

ORIGINAL

18 NOV 1996

Decision No.                    A95/96

IN THE MATTER                of the Resource Management  
Act 1991

AND

IN THE MATTER                of an appeal under clause 14 of  
the First Schedule

BETWEEN

ROMILY PROPERTIES  
LIMITED  
(Appeal RMA431/95)

Appellant

AND

THE AUCKLAND CITY  
COUNCIL

Respondent

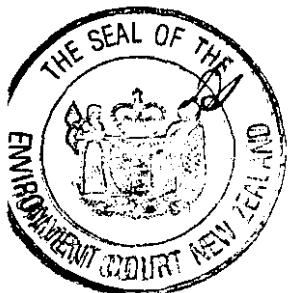
BEFORE THE ENVIRONMENT COURT

Environment Judge DFG Sheppard  
Environment Commissioner PA Catchpole  
Environment Commissioner J R Dart

HEARING at AUCKLAND on 1 and 3 April and 23 September 1996.

COUNSEL

Mr R B Brabant and Miss K Sherry for the appellant  
Mr D A Kirkpatrick and Mr M J Maclean for the respondent



## DECISION

### **Relief sought by appellant**

The appellant has referred to the Environment Court (formerly called the Planning Tribunal) Rule 7.8.1.3(a) of the proposed Auckland City (Isthmus section) district plan. That is a rule which controls the bulk and location of buildings in the Residential 1 zone. The objective of that zone is –

To promote the survival of the historic form and pattern of subdivision, buildings and streetscape in Auckland's early-established residential neighbourhoods.

The rule limits the height of buildings by reference to distance from site boundaries by stipulating –

No part of any building shall exceed a height equal to 3m plus the shortest horizontal distance between that part of the building and any boundary of its site other than a road boundary. Provided that this control shall not apply to sites defined in Fig 7.7. These defined sites will instead be subject to the controls set out in subclause (b) following.

The proviso exempting certain sites, and the controls applicable to them, are not material to these proceedings.

The basis of the appellant's challenge to the proposed rule is that it effectively prevents two-storey cottage style development. By its submission on the proposed plan, the appellant sought that –

This rule should be re-written to encourage new buildings to relate to the form of its [sic] neighbours rather than a zone wide control.

By the reference to the Court the appellant sought –

Amend rule 7.8.1.3 to allow for new building development in the Residential 1 zone consistent with the objectives and policies of the zone ie, to allow for a characteristic two storey building.

By an amended reference the appellant added more specific relief, seeking that the rule be amended to read –

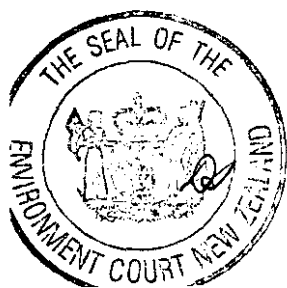
(a) Residential 1 and Residential 3a — Height in Relation to Boundary:

No part of any building shall exceed a height equal to 3m plus the shortest horizontal distance between that part of the building in [sic] any boundary of its site other than a road boundary; provided that:

(i) This control shall not apply to sites defined in Fig 7.7. These defined sites will instead be subject to the controls set out in subclause (b) following.

(ii) This control shall not apply on sites in the Residential 1 zone where a building is proposed to be constructed within a building envelope determined by :

- A line drawn connecting the highest point of the front eaves of the buildings immediately adjacent and on either side of the subject site.
- A line drawn connecting the highest point of the rear eaves of the buildings immediately adjacent and on either side of the subject site.
- A line drawn connecting the highest point of the ridgeline of the buildings immediately adjacent and on either side of the subject site.



- The ridgeline of the proposed building must fall within 3m either side of the centre line of the subject site.
- The building envelope shall comply with all other development controls with the exception of maximum height. Maximum height within the building envelope shall be determined by the calculation arising from the ridgeline height of the adjacent buildings.

A consequential amendment would be made to the explanatory notes, and a diagram would be inserted showing how the lines joining front eaves, rear eaves, ridgeline and centre lines can be achieved.

