Decision No. **W 14/98**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **CHALLENGER SCALLOP ENHANCEMENT COMPANY LIMITED**

(RMA 471/96)

Appellant

AND **MARLBOROUGH DISTRICT COUNCIL**

Respondent

AND **MARLBOROUGH AQUACULTURE LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Her Honour Judge Kenderdine sitting alone pursuant to section 279 of the Act

IN CHAMBERS at WELLINGTON

DECISION ON INTERLOCUTORY APPLICATION TO STRIKE OUT AND DIRECTIONS FOR FURTHER PARTICULARS

This is an interlocutory application by Marlborough Aquaculture Limited (the applicant) dated 26 January 1998 to strike out these proceedings. If the matter is not struck out completely then the applicant has applied for directions to require the appellant to supply further and better particulars in relation to the grounds of the appeal. The applications were opposed by Challenger Scallop Enhancement Company Limited (the appellant) by way of notice dated 29 January 1998.

The matter involves an appeal lodged on 27 June 1996 against the decision of the Marlborough District Council (the respondent) to grant a coastal permit by the to the applicant for the purposes of establishing a marine farm in the Marlborough Sounds.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

On 4 February 1998 a teleconference was held, attended by counsel for the applicant, the appellant, the respondent, and counsel for Te Tau Ihu Iwi, being a s.274 party. A timetable was established for the filing of full written submissions on the two issues raised.

On 12 February 1998 the submissions of the applicant were received by the Registrar. On 18 February 1998 the reply from the appellant to both these issues was received by the Registrar. On 19 February 1998 the respondent's submissions were received, on the basis that it took a neutral stance over the outcome of the application for directions, and entered submissions on the application for strike out because it had argued the point before, and it was providing further information for the Court. On 23 February 1998 the applicant's final submissions in reply were received.

The Application to Strike Out the Appeal

The Applicant's Submissions

The applicant has applied, pursuant to s.279(4) of the Resource Management Act 1991 (the RMA), to strike out the appeal, or such parts of the appeal as the Court sees fit, on the basis that the grounds of the appeal are outside the jurisdiction of the Court, and this lack of jurisdiction falls within all three of the categories set out in s.279(4) of the RMA, which are as follows:

> **(a) That it is frivolous or vexatious; or**
> **(b) That it discloses no reasonable or relevant case in respect of the proceedings; or**
> **(c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further."**

The applicant submitted that the grounds of appeal, primarily those listed as grounds (a) to (e) in the notice of appeal, concern and involve a determination of access to a fishery. The appeal is based on the allegation that there are scallops and scallop beds in the area of the application site. It was noted that even this is yet to be scientifically established.

It was submitted that under the fisheries legislation (being the Fisheries Act 1983 and the Fisheries Act 1996), scallops are a fisheries resource, and the control of a fisheries resource is under the sole jurisdiction of the Ministry of Fisheries. Therefore, any issues relating to scallop resources are outside the jurisdiction of the council, and the Environment Court.

The statutory provisions of the RMA relied on by the applicant to establish the respective jurisdictions are as follows:

Section 290. Powers of Environment Court in regard to appeals and inquiries -

(1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.

...

(4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation.

Section 290 of the RMA limits the Court's jurisdiction to the jurisdiction afforded, in this case, to the regional council. The jurisdiction of the regional council is governed in part by the functions set out in s.30(1) of the RMA and is restricted by the limitation in s.30(2).

Section 30. Functions of regional councils -

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

(d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of-

- **(i) Land and associated natural and physical resources:**
- **(ii) The occupation of space on land of the Crown or land vested in the regional council, that are foreshore or seabed and the extraction of sand, shingle, shell, or other natural material from that land:**
- **(iii) The taking, use, damming, and diversion of water:**
- **(iv) Discharges of contaminants into or onto land, air, or water and discharges of water into water:**
- **(v) Any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:**
- **(vi) The emission of noise and the mitigation of the effects of noise:**
- **(vii) Activities in relation to the surface of water:**

(2) The functions of the regional council and the Minister of Conservation under subparagraph (i) or subparagraph (ii) or subparagraph (vii) of subsection (1)(d) do not apply to the control of the harvesting or enhancement of populations of aquatic organisms, where the purpose of that control is to conserve, use, conserve [sic], enhance or develop any fisheries resources controlled under the Fisheries Act 1996.

Emphasis was placed on the interpretation of particular words in s.30(2) and from this interpretation it was concluded that the council is expressly excluded from the control of harvesting or enhancement where the purpose of the control is to 'use, conserve, enhance or develop' any fisheries resource, including scallops. While local authorities must involve themselves with the sustainable management of resources, one specific resource is excluded from their jurisdiction, namely the fisheries resource. Consequently, it was submitted, that the Court cannot intervene to control either the effect of marine farming on the scallop fisheries or vice versa.

Reliance was also placed on the role of the Director General (now Chief Executive) of the Ministry of Fisheries who has exclusive right to grant marine farming permits, pursuant to s.67J Fisheries Act 1983. It was submitted that, given that all marine farms must have a marine farming permit, and the Chief Executive is not expressly subject to the decision of the Environment Court, it would give rise to inconsistencies to allow the two decision makers to make separate decisions on the same issue. Therefore, as the Chief Executive has express jurisdiction over the issue of "undue adverse effects on fishing or the sustainability of any fisheries resource", pursuant to s.67J(8) Fisheries Act 1983, the council and the Environment Court cannot include this in their jurisdiction.

