IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 248/98
(Wellington Registry)

IN THE MATTER	**of an appeal pursuant to section 299 of the Resource Management Act**
AND	
IN THE MATTER	**of a decision of the Environment Court sitting at Christchurch on 27 August 1998 [Decision C104/98] in respect of an application for declarations concerning the coastal marine area and Lyttelton Harbour by Lyttelton Marina Ltd [ENF 54/98]**
BETWEEN	**CANTERBURY REGIONAL COUNCIL a regional council established under the Local Government Act 1974 and having its head office at 58 Kilmore St, Christchurch** **Appellant**
AND	**LYTTELTON MARINA LTD a duly incorporated company having its registered office at Christchurch, developer** **Respondent**
AND	**CP 161/98**
IN THE MATTER	**of an application for a declaratory order under section 3 of the Declaratory Judgments Act 1908**
BETWEEN	**LYTTELTON MARINA LTD a duly incorporated company having its registered office at Christchurch and carrying on business as a marina development company** **Plaintiff**

AND	**MAGAZINE BAY BERTH HOLDERS' ASSOCIATION INCORPORATED** an association of holders of berths in the Magazine Bay Marina **First Defendant**
AND	**BANKS PENINSULA DISTRICT COUNCIL** a statutory body created by the Local Government Act 1974 **Second Defendant**
AND	**CANTERBURY REGIONAL COUNCIL** a statutory body created by the Local Government Act 1974 **Third Defendant**

Dates of Hearing: 11 December 1998 and 12 February 1999

Judgment Released: 15 MAR 1999

Counsel:
Mr Rogers for the Plaintiff
Ms Robinson for the First Defendant
Mr Sleigh for the Second Defendant
Ms Perpick for the Third Defendant

INTERIM RESERVED JUDGMENT OF HANSEN AND YOUNG JJ

INDEX

PART 1 INTRODUCTION

This case concerns a marina in Magazine Bay, Lyttelton. The marina was constructed in the early 1980s by the then Lyttelton Harbour Board.

The Lyttelton Harbour Board acted as a facilitator for those who proposed to use the marina. Payments made by these people (to whom, together with their successors, we will refer, slightly loosely, as "the berth holders") funded the construction of the marina. It consists of a floating breakwater built from tyres and anchored by piles. There is a single fixed finger jetty system which provides for the berths.

The berth holders were issued with licences by the Lyttelton Harbour Board. Each permits the use of a defined berth, incidental use of the facilities and casual use of water and power. We will set out the relevant terms of the licence shortly. For present purposes, it is sufficient to note that each licence is for a period of 14 years. It is clear enough, however, that it was intended that the licences be extended, one way or another, so that the berth holders (or their successors) would be able to continue to use the marina for more than 14 years and perhaps for its effective life. As well, we note that the licences provide for maintenance of the marina to be effected by the Lyttelton Harbour Board but for the costs associated with this to be passed on to the berth holders.

The current litigation arises out of the following factors:

- The marina itself does not appear to have been ideal in design. The tyre breakwater was not as effective as hoped for in relation to the reduction of wave action. Basic marine facilities such as lavatories, fuelling facilities and haul out arrangements were not provided. These possible short-comings in the design and construction of the marina have been exacerbated by lack of maintenance in recent years. We suspect that these factors have led to a general atmosphere of discontent on the part of the berth holders.

- The restructuring of local government in 1989 resulted in the physical marina structure being vested in the Banks Peninsula District Council but with general regulatory functions associated

with the harbour vested in the Canterbury Regional Council. The introduction of the Resource Management Act in 1991 has further significantly changed the regulatory environment relevant to the administration of the marina.

- Associated with these changes have been a number of particular difficulties:

  - The Banks Peninsula District Council has no appetite for the role of marina owner previously occupied by the Lyttelton Harbour Board. This is not surprising. The marina lies outside of its areas of core interest. The maintenance and operation of the marina are likely to be costly and there may be difficulties in a full cost recovery from the berth holders. In any event, the present legal structure offers no opportunity to manage the marina at a profit commensurate with the time and effort required and the risks involved

  - The splitting of regulatory and ownership functions in respect of the marina and harbour, previously vested in the Lyttelton Harbour Board, between the Banks Peninsula District Council and the Canterbury Regional Council, and then the later change in the regulatory position, with the Resource Management Act replacing some of the Harbours Act provisions, have produced a legislative environment where the licences granted under the Harbours Act must now be construed against a very different regulatory background.

  - A proposal for a more sophisticated and extensive marina has emerged. This was initially to have been achieved pursuant to a joint venture between the Banks Peninsula District Council and Lyttelton Port Co Ltd but more recently Lyttelton Marina Ltd has emerged as the protagonist for

this proposal. An accommodation between Lyttelton Marina Ltd and the existing berth holders in terms of how the existing berth holders will fit into the proposed new marina has, sadly, eluded the parties.

The present litigation involves an attempt by the parties to resolve considerable legal uncertainty in relation to the contractual and planning issues which have developed in relation to the marina. The proceedings before us consist of:-

1. An appeal by the Canterbury Regional Council against a decision of the Environment Court delivered on 27 August 1998 by Judge Jackson in which he concluded that marina berth holders required coastal permits under s 12 of the Resource Management Act and that each berth licence is a deemed coastal permit under s 384 of that Act. This decision was given in the context of an application by Lyttelton Marina Ltd made under s 301 of the Resource Management Act to the Environment Court for declarations as to the extent of the company's obligations, if any, in respect of the berth licences.

