PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v LANDS AND MINING TRIBUNAL and JOHN ROBINSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	96 of 2002 (20210050)
DELIVERED:	2 October 2002
HEARING DATE:	23 September 2002
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Applicant:	A Young
First Respondent:	T Berkely
Second Respondent:	P Ward

Solicitors:

Applicant:	Solicitor for the Northern Territory
First Respondent:	Woodcock
Second Respondent:	Cridlands

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bai0211

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Lands and Mining Tribunal & Anor [2002] NTSC 57
No. 96 of 2002 (20210050)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Applicant

AND:

LANDS AND MINING TRIBUNAL
First Respondent

AND:

JOHN ROBINSON
Second Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 2 October 2002)

Background

[1] The second respondent applied to the applicant (in the form of the Development Consent Authority) for consent to develop a tourist accommodation complex on land at the intersection of the Esplanade and Herbert Street, Darwin.

[2] The Development Consent Authority refused the application on 7 November 2001 and issued a Notice of Refusal on 9 November 2001.

[3] On 20 November 2001, the second respondent appealed under s 111(1) of the *Planning Act* against the Notice of Refusal.

[4] A compulsory conference was convened on 13 December 2001 under s 121 of the *Planning Act*, but not compromise was achieved. The second respondent then applied to have the appeal determined by the first respondent (the Lands and Mining Tribunal). The second respondent engaged a town planner to prosecute the appeal.

[5] The Lands and Mining Tribunal delivered its decision on 4 March 2002. The Tribunal directed the Development Consent Authority to issue a permit. The Tribunal found that the Development Consent Authority's grounds of refusal lacked any substance whatsoever and concluded that the Authority's conduct in relation to both the refusal of the permit and the prosecution of the appeal lacked fairness, bona fides or validity.

[6] On 2 April 2002, the second respondent made an application for costs of the appeal in the sum of $17,725, the entirety of which constituted the town planner's professional fees with the exception of disbursements of $550 for the prescribed appeal fee and $16.38 for an amount paid to a photocopying shop.

[7] The matter came on for hearing in relation to costs on 9 April 2002. Both parties were represented by lawyers on that day. The Development Consent Authority was not ready to proceed. On 2 May 2002, the Lands and Mining Tribunal made an order that the Development Consent Authority pay the

second respondent's costs thrown away in consequence and the costs of the appeal. With respect to the latter, the Tribunal ordered that:

> "… the appeal costs comprising reasonable and necessary expenses and charges levied by the (second respondent's) agents shall be paid by the (applicant) to the (second respondent) as agreed, or failing agreement as taxed on the basis of reasonableness and necessity assessed by the Chairperson (of the Tribunal) in respect of the taxation of such amounts of costs before him."

The Application

[8] By summons of 5 July 2002, the applicant seeks:

(a) an order in the nature of certiorari quashing the Lands and Mining Tribunal's decision of 2 May 2002 to make an order for costs against the Development Consent Authority in favour of the second respondent pursuant to s 18 of the *Lands and Mining Tribunal Act*; or

(b) in the alternative, a declaration that, properly construed s 18 of the *Lands and Mining Tribunal Act* does not permit the Lands and Mining Tribunal to make an order for costs, other than legal costs.

[9] Mr Young, on behalf of the applicant, made it clear that the applicant seeks to challenge only that part of the Tribunal's order that the applicant pay the second respondent "… the appeal costs comprising reasonable and necessary expenses and charges levied by the (second respondent's) agents". The applicant does not seek to challenge the Tribunal's order that it pay the prescribed appeal fee, photocopying expenses and the costs thrown away in consequence of the applicant's not being ready to proceed on 9 April 2002.

[10] Section 133 of the *Planning Act* provides for an appeal against a determination of the Tribunal "only on a question of law". Such an appeal must be made within 28 days after the date of service by the Tribunal of the statement of reasons for the determination. The applicant did not seek to appeal the Tribunal's decision on costs within the relevant 28 day period due to an oversight by counsel as to the existence of the right of appeal in s 133 of the *Planning Act*.

[11] The failure to exercise an appeal right is a consideration relevant to the discretion to refuse discretionary relief (*R v Johns; Ex p Public Service Association* [1971] SASR 206 at 209-210, *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501).