It was submitted that the fisheries resource was deliberately isolated from the general jurisdiction exercised by councils and the Environment Court due to its currently stressed state, and the fact that it is a vital industry to New Zealand's economy.

Further it was submitted that if the two enactments cannot be reasonably reconciled and there is an overlap in the jurisdiction of the Chief Executive of the Ministry of Fisheries and the council/ Environment Court, then two interpretation principles apply. These are ***generalia specialibus non derogant,*** and repeal by implication. These principles were discussed in Stewart v Grey County Council [1978] 2 NZLR 577 (CA) where the conflict between mining permits and resource consents was discussed. At page 583 Richardson J states:

> **"There is no suggestion or implication that the use of land for mining purposes is also subject to other and possibly inconsistent controls imposed by territorial authorities. And it would be surprising if the Minister, having determined as he did in this case that it was in the national interest for land to be declared open for mining as if it were Crown land, and having then granted a mining licence, the Town Planning legislation could then be invoked to negate that decision. We are satisfied that would be contrary to the legislation".**

It was submitted that if the inconsistency cannot reasonably be construed so as to give effect to both provisions then it is necessary to determine which is to prevail. Given the scope for inconsistent decisions it was submitted that such inconsistency did exist. To determine which provisions would prevail it was submitted that the purposes of the Acts should be considered.

The purpose of the RMA, pursuant to s.5(1), is **"to promote the sustainable management of natural and physical resources."** The purpose of the Fisheries Act 1996, pursuant to s.8(1), is **"to provide for the utilisation of fisheries resources while ensuring sustainability."**

Both purposes relate to sustainability, but clearly the purpose of the RMA is very general, whereas the purpose of the Fisheries Act 1996 is very specific in relation to fisheries resources. On this basis it

was submitted that the Fisheries Act 1996 should prevail, removing the issue of fisheries resources from consideration under the RMA.

As a final submission, counsel for the applicant referred to s.6 Fisheries Act 1996:

> **Section 6. Application of Resource Management Act 1991-**
>
> **(1) No provision in any regional plan or coastal permit is enforceable to the extent it provides for -**
> **(a) The allocation to one or more fishing sectors in preference to any other fishing sector of access to any fisheries resources in the coastal marine area: or**
> **(b) The conferral on any fisher of a right to occupy any land in the coastal marine area or any related part of the coastal marine area, if the right to occupy would exclude any other fisher from fishing in any part of the coastal marine area.**
>
> **(2) Subsection (1) of this section does not prevent any regional plan or coastal permit authorising the erection in the coastal marine area of any fish farm structure or other structure.**

It was submitted that this section is so wide as to be applicable to the present appeal, in that the appeal seeks to determine who should have access to the area in question. It was submitted that the issue of access to a fishery resource clearly falls under the fisheries legislation, to be determined by the Ministry of Fisheries, and as such is beyond the jurisdiction of the council or the Environment Court.

It was also submitted that consideration should be given to the submission that to strike out the appeal would not deny the appellant a remedy as the matter is more properly left to be determined by the Ministry of Fisheries.

In conclusion, the applicant submitted that grounds (a) to (e) should be struck out for being outside the jurisdiction of the Court. Further the applicant invited the Court to find that the whole appeal was limited to fisheries issues and thus the whole appeal should be struck out. In the alternative, if the Court found there were issues raised which remained within the jurisdiction of the Court, it was submitted that these issues should be particularised. The basis for this submission is covered later in the decision..

The Appellant's Submissions

The appellant submitted that the Environment Court may only strike out an appeal based on the grounds in s.279(4) of the RMA, set out above. It was also submitted that the Court is generally cautious in striking out an appeal, with the discretion used sparingly. Reference was made to a Court of Appeal decision, Takaro Properties Ltd v Rowling (1978) 2 NZLR 314, where the threshold

determining when a case might be struck out is when the causes of action put forward are **"so clearly untenable that they cannot possibly succeed."**[1] Reference was also made to Adams v Joseph Banks Trust Ltd[2] where Master Williams gives a full statement of the position taken on the jurisdiction to strike out applications in the District Court.

Counsel for the appellant also referred to a statement made in Coldway Installation Ltd v North Shore City Council W 118/96, at page 3:

> **"All the relevant case law emphasises that the jurisdiction to strike out applications is to be exercised sparingly and only in cases where the court or Tribunal is satisfied that it has the requisite material before it [...] to reach a certain and definite conclusion."**

It was submitted that where the relevant law has not been settled at the highest level, or it is a novel point of law, then proceedings should be allowed to go to trial unless the case is inarguable (see Porter v NZ Guardian Trust Co Ltd[3]). It was submitted that the legal issue of jurisdiction should be raised in a full hearing, rather than at the interlocutory stage because there is no settled law on the point and the applicant has not established that there is no case to argue.

In terms of the jurisdiction of the Environment Court to hear the appeal it was submitted by the appellant that the matters raised in the notice of appeal relate to matters under the RMA, and not within the exclusive jurisdiction of the fisheries legislation. The issues on appeal relate to the effects of the activity, not to the allocation of exclusive fishing rights to a particular person. Further the appeal is not limited to the issue of access to the site, but rather involves the occupation of space which is a resource management matter. An affidavit by Mr Michael Willis Arbuckle, Chief Executive Officer of the appellant, was filed on 11 February 1998 in support of the opposition to the application to strike out the appeal. Mr Arbuckle refuted the statement in the applicant's original notice of motion that the appellant had informally advised the applicant that the appeal only related to the issue of access to the fishery.

