Costs Awards in the Planning Tribunal – Should the Environment Court Change its Approach?

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The article considers the awards of costs by the Planning Tribunal and Environment Court. There are three parts to the article. In the first part a normative approach to costs awards is taken. This involves a detailed examination of the broad justifications for costs awards - as compensation, punishment and disincentive - and the practical effects of those awards. This leads to an outline of a system which it is submitted the Environment Court should adopt. The second part considers some of the awards which have been made, in particular under the Resource Management Act 1991. The focus is on the principles which underlie the awards of costs. In the final part an attempt is made to state the claimed approach of the Court, and to identify its actual approach. Proposals for reform in the Environment Court are advanced.

I: INTRODUCTION

This paper examines awards of costs in the Planning Tribunal and Environment Court (The Planning Tribunal was re-named the Environment Court on 2 September 1996). There are three parts to the paper.

First, a normative approach to costs awards is taken. This involves a detailed examination of the broad justifications for costs awards - as

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compensation, punishment and disincentive - and the practical effects of those awards. Policy reasons for and against the imposition of costs generally are put forward, and the special considerations specific to environmental and planning law are also looked at as part of the equation. In this context, questions of access and participation are addressed. Finally it is concluded that the most desirable basis on which costs ought to be awarded, both in terms of logical consistency, maximising the positive effects and minimising the negative, is that of punishing the party against whom the award is made. This leads us to outline in broad brush strokes the system which it is submitted the Environment Court should adopt.

Second, a look at some of the awards which have actually been made will be taken, with a particular emphasis on decisions since the introduction of the Resource Management Act. The focus is on the principles which underlie the awards of costs, and the factors which the Court is likely to take into account as significant. Decisions are examined both in terms of the explicit enunciation of the justifications for awards, the mention of agreed principles to be applied in making awards, and the reasoning used in reality.

Third, an attempt is made to state the claimed approach of the (Tribunal) Court, and to identify its actual approach. Possible reasons for the differences are suggested, and proposals for steps which might be taken towards reform in the Environment Court are put forward.

II: THE NORMATIVE ANALYSIS

1. Arguments For and Against Costs

There are three primary justifications for imposing costs in a court case. The first is to compensate the party who is awarded costs. The second is to punish the person against whom costs have been awarded. The third is to act as a disincentive to litigation - to encourage parties to settle their

disputes in some more cooperative manner. Each argument is presented below, together with the counter arguments.

(a) The arguments for costs as compensation

This is the foundation justification for costs awards in New Zealand, and has been particularly applied in the past in the Planning Tribunal. The manner in which the Tribunal has justified costs awards will be discussed in some detail later, but at this stage it is worth being aware of the importance of this category, and of the counter-arguments which relate to it.

It is argued that costs should be ordered against losing parties to compensate the winners for the trouble to which they have been put. The basis for this approach is that once a decision has been made, it has moral consequences. It follows ex post logic, saying to the party which has lost in court: "you have failed, now you must pay the costs involved in putting your opponent to all this trouble." The foundation for this approach is that those who choose to proceed with litigation and lose should compensate their adversaries, because the expenses of court proceedings would not have been incurred if they had sensibly chosen to abandon their case at an early stage - and this is what they should have done, because they were wrong.

The argument is based on notions of morality dictated by result. In its purest form, compensation is awarded regardless of the conduct of the case. That is, costs are awarded to compensate the winner for the expense of participating in the case, not for the extra costs incurred as a result of some misbehaviour of the loser. Where some element of fault beyond simple participation (and losing) is introduced, then the reason for the award of costs moves from the compensation of the winning participant to the punishment of the loser.

This is a particularly important point to make clear in considering the various justifications which are available. If the reason for awarding costs is to compensate the winning party for the expense of participation, then

the moral right (and thus the right to compensation) is determined by the fact of winning. This is because it makes no difference to the victor whether the arguments presented were strong or weak, they all required a response and they were all wrong, as the winner correctly argued from the beginning of the process. Thus, having lost the loser should compensate the winner. Of relevance are only the fact of losing and the actual costs incurred by the other party.

(b) The arguments against costs as compensation

The arguments against using costs to compensate the winners for the trouble to which they have been put are very simple: all else remaining equal, this approach takes no account of the relative strengths of the arguments of each side, the manner in which their cases have been conducted, the motivation of the parties, whether there was some public interest in the case being argued or the reasoning behind the decision.

The compensatory approach, as noted above, is based on the assumption that the losing parties know in advance that their cases will fail, and therefore must bear the responsibility for the expenses incurred by the winner when litigation proceeds. While this may be true in some instances, they are likely to be a small minority. Generally speaking, it will be unusual for a case to proceed where one side knows it will lose. The justification for applying costs as compensation assumes it is always so, and it is therefore always the losers' responsibility to compensate the winners.