In opening the appellant's case, its counsel Mr Brabant acknowledged that evidence to be given by witnesses for the respondent identified some potential problems with the application of the rule proposed by the amended reference. In his address, counsel proposed further amendments to address those concerns, so that the rule incorporating those amendments (and additional alterations raised in the course of presentation of the submissions) would read:

(a) Residential 1 and Residential 3a — Height in Relation to Boundary:

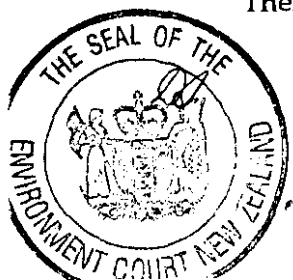
No part of any building shall exceed a height equal to 3m plus the shortest horizontal distance between that part of the building and any boundary of its site other than a road boundary; provided that:

(i) This control shall not apply to sites defined in Fig 7.7. These defined sites will instead be subject to the controls set out in subclause (b).

(ii) *As an alternative the following control can be substituted on sites in the Residential 1 zone where a building is proposed to be constructed within a building envelope determined by :*

- A line drawn connecting the highest point of the front eaves of buildings *within the Residential 1 zone and on sites immediately adjoining the subject site. Where the buildings immediately adjoining are not both 2-storied, then the highest point of the front eaves of the lowest of the buildings will be used to determine this line.*
- A line drawn connecting the highest point of the rear eaves of the buildings *within the Residential 1 zone and on sites immediately adjoining the subject site. Where the buildings immediately adjoining are not both 2-storied, then the highest point of the rear eaves of the lowest of the buildings will be used to determine this line.*
- A line drawn connecting the highest point of the ridgeline of the buildings *within the Residential 1 zone and on sites immediately adjoining the subject site. Where the buildings immediately adjoining are not both 2-storied, then the highest point of the ridgeline of the lowest of those buildings will be used to determine this line.*
- The ridgeline of the proposed building must fall within 3m either side of the centre line of the subject site.
- The building envelope shall comply with all other development controls with the exception of maximum height. Maximum height within the building envelope shall be determined by the calculation arising from the ridgeline height of the adjoining buildings. *Where the buildings on sites immediately adjoining are not both 2-storied, then the height of the lowest of those buildings will be used to determine overall height.*
- *In the case of a corner site, the proposed dwelling shall be orientated on the site to align with the pattern of dwellings on neighbouring sites and the shape of the site.*

Alterations to the version sought in the amended reference are shown in italics. There would also be a consequential amendment to the explanatory notes.



After both parties had presented their cases, in his address in reply counsel for the appellant proposed a further amendment to address a concern that had been expressed by the respondent's witnesses about buildings being constructed too close to property boundaries. The further amendment proposed to address that concern was to add a requirement for a side yard of at least 1.2 metres width on each side boundary. As that had not been put to the respondent's witnesses for comment, the parties were given further opportunity to consider their positions in the light of the development of the amendments sought to the rule. However the parties were unable to reach agreement, and counsel submitted a joint memorandum to that effect. They attached to that memorandum a "final" version of the proposed amendments to the rule sought on behalf of the appellant:

(a) Residential 1 and Residential 3a — Height in Relation to Boundary:

No part of any building shall exceed a height equal to 3m plus the shortest horizontal distance between that part of the building and any boundary of its site other than a road boundary; provided that:

(i) This control shall not apply to sites defined in Fig 7.7. These defined sites will instead be subject to the controls set out in subclause (b).

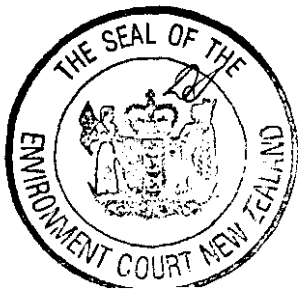
(ii) As an alternative the following control can be substituted on sites in the Residential 1 zone where a building is proposed to be constructed within a building envelope determined by :

- A line drawn connecting the highest point of the front eaves of buildings within the Residential 1 zone and on sites immediately adjoining the subject site. The highest point of the front eaves of the lowest of the buildings will be used to determine this line.
- A line drawn connecting the highest point of the rear eaves of the buildings within the Residential 1 zone and on sites immediately adjoining the subject site. The highest point of the rear eaves of the lowest of the buildings will be used to determine this line.
- A line drawn connecting the highest point of the ridgeline of the buildings within the Residential 1 zone and on sites immediately adjoining the subject site. The highest point of the ridgeline of the lowest of those buildings will be used to determine this line.
- The ridgeline of the proposed building must fall within 3m either side of the centre-line of the subject site.
- The building envelope shall comply with all other development controls with the exception of maximum height. Maximum height within the building envelope shall be determined by the calculation arising from the ridgeline height of the immediately adjoining buildings. The height of the lowest of those buildings will be used to determine overall height.
- In the case of a corner site, the proposed dwelling shall be orientated on the site to align with the pattern of dwellings on neighbouring sites and the shape of the site.
- *If this alternative control is used then side yards of not less than 1.200 metres are required.*

An example of how this building envelope is determined is demonstrated in Fig 7.9.