It was submitted that s.30(2) of the RMA and s.6 of the Fisheries Act 1996 make it clear that the Ministry of Fisheries and the local authority/ Environment Court have different functions. Both s.30(2) and s.6 preserve some jurisdiction for the local authority to issue coastal permits. But it is the purpose of the controls which is the important aspect of the jurisdictional restrictions.

---

1 *Takaro Properties Ltd* v *Rowling* (1978) 2 NZLR 314, 316.
2 Unreported, 5 March 1992, High Court, Wellington CP 224/91.
3 Unreported, 31 July 1997, High Court, Dunedin, CP 136/91.

Reliance was placed on a decision of Judge Treadwell's with respect to the intersection between the RMA and the fisheries legislation: see Southern Scallop Fishery Holders v Tasman District Council W 24/94, at page 10:

> **"We do not find an overlap in the functions of a regional council and the Minister. The regional council and this Tribunal on appeal is concerned with whether or not a resource consent should be granted in terms of the management of the resources recognised by the RM Act. The Minister is concerned with the issues facing the fishing industry in respect of quotas, times of harvesting, overseas trade and matters of that kind. The Minister is furthermore concerned with the management of the fisheries resource as between the persons who wish to access that resource. It is therefore perfectly competent for a regional council to grant a resource consent and for the Minister after taking account of his, functions to refuse to issue a permit or licence for that particular activity. We do not consider any of the conditions presently imposed in this case impinge upon the matters contained in s.30."**

It was also submitted that a permit granted by the Ministry is personal to a particular fisher, whereas a resource consent is not personal unless specified as such. It was submitted that this highlights the distinction between the two jurisdictions. Further, the purposes of the two Acts are quite distinct, and there is no need for minute interpretation of the various sections to determine this.

Finally counsel for the appellant dealt with the claim that the appeal was frivolous or vexatious, or an abuse of process. The meaning of the term 'vexatious' is discussed in Ngati Kahu Trust Board v Northland Regional Council A 48/94, and it was submitted that the appellant's case did not fall within the meanings discussed therein. It was submitted that the appeal was not malicious, or brought in bad faith. The matters at issue are serious and the appellant has a legal right, as a submitter, to bring them before the Environment Court. Further, this is not an attempt to re-litigate settled issues.

It was also submitted that the appeal was not an abuse of process for similar reasons. It was emphasised that the appeal is not a delaying tactic, and it was noted that the broadness of the grounds of appeal is not a reason in itself to strike out the appeal, as noted in Casino Holdings v Wellington City Council W 125/96.

The Council's Submissions

The jurisdictional issue was summarised by the respondent as being a question of whether or not the local authority, and hence the Environment Court, has jurisdiction to decline consent to the establishment of structures in the coastal marine area due to their effect on the scallop fishery.

The council saw the applicant's argument as being based on the premise that the marine farm structures are part of the harvesting and enhancement process and that pursuant to s.30(2) the

functions of the council do not extent to controlling these structures if the purpose of the control is to 'use, conserve, enhance or develop' any fisheries resource, including scallops. It was the council's position that this was not correct.

Counsel for the council drew the Court's attention to the fact that s.30(2) of the Act only restricted a local authority with respect to functions under subparagraphs (i), (ii) and (vii) of s.30(1)(d), which left subparagraph (v) unfettered by the restriction. Under this provision it is the function of the council to control 'any actual or potential effects of the use, development, or protection of land' within the coastal marine area. That provision is consistent with the purpose of the Act, pursuant to s.5(2), where the concept of sustainable management includes safeguarding the life supporting capacity of air, water, soil and ecosystems and avoiding, remedying or mitigating any adverse effects of activities on the environment.

It was submitted by the respondent that marine farming is an activity which involves the use or development of land which is defined in s.2 as including **"land covered by water and the air space above land".** Marine farms involve structures such as anchor systems which are established on and suspended above the land being the seabed.

Under the RMA, s.2(1), both the terms 'structure' and 'raft' are given specific definitions:

> **"Structure" means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft**
>
> **"Raft" means any moored floating platform which is not self-propelled; and includes platforms that provide buoyancy support for the surfaces on which fish or marine vegetation are cultivated or for any cage or other device used to contain or restrain fish or marine vegetation: but does not include booms situated on lakes subject to artificial control which have been installed to ensure the safe operation of electricity generating facilities**

In exercising the function of controlling the effects of use or development of land it was submitted that the council is entitled to have regard to all effects (including effects on the use of the area by scallopers) of the development which the applicant proposes to establish. One acknowledged effect is an impact on the ability of fishermen to dredge an area (see Jessep v Marlborough District Council [1994] NZRMA 472, 479-480).

It was further submitted that s.6(2) Fisheries Act 1996 acknowledges this function of council by providing that they may authorise the erection any fish farm structure or other structure in the coastal marine area. It is clear from the definition of 'raft' and 'structure' and the combination of s.30(2) and s.30(1)(d)(v) RMA, and s.6(2) Fisheries Act 1996, therefore, that the issues arising from the establishment of structures in the coastal marine area, including marine farm structures, are matters for the council, and hence within the jurisdiction of the Environment Court on appeal.