In isolation, this is a fundamentally unfair approach. It disregards the possibility that the opposing arguments were closely balanced, as will often be the case. When this is so, it seems absurd to impute knowledge of the forthcoming loss to one party.

The other way to justify compensatory costs awards is to suggest that the morality of the situation is not dependent on foreknowledge of the

outcome. That is, that while the losers may not have known in advance that they were in the wrong, that is not relevant. What matters is that they were in fact wrong, and as such should pay. This is a notion of responsibility which seems unusual (at the least) on its face. The clear implication is that the intent of those concerned was irrelevant. An almost God-like power is also imputed to the court concerned. It is the decision of the court as to who will bear responsibility for the expenses incurred. That decision will be based on the relative strengths of the arguments presented, with no account taken of the absolute merits involved.

The counter argument to this approach says that there is no reason that the presenters of losing arguments are somehow responsible for the costs of the winners. As with the argument assuming foreknowledge of the result, this takes no account of conduct and ignores the value in absolute terms of the cases presented.

Perhaps more importantly, these compensation-based justifications also ignore any public interest in having an issue argued. In a planning context this is especially important. Often appeals to the Environment Court have very wide reaching effects. The decisions made with regard to District Plans, especially, may be of interest to all the citizens in the area concerned, not just those who are parties. To make one party compensate another for their expense makes an obvious moral statement (as has been discussed), and any awards made automatically on this basis ignore the possibility that there was no obvious answer to the issue concerned, or that the answer which emerged and appears in retrospect to be obvious was only one from a range of possible answers available.

It also seems strange that this justification for costs would burden a losing party who had presented a concise, logical, well-reasoned case with the expenses of a winning party who had presented a number of irrelevant points, wasted the time of the Court and put the loser to unnecessary expense. Again, this observation indicates a gap between the perception of the winner as without fault and the reality of participation in an adversarial system.

The foundation of all arguments against compensatory costs is this: *there is no necessary connection between winning the case and holding the moral high ground.*

(c) The arguments for costs as a punishment

Awards of costs are also justified as a punishment for those parties who have strayed beyond acceptable behaviour in judicial proceedings. In some ways, this is similar to contempt jurisdiction. Such awards are seen as being an essential way in which courts can regulate the conduct of the parties which appear before them.

The basis for this approach is that the court has limited resources, especially in respect of time. These resources are subject to great demand, and are provided courtesy of the public purse for the public good. It is appropriate therefore that they be used in the best way possible, to hear contentious issues concisely argued and to clarify the law where it is confusing. If a party wastes time by presenting a frivolous argument or otherwise misusing the court, then costs will be ordered, not primarily to compensate the other party (they need not be paid to the other party at all - hefty court costs would be an example[1]), but to punish the party ordered to make the payment.

The moral aspect of awards is that they are made for behaviour which wastes the resources available. Here it is important to make clear the distinction between awards which aim to compensate and those which aim to punish. Compensatory awards focus on the recipient of the award. The primary area of concern is how much that party has spent (possibly subject to comparison with some objective standard). In looking to compensation as the aim, the quality of the arguments presented must necessarily be

1 See Resource Management Act 1991, section 285(1)(b) and (2)(a).

disregarded. Again, the reason for this is stressed: the quality of the defeated arguments is immaterial to a winner. The winner has argued all along that the losing arguments were wrong, and the expenses incurred in responding to a vexatious argument are going to be no greater than those incurred in responding to a solid argument, all else being equal. Indeed, it is likely that responding to a strong argument will be more burdensome than dealing with a weak one. Thus in terms of compensating for the expense wasted in facing a case which has now been proved wrong, any morality must rest entirely with the victors.

By contrast, in imposing costs as a punishment the focus is on the party who is being made to pay the award. The primary question in deciding whether a costs award is appropriate will not be "who won, and how much did they spend?", but rather "did this party misuse the system?" There is no necessary connection between losing and being made to pay costs in a system based on punishment. It is only where the system itself has been the victim (and thus, the public), that an award will be made.

(d) The arguments against costs as a punishment

Imposing costs as a punishment is not so objectionable on its face as the other justifications for these awards. Certain important issues do arise though, especially in terms of the structure of any system which is based on this rationale.

The punishment analysis fits comfortably with awards made to the court, but the obvious difficulty is in applying it to costs awards made to other parties. If the object of costs is to punish, surely awards should not be made to the other parties, resulting in the receipt of an undeserved windfall. This logic suggests that any regime designed to punish must not be based on awards to the other parties, and that if a system does function on that basis then the intent behind it is unlikely to be punishment. The counter-response to this interpretation is based on a recognition of one of

the other major drawbacks of imposing costs as a punishment - the disincentive effect.

