CASEBOOK

S0167-Queenstown-T02-Macdonald J-Legal Submissions

1.	Lambton Quay Properties Nominee Ltd v Wellington City Council	[2014] NZHC 878
2.	Glentanner Park (Mount Cook) Limited and others v Mackenzie District Council	PT Decision W50/94
3.	Dart River Safaris Limited v Kemp	[2001] NZRMA 433

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-007919
[2014] NZHC 878

BETWEEN	LAMBTON QUAY PROPERTIES NOMINEE LIMITED Appellant
AND	WELLINGTON CITY COUNCIL Respondent
	NEW ZEALAND HISTORIC PLACES TRUST (POUHERE TAONGA) Section 274 Party

Hearing:	31 March 2014 and 1 April 2014
Counsel:	C Anastasiou for Appellant S F Quinn for Respondent R M Devine and K M Krumdiek for Section 274 Party
Judgment:	2 May 2014

JUDGMENT OF COLLINS J

Introduction

[1] Lambton Quay Properties Nominee Ltd (the building owner) wishes to demolish its building on the corner of Lambton Quay and Grey Street in central Wellington. The building is known as the "Harcourts Building".

[2] The Harcourts Building has been assessed by the Wellington City Council (the Council) as being an earthquake-prone building under the Building Act.[1] It is also listed as a category 1 heritage building under the Historic Places Act.[2]

---

1 Building Act 2004, s 122.
2 Historic Places Act 1993, s 22(3)(a)(i).

[3] After the Council assessed the Harcourts Building as being earthquake-prone it issued the building owner with a notice in July 2012 under s 124 of the Building Act requiring the building owner to either strengthen the building or demolish it by 27 July 2027.

[4] After conducting investigations and consultations the building owner concluded that it was not economically viable to strengthen the Harcourts Building. On 4 September 2012 it applied to the Council for resource consent under the Resource Management Act for permission to demolish the building.[3] However, even though the Council had required the building owner to either strengthen or demolish the building, the consent authority declined the building owner's application to demolish the building. The consent authority's decision was primarily based upon its interpretation and application of the heritage provisions of the Council's District Plan created under the Resource Management Act.[4]

[5] The building owner appealed the consent authority's decision to the Environment Court. The Environment Court dismissed the building owner's appeal.[5] The building owner has now lodged 15 grounds of appeal in this Court. I will explain each of the building owner's grounds of appeal in paragraphs [68] to [110] of this judgment. For convenience I set out the 15 grounds of appeal in Appendix 1 to this judgment.

[6] Determining the fate of the Harcourts Building has brought into focus a number of competing considerations, the most significant of which are:

(1) the safety of the public;

(2) the risk of damage to buildings which are in close proximity to the Harcourts Building;

(3) the public interest in preserving heritage buildings; and

---

3 Resource Management Act 1991, s 88. I refer in this judgment to the body that heard the resource consent application as the "consent authority".

4 Sections 31, 72 to 77D.

5 *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2013] NZRMA 39 (EC).

(4) the private, financial and property interests of owners of heritage buildings.

[7] While I am aware of the significance of these issues, my task is confined to determining if the Environment Court made an error of law.[6]

[8] I have decided that the Environment Court made two errors of law when it dismissed the building owner's appeal. The errors occurred when the Environment Court:

(1) stated the wrong test when it said the onus on the building owner was to establish that alternatives to demolishing the building had been "exhaustively and convincingly excluded"; and

(2) concluded that the relevant provisions of the Resource Management Act and the Building Act could not be reconciled, and in doing so, failed to give adequate consideration to the risk to public safety and surrounding buildings if the Harcourts Building remains as it is.

[9] To assist in understanding why I have reached these conclusions, I shall divide my judgment into the following parts:

Part 1

Background.

Relevant legislative provisions.

Part 2

Evidence in the Environment Court.

Reasons given by the Environment Court for its decision.

---

6 Resource Management Act 1991, s 299.

Part 3

Principles which govern the way I must decide this appeal.

Reasons for allowing the appeal.

Reasons for dismissing the majority of the building owner's grounds of appeal.

Conclusion.

Part 1

Background

[10] The Harcourts Building is an eight-storey building that was constructed in 1928 for the Australian Temperance & General Mutual Life Assurance Society. The building became known as the Harcourts Building when the real estate firm, Harcourt & Co Ltd, acquired the naming rights to the building in 1984. The building is constructed with a steel frame encased in concrete with a plastered brick facade. The facade has a number of features including columns, corbels and parapets that are constructed from masonry that is not reinforced.

[11] The Harcourts Building was given a "C" classification under s 35 of the now repealed Historic Places Act 1980 on 1 October 1982. In August 1989 the building was re-classified as a "B" category building by the New Zealand Historic Places Trust (the Trust). This classification was upheld in an appeal to the High Court on 7 September 1992.[7] The building became classified as a category 1 building upon the passing of the Historic Places Act 1993. The building was listed on the heritage schedule of the Proposed Wellington City District Plan in 1994.

[12] In 1999 the building was sold to Customhouse Quay Properties Ltd. The following year it was transferred to Lambton Quay Development Ltd and then in 2002 to the current building owner. The principal shareholder and sole director of

---

7 *T & G Mutual Life Society Ltd v New Zealand Historic Places Trust* HC Wellington CP1083/90, 7 September 1992.

the building owner is Mr Dunajtschik who first became involved with the building in 1999 as a minority shareholder of the company that acquired the building that year.

[13] At the time Mr Dunajtschik and his company became involved in the ownership and development of the building, there were three adjoining buildings on Lambton Quay and Panama Street. An overall development was planned for all sites. This resulted in the demolition of the three adjoining buildings and the construction in 2002 of the 25-storey HSBC Tower on the corner of Panama Street and Lambton Quay.

[14] Part of the HSBC Tower encroaches on the title to the land occupied by the Harcourts Building. The encroachment involves part of the HSBC Tower "dove tailing" into the light shaft of the Harcourts Building. At the time consent was given to this development the building owner agreed to retain and refurbish the Harcourts Building. The refurbishment work on the Harcourts Building was carried out in 2000 at a cost of $4.5 million.

[15] On 4 September 2010 Christchurch suffered the first of a series of earthquakes which included a devastating earthquake in that city on 22 February 2011. Those events had a significant impact on the assessment of earthquake risks in earthquake-prone areas such as Wellington.

[16] On 27 July 2012 the Council served the building owner with a "Earthquake-Prone Building Notice" under s 124(1)(c) of the Building Act (Building Act Notice). The Building Act Notice classified the building as earthquake-prone[8] and required the building owner by 27 July 2027 to either:

> (a) strengthen the building to a sufficient degree so that it is not earthquake-prone; or
>
> (b) demolish all or part of the building, so that the remainder of the building (if any) is not earthquake-prone.

---

[8] Section 122(1) of the Building Act 2004 explains that earthquake-prone buildings are those likely to collapse causing injury or death, or damage to any other property, during or following a moderate earthquake. A moderate earthquake is defined in reg 7 of the Building (Specified Systems, Change to Use, and Earthquake-Prone Buildings) Regulations 2005. Under that regulation a moderate earthquake is one that would cause shaking to a building that is one-third of the strength of a new building at that site.

[17] An earthquake-prone building is one that fails to meet 34 per cent of the New Building Standard (NBS).[9]

[18] The Council initially assessed the building at four per cent of the NBS. The building owner engaged civil engineers to evaluate the Council's initial assessment of the extent to which the building complied with the NBS. Following consultations with the building owner's engineers the Council revised its assessment of the building to 17 per cent of NBS.

[19] On 4 September 2012 the building owner applied to the Council for resource consent to demolish the Harcourts Building. It will not apply for consent to build a replacement building until it knows if it can demolish the building.[10]

[20] The building owner's application was opposed by the Trust, and six other individuals and entities,[11] but supported by the Council's planning manager and senior consents planner. The support of the Council's senior planners was subject to conditions, including the granting of resource consent for a replacement building for the site.

[21] On 25 February 2013 Hearing Commissioners,[12] who were delegated by the Council to make the Council's decision, concluded that a compelling case had not been made to justify demolition of the building.[13]

[22] Accordingly the application for resource consent to demolish the building was declined.

[23] The building owner then appealed the consent authority's decision to the Environment Court.[14] When hearing an appeal, the Environment Court has the same

---

9 "New Building Standard" is the current earthquake design level for a new building as specified in Standards New Zealand *NZS 1170.5:2004 Structural Design Actions Part 5: Earthquake Actions – New Zealand* (22 December 2004).

10 In a preliminary decision the Environment Court said it was not necessary for the building owner to apply for resource consent to build a replacement building in order to enable the consent authority to assess the building owner's application to demolish the Harcourts Building. See *Lambton Quay Properties Nominee Ltd v Wellington City Council* [2013] NZEnvC 147.

11 The Trust is the only one of the original opponents that has participated in this appeal.

12 Appointed pursuant to s 34A of the Resource Management Act 1991.

13 Report of Hearing Commissioners CIV-2013-485-7919, 25 February 2013 at [268].

"power, duty, and discretion" as the consent authority,[15] although the Environment Court must also have regard to the decision which is the subject of the appeal.[16]

Relevant legislative provisions

[24] The relevant provisions of the Resource Management Act are contained in ss 5, 6, 7, 77A, 87A(3), 104 and 104C. The heritage provisions of the Council's District Plan created under the Resource Management Act are also relevant.

Section 5 of the Resource Management Act: purpose

[25] Section 5 provides:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety …

Section 6 of the Resource Management Act: matters of national importance

[26] Section 6 provides for recognition of matters of national importance. It provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:
>
> …

---

14 Resource Management Act 1991, s 120.
15 Section 290(1).
16 Section 290A.

Section 7 of the Resource Management Act: other matters

[27] Section 7 sets out other matters that those exercising functions and powers under the Resource Management Act are to have particular regard to. They include:

> ...
>
> (aa) the ethic of stewardship:
>
> (b) the efficient use and development of natural and physical resources:
>
> ...
>
> (c) the maintenance and enhancement of amenity values:
>
> ...
>
> (f) maintenance and enhancement of the quality of the environment:
>
> (g) any finite characteristics of natural and physical resources:
>
> ...

Section 77A of the Resource Management Act: categorisation of activities

[28] Section 77A enables the Council to categorise the activities to which its District Plan relates. The activities that can be provided for in a District Plan are set out in s 77A(2) of the Resource Management Act. Those activities were explained in the following way by Randerson J in *Auckland City Council v The John Woolley Trust*:[17]

> a) Permitted activities (which do not require any resource consent);
>
> b) Controlled activities (which require a resource consent but must be granted unless there is insufficient information to determine whether the activity is a controlled activity);
>
> c) Restricted discretionary activities (which are subject to the particular restrictions under s 104C);
>
> d) Unrestricted discretionary activities (where the full range of considerations under s 104 undoubtedly apply);
>
> e) Non-complying activities (which are subject to all the provisions of s 104 and the further particular restrictions in s 104D); and

---

[17] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC) at [30].

f) Prohibited activities.