The Applicant's Reply

In response to the appellant's submission that the Court decline the application to strike out the appeal, and instead hear the matter of jurisdiction at the substantive appeal it was submitted that the Environment Court, as an administrative tribunal, does not have an inherent jurisdiction so it cannot embark on an enquiry which it has no jurisdiction over. Given that the applicant has applied to have the matter considered before the substantive hearing, it was submitted that the Court must deal with the matter at this stage.

Reference was made to the Butterworths District Court Rules Commentary which discusses an alternative view from that advanced by the appellant with respect to the court's role in determining whether or not to strike out a cause of action. It was noted that even if extensive argument is required to determine if a cause of action exists, it is desirable for the Court to decide the matter at the interlocutory stage as this provides the opportunity for an appeal to a higher court to determine the matter before proceeding to a substantive hearing. In support of this proposition, the Court of Appeal decision in Attorney General v Equiticorp Industries Group Limited (In Statutory Management) [1996] 1 NZLR 528 was cited. This decision is referred to in more detail below. It was submitted that the question of jurisdiction was a matter of law alone, and in this case the 'material' was all before the Court, so the decision should not be deferred.

It was submitted that the decision in Southern Scallop Fishery Holders (supra) was based on the provisions which have since been amended so it cannot be relied on as being determinative in this case. The current provisions discussed in submissions are the result of amendments carried out in 1993 and again in 1996, including the insertion of s.67J Fisheries Act 1983, the enactment of the Fisheries Act 1996, and the amendment of s.30(2) of the RMA. It was submitted it is significant that even in considering the pre-amendment provisions, Judge Treadwell was concerned with the possibility of overlap.

Further detail was given in submissions on the purposes of the two Acts. It was submitted that animals and plants came within the definition of natural and physical resources, so generally these are covered by the RMA. However, as fish may be assumed to be included within the group termed animals, it is seen that the Fisheries Act has a very narrow focus whereas the RMA has a very broad focus. Both Acts impose obligations to maintain sustainable management of the respective resources. However, if fisheries resources are included within the ambit of the RMA then people exercising their obligations under the two enactments are bound to come into conflict. To avoid this conflict the

special statute would over-ride the general based on the maxim that the general will not derogate from the special.

Emphasis was also placed on the fact that the interpretation argument raised, based on ***generalia specialibus non derogant,*** is subsidiary to the main argument that the RMA has expressly removed fisheries resources from the jurisdiction of the regional council.

In response to submissions by the appellant, it was submitted by the applicant that the fishing permits granted under s.67J of the Fisheries Act 1983 are not personal, in that there are no personal criteria included in the assessment to be made by the Chief Executive. The basis for the assessment under the Fisheries Act 1983 is the activity, just as it would be under the RMA.

With respect to the council's submissions, objection was made to the wording used by the council in summarising the applicant's argument. The consent application refers to the occupation of space on land of the Crown that is seabed, not to the establishment of structures in the coastal marine area as submitted by the council. The disturbance of seabed and placement of a structure above it are only incidents of the occupation. It was submitted that Jessep (supra) is not authority for the council's proposition. This issue was not dealt with in Jessep, and in any event the case involved a pre-1993 amendment application.

It was submitted that s.30(1)(d)(v) refers to the effects of the use of land, not the effects of the use of a coastal marine area, which is a much narrower concept. Land does not include the water column above it. It is submitted this gives support to the applicant's position given that the fish are located in the water column, and this is included in s.30(1)(d)(i), which has been removed from the council's control with respect to the enhancement and harvesting of aquatic organisms.

The only use of land undertaken by the applicant will be drilling of the anchors, and it is submitted that this is covered by s.30(1)(d)(ii) because it involves the occupation of space on land of the Crown that is seabed, and is hence excluded by s.30(2). Similarly the rafts (as defined in the RMA and set out above) are covered by s.30(1)(d)(vii) and are also excluded.

Therefore the council's argument can be confined to the effect of the anchors, although it is noted that the control of the occupation is excluded. It is submitted that the council cannot control only the effects, without controlling the activity. Reference was made to the Court of Appeal decision in Canterbury Regional Council v Banks Peninsula District Council [1995] 3 NZLR 189, 194 where

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

McKay J states "...**it is difficult to see how a territorial authority could control the effects of use without regulating the use itself."**

Finally it was submitted that s.30(2) removes the ability of the council to consider one particular effect, namely the effect on fisheries. If the council's submission is correct then it renders s.30(2) meaningless because s.30(1)(d)(v) refers to any actual or potential effects. Again such an interpretation would deny the maxim that the general does not derogate from the special

The applicant's position is that regional councils do have a role to play in granting coastal permits for marine farms. They control the occupation of space, the activity on the surface of the water and the effects of the use of land in all cases except where to do so would be to assume the function of fisheries resource management. If the Court accepts this proposition then, it was submitted, grounds (a) to (e) of the appeal must be struck out. If the Court decides the whole appeal is only about the fishery then the appeal should be struck out entirely. If grounds (f) to (i) are seen to include matters which are not fisheries related, then an order should be made for further and better particulars, without allowing for the scope of the appeal to be widened.