Increasing the costs of litigation acts as a disincentive to participation in the process. If it is accepted that access to justice is important, and that discouraging litigation is not an acceptable result of costs awards (again, the arguments in relation to this are discussed more fully below), then the disincentive effect of costs awards as a punishment must be minimised. The reason that awards of costs as a punishment act as a disincentive to participation is that if they are paid to the court then they are a possible expense with no corresponding benefit. They increase the likely cost of proceedings to parties. This will systematically exclude those to whom the likely benefits are less than the likely expense as a result of this increase.

A possible reason for making costs awards to the other party emerges from this situation - if the money is paid to the other party (albeit as an undeserved windfall), then the possibility of that windfall is introduced to balance the possibility of costs being awarded against a party. It is even possible that this could outweigh the disincentive effect, because the likelihood of costs being awarded as a punishment against a party can be controlled by them - assuming they are aware of the appropriate rules of conduct which they must follow in a court - while the possibility of costs being awarded against the other side is not a variable they can influence.

Issues of access to justice do not end at the sums of money awarded as punishment. The Environment Court is a forum in which lay-people may theoretically appear and present their cases without legal or other professional representation. Although in practice this may be an illusory opportunity, introducing costs awards to this environment as a punishment for failing to maintain certain procedural standards would ensure that professional representation became essential. Furthermore, in theory the opportunity to represent oneself means that the expenses of taking an appeal to the Court are minimised. Instituting rules which force parties to retain

representation will amount to an across the board disincentive to running proceedings in the Court.

(e) The arguments for costs as a disincentive to litigation

The effectiveness of costs awards as a disincentive to litigation is often cited as one of the best reasons for the maintenance of such a system. This argument is regularly made with reference to the approach of the United States to civil litigation. Costs awards are not available in the US, and this, together with the existence of a legal profession both willing and permitted to work on a contingency fee basis, is often blamed for what is perceived as an overly litigious society.

It is argued that court proceedings are an inefficient way of solving problems which would be best dealt with by some form of negotiation. By taking up the time of the court private disputes are resolved at the cost of the public, the resolutions reached seldom being satisfactory to both parties and usually optimal for none.

Costs are an effective disincentive, it is suggested, because proceedings will only be carried through if the expected benefits of going to court outweigh the expected expense, say:

$$B > E$$

A purely economic argument would couch both sides of this equation in monetary terms, however in a planning law context it is more appropriate to consider measures of utility, with expense in terms of negative utility. In marginal cases the possibility of an award of costs will increase the expected expense of proceedings by the expected quantum of an award of costs, to the point where the expected benefits do not justify continuing:

$$B < E + E(C)$$

This analysis, though, ignores the corresponding benefit which will

be derived from costs awards: if one party pays costs the other receives them. This may balance the disincentive with a corresponding incentive.

The response to the claim of a balancing effect is to examine the dynamics of litigation. Generally one party is content to live with the status quo, while the other would attempt litigation to achieve some end. Costs are more likely to be applied to the party providing the impetus for litigation, rather than the party defending. This is especially true where the appeal process is concerned.

It is this asymmetry of outcomes which makes the possibility of costs awards an active disincentive to the pursuit of litigation - because they increase the likely expense to the party providing the momentum for the litigation without introducing any corresponding increase in the likely benefit. An alternative approach to this question says that the benefit which is gained from costs awards is less than the expense incurred. The suggestion is that the system itself takes a proportion of costs awards along the way, and that this accounts for the disincentive effect.

In New Zealand another particularly relevant concern, in terms of the disincentive to litigation which costs can be, is the buildup of pressure on the Environment Court. Approximately 1,600 cases were awaiting hearing in the Court as at June 1996, according to the report of the Justice and Law Reform Select Committee, *1996/97 Estimates - Vote Courts*.[2] While the committee credited the large number of cases awaiting hearing to references being filed arising from the review of district plans by all local authorities, it noted that the efficiency of the Court was increasing and that extra resources were being directed to it with more Commissioners, research assistance, and a new advisory committee, still it is difficult to escape the conclusion that the system is in crisis. In these circumstances it may be argued that any disincentive to the filing of further proceedings must be a good thing.

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2 Cited at 19 TCL 27 2.

Finally, it is argued that even given the relative informality of the Environment Court, its relaxed rules of evidence and its willingness to entertain appearances from lay-people, it is still a fundamentally adversarial institution, and as such is an inefficient way of solving problems. Many means of resolving disputes by alternative means are available, and the parties should make use of them. Using costs awards as a disincentive to taking proceedings, it is said, will fulfil this objective.

(f) The arguments against costs as a disincentive to litigation

There are several problems with the above analysis. In terms of the effect of costs on the decision making process of litigants, it may be argued that the imposition of costs does not necessarily discourage those who are of a mind to pursue litigation. The alleged asymmetric effect is argued not to be so, as it is suggested that defendants are just as likely to be ordered to pay costs as plaintiffs.