[12] In *Boral Gas (NSW) Pty Ltd v Magill*, supra at 508, Kirby P observed:

> "It has long been a principle in the provision of relief by way of the prerogative writs that the relief will commonly be withheld if there is another 'equally effective and convenient remedy'. This much was said by Lord Widgery CJ in the case of certiorari in *R v Hillingdon London Borough Council; Ex parte Royco Homes Ltd* [1974] QB 720 at 728. It was also said by Wilson J and Dawson J (in respect of a claim for prerogative relief against the Family Court of Australia before appeal to the Full Court was exhausted) in *R v Ross Jones; Ex parte Green* (1984) 156 CLR 185 at 214.
>
> The mere existence of an alternative statutory remedy is not necessarily fatal to the provision of the prerogative relief."

[13] At p 511, His Honour summarised "the considerations which seemed … to favour the normal rule of policy" in the following terms:

> "1. It recognises and gives effect to the legislative scheme provided by Parliament for internal appeals …

> 2. It affords a proper place to the specialised tribunal which may have a superior advantage in ready knowledge of the developments of jurisprudence under scrutiny which this Court does not initially enjoy. Furthermore, that tribunal frequently has a superior armoury of remedies at its disposal than this Court can offer;
>
> 3. Whilst it may involve the possibility of additional cost or delay, it affords this Court the advantage of having the opinion of the appellate tribunal should the tribunal determine the question of jurisdiction and should it still be the intention of a party to challenge jurisdiction;
>
> 4. It allows complete exhaustion of any additional factual issues which may be relevant to establishing the facts said to ground jurisdiction, which facts may more readily be determined below than in this Court; and
>
> 5. It conserves to cases where no other remedy exists, the discretionary and exceptional remedies provided by writs in the nature of prerogative writs and recognises the pressure of business in this Court, including in the exercise of its general supervisory jurisdiction."

[14] Mr Young submitted that the above considerations militated against a refusal of discretionary relief in the present case. Mr Young submitted that an elaborate appeal process was not being circumvented because an appeal under s 133 of the *Planning Act* was to a single judge of the Supreme Court and that the appeal process, which here would require leave to appeal out of time, would likely to be more cumbersome and expensive. In Mr Young's submission, no point would now be served by requiring the applicant to pursue an appeal under the *Planning Act*.

[15] I feel bound to say that the submissions on behalf of the applicant pay scant regard to the legislative scheme provided by the legislature for appeals and

appear to treat the granting of leave to appeal out of time as a mere formality. However, neither Mr Berkley on behalf of the Tribunal nor Mr Ward on behalf of the second respondent raised objection to the course pursued by the applicant. In such circumstances, I am not inclined to refuse discretionary relief on the basis that the applicant should proceed with an appeal under the *Planning Act*.

The Tribunal's power to award costs

[16] Section 18 of the *Lands and Mining Tribunal Act* provides:

> "Each party to a proceeding is to bear its own costs unless the Tribunal orders otherwise."

[17] The word "costs" is not defined in the Act or other relevant legislation of general application such as the *Interpretation Act* or the *Legal Practitioners Act*.

[18] In the applicant's submission, "costs" carries its "ordinary or common law meaning". Mr Young referred to what he described as a conventional definition in *Butterworths Australian Legal Dictionary*:

> "At common law, the remuneration and disbursements incurred in relation to legal work … fees, charges, disbursements, expenses and remuneration for work done by a person in the capacity of a barrister or solicitor."

[19] In Mr Young's submission, the ordinary meaning of "costs" has not been displaced by the provisions of the *Lands and Mining Tribunal Act,* in particular s 12(2) and (3) which are in the following terms:

"(2) A person appearing before the Tribunal may be represented by -

(a) a legal practitioner; or

(b) an agent.

(3) A person who represents another person before the Tribunal has the same protection and immunity as a legal practitioner appearing for a party in a proceeding before the Supreme Court."

[20] In the applicant's submission, the presumption against alteration of common law doctrines would require the legislature to express an intention to alter the common law meaning of "costs" with irresistible clearness. In the appellant's submission that was not the case here – the application of the ordinary meaning of "costs" would not render s 18 of the *Lands and Mining Tribunal Act* either inoperative or meaningless.

