

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA269/2009
[2009] NZCA 370**

BETWEEN STOP THE STADIUM SOCIETY INC
 Appellant

AND THE DUNEDIN CITY COUNCIL
 Respondent

Hearing: 18 August 2009

Court: O'Regan, Ronald Young and Venning JJ

Counsel: L A Andersen and K P Lane for Appellant
 F B Barton and M B Couling for Respondent

Judgment: 24 August 2009 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We award costs to the Council for a standard appeal on a band A basis.

REASONS OF THE COURT

(Given by O'Regan J)

Introduction

[1] This appeal arises from the decision of the Dunedin City Council to proceed with the building of a sports stadium in the city, and to enter into a contract with a construction company to build the stadium.

[2] The appellant, Stop the Stadium Society Inc, argues that the Council was in breach of s 97(2) of the Local Government Act 2002 (the Act) when it resolved to proceed with the stadium. Section 97(2) says that a local authority must not make a decision which (among other things) significantly affects the cost to the local authority of an activity identified in its long-term council community plan (long-term plan) unless the decision is explicitly provided for in the long-term plan. The appellant argues that the decision to proceed with the stadium project was a decision which significantly affected the cost to the Council of the building and funding of the stadium, as recorded in the Council's long-term plan for the period 2007/08 – 2016/17 (we will call this the 2008 long-term plan).

[3] The 2008 long-term plan had been subject to the consultation process envisaged by s 93 of the Act and had largely adopted the cost projections for the project in the long-term plan for the period 2006/07 – 2015/16 (the 2007 long-term plan). (For ease of reference we do not differentiate between long-term plans and annual updates to long-term plans: we refer to each as a long-term plan for the relevant year).

[4] On 17 April the appellant applied to the High Court for judicial review of the decision to proceed with the stadium, seeking a declaration that the decision was contrary to s 97, an injunction restraining the Council from signing a construction contract for the stadium and an order quashing the decision to proceed.

[5] The applications were dismissed after an urgently convened hearing before Chisholm J: *Stop the Stadium Inc v The Dunedin City Council* HC DN CIV 2009-412-337 24 April 2009.

[6] Shortly after that decision was released, the Council entered into the construction contract for the stadium and substantial work has now been undertaken. After the execution of that contract, the appellant filed its notice of appeal to this Court.

[7] The focus of the appeal is on the projected cost to the Council of the project to which the Council's resolution committed it (subsequently followed up by the entry into the construction contract) when compared to the projected costs as set out in the 2008 long-term plan. The appellant says that the projected costs to the Council of the project that the Council has committed to are significantly higher than those specified in the 2008 long-term plan and, accordingly, the Council acted unlawfully in proceeding with the stadium project before completing consultation on the long-term plan for the 2008/09 – 2017/18 years (the 2009 long-term plan).

Issues

[8] The parties have agreed that the issues which require determination are:

- (a) Is the cost to the Council of the stadium for which the construction contract was let pursuant to the resolution of 20 April 2009 significantly different to the stadium proposal authorised by the 2008 long-term plan?
- (b) If the answer to question (a) above is "yes", has the Council acted contrary to s 97(2) of the Act in entering into the construction contract for the stadium?
- (c) If the answer to question (b) is "yes", should relief be granted to the appellant?

[9] Before addressing those issues in detail, we set out the factual background and the legislative provisions which require consideration.

Factual background

[10] The proposal to build a new stadium in Dunedin, replacing Carisbrook Stadium, has been the subject of consideration for a number of years. For present purposes, however, the important starting point of the narrative is the inclusion of the proposal to build a stadium and for the Council to be involved in its funding in the Council's planning consultation process.

2007 long-term plan

[11] The 2007 long-term plan describes the stadium proposal as then contemplated. The draft of the 2007 long-term plan which was the subject of consultation set out the Council's preferred option for a new stadium on a site in Awatere Street, Dunedin with capacity for 25,000 – 30,000 spectators and a roof over the stands and pitch. It said that the estimate of the development costs for the preferred option was within the range of \$180 million - \$195 million excluding GST, of which the Council was proposing to commit \$91.3 million (we will use rounded figures in this judgment). The detailed breakdowns of the estimated costs and the proposed funding were set out in tables. The table specifying the development costs recorded the stadium cost as \$188 million. There was also a 50 year maintenance cost of \$6.3 million, so that the total funding required was \$194.3 million. This was said to be available from the following sources (figures have been rounded):

The Council	\$91.3 million
Otago Regional Council	\$37.4 million
University of Otago	\$10 million
Community Trust	\$10 million
Other funding sources	\$42.5 million
Sale of Carisbrook	\$3 million

[12] As the Council's \$91.3 million included the \$6.3 million required for maintenance requirements, its contribution to the development cost of the stadium was at that stage proposed to be \$85 million.