Even if it is accepted that costs provide an effective disincentive to court proceedings, it may be strongly argued in response that this can have no appropriate application in the context of New Zealand planning and environmental law. While the United States may be faced with an overly litigious population, there is little evidence to suggest that this is the case in New Zealand. Indeed, in the planning and environmental field the difficulty has more often been how to encourage participation in the process than how to discourage it.

It is true that the Environment Court is currently under the pressure of a large case load, however a response to this which involves the effective exclusion of cases by increasing the expense involved fails to recognise the value of the Court's role. Planning is a unique area of the law in some respects, especially as the role of the Environment Court is in many cases to review the decisions of local government. This is an important function, balancing in a way the public concern which often results from councils

making decisions on objections to their own plans. To knowingly restrict access to this forum would be against the public interest. It may even be argued that the heavy workload faced by the court is the best available indicator that the system is working.

Finally, against the suggestion that costs should be used as a disincentive to litigation is the principled argument that such a move is immoral, and runs against fundamental rights of access to justice.

The nature of costs as a disincentive is that they are ruthlessly systematic. Employing such awards can very effectively discourage litigation. Those who are discouraged, though, are the people whose access to justice is always hampered by the expense - the poor. By employing such awards as a disincentive to litigation, those with more limited resources are systematically excluded to the benefit of parties with deeper pockets. In New Zealand, there is a strong connection between ethnicity and socio-economic grouping, so that such a distinction on the basis of wealth is also an effective distinction on the basis of ethnicity. For this reason, if for no others, costs should not be employed to discourage court proceedings.

(g) Summary of arguments

In respect of the arguments set out above, the following assessments are submitted:

(i) Applying costs awards in order to compensate winning parties for the expenses they have incurred is by itself an unsatisfactory approach. There is no moral justification for the broad decision to have losers bear the costs of winners (except on an ex post basis).

(ii) By contrast, it does not seem objectionable to apply costs as a means of punishing those participants who do not comply with the required procedural standards of the forum. The imposition of costs on this basis is narrowly targeted and morally justifiable.

It will not have the effect of denying lay-people access to justice because already in reality it is extremely unusual for laypeople to present their own cases before the Court.

(iii) Costs should not be used as a disincentive to the pursuit of proceedings in the Environment Court. As well as concerns on principle about restricting access to justice, planning is unique in that full public participation in the process is very desirable, even at appellate level. There are other ways of addressing the costs of the process to the public and the pressure the system is currently under.

2. An Appropriate Solution for the Environment Court

Based on the above analysis, it is suggested that the most appropriate design for the Environment Court's costs awards would apply costs primarily to punish and regulate proceedings. Compensation would be a strictly secondary concern, with the recognition that costs awards were paid to other parties to the proceedings only to ensure that the making of such awards remained a 'zero sum game', and thus to minimise the disincentive effect.

One significant issue remains unresolved concerning such a system. There is a conflict between rejecting the use of costs as a disincentive to litigious behaviour on the one hand and choosing to endorse costs awards designed to regulate procedure by punishing those who waste court resources and compensating those parties who are also the victims of such wastage. Any imposition of costs will inevitably have some disincentive effect by increasing the variance of expenses and benefits likely to result from the process (assuming risk averse participants). It is arguable that the disincentive effect will be even greater when the possibility of awards payable to the Crown is introduced.

There is no easy solution to be had to this conflict. The only acceptable

approach is to compromise, accepting that some disincentive will occur but attempting to design a system where that is outweighed by the benefits of a Court more efficiently regulated. As part of this, the disincentive effect of expenses generally could be targeted by making legal aid available for Court proceedings - a step that in itself would more than outweigh the effects of any possible costs awards.

III: THE PLANNING TRIBUNAL'S APPROACH TO COSTS

The object of this section is to identify the key Tribunal decisions on costs, particularly since the passing of the Resource Management Act (there has been no change in philosophy since the passing of the Act, so that recent decisions should evolve from the older Town and Country Planning Act cases). Also of relevance are any decisions of the High Court which relate to Tribunal costs awards.

The decisions we will examine are of several types. First, we look at those judicial comments which lay claim to one or more of the policy justifications for costs awards discussed above, or which explicitly reject any of those justifications. Next, we look at the agreed principles upon which awards are made, and then at the actual reasons for decisions which have been made. Finally a key High Court appeal against a Planning Tribunal award is considered. The objective of all this is to compare the claimed justification for awards with the relevant factors and the actual reasoning on which decisions are based, to see if the application accords with the rhetoric.