[21] Mr Young submitted that the position in Australia concerning the fees of lawyers and of litigants in person is well settled. In *Cachia v Hanes* (1994) 179 CLR 403, the High Court was concerned with the *Supreme Court Rules*, (NSW). At 410, the Court held:

> "Costs, within the meaning of the Rules, are reimbursement for work done or expenses incurred by a practitioner or practitioner's employee. Compensation for the loss of time of a litigant in person cannot be said to constitute costs within the meaning of the Rules.
>
> This is hardly surprising. It has not been doubted since 1278, when the *Statute of Gloucester* 1278 (UK) 6 Edw Ic 1 introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant. As Coke observed of the *Statute of Gloucester*, the costs which might be awarded to a litigant extended to the legal costs of the suit, 'but not to the costs and expenses of his travell and losse of time'".

[22] The Court also observed at 417 in relation to the approach adopted in some cases where courts have treated the loss in earnings of a litigant incurred in the course of the presentation or conduct of his case as a disbursement:

> "Clearly, that is merely an indirect way of recompensing a litigant for time spent in the preparation or conduct of his case which, if it is not contemplated by the relevant legislation or rules, is not permissible. Of course, a litigant who qualifies as a witness is entitled to the ordinary witness's fees."

[23] In the applicant's submission a similar approach must be adopted where the work is done by an agent rather than a litigant in person, i.e. it is not permissible to treat the fees of the second respondent's agent simply as a disbursement as this would amount to an indirect way of awarding a non-lawyer the "costs" of preparation or conduct of a matter.

[24] The Tribunal gave very extensive reasons for its decision to order the applicant to pay the fees of the second respondent's agent. However, the gravamen of that decision is succinctly stated in paragraphs [61] and [62] of the Tribunal's reasons:

> "61. The provisions of section 12(2) of the *Lands and Mining Tribunal Act* specifically authorise an agent to appear in the same empowering section that permits representation by a legal practitioner. This Tribunal finds that it is necessary to draw an inference which the Tribunal finds is not only necessary but irresistible to the effect that there is by virtue of that section expressed a clear intention to alter the common law in relation to the position of 'costs' at common law.
>
> 62. This Tribunal finds that by virtue of the legislation allowing agents (who can notionally include accountants, civil, mechanical and other engineers, architects and no doubt other professionally qualified people including town planners), it must

> be necessarily inferred that by the provisions of section 12(2) and (3) of the *Lands and Mining Tribunal Act* permitting an agent to appear in lieu of a qualified legal practitioner that the costs of that agent (which are not the costs of the appellant in person) ought be allowed by virtue of and in terms of the power to award costs set out in section 18 of the *Lands and Mining Tribunal Act*."

[25] In the applicant's submission, the absence of specific provision for treatment of an agent's fees as "costs" is inconsistent with an intention by the legislature that such fees be treated as costs. Secondly, it is put that the right of a person in s 12(2)(b) to be represented by an agent cannot give rise to an inference that the Tribunal has the power to order the payment of all "costs" of the work undertaken in preparing and representing a person at every stage of an appeal pursuant to s 111(1) of the *Planning Act*. In the applicant's submission, s 12(3) of the *Lands and Mining Tribunal Act* is not concerned with costs and takes the matter no further. Finally, it was submitted, that it is significant that while the Act makes express provision for the fees and expenses of witnesses (s 19: in accordance with the Supreme Court scale) the Act is silent about how the fees allegedly payable to agents are to be calculated.

[26] For the second respondent, Mr Ward emphasised the provisions of the *Lands and Mining Tribunal Act* which permit a person to appear by agent and afford the same protection and immunity to such an agent as a legal practitioner appearing for a party in a proceeding before the Supreme Court. In Mr Ward's submission, to give the word "costs" the narrow meaning contended for by the applicant would frustrate the clear legislative intent to

allow representation by persons other than legal practitioners. It would also create a potential absurdity in that a party could recover an agent's fees as a disbursement if the party also engaged a lawyer but not recover such fees if he did not engage a lawyer – regardless of how little value, if any, the lawyer might have added to the party's representation.

[27] In Mr Ward's submission, contrary to the applicant's assertions, there is no "common law doctrine" to the effect that "costs" are limited to legal costs – the usual practice in adopting such a limitation is merely a reflection that representation is usually limited to legal representation. In Mr Ward's submission, once the usual limitation on representation is lifted, there is no basis for confining "costs" to the approach adopted in *Cachia v Hanes*, supra.