[13] The risks and assumptions section of the draft recorded that there was a high risk of the development cost increasing and also that there was a high risk that the level of funding gained from other sources would not be achieved.

[14] The 2007 long-term plan adopted by the Council recorded the Council's funding commitment at \$91.4 million, (essentially the same amount as foreshadowed in the draft on which there had been consultation). However, it was noted that the Council thought this amount of ratepayer funding was unacceptable and that alternatives were being explored.

2008 long-term plan

[15] As required by the Act, the Council undertook a similar consultation process on its 2008 long-term plan. The draft on which the consultation process was based said that there were no changes to the stadium proposal that had been approved in the 2007 annual plan. The estimated cost (\$180 million - \$195 million) and the indicative cost (\$188 million) were repeated, as was the list of funding sources which had been set out in the 2007 long-term plan.

[16] There was a similar statement about the risk of funding from other sources not being achieved. The progress in meeting milestones which had been identified in the 2007 long-term plan was set out.

[17] While consultation on the draft 2008 long-term plan was proceeding, the Council placed an advertisement in the Otago Daily Times which provided information about the stadium project. This contained a table showing the costs to ratepayers, with a number of examples. The cost for a ratepayer occupying a property of the average value of Dunedin properties was said to be an average of \$66 per year over 22 years (the construction period plus the 20 year term of the Council funding for the project).

[18] On 17 March 2008, the Council resolved to commit to the stadium project subject to certain terms and conditions, one of which was that the project cost was not to exceed \$188 million and the total Council commitment \$91.4 million. Another condition was the availability of the other funding sources as detailed above at [11].

[19] The 2008 long-term plan which was adopted following the consultation process reflected what had been provided for in the draft.

Draft 2009 long-term plan

[20] Once again, the Council undertook the planning and consultation process required of it for the 2009 year. The draft 2009 long-term plan (incorporated in the draft 2009 annual plan) recorded that, on 9 February 2009, the Council had passed a resolution to commit to the stadium project. In that resolution, the Council had noted, among other things, that the total cost of the project was now \$198 million, that the increase was primarily due to increased land costs and lack of off-sets from the sale of Carisbrook, and that an extra \$15 million would be required for debt servicing in relation to bridging finance that was required to deal with the private funding target. The Council's commitment to the stadium project was subject to a number of conditions, including a condition that the funding source to meet the \$15 million top up of the private sector funding be confirmed.

[21] The funding for the project was noted as follows:

The Council	\$85 million
Otago Regional Council	\$37.5 million
University of Otago	\$10 million
Community Trust	\$7 million
Private sector funding	\$45.5 million

External contribution	\$15 million
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[22] In addition, the \$6.4 million capital maintenance fund was noted.

[23] The \$15 million external funding figure referred to here needs to be explained. That sum has, in fact, been contributed by the Crown as a grant, subject to a right to demand repayment if the stadium is not completed and operational in time for the 2011 Rugby World Cup. At the earlier stages of consultation it had been anticipated that the Crown would provide underwriting of the private sector funding (sale of memberships etc) but, in fact, the Crown actually paid over the amount in July 2009.

[24] However, the inclusion of the \$15 million in the table reproduced at [21] above as a stand-alone contribution was erroneous. This seems to have led to the Council's contribution being stated as \$85 million when it should, in fact, have been about \$99 million. The \$15 million Crown contribution should not be aggregated with the \$45.5 million private sector contribution: the Crown contribution is, in fact, being applied to deal with the slower than projected receipt of this private sector funding contribution. (The correct position is set out in the 2009 long-term plan which was subsequently adopted by the Council.)

[25] We will explain this in further detail later.