Discussion

I understand the only ground raised by the application to strike out the appeal is whether the Court has the jurisdiction to enquire into the grounds of appeal put forward by the appellant in the notice of appeal. I do not understand the applicant to have challenged the validity of the appeal on any other basis, and hence I accept the appellant's submission that there are no other reasons why the appeal should be struck out, including that the use of broad terms in the notice is not a reason in itself to strike out an appeal. Therefore, this part of the decision is focused solely on the issue of jurisdiction.

The Court may only strike out an appeal if one or more of the grounds specified in s.279(4) of the RMA is satisfied. It was the applicant's submission that a lack of jurisdiction would fall into all three categories. The appellant appears to have dealt with the issue of a lack of jurisdiction only under the category of 'no reasonable or relevant case' and has sought to show that the other two grounds in s.279(4) of the RMA are not applicable. It is only necessary for the Court to determine that one of the grounds in s.279(4) of the RMA is satisfied in order to strike out the appeal. If the lack of jurisdiction is made out in respect of any of the grounds of appeal then I prefer to deal with it under the category of 'no reasonable or relevant case' as this was focus of submissions from both applicant and appellant.

It is clear from the relevant case law that the courts will exercise the discretion to strike out an appeal sparingly. I have found the Court of Appeal decision, Attorney General v Equiticorp Industries Group Limited (In Statutory Management) (supra), referred to by counsel for the applicant, helpful in this regard. After reiterating that the discretion to strike out is to be exercised sparingly, McKay J stated at page 533 :

> **"Striking out is justified only if, on the material before the Court and in the present state of evolution of the common law, the case as pleaded is so clearly untenable that the plaintiff cannot possibly succeed. If disputed questions of fact arise, the case must go to trial. If the claim depends on a question of law capable of decision on the material before the Court, the Court should determine the question even though extensive argument may be necessary to resolve it"**

Therefore, the test to determine whether a cause of action may be struck out has three aspects. The first question is whether the issue to be determined is a matter of law or fact. The second question is whether the Court has all the material or information necessary for it to determine the issue (being, in this case, whether or not the grounds of appeal lie outside the jurisdiction of the Environment Court). The third question is whether, given that the discretion to strike out is to be exercised sparingly, the cause of action is untenable or, as in this case, beyond the jurisdiction of the Court, in which case the cause of action will be struck out. In practice I would expect the second question to be answered during the pursuit of the answer to the third.

There is some force behind the appellant's submission that where the matter of law is not settled by a higher court, or it is a novel point, the matter should not be struck out unless clearly untenable. It seems there is no settled law on the exact interaction between the RMA and the Fisheries legislation (being the Fisheries Act 1983 and 1996), given that the three cases[4] which have touched on the issue have not been required to determine the matter for varying reasons, and have been overtaken by amendments to the relevant legislation in any event.

However, I am persuaded by the submissions of the applicant that where there is a right of appeal to a higher court, as there is in this case, the Court should determine the matter at this stage (if adequate material is presented to the Court to allow this approach). This would enable the parties to appeal the decision if they chose, before embarking on the expense inherent in a substantive hearing. It is on this basis that I have adopted the Equiticorp test to determine if the application for striking out should be granted.

[4] *MacNab* v *Marlborough District Council* C 30/94; *Southern Scallop Fishery Holders* v *Tasman District Council* W 24/94; *Wells* v *Marlborough District Council* W 13/95.

With respect to the first part of the test I accept the submission that the issue before the Court at this stage is a legal one, being a matter of the scope of jurisdiction of the Court, which may be determined without reference to disputed facts. With respect to the second part of the test, based on the lengthy and careful submissions filed by the three parties, I am confident that there is sufficient information before the Court to determine the matter of the jurisdiction.

It is the third part of the test which is the main issue to be determined, namely whether the Environment Court has the jurisdiction to determine a matter regarding the use of resources in the coastal marine area, based on the effects of the proposal on the scallop fishery.

The Environment Court sits in the shoes of the local authority when determining an appeal, pursuant to s.290 of the RMA. In this case it sits in the shoes of a unitary authority which is acting in its role as the regional council in considering an application for a coastal permit. The central question is the scope of the restrictions placed on a regional council's functions, with respect to determining a coastal permit application, by s.30(2) of the RMA, and s.6 of the Fisheries Act 1996.

It is clear from the legislative provisions cited above that there are different functions assigned to the Ministry of Fisheries and to the local authority/ Environment Court with respect to marine farm issues. Neither s.30(2) of the RMA nor s.6 of the Fisheries Act 1996 describes a blanket exclusion of the local authority/ Environment Court from the jurisdiction of issuing coastal permits for marine farms. In fact, a partial jurisdiction is expressly reserved for the local authority/ Environment Court.

When issuing a coastal permit for a marine farm, the local authority is exercising its functions in the context of the coastal marine area, being where the marine farm is located, pursuant to s.30(1) of the RMA. The most relevant functions with respect to marine farms are the control of land and associated natural and physical resources, the control of the occupation of space on land that is seabed, the control of any actual and potential effects of the use or development of land, and the control of activities in relation to the surface of the water.

Given that granting a coastal permit to authorise the establishment of a marine farm operation involves the control of the harvesting or enhancement of populations of aquatic organisms, three of these four relevant functions may be restricted by s.30(2) of the RMA (depending on the purpose of the control).