2. Declaration claims which originate in this court in which Lyttelton Marina Ltd, as plaintiff, seeks declarations addressing the Resource Management Act and contractual issues which arise between the parties.

Because the legal issues in this case are troublesome when approached in a piecemeal way, we will defer, until later in this judgment, a detailed discussion of the positions adopted by the parties in respect of the present litigation. This is because we think it is more helpful first to review in the next part of this judgment the contractual and legislative context: in short, to examine the situation in the round before turning to the details. Then, in part 3 of the judgment we set out the positions adopted by the parties and our responses. Finally, in part 4 of the

judgment we record our conclusions and specify the relief which we consider to be appropriate

PART 2 THE CONTRACTUAL AND LEGISLATIVE CONTEXT

The Physical Construction Of The Marina

As we have indicated, the marina was constructed in the early 1980s. The piles are set into the bed of the harbour. The breakwater floats, but the access ways are fixed. Within the individual berths, boats move in accordance with the tide and, to a limited extent, the wind.

The berth holders appear, from the evidence, to have funded construction of the marina; this on a prepayments basis. It is clear that they were invited to do so on the understanding that licence terms of 21 years would be available.

Construction seems to have started in September 1981. There are indications that construction, in the event, proceeded in two stages with the second stage not completed until 1985.

The Statutory Scheme Governing Construction Of The Marina

At the time when marina was constructed, the relevant (or arguably relevant) provisions of the Harbours Act were ss 156, 173, 178.

S 173 provided:

> "The Board may, subject to the provisions of this Act, do the following things:-
>
> (a) Make, construct, erect, and maintain harbour works as defined by this Act: ..."

It is clear that the marina was, for these purposes, a harbour work,

S 178 provided:

> "Except where this Act or any other Act otherwise specially provides, the following provisions shall have effect with respect to harbour works, pipelines, cables or any other structure of any kind undertaken or constructed by any Board or any local authority or other body or person (hereinafter called "the constructing authority") on, in, over, through, or across tidal lands or a tidal water, or the bed of the sea, or the bed or bottom of any harbour, navigable lake. or navigable river, by virtue of this or any other Act, namely:
>
> (a) Before commencing the making or construction of the work the constructing authority shall deposit at the office of the Marine Department a plan in duplicate of the whole work, showing all the details of the proposed work and the mode in which it is proposed the same shall be carried out.
>
> (b) If it appears to the Minister that the proposed work will not unduly interfere with or adversely affect the interests of the public (whether by being or tending to be to the injury of navigation or otherwise), he may approve the deposited plan, with or without such modification, addition, or condition as he may reasonably require, and subject or not to any restriction or condition necessary for the preservation of any public right.
>
> (c) The work shall not be made, constructed, altered, or extended without the like approval but any such approval shall not confer on the constructing authority any right to construct, alter, or extend any work which independently thereof it would not have had:
>
> (d) The Minister may, either in whole or in part, revoke any approval given by him under para (b) of this section -
>
> (i) if the constructing authority so requests in writing; or
>
> (ii) on his own initiative, after consultation with the constructing authority if in the opinion of the Minister significant progress has not been made in completing the work within 10 years after approval for the work is given and such progress is unlikely to be made within a reasonable time in the near future
>
> (e) No constructing authority or person who, with such approval as aforesaid, constructs, makes, or erects any harbour work or any structure shall be liable to indictment for nuisance, encroachment, or obstruction on account thereof."

So the board had the power to construct the marina but this was subject to it first having obtained the approval of the Minister of Transport pursuant to s 178(b). We note in passing that this section was amended in 1987 and a new subsection (2) was added. The result is that what was s 178(b) became s 178(1)(b). It is, however, convenient to refer to the section in the form in which it was when the marina was constructed.

There was in the material which was initially laid before us no precise evidence of the s 178 approval of the Minister of Transport having been obtained to the construction of the marina. It seemed to us to be likely that appropriate approval was obtained as the contemporaneous documents which were produced relating to the then proposed construction of the marina referred to the necessity to obtain governmental approvals. The hearing was reconvened (before Young J) with a view to giving the parties the opportunity to investigate this issue. The result was that we have had submitted to us an approval in respect of stage 2 of the marina. No approval has been able to be located in respect of stage 1.

In the circumstances of this case (with the subsequent considerable re-organization of the Ministry of Transport and the abolition of the Lyttelton Harbour Board) the fact that no such approval has been found does not imply that that such approval was never granted. In the balance of this judgment, we will assume that such approval was obtained, see *Whangarei District Council v Northern Regional Council* [1996] NZRMA 445.

It will be noted that s 178(e) provides what is, in effect, a continuing authority for the existence of harbour works constructed pursuant to that section.

So we are satisfied that the construction of and maintenance of the marina (as a harbour work) was within the competence of the Lyttelton Harbour Board and we proceed on the basis that appropriate approvals under s 178 were obtained.

We should, at this point, also set out s 156 of the Harbours Act:-

> "A Board or local authority may from time to time, subject to the provisions of section 178 hereof, license and permit any [land vested in it (being part of the foreshore or of the bed of the harbour or the sea) and any part of the bed of the harbour or the sea immediately contiguous to any such land included in the licence] to be used or occupied for all or any of the following purposes:
>
> (a) The building or repairing of ships or vessels of any kind:
>
> (b) The erection and use of any boatshed, slipway, ramp, pipeline, pile, boat-grid, groyne, seawall, fence, mooring, landing place, or wharf:
>
> (c) The erection of baths and bathhouses, and any enclosure or fence necessary for the protection or privacy of the same:
>
> (d) The erection and use of stores, freezing works, and cool chambers:
>
> (dd) The protection and preservation of any building, object, feature, or other thing of national, historical or scientific interest.
>
> (e) Any other purpose relating to the convenience of shipping or of the public, or for any local enterprise or object which [the Governor-General by Order in Council, or the Minister] may approve."