1. Explicitly Claimed Justifications

Geotherm Energy Ltd v Waikato Regional Council[3]

This was a case where Geotherm substantially lost an appeal from a decision of the Waikato Regional Council regarding the right to make use of geothermal fluid. In awarding substantial costs against Geotherm, the Tribunal explicitly noted that costs were given not as a penalty but as fair compensation. This is a clear indication of the philosophical underpinnings of costs decisions - or at least of the claimed justification for awards.

Greig v Burrell[4]

An application for an enforcement order was settled by mediation. The applicants sought costs from the respondent. The Tribunal refused to make such an award on the basis that there had been no conduct by a party in relation to the legal proceedings which was relevant to costs. In coming to this decision, the Tribunal noted that the purpose of costs was to compensate only in recouping hearing costs, not to compensate for other losses. Although the words of this judgment echo compensation, the emphasis on the conduct of the parties suggests that punishment is the real rationale.

Newlove v Northland Regional Council[5]

The appellants in this instance failed in their attempt to have changes made to conditions attached to a permit to take water for irrigation. Although one minor change was made, the result was substantially a victory for the applicants, who then made an application for costs.

The Tribunal decided to make a significant award of costs. In Judge

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3 3 NZPTD 480.

4 4 NZPTD 171.

5 3 NZPTD 787.

Sheppard's decision he made it clear that the award was not in any way being made as a penalty for having brought the appeal, nor for not having reached a settlement, nor for something unsatisfactory in the manner in which their appeal had been presented. Rather, because the Tribunal agreed with the council's decision at first instance it was fair that the appellant should contribute to the applicant's costs. This was partial compensation to the applicants for the expenses they had incurred, expenses which only arose because the appellants chose to take their appeal to a hearing.

The judgment is clearly expressed in terms of compensation, and disavows punishment as a motive. Judge Sheppard says that no complaint could be made about the manner in which the appellants presented their case. It is submitted, however, that the emphasis of the judgment is on the Tribunal's agreement with the decision of the council. It seems as though the appellant's case was less than convincing.

The words in this judgment preach pure compensation, but there is a subtext which does seem intent on punishing the appellants for wasting the time of the Tribunal with a case which did not stand up to testing.

Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council[6]

Again, this is a costs decision of the Tribunal which preaches compensation while applying penal awards. The detailed facts of a complicated case are not relevant for our purposes, however it is worth noting the comment that:

> Costs are not awarded as a penalty, nor to encourage or discourage resort to the Tribunal in different classes of case; but as compensation where that is just. Decisions on claims for costs are made in exercise of judicial discretion, having regard to the circumstances of the individual case.

6 2 ELRNZ 138.

While it is probably true to say that costs are not awarded as a punishment for mere participation and the exercise of the right to be involved, certainly they seem to be awarded to punish behaviour deemed unacceptable by the Tribunal. That approach is clear even in this decision, where the purported compensatory aims are punctuated with references to the ways in which parties misused the Tribunal.

2. Agreed Principles of Awards

Magnate Holdings Ltd v Waikato District Council[7]

This case focuses very carefully on the circumstances which the Tribunal will take into account in making an award of costs on an indemnity basis. Judge Willy (sitting alone) set out five circumstances in which it is appropriate to consider an award of costs by way of full indemnity:

1. Where arguments are advanced which are without substance;
2. Where the process of the Court is abused;
3. Where the case is poorly pleaded or presented including conducting a case in such a manner as to unnecessarily lengthen the hearing;
4. Where it becomes apparent that a party has failed to explore the possibility of settlement where a compromise could have reasonably been expected;
5. Where a party takes a technical or unmeritorious point of defence.

Stevens v Dunedin City Council[8]

This case suggests strongly that compensation cannot be the rationale

7 4 NZPTD 177.

8 4 NZPTD 151.

for the imposition of costs awards. The appellants had failed before the respondent at first instance and again on appeal to the Tribunal. Both the applicants and the respondent sought costs.

The Tribunal chose not to make an award of costs. In coming to that conclusion it began by noting that there is no general rule that in proceedings before it costs should follow the event unless there are special circumstances justifying another course. It then examined the conduct of the appellants and the case presented, and concluded that there were no good reasons for costs.

The observation that there is no general rule that costs should follow an event in the Tribunal is important because (as discussed in Part II above), automatic awards of costs are at the centre of attempts to compensate for expenses incurred by participation in litigation. Decisions made on the basis of an assessment of the morality of acts undertaken usually fit more comfortably into the framework of awards made to punish, as do the Tribunal's considerations in this case.

3. Actual Judgment Reasoning

Oertli v Selwyn District Council[9]

This decision was made purely on the basis of the conduct of the appellants (who had effectively lost the hearing). The Tribunal focused on the fact that the conduct of the losing case had been reasonable and sensible, confined to the matter of most concern to them. It was also noted that the proposed consent had been modified somewhat as a result of the appellants' participation, and this was seen as being indicative of the strength of their arguments.