[26] The draft 2009 long-term plan had a section headed up "What Will It Cost Ratepayers", which, despite the error identified above, is correctly predicated on the cost to the Council being \$99 million, not \$85 million. The average cost per ratepayer is essentially the same as shown in the newspaper advertisement referred to at [17] above. In particular, the average annual cost to a ratepayer occupying an average Dunedin property remains at \$66 per annum.

Commitment to the project

[27] As it turned out, the process of consultation on the 2009 long-term plan was still ongoing at the time of the High Court proceedings. The Council had taken the view that it had to commit to the stadium and sign the construction contract in April 2009 in order to make it possible for the stadium to be completed in time for the 2011 Rugby World Cup. Since the \$15 million contribution from the Crown was conditional on that completion target being met, the option of waiting until after the completion of the consultation process in June 2009 was not seen as viable, as it would compromise one of the essential funding sources, that of the Crown, as well as making it likely that the stadium would not be built in time for the World Cup.

The High Court proceedings

[28] When the Council signified that it intended to have a meeting on 20 April 2009 to consider resolving to enter into a contract to construct the stadium, the appellant commenced proceedings in the High Court (see [4] above) on 17 April 2009. There was a telephone conference between Chisholm J and counsel on 20 April 2009, at which the Judge determined that it was inappropriate to deal with the matter on an interim basis, and that the substantive matter would be called on Thursday 23 April 2009. It was heard on that day and the Judge gave his decision the following day.

Construction contract

[29] By the time the matter came to a hearing, the Council had resolved to enter into the construction contract for the stadium. Subsequently it entered into the construction contract, but the contract was subject to a condition that the litigation be resolved in the Council's favour by 5 pm on 27 April. As the Council had succeeded in the High Court and neither an appeal nor a stay application had been filed by 5 pm on 27 April, the construction contract became operative. The evidence before us was that since the signing of the contract a number of steps have been taken towards the construction of the stadium, including purchase of the land, clearance of buildings

from the land, extensive piling and the letting of a number of sub-contracts for initial stages of the building project.

[30] The evidence before us was that the termination of the building contract would involve considerable costs for the Council not only in termination payments, but also in relation to expenditure that would be wasted and, in many cases, not be recoverable. It was common ground that the granting of the relief sought by the appellant may well bring an end to the project to build the stadium, because if the Council was required to conduct another consultation process, the delay would make it impossible to meet the World Cup deadline, the Crown \$15 million would no longer be available and the fixed price contract would need to be renegotiated.

Statutory regime

[31] The obligation to consult on long-term plans arises under s 93 of the Act. It requires local authorities to have a long-term plan at all times, adopted after use of the special consultative procedure set out in ss 83 and 84. In essence this procedure requires preparation of a draft made available for public inspection, public notice, a call for submissions, facilitation of the making of submissions, and an open public meeting to consider submissions.

[32] Under s 93(8), the local authority must, when complying with the requirements in relation to preparation and adoption of a long-term plan, “act in such manner, and include in that plan such detail, as the local authority considers on reasonable grounds to be appropriate”. Section 94 requires the long-term plan to contain an audit report of the plan.

[33] Section 97, which is at the heart of the present case, provides as follows:

97 Certain decisions to be taken only if provided for in long-term council community plan

- (1) This section applies to the following decisions of a local authority:
 - (a) a decision to alter significantly the intended level of service provision for any significant activity undertaken by or on

behalf of the local authority, including a decision to commence or cease any such activity:

- (b) a decision to transfer the ownership or control of a strategic asset to or from the local authority:
- (c) a decision to construct, replace, or abandon a strategic asset:
- (d) a decision that will, directly or indirectly, significantly affect the capacity of the local authority, or the cost to the local authority, in relation to any activity identified in the long-term council community plan.

(2) A local authority must not make a decision to which this section relates unless—

- (a) the decision is explicitly provided for in its long-term council community plan; and
- (b) the proposal to provide for the decision was included in a statement of proposal prepared under section 84

...