Section 87A of the Resource Management Act: restricted discretionary activities

[29] Section 87A was passed in 2009 and replaced s 77B, which had been enacted in 1993. Section 77B introduced the concept of restricted discretionary activities and required a consent authority to specify in its District Plan matters to which it had restricted its discretion when *declining* a resource consent application.

[30] In *Woolley*, Randerson J had to consider the relationship between Part 2 of the Resource Management Act which sets out the purposes and principles of the Resource Management Act,[18] and the restricted discretionary activity provisions of the Resource Management Act. Randerson J said that the provisions of Part 2 could not be:[19]

> ... used effectively to override the specific provisions of s 77B(3) ... To permit Part 2 matters to be taken into account as additional grounds to decline consent for a restricted discretionary activity would be inimical to the very nature of such an activity and the strictly confined powers available to the consent authority.

Randerson J held, however, that the provisions of Part 2 of the Resource Management Act could be taken into account in deciding to grant a restricted discretionary activity.[20]

[31] The legislation now refers to a consent authority's power to grant consent in addition to declining consent. Section 87A(3) provides:[21]

---

18 See [25]-[27] of this judgment.

19 *Auckland City Council v John Woolley Trust*, above n 17, at [44].

20 At [45].

21 Section 87A(3) was based on a recommendation in a report from an "Experts Panel to Local Government and Environment Select Committee on Drafting Accuracy Issues" at [101]-[102]. The authors of the report said:

> In relation to restricted discretionary activities, we understand that, in *Woolley*, Randerson J held the matters in Part 2 were relevant in deciding to grant consent to a restricted discretionary activity but they were not relevant when deciding to refuse consent. This was because section 77B(3)(c) of the RMA referred only to declining a consent. In other words, the Judge's decision on this issue was not based on the wording of s 104C.
>
> It is proposed that, in new section 87A(3) (to replace section 77B), both declining and granting of consent are covered. This seems to us to completely negate the *Woolley* judgment.

The Expert Panel's recommendation was adopted by Parliament's Local Government and Environment Committee, which explained in the commentary to the Resource Management

(3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—

(a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

Section 104 of the Resource Management Act: consideration of applications

[32] Section 104 applies to all resource consent applications. It provides that:

(1) When considering an application for a resource consent ... the consent authority must, subject to Part 2, have regard to—

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

...

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Section 104C of the Resource Management Act: determination of applications for restricted discretionary activities

[33] Section 104C provides that:

(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

...

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

...

(Simplifying and Streamlining) Amendment Bill 2009 that the intent of s 87A(3) of the Act was to reverse the effect of the High Court's judgment in *Woolley*.

The District Plan

[34] Rule 21A.2.1 of the Council's District Plan stipulates that demolition of any listed heritage building is a restricted discretionary activity.

[35] The heritage objective and policies of the District Plan are expressed in the following way:[22]

> **OBJECTIVE**
>
> 20.2.1 To recognise the City's historic heritage and protect it from inappropriate subdivision use and development.
>
> **POLICIES**
>
> 20.2.1.2 To discourage demolition, partial demolition and relocation of listed buildings and objects while:
>
> - acknowledging that the demolition or relocation of some parts of buildings and objects may be appropriate to provide for modifications that will result in no more than an insignificant loss of heritage values; and
>
> - giving consideration to total demolition or relocation only where the Council is convinced that there is no reasonable alternative to total demolition or relocation.

[36] The District Plan sets out 22 non-exhaustive "assessment criteria" that the "Council will have regard to" when considering an application for resource consent to demolish a heritage building. For present purposes it is necessary to set out only four of those assessment criteria:

> 21A2.1.8 The extent to which the work is necessary to ensure structural stability, accessibility, and means of escape from fire and the extent of the impact of the work on the heritage values of the building. The Council will seek to ensure that in any case every reasonable alternative solution has been considered to minimise the effect on heritage values.
>
> ...
>
> 21A.2.1.15 The extent to which the building object has been damaged by fire or other human generated disaster or any natural disaster.
>
> ...

---

[22] The objectives, policies and assessment criteria are incorporated into the District Plan pursuant to s 75(2) of the Resource Management Act 1991.

21A2.1.21	Whether adaptive reuse of a listed building or object will enable the owners, occupiers or users of it to make reasonable and economic use of it.
21A2.1.22	The public interest in enhancing the heritage qualities of the City and in promoting a high quality, safe urban environment.

The Building Act 2004

[37] Two aspects of the Building Act were referred to during the course of submissions.

[38] First, the effect of s 115 of the Building Act is that if the use of the building were to change to, for example, a hotel or an apartment complex, then the building would need to comply "as nearly as is reasonably practicable" with 100 per cent of the NBS.

[39] Second, the consequences of the building owner failing to comply with the Building Act Notice could include:

(1) Prosecution of the building owner for failing to comply with the Building Act Notice.[23]

(2) The Council seeking an order from the District Court authorising it to carry out the work specified in the Building Notice, including, in this case, demolition of the building. Any order of the District Court might include a requirement that the building owner meet the costs incurred by the Council in carrying out the work specified in the Building Act Notice.[24]

---

23 Building Act 2004, ss 124(3) and 128A.

24 Section 126(3).

Part 2

Evidence in the Environment Court

[40] The Environment Court had the benefit of extensive evidence from 21 witnesses, including expert witnesses who gave evidence on behalf of the building owner, the Council and the Trust. As the appeal before me is confined to questions of law, I shall only briefly explain the key elements of the evidence before the Environment Court.

Building owner

[41] Mr Dunajtschik gave evidence in the Environment Court. He explained that if the building were demolished the building owner intended to either:

(1) construct an extension of the HSBC Tower on the site occupied by the building and integrate the new structure into the HSBC Tower; or

(2) construct a separate stand alone building on the building site similar in design and standard to the HSBC Tower.

[42] In his evidence Mr Dunajtschik explained that:

(1) Prior to the Christchurch earthquakes the building was valued by Quotable Value at $19.5 million. In its most recent report Quotable Value assessed the building as having a $10 million value.

(2) Six floors of office tenants moved out of the building within a year of the Christchurch earthquakes.

(3) At the present time there are approximately 16 people working in the building compared to approximately 400 when the building was fully tenanted.

(4) Two years of consultation with experts has led him to conclude that strengthening the building or retaining the facade as part of a re-development are not commercially viable options.

(5) Alternative use options that have been considered include creating the building into a hotel, apartments or university student hostel. None of those options proved to be commercially viable.

(6) He has tried to reach an accommodation with the Trust but has not succeeded. His efforts included offering what was referred to as a "set off" proposal to contribute to restoration of St Gerard's Monastery in Oriental Bay and buildings on Cuba Street.

(7) No one has been prepared to purchase the building for what he considers to be a fair price.

(8) The building is not insured and is probably uninsurable.

(9) Rental from tenants in the property is now significantly less than the Council's rates of $260,433 per annum.

(10) "If the property was someone's only major investment they would be bankrupt by now".[25]

(11) The building owner would prefer to let the building stand as it is rather than sell it for what it considers to be an unfair price or undertake uneconomic strengthening and restoration work.

[43] Mr Corleison, a qualified valuer, gave evidence for the building owner. Mr Corleison is the sole shareholder of Robert Fisher Associates Ltd, which engages in the development, leasing and management of commercial properties. Mr Corleison is a business associate of Mr Dunajtschik. Mr Corleison has worked in the building since 1981 and with the building owner in managing the building and the HSBC

---

[25] Statement of evidence of M Dunajtschik, 15 July 2013 at [32].

Tower project. Mr Corleison was able to explain recent developments in relation to the building from the building owner's perspective. Mr Corleison's evidence included:

(1) An explanation that since the Christchurch earthquakes there has been:[26]

> a flight of tenants from the Harcourts Building. The Housing New Zealand's lease expired in 2010 and [it] was unwilling to take up a new lease in the building. A number of other tenants followed suit. All attempts to fill the vacant space left by the departing tenants have been unsuccessful ... As a result ... only 1 office floor, a small portion of the second floor and the penthouse are occupied.

(2) Attempts have been made to sell the building. These efforts have included assessments of the feasibility of turning the building into a hotel and a university student hostel. These assessments concluded the proposed re-developments were commercially unviable.

Engineering evidence

[44] Four civil engineers gave evidence in the Environment Court. They were Mr Clark and Mr Ian Smith, who gave evidence for the building owner and Mr Ashley Smith and Mr Cattanach, who gave evidence for the Trust.

[45] Mr Clark, a structural engineer, was engaged as an independent consultant – on the recommendation of the Trust to provide a written report on the "overall earthquake resilience capacity" of the Harcourts Building. Mr Clark provided the Environment Court with a very comprehensive report in which he assessed the building as having a "moderate risk" of sustaining significant damage in an earthquake. He also concluded there was a high probability of "pounding" between the Harcourts Building and the HSBC Tower in a severe earthquake.

[46] Mr Ian Smith is a consultant engineer with extensive experience in upgrading earthquake-prone buildings. In his first statement of evidence, Mr Ian Smith provided the Environment Court with a thorough analysis of the way the Harcourts

---

[26] Statement of evidence of G Corleison, 15 July 2013 at [57]-[58].

Building was constructed and its likely performance in a moderate earthquake. Mr Ian Smith explained that the unreinforced masonry elements of the building "are brittle in nature and will fail suddenly."[27] As a consequence, the building will likely suffer severe damage in a moderate earthquake unless a substantial and robust new structure is added.[28]

[47] Mr Ian Smith explained the way the Harcourts Building is likely to perform in a moderate earthquake based upon the results of a computer analysis using Extended Three Dimensional Analysis of Building Systems (ETDABS). Based on the detailed ETDABS analysis Mr Ian Smith believes "there is a likelihood of failure of the existing building in a moderate earthquake".[29] He explained the mode of failure will likely start with hidden masonry infill walls giving way after which the riveted steel joints in the structure will start to yield. In his assessment continued earthquake shaking, even at a moderate level, will cause a significant twist in the building at the first floor at which "point there is a real possibility that the building columns under the facade will not recover".[30]

[48] Mr Ian Smith advised that:[31]

> Even if overall collapse does not occur in a moderate earthquake the calculations show that the facade elements [will] fail and are likely to fall off the building permanently causing injury to life and other property.

[49] Mr Ashley Smith, a structural engineer, advised it was not possible to reach a conclusive decision about whether the building is earthquake-prone, but he did agree that improvement was needed. Mr Ashley Smith said the masonry elements of the facade needed to be separated and/or restrained and the potential for the building to pound into the HSBC Tower needed to be reduced or eliminated.

[50] Mr Ashley Smith did not have the benefit of a site inspection when he reached these conclusions. However, he did undertake a "brief walk-through" inspection on 8 August 2013. After that inspection Mr Ashley Smith concluded that

---

27 Statement of evidence of I Smith, 15 July 2013 at [64].
28 At [34].
29 At [64].
30 At [65].
31 At [66].

the recent cracks caused by the Cook Strait sequence of earthquakes did not render the building uninhabitable.

