IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CIV-2005-485-001241

IN THE MATTER OF	an appeal pursuant to s.299 Resource Management Act 1991
BETWEEN	GISBORNE DISTRICT COUNCIL Appellant
AND	ELDAMOS INVESTMENTS LTD First Respondent
AND	GLADIATOR INVESTMENTS (GISBORNE) LTD Second Respondent

Hearing: 4 October 2005

Appearances: Nicholas Wright for Appellant
Trevor Gould and Angela Hurst for Respondents

Judgment: 26 October 2005

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 2.45 p.m. on 26 October 2005

SOLICITORS
Brookfields (Auckland) for Appellant
Chapman Tripp (Auckland) for Respondents

Introduction

[1] The Gisborne District Council (GDC or Council) appeals against a decision of the Environment Court, allowing a zoning appeal by Eldamos Investments Ltd. Council had zoned amenity commercial 4.7 hectares of land known as the Heinz Wattie block but the Court directed a change to fringe commercial.

[2] GDC has abandoned its appeal against the Environment Court's decision allowing a separate appeal by Gladiator Investments (Gisborne) Ltd against a refusal to grant a resource consent to construct a Warehouse store on a 2.37 hectares site within the block.

[3] The genesis of this appeal is most unusual. A commercial building, an hotel, and residential apartments have already been constructed within the block. Construction of the Warehouse store, occupying the balance of the land, will proceed shortly. On that event the whole block will be developed as a fringe commercial zone, just as the Court directed. GDC's counsel, Mr Nicholas Wright, accepted that, in the context of this appeal, the block's actual development is, in the short to medium term, "a lost cause".

[4] Nevertheless, Mr Wright justified GDC's appeal upon its long-term desire to resume what he called its "planning vision" for the block once the Warehouse decides to vacate, if and when that ever occurs. He also advised that the Court's decision will have a far reaching, adverse precedential effect on GDC's planning policy direction, even though Council views it as flawed in many respects. I must say that Mr Wright's advice is not easily reconcilable with his later concession that Council's zoning decision was without intrinsic merit. His acknowledgement was inevitable, given the Court's unassailable finding that GDC's decision was not dictated by legitimate planning considerations, but by the expedient of preventing bulk retailing activity on the land.

Background

[5] The Heinz Wattie block is a prominent area immediately to the south east of Gisborne city. Heinz Wattie used the property for many years as a food processing plant. GDC purchased it in 1997 when the company ceased its operations there. The land was then zoned Industrial 2 for light and medium industry, excluding residential, retailing and visitor accommodation activities. The plant was later demolished.

[6] In November 1997, shortly after purchasing the site, Council notified its proposed regional and district plan. It intended to zone the Heinz Wattie block outer commercial which allows retailing as a permitted activity. Three years later Council agreed to sell the land to Gladiator, knowing of the company's proposals to develop it for bulk retailing.

[7] In September 2001 Gladiator applied to Council for a resource consent to subdivide the land for a range of residential and commercial purposes. Among them was development of a large format retail store for Harvey Norman. A number of parties opposed. In March 2002 hearing commissioners heard Gladiator's application.

[8] In April 2002, before the Commissioners had delivered a decision, some of the parties opposed to Gladiator's application issued judicial review proceedings in this Court. They challenged the proposed district plan alleging GDC's failure to consult adequately in breach of s 32 Resource Management Act 1991. On 8 May 2002 the parties settled the proceeding. Council agreed to withdraw the permitted activity status of retailing activities within outer commercial zones in its proposed district plan. It passed a contemporaneous formal resolution to this effect pursuant to Clause D, First Schedule, Resource Management Act. In consideration Gladiator undertook to withdraw its application for resource consent so far as it related to retail, and not to take any steps to appeal or challenge Council's zoning change.

[9] Within weeks GDC granted Gladiator's application to subdivide the block into nine lots and to develop apartments and the Portside Hotel. As noted, they have since been completed along with an office building. Together they constitute a ribbon or boundary to the block parallel to the side of the Turanganui River and the start of Waikanae beach.

[10] In August 2002 Council gave public notice of withdrawal of retailing as a permitted activity within the outer commercial zone. Later that year Eldamos agreed to purchase from Gladiator the site originally designated for a Harvey Norman store, conditional upon the vendor obtaining consent to construct a Warehouse store. At the same time GDC notified variations to its proposed scheme introducing new fringe commercial and amenity commercial zones. The latter was to apply to the Heinz Wattie block, permitting retail activities provided they are ancillary to other permitted activities. Small retail activities (where premises are less than 1500 square metres gross floor area) were allowed as discretionary activities but all other retailing was non-complying.