The arguments in front of us ignored ss 173 and 178 of the Harbours Act and instead proceeded on the assumption that that the construction of the marina must be regarded as being authorized under s 156. This was because Baragwanath J in *Whangarei District Council v Northern Regional Council* [1996] NZRMA 445 treated the construction of a marina by a harbour board as involving the grant by the harbour board to itself of a s 156 permit. The judge said this at 465-66:

> "The harbour board could not enter into a bipartite transaction with itself by granting itself a licence: *Ingram and another (executors of the estate of Lady Ingram (decd)) v Inland Revenue Commissioners* [1995] 4 All ER 334. But s 156 did not contemplate a bipartite transaction. That section empowered the Board to:
>
> > '...license and permit ... land vested in it (being part of the foreshore or the bed of the harbour ... to be used or occupied ... for the purposes [specified].'
>
> It is the land - not a person - that is licensed/permitted.
>
> There can be no doubt that by proceeding to erect the piles, marinas, wharves, boat ramps and other facilities the Board did purport to:
>
> > 'license and permit .. land vested in it (being part of the foreshore ...) and ... part of the bed of the harbour ... immediately contiguous to ... such land included in the licence ... to be used or occupied for [the relevant purposes].'
>
> In relation to Kissing Point (subject to the question of s 178) the s 156 analysis is plainly available. The harbour board had both the foreshore and the bed of the relevant part of the Hatea River vested in it at the time of the conduct of permitting the land to be used for the relevant purposes."

We confess to some difficulty with that approach. It is clear enough that s 156 does contemplate bipartite transactions (as *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 demonstrates). Moreover, s 158 (which is set out below and plainly refers back to s 156) indicates that the form of the licence is to be in writing and may be for a period not exceeding 14 years. So s 158 also makes it clear, we think, that s 156 contemplates "bipartite transactions". We think it unreal to distinguish, in s 156, between "license" and "permit". We also think it improbable that the board, in constructing the marina, was thereby permitting itself, to use the marina only for a period not exceeding 14 years, particularly as the useful economic life of the marina might be as long as 50 years. In any event, the authority for the board to construct and maintain the marina came from ss 173 and 178 and not s 156.

The Statutory Power Of The Lyttelton Harbour Board To License Use Of The Marina

We have already set out at length the provisions of s 156 of the Harbours Act. This section appears to have provided authority for the Lyttelton Harbour Board to license use of the marina. We should also refer to certain other statutory provisions which might be material.

S 158 provided:

> "Every such licence shall be in writing under the seal of the Board or authority granting the same, and may be for any period not exceeding 14 years from the date thereof, and may prescribe a sum of money to be payable, either at stated periods or on or before the granting thereof, for the use of the foreshore [and any part of the bed of the harbour or of the sea] so granted, and may prescribe any other terms or conditions, general or particular, to be observed or performed by the licensee."

It is clear that this section refers back to s 156.

S 173 provided:

> "The Board may, subject to the provisions of this Act, do the following things:-
>
> …
>
> (f) Grant by lease or licence the use or occupation of any warehouses, buildings, wharves, yards, cranes machines, or other conveniences provided by it, at such annual rents and on such terms as may be agreed on:
> Provided that no such lease or licence shall be granted for a longer term than fourteen years:
> Provided further that every such lease or licence for a longer term than one year shall be sold by public auction or public tender, of which at least fourteen days' public notice shall be given:
>
> (g) Carry on the business of a wharfinger or warehouse keeper, or of dumping, repacking, or reconditioning produce or other goods, or any other business in the interests of importers or exporters or of shipping."

As well, the board had power, under s 232(37) to make by-laws to regulate and control the use of the marina and, as well, to :

> "fix fees, rents or payments for [the use of the marina] and provide for the registration with the Board by and of persons to whom the Board grants any lease, tenancy, licence or other permission to use or occupy the said amenities or land, and fix fees or payments to be paid by such persons to the Board in respect of such registration.".

As will become apparent, there is some dispute as to which, if any, of these sections were invoked when the Lyttelton Harbour Board granted licences to the berth holders. So it is convenient to turn now to the licences which were granted.

The Licences Granted By The Lyttelton Harbour Board

The licences all start in the following terms:

> "IN CONSIDERATION of certain sums paid to the LYTTELTON HARBOUR BOARD (hereinafter called 'the Board') for the costs of construction of the berth in the Magazine Bay marina in Lyttelton Harbour specified in the schedule hereto (hereinafter called 'the berth') the Board HEREBY GRANTS to [the licensee] (hereinafter called 'the licensee" which expression shall if there are two or more persons constituting the licensee mean and include all of such persons jointly and severally) are licensed to use and occupy the berth upon the following terms and conditions."

The licence in each case is confined to the use of a nominated pleasure boat.

As to term, clause 4 provides:

> "IN accordance with the restriction imposed by Section 158 of the Harbours Act 1950 the term of this licence is 14 years from the commencement date shown in the schedule but if the Board should subsequently obtain legislative authority to grant a term of 21 years then the Board will on request by the licensee and by endorsement hereon extend the term to 21 years from the commencement date. Should such authority not be obtained the Board should use its best endeavours to grant the licensee a further licence for a period of 7 years from the date of expiry of this licence and to grant further subsequent licences if the Board

> does not require the marina area for its commercial activities. Such licence shall be on the same terms as this licence except for the term thereof in this clause. No further berth cost payment shall be payable for any extension of this licence or any further term."