In a key passage of the decision, the Tribunal said:

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9 [1994] NZRMA 39.

> We agree that the appellants have acted reasonably and sensibly in confining the scope of their appeal to the matter that was of most concern to them and in the result they have achieved some measure of success even though they have failed to have that part of the respondent's decision relating to helicopter flights overturned completely. We also take into account the fact that the applicant's evidence about noise measurements was new evidence put before the Tribunal for the first time.

As a result, costs were not awarded against the appellants. Clearly the reason for this was that their conduct throughout the course of proceedings had been beyond reproach.

Fennell v Rodney District Council[10]

This was a case where costs were sought against both the council and one of the submitters. The Tribunal decided that they should be awarded against the local authority only, for two reasons. First, the council called no evidence to support its opposition to the appeal, and instead tried to establish a case by cross-examination alone. Second, it had botched service of the initial application on one of the neighbours. The result was that the Tribunal had to hear extensive submissions and evidence from that neighbour so that they could get a fair hearing, amounting to a significant waste of time and effort.

Cumulatively, the Tribunal categorised the effect as putting the applicant to costs which would otherwise not have been incurred. Criticism of this reasoning must focus on the fact that while the time and effort of the Tribunal was clearly wasted, the appellant's time was no more wasted than it would have been in responding to more substantial arguments. Indeed, the council tactic of making a case by cross-examination only would surely have saved the appellant expense.

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10 4 NZPTD 14.

Chan v Auckland City Council[11]

Here the submitters sought costs against the appellant. The submissions in favour of an award focused on the fact that although the issues to be decided may have been finely balanced, in the end a value judgment was required, and such judgment should be reflected in a costs award. It was also said that the previous failure of the appellant before the council was another reason to award costs.

The Tribunal (Judge Kenderdine alone) decided not to make an award of costs, and in so doing provided some of the best evidence that compensation is not their objective. The submitters' argument that a value judgment was required is based on a pure conception of compensation with the moral right resting with the winner. In rejecting this approach and looking instead at the fact that substantial arguments were advanced by the appellant, Judge Kenderdine is indicating (perhaps unintentionally) that awards will be made based on the use to which the Tribunal's resources are put - if valid arguments are well put then a loser will not be required to compensate a winner despite the fact that participation has been expensive for the winner.

Wyatt v Auckland City Council[12]

The applicant succeeded in this case, and sought costs against both the respondent council and the appellants. Costs against the council were not granted, but an award was made against the appellants. The basis for the award provides more evidence for the Tribunal having a regulatory, punitive rationale for costs awards.

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11 4 NZPTD 455.

12 4 NZPTD 684.

The relevant extract from the judgment of Judge Willy and Commissioners Easdale and Catchpole reads:

> The unrestricted right to appear before the Tribunal must be understood to carry with it the correlative duty to act responsibly. That involves considering all other available ways of achieving the desired result. To the extent that an appeal against a site specific consent is the only way, then a facet of the duty is to narrow the issues to those matters relevant to the case. Presentation of the appeal should always be in the most economical way possible commensurate with the right to appear and the objective sought.

No compensatory sentiments are present either in this passage, in the remainder of the judgment, or in the application of the rules described.

4. High Court Appeal

McKenzie v Taupo District Council[13]

This case was an appeal to the High Court from a decision of the Planning Tribunal on costs. It is useful for our purposes because it makes clear the basis upon which such appeals may be taken, and goes some way towards clarifying the reasons costs are awarded.

Here the substance of the case concerned an application to erect a jetty in Little Acacia Bay, Lake Taupo. The appellant lost at the council hearing level, then again before the Planning Tribunal. After deciding in favour of the applicant, the Tribunal noted (as per *Stevens)* that there was no general practice that costs follow the event. The circumstances of the case were then examined and it was determined that although presenting some strong arguments, the appellant had raised peripheral issues which took up a significant portion of the hearing time unnecessarily. In the result,

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13 [1996] NZRMA 237.

a costs award of $3,000 from total costs of $11,000 was made against the appellant.

On appeal to the High Court it was argued primarily that the Tribunal had made an error of principle in giving undue weight to one part of the evidence and insufficient weight to the value of another part of that evidence, but also that it had been "plainly wrong" to penalise the appellant. The High Court (Doogue J and Goddard J) noted that its role was not to reconsider the Tribunal's evaluation of the evidence in exercising its discretion, but to look to either the misapplication of matters of principle or the question of whether a decision was indeed plainly wrong.