[11] In June 2003 Gladiator applied to Council for a resource consent to construct a Warehouse store on the designated site. In October GDC confirmed the permitted activities within the amenity commercial zone applying to the block. In November the hearing commissioners heard Gladiator's application for resource consent, which they refused the following month.

[12] Eldamos appealed against GDC's zoning change for the Heinz Wattie block from outer commercial to amenity commercial zone. Gladiator appealed against the hearing commissioners' decision to dismiss its application for a resource consent for the Warehouse site. The hearings of these appeals in the Environment Court occupied 14 days in October 2004 and February 2005. The Court delivered its decision, totalling 69 pages, on 22 May 2005.

Environment Court decision

[13] The Court's decision on the zoning part of the appeal considered a range of legal issues and totalled 53 pages. In summary, the Court held that:

(1) Council's withdrawal of its original plan provisions was legally ineffective (even though none of the parties had raised this issue in pleadings on appeal) (paras 66-106);

(2) Amendments to s 32 Resource Management Act in 2003 materially altered the test for determining the evaluation exercise undertaken by local authorities in deciding whether to adopt a certain zoning objective (paras 112-131); and

(3) The variation proposed by Council failed to meet the test of achieving the purpose of the Resource Management Act in that, instead of managing or controlling effects of activity, it directed a particular outcome (precluding bulk retailing) (paras 132-159).

[14] The Court undertook an inquiry into the purpose of the zoning change, which GDC had described as (para 147):

> ... managing effects of buildings and other development by discouraging types that do not contribute to amenity through built form, and enhancing positive characteristics of natural and physical resources.

[15] The Court found that these were not in fact Council's purposes for introducing the zone. Furthermore, even if they were, they would not qualify as assisting GDC to discharge its statutory functions (paras 147-153). The Court was satisfied Council's true objective was to prevent bulk retailing on the site (para 253).

[16] The Court considered the weight to be placed on consultation and community attitudes to the future of the land (paras 160-182) and, after reviewing the relevant evidence and undertaking its own site visit, concluded that the Heinz Wattie block possessed no significant visual, landscape, heritage or cultural amenity value (paras 183-216). This was the primary issue for determination on the appeal. The Court allowed Eldamos' appeal. It directed Council to zone the Heinz Wattie block fringe commercial, and amend the zoning rules for that block only by providing that retail activity having a gross floor area greater than 5000 square metres be provided for as a restricted discretionary activity.

Decision

(a) Jurisdiction

[17] It is appropriate to refer briefly to the nature of the High Court's jurisdiction to consider an appeal before considering each of the seven questions of law said to arise. S299(1) Resource Management Act provides:

> A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a point of law to the High Court **against any decision**, report, or recommendation of the Environment Court made in the proceeding.
>
> [Emphasis added]

[18] A right of appeal lies "against any decision". The jurisdictional prerequisite is the existence of a point of law. Without it, an appeal cannot be brought. An appellant must establish a decision is wrong because the Court has erred in law. The right of appeal is against a decision, not a legal finding of itself. It follows that the point of law on which the Environment Court has erred must have materially affected the result (*Royal Forest and Bird Protection Society (Inc.) v WA Habgood Ltd* [1987] 12 NZTPA 76, 81-82, Holland J). This nexus is essential.

[19] This statutory requirement accords with a well settled principle of common law. As the Court of Appeal has observed (*Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 at 579 per Gault J):

> To the extent to which these findings are not material to orders made and appealed against they are not appealable: *Lake v Lake* [1955] 2 All ER 538, *Meridian Global Funds Management Asia Ltd v Securities Commission* (Court of Appeal, Wellington, CA 4/92, 14 September 1992).

[20] The same principle applies where a case is stated under s 78 Summary Proceedings Act 1957. A case should not be stated unless the point of law which arises is "(a) clearly necessary for the decision and (b) likely to be decisive one way or the other" (*Police v O'Neill* [1991] 3 NZLR 594, Tipping J at 598).