The licence provides for annual fees to be paid by licensees in advance at a figure set by the board:

> "to cover the actual or budgeted costs incurred by the Board in operating and maintaining the Marina."

The licences are not in themselves strictly speaking assignable although they have, in fact, been transferred as we understand it. Instead, the licence provides for a surrender mechanism in terms of which the board would seek to provide a new licensee who would pay a transfer price to the board which would be paid on to the licence holder who surrendered the licence.

Clause 15 provides:

> "THIS licence relates only to the allocated water space of the berth. In common with others the licensee shall have the right of making fast to the allocated berth structures and access and use rights over the structure of the Marina. Mooring ropes and chains shall be provided by the licensee but of the nature required by the Board and shall be maintained to the Board's satisfaction. The licensee shall not alter or modify the berth or adjacent structure and any additions such as fendering shall first be approved by the Board. The licensee may use the water, power and any other facilities provided on the structures in common with other berth licensees. This clause entitles the licensee to casual use only of these facilities subject to such payments and such other conditions as may be from time to time fixed by the Board."

The licences started to expire in 1996. The last of the licences will expire in 2003.

It was common ground that the licences (which provide for 14 year terms and refer to s 158), rather look as though they have been issued under s 156. If the board was acting under s 173(f), which is what was suggested by the Canterbury Regional Council, we would have

expected the board to have put the licences out to tender or auction; something which did not happen.

It was suggested in argument, however, that although s 156 was the statutory power the board thought it was invoking, the section does not in fact apply to the berth licences. It was argued before us that s 156(b) did not apply because what was licensed was only the use of the marina rather than the erection and use of the marina. We disagree. We think that erection and use can be read disjunctively. We note that in *Webster v Auckland Harbour* Board [1987] 2 NZLR 129 it was accepted that licence fees in relation to what was plainly only the use (and not the erection and use) of slips and ramps fell to be determined under s 156(b) of the Harbours Act.

In short, we are of the view that the board had statutory authority to license the use of the marina under s 156, this pursuant to licences for periods not exceeding 14 years. We are of the view that this is what it set out to do when it granted licences to the berth holders.

The Berth Licences As Contracts

We have no difficulty with licences under s 156 being granted in contractual form. That such a licence could be in contractual form was plainly accepted in *Webster v Auckland Harbour Board (supra).* That the licences could be on terms and conditions to be agreed between the parties is also contemplated by s158. That a licence or permit might impose obligations on the harbour board seems to us to be implicit in the concept of a licence. It must be born in mind that the berth holders financed the construction of the marina. It is, therefore, understandable that the licences would be in terms which imposed some obligations on the harbour board.

The critical issue is as to the validity of the commitment by the board to use its best endeavours to grant further licences on the expiry of the original 14 years term.

Originally, as we have noted, the intention was that the berth holders would receive a right to use the berths for 21 years. The legislation was such that this intention was not able to be carried through into legal effect. This is because s 158 provided for a maximum licence term of 14 years.

Had the legislation remained unchanged the harbour board could, consistently with the 14 year limitation, have granted an original 14 year term and, at the expiration of that term, a further term of 7 years. The best endeavours clause was obviously drafted with the 14 year limitation in mind. But we see nothing improper in this. The clause provides for the possibility that the board might itself require the area for its own purposes (related to the operation of the port). In the absence of this remote possibility materialising there was no reason easily foreseeable in the early 1980s why the berth holders should not get renewals to permit continued use of the marina which they had paid for.

The “best endeavours” commitment really gives contractual effect to the reasonable expectations of the berth holders when the licences were granted. In the early 1980s it was, of course, not possible to foresee exactly what the position would be 14 years ahead The “best endeavours” commitment contains sufficient flexibility to accommodate that uncertainty.

Obviously the licences fell to be administered in the context of the general laws of New Zealand including the special provisions of the Harbours Act which were applicable. They were, therefore, notwithstanding their terms, revocable pursuant to s 161 of the Harbours Act which permitted revocation in the event that the area in issue was

"required for harbour purposes or for any other public purpose". We do not see this as affecting the validity of the licences. Indeed, given that the occasion to exercise the s 161 power never arose at any relevant time and that s 161 has subsequently been repealed we do not see it as material to the case.

Attempts By Lyttelton Harbour Board To Obtain Special Legislation

The Lyttelton Harbour Board did endeavour to promote special legislation which would have permitted marina licences to be granted for initial terms of 21 years (and including renewals for up to 50 years and more if special circumstances required or justified longer terms).

As far as we can tell from the limited material before us, it appears that momentum in relation to this was lost following the reorganisation of local government in 1989.

Local Government (Canterbury Region) Reorganisation Order 1989

Pursuant to the Local Government (Canterbury Region) Reorganisation Order 1989 the marina became vested in the Banks Peninsula District Council (see clause 246(8)(a)). So too were all liabilities of a contractual nature associated with the marina (see clause 256(1)(b)).

The land on which the marina structure was built on or over was vested in the Canterbury Regional Council (clause 246(6)). We note that the ownership of the seabed has since revested in the Crown, see Foreshore and Seabed Endowment Revesting Act 1991. Given the savings provision in that Act, this revesting is irrelevant for the purposes of this litigation.

Clause 16 of the order provided that:

> "The functions, duties and powers of the Canterbury Regional Council shall be ...

> (f) Except as otherwise provided in this order, the functions, duties and powers of the Harbour Board under the Harbours Act 1950 ..."