The council raised the argument that controls undertaken pursuant to s.30(1)(d)(v) of the RMA, being the control of the effects of the use or development of land, are not subject to the exclusion in **s.30(2)**

of the RMA. However, in the case of a marine farm, the use of the land is limited to the anchorage of the lines. The bulk of the marine farm operation falls within the activities on the surface of the water, and the occupation of space, being the seabed. These two uses are restricted by s.30(2) of the RMA, and it is clearly the intention of Parliament to restrict the local authority's functions in that regard, but only ins o far as the controls have the purpose of conserving, using, enhancing, or developing any fisheries resource controlled under the Fisheries Act 1996.

I accept the submission that the distinction between controlling the effects of a use and controlling the use itself is illusory.[5] Therefore, to control the effects of a use for the purpose of conserving, using, enhancing, or developing any fisheries resource controlled under the Fisheries Act 1996 would be to control the use itself based on a criteria which has been expressly excluded by Parliament. Not only would such an interpretation defeat the purpose of s.30(2) of the RMA, it would also invoke a strained interpretation of the section.

However, when the purpose of the controls is not to conserve, use, enhance, or develop any fisheries resource controlled under the Fisheries Act 1996, then the local authority is acting within its jurisdiction. This is reinforced by s.6(2) Fisheries Act 1996 which expressly retains the council's ability to authorise a fish farm structure in the coastal marine area.

Therefore the jurisdiction of the local authority, and hence the Environment Court, to consider matters with respect to the granting of a coastal permit to control harvesting or enhancement of aquatic organisms is limited only where the purpose is to conserve, use, enhance, or develop, any fisheries resource controlled under the Fisheries Act 1996.

Given that I accept the council's functions (and therefore the jurisdiction of the Environment Court) are restricted by s.30(2) of the RMA, it is not necessary to determine which of the two enactments would have priority in the event of an irreconcilable inconsistency. However, for the sake of completeness I record my agreement with the application of the principle of ***generalia specialibus non derogant*** in this case. I accept the submission that the fisheries resources would fall within the general definition of natural and physical resources, therefore the Fisheries Act 1996 has a very narrow focus in comparison to the broad focus of the RMA whilst both seek to sustainable manage resources. In line with the maxim that the general should not derogate from the special, it is important that the general provisions of the RMA not undermine the operation of the specific provisions of the Fisheries Act 1996. Therefore, the Fisheries Act 1996 would over-ride the RMA if the provisions were found to be inconsistent and not reasonably reconcilable.

---

[5] *Canterbury Regional Council* v *Banks Peninsula District Council* [1995] 3 NZLR 189, 194.

It remains to consider whether any of the grounds of appeal relate to the conservation, use, enhancement, or development of the scallop fishery. The applicant submitted that grounds (a) to (e) should all be struck out. However, there were no submissions on why each individual ground should be struck out. This being the case I have included the full text of the grounds of appeal as they were filed by the appellant. Having determined the scope of the jurisdiction, and bearing in mind that the discretion to strike out is to be exercised sparingly, each ground is now considered separately.

The grounds of the appeal are as follows:

"(a) The reasons for the decision record:

"The Committee considered that the accuracy of the GPS readings, as presented by Mr Wells, could not be relied upon in determining the use made of the area by commercial fishermen."

The Committee erred in not taking into account that evidence given, not only GPS was used, but also landmarks and depth soundings for the purposes of ascertaining fishing areas.

(b) The decision records:

"The loss of seabed for scallop dredging as a result of the proposed marine farm was considered to be minimal."

The Committee erred in its finding that the area "lost" to marine farming was minimal, because the area involved high quality scallop growing space and of particular importance to commercial fisherman as the evidence recorded.

(c) The decision records that the committee considered that the proposed marine farm was:

"... both in keeping with the proposed Marlborough Sounds Resource Management Plan, and consistent with Policy 1.1.1 of the New Zealand Coastal Policy Statement, in that the area has already been compromised by development and the proposal was not considered to add significantly to the adverse cumulative effects of marine farming."

The area adjoining the marine farm has not been compromised, although a consent may have been given, no marine farm has yet been established.

(d) The Committee erred in finding that:

"The proposal was not considered to add significantly to the adverse cumulative effects of marine farming."

The effect of the grant of consent will be to exclude commercial fisherpeople from the area over which the marine farm lies, and together with the cumulative effect of the presence of other farms, the effect is major.

(e) The establishment of a marine farm on the site, particularly given its dimensions, conflicts with and will have a detrimental impact upon other forms of fishery and will not promote the sustainability of the fishery resource and will have more than a minor adverse effect on the environment.

(f) A grant of consent leading as it does to the establishment of a substantial marine farm in this location is inappropriate.

(g) The decision does not accord with the purpose and principles of the Resource Management Act 1991 as set out in Part II of that Act.

(h) A grant of consent does not promote the efficient use and development of natural and physical resources.

(i) A grant of consent conflicts with the objectives and policies of the Respondent's Marlborough Sounds Resource Management Plan."[11]

Ground (a) requires a consideration of the factual basis for the claim that there is a scallop fishery. While some care must be taken over the intended use of this information, it is not beyond the jurisdiction of this Court to establish the existence of the scallop resource.

Ground (b) requires a consideration of the area "lost" to scallopers on the basis that it is of particular value to them. Central to this analysis is the use and development of the scallop resource, and this is outside the jurisdiction of this Court.

Ground (c) raises the factual issue of whether or not the area in which the farm will be located has already been compromised by development. This issue does not involve the use or development of the scallop resource and it is within the jurisdiction of this Court.