[51] Mr Cattanach, a structural engineer, also gave evidence for the Trust. Mr Cattanach participated in the same "walk-through" inspection of the building as Mr Ashley Smith. In his evidence Mr Cattanach explained that he thought the building was a "good candidate for strengthening from a structural perspective".[32]

[52] The four engineers prepared a joint statement in which they agreed that:

(1) because of its relatively low strength the building must be strengthened;

(2) the risk of pounding between the building and the HSBC Tower should be addressed in any strengthening programme; and

(3) further investigations needed to be carried out to ascertain the extent of the damage caused by cracks in the building associated with the Cook Strait sequence of earthquakes.[33]

[53] The four engineers also recorded that they disagreed on:

(1) the extent of the strength of the building prior to the Cook Strait sequence of earthquakes;

(2) the likely extent of cracking beyond that which could be seen following the Cook Strait sequence of earthquakes; and

(3) "what level of strength should be targeted for the building".[34]

---

32 Statement of evidence of A Cattanach, 29 July 2013 at [9].

33 In mid-2013 Wellington was affected by a series of earthquakes in Cook Strait, the most powerful of which occurred on 21 July 2013.

34 Statement of evidence of Engineering Experts, 9 August 2013 at [10].

Quantity surveyors' evidence

[54] Mr Cooke, a principal of the quantity surveying firm Mallard Cooke, gave evidence for the building owner. He was appointed on the advice of the Trust to prepare an independent report. Mr Cooke concluded that it would cost approximately:

(1) $10,850,000 plus GST to strengthen the building to 100 per cent of the NBS.

(2) $10,250,000 plus GST to strengthen the building to 67 per cent of the NBS.

(3) $5,750,000 to $6.5 million plus GST to retain the facade and certain other architectural features of the building and demolish around them.

Valuation evidence

[55] Mr Washington, a director of Colliers International (Wellington Valuations) Ltd, assessed the commercial viability of implementing the strengthening work identified by Mr Clark and costed by Mr Cooke. Mr Washington concluded that the commercial market value of the building "as is" was nil and that the current market value of the building if strengthened to 100 per cent of the NBS would be approximately $14 million. Mr Washington concluded that:[35]

> The strengthening and reinstatement works [for the building] are not commercially viable and the highest and best use of the property is as a re-development site cleared of the existing building.

[56] Mr McColl, a registered valuer, and Mr Butchers, a director of Valuation & Advisory Services, of Bayleys Valuations Ltd (the authors of the Bayleys report), prepared a commercial viability valuation of the building in October 2012 at the request of the Trust. The authors of the Bayleys report were asked to consider three scenarios:

---

[35] Statement of evidence of A P Washington, 15 July 2013 at [35.1].

(1) strengthening the existing building;

(2) strengthening the existing building to 100 per cent NBS and adding a four floor storey addition above the existing structure; and

(3) an approximately 80 metre high multi-storey structure built to 100 per cent of the NBS that would retain the Lambton Quay and Grey Street facades of the building and the existing lobby and stairs to the second floor.

[57] The authors of the Bayleys report concluded none of these scenarios were commercially viable.

[58] Neither the Council nor the Trust produced evidence from a registered valuer. The Trust did, however, produce evidence from Mr Dowell and Mr McDermott, both of whom gave evidence about the commercial viability of strengthening the building:

(1) Mr McDermott, a consultant in development planning, concluded "that the public economic benefits of strengthening the Harcourts Building outweigh the commercial benefits of demolishing it".[36]

(2) Mr Dowell, Vice-President of Historic Places Aotearoa who has a diploma in valuation and property management, concluded that "reasonable commercial use could be made of the Harcourts Building if it were to be retained and strengthened".[37] He also thought "that retaining substantial elements of the Harcourts Building and integrating these with a new building is likely to be commercially viable".[38]

Economic evidence

[59] Mr Copeland, a consulting economist, provided expert economic evidence for the building owner. Mr Copeland disagreed with the analysis undertaken by

---

36 Statement of evidence of P McDermott at [7(G)].
37 Statement of evidence of P Dowell, 29 July 2013 at [65].
38 At [65].

Mr McDermott. Mr Copeland concluded that the economic benefits of demolishing the building outweighed the benefits of retaining and strengthening the building.

Planning/urban design evidence

[60] Mr Leary, a member of the New Zealand Institute of Planners and the New Zealand Institute of Surveyors, gave evidence for the building owner. Mr Leary is a director of Spencer Homes Ltd. Mr Leary concluded that if the building owner's application was declined then there was potential for significant long-term adverse effects and safety risks for the community.

[61] Mr Blunt is a registered architect and urban designer. He gave evidence for the Trust. Mr Blunt concluded that the evidence did not support demolition of the building. Mr Blunt succinctly summarised his approach by stating "never replace something unless you can replace it with something better".[39]

Heritage evidence

[62] The Environment Court heard evidence from five witnesses with expertise in architectural heritage:

(1) Mr Salmond is an architect with considerable experience in the field of conservation architecture. He gave evidence for the building owner. Mr Salmond acknowledged the heritage significance of the building. In his evidence Mr Salmond recognised that the question of cost and who pays for the retention and strengthening of the building is a material consideration. Mr Salmond appreciated that the costs of making the building compliant with New Zealand building standards would not be commercially viable.

(2) Mr Kelly is a historian and heritage consultant, who gave evidence for the Council. He concluded the building is:[40]

---

39 Statement of evidence of G Blunt, 29 July 2013 at [74].
40 Statement of evidence of M Kelly, 25 July 2013 at [52].

> a significant heritage building, well worthy of permanent protection ... It is a notable example of inter-war architecture, with two richly decorated prominent facades which give it a strong presence on its corner site. It is a key building in Wellington's architectural heritage, being arguably the city's best example of a Chicago-style design.

(3) Ms Neill is the "general manager-central region" of the Trust. In her evidence Ms Neill explained that the Trust "wants a safe heritage-orientated solution to the building".[41] Ms Neill explained the Trust's concerns over the possibility of demolition of the building and the irreversible loss of a valuable historic heritage.

(4) Ms Dangerfield is an architect and a heritage advisor to the Trust. She advised that the building has "outstanding or special heritage significance", which "makes it worthy of retention in some way".[42]

(5) Mr McClean is a senior heritage policy advisor for the Trust. Mr McClean explained that in his expert opinion the building should not be demolished and that it should be strengthened or, at least, the facade should be retained as part of any development.

[63] Mr Salmond, Ms Dangerfield and Mr Kelly prepared a joint experts' statement. They agreed the building is a heritage building worthy of being preserved. They all agreed that if the building is to be demolished there would be a total loss of heritage values, but that a full structural upgrade of the building would result in the substantial retention of the building's heritage qualities. They also recognised that alternative strategies which combine the street walls of the building with a new building would ensure retention of some of the building's heritage values.

---

41 Statement of evidence of A Neill, 29 July 2013 at [64].

42 Statement of evidence of A Dangerfield, 29 July 2013 at [74].

Evidence of alternative uses

[64] Mr Dunajtschik, Mr Corleison, Mr Clark and Mr Leary, amongst others, gave evidence about the various options that have been considered for the building. Those options were summarised in the following way by Mr Leary:[43]

(1) Keeping the building as is.

(2) Strengthening the building to 100 per cent of NBS.

(3) Strengthening the building in conjunction with the adjacent HSBC Tower.

(4) Strengthening the building to 67 per cent of NBS.

(5) Strengthening the building to 100 per cent of NBS and adding four floors.

(6) Retaining the facade, demolishing the interior of the building and constructing a new building behind the facade to a height of 80 metres.

(7) Replicating the facade and lightweight materials when constructing a new building.

(8) Retaining the corner section of the building and constructing a new building on the site.

(9) Converting the existing building into a hotel.

(10) Converting the existing building into apartments.

(11) Converting the existing building into student accommodation.

---

[43] Statement of evidence of I Leary, 15 July 2013 at [131].

Reasons given by the Environment Court for its decision

[65] I shall explain in further detail aspects of the Environment Court's decision when I explain my reasons for allowing the appeal, and my reasons for disallowing the majority of the building owner's grounds of appeal. For present purposes I shall summarise the Environment Court's decision by quoting paragraph [140] of its judgment in which it distilled its reasons for dismissing the building owner's appeal to seven points:[44]

> [1] The building has high heritage values, because of its architectural character and design. Its exterior is original and in a very good state. It contributes strongly to streetscape.
>
> [2] It does have significant seismicity issues and, if it is to be retained, it must be brought up to an acceptable percentage of NBS. We do not accept that the possibility of this building pounding the HSBC Tower, of itself, adds to a justification to demolish.
>
> [3] The District Plan provisions relevant to heritage are very strongly expressed, discouraging demolition and having total demolition to be considered only when the decision-maker is convinced that there is no reasonable alternative.
>
> [4] Sections 6 and 7 of the [Resource Management Act] are also strongly expressed – requiring the decision-maker to consider what might be an appropriate use or development that would overcome the nationally important protection of historic heritage, which is otherwise to be recognised and provided for, and requiring particular regard to be had to the s 7 matters we have discussed.
>
> [5] We recognise that in its present state the building cannot support itself financially, let alone make an acceptable return on funds invested for its owner. But nor is that a reason, without more, to justify demolition. The District Plan, and s 6, require the alternatives to be exhaustively and convincingly excluded before demolition can be justified.
>
> [6] While possible reuse as an office/retail building, and other adaptive reuses, have been considered, we cannot be satisfied that they have been explored other than with a handicap imposed by a rigidly set bottom-line figure being demanded for the land and building as they are.
>
> [7] The Historic Places Trust, admittedly as a second best, has indicated that a sensitive retention of the building's facades may be acceptable, but that position has not been adequately explored.

---

44 *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 5, at [140].

Part 3

Principles which govern the way I must decide this appeal

[66] In *Bryson v Three Foot Six Ltd*, the Supreme Court discussed what amounted to a question of law for appeal purposes.[45] The Supreme Court has revisited this topic on other occasions such as in *R v Gwaze*[46] and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*.[47] From these authorities, and for present purposes I note that an error of law may arise if the Environment Court has:

(1) misdirected itself when making a decision pursuant to the requirements of the Resource Management Act or any other relevant legislation;[48]

(2) failed to take into account a matter required by the Resource Management Act or any other relevant legislation; or

(3) reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error of law".[49]

[67] The building owner faces a high hurdle in relation to any ground of appeal based on the contention that the Environment Court did not give appropriate weight to the evidence put before it. My task is not to question the weight which the Environment Court placed on the evidence, but to determine whether or not any one of the 15 grounds of appeal advanced by the building owner constitutes a *material* error of law.

---

45 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]-[27].
46 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [50].
47 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [51].
48 *Bryson v Three Foot Six Ltd*, above n 45, at [24].
49 At [26].

Reasons for allowing the appeal

First successful ground of appeal

[68] The sixth and 10th grounds of appeal allege:

(1) The Environment Court acted unreasonably in its interpretation of the expressions, "is convinced there is no reasonable alternative to total demolition", and "every reasonable alternative solution has been considered" in the Council's District Plan.[50]

(2) The Environment Court erred by applying the wrong legal testing in considering the building owner's appeal and setting the bar to granting consent at such a high level that the practical consequence was to make the granting of consent impossible.

[69] These two grounds of appeal can be conveniently dealt with together.