Clause 144(b) of the order provided that the Banks Peninsula District Council should have:

> "The functions, duties and powers of a harbour board in respect of the provision and maintenance of those marinas, wharves, jetties, boat ramps and other facilities, formerly the responsibility of the Lyttelton Harbour Board and transferred to the Banks Peninsula District Council by virtue of Part XII of this Order."

Clause 256(1) of the order also provided:

> "Except as otherwise provided in this order, a local authority constituted by this order shall, in respect of the district of that local authority:
>
> (a) Have and may exercise and be responsible for all the powers, duties, acts of authority and functions which were previously exercised, or which could have been so exercised by, the former authorities had they not been dissolved: ..."

There is an issue as to the body in which the power to grant berth licences in respect of the marina was vested following the coming into force of the reorganisation order.

We think that the only sensible approach on this point is that those powers devolved onto the Banks Peninsula District Council; this view being consistent with that of Baragwanath J in *Whangarei District Council v Northland District Council (supra)* at pages 456-57.

We will later refer to an argument addressed to us by the Banks Peninsula District Council to the effect that we should draw a distinction between the marina and its use and licensing, on the one hand, and, on the other hand, the occupation of what was referred to as "coastal space"; that is, the sea and air occupied by boats when using the marina. The latter was said to be subject to the control of the Canterbury Regional Council and the Crown and thus subject to

licensing by the Canterbury Regional Council. We regard this argument as over-refined (in fact over-refined by a long margin).

We think that the position here is relatively straight-forward. The Banks Peninsula District Council stepped into the shoes of the Lyttleton Harbour Board in respect of the marina and had all proprietary, contractual and regulatory powers necessary in that regard and was subject to the same contractual obligations.

Impact Of Resource Management Act - General

The Resource Management Act repealed ss 156 and 178 of Harbours Act; these being the provisions which had hitherto governed the construction and operation of the marina. Such structures now fall under the purview of s 12 of the Resource Management Act which relevantly provides:

> "(1) No person may, in the coastal marine area, - ...
>
> (b) Erect, reconstruct, place, alter, extend, remove or demolish any structure or any part of a structure that is fixed in, on, under or over any foreshore or seabed; ....
>
> (2) No person may, in relation to land of the Crown in the coastal marine area, or land in the coastal marine area vested in the regional council, -
>
> (a) Occupy any part of the coastal marine area; or
>
> ...
>
> (4) 'Occupy' means the activity of occupying any part of the coastal marine area -
>
> (i) Where the occupation is reasonably necessary for another activity; and
>
> (ii) Where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent and;

(iii) For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense:-

and 'occupation' has its corresponding meaning'."

Putting on to one side for the moment some of the subtle arguments addressed to us, the effect of s 12 on the marina does seem relatively straight forward:

1. The marina occupies part of the coastal marine area with the result that s 12(2)(a) applies.

2. The marina is itself a structure which is fixed to the bed of the harbour and thus any extension or alteration of it is within the scope of s 12(1)(b).

3. Providing the position of the marina is adequately addressed in terms of resource consents or provisions of the relevant regional coastal plan, the activities of those who use the marina do not themselves fall under the purview of s 12.

For reasons we are about to discuss, we think that this straight-forward approach is the correct one to adopt

Impact Of Resource Management Act - Marina Owner

As earlier indicated, the construction of the marina required a consent under s 178 of the Harbours Act 1950. There is in fact no evidence that such a consent was granted. For reasons already discussed we are prepared to presume that there was such consent.

S 384(1) of the Resource Management Act provides that every approval granted under s 178:

> "[I]n respect of any area in the coastal marine area ... shall be deemed to be a coastal permit granted under this Act on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act) by the appropriate consent authority"

An approval under s 178 must be treated as a consent extending not only to the construction of harbour works but also to their continued existence and operation. This is because S 178 (e) provided that:

> "No constructing authority or person who, with such approval as aforesaid, constructs, makes, or erects any harbour work or any structure shall be liable to indictment for nuisance, encroachment, or obstruction on account thereof."

We think it follows that the marina must be regarded as being the subject of an appropriate coastal permit in relation to its occupation of the coastal marine area. This deemed coastal permit must be regarded as being of indefinite duration, see s 425 (3) Resource Management Act.

By the time the licences started to expire (in 1996) the marina was vested in the Banks Peninsula District Council.

S 425(3)(a), Resource Management Act provides that:

> "except as provided in section 384(1) ... every licence or permit granted under ... section 156 of the Harbours Act 1950 ... shall, notwithstanding the amendment of that Act by this Act, continue in force after the date of commencement of this Act on the same conditions and with the same effect as if that Act had not been amended."

It follows that the repeal of s 156 did not itself terminate the licences.

Does it matter in terms of the application of the best endeavours commitment that the statutory power under which the original licence

was granted has now been repealed? We think not; this providing it was still open to the licensor to grant a renewal permitting the licensee to do the same things for the renewed term as could be lawfully carried out under the s 156 licence.

Since it was open to the Banks Peninsula District Council, on our view of the law, to license the use of the marina (by reason of its ordinary proprietary rights as owner of the marina), we do not see the repeal of s 156 as affecting the contractual position.

In those circumstances we see no reason why the Council should not be regarded as subject to the commitment to use its best endeavours to grant renewals.

Impact Of Resource Management Act - Berth Holders

Overview

The argument put forward by the Banks Peninsula District Council and Lyttelton Marina Ltd is that the activities of the berth holders are in *prima facie* breach of s 12(1)(b) and 12(2)(a) so that they require a resource consent, in this case, a coastal permit. As well, it is said that the licences issued under s 156 of the Harbours Act are now deemed to be coastal permits.