Ground (d) considers the effect of the consent to exclude commercial fisherpeople from the particular site, when considered with the adverse cumulative effects of other marine farms. While this raises the issue of cumulative effects, which is an issue to be determined under the RMA, it focuses on the impact on certain people arising from being excluded from a particular area. This involves the control of access to a fishery, which is beyond the jurisdiction of this Court to consider.

Ground (e) is focuses on the fishery itself, and its sustainability, which is the very purpose of the Fisheries Act 1996, hence it is beyond the jurisdiction of this Court to consider.

Grounds (f) to (i) are broad enough to include matters relating to the use of the scallop resource, which would put them outside the jurisdiction of this Court. However, they may also encompass matters which are squarely within the jurisdiction, and on that basis these are not struck out, but are subject to the application for further and better particulars which is dealt with later in this decision.

For the aforegoing reasons I Hereby Order the grounds (b), (d) and (e) of the notice of appeal lodged on 27 June 1996 be struck out pursuant to s.279(4) of the RMA.

The Application for Directions as to Further Particulars

The applicant submitted that the grounds (f) to (i) in the notice of appeal do not contain sufficient details to alert the applicant (or any other party) to the matters which the appellant intends to advance at the substantive hearing (these grounds are reproduced on pages 15-16 of this decision). It was submitted that the other parties are entitled to know the case the appellant intends to advance before the exchange of evidence. The applicant submitted that the Court's ability to make such an order is based on the powers found in s.267(1)(a) and (k) of the RMA. Given this power in the RMA, it was submitted that there is no need to utilise the District Court's civil procedures.

The applicant, while not wishing to limit the request for further particulars, set out four specific questions in the original notice of motion. In the applicant's reply it was submitted that at least these questions be answered.

(a) In relation to ground (f) of the Notice of Appeal that the Appellant state why and in what way **"a grant of consent leading as it does to the establishment of a substantial marine farm in this location is inappropriate".**

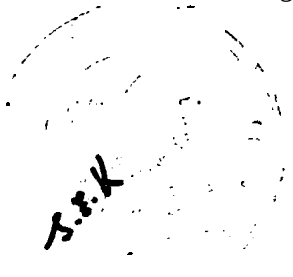
(b) In relation to ground (g) that the Appellant state why **"the decision does not accord with the purposes and principles of the Resource Management Act 1991 as set out in Part II of the Act"** and that it specify the particular 'purposes and principles'.

(c) In relation to ground (h) that the Appellant state why **"a grant of consent does not promote the efficient use and development of natural and physical resources".**

(d) In relation to ground (i) that the Appellant state why **"a grant of consent conflicts with the objectives and policies of the respondent's Marlborough Sounds Resource Management Plan"** and specify which 'objectives and policies' it alleges so conflicts with.

In response, it was submitted by counsel for the appellant that there is no jurisdiction for the Environment Court to order further particulars in response to a notice of motion filed by the applicant. This was based on premise that the applicant does not have the status of a party (as defined under the High Court Rules, used in the absence of a relevant District Court Rule) and thus cannot apply for further particulars under District Court Rule 208.

I accept the applicant's submission that with an express power in the RMA there would be no need to seek assistance from the District Court's civil procedures. However, the matter is not as straightforward as the applicant submits.



It is clear that if a prehearing conference is held, then the Environment Court enjoys wide powers to make various orders and directions, pursuant to s.267 of the RMA. Such powers include an express provision to allow the presiding judge to require further or better particulars of any matters connected with the proceedings, see s.267(3)(k) of the RMA. Other powers include the ability to direct that amendments be made to pleadings if that is considered necessary, see s.267(3)(a) of the RMA, and to define the issues to be tried, see s.267(3)(c) of the RMA. These powers are available upon request of a party at the conclusion of a prehearing conference, provided all the parties have been given an opportunity to be heard.

However, while a prehearing conference was held in this matter on 4 February 1998, the request for directions was not made pursuant to that conference, but instead it was made by way of the notice of motion filed with the Court on 26 January 1998.

Regulation 32 of the Resource Management (Forms) Regulations 1991 allows any party to apply for directions on any matter concerning the conduct of the proceedings. However, there is no corresponding power given to the Environment Court to grant general directions. The application for directions, pursuant to regulation 32, will usually relate to a matter over which the Court has a power to make the directions sought. For example, an application made pursuant to regulation 32 may request that the Court make directions pursuant to s.293 of the RMA, see Bay of Plenty Regional Council v Tauranga District Council A 68/96. A similar power is found under s.281 of the RMA. However, there is no provision in the RMA conferring on the Court the power to direct a party to provide further or better particulars based on an application pursuant to regulation 32.

Where there is no express provision determining how an application should be dealt with, the Environment Court may regulate its own proceedings in such a manner as it thinks fit, pursuant to s.269(1) of the RMA. Given that the Court has the ability to deal with such matters when raised by way of prehearing conference, and in this situation the parties have been given the opportunity to present submissions, although not by way of a hearing, it is appropriate that the Court have the power to make directions on this matter. It is also noted that while the applicant has referred to the matter as an order for further particulars, any such particulars would be requested from the appellant by way of directions from the Court, rather than an order.

The applicant submitted that unless the court was satisfied, that the notice of appeal is already in an **acceptab**le form and is not too vague and it identifies all matters which are at issue, then it is in the **interests** of justice that the order [sic] for better particulars be made. This is because it is in the

interests of justice to avoid unnecessary hearing time, and for other parties to know in advance what the case is that the appellant intends to run.