[70] In the conclusion of its judgment, the Environment Court said "the District Plan, and s 6 [of the Resource Management Act] require the alternatives to be exhaustively and convincingly excluded before demolition can be justified".[51]

[71] In my assessment the Environment Court erred when it said the alternatives to demolition were to be "exhaustively and convincingly excluded". This test does not reflect s 6 of the Resource Management Act or the District Plan.

Section 6 of the Resource Management Act

[72] Section 6 of the Resource Management Act requires those who exercise powers under the Resource Management Act to recognise and provide for, amongst other matters, "the protection of historic heritage from inappropriate subdivision and development". The parties and the Environment Court have proceeded on the basis

---

50 Clauses 20.2.1.2 and 21A.2.1.1.8.

51 *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 5, at [140.5].

that demolition of the Harcourts Building is a "use" or "development" within the meaning of s 6 of the Resource Management Act.[52] I agree with this approach.

[73] In this case s 6 of the Resource Management Act requires the consent authority to ensure heritage buildings are only demolished in appropriate circumstances. "Appropriate" in this context means the consent authority approves a demolition of a heritage building only when it is "proper" to do so.[53] In my assessment this requires the consent authority to ensure its consideration of an application to demolish a heritage building is founded upon an assessment of whether or not demolition is a balanced response that ensures all competing considerations are weighed, and the outcome is a fair, appropriate and reasonable outcome.

[74] Section 6 of the Resource Management Act does not mean a consent authority is required to "exhaustively and convincingly exclude" alternatives to demolition before granting resource consent to demolish a heritage building. The statutory requirement for a consent authority to recognise and provide for the protection of historic heritage is a less onerous obligation than the Environment Court's "exhaustively and convincingly" test for excluding alternatives to demolition of a heritage building. In my assessment the Environment Court overstated the effect of s 6 of the Resource Management Act.

The District Plan

[75] The Environment Court also misinterpreted the meaning of cl 20.2.1.2 of the heritage provisions in the District Plan. That clause required the consent authority to give "consideration to total demolition [of the Harcourts Building] only if it was convinced that there [was] no reasonable alternative to total demolition ...".

[76] The Environment Court had recognised at other places in its judgment that the District Plan allowed consideration of "... total demolition ... only where the

---

52 *Universal College of Learning v Wanganui District Council* [2010] NZEnvC 291 at [142].

53 Definition of "appropriate" in The New Oxford English Dictionary, Lesley Brown (ed), Clarendon Press, Oxford 1993.

decision-maker is convinced there is no reasonable alternative".[54] However, when the Environment Court stated in bullet point five of paragraph [140] what it understood to be the requirements of the District Plan, it employed words that did not accurately reflect the requirements of the District Plan. By omitting any reference to "reasonable alternatives" to demolition in bullet point 5 of paragraph [140] in its judgment, the Environment Court imposed a test that is materially higher than the threshold set by cl 20.2.1.2 of the District Plan.

[77] I have carefully considered whether or not the Environment Court's erroneous statement of the test in bullet point five of paragraph [140] of its judgment was merely an unintended oversight. In considering this issue I have been driven to conclude that the Environment Court must have deliberately used the words that are in bullet point five of paragraph [140] of its judgment. However the Environment Court provided no explanation for departing from its earlier correct statements of the meaning of cl 20.2.1.2 of the District Plan.[55]

[78] Thus I have been faced with a situation in which the Environment Court has stated two tests that it might have applied when considering the building owner's case. Those two tests are not reconcilable because the test set out in bullet point five of paragraph [140] of the Environment Court's decision makes no reference to reasonable alternatives to demolition which is a clear requirement of s 6 of the Resource Management Act and cl 20.2.1.2 of the District Plan.

[79] In this situation I must allow the appeal for two reasons:

(1) I cannot decide which of the two tests was actually applied by the Environment Court. Because I am left in genuine doubt about which test the Environment Court actually applied I must allow the appeal.

---

54 *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 5, at [140.3]. See also [108] and [139].

55 There is also no explanation for the Environment Court departing from the analysis undertaken by the Hearing Commissioners in the Report of Hearing Commissioners, above n 13, at [275]:

> ...Whilst we agree with the submission of the [building owner] that it is not required to exhaustively consider all alternatives or conduct a full cost-benefit analysis of alternative locations and methods, we do not consider that all reasonable alternatives have been adequately considered.

(2) If the Environment Court applied the test recorded in bullet point five of paragraph [140] of its judgment then it applied the wrong legal test when considering the building owner's appeal. By applying the wrong legal test it acted unfairly by requiring the building owner to discharge too high a burden.

Second successful ground of appeal

[80] The eighth ground of appeal alleges that the Environment Court erred by determining that "the tension" between the Building Act and the Resource Management Act was not resolvable.

[81] The Environment Court did not attempt to reconcile the two legislative regimes. Instead, the Environment Court concluded that s 124 of the Building Act could not be reconciled with the provisions of the Resource Management Act that govern the consent authority's consideration of the building owner's application to demolish the building. The Environment Court resigned itself to what it described as:[56]

> ... another demonstration that [the Resource Management Act] provides mechanisms to manage development from the point of view of effects on the environment, and the other statute may independently govern other aspects of the use of resources. Having a permit under one statute will not necessarily be matched by one under another.

[82] The Environment Court referred to the "tension" and "inherent irony" in the requirements of s 124 of the Building Act and the consent provisions of the Resource Management Act.[57] There is obvious "inherent irony" between the earthquake-prone building provisions of the Building Act and the decisions made to date in this case. On one hand the Council has issued the Building Act Notice requiring the building owner to strengthen or demolish the Harcourts Building. Failure to comply with the Building Act Notice may result in the building owner being prosecuted and/or the Council applying for authority to demolish the building. On the other hand, the consent authority, acting under delegated authority from the same Council, has decided to decline the building owner's application for resource consent to demolish

---

56 *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 5, at [133].
57 At [132].

the building because of the way in which the heritage provisions of the District Plan have been interpreted and applied.

[83] The Trust submitted that the approach taken by the Environment Court on this point was consistent with that followed by Tipping and Chisholm JJ in *Christchurch International Airport Ltd v Christchurch City Council*.[58] In that case the Christchurch City Council wanted to use the powers conferred on it by the Resource Management Act to impose conditions over and above those powers set by the now repealed Building Act 1991 on those who wished to build homes near the Christchurch Airport so as to restrict the effects of noise from the airport on their homes. The Full Court held that the power conferred on the consent authority by the Resource Management Act that enabled it to impose conditions when granting resource consents could not negate the express provisions of the Building Act 1991, which limited building performance criteria to those contained in the Building Code. Tipping J said:[59]

> The only sensible and effective way to harmonise the potentially conflicting provisions of ... the Building Act [1991] and, ... the Resource Management Act, is to focus on the different purposes of each statute. Reduced to the simplest level relevant to the present case, the Building Act allows a council to control building work in the interests of ensuring the safety and integrity of the structure, whereas the Resource Management Act allows the council to impose controls from the point of view of the activity to be carried out within the structure and the effect of that activity on the environment and of the environment on that activity.

[84] The Trust submitted that in this case I should take a similar approach and conclude the earthquake-prone building provisions of the Building Act and the consent provisions of the Resource Management Act reflect different legislative purposes. The Trust argued the Environment Court was correct by saying the provisions of the Building Act could not legitimately influence the basis upon which the consent authority considered the building owner's application to demolish the Harcourts Building.

---

58 *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC).

59 At 576.

[85] In my view this approach was incorrect. The provisions of the Building Act and the consent provisions of the Resource Management Act are not completely irreconcilable.

[86] When Parliament enacted ss 124 to 130 of the Building Act relating to earthquake-prone buildings it conferred powers on the Council to:

(1) identify earthquake-prone buildings; and

(2) force owners of such buildings to remedy the potential hazards created by those buildings.

This reflects one of the purposes of the Building Act, namely the setting of standards for buildings to ensure "people who use buildings can do so safely and without endangering their health".[60]

[87] One of the purposes of the Resource Management Act is the management of physical resources in a way that enables people and communities to provide for their safety.[61] The assessment criteria and the relevant portions of the District Plan refer to the need for the Council to consider, amongst other matters, "structural stability" of a heritage building,[62] and the "public interest in ... providing a high quality, *safe* urban environment" (emphasis added).[63] The District Plan also requires the Council to "give consideration to total demolition ... only where the Council is convinced there is no reasonable alternative to total demolition".[64] These provisions make it clear that public safety is a factor that a consent authority needs to consider when assessing an application to demolish a heritage building.[65]

---

60 Building Act 2004, s 3(a).

61 Resource Management Act 1991, s 5(2).

62 District Plan, cl 21A.2.1.8.

63 Clause 21A.2.1.22.

64 Clause 20.2.1.2.

65 The consent authority did consider public safety in its report. See Report of Hearing Commissioners, above n 13, at [256]:

> ...Witnesses, including the Applicant's engineer [Mr Clark], noted the need for a detailed seismic assessment of the building. Without a detailed seismic assessment to confirm the current seismic status of the building we have not been persuaded that the Harcourts building, in its present state, presents an unacceptable risk to either the HSBC tower building or to public safety.

[88] There is some degree of commonality between the overriding purposes of the Building Act and the relevant purposes in the Resource Management Act. There is also commonality between the public safety objectives of the Building Act and the relevant parts of the District Plan. Public safety must always prevail.[66] For this reason, when assessing the reasonable alternatives to demolition the Environment Court needed to consider the risks to public safety of nothing being done[67] to the building because of the building owner's inability to comply with the Building Act Notice.

[89] The Environment Court erred by not reconciling the relevant provisions of the Resource Management Act with the Building Act. However, to found a successful appeal, the error of law must be material. The materiality of the Environment Court's error must be assessed by examining the consequences of that error.

[90] The consequence of the Environment Court's error was that it put the effects of the relevant provisions of the Building Act to one side and only focused upon the options of the building being demolished or strengthened. When it only focused upon these two options, the Environment Court did not consider that the building owner had said it could not feasibly comply with the Building Act Notice requirement to strengthen the building. Therefore the Environment Court failed to take into account the realistic possibility of the building being left as it is until such time as the Council takes steps to enforce the Building Act Notice or until the Council applies for consent to demolish the building.

[91] In my assessment, the consequences of the building owner doing nothing because of its inability to comply with the Building Act Notice was an important consideration because it requires a careful analysis of the risks to public safety and surrounding buildings. Mr Ian Smith's evidence clearly explained that even if the building survives a moderate earthquake it is likely to be a source of "injury to life

---

66 At [64(a)] of her statement of evidence, Ms Neill for the Trust agreed when she said that the Trust "is mindful that public safety is paramount".

67 At [51] of its judgment the Environment Court restated the evidence of the civil engineers who were unanimous in their view that the Harcourts Building must be strengthened. In referring to this evidence the Environment Court said "doing nothing is not a viable option", but then did not expand on that finding.

and other property".[68] I appreciate the Environment Court did refer to "the risk to life and limb and other property in the event of a *major* earthquake" (emphasis added) if the building were not strengthened.[69] The Environment Court also said that retaining the building without strengthening it would "not promote a safe urban environment".[70] However, the Environment Court failed to take into account Mr Ian Smith's evidence about the likely performance of the Harcourts Building in a *moderate* earthquake or the consequences of the building owner not being able to comply with the Building Act Notice.

