

[78] Whether local authority hearings should be more or less formal is currently a polemic issue.

[79] Although the Tribunal, of its own volition, may call evidence which the parties to the appeal may cross examine - s. 149(3)(4) T.C.P. Act 1977.

[80] By comparison, under T.C.P. regulations promulgated under the 1953 Act, it was a mandatory requirement that the council:

1. When hearing objections, keep a record of the "substance of the evidence" - reg. 23(4) 1954 Regulations (amended in 1960 to include a record of the arguments received - reg. 21(3) 1960 Regulations).
2. Furnish the Appeal Board with a copy of that record, on appeal - reg. 27(1)(a) 1954 Regulations.

[81] Wellington Club Incorp. (supra n. 68, 702) per Woodhouse, J: "Indeed it needs to be recognised that the first hearing in any conventional sense is the hearing before the Board (Tribunal)".

[82] Report 3, 1970, para. 85.

[83] Supra n. 2.

[84] As adopted in both New Zealand and Australian decisions. In Free and Another v Takapuna Borough Council (No 2) (1958) 1 NZTPA 69 regarding an appeal under the Municipal Corperation Act 1954, against council approval of a subdivision plan, the Board dismissed the appeal, and held: " ... as the point is a novel one, and of importance to all municipal authorities the Board is not disposed to mulct the appellants in costs and ... makes no order ...".
Sugarman J. in Jansen v Cumberland County Council (1952) 18 LGR 167, 162 equally declined a costs award, the case being in the position of a test case " ... the general rule that costs follow the event should be regarded as prima facie to be applied, unless there is something in the nature of the jurisdiction of the circumstance of the particular case which suggests that the application of some other principle would be more just".

[85] Resort to the Tribunal, in an attempt to discover whether in practice a rule of thumb, or informal recourse to a scale of any kind guided cost awards, did little to clarify the present obscurity. It was reiterated that cost awards are discretionary, the Tribunal in each case guided solely by what it considers "reasonable". Reference to the Code of Civil Procedure in the Woolworths decision was felt to be an isolated case.

[86] Refer supra n. 49.

[87]A review of Tribunal decisions illustrates the following factors as being germane to a cost award at the appellate level:

1. Evidence:
   (a) If no evidence is raised, the costs sanction will be invoked - Wellington Regional Progressive Association supra n. 15.
   (b) Treating the local authority hearing as a "dummy run", and adducing further evidence on appeal will result in costs - Remarkables supra n. 4.
   (c) Failing to concede facts the Tribunal felt should have been conceded will draw a costs award - practice note.
2. Principles of Law:
   (a) If no new principle is raised on appeal, costs will result - Shaw supra n. 13.
   (b) If solely a value judgment is required, the costs sanction will be invoked - Royal Forest and Bird supra n. 19.

[88]RR 555 and 556 (et seq.). Code of Civil Procedure (q.v.) do impose ascertainable restrictions on the power to award costs. The rules require that costs in civil proceedings follow the event, unless there are good reasons to the contrary.

[89]Third sch. Table C Code of Civil Procedure.

[90]Section 148 T.C.P. Act 1977.

[91]In Woolworths v Dunedin City Council (supra n. 2) the Tribunal, in exercising its discretion, considered it reasonable to refer to the Code of Civil Procedure in determining its cost award.
Note however the Tribunal's suggestion that such reference was an isolated case - supra n. 84.
Similarly in Ministry of Works and Development v Stackwood

(1980) NZ Recent Law 368, 369 where the High Court upheld a costs award based on the Supreme Court scale, considering the Fees Regulations for witnesses to be a reasonable basis for the award of witnesses' expenses.

[92]N.Z. Parliamentary Debates Vol. 413, 1977, 2409: introducing the T.C.P. Bill.

[93]Section 2(3): Persons with objection rights under the Act:

(a) The Minister.

(b) Any united or regional council, Regional Planning Authority or local authority having jurisdiction in or adjacent to the area to which the district ... scheme or application relates.

(c) Any body or person affected.

(d) Any body or person representing some relevant aspect of the public interest.

[94]For example, despite the perceived merits of its case, the Protection Committee's failure to comply with a practice note (requiring the production of evidence briefs no less than seven days in advance of the appeal hearing) was held reprehensible, and dictated a punitive costs award. The Tribunal railing against the appellant " ... by reason of the way in which it conducted its case."

[95]The intention that " ... environmental considerations should be brought directly into the planning process ..." and given more emphasis, and that the Tribunal " ... fulfil a very important role in environmental planning under the new Act ..." (the Hon. W.L. Young introducing and conducting the second reading of the 1977 T.C.P. Bill, respectively at N.Z. Parliamentary Debates Vol. 413, 1977: 2408 and Vol. 416, 1977: 5223) is reflected in S. 3(1)(a) of the Act. Section 3(1), defining matters of national importance as including

(a) the conservation protection and enhancement of the physical ... environment, prescribes their recognition and implementation in regional, district and maritime schemes.

[96]The Tribunal's desire that local body hearings be as full as possible (without recognition of the inherent bias of local authority decisions), its own preoccupation with administration and procedure, and the requirement, in practice, that the environmental detriment be proven essentially preclude its own objective balancing and consideration of environmental factors.

[97]N.Z. Parliamentary Debates, Vol. 416, 1977: 5223 - second reading.

[98]Federated Farmers Ltd v Ashburton County (1976) Butterworths Current Law 149.

[99]EDS v T.C.P. Appeal Board (1977) 6 NZTPA 353.