The court decided that the decision had not been plainly wrong on the facts. It noted that the Tribunal had carefully evaluated the conduct of the parties, and that the award of costs had been based only on the fact that the appellant's case involved took more time and expense than it should have, because of a concentration on unmeritorious issues. Here the emphasis of the court seems to have drifted away from claiming compensating the applicant as the object of the award towards the true aim - the punishment of the appellant who has misused the system. This is an impression which is reinforced when the court says:[14]

> An appellant who brings an appeal has to recognise that, if the manner of conducting the appeal contributes to costs which the Tribunal does not consider should justifiably have been required, an order for costs may be made against that appellant. That is what occurred here. There was no endeavour to penalise the appellant for bringing an appeal. The appellant was merely being required to make some contribution towards costs which the Tribunal considered had been unnecessarily incurred because of the appellant's actions.

Again the focus is not on the costs to other parties, but rather on the

14 Ibid, 240.

wastage caused by the party against whom costs are to be awarded - a clear indicator that the basis for awards is punishment for inadequacies of presentation or substance, not compensation.

IV: APPLYING NORMATIVE STANDARDS TO THE TRIBUNAL'S APPROACH

In this section the Tribunal's approach to costs awards is summarised, based on our examination of its decisions. We look to both the claimed justifications and the actual applications, identify the reality, make an assessment of it, and suggest reform for the Environment Court.

1. Summary of Tribunal Approach

The rhetoric of the Planning Tribunal is obviously based on compensation, but from the observations set out in the previous part, there seems to be a big difference in its practical application. This may be illustrated clearly by analysing the five relevant circumstances set out in *Magnate*[15] which may lead to an award of costs on an indemnity basis. For each relevant circumstance it must be asked: which of the three reasons for imposing costs (compensation, punishment or disincentive) does this circumstance address?

1. *Where arguments are advanced which are without substance.* This is a criterion which draws a particular distinction between parties which have lost before the Tribunal. The **quality** of their legal argument is under scrutiny. All else remaining equal, costs will be

15 Supra, at note 7.

awarded against some losing parties but not others based on whether their arguments had a modicum of validity. Given that this assessment will be made by the Tribunal after deciding that the party presented inferior arguments, it is tempting to view this simply as a disincentive to bringing cases before the Tribunal, which functions by making a loss potentially a more costly exercise. It would also seem to be relevant in terms of compensation, because of the wasted time and expense to which the other side has been put.

In fact, neither of these justifications stands up to rigorous scrutiny. There may be some disincentive to litigation involved in this criterion, however it is a disincentive only to those who accept there is a possibility their arguments will be viewed as being without substance. The discouragement is effectively targeted, instead of a blanket approach. Similarly, compensation cannot be the rationale for this criterion, for winning plaintiffs are put to no more costs, necessarily, by insubstantial arguments than by those which amount to something more. Indeed, it is the better founded arguments which are likely to cause the most expense, and which are no less likely to be verbose and time consuming.

By a process of elimination we reach the conclusion that the reason the Planning Tribunal takes into account any lack of substance in the losing arguments is to punish the party concerned. This is a conclusion which bears up under consideration - the punishment justification is based on the concept of some wrong doing, and the consideration of arguments' substance certainly focuses on wrong doing. What the Tribunal is effectively saying is 'we are a body which has much work to do. Our time should be spent on matters where there is some issue to be decided. If there is no issue, then you are wasting our time, and

for that you must be punished. Your punishment may result in some benefit to the other side, however that is simply their good fortune. It may also effectively discourage some litigation - again, this is only good fortune.'

2. *Where the process of the Court is abused.*

It is not difficult to see that the justification for abuse of process being taken into account is again punishment. The significance of this factor is similar to the significance of insubstantial arguments - again it is a question of misusing the forum. This factor will also result in some discouragement of taking proceedings to the Environment Court. Where litigation is viewed as a possible delaying tactic, for example, the threat of an award of costs being more likely to be made because of the abuse of process will carry some weight. This is another instance, though, where the disincentive is narrowly targeted, not applied generally.

3. *Where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing.*

There is no necessary disincentive to the advancement of proceedings to the Court in this factor. There are elements of both compensation and punishment, though again it is submitted that punishment is the primary purpose. Compensation is relevant in terms of the unnecessary lengthening of the hearing, putting the other party to expense which need not have been incurred.

Generally though, the poor pleading or presentation of a case will not result in disadvantage to the other side. If anything, unsatisfactory performance here will make life easier for the adversary of the

presenting party. It will effectively make life difficult for the Court, however. Poor pleading or presentation will make the work of considering the arguments harder. Again, punishment for the inefficient use of the Court seems to be the underlying reason for this circumstance to be taken into account in deciding whether an award of costs is appropriate.