In both respects Lyttelton Marina Ltd was successful in the Environment Court proceedings to which we have referred and which are now under appeal before us.

Do The Berth Holders Require Coastal Permits Under S 12(1)(b)?

S12(1)(b) is said to apply on the basis that when the berth holders tie their boats into the marina structure this is within the language of s 12(1)(b). The argument comes down to the assertion that a boat tied into the marina is a "structure or part of a structure that is fixed in, on, under or over any foreshore or seabed".

As already noted, we have no difficulty with the view that the marina structure is itself is a structure that is "fixed in, on, under or over any foreshore or seabed". The argument for Lyttelton Marina Ltd and the Banks Peninsula District Council is that a boat, when tied up to the marina, is itself a structure fixed to the seabed

We interpolate here that there is an element of tautology in s 12(1)(b). This is because the word "structure" is itself defined (in s 2) as something which is fixed to land, as "structure" is defined as meaning:

> "any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft."

There have been a number of earlier cases which are relevant here, either directly, or by way of analogy.

In *Auckland Regional Council v Moulton* (unreported, Planning Tribunal decision A77/96) the issue was whether s 12(1)(b) applied in relation to two moored houseboats, the "Zeus" and the "Phoenix". They were described by the tribunal in this way:

> "in essence, the defendants' vessels are facilities for houseboat living purposes, fixed to the land by ropes attached to objects embedded in the seabed... ."

The tribunal held that boats so secured are structures in terms of s 12(1)(b).

Mr Moulton then took the vessels to the estuary of the Piako River close the Firth of Thames. There they were tied together and at low tide sat on the bed of the Piako River. The issue then arose whether Mr Moulton was in breach of s 13(1)(a) of the Act in that he had placed a structure "in, on, under or over the bed of a lake or river". This is not an identical prohibition to that contained in s 12(1)(b) because there the word "fixed" appears in the section itself. But given that the definition of "structure" itself contains the word "fixed" the difference would appear not to be significant.

In *Hauraki District Council v Moulton* (unreported decision C30/97) it was found that the two vessels were structures for the purposes of s 13 and that Mr Moulton was again in breach of the Resource Management Act. The court said:

> "Mr Moulton claimed that if his vessels need a resource consent then **all** vessels tied to the land (or anchored) need a resource consent. He argued that was so absurd it cannot be the intention of the Act.
>
> The answer is that all vessels do not require resource consent (or a permissive rule in the plan) unless they are fixed to the land and thus meet that part of the definition of 'structure'. To borrow a rather ugly phrase from land law, the factor which determines whether a vessel is affixed to the land is the 'degree of annexation'. In the case of a vessel the degree of annexation would involve two, possibly three, aspects:
>
> - the method of mooring; and
> - the duration of the mooring; and
> - and (possibly) whether the vessel can move under its own steam or by sail.
>
> Mr Moulton claimed that if he needed a resource consent then every boat which is moored needs a resource consent. That is incorrect: if boats are temporarily moored or tied up they are not 'fixed to the land', but there may come a time when the duration of mooring indicates that the vessel is fixed (depending on the circumstances in each case). Similarly the method of mooring (e.g. bolting to a jetty) might show a vessel is fixed."

The final case to which we refer is the decision of Elias J in *Dorn v The Environment Court* v *Hauraki District Council* (unreported, M1448/97, Auckland Registry, judgment delivered 5 February 1998). This case also concerned s 13 and related to the mooring of Mr Dorn's vessel "Otago" in the Piako River. The vessel was secured by ropes to piles on the side of the river which were the remnants of an old wharf. There the judge said this:

> "Although the reference to the inclusion of rafts in the definition in s 2 of the Act provides some parallel, the real issue it seems to me, is with the notion of fixing. A raft may well be fixed to the bed of lake or a river. The notion that a moored boat is similarly fixed seems to me to be rather more difficult to accept. It would mean that even transitory moorings might, according to the definition adopted by the Environment Court, require resource consents.
>
> I recognise that there may be an element of degree in the activity and have some sympathy with the Council's position that a boat presently not capable of self-propulsion because its propellers have been removed and which has been positioned on the same mooring for five years, is a fixed facility. The Planning Tribunal in the *Moulton* (A6/95 and A65/96, 8 February 1995) case considered that a vessel treated as a houseboat living facility and attached by roped to objects embedded in the seabed, was capable of being a structure within the meaning of s 2. The circumstances are not entirely parallel here, because there is no suggestion of the boat being attached in any way to the bed of the river. But for my part, without more substantial argument than I have received in the present case, I would not want to be taken to endorse the proposition accepted by the Environment Court here, that a boat moored by ropes is a structure within the meaning of the Act ..."

In the Environment Court in the case under appeal, Judge Jackson reviewed the authorities which we have mentioned. He noted that Elias J does not appear to have been referred to the decision of the Environment Court in *Hauraki District Council* v *Moulton* and that, in any event, her judgment dealt with s 13 and not s 12 (although for reasons already given we doubt if that is particularly material). Judge Jackson then went on to say:

> "I can see no reason to distinguish boats in a marina from the situation in the *Moulton* cases, or *Dorn,* where admittedly the boats were only afloat for some of the time (and sat on the

seabed, or riverbed, at low tide), but were permanently fixed to the relevant bed. In the marina situation, while it is artificial to separate the marina structure from the berthed boats, the latter are still fixed to the seabed or foreshore - through the marina - when the boats are tied up. Adopting the reasoning in the *Moulton* cases I consider that a boat which is in a marina at Magazine Bay is likely to require a resource consent as a structure which is placed and fixed over the seabed.