[100]The right to participate arises from:
1. An individual's desire to be informed, consulted and express his views on matters which affect him, both personally and collectively.
2. The failure of past plans or policies to correctly identify the desires of the public. M.S. Nyein "Public Participation in Environmental Decision Making" LLB (Hons) Legal Writing Paper, Victoria University of Wellington, 1979, p.1.

[101]"Environmental quality has been promoted through the exercise of rights of objection to, and appeal against the scheme itself, and through objections and appeals by third parties against specific applications ...".
A.R. Turner (Tribunal Chairman) "Planning for Environmental Quality" (1975) NZLJ 639.

[102] OECD Report Environmental Policies in New Zealand p 36 (Paris, 1981).

[103] Ibid, p 27.

[104] The local authority essentially adjudicates on questions where its self interest is inexplicably entwined. Notably with large scale development proposals, more immediate concern with the local tax base and promotion of local economic growth, rather than the higher and abstract perceptions of environmental quality, results in an increased receptivity to the development cause.

[105] Section 131 T.C.P. Act 1977.

[106] Current Tribunal membership
(gleaned from Justice Department records)

	Prior occupation
No. 1 Division	
A.R. Turner (Chairman)	Stipendiary magistrate - lawyer
J. Shaw	Town Clerk
G.R. Tutt	-
R.E. Hermans	District Commissioner of Works
No. 2 Division	
W.J.M. Treadwell	Stipendiary magistrate - lawyer
R.S. Martin	-
J.F. McKenzie	Rear Admiral - Chief of Naval Staff
H.L. Riley	Counties Association member and county councillor
No. 3 Division	
P.R. Skelton	Stipendiary magistrate - lawyer
G.J. Broker	-

G.W. Enson	County engineer
R.A. McLennan	Civil engineer; regional authority member
No. 4 Division	
D.T.J. Sheppard	Stipendiary magistrate - lawyer
B. Byrnes	Town Clerk
R.A. Catchpole	Registered surveyor
K.A. Earles	County clerk

[107]Sir Guy Powles "Environmental Control: The Rights of the Individual Citizen" (1970) NZLJ 469, 470.

[108]EDS v National W.S.C. Authority (1976) 6 NZTPA 49. Ministry of Works and Development v National W.S.C. Authority and Kearn (1981) New Zealand Recent Law 156.

[109](1971) 4 NZTPA 59.

[110]Supra n. 19.

[111]Idem.

[112]In the above decision, the Tribunal went on to presume an unmet demand for electricity, hence outweighing the wildlife and recreational interests involved.

[113]T. Black "Defending the Environment" (1978) NZLJ 153.

[114]J.E. Krier "Environmental Litigation and the Burden of Proof" in Baldwin, M, and Page, J.K. Law and the Environment, p 105, 107 (Walker, New York, 1970).

[115]It is not the purpose of this paper to analyse viable financial alternatives, since any such proposals represent

potential sources of funding, and hence are no panacea to present environmental appellants pursuing a planning appeal, and wishing to avoid a calamitous costs award if unsuccessful. However, a brief survey may prove instructive.

1. Development of a scale of fees (as some measure of certainty).
2. Widening of cost exceptions under the practice note.
3. Legal aid, under Legal Aid Act 1969.
4. Public appeals.
5. Acceptance of some costs liability by the initiator of a planning proposal (as part of the price of development).
6. Environmental trust.
7. Private funding, on lines similar to the Ford Foundation in the United States.
8. "Costs follow the event" practice in planning appeals (the possibility of receiving costs upon success balancing the inhibitive costs liability upon failure).
9. Central government funding of environmental appeals.
10. Legislative intervention.

[116]Reflecting the application of s. 148, and exercising the "jointly and severally" discretion in Freemans Bay Community Committee v Auckland City (1979) B 1456.

[117](1980) 7 NZTPA 132.

[118](1978) 6 NZTPA 139.

[119]In Maine v Christchurch City Corporation (1981) 7 NZTPA 92, the issues raised in an appeal against a grant of conditional use consent had become largely academic, the result of a scheme change. Apart from the fact of the appellant being legally aided, the High Court would have awarded $500 and $250 costs in favour of the second and first respondents respectively.

[120] Smith and others, EDS Inc. and Natural Gas Corp. (NGC) v Waimate West County Council
EDS Inc and NGC v Taranaki Catchment Committee and Regional Water Board and NGC (1981) 7 NZTPA 241.

[121] In Kapuni, the Planning Tribunal were disposed to award substantial costs against EDS (acting in the public interest), despite its success on the sole issue pursued. By comparison, those appellants protecting a proprietary interest (a self interest motivation that the Tribunal regarded as fully justified) warranted no cost award, yet their appeal only achieving " ... some degree of success ...". Ibid, 268.

Appendix A: Analysis of the cost awards in the Remarkables costs decision

A Cost claims and awards		Costs claimed		Costs awarded
(i)	For the Protection Committee	Costs incurred in applicant's unsuccessful challenge to the appellant's standing		Rejected
(ii)	Against the Protection Committee			
-	Lake County Council	Expert witness costs	1,101.65	500.00
		Legal Costs	8,547.53	3,000.00
			9,649.18	3,500.00
-	Mount Cook Group	Expert witness costs	20,868.00	2,500.00
		Legal Costs	10,521.43	2,500.00
		Helicopter Hire	300.00	
			31,689.43	5,000.00
		TOTAL	$41,338.61	$8,500.00

B Total costs liability of Remarkables Committee	
(i) Conducting its own case	19,000
(ii) Costs awarded against	8,500
(iii) Costs awarded in favour	-
	$27,500

LXLi. LINTON C.E. THE REMARKABLES COST AWARD