[92] Had the Environment Court taken into account the realistic possibility of the building being left as it is until July 2027, then the Environment Court would have at the very least considered the risks to the safety of the public and surrounding buildings which Mr Ian Smith carefully explained in his evidence. By not fully considering this issue the Environment Court failed to take into account a relevant and important matter. This was a material error of law.

Reasons for dismissing remaining grounds of appeal

[93] In its first, second, third, seventh and ninth grounds of appeal the building owner alleges that the Environment Court erred in law:

(1) by misinterpreting ss 87A(3), 104 and 104C of the Resource Management Act and the relationship between those sections and Part 2 of the Resource Management Act;

(2) in determining that consideration of the principles of Part 2 of the Resource Management Act is restricted to matters over which the consent authority has reserved its discretion;

(3) in determining that the combination of s 104C of the Resource Management Act and r 21A.2.1 of the Council's District Plan meant

---

68 Statement of evidence of I Smith, 15 July 2013 at [34].
69 *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 5, at [100].
70 At [112].

that the only matters that could be legitimately considered were matters relating to historic heritage;

(4) by elevating the heritage provisions of the District Plan to a position of pre-eminence in respect of which the remaining provisions of the District Plan were subordinate; and

(5) in failing to have regard to the provisions of s 5 of the Resource Management Act and in failing to have regard to all of the relevant provisions of ss 6 and 7 of the Resource Management Act.

[94] The first, second, third, seventh and ninth grounds of appeal advanced by the building owner have some degree of overlap and can conveniently be dealt with under the heading "The role of Part 2 of the Resource Management Act".

The role of Part 2 of the Resource Management Act

[95] The debate about what role (if any) Part 2 of the Resource Management Act plays in relation to applications for resource consent in relation to restricted discretionary activities stems from the way in which ss 87A, 104 and 104C of the Resource Management Act are drafted.

[96] In *Woolley*, Randerson J held that the wording of the now repealed s 77B(3) of the Resource Management Act only allowed the provisions of Part 2 of the Resource Management Act to be taken into account in deciding to decline an application for a resource consent for a restricted discretionary activity.[71] It is this part of Randerson J's judgment that Parliament focused upon when it enacted s 87A so that the legislation now refers to decisions "to decline consent, or grant consent".

---

[71] The effect of *Woolley* was considered by French J in *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [98]. French J said:

> What *Woolley* prohibits is the use of a Part 2 matter as an *additional* ground to decline consent, [that is,] additional to the matters for discretion. To put it another way, Part 2 cannot extend the range of grounds for declining a consent beyond those specified in the Plan. It cannot bring additional matters into play, except when it comes to granting a consent.

Ayrburn was decided after the enactment of ss 87A and 104C of the Resource Management Act. French J's judgment was, however, concerned with the law as it stood prior to the enactment of those sections. French J did not need to consider the meaning of the new provisions.

[97] The building owner submits s 104 requires Part 2 of the Resource Management Act to be taken into account when a consent authority considers any application for resource consent. In my assessment ss 87A and 104C of the Resource Management Act mean that when a consent authority considers an application for a restricted discretionary activity it "must *consider only* those matters over which ... it has restricted the exercise of its discretion in its Plan ..." (emphasis added). The language of s 104C of the Resource Management Act plainly limits the matters the consent authority must take into account when considering and determining an application for resource consent for a restricted discretionary activity.

[98] The words in ss 87A and 104C suggest that Parliament has precluded the consent authority from relying on the provisions of Part 2 of the Resource Management Act as additional grounds when considering an application for resource consent for a restricted discretionary activity.

[99] As Randerson J explained in *Woolley*, Part 2 of the Resource Management Act does not apply when it "... is clearly excluded or limited in application by other specific provisions of the [Resource Management Act]".[72]

[100] Therefore I am driven to conclude that when Parliament passed s 87A of the Resource Management Act it overturned the part of *Woolley* that limited the effect of s 77B(3) to decisions to decline applications for resource consent in relation to restricted discretionary activity. By repealing s 77B(3) and enacting s 87A of the Resource Management Act, Parliament intended that s 104C would apply to decisions to grant and decline resource consents for restricted discretionary activities. As a consequence, the factors in Part 2 of the Resource Management Act cannot be taken into account as additional grounds to grant or decline an application to undertake a restricted discretionary activity.

[101] However, Part 2 of the Resource Management Act can be used to inform those parts of the District Plan that are consistent with or compliment Part 2 of the Resource Management Act. One effect of ss 87A and 104C is that a consent authority cannot rely on the provisions of Part 2 of the Resource Management Act to

---

72 *Auckland City Council v John Woolley Trust*, above n 17, at [47].

override the matters the consent authority has specified in its District Plan in relation to restricted discretionary activities.

[102] In view of my explanation of the law concerning the interrelationship between ss 87A(3), 104, 104C and Part 2 of the Resource Management Act, I conclude:

(1) The Environment Court did not misinterpret ss 87A(3), 104 and 104C of the Resource Management Act and the relationship between those sections and Part 2 of the Resource Management Act.

(2) The Environment Court did not misinterpret the role of Part 2 in the context of this case.

(3) The Environment Court did not confine its decision to matters relating to historic heritage.

(4) The Environment Court referred to the principles set out in Part 2 of the Resource Management Act throughout its judgment. Although it did not specifically refer to s 5 of the Resource Management Act it did refer to the relevant provisions of that section. The Environment Court referred to "sustainable management";[73] the "overall judgment" approach;[74] "social and cultural" values;[75] "economic" effects and benefits;[76] "amenity"; [77] and "efficient" use.[78]

[103] For these reasons the first, second, third, seventh and ninth grounds of appeal must be dismissed.

---

73 *Lambton Quay Properties Nominee Ltd v Wellington City Council*, above n 5, at [18].
74 At [26].
75 At [39] and [94].
76 At [51], [91], [93]-[94] and [110].
77 At [101], [117] and [139].
78 At [117], [123] and [139].

Remaining grounds of appeal

[104] The fourth ground of appeal alleges the Environment Court erred when it determined that the assessment criteria in the District Plan were not matters over which discretion is reserved. This ground of appeal fails because the building owner has not demonstrated the Environment Court made a material error of law in relation to this issue.

[105] The fifth ground of appeal alleges the Environment Court erred in determining that criterion 21A.2.1.8 was the "nub of the argument" particularly in relation to viable alternatives. This ground of appeal fails because I am satisfied this was not intended to convey that it was the only consideration that the Environment Court took into account. Indeed, the Environment Court proceeded to give consideration to the remaining assessment criteria relevant to its determination.

[106] I have not found it necessary to provide a detailed response to the 11th ground of appeal, which alleges the Environment Court erred by failing to take into account that in its present state the Harcourts Building is incapable of reasonable use and imposes an unfair burden on the building owner. To some extent, the answer to the 11th ground of appeal is subsumed within the answer that I have provided in relation to the eighth ground of appeal.

[107] The 12th ground of appeal alleges that there was not any evidence to support the Environment Court's finding that the building owner had imposed a rigidly set bottom line figure being demanded for the sale of the building. This ground of appeal involves an evaluation of evidence and cannot be sustained. The building owner acknowledged that this was not its strongest ground of appeal.

[108] The 13th ground of appeal alleges the Environment Court erred by failing to take into account both the detailed analysis of the behaviour of the Harcourts Building during a seismic event and the prediction of the model used in the detailed analysis that there was a likelihood of failure of the Harcourts Building in a moderate earthquake. The answer to this ground of appeal is effectively subsumed within the answer I have provided to the eighth ground of appeal, which I have explained in paragraphs [80] to [92] of this judgment.

[109] The 14th ground of appeal alleges the Environment Court erred by failing to take into account the burden imposed on the building owner by requiring the building owner to promote the public good by retaining heritage without contribution from the beneficiaries of that public good and without any benefit to the building owner from promoting that public good. The 14th ground of appeal involves issues of legislative policy which are beyond my jurisdiction.

[110] The 15th ground of appeal alleges the Environment Court's decision was so unreasonable that no reasonable decision-maker could have reached the same decision considering the evidence before it and properly directing itself as to the law. The 15th ground of appeal cannot be answered in favour of the building owner. The building owner's 15th ground of appeal is better described as a complaint against the way in which the Environment Court evaluated the evidence before it. That does not constitute an appealable question of law.

Conclusion

[111] The appeal is allowed.

[112] Consistent with the normal course taken in cases such as this I remit the decision back to the Environment Court for rehearing.[79] When rehearing the building owner's application the Environment Court must:

(1) give consideration to demolition of the building only if it is convinced that there is no reasonable alternative to total demolition.

(2) give consideration to the risk to public safety and surrounding buildings if the Harcourts Building remains as it is.

[113] The building owner is entitled to costs on a scale 2B basis. Those costs are to be split evenly between the Council and the Trust.

---

[79] *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC).

D B Collins J

Solicitors:
Con Anastasiou, Wellington for Appellant
DLA Phillips Fox, Wellington for Respondent
Minter Ellison Rudd Watts, Auckland for Section 274 Party

Appendix 1

The 15 grounds of appeal

(1) The Environment Court erred in law by misinterpreting ss 87A(3), 104 and 104C of the Act and the relationship between those sections and Part 2 of the Act.

(2) The Environment Court erred in determining that consideration of the principles of Part 2 of the Act is restricted to matters over which the consent authority has reserved its discretion.

(3) The Environment Court erred in law in determining that the combination of s 104C of the Act and r 21A.2.1 of the Council's District Plan meant that the only matters that could be legitimately considered were matters relating to historic heritage.

(4) The Environment Court erred in law when it determined that the assessment criterion in the District Plan were not matters over which discretion is reserved.

(5) The Environment Court erred in law when determining that criterion 21A.2.1.8 was the "nub of the argument" particularly in relation to viable alternatives.

(6) The Environment Court erred in law in its interpretation of the expressions, "is convinced that there is no reasonable alternative to total demolition", and "every reasonable alternative solution has been considered", in the Council's District Plan (cls 20.2.12 and 21A2.1.8).

(7) The Environment Court erred in law by elevating the heritage provisions of the District Plan to a position of pre-imminence in respect of which the remaining provisions of the District Plan were subordinate.

(8) The Environment Court erred in law by determining that "the tension" between the Building Act and the Act was "irresolvable".

(9) The Environment Court erred in law in failing to have regard to the provisions of s 5 of the Act and in failing to have regard to all of the relevant provisions of ss 6 and 7 of the Act.

(10) The Environment Court erred in law by applying the wrong legal test in considering the building owner's appeal and setting the bar to granting consent at such a high level that the practical consequence was to make the granting of consent impossible.

(11) The Environment Court erred in law by failing to take into account that in its present state the Harcourts Building is incapable of reasonable use and imposes an unfair burden on the building owner.

(12) There was no evidence to support the Environment Court's finding that the building owner had imposed a rigidly set bottom line figure being demanded for the sale of the building.

(13) The Environment Court erred in law by failing to take into account the detailed analysis of the behaviour of the Harcourts Building during a seismic event and the prediction of the model used in the detailed analysis that there was a likelihood of failure of the Harcourts Building in a moderate earthquake.