To find otherwise gives smaller vessels a privileged position in the context of the Resource Management Act which they do not deserve bearing in mind their effects. Many of the pollution problems occurring in and around marinas do not arise from the marina structures (jetties and pontoons) but from boats. Fuel and oil slicks, anti-foul deposits, rubbish (plastic bags, cans, bottles) and human waste can be jettisoned from the boats in a badly-managed marina. So there is good reason in terms of remedying the mischief caused to sustainable management why boats in permanent marinas should be subject to controls under s 12(1)."

We disagree. Our reasons, briefly, are as follows:

1. In determining whether a boat is a structure "fixed" to the seabed, we think that the primary focus must be on the manner of the alleged affixation.

2. We think it unlikely that the legislature intended to distinguish between mooring a boat for a short term and mooring a boat for a long term with the latter requiring, but the former not requiring, a resource consent. One might as well ask how long is a piece of string as to inquire whether a mooring is for a short or long term.

3. We think that tying or chaining a boat to a mooring using the conventional methods intended to permit easy tying and untying does not make a boat a structure fixed to the seabed.

4. We accept that there may be environmental impacts from boats moored in a marina as Judge Jackson pointed out. But such environmental consequences can occur irrespective of whether a boat is moored and indeed irrespective of the duration of the mooring, In any event, as Ms Perpick pointed out, such

consequences are capable of independent control under s 15, Resource Management Act.

Do The Berth Holders Require Coastal Permits Under S 12(2)(a)?

The s 12(2)(a) point is difficult because of the obscurity of the definition of "occupy" which appears in s 12(4).

We regard the suggestion that s 12(2)(a) applies in this case as a little forced. Assuming there is a marina in place, the practical position is that the seabed and the sea column above it (both forming part of the coastal marine area) are occupied by the marina. To treat each individual berthing of a boat within the marina as itself involving a separate occupation and thus requiring a separate resource consent adds unnecessary complexity to the situation.

Because we think that the occupation by a berth holder of a marina berth is no more than a subset of the broader occupation of the relevant area by the marina owner for which there is in existence a deemed coastal permit, we see s 12(2)(a) as inapplicable.

The s 12(2)(a) issues generated some closely reasoned semantic arguments. Given the conclusion we have reached, these are largely irrelevant. We should however mention two of the issues raised.

The first is whether s 12(2)(a) applies to the occupation of water *simpliciter.* This argument arises because the opening words in s 12(2) are:

> "No person may, *in relation to land of the Crown* in the coastal marine area, or *land* in the coastal marine area vested in the *regional council* ... ." (emphasis added)

The argument was that it followed that the subsection applied only to an occupation which directly related to land - in this context the bed of the harbour. But, as Judge Jackson pointed out in the Environment Court, what is proscribed is the occupation of the coastal marine area, not the land. He then went on to say (and we agree with what he said):

> "It is a straightforward inference that the coastal marine area is a subset of land confined horizontally on the landward edge by the mean high water springs mark and on the seaward edge by the territorial sea. In the third, vertical dimension - which is more important to this case - the coastal marine area includes the seabed (and presumably what is underneath), the water column: because of the inclusion of 'coastal water' in the definition and the sky above."

The second point we mention is that the purpose underlying s 12(4)(a)(i) is far from clear. Why "occupation" should be seen as requiring a resource consent where it is "reasonably necessary for another activity" but not when it is an end in itself makes no obvious sense (at least to us). But we think that here the occupation by a boat of the main marina is an end in itself. We regard as unconvincing the suggestion that pleasure boating can be treated as the "other activity". We say this because that activity is not carried on from the place which is occupied. We think that the section requires a resource consent to be obtained only where the occupation in issue is related to an activity taking place at the same location.

The Harbour Board Licence As A Deemed Coastal Permit

One of the issues before us was whether the berth holders' licence agreements must be treated, pursuant to s 384(1) as coastal permits. We have already set out the provisions of s 384(1) as to the deemed effect of a s 178 approval. The same applies to:

> "every 'licence or permit' granted under ... section 156 ... of the Harbours Act 1950 ... in respect of any area in the coastal marine area."

We have already expressed the view that the berth holders' licences were granted pursuant to s 156(b), Harbours Act. On the face of it, therefore, the effect of s 384(1) is that such licences become deemed coastal permits.

For reasons already indicated, however, we do not accept that the activities of the berth holders in fact require a coastal permit. There is not an exact match between what could be permitted or licensed under s156 (essentially use and occupation of the foreshore or the bed of the harbour or the sea for the purposes defined) and the activities which are subject to *prima facie* prohibition in s 12 of the Resource Management Act. We think that the clear sense of s 384 is that a licence or permit granted under s 156 becomes a deemed coastal only if, and to the extent that, a coastal permit is required in respect of the activities licensed or permitted.

Accordingly, we reject the view that the licences must be treated as deemed coastal permits.

PART 3 POSITIONS ADOPTED BY THE PARTIES

The Banks Peninsula District Council seems to have adopted the following arguments:

1. Upon the Local Government (Canterbury District) Reorganisation Order 1989 coming into effect, the marina itself was vested in the District Council but what counsel for the District Council called the "coastal space on which the boats were moored" was vested in the Regional Council with the result that the Regional Council had the power to license the use of the coastal space pursuant to s 156 of the Harbours Act.