[34] Both in the High Court and in this Court, counsel’s arguments focussed on s 97(1)(d), and, in particular, the reference to a decision which significantly affects the cost to the local authority in relation to any activity identified in the long-term plan. The term “significantly” has a special meaning under the Act. The definitions of “significance” and “significant” in s 5 of the Act apply. These provide as follows:

significance, in relation to any issue, proposal, decision, or other matter that concerns or is before a local authority, means the degree of importance of the issue, proposal, decision, or matter, as assessed by the local authority, in terms of its likely impact on, and likely consequences for,—

- (a) the current and future social, economic, environmental, or cultural well-being of the district or region:
- (b) any persons who are likely to be particularly affected by, or interested in, the issue, proposal, decision, or matter:
- (c) the capacity of the local authority to perform its role, and the financial and other costs of doing so

significant, in relation to any issue, proposal, decision, or other matter, means that the issue, proposal, decision, or other matter has a high degree of significance.

[35] Section 90 requires a local authority to adopt a policy setting out the local authority’s general approach to determining the significance of proposals and

decisions in relation to issues, assets or other matters and any thresholds, criteria or procedures that are to be used by the local authority in assessing the extent to which issues, proposals, decisions, or other matters are significant.

[36] The Council has complied with this requirement. In effect that policy says that the Council will apply the definition of “significance” in s 5 of the Act and determine the significance of each proposal or decision on a case-by-case basis.

[37] The term “activity” is defined in s 5 of the Act as follows:

activity, means a good or service provided by, or on behalf of, a local authority or a council-controlled organisation; and includes –

- (a) the provision of facilities and amenities; and
- (b) the making of grants; and
- (c) the performance of regulatory and other governmental functions.

[38] The entry into a commitment for a major new capital asset does not sit very neatly within this definition. On the face of it, “activity” is a strange word to use for something which had no previous existence and which will come into existence in the future or will involve some future activity. If the term “activity” were qualified by “new” or the reference was to the commencement of an activity (as it is in s 97(1)(a)), the position would be different. But in the context in which it is used under s 97(1)(d), it is at least possible that “activity” is referring to something which is already active on the Council’s part and which will be subject to a change that significantly affects the cost of its continuance. Some support for that conclusion may be drawn from s 97(1)(c), which deals specifically with new strategic assets (a term which is also defined in s 5), and s 97(1)(a), which expressly covers decisions to commence a significant new activity. No allegation of failure to comply with either of those provisions has been made, presumably because they did not apply or because the extensive provisions relating to the proposed stadium in the council’s long-term plans meant they had been complied with.

[39] The interpretation of s 97(1)(d) suggested in [38] above would make more sense of the concept of significant effect on the cost to the Council contained in that provision. The benchmark for the assessment would be the actual cost of the activity

before the decision in question. In the present case, the cost of the “activity” was, strictly speaking, zero, before the decision to proceed with the project, because the “activity” had not started. The parties’ approach requires us to interpret “cost” in s 97(1)(d) as “cost projected in the most recent long-term plan.” We agree that that is the only way to make sense of the provision if it applies in the present situation. But the strain on the plain wording this requires may reflect that our doubts about its applicability are well-founded.

[40] We heard no argument from counsel as to whether the Council’s involvement in the stadium project fits within the definition of “activity” in the context of s 97(1)(d), but the argument proceeded on the basis that it did. Given our later conclusions, it is not necessary for us to go behind the parties’ common position on this aspect of the case. But we record that we are assuming for the purposes of our later analysis that this position is correct, not making a decision to that effect.

Issue 1: Is there a significant cost increase?

[41] We now turn to the issue identified at [7] above. Although the argument before us, as before the High Court Judge, involved discussion of figures of considerable complexity, the issue essentially reduces to an assessment of whether the term “cost” in s 97(1)(d), when applied to an activity like the Council’s involvement in the stadium project, refers to the capital contribution by the Council to the project (in this case, the amount which the Council needs to borrow to fund its contribution) or the cost to the Council over the term of the financing arranged, or to be arranged, by the Council to fund that contribution.

[42] If the former is correct, then there is considerable force in the appellant’s argument that the increase in the Council’s contribution to the building of the stadium from \$85 million to about \$99 million is a significant increase in costs to the Council. We will explain our reasons for that conclusion later.

[43] On the other hand, if the appropriate cost measurement is the total cost to the Council over the 20 year period of the funding arrangement, the evidence presented by the Council indicates that this figure has not significantly increased. This is

because the cost of the overall project as calculated by reference to the total amount of Council debt at the time of the completion of the stadium referred to in the 2009 long-term plan (which reflects the Council's actual obligations in respect of the project) is essentially the same as the cost would have been on the basis of the assumptions contained in the 2007 long-term plan as amended by the 2008 long-term plan. We will also explain this below.