Discussion

[28] I have not sought to provide a full summary of the submissions made on behalf of the applicant and the first and second respondents. I intend no discourtesy to counsel, each of whom ably presented their arguments on behalf of their respective clients. However, it seems to me that an important feature of the Tribunal's power to award costs was not addressed sufficiently in submissions, i.e. the nature of the Tribunal as a statutory tribunal in contrast to a court of law.

[29] The functions of the Tribunal are prescribed by s 5 of the *Lands and Mining Tribunal Act* and include:

"(1)(a) to hear and make recommendations about objections to the acquisition of land under the *Land Acquisitions Act*…,

(b) to hear and determine claims for compensation referred to the Tribunal under section 51(b) or Part VIII of the *Lands Acquisition Act* ...,

(ba) to hear and make recommendations about applications for the grant of extractive mineral interests referred to the Tribunal under section 100(1)(e) or 111(1)e) of the *Mining Act*;

(c) to hear and make recommendations about objections by registered native title claimants and registered native title bodies corporate to the doing of prescribed mining acts to which Part XIA of the *Mining Act* applies …;

(d) to hear and determine disputes about compensation referred to the Tribunal under section 120(4), 140N(4), 140U(4), 174B(3)(a) or 179(3)(a) of the *Mining Act*;

(e) to hear and make recommendations about objections by registered native title claimants and registered native title bodies corporate to the doing of prescribed petroleum acts to which Part IIA of the *Petroleum Act* applies so far as the doing of those acts affects the registered native title rights and interests of the claimants and bodies;

(f) to hear and determine disputes about compensation referred to the Tribunal under section 57P(4), 57V(4), 81(3) or 82(2) of the *Petroleum Act*;

(g) to hear and make recommendations about objections by registered native title claimants and registered native title bodies corporate to the extension or grant of a pastoral lease under section 49, 61, 62 or 64 of the *Pastoral Land Act* so far as it affects the registered native title rights and interests of the claimants and bodies;

(ga) to hear and determine disputes about compensation referred to the Tribunal under section 72C(4) of the *Pastoral Land Act*;

> (h) to hear and determine disputes about compensation referred to the Tribunal under section 67B(6) of the *Energy Pipelines Act*;
>
> (j) the other functions conferred on the Tribunal by or under this Act or any other law of the Territory."

[30] Pursuant to s 5(1)(j) of the *Lands and Mining Tribunal Act*, Part 9 of the *Planning Act* establishes the Tribunal as the Appeals Tribunal for the purposes of that Act.

[31] I do not consider that it is necessary or desirable in these proceedings to express a concluded view whether the Tribunal is a court. It is sufficient for present purposes to recognise that many of the Tribunal's functions (in particular the hearing and making of various recommendations) are not analogous with or similar to those exercised by courts. Other functions (in particular the hearing and determining of various disputes) and some obligations upon the Tribunal as to the manner in which it must act are analogous with or similar to those exercised by courts. However, it is noteworthy that there are no rules of the Tribunal regulating the nature and quantum of costs (aside from s 19 concerning witness expenses) which may be ordered to be paid as there are under rules of court.

[32] The applicant's case is that the reference in s 18 of the *Lands and Mining Tribunal Act* to "costs" is restricted to legal costs, namely such costs as might normally be recovered pursuant to a costs order made by a court of law either in accordance with inherent power or, more usually, pursuant to a statutory or rule power.

[33] No such restriction is expressed in s 18 of the *Lands and Mining Tribunal Act*. Nor is there any indication of such a restriction in either that Act or the *Planning Act*. However, the applicant argues that "costs" should be interpreted narrowly in accordance with the High Court's approach in *Cachia v Hanes*, supra at 417.

[34] *Cachia v Hanes* was concerned with whether a (self-employed consulting engineer) litigant in person could recover moneys for the loss of his time spent in preparation and conduct of the case and for out-of-pocket travel expenses. The sums sought were disallowed in the litigant's bill of costs presented under the *Supreme Court Rules* (NSW). The High Court held that such costs were irrecoverable.

[35] In *Walton v McBride* (1995) 36 NSWLR 440, the Court of Appeal of NSW considered, inter alia, whether the Medical Tribunal of New South Wales had the power to award costs on an indemnity basis and whether "costs" could include a party's costs of attending both as a witness and to observe or to instruct legal representatives.