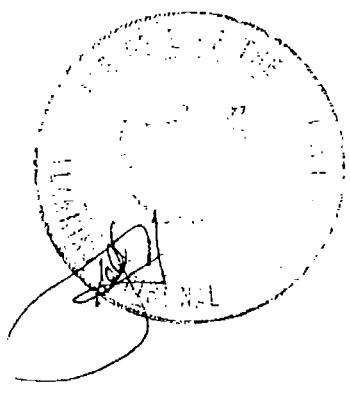
(14) The Environment Court erred in law by failing to take into account the burden imposed on the building owner by requiring the building owner to promote the public good of retaining historic heritage without contribution from the beneficiaries of that public good and without any benefit to the building owner from promoting that public good.

(15) The Environment Court's decision was so unreasonable that no reasonable decision-maker could have reached the same decision considering the evidence before it and properly directing itself as to the law.

ORIGINAL

Decision No. W50/94

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of four appeals pursuant to s.120 of the Act
BETWEEN	GLENTANNER PARK (MOUNT COOK) LIMITED
	(Appeal RMA 131/94)
	First Appellant
AND	THE HELICOPTER LINE LIMITED
	(Appeal RMA 121/94)
	Second Appellant
AND	AIR SAFARIS AND SERVICES LIMITED
	(Appeal RMA 122/94)
	Third Appellant
AND	MOUNT COOK GROUP LIMITED
	(Appeal RMA 157/94)
	Fourth Appellant
AND	MacKENZIE DISTRICT COUNCIL
	Respondent
AND	GLACIER HELICOPTERS LIMITED
	Applicant



BEFORE THE PLANNING TRIBUNAL

His Honour Judge Treadwell presiding
Mr R G Bishop
Mr I G McIntyre

HEARING at CHRISTCHURCH on the 3rd, 4th, 5th and 6th days of May 1994

COUNSEL/APPEARANCES

Mr A Hearn QC and Mr H C Matthews for Glacier Helicopters Limited
Mr A J P More for the MacKenzie District Council
Mr E O Sullivan and Miss N A Hornsey for Air Safaris and Services Limited, The Helicopter Line Limited and Glentanner Park (Mount Cook) Limited
Mr T C Gould for Mount Cook Group Limited

DECISION

These are a series of appeals pursuant to s.120 of the Resource Management Act 1991 (RM Act) against the grant of a resource consent by the respondent council to the applicant Glacier Helicopters Limited (Glacier) to enable the establishment of a heliport and associated facilities at Ferintosh Station, State Highway No. 8 near the western bank of Lake Pukaki. The appellants are operators of tourist air services and or airports in and about the Mount Cook National Park area. As will be seen from the evidence, apart from not wishing additional competition from another airline for the tourist market, there is a genuine concern for air safety in this burgeoning tourist area which already suffers from some air space and radio space overload.

The various appellants are:-

(i) Glentanner Park (Mount Cook) Limited (henceforth referred to as Glentanner) which operates a private airfield capable of handling aircraft up to 22,000 kgs in weight such as Dash 7, Dash 8, and F27 aircraft. Its aircraft are controlled on a radio frequency of 118.6 which is the local VHF frequency allocated to Mount Cook Group Limited but which that company allows to be used by other operators for safety purposes. Glentanner owns associated tourist accommodation facilities and has a large investment in the area including the airfield itself which is sealed and capable of carrying aircraft such as Boeing 737 if the runway were extended and widened, the extent of the latter depending on the type of 737 aircraft ultimately decided upon. There is some suggestion that international flights using that type of aircraft may be catered for in the future. The Helicopter Line Limited also operates from

Glentanner Airfield and by virtue of a contract entered into between Glentanner and that company it has exclusive rights to operate helicopter services from that airfield hence Glacier cannot gain access to the facility. Lastly in this brief opening Glentanner is not within the Mount Cook National Park and is some 17 km distant from the Mount Cook Group Limited Airfield which is within the National Park. That group is the only operator with permission from the National Park authority to operate within the park itself.

(ii) Mount Cook Group Limited (Mount Cook Group) operates an airfield within the National Park which it uses as a base for tourist flights to the Mount Cook region; for aircraft catering for skiers; and for sightseeing aircraft. It is not presently operating helicopters but indicated that it may in the future enter into that activity. It is the company which has the radio frequency of 118.6 allocated to it and uses that frequency for the purpose of controlling its own aircraft movements within the Mount Cook area and, as we have recorded, makes the facility available to other operators but has indicated that the availability is causing overload. It has made clear that it would not welcome Glacier adding to the use of the frequency. We will discuss the question of radio in a little more detail later in this decision.

(iii) Air Safaris and Services Limited (Air Safaris) operate fixed wing aircraft in the Mount Cook area from Glentanner Airfield and from an airfield at Lake Tekapo. They are larger aircraft such as the Nomad and generally fly visual rather than instrument. They share use of Glentanner Airfield on a regular basis with the Helicopter Line Limited and between themselves have evolved a pattern of aircraft movement which appears to achieve compatibility and a relatively risk free environment.

(iv) The Helicopter Line Limited (Helicopter Line) operate helicopters which not only undertake tourist flights but also have various landing sites within the National Park approved by the Department of Conservation for the purpose of landing tourists above the snowline.

The applicant company, Glacier, is presently operating on the West Coast of the South Island with tours and landings in the Franz Josef and Fox Glacier areas. It also undertakes flights over the divide between the West Coast and the Mount Cook area but presently do not have landing and take-off rights anywhere on that eastern side of the divide. Thus if bad weather prevents tourists from taking advantage of the flights offered by Glacier to the west of the divide those tourists, particularly if they are independent travellers, cannot again link with Glacier to the east of the divide. Glacier thus consider they are losing a considerable market which they hope to regain if they can obtain landing and take-off rights in the Mount Cook area itself.

THE PROPOSAL

We may be excused in the course of this decision if we fluctuate between metric and imperial measurements because witnesses transposed the two at will. The proposed heliport is on the western bank of Lake Pukaki near the mouth of the Whale Stream and on the landward side of State Highway 8. The terrain rises relatively steeply to the west making a vertical helicopter ascent inland of the lake a fairly difficult exercise. The proposed heliport is approximately 4.65 km from the southern threshold of Glentanner Airfield. That airfield may extend in future a further 200 m but we were not told whether that extension will be to the south, to the north or in both directions. The proposed heliport is directly over the approach path of aircraft flying from Pukaki Airport at Twizel and we are told that although those flights are not frequent they can happen perhaps once a month if aircraft flying over the Mount Mary Beacon cannot achieve 8 km visibility at 3,500 ft/7 km to the north of that beacon on approach to Mount Cook or Glentanner Airports. In those circumstances aircraft will circuit and possibly make an approach from the Pukaki Airfield area if they have adequate visibility at the lower permitted altitude of 3,000 ft from that direction. For aircraft approaching on instruments or visually over the Mount Mary Beacon the proposed heliport would be some 5 miles from the point at which aircraft would deviate at an angle towards the Mount Cook Airport or would choose to proceed straight ahead to Glentanner. We are told that in weather conditions where the required 8 km visibility is available there may be pockets of rain or snow showers necessitating weaving manoeuvres and in those circumstances aircraft could approach the proposed heliport closer than 5 miles. The heliport is also below the paths taken by Air Safari aircraft before those aircraft descend to join the landing pattern for runway 33 at Glentanner. In respect of actual take-off and landing patterns from and to Glentanner aircraft are required to join the approach paths from the east when landing and to fly away to the east upon take-off. Neither of those manoeuvres would affect the proposed heliport.

The heliport itself has been the subject of two aerodrome determinations under Civil Aviation Rules Part 157 which we will discuss in a little more detail later. The first determination was issued on 14 December 1993 and was expressed to be a conditional determination pursuant to the rule. The determination acknowledges that the establishment of the Ferintosh Station heliport will not adversely affect the safe and efficient use of the airspace by aircraft, nor the safety of persons on the ground, provided an aerodrome traffic zone is established at the station. For this purpose an aerodrome traffic zone centred on the heliport was plotted with a radius of one nautical mile which appears on the maps as a semi-circle with the diameter roughly following the shore of Lake Pukaki with the one nautical mile radius extending inland not over the lake. The first determination required adherence by Glacier to certain procedures attached to the determination which could be amended in the light of experience for the purpose of making safety improvements. Those procedures were directed at the particular operator. The Director of Civil Aviation later considered that it was inappropriate

to make such conditions because the conditions should pertain to the aerodrome not to the operator.

As a result a second determination was issued on 25 January 1994 but we are unable to ascertain whether this was in substitution for or an amendment to the original determination. This second determination was also conditional.

This latter determination specified that the same aerodrome traffic zone (ATZ) as defined in the first determination be promulgated pursuant to Regulation 93 of the Civil Aviation Regulations 1953. Although appearing on the map as a semi-circle it also has a vertical measurement to 3,300 ft above mean sea level thus approximating in three-dimensional geometric terms to a type of sphere quadrant. The second determination establishes a special procedure in respect of the use of the ATZ requiring aircraft to enter or exit the airspace contained within the quadrant via its boundary on the west or via the upper limit. It then requires each operator using the station heliport to establish their own procedures for the purpose of complying with the special procedures relating to the use of the ATZ and for the purpose of avoiding conflict with the pattern of traffic formed by aircraft using Glentanner Aerodrome as required under Regulation 91 of the Civil Aviation Regulations 1953.

We will come a little later to a discussion of the legal standing of these documents with particular regard to the question of aircraft safety and whether this Tribunal can take safety aspects into account itself for the purpose of determining issues under the RM Act. We record at this stage that counsel for the applicant quite properly conceded that the Tribunal would not be debarred from such a consideration but that if airport safety had been addressed by an authority set up for that purpose then it would be inappropriate for the Tribunal to itself enter into the controversy. We record that none of the appellants accept that the Director of Civil Aviation has properly applied his mind to questions of safety and we record further that the issue has now been taken to the High Court on judicial review.

Glacier intend at this stage to use the proposed heliport for three basic purposes:-

(a) for scenic flights around Mount Cook and generally in the Mount Cook area:

(b) for flights to a landing area above the snowline for which they have been given rights within the National Park near Barren Saddle. This would require helicopters upon leaving the Ferintosh Station to travel to the west of and away from the Tasman River and Lake Pukaki areas wherein are located Glentanner Airfield and Mount Cook Airfield:

(c) for flights to a landing area for which they also have landing rights near the Abbey Pass. This would require helicopters to cross the flight paths of aircraft using Glentanner and Mount Cook Airfields. The procedures set in the first determination but not in the second

require the helicopters to attain an altitude of 2,800 ft above sea level prior to crossing Glentanner Aerodrome circuit traffic area. This would effectively be some 1,000 ft above the airfield but we are a little uncertain about the efficacy of this original condition because of evidence we heard concerning the circuit pattern of Air Safaris. Nevertheless these specific requirements do not appear in the second determination the obligation being on the operator to establish procedures which presumably would require the subsequent approval of the Director of Civil Aviation.

We do not think it necessary to go further in detail into the proposals of Glacier. All we can say at this stage is that if procedures are not rigidly adhered to then a potential for disaster exists and this potential is indeed recognised by the Director of Civil Aviation in the wording of his conditional determinations.