Appellant's position

[44] The appellant's position is that the decision significantly affects the cost to the Council of its involvement in the stadium project (as projected in the 2008 long-term plan). First, the stadium is, in round terms, about \$10 million more expensive than anticipated in the 2008 long-term plan and the Council is required to meet this. Second, the contribution from the Community Trust has reduced from \$10 million to \$7 million, and the Council is also required to step into the breach. Thus, the cost of the "activity" (the Council's involvement in the stadium project) has increased by \$13 million from \$85 million to \$98 million, or from \$91.4 million to \$104.4 million if the fund for ongoing maintenance is included.

[45] In the High Court, the Council seems to have argued that the requirement to meet this \$13 million unallocated cost did not fall on the Council, but was rather met out of the \$15 million contribution made by the Crown, which had not been provided for in the 2008 long-term plan. This was accepted by Chisholm J. On behalf of the Council Mr Barton renewed that argument in his written submissions, but accepted in his oral submissions in this Court that the \$15 million Crown contribution did not, in fact, off-set the \$13 million funding gap. That is clear from the 2009 long-term plan adopted after the High Court hearing, where the correct position is stated.

[46] In an updating affidavit filed in this Court, the Finance and Corporate Support General Manager for the Council, Mr Stephens, explained the actual position. The anticipated receipt of the private sector fundraising of some \$42.5 million (see [11] and [21] above) has changed: a smaller proportion is now expected to be received in the period before the completion and opening of the stadium than had been projected for the purposes of the 2008 long-term plan. The draft

2009 long-term plan assumed that only 3 per cent of the private sector fundraising will be received before opening day, and that the remainder will be received in annual instalments after the opening day. A much greater proportion had previously been assumed to be received in advance of the opening day. In addition, the assumption that 100 per cent of the lounge memberships and open club reserve seats would have been sold prior to the opening day (reflected in the 2008 long-term plan) was changed to an assumption that only 75 per cent of each would be sold by that date.

[47] The 2008 long-term plan assumed that there would be a bridging loan of \$19.2 million to cover the proportion of the private sector fund raising which will not have led to the receipt of cash before opening day, on the basis that the subsequent receipt of payments for lounge memberships and the like after opening day would be sufficient to meet all of the principal and interest payments on that bridging loan i.e. there would be no actual cost to the Council, though it would nominally have taken out the loan. The much greater deferral of the private sector fundraising contemplated by the draft 2009 long-term plan would have required this bridging loan to increase to about \$42 million, but the introduction of the Crown funding of \$15 million has meant that the amount of a bridging loan can be limited to \$29.1 million, which will continue to be fully financed by the instalments received from buyers of seating products over five and ten year terms. Thus, the effect of the introduction of the Crown contribution has been to allow for the preservation of the position where the private sector funding, though received after opening day, will not lead to any increase in the actual contribution by the Council.

[48] That being the case, it is clear that the \$15 million Crown contribution cannot also do what Chisholm J thought it did, namely net off the unallocated \$13 million funding shortfall. It seems that this is what the evidence before the Judge indicated, so we certainly make no criticism of him for having reached that conclusion. For present purposes we simply record that we are satisfied that the unallocated \$13 million shortfall has now been picked up by the Council, thus increasing its capital contribution to the project by about \$13 million.

[49] As indicated earlier, we are satisfied that, if the required measure of any significant effect on cost is between the capital contribution as specified in the 2008 long-term plan and the capital contribution required of the Council in respect of the project to which it has committed itself, then s 97(1)(d) would apply.

The Council's position

[50] The position taken by the Council is that the cost of the activity for the purposes of s 97(1)(d) should be the cost to the Council on a year-by-year basis of the activity or over the full 22 years of construction and debt servicing, rather than the capital cost of the stadium. As we noted earlier in our comments on the definition of the term “activity”, we consider that this interpretation is supported by the context, in that an activity is something which is normally ongoing, and the assessment which has been made is being made in the context of a long-term plan which covers a ten year period.