2. With the coming into effect of the Resource Management Act, s 156 of the Harbours Act was repealed with the result that the

Regional Council no longer had the ability "to grant the use of this coastal space under the Harbours Act 1950" but the berth licences became deemed coastal permits pursuant to s 384(1) of the Resource Management Act. As well, the District Council still had an ability to license the use of the marina and provide services pursuant to s 173 of the Harbours Act (which has not been repealed).

3. The best endeavours clause was *ultra vires* ss 156 and 158. The suggestion was that there is "no power to extend the berth licences (to the extent they are still valid) past the 14 years".

4. The berth licences must be treated as having been frustrated by the reorganisation of local government and the Resource Management Act because:

> "in essence the ownership and administration of the underlying assets of the berth licences was now split between two separate parties".

5. As well, it was argued that the repeal of s 156 of the Harbours Act meant that licences could no longer be granted in respect of the use of the marina and that, whereas, at the time the licences were granted, s 161, Harbours Act permitted revocation of the licences, this has now been repealed making a renewal of the licences essentially different from what was contemplated under the original licences.

Lyttelton Marina Ltd adopted arguments that were, we think, broadly similar. In particular it argued that:

1. The berth holders did require coastal permits to occupy the berth; this under s 12(1)(b) and 12(2)(a) Resource Management Act.

2. The berth licences must be treated (if extant at the time the Resource Management Act came into effect) as deemed coastal permits.

3. The licences, or perhaps just the best endeavours obligation, had been frustrated by local government reorganisation.

4. The effect of the Resource Management Act, and in particular s 384, was to extinguish any contractual rights as between the parties and simply leave the right or expectations of the berth holders to continue to use the marina as subject to the Resource Management Act.

5. The berth licences, if coastal permits, should be treated as expiring when the licences expire; this submission in fact requiring an extremely robust reading of s 418(6).

It is apparent from what we have already said that we reject all arguments put forward by the Banks Peninsula District Council and Lyttelton Marina Ltd. The right which the berth holders have is to tie up to the marina and use its facilities. We do not see this as involving (or as ever having involved) any occupation of the "coastal space" which requires any separate permit or licence. The Banks Peninsula District Council stepped into the shoes of the harbour board and has had, since the coming into effect of the reorganisation, all powers (initially regulatory and proprietary and, since the Resource Management Act, proprietary) to license use of the marina. For reasons already given we do not see the activities of the berth holders as being subject to the Resource Management Act. In our view the legal position as between berth holders and the Banks Peninsula District Council is fundamentally governed by contract (in the form of the licences). We reject the view that the best endeavours commitment is ultra vires. As well, we do not regard the licences as having been frustrated.

The Canterbury Regional Council's principal concern is not to be left with regulatory functions which it says that the legislature never intended to confer on it. It has therefore challenged the suggestion that the mooring of boats itself requires a coastal permit under s 12 of the Resource Management Act.

The berth holders have been largely organised into an incorporated society, Magazine Bay Berth Holders Association Incorporated. The position adopted by the Berth Holders Association essentially is that the Banks Peninsula District Council has stepped into the shoes of the Lyttelton Harbour Board and that the best endeavours obligation is valid and can, in fact, be performed by the Banks Peninsula District Council. The Berth Holders Association appears to be comparatively neutral in relation to whether the activities of their members in securing their boats to the marina require coastal permits. Their position is that if that is the case then the berth licence is the necessary coastal permit but that it, in any event, continues in effect contractually.

As already indicated, Judge Jackson, in the Environment Court, essentially upheld the contentions of Lyttelton Marina Ltd in relation to the application of s 12 of the Resource Management Act to the activities of berth holders.

It is apparent from what we have already said that we generally accept the position as put to us by the Canterbury Regional Council and the Berth Holders Association There are, however, some evidential issues unresolved and, in those circumstances, there are limits to the extent to which we can make the declarations sought by the parties.

PART 4 CONCLUSIONS AND RELIEF

We think it is sufficient to express, at this point, our views in summary form with a view to the parties then having the opportunity to consider their position further.

In summary our views are as follows:

1. The best endeavours commitment was valid although, looking at the matter as at the date the licences were granted, its actual application would depend upon the circumstances (including legislative circumstances) as they were when the renewal issue arose. It must now be performed within the current legislative environment.

2. Upon the reorganisation of local government in 1989, the rights and obligations (statutory, contractual and proprietary) of the Lyttelton Harbour Board in respect of the marina devolved to the Banks Peninsula District Council. The contractual obligations in respect of the berth holders licences were not thereby frustrated.

3. S 12 of the Resource Management Act does not apply to the activities of berth holders tying their boats to the marina and otherwise using the marina.

4. The licences granted to the berth holders continued to have contractual effect, notwithstanding the enactment of the Resource Management Act and the repeal of s 156 of the Harbours Act, with the result that the Banks Peninsula District Council was required to use its best endeavours to grant renewed licences to use the marina.

The result is that the appeal from the Environment Court decision is allowed. Beyond that the precise form of the relief which is appropriate will be a matter for further discussion with counsel. We invite counsel for the berth holders and the Canterbury Regional Council to submit memoranda as to:

(a) The precise form of judgment which is sought;

(b) Whether this hearing needs to be resumed for further evidence to be given in relation to unresolved issues; and

(b) Costs

This is to be filed within 30 days.

Counsel for the Banks Peninsula District Council and Lyttelton Marina Ltd are to respond within a further 14 days.

Hansen J.

Young J.

Solicitors:
Anthony Harper, Christchurch for the Plaintiff
Duncan Cotterill, Christchurch for the First Defendant
Chapman Tripp, Christchurch for the Second defendant
Wynn Williams & Co, Christchurch for Third Defendant