THE DISTRICT PLAN

The subject site is zoned Rural 1 in the county section of the MacKenzie District Council transitional district plan. It presently forms part of a large sheep station. The council considered the activity to be non-complying but with respect we do not agree. It appears reasonably clear to us that the district plan sets out to specifically recognise the type of activity proposed by the applicant in certain specified areas but leaves it in the discretion of council in areas where it is not so specified. There is a definition in the scheme "*tourist service operations*" which is expressed to mean:-

> "*the premises ... of an operator engaged in providing primarily for the outdoor recreational requirements of tourists, and includes but is not limited to jet boating, rafting, shooting, guiding, skiing and mountaineering. It does not include travellers' accommodation ...*".

Tourist Service Operations are specifically provided for in the Tourist Facility Zones as a predominant (permitted) use. One zone is situated at Twizel and two smaller zones are situated in the Glentanner area. In these zones the type of activity proposed by the applicant can be undertaken as of right. The National Park area within which the Mount Cook Aerodrome is situated is not covered by the provisions of the District Plan but we suspect that the Department of Conservation on a limited scale would not prevent modest development designed to attract tourists.

Because tourist services were specifically mentioned in these zones it was argued that by implication they should be prohibited elsewhere. We do not accept that proposition. The Rural 1 zone wherein the appeal site is situated specifically provides for "*buildings and land for or connected with indoor or outdoor recreation*" as a discretionary use. In a plan which recognises and encourages tourism we consider this particular type of expression should be read in the context of the whole plan. It is clear to us that this district scheme sets out to allow tourist oriented activities in specified areas which are already developed for that purpose or are intended to

be so developed and then allows various uses in the Rural 1 zone (which encompasses much of the district) as a discretionary activity. Apart from the indoor or outdoor recreational theme to which we have referred there are such activities as game parks, motor racing circuits, motels, and tourist operations associated with farming, recognised as being discretionary.

The activities proposed by the applicant which encompass sightseeing and landings above the snowline where tourists can disembark from the aircraft and enjoy mountain grandeur without the expenditure of the energy otherwise required to reach such inaccessible spots is outdoor recreation and we are not prepared to artificially restrict the meaning of that expression by reference to zones where more specifically defined activities may be undertaken as of right.

If we are wrong in that finding it is nevertheless abundantly clear that the objectives and policies of this plan are such that the activity proposed by the applicant is not contrary to them and therefore one of the threshold tests in s.105(2)(b) would have been overcome in any event had that been necessary.

We will not go further into the provisions of the plan at this stage because they are better looked at in terms of s.104 when considering the matter as a discretionary activity.

STATUTORY CONSIDERATIONS

There are two relevant Acts of Parliament namely the Civil Aviation Act 1990 and the RM Act.

We will consider the former Act first in order to ascertain whether the Tribunal's enquiries can extend to matters of safety generally and to the consequential effect upon the environment of an air accident or whether we must accept that the Director of Civil Aviation by making a conditional determination has removed these matters from consideration. As we previously recorded we think the concession made by the applicant that the provisions of the Civil Aviation Act do not debar the Tribunal from investigating these matters was properly made.

1. The Civil Aviation Act is an Act which is intended to (inter alia)

> *(a) to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; ...* (emphasis added)

That is the first statement in the headnote and it will be noted that the word "*promote*" is used which amongst its other meanings has such synonyms as "*encourage*"; "*support actively*"; and "*initiate*". There is nothing in the Act to indicate that another authority charged with the consideration of matters of public safety and environmental protection cannot enquire in any particular instance as to whether there is still a risk and if there is a risk whether that risk is acceptable in general resource management terms.

2. The Director of Civil Aviation by his determination in respect of this aerodrome has indicated that there is a potential risk but that the conditions he has set and the conditions which presumably will be set by any operator who chooses to use the helipad will be acceptable in public safety terms or, if not acceptable, will be tightened later.

When setting these matters against the provisions of s.5 of the Resource Management Act we note that that Act relates to managing the use, development, and protection of natural and physical resources in a way which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while avoiding remedying or mitigating any adverse effects of activities on the environment.

That is one of the fundamental sections of the RM Act and we would need a great deal of persuasion before we would hold that an Act couched in the terms contained within the Civil Aviation Act 1990 would override those matters of national and environmental importance. We would furthermore be even more surprised if the rules made in terms of the Civil Aviation Act and which are deemed to be regulations, could take away the statutory duty imposed upon councils and upon this Tribunal by the RM Act. Essentially we find that the determination made under the Civil Aviation Act relate to the aerodrome itself and the structures and people within the confines of that aerodrome leaving matters of wider public importance for the determination by the RM Act consent authorities.

Also whilst questions of safety in the air are matters for the Director to determine it is still competent for this Tribunal to consider whether a risk remains and whether any particular accident even if improbable would have environmental consequences which would warrant refusal of a resource consent.

Turning now to the RM Act there is presently a judicial difference as to the place of Part II in relation to s.104. Broadly in Reith v Ashburton District Council Decision C 34/94 it was held that the expression "*subject to Part II*" applied only in circumstances where a conflict existed. In Minister of Conservation v Kapiti Coast District Council A 24/94 it was considered that the expression required "... *exercise of the discretionary judgement informed by the statutory purpose, and made in fulfilment of that duty, ...*". In both of those judgments the Tribunal considered Environmental Defence Society & Anor and Mangonui County Council 13 NZTPA 197 (CA).

For our part we prefer the construction which achieves the primary purposes of the Act and do not consider that primary purpose is best achieved by using the expression "*subject to*" solely for the purpose of perhaps striking down a rule, policy or objective which may conflict with that part of the Act. We consider the purpose of the Act is best achieved by using Part II as an aid to construing s.104 in much the same way as the headnote of the Water and Soil Conservation Act 1967 was used by the Courts in construing the provisions of that Act.

For the purposes of our present approach and as a preliminary observation we consider the key issue to be the potential effects on the environment of allowing the activity as set forth by s.104(1)(a) and in applying that subsection we derive guidance from s.5 which gives as a purpose the management of the natural and physical resources in a way which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while (inter alia) avoiding, remedying, or mitigating any adverse effects of activities on the environment. It will be noted that both s.5 and s.104(1)(a) refer to the "effects" of the activity on the "environment" - both those words have a statutory definition.

In relation to the potential effects of a heliport at Ferintosh Station we must first consider what is the environment in terms of the Act. The definition of that word as contained in s.2 shows that it includes:-

(a) ecosystems and their constituent parts, including people and communities; ... and

(d) the ... economic ... conditions which affect the matters contained in paragraphs (a) ... of this definition or which are affected by those matters.

We have formed the conclusion from the evidence we have heard that those living and working in and about the National Park boundaries such as Mount Cook, the Mount Cook Airfield, and the Glentanner Park with its associated airfield are a community. We say that despite the fact that Mr K P McCracken, the consultant planner to the council, was not greatly receptive to the application of the word "community" to that grouping of activities. We record however that the question as put to him was restricted to the community at Glentanner Airfield.

Even if our assessment of the community concept in and about Glentanner and Mount Cook should be too narrow then we would consider that the addition of Twizel but a short distance away would certainly constitute all persons in the areas to which we have referred as a community greatly concerned with tourism in the Mount Cook area. Insofar as the Mount Cook/Glentanner area is concerned the persons concerned with tourism in those areas can certainly be regarded as a body of people living in the same locality. It may be stretching the word "locality" too far to include Twizel, but Twizel can certainly be included in the compass of the word "community" if another meaning of that word is applied namely a body unified by common interests. The Twizel community is vitally concerned with tourism as is Mount Cook and Glentanner and the district plan certainly recognises that to be so.

In order to set the scene for the matters we are now about to discuss we have concluded from the evidence that the potential for an air accident is present even if caused by human error as a result of not complying with the requirements of Civil Aviation. If there were an air accident involving the loss of tourist lives we are satisfied from the evidence that such an accident would have an effect upon the communities to which we have referred in an economic sense. The evidence

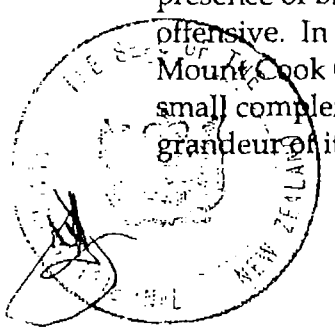
showed that following a similar accident in the Milford Sound area tourist operators and in particular the Mount Cook Group suffered a substantial economic loss caused by the reluctance of Japanese and other tourists to use tourist aircraft. There is thus a potential "*effect*" on the "*environment*" with particular reference to the economic well-being of the community. We hold and will later expand upon the fact that this potential effect may be of low probability but the potential impact is high.

SECTION 104 AND MORE DETAILED BACKGROUND

We will now move to a consideration of this section and in the course of discussing the various matters contained within it we will traverse the relevant evidence we have heard. Our main concern is the potential effect to which we have just referred because despite our previous comments concerning the jurisdiction of this Tribunal we do not consider it our function to embark upon a consideration of air safety; aircraft to aircraft or pilot to pilot. We do consider it our function under the RM Act to assess whether the proposed heliport is in a situation where a low probability accident might eventuate and to further consider that if such an accident did eventuate what its effect would be upon the matters relevant in terms of the Act.

Turning now to the section we consider matters relevant to this particular case to be subsections - (a), (d), (i). In respect of the latter subsection we consider that to be largely a fall back position if our observations on the meaning of "*potential effects on the environment*" is not correct. In other words if our construction of the meaning of subsection (a) is erroneous then we consider the probable results of an air accident in this area of such importance that it is relevant in considering and determining this application. It can therefore be considered under (i).

Before considering the elements of the section it is necessary to paint the future canvas of tourism in the Mount Cook area in order to understand the importance of tourism both to the appellants and to the applicant. We accept that the closer Glacier can establish a base to the National Park the more viable its operation. We have no criticism of Glacier in that regard and also fully appreciate that Glacier would not willingly put its pilots at risk. It has made a business assessment that with a heliport at Ferintosh Station it has the ability to attract some 5,000 customers to its scenic operations. Its base at Ferintosh would comprise a building which would be environmentally sensitive and which would serve as a ticketing office and lounge for clients. It would have toilets; provide limited refreshments; and retail products such as film. It will be landscaped and apart from a sign on the State Highway entrance and the potential tourist atmosphere caused by the presence of brightly coloured tour buses and cars will not be environmentally offensive. In that regard we do not accept the submissions addressed to us from Mount Cook Group that resource consent should be refused on the basis that this small complex would be environmentally offensive in the context of the alpine grandeur of its surrounds.



Glacier intends to operate within the suggested guidelines of the original conditional determination issued by the Director of Civil Aviation whereby it will maintain VHF contact with Glentanner Aerodrome at frequency 118.6 prior to lift-off and shall state its intentions as to the departure route and destination. It was accepted that VHF frequency contact with Glentanner cannot be established whilst helicopters are on the ground at Ferintosh because of intervening hills which prevent this type of transmission which relies on line of sight. The suggested conditions from CAA state that if communications cannot be established on ground the helicopter may ascend and contact Glentanner and if that contact cannot be established the aircraft shall contact Ferintosh base and have the office manager contact Glentanner by telephone and communicate intentions. On suggested procedures the helicopter is not permitted to depart the Ferintosh ATZ to which we have previously referred until its intentions have been relayed to Glentanner Aerodrome and confirmed.