[51] In his updating affidavit, Mr Stephens explained that the calculations made for the purpose of the 2008 long-term plan assumed an interest rate of 9 per cent payable by the Council on a 20 year loan. By the time the draft 2009 long-term plan was prepared, interest rates had fallen, and the assumed interest rate was by then 7 per cent. This dramatically reduces the projected cost to the Council of servicing the 20 year debt funding. The draft 2009 long-term plan has now been adopted by the Council (subsequent to the High Court hearing) and in this plan the interest rates are recorded as 6.29 per cent for five years and 7.47 per cent for the remaining 15 years. This is based on a contractual commitment for the first five years, and a projection made on expert advice for the remaining 15 years. Mr Stephens provided a table showing the amount of debt to be serviced by the Council post-construction of the stadium. This includes some interest which has been capitalised on the funding during the construction period, leading to an amount of debt in the 2009 long-term plan of \$109.9 million, whereas the total of the Council's capital commitment (about \$98 million) and the capital maintenance fund (about \$6.4 million) is less than that. The table is as follows:

	\$ Million	\$ Million	\$ Million
Planning Document	2008/09 Final Annual Plan	2009/10-2018/19 Draft Community Plan	2009/10-2018/19 Final Community Plan
Debt to be serviced post construction	\$91.7	\$108.8	\$109.9
Interest rate post construction	9.0%	7.0%	6.29% until April 2015 7.47% from April 2015
Interest and Principal Repayments per annum for a 20 year table loan	\$9.9	\$10.1	\$9.7 until April 2015 \$10.4 from April 2015

[52] Applying the figures in this table, the total cost to the Council of the project over 20 years from the date of the completion of the stadium on the amount of funding it is required to service increases from \$198 million to \$204.5 million, an increase of between three and four per cent. We accept Mr Barton’s submission that that is not “significant”. Looking at it another way, the average annual cost based on the 2008 long-term plan is \$9.9 million per annum, while the equivalent figure under the 2009 long-term plan as adopted, which reflects the commitment made by the Council in the going ahead with the stadium project, represents an average annual cost of \$10.2 million.

[53] An alternative basis of assessing the comparative cost to the Council is to do so on a “per ratepayer” basis. Mr Barton suggested this was the essential yardstick for consultation purposes because it was a figure that would mean most to the beneficiaries of the consultation, the ratepayers. As is apparent from the material discussed at [17] and [26] above, the evidence before us is that average annual cost per ratepayer as projected for the purposes of consultation on the 2008 long-term plan is essentially the same as that which is now projected on the basis of the Councils actual commitment to the project.

[54] There are a number of assumptions made in reaching this position, relating to the tax position of Council-owned companies and the flow of dividends from these

companies to the Council. Mr Andersen suggested that these assumptions were not robust, but Mr Stephens' evidence is unchallenged and we have nothing before us to gainsay it. In those circumstances there is no basis on which we could properly reject it.

Our assessment

[55] There are a number of difficulties with the present case in applying s 97(1)(d) and as we have indicated we do so only on the basis that both parties urge that approach on us. Taking account of the unusual term "activity" and its incongruence in the present context, and also taking account of the normal ongoing nature of an activity, we conclude that the measure of "cost" adopted by the Council is an appropriate one in the circumstances. We therefore conclude that the Council was justified in reaching the view that the entry into the stadium project was not contrary to the requirement of s 97(1)(d) and therefore not unlawful under s 97(2).

Conclusion

[56] We now return to the question which the parties identified as the first issue requiring the Court's determination. We are satisfied on the evidence presented to us that the capital contribution to be made by the Council to the Stadium is greater than that projected in the 2008 long-term plan. But we are also satisfied on the evidence before us that the total cost to the Council is not significantly increased from that projected in the 2008 long-term plan, nor is the average cost per ratepayer.

Issue 2: Has the Council acted contrary to s 97(2)?

[57] For the reasons we have given earlier, we are satisfied that the Council has not acted contrary to s 97(2) in entering into the construction contract for the stadium.

Issue 3: Should relief be granted?

[58] Our answer on the earlier issues makes it unnecessary to deal with this aspect of the case.

Result

[59] The appeal is dismissed.

Costs

[60] Counsel were agreed that costs should follow the event. We award costs to the Council for a standard appeal on a band A basis.

Solicitors:

H J Calvert, Dunedin for Appellant

Anderson Lloyd, Dunedin for Respondent