[36] The Court held (Powell JA and Cole JA; Kirby P dissenting) that the general power of the Medical Tribunal to award "such costs … as the Tribunal may determine" under s 161 of the *Medical Practices Act* (NSW) extended to the award of costs on an indemnity basis. The Court also held (Powell JA and Kirby P; Cole JA dissenting) that the term "costs" as used in the *Medical Practice Act* (NSW) included a party's costs of attending as a witness, but

did not extend to that party's costs for attending to observe or to instruct legal representatives.

[37] The three judgments of the Court of Appeal in *Walton v McBride* include extensive consideration of the history of costs in various courts and tribunals at common law and in equity. As to the question of whether the Medical Tribunal had the power to award costs in relation to a party attending to observe or to instruct legal representatives, their Honours each adopted different reasoning. Kirby P considered himself bound by the High Court's decision in *Cachia v Hanes*, supra. In his opinion, the case was of general application to questions of the power to award "costs" by courts and tribunals. Powell JA was of the view that the Medical Tribunal was "in a position which is, to say the least, strongly analogous to that of a court" (at 463). His Honour then held at 464:

> "This fact suggests to me that, when there was vested in the Tribunal a power to make orders as to costs, the subject of that power was intended to be 'costs' in the sense in which that word was, and is, used when applied to the like power when vested in a court, that is, professional costs and out-of-pocket expenses in fact incurred by a party to the particular proceedings, together with an allowance – in the nature of a witness fee – in respect of any time involved in the party giving evidence."

[38] Cole JA, while not expressing a concluded view as to whether the Medical Tribunal is a court, held at 472:

> "In my view such similarities as exist between the nature and functions of the Medical Tribunal and the courts are insufficient to cause the unconfined expression 'costs' where used in the Act and regulations to be restricted to legal costs. Such similarities do not, in

my view, lead to the view that the intention of the legislature or executive in enacting and proclaiming s 53(1)(c1) and reg 27 intended that only 'legal costs' were permitted to be ordered, or that such costs should be restricted to prohibit the awarding of indemnity costs: for a consideration of the nature of courts and their functions see *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361 at 373-374 per Kitto J; *Re Ludeke; Ex parte Australian Construction Employees & Builders Labourers Federation (No 2)* (1985) 60 ALJR 98 at 105; 62 ALR 407 at 419.

The complainant placed strong reliance upon the judgment of the High Court in *Cachia v Hanes*. That case was concerned with whether a non-legal successful litigant who appeared in person could recover moneys for the loss of his time spent in preparation and conduct of his case and for out-of-pocket expenses, being travelling expenses associated with the preparation and conduct of his case. Those sums were sought in his bill of costs and disallowed. The claimant was a self-employed consulting engineer. The claim was brought within Pt 52 of the *Supreme Court Rules* 1970 made in pursuance of s 76(1) of the *Supreme Court Act* 1970. The High Court held that such 'costs' were irrecoverable.

The majority judgment noted (at 409):

> 'It is fundamental to the appellant's argument that the time he lost in preparing and conducting his case constitutes 'costs' within the meaning of this rule. He is, however, unable to sustain that proposition. The 'costs' provided for *in the rules* do not include time spent by a litigant who is not a lawyer in preparing and conducting his case. They are confined to money paid or liabilities incurred for professional legal services. It is only in that sense that the Rules speak of 'costs''. (Emphasis added.)

Later their Honours said (at 410):

> '*To use the Rules* to compensate a litigant in person for time lost would cut across their clear intent. Costs, *within the meaning of the Rules*, are reimbursement for work done or expenses incurred by a practitioner or practitioner's employee. Compensation for the loss of time for a litigant in person cannot be said to constitute costs within the meaning of the Rules.' (Emphasis added.)

The history of the awarding of costs by courts pursuant to statutes since the *Statute of Gloucester* 1278 6 Edw Ic 1, and rules pursuant to such Acts, were traced. The anomalous exception to the rule allowing a solicitor acting for himself in litigation to recover costs although he was a litigant in person was noted. The majority concluded as follows (at 416-417):

> 'We should add that the English legislation and rules represent a straight forward approach to the problem, in contrast to the approach adopted in some cases where courts have treated the loss in earnings of a litigant incurred in the course of the presentation or conduct of his case as a disbursement. Clearly, that is merely an indirect way of recompensing a litigant for time spent in the preparation or conduct of his case which, if *it is not contemplated by the relevant legislation or rule*, is not permissible. Of course, a litigant who qualifies as a witness is entitled to the ordinary witnesses' fees.' (Emphasis added.)