Mount Cook Group point out that:-

(a) they do not want any further cluttering of the VHF 118.6 frequency which belongs to them and is already overloaded; and

(b) that Glentanner Airport is not manned; and

(c) that telephone communication with Glentanner Airport is of little use, it being aircraft to aircraft contact which is of importance.

We have mentioned these matters at this stage to indicate that even were Glacier to obtain access to the Mount Cook Group frequency, which appears unlikely, the situation would still be uncertain from the viewpoint of this Tribunal to a degree where it would not grant resource consent based upon the hypothesis that satisfactory procedures would be set in place with approval of CAA.

It would however be competent for us to make it a condition of consent that VHF facilities be available to Glacier, with appropriate repeater locations to ensure efficient transmission, and leave it in the hands of Glacier to obtain such facilities before exercising any resource consent

Glacier are thus prepared to accept a fairly tight operational format in an area where there are already many aircraft movements and congested radio frequency because of the economic advantages to it. Turning to the tourist aspect they intend to operate the heliport at Ferintosh Station; to sightsee in and about the Mount Cook region which would essentially be the same type of sightseeing as it is already undertaking from its West Coast bases but without the necessity to cross the divide; and to operate concession licences from the Department of Conservation at Abbey Pass and Barren Saddle to which we have previously referred. As we have briefly recorded before this business decision was based on the premise that significant client passenger numbers were being lost as a result of the highly changeable weather conditions on the West Coast and with the

knowledge that many visitors lost to their West Coast operation subsequently visited Mount Cook to the east of the divide.

Evidence concerning the potential build-up of tourism was given to us by Mr P G McGahan who has extensive experience in tourism and conducts his own tourism consultancy business. We think it important that his evidence be recorded as given to us and the relevant parts of his evidence are annexed to this decision as Appendix 1.

It can thus be seen that Glacier are anxious to be part of this tourist development and it can furthermore be seen that Mount Cook Group, Air Safaris, and Helicopter Line are equally anxious to see that Glacier are not participants.

As a final part of this backgrounding we record that all operators accept that the number of tourists to be moved by air will undoubtedly increase but the appellant operators do not see the necessity for further aircraft, either fixed wing or rotor blade, as necessarily being the answer because an increase in aircraft numbers will in the opinion of the appellants add to air congestion and radio congestion with a resultant increase in the potential for a disastrous air accident. The appellants intend to cope with the increased tourist influx as follows:-

- incoming tourists will be carried by aircraft of the size of the HS78 or similar or, should Glentanner extend its runway, 737 or similar (possibly from overseas);

- helicopter operations will increase passenger loading by use of larger helicopters in order to shift a larger number of tourists without the necessity of a great increase in aircraft movements;

- greater use of fixed wing aircraft with greater passenger capacity

We mention these points to show that the existing operators are not unmindful of the future tourist potential and are actively investigating methods of coping with that increased number.

We now move to the provisions of s.104.

Any actual and potential effects on the environment of allowing activity (subs.(a))

We now come to the extensive evidence which was placed before us by persons skilled in the aviation industry all of whom were persons with undoubted expertise well able to speak about air safety and operational requirements. Before moving to a consideration of the evidence we record that we do not find it necessary to go into great detail because it appeared to us to fall into two categories, one supporting Glacier, and one against Glacier, both sets of evidence being based on a premise which, if accepted, would support the views of the particular witness.

We found in essence that one set of evidence was a type of "*line on the map*" evidence and the other was a "*cope with conditions as we find them*" type of evidence. The former relied on the proposition that if operators would adhere to the guidelines set by CAA and to their own internal procedural guidelines then all would be well whereas the latter adopted the approach that regardless of how well a pilot attempted to follow the strict requirements of civil aviation rules the weather conditions likely to be experienced in this area tended to be extreme and, for safety, the pilot would need to deviate from time to time from a strict geometric track along a predetermined course. It must be remembered that the Civil Aviation Act itself places the ultimate responsibility on the pilot who is entitled to make decisions based on safety regardless of whatever theoretical procedure he is supposed to be following in any given circumstance.

The situation is also a little difficult when there is more than one operator because a base control, if any, is only responsible for its own aircraft which makes the advent of additional operators more difficult to fit into the jigsaw of airspace.

We lastly record that Civil Aviation appear to be now working from a Government policy that airspace is open to all. It also appears to be moving from airspace control exercised by CAA to a type of laissez faire control whereby in certain areas the operators form a group which sets its own internal rules which, if adhered to, should work but no individual operator is under any obligation or sanction if the agreed procedures are not followed.

Returning now to the operational area in question. We will commence this part of the decision by taking the larger aircraft first and moving to the smaller fixed wing and rotor blade craft. The comments we are about to make are based on the fact that an ATZ surrounding the Glacier proposed helipad is not in place. If it were the aircraft movements we are about to describe may need to be modified to avoid that particular zone in which case a type of domino effect could result whereby other operators require compensating modification of their movement. There was no suggestion that this would prove impossible but it may be difficult.

We will first discuss the Mount Cook Group movements some of which are instrument rated approaches. We were told by Captain J G Johns of these operations in relation to the flight paths of helicopters from the proposed heliport. If resource consent is granted the flight paths of helicopters would directly conflict with the airline flight path Queenstown/Mount Cook which can consist of up to 50 flights or more per day. Mount Cook Group operations are already involved with the flights of Helicopter Line and Air Safaris from Glentanner but the arrangement between the three presently appears to be working despite those aircraft operating in the vicinity of the flight paths of HS748 and F27 aircraft operating in and out of the Mount Cook Airfield.

We were further told that the proposed Glacier helicopter base is "*under*" the instrument approach path for aircraft heading towards the Mount Cook Airfield

or the Glentanner Airfield if approaching over the Mount Mary Beacon. This could involve 30 to 50 HS748 movements in any one day.

There was considerable discussion and cross-examination concerning this aspect of the evidence because the approach lines over the Mount Mary Beacon into Mount Cook Airfield indicated a clearance of some five miles from the proposed Glacier heliport at the point where aircraft would slightly change direction to the right on approach in order to line up with the Mount Cook Airfield. When crossing the Mount Mary Beacon aircraft descend to 3,500 ft and if at that height at a point 7 km from the beacon they do not have 8 km visibility the aircraft must then turn right, ascend, and recross the beacon at which stage it can endeavour to make a further approach under the same rules or may head for Pukaki Airfield where it can descend to 3,000 ft and if it has visibility at that point it may then proceed north up Lake Pukaki normally hugging the western shore of the lake in order to keep contact with landmarks such as State Highway 8 and it can on that course proceed to Mount Cook Airfield but would pass over the proposed Glacier heliport and also pass over Glentanner but at heights which should theoretically cause no problem.

Returning to the direct approach. If the aircraft 7 km from the Mount Mary Beacon has the required visibility it then veers to its right and commences a direct approach to Mount Cook Airfield. If it is an aircraft bound for Glentanner it would not veer but would continue directly to Glentanner Airport on a straight line from the Mount Mary Beacon. We were told by Mr C B Lewis, an aviation consultant with a great depth of experience, that in the visual flight conditions we have described there should be no problems associated with the proposed heliport and that any pilot on approach to either Mount Cook or Glentanner would, at that stage, have only minor cockpit adjustments to make to the aircraft such as flap control and would have plenty of time to observe the movements of any other aircraft in the vicinity.

Returning however to the evidence of Captain Johns we can simply say that he did not agree with Mr Lewis. Captain Johns has a far greater experience of this particular area and we now return to his comment concerning the concept of Glacier heliport being "*under*" the flight path.

There is an approach fan to Mount Cook Airfield which, on its western extremity, comes to within approximately one mile of the proposed Ferintosh heliport. As we have observed the centre line of that approach fan is some five miles from that point. We were told that once an aircraft has the required visibility at the 7 km point from Mount Mary the pilot may still be faced with intermittent snow squalls and rain squalls and for safety purposes is required to make his own decisions as to the course he should follow. Captain Johns said that in these circumstances the pilot may well make use of the whole of the fan space and may on occasions deviate outside of that area either by accident or by necessity. The impression we gained from that evidence was that a pilot faced with this type of weather condition possibly combined with considerable turbulence would not be particularly enamoured with having to search for possible stray helicopters at the

same time although his approach height should at that stage be giving sufficient clearance. The same situation could apply, with even closer proximity to the proposed heliport, if the aircraft on approach had decided to adopt the Lake Pukaki alternative whereby it would have descended to a lower level to see if visual flight approach could be attained. We record that the instrument approach from Pukaki also passes over the heliport.

Turning now to Mr M J McKeown who is deputy chief pilot of Air Safaris. He normally flies a Nomad N24 twin turbo prop aircraft carrying up to 15 passengers but also flies a Cessna Stationair 8 which can carry seven passengers and the smaller Piper Cherokee carrying up to three passengers. He expressed grave concern because of the close proximity of the proposed heliport to Glentanner which is the airport from which Air Safaris operate. He stated without qualification that the helicopter operation would inevitably result in a mixing of air traffic from the adjacent Glentanner operation bringing a certainty of air traffic conflict and a high risk of inflight collision. He considered the potential for serious loss of life and major effect on tourism to be of grave concern.

He told us that the proposed base of operation at Ferintosh Station is virtually on the final approach to runway 33 at Glentanner. That runway because of prevailing wind conditions takes a large proportion of fixed wing landings with an approach passing close to the proposed helipad. He felt that with the prevailing winds a stable reasonable length final approach to land was imperative and that the potential of a helicopter taking off or landing at Ferintosh, also coping with adverse weather conditions, was of grave concern. He was also concerned with radio overloading.

Mr McKeown also told us that fixed wing aircraft intending to land at Glentanner join an overhead circuit on the hillside of the approach path (i.e. in the vicinity of the proposed helipad) and proceed to let down from that point flying over the lake to join the required right-hand turn into final approach at Glentanner. If helicopters came up the side of the hill he considered they would be in direct conflict. He also referred to an area of severe turbulence often encountered over the Lake which made this approach desirable.

Of the pilots presently flying in this area we heard from Mr G R Craig the pilot manager for Helicopter Line which operates from Glentanner. He was not particularly concerned with conflict between helicopters but was greatly concerned with the effect on tourism if an accident were to occur between a helicopter and a fixed wing aircraft. He also was concerned with the present overload of 118.6 frequency which he considered so bad that a person transmitting an aircraft position could not be certain that persons potentially affected had received that message.

We lastly heard from Mr B W Payne an aviation consultant again with extensive qualifications similar to those of Mr Lewis but a pilot with more operational experience in this area. He also expressed great concern at the practicalities of compliance with civil aviation requirements. To a degree he aimed his evidence at

the possibility of larger aircraft using Glentanner Airfield which would of course exacerbate the concerns expressed by other witnesses.

The Tribunal formed a favourable impression of the witnesses we heard who were actively flying in this area. We record that we did not consider them to be motivated by questions of trade competition. We found the