There would be a consequential amendment to the relevant explanation.

Although the respondent did not agree to the further revised amendment to the rule, it proposed in the alternative an amendment to its proposed district plan by inserting a new Rule 4.3.1.2D—



#### 4.3.1.2D Building in Relation to Boundary Residential 1 Zone

The Council may grant discretionary activity consent to an application to exceed the provisions of Rule 7.8.1.3 (Building in Relation to Boundary) in the Residential 1 zone, with the application being assessed on the extent to which the activity may affect amenity values, taking into account the following:

- (a) whether the activity will conserve and maintain the original or historic housing stock on the site;
- (b) whether the activity will contribute to the conservation and maintenance of the historic form and pattern of subdivision, buildings and streetscape in the neighbourhood, including the scale and bulk of the original or historic housing stock;
- (c) whether the style and proportions of the original or historic housing stock on the site and in the neighbourhood are sympathetically acknowledged in the design of the proposed activity;
- (d) whether any loss of amenity values to properties in the neighbourhood from the proposed activity is compensated for by any benefit to amenity values (having regard to other district plan development controls).

That amendment was not acceptable to the appellant in satisfaction of its appeal. As requested, the Court reopened the hearing to hear evidence directed to the further revised version of the amendments to the rule sought on behalf of the appellant. Further submissions were made by counsel, and further evidence given by witnesses for both parties. At the end of that hearing counsel for the appellant proposed yet another alteration to the amendment to Rule 7.8.1.3 proposed for the appellant, so that it would read –

#### (a) Residential 1 and Residential 3a — Height in Relation to Boundary:

No part of any building shall exceed a height equal to 3m plus the shortest horizontal distance between that part of the building and any boundary of its site other than a road boundary; provided that:

(i) This control shall not apply to sites defined in Fig 7.7. These defined sites will instead be subject to the controls set out in subclause (b).

(ii) As an alternative the following control can be substituted on sites in the Residential 1 zone where a building is proposed to be constructed within a building envelope determined as follows:

- *In plan view, the distance between the road boundary and the building or any part of the building to be constructed is to comply with Rule 7.8.1.7A, Front Yard*
- *In plan view, no part of the building shall extend beyond a line drawn from that part of the buildings situated within the Residential 1 zone and immediately adjoining the subject site which is furthest from the road boundary. Where there is only one such building the line shall be drawn parallel to the road boundary from which the front yard control is taken.*
- *In elevation, the maximum height of the highest ridgeline of the new building shall be no greater than the highest roof ridge of the lowest of the buildings situated within the Residential 1 zone and immediately adjoining the subject site.*
- *In elevation, the maximum height of the front and rear eaves of the new building shall be no greater than the highest point of the front and rear eaves of the lowest of the buildings situated in the Residential 1 zone and immediately adjoining the subject site.*
- The ridge-line of the proposed building must fall within 3m either side of the centre-line of the subject site.
- The building envelope shall comply with all other development controls with the exception of maximum height.
- In the case of a corner site, the proposed dwelling shall be orientated on the site to align with the pattern of dwellings on neighbouring sites and the shape of the site.



- If this alternative control is used then side yards of not less than 1.200 metres are required.

Again there would be a consequential amendment to the relevant explanation passage in the proposed district plan.

In the foregoing passages of this decision, we have carefully traced the relief sought by the appellant. The amendment to the rule that was sought in the submission on the plan, and the amendment that was sought in the reference originally lodged, were both stated in general terms. The submission did not "give precise details" of the amendment sought, as directed by the prescribed form (Form 3). The relief originally sought in the reference also lacked the particularity to be expected. The Court is now faced with a development through six versions of the relief sought by the appellant.

In that respect, these proceedings represent poor practice, which should not be followed. The appellant should have set out in the original submission the wording of the amendment to the rule that it wanted.

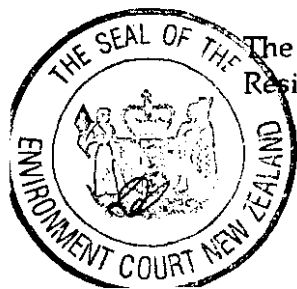
The importance of submissions and references stating with particularity the amendments sought is evident from the scheme of the Act. People who may wish to oppose a submission or appeal, or to propose some modification to the relief sought, have only the original documents from which to learn what is the scope of the possible amendments that might be made to the proposed instrument. It is the relief sought by the original submission which defines the extent of the authority of the council, or the Environment Court on appeal, to amend the proposed instrument. If amendments are considered that are beyond the scope of the relief sought in the original submission, that could unfairly affect the interests of people who have not taken part in the proceedings, not realising that their interests could be affected. See the Planning Tribunal's decision in *Leith v Auckland City Council* [1995] NZRMA 400, 411.

We acknowledge the considerable efforts made by counsel for the appellant, following his engagement in the matter, to develop the relief sought in the proper form of a statement of specific amendments to the proposed district plan. We also acknowledge that the further refinements of the amendments were made with a view to giving them the clarity and precision appropriate for district rules. However we need to remember that the Court's authority to direct amendments is generally restricted to the scope of the relief sought in the original submission, unless further notification and opportunity to be heard is given in the way provided for by section 293.

### Grounds for amendment

We now summarise the appellant's case for amending the district plan, gathered from counsel's submissions, and from the evidence of Mr B W Putt, town planner, at both hearings.

The amendment of the rule was put forward on five grounds: the purpose of the Residential 1 zone; the effect of the rule on achieving that purpose; the application of



the section 32 tests; the application of Part II; and the result if the rule is not amended.

The Residential 1 zone is a special character zone that applies to areas of mainly Victorian and Edwardian wooden houses, mostly in inner suburbs, that are regarded as having heritage value. The houses generally stand close to the street and to each other on narrow sites. The proposed district plan has a strategy for the zone which recognises that the built form predominates, that design criteria for new buildings are applied to maintain consistency of building set-back, and of architectural mass, form, proportion, detail and materials; and that building set-back is determined on a lining-up basis.

In the Residential 1 zone, construction of new dwellinghouses is a controlled activity. The expected outcome of the zone provisions is said to be providing a climate of stability and certainty, encouraging owners to maintain and rehabilitate their period homes in a manner that is in keeping with the form of the surrounding built environment.

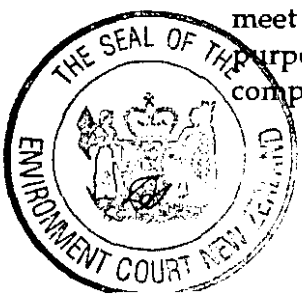
It was contended that Rule 7.8.1.3 would effectively prevent construction of tall (two-storey) narrow houses similar to numerous existing houses in the zone; and would also prevent construction of houses that are single-storey to the street frontage, but two-storey to the rear on sites that slope away from the street. Instead, it was claimed, the rule forces replacement two-level dwellings well back from the side boundaries. With the narrow width of many sites, it would be virtually impossible to erect a complying building that reflects the character of the zone.

The amendment would allow that opportunity where existing neighbouring buildings are higher than the recession plane control would permit; and would also allow houses with a single storey at the front and two storeys at the rear, where that follows the neighbouring houses.

In terms of the section 32 tests, it was argued that the existing rule is not necessary to achieve the objectives in the plan and the purpose of the Act; there is an alternative means of controlling bulk and location of buildings in the Residential 1 zone.

The benefits of the amended rule was said to be more efficient and economic development, a coherent pattern of development that mirrors the historic pattern and form of buildings and streetscape, and opportunities for building development which are not in conflict with the objectives and policies for the Residential 1 zone. It was acknowledged that the potential cost of the amendment to the rule would be reduction in sunlight and daylight admission to adjoining buildings; and it was contended that this cost is warranted for maintaining the historic built form and streetscape.

It was the appellant's case that the amendment is necessary, and in providing an alternative, is the most appropriate means, having regard to efficiency and effectiveness relative to other means; and that the rule as amended would better meet the purpose of the zone, the provisions of section 7(c), (e) and (f), and the purpose of the Act. If the rule is not amended, new houses or upgraded houses to complement an existing streetscape pattern would need resource consent, for which



applications would generally be notified, but the additional frustration of that process could be avoided by the amendment. It was submitted that the development control modification rule (4.3.1.2B) would not assist because a larger building infringing the daylight indicators would not meet the condition of having only minor effect.

On balancing between allowing new buildings to follow the historic pattern, form and streetscape and achieving enhanced daylight admission, it was argued that the expectations of people living in the zone are relevant.

### **The respondent's attitude**

The respondent's attitude was that the district plan encourages retention of existing houses in the Residential 1 zones, and encourages owners to maintain, rehabilitate and renovate them. The proposed rule would act as an incentive to do so, and ensures that adequate daylight and a measure of sunlight can access residential sites, but the amendment to the rule would instead encourage replacement of existing houses. The plan's development control modification rule (4.3.1.2B) allows for modification of development controls as a discretionary activity where adverse effects are minor, where unusual circumstances exist, and where conditions can adequately avoid or mitigate adverse effects of the modification. The modification rule is broad enough to allow for the kind of development that is the subject of the appeal in appropriate cases, but in a way that avoids adverse effects on neighbouring properties that would be more than minor. In addition, it was claimed that the great majority of sites in the Residential 1 zone have been developed, and rights under sections 10 and 10A will allow replacement of most houses in the zone.

Further it was submitted that issues raised by the appellant in terms of Part II in the context of these proceedings are matters of balance between cultural wellbeing (ie, heritage) and economic wellbeing (ie development opportunities) and that the respondent favoured the heritage issue, and the health effects of admission of daylight and sunlight to residential buildings.

In addition the evidence was that the housing in the Residential 1 zones does not have standard building heights, but that they are irregular. The amendment would encourage redevelopment which could become widespread through the Residential 1 zone.

### **Judgment**

The appeal has to be decided by the relevant provisions of the Resource Management Act. In particular the rule has to serve the statutory purpose of promoting sustainable management of natural and physical resources, and has to assist the territorial authority to carry out its functions under the Act, and has to have a purpose of achieving the objectives and policies of the plan. District rules that are challenged have to pass the tests prescribed by section 32, and in particular necessity, reasoned choice of alternatives, evaluation of benefits and costs, effectiveness and cost of alternatives. There is no onus on an appellant, nor any





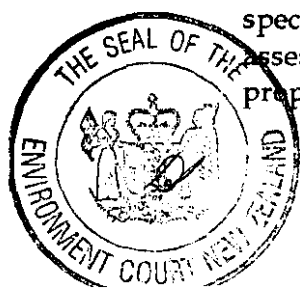
presumption in favour of the proposed instrument. See *Nugent Consultants v Auckland City Council* (1996) 2 ELRNZ 254, 257; and *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305, 320.

In our opinion the key to the resolution of this dispute lies in two questions. The first involves comparing the effects on the environment of Rule 7.8.1.3(a) as proposed, and the effects if the rule is amended. The second involves comparing the effects on encouraging the retention of existing buildings in the historic form and relationships.

On the first question, there was no contest that by the amended rule (even in its later form incorporating a 1.2 metres side-yard requirement) new buildings would be allowed that do not admit daylight and sunlight to the same extent as would occur under the rule as notified. The appellant's answer is that the plan acknowledges that expected levels of amenity in terms of daylight admission and separation of buildings on adjoining sites are less than in other parts of the city. That may be so. However that does not entitle decision-makers to overlook those amenity values. The City Council's functions under the Act (which the district plan is to assist it to carry out) include the control of actual and potential effects of the development of land (section 31(b)). The extended meaning given to the term "sustainable management" by section 5(2) includes enabling people and communities to provide for their social, economic and cultural wellbeing and for their health and safety, while (among others) avoiding, remedying or mitigating adverse effects of activities on the environment. The proposed district plan records the importance of daylight to health and wellbeing, and that was not challenged. We hold that the provision for daylight admission to adjoining properties is relevant to deciding the appeal, despite lower expectations in Residential 1 zones. Indeed, it is our judgment that the lesser availability of sunlight and daylight to existing inner-city dwellings for that reason renders those qualities the more to be valued and therefore, if anything, deserving of greater rather than lesser protection.

On the second question, the district plan is at first reading somewhat ambivalent. There are many passages from which indications of the purpose of the Residential 1 zone may be drawn. Some are consistent with encouragement of maintenance of existing houses, and others are consistent with replacement of them. Reading all the contents about the Residential 1 zone together to gain a coherent understanding, we infer that the intention is twofold: primarily to encourage owners to maintain and renovate existing buildings where they are in the historic form and relationship; and secondarily, where those buildings have to be replaced, to control any replacement buildings so as to maintain the historic form and pattern of buildings and streetscape.

There is diversity of sites through the Residential 1 zones, including variety of topography, of shape and street pattern. We are persuaded that general provision by which new buildings would be allowed without site-specific consideration, could indeed have the effect of encouraging replacement rather than encouraging rehabilitation of existing buildings. We do not accept that the proposed amendment would serve the primary purpose of the zone. Rather, the plan as notified allows for specific proposals for buildings that do not comply with the general rules to be assessed on a site-specific basis. That provides opportunity for consideration of the proposed design in the context of the chosen site, having regard to its shape and



topography, and to the relationship of the proposed building with buildings on adjoining sites and on the streetscape generally.

For the appellant it was argued that having to apply for consent would be a frustrating process, especially as many such applications might be expected to be notified. We accept that many should be notified, especially in the absence of neighbours' consents. However we also accept that the Act expressly contemplates use of the consent process for proposals which might be worthy of approval in the circumstances of specific sites and designs, but not necessarily on all the diversity of sites in the Residential 1 zones. Particularly because obscuring admission of daylight of neighbouring properties may be involved, we judge that the cost to applicants of the consent process is justified to avoid inappropriate adverse effects on the environment.

Having made those findings, we have now to apply the tests for deciding the appeal.

In our judgment Rule 7.8.1.3(a), in the context of the proposed plan, including the development control modification rule (4.3.1.2B), serves the promotion of sustainable management (as defined) of natural and physical resources by setting an appropriate threshold between the bulk and location of new buildings in the Residential 1 zones that are allowed as controlled activities, and those for which discretionary consent are required. It does so by reference to a building envelope which, if infringed, could exclude neighbouring properties from reasonable admission of daylight, an adverse effect on the environment. In that way the rule also assists the City Council to carry out its statutory function of control of actual or potential effects of the development of land. The purpose of the rule serves the objectives and policies of the plan about protection of amenities of neighbouring sites and admission of daylight to them. The availability of the development control modification rule allows for the granting of consent to buildings that do not comply with the general rule in appropriate conditions which can be assessed on a site specific basis. The conjunction of the two rules provides for resolution of the tension that might exist between protection of neighbouring amenity values and maintaining the historic form and pattern of buildings and streetscape in the Residential 1 zones, which responds to the element in section 5(2) of enabling people to provide for their economic and cultural wellbeing.

Referring to the section 32 tests, there was no issue about the need for a rule governing the bulk and location of new houses in the Residential 1 zone, only about the proposed amendment. We do not accept that the amendment is necessary, because new buildings that do not comply with the rule can be allowed where appropriate by grant of consent under the development control modification rule. The choice of that method rather than a general provision, such as the proposed amendment to Rule 7.8.1.3(a), is justified by the diversity of sites in the Residential 1 zone and the importance of ensuring that neighbouring amenity values are not unduly affected. There is greater cost (monetary and non-monetary) in having to apply for specific consent, but it is to be remembered that even complying new houses are controlled activities, so the comparison is between the cost of applying for controlled activity consent and for discretionary activity consent. However in cases where the proposal would not adversely affect neighbouring amenities, presumably neighbours' consents could be obtained, and in those circumstances the



cost of obtaining consent would not be likely to be significantly greater. The point is that the requirement for specific consent would be more effective in ensuring that the objective of protective neighbouring amenities is achieved as well as the objective of maintaining the historic form and pattern of buildings and streetscape.

In summary, it is our judgment that the rule as notified meets the tests and serves the statutory purpose better than it would if amended in the manner proposed by this appeal. The appeal is therefore disallowed.

In accordance with the usual practice with appeals about the contents of proposed planning instruments, there is no order for payment of costs.

DATED at Auckland this 8<sup>th</sup> day of November 1996.



DFG Sheppard,  
Environment Judge