[21] In *Lake* (supra) a wife sought to appeal against an adverse finding of fact made by the Judge when dismissing her husband's divorce petition; he held that she

had committed adultery but her husband was guilty of condonation. The wife wished to challenge that finding even though she was successful. In dismissing her appeal Sir Raymond Evershed MR said (541F):

> In other words, I think that there is no warrant for the view that there has by statute been conferred any right on an unsuccessful party, even if the wife can be so described, to appeal from some finding or statement – I suppose it would include some expression of the view about the law – which you may find in the reasons given by the Judge for the conclusion at which he eventually arrives, disposing of the proceeding. If that is right … there is no part of the [decision] against which any appeal … could be made on the part of the wife.

[22] In *Lyttleton Port Co Ltd v Canterbury Regional Council* (Wellington Registry, AP10/01, 20 June 2001) John Hansen J applied this reasoning directly in the Resource Management Act context. The Judge dismissed an appeal brought by a company which accepted the Environment Court's decision but sought to challenge some findings made in its course. John Hansen J concluded that the High Court had no jurisdiction to quash part of a decision said to be clearly wrong in law and substitute its own corrected view. He was satisfied that obiter dicta or intermediary findings cannot be subject to appeal (para 43).

[23] The same principle applies where an unsuccessful appellant's challenge is directed at legal findings which are not germane to the Environment Court's decision. An immaterial error is plainly obiter; that is, it does not form part of the ratio of the decision. There is no appealable issue. Furthermore, an obiter finding has no binding or precedential value (although its effect may be persuasive if the reasoning is compelling), and an appellate decision upon it would fall into the same category. This is the reason why the High Court does not exercise its jurisdiction under the Declaratory Judgments Act 1908 where the result would be of academic value only. I add that this principle goes to jurisdiction, not merely relief.

(b) First Three Questions

[24] Council's notice of appeal alleged that the Court's decision "gives rise to [seven] distinct questions of law". Mr Wright placed them in three separate categories. I will deal with them in the same order. The first three related to the

Court's findings on GDC's decision to withdraw part of its proposed district plan without notification. Mr Wright identified these questions as whether the Court erred in (1) finding that it had jurisdiction to consider the validity of GDC's purported withdrawal in 2002 of part of the proposed district plan; (2) finding that the purported withdrawal was invalid, as it was made without "prior public notice and opportunities to make submissions and appeal"; and (3) by taking into account the proposed district plan as it existed prior to the purported withdrawal.

[25] The Court held that Council's resolution on 8 May 2002 to withdraw the retailing provisions from the outer commercial zone of its proposed plan for the Heinz Wattie block was ineffective because it breached Clause 8D, First Schedule. Accordingly the plan must be taken still to have included those provisions when the variations were notified (para 106).

[26] The Court acknowledged that the question was not raised by the scope of the pleadings. Nevertheless, it went on to consider whether or not the resolution to withdraw was legally effective, before reaching an adverse conclusion. The difficulty I have in understanding the purpose of the Court's approach is compounded by this statement (para 81):

> ... If, in the course of making a finding about the contents of the proposed plan, the Environment Court were to form an opinion that the withdrawal was not effective at law, that would not be assuming the authority of judicial review. Forming the opinion would not be declaring the withdrawal invalid, nor quashing or cancelling it. **It would simply be a necessary step in making a finding of fact that is essential to decide the appeals within their scope.**
>
> [Emphasis added]

[27] With respect, a finding that Council's withdrawal was ineffective at law is solely legal in character. It was unnecessary for the Court to go further. In the ordinary course of events its finding must be determinative because it means, despite the Court's protestation to the contrary, that the withdrawal was legally invalid or of no effect, thereby reinstating the outer commercial zone in effect until 8 May 2002. It cannot be characterised as simply 'a necessary step in making [an essential] finding of fact ...' for deciding the appeal.

[28] However, despite this conclusion, the Court never referred again to the question of the legal ineffectiveness of Council's May 2002 withdrawal again. It fell into an obiter void. It played no part in the Court's substantive decision to allow the appeal and thus does not require further consideration.

(c) Fourth, Fifth and Sixth Questions

[29] The second category of questions, said to relate 'to questions of statutory interpretation as to the Court's role in the context of district plan appeals', was whether the Court erred in (4) finding that the hearing on the variations ought to be fully de novo and that it was entitled, within that context, to 'supplant the Council's decision making role' (para 127); (5)(a) in the manner in which it characterised 'the revised legal test' for the assessment of district plan appeals (para 129); and (b) in concluding that it is the Court's role, in the context of a district plan appeal, to determine and apply what is in its view the 'optimum planning solution' (para 129); and (6) in the definition it adopted of the concept of 'amenity values' and in failing to address in that context (a) evidence concerning the content of submissions made by members of the Gisborne community at first instance; and (b) the expert views of Council's witnesses concerning the expectations and values of the local community.