4. *Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected.*

This factor is somewhat different to those which we have examined up to this point. The concern is not the arguments and behaviour seen in the Court, but instead conduct which occurs outside judicial proceedings and simply comes to the notice of the Court. There is no inherent misuse of resources involved in the situation where a party has refused to entertain notions of settlement - it is quite possible that the case to be presented is seen as strong enough to make concessions unnecessary. The Court, though, is sending the message that if it comes to the objective conclusion that a compromise could reasonably have been expected, then it is more likely to impose costs against parties which have failed to explore the possibility of a settlement.

While this circumstance fits into a regulatory framework (ensuring that only cases involving non-negotiable issues come before the Environment Court), it is also relevant to the objective of discouraging proceedings from reaching the Court and encouraging negotiated settlements. The qualification "where compromise could have been reasonably expected" forces the parties to at least consider at an early stage whether there is any possibility of some compromise. If there

is, then the threat of a costs award will act as a spur to fully explore the possibility of settlement. Forcing parties to thus take on board the process of considering settlement possibilities at an early stage is a very effective way of discouraging cases from reaching the Court.

Again though, compensation is not a relevant consideration. Certainly it would be ironic to award costs to a party which had won the court case in order to compensate for the loss they have suffered in not reaching a negotiated settlement likely to have been far less favourable than the adversarial result.

5. *Where a party takes a technical or unmeritorious point of defence.*

Compensating the other party cannot be the objective of this factor. As with issues relating to the substance of the arguments presented, the other party has no concern in whether the point is technical or not, meritorious or unfounded. A technical or unmeritorious point of defence is no more worrisome than one of real substance, and the adversary concerned would likely prefer to face a raft of technical or unmeritorious points than a few of substance. Technical points are not likely to take up more time than non-technical, and there is no reason to suppose that unmeritorious points will put the other party to more significant expense in preparing a response than genuine points.

The primary justification for imposing costs based on this circumstance must once more be to punish the party concerned for wasting the resources of the Court. There is also an element of discouragement involved - the taking into account of this factor sends a clear message that these kinds of arguments are likely to be costly for the party making them. There is a disincentive to appearing with

a defence in part based on them, and a corresponding incentive to settle at an earlier point.

So why, if the Court is so concerned with punishment for misusing the institution, do parties continue to argue costs in compensatory terms? The answer is simple: because they are encouraged to do so. As we saw from the cases, compensation is constantly advanced as being the reason costs awards are made. Why might this be so?

It is submitted that costs are awarded by the Court to punish and to regulate as outlined in the first part of this paper. The disincentive effect of such awards is recognised, though. In order to minimise this barrier to participation awards are usually made not to the court, but to the other party. This is a completely amoral procedure - there is no reason whatsoever that the other party should benefit from such an award, except to counter the disincentive effect. It would be difficult, though, for the Environment Court to own up to such an approach; certainly it would lead to many bitter litigants. Instead of admitting to the true reasoning, the rhetorical glaze of compensation is applied. In this way the public interest in 'fairness' is satisfied, while the orderly conduct of proceedings is encouraged and barriers to participation are minimised.[16]

2. Assessment of the Court Approach and Suggestions for Reform

Overall, it is submitted that the Tribunal has made awards of costs on a very solid basis. The punitive, regulatory motive has been to the forefront, while concerns about minimising the disincentive effects have resulted in awards being paid to other parties, and in such factors as the public interest

16 [This article was completed before the decision in *Peninsula Watchdog Group Inc v Coeur Gold New Zealand Ltd*, High Court, Auckland, HC 120/96, 9 July 1997, Salmon J, upholding the Tribunal decision in *Peninsula Watchdog Group Inc v Waikato Regional Council* [1996] NZRMA 218, was delivered. Ed.]

in proceedings being taken into account. There is no need for the Environment Court to fundamentally change the approach. The most significant problem with the system as it stands, though, is that it is underhanded. While the effects are admirable, the new Court would be better served by recognising the regulatory role of its costs awards and abandoning claims of a compensatory objective.

This move would expose the inequity of awards being paid to other participants. It is suggested that this either be accepted as the inevitable consequence of minimising the disincentive effect of such awards, or that some more basic changes be made. If awards to other parties are to be abandoned, then other means of minimising the disincentive of awards to the Court must be found. It is submitted that one way of doing this would be by introducing a legal aid system. Certainly, costs awards could be redistributed to participants in need of access. It is suggested that a concerted attack on the barriers to participation would involve a far greater contribution of funds, primarily from the government.

This is an expense which would be justified by the pubic interest in a planning process in which all participate. The disincentive effect of costs awards would be far outweighed by the effective removal of barriers which would accompany the legal aid system. Until the introduction of such an innovation, it is appropriate for awards to continue to be made to participants, lest the interest in ordered proceedings should override the more important interest of broad public participation.

It is only when the reforms suggested are put into place that we will genuinely have a planning law forum to which all have access. It is to be hoped that the Environment Court becomes this forum.

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