The applicant referred me to Commerce Commission v Qantas Airways Ltd (1992) 5 PRNZ 227 in which Justice Barker quotes from an earlier judgment of his in stating, at page 230:

> **"The function of particulars is to carry into operation the over-riding principle that the litigation between the patties, and particularly the trial, should be conducted fairly, openly, without surprises and, incidentally to reduce costs. Their function has been stated inter alia:**
> **(a) To inform the other party of the nature of the case he has to meet, as distinguished from the mode in which the case will be proved;**
> **(b) To prevent the other party from being taken by surprise;**
> **(c) To enable the other party to know with what evidence he ought to be prepared; and**
> **(d) To limit and define the issues."**

The appellant submitted that it is the appellant's prerogative to state the grounds of appeal as widely as it chooses, provided the other parties have adequate notice of the grounds to be relied on. It was submitted that the grounds of appeal supplied are not so vague as to prevent other parties preparing their case. It was acknowledged that by not narrowing the issues, the appellant may expose itself to a costs award if the appeal is unsuccessful, but the choice to couch the appeal in wide terms remains at the discretion of the appellant, see Casino Holdings (supra).

Counsel for the applicant also raised concerns over the possibility that the appellant would wish to advance matters not raised earlier in proceedings, in particular the issue of amenity values. It was submitted that in order to raise a matter which is outside the grounds of appeal the appellant would be required to amend their pleadings, or file a new appeal.

I accept this submission and acknowledge that the appellant is limited by the grounds set out in the original notice of appeal. To go beyond them would require an amended pleading, or a new appeal, depending on the degree of inconsistency. This is a matter to be considered when further particulars are being supplied.

The applicant also submitted that the appellant had not explained why it wishes to place matters before the Court which were not raised at the council hearing. It was submitted that to raise an issue for the first time at a ***de novo*** hearing when such issues could and should have been raised at earlier proceedings is an abuse of process. The case of Rowell v Tasman District Council W 65/94 was cited as being illustrative of such an abuse of process.

I reject this submission on the basis that the Environment Court hears the appeal ***de novo,*** and is able to receive evidence and submissions not put forward at the first instance hearing before the local

authority. Indeed without such a power the s.274 provisions, which allow certain non-parties to appear and, present evidence, would be of little effect. Therefore I cannot accept the applicant's submission that the appellant has abused the process of the Court by choosing to phrase the grounds of appeal as he has, leaving open the prospect of raising issues not dealt with at the council hearing.

Further, I see the fact situation in Rowell as different from that before me now. In that case the appellant at first supported the application, then sought to substitute an objection to a condition which would have no effect on himself or his property. The appeal was struck out on all three grounds set out in s.279(4) of the RMA and full costs were awarded against the appellant. It is my assessment that in the present case the appellant is not fundamentally altering the position presented at the council hearing.

I accept the submission of the appellant that there is a discretion as to how the grounds of appeal may be presented, provided the document complies with the provisions of the RMA and with the accompanying regulations and forms. I also accept the submission that there is no requirement for the appellant to provide evidence before the appropriate exchange of evidence, nor to provide particulars of legal submissions. However, while the appeal will not be struck out for being broadly worded, that does not prevent the Court directing that further particulars be provided in order to assist the parties and for the Court to deal with the matter in a fair and efficient manner.

Justice Barker, in Qantas Airways Ltd (supra) went on, at page 230, to state:

> **"If the only object of an application for particulars is to obtain the names of witnesses or some other detail of the opposite party's evidence, it will be dismissed; however, where the information sought is clearly necessary to enable the applicant properly to prepare for trial, the information must be given, even though it may incidentally disclose some portion of the evidence upon which the other party proposed to rely at the trial."**

I am of the view that it would be of benefit to all the parties, and the Court, if the appellant were to provide a more detailed indication of the grounds to be relied on, particularly in light of the limitation as to the Court's jurisdiction on fishing resource access, as stated above.

In terms of the further particulars sought by the applicant, I am of the view that the further particulars suggested in question (b) I find that ground (g) of the Notice of Appeal raises a legal question and the assessment of it will be based on the evidence put forward. Therefore, no further particulars on this ground are required. Similarly in relation to question (c) further particulars are not required as ground (h) will require a legal interpretation of the phrase "efficient use", and it is phrased in sufficiently clear language to signal this to the other parties.

I accept that it would be appropriate to direct the appellant to provide further particulars in answer to the questions labelled (a) and (d). However, I am of the view that there is no need for the appellant to state "why" it has included the grounds of appeal, and it is sufficient to require the appellant to provide particulars as to the way a marine farm would be inappropriate, and to specify the particular objectives and policies, as referred to in the questions.

Therefore, for the reasons given above, I Hereby Direct that the appellant provide the following further and better particulars:

1. In relation to ground (f) of the Notice of Appeal that the Appellant state in what way **"a grant of consent leading as it does to the establishment of a substantial marine farm in this location is inappropriate".**

2. In relation to ground (i) of the Notice of Appeal that the Appellant specify which 'objectives and policies' of the Marlborough Sounds Resource Management Plan it alleges the grant of the consent would be in conflict with.

The question of costs is reserved.

DATED at WELLINGTON this 4th day of March 1998

S E Kenderdine
Environment Judge