[30] The apparent purpose of the fourth and fifth questions is to constitute a challenge on the Court's conclusion about the effect of the 2003 amendment to s 32. In its introduction to the variation appeals section of its decision the Court recorded as follows (para 109):

> **The parties agreed that the issues in the variation appeals** can be confined to whether the application of the amenity commercial zone to the Heinz Wattie land is **the most appropriate way to achieve the purpose of the Act**, with regard to:
>
> (a) The visual, landscape, heritage and social amenity values of the land in the zone and the surrounding or connected environs;
> (b) The overall form and function of Gisborne's central commercial area, including social and economic effects on its shape and urban form; and
> (c) Transportation planning and transportation efficiencies and related effects.
>
> [Emphasis added]

[31] The phrase "the most appropriate way to achieve the purpose of the Act" is the test prescribed by s 32(3) as amended in 2003 for evaluating whether an objective in a zone change achieves the purpose of the Act. The Court recited the parties' agreement that it should determine the issues accordingly. It was entitled, when hearing an appeal on a proposed plan or variation, to take account of the same matters considered by the local authority (s 32(5)). However, the Court then stated that before addressing the issues it would '... identify the basis on which challenges to plan provisions are to be considered' (para 110). I am at a loss to follow why this exercise was necessary when, in the preceding paragraph, the Court had succinctly identified the agreed basis for determining the zoning appeal; that is, according to the criterion imposed by the plain words of s 32(3).

[32] I cannot discern GDC's objective in advancing an elaborate argument before the Court about whether the 2003 amendment to s 32 changed the basis for deciding planning appeals. The exercise was pointless because, as just noted, its counsel had agreed that the test to be applied was the unambiguous one now mandated by the amended s 32 in terms materially different from its predecessor. I accept Mr Trevor Gould's observation that the Court was probably motivated to respond out of courtesy for GDC's arguments (paras 111-131), not because they had any relevance to the issues for determination. Ultimately Mr Wright accepted that the Court's conclusions in this part of the decision do not feature in its later reasoning on the primary issue falling for appeal. They are also obiter and, accordingly, do not require further consideration.

[33] I should add that there is no magic in this area of the law. It is simply a question of statutory interpretation. It does not require the superimposition of an artificial jurisprudence upon plain words which mean what they say. As Mr Gould and Ms Hurst emphasised, the purpose of a district plan is to assist the territorial authority to carry out its functions 'to achieve the purpose of the Act' (s 72). Its primary function is (s 31(a)):

> (a) The establishment, implementation, and review of **objectives,** policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district; ... [Emphasis added]

[34] The evaluation required when considering a change to a district plan is one, which as I repeat GDC accepted before the Court, of the extent to which each objective is 'the most appropriate way to achieve the purpose of the Act' (s 32(3)). That 'purpose' is promotion of 'the sustainable management of natural and physical resources' (s 5(1)). Previously the criterion was one of necessity (s 32(1)(a)). I accept Mr Gould's advice that the necessity test was unsatisfactory because very little is actually 'necessary' in Resource Management Act terms. The amendment makes it easier for a local authority to initiate a scheme change, and assume a more proactive than reactive role.

[35] I reject Mr Wright's submission that the 2003 amendment introduced a fundamental change in character to the evaluation required for changing a district plan, to allow local authorities to advance plan changes or variations which are not the optimum planning solution or to give them a policy making function when initiating variations with which the Court cannot interfere. I also reject his submission that the terms of the 2003 amendment constitute a legislative recognition that, while the Court as a judicial body is well equipped to determine matters of law and also objectively determine matters of contested fact, it is poorly equipped, compared to a local authority, to make sound judgments on the needs and aspirations of the local community, and thus how those needs are best addressed and met in a policy sense. In short, that is not what the Resource Management Act provides, and the circumstances of this appeal do not remotely justify Mr Wright's submissions.

[36] Although characterised as in the same category as the fourth and fifth questions, the sixth question was of a different nature. Its essence was that the Court erred in its approach to the term 'amenity values'. The Act defines 'amenity values' as meaning (s 2(1)):

> ... those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[37] Without advancing an analytical argument in support, Mr Wright simply suggested that the definition is subjective rather than objective in nature, and that the Court erred in adopting an objective approach. He submitted that whether or not an area possesses amenity values is not defined by reference to the determination of an

objective statutory body, but on the basis of the local community values; that it is "self-evident" that the Court, as a judicial body, is not equipped to make that type of subjective judgment; that the Court placed no weight whatsoever on views from members of the local community or the expert evidence of a Ms O'Shaughnessy; and that views of this nature are inherently local, policy issues to be determined by the community's elected representatives.

[38] I do not accept Mr Wright's attempt to challenge two distinctly separate parts of the Court's decision under the umbrella of one point of law straddling both. First, the Court considered what weight should be placed on consultation and community attitudes to the future of the site (paras 160-182). It considered in detail Ms O'Shaughnessy's evidence, and concluded (para 182):

> In summary, for the purpose of these proceedings the sources of Ms Shaughnessy's opinion about the views of the community do not establish that those views were representative of the public, and we place no weight on them. Rather we will make our findings on the evidence given at the appeal hearing.

[39] Mr Wright challenged this finding in written submissions. However, it does not raise a point of law. The Court was not satisfied, as a matter of fact, that Ms O'Shaughnessy's opinions were representative of the views of the community. It rejected her evidence accordingly. Mr Wright did not suggest that the Court's finding was without an evidential basis.

[40] Second, in logical sequence, the Court considered whether or not the land possessed visual, landscape, heritage and cultural amenity values (paras 183-185). After considering the statutory meaning of 'amenity values' (paras 187-188), it followed a logical, two-step process of considering visual and landscape values in one category (paras 189-205) and heritage and cultural values in another (paras 206-216). Mr Wright's submission is confined to a challenge to the Court's findings on visual and landscape values (paras 202-205). The Court recited its assistance from having viewed the land, at the parties' request, from various vantage points, and concluded (205):

> We find unpersuasive the opinions of Ms Dick and Ms Buckland ascribing visual and landscape values to the site as specialness of place, and as holistic dealing. Although other parts of the former Heinz Wattie land possess visual

> and landscape amenity values (especially along the riverside recently developed for multi-storey buildings), we find that the site possesses no significant visual or landscape amenity values.

[41] It is regrettably necessary to recite what has been frequently said before. When determining an appeal from a local authority, the Court has 'the same power, duty and discretion in respect of a decision appealed against …' (s 290(1)). This is the statutory source of its de novo jurisdiction. It follows, as Mr Gould and Ms Hurst submitted, that the Court has the same role as the territorial authority in achieving the integrated management of effects, and must evaluate for itself the extent to which the objectives, policies and rules are the most appropriate way to achieve the purpose of the Act.

[42] In performing these functions, the Court must apply the law objectively. It is a specialist body; its members are appointed because of their expert knowledge of and experience in planning and are uniquely placed to exercise a collective judgment on the issue of whether or not a block of land possesses a significant visual or landscape amenity value. This power is central to the Court's judicial function. It is not bound by the opinions of landscape architects, or what the local community thinks or values. And, as Mr Gould and Ms Hurst noted, to suggest that the Court is unable to make an assessment of amenity values would result in its inability to make any assessment in terms of effects on the environment, with a consequent inability to perform its statutory function.

(c) Seventh Question

[43] Council's final question is whether the Court erred in its findings that a consent authority is not limited, in preparing a district plan, to introduce provisions designed to 'enhance positive characteristics of existing natural and physical resources' or that 'promote appropriate outcomes to most efficiently and effectively manage resources in a sustainable manner for future generations'.

[44] This question is apparently directed to the Court's identification of this issue for decision (para 132), namely:

> ... whether the variations fail to meet the test of achieving the purpose of the Resource Management Act in that, instead of managing or controlling effects of activities, they are directive of a particular outcome (precluding bulk retailing) as was the purpose of district schemes under previous planning legislation.

[45] The Court then identified what GDC said were the two purposes of its variations (para 136). The Court found as a matter of fact that Council's purpose was not designed 'to enhance the positive characteristics of existing natural and physical resources' (paras 136-153) but to preclude bulk retailing from the Heinz Wattie block and prefer other classes of activity there (para 151). The Court recorded it was common ground that (para 145):

> ... the purpose of a district plan is to assist the local authority to carry out its functions under the Act to achieve the purpose of the Act; and not in effect to allocate resources, or prescribe what the local authority considers the wise use of them.

[46] Accordingly, there are two short and alternative answers to this last ground of appeal. First, Council is attempting to challenge a finding of fact for which there was a proper evidential foundation; namely, that Council's purposes in initiating the zone change were not as predicated by its seventh question on appeal, 'to enhance positive characteristics of existing natural and physical resources'. Second, the Court did not find that the local authority was not entitled to 'promote appropriate outcomes to most efficiently and effectively manage resources in a sustainable manner for future generations'. Instead the Court found that GDC must carry out its functions under the Act to achieve its statutory purpose rather than, in effect, to allocate resources (para 154). Again, as Mr Gould and Ms Hurst pointed out, this proposition was not even in contest between counsel as representing the proper approach (para 145).

Conclusion

[47] The ratio of the Court's decision, as I pointed out earlier, was its conclusion that the Heinz Wattie block possessed no significant visual, landscape, heritage or cultural amenity values (paras 189-214). An inquiry into this question was the

function it was required to perform in determining Eldamos' appeal. In oral argument Mr Wright accepted that the Court's findings of fact were unchallengeable.

[48] However, Mr Wright argued that the Court, by confining its consideration to existing 'natural or physical qualities and characteristics of' the Heinz Wattie block, erred in failing to inquire into its potential. This proposition did not feature anywhere in his written synopsis. He admitted that it faced a real difficulty – in my judgment, it met a number of insurmountable difficulties. One is that by definition natural or physical qualities and characteristics are existing; describing them as having a potential component is contradictory. Another is that, once the Warehouse site is constructed, the whole Heinz Wattie block will be fully developed and comprise a mixture of bulk retailing, commercial and residential activities including a hotel; its potential will be exhausted. In any event, as Mr Gould pointed out, the Court specifically considered the impact of current and future development (para 204). This ground of appeal, like the others, must also fail.

[49] Even though its path to consideration of the true issue arising on this appeal was diverted by a range of irrelevant arguments advanced by Council, the Court conventionally exercised its specialist role of drawing upon its collective expertise in determining whether GDC's proposed zone change conformed with Part II. The terms of its decision on this question provide unequivocal confirmation of the Court's reliance upon its own judgment, and its rejection of so-called expert evidence which, contrary to the purpose underlying the admissibility of opinion evidence in any forum, frequently amounted to no more than advocacy or submission. In my judgment none of the points of law raised by GDC on this appeal materially affected the Environment Court's decision, which was based upon an unchallenged factual determination that the Heinz Wattie block did not possess significant visual, landscape, heritage or cultural amenity values sufficient to justify an amenity commercial zoning.

[50] Accordingly, I dismiss Council's appeal against the Environment Court's decision dated 22 May 2005 allowing Eldamos' appeal against its zoning change to the Heinz Wattie land.

Costs

[51] Costs must follow the event. Eldamos and Gladiator were represented by one set of counsel; collectively they are entitled to one award of costs against GDC. I certify for two counsel. I invite counsel to confer on the level of costs. If they cannot agree, I will determine them according to memoranda to be filed first by Gladiator and Eldamos.

[52] It may assist counsel if I record my provisional view that Eldamos is entitled to costs on an indemnity or reasonable solicitor/client basis. A figure in the range of $15,000-$20,000 plus disbursements seems appropriate. This appeal was hopelessly misconceived. An objective evaluation by Council of the questions of law raised would have established that its appeal had no prospect of success; its points were diffuse and immaterial to the Court's decision. In this respect I record that my minute dated 8 August 2005 specifically drew counsel's attention to GDC's obligation to prove that a legal error 'caused or substantially contributed towards a wrong decision' if its appeal was to succeed.

[53] Also, as I have already noted, the entire Heinz Wattie block will soon be developed with a mixture of bulk retailing, commercial and residential activities. GDC's decision to pursue a zoning appeal is irreconcilable with abandonment of its appeal against the Warehouse resource consent. I am satisfied there is nothing in the Court's decision which might adversely interfere with or influence future zoning changes made by Council in accordance with its statutory functions and obligations for any land within its territorial boundaries, including the area to the north of Customhouse Street and the disused railway yards to the west. The relevance of the Court's decision is limited to the unusual circumstances of Council's 2002 zoning change to the Heinz Wattie block.

[54] I trust that counsel will be able to resolve the question of costs between them.

Rhys Harrison J