Cachia v Hanes, and all of the cases considered in that judgment, were concerned with the construction of the definition of 'costs' in statutes or rules of court. The particular case was concerned with s 76(2) of the *Supreme Court Act* which defined 'costs' to include 'costs of and incidental to proceedings in the court', although, as the High Court noted (at 408) 'a definition of 'costs' as including 'fees, charges, disbursements, expenses and remuneration' is provided by s 19(1)'. Further, Pt 52 r 23(1) there being considered provided that, save for immaterial exceptions, 'costs shall be taxed on a party and party basis'. Rule 2(2) provides: 'On a taxation on a party and party basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.'

In my view the expression 'costs' where used in s 76 and Pt 52 of the *Supreme Court Act* and *Rules* is restricted by the expressions which I have quoted.

There are no such restrictions in either the *Medical Practitioners Act* 1938 or the regulations thereunder. Whilst *Cachia v Hanes* is definitive of the law regarding recovery of 'costs' as defined in statutes and rules similar to those of the Supreme Court, in my view it is not to be extended to determine the meaning attributable to 'costs' where that expression is used by the legislature, or in regulations, which are not constrained by the restrictions imposed by the definition in s 76 of the *Supreme Court Act*, and Pt 52 of the

> Rules. Particularly is that so where the regulations which I am considering impose a power to order the payment of 'such costs to such person as the Tribunal may determine'.
>
> Senior counsel for the cross-appellant was unable to point to any authority not involving a consideration of a statute or rule which contained restrictive provisions, such as those in the *Supreme Court Act* (1970) and rules, where the expression 'costs' or 'such costs' had been interpreted as being limited in the manner contended for in this case.
>
> In my view the similarities between some of the functions and procedures performed by the Tribunal to those performed by courts are not sufficient to permit the distilling of a legislative intention that in using the word 'costs' in the *Medical Practitioners Act* 1938, and regulations thereunder, only such costs as would be recoverable were the Tribunal a court of law with attendant cost-making powers restricted both by statute and rules, was conferred upon the Tribunal. Had that been the intention it would be expected that the legislature would have used an expression more restrictive than either 'costs' or 'such costs', and would have either referred to or created an appropriate rule structure so restricting the power. It did neither.
>
> In my view 'costs' is not to be restricted to 'legal costs and disbursements'."

[39] In my view, while acknowledging that Cole JA was in the minority on one of the issues addressed in the above passages of his judgment, I consider His Honour's reasons are applicable to the present case. I am, of course, not bound by the majority's decision in the NSW Court of Appeal and in view of the divergence in the reasoning of Kirby P and Powell JA I do not feel constrained to adopt the view of either.

[40] In my view, the similarities between some functions and procedures of the Tribunal to those performed by courts are not sufficient to conclude that the Legislature intended that the power to award "costs" in s 18 of the *Lands*

and Mining Tribunal Act should be restricted to only costs of a kind which would be recoverable in a court of law governed by rules of the type found in Order 62 of the *Supreme Court Rules*. The Legislature could have restricted the Tribunal's power to award costs. The Legislature could have created or cross-referenced to an appropriate rule structure to limit the power to award costs. It did neither. On the other hand, the Legislature did provide for a party to be represented by an agent. I agree with Mr Ward that it would be absurd that a party could recover fees paid to an agent, such as a town planner, only if a lawyer was engaged to present the agent's work. Such an approach ignores the specialist nature of the Tribunal and the possibility, if not probability, that an appropriate specialist agent may be better equipped to present a party's case than a legal practitioner. It also ignores s 11(1) of the *Lands and Mining Act* which provides:

> "(1) A proceeding is to be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matter before the Tribunal permits."

[41] The applicant's application for discretionary relief is refused.

[42] I turn to the question of costs of the application. The usual rule in interlocutory matters is that each party bears its own costs. Although the present application was brought by summons, the relief sought was in the same terms as the final relief sought in the originating motion, filed on 1 July 2002. Having regard to that, I consider it is appropriate that the

applicant pay the second respondent's costs. I so order. I make no order in relation to the costs of the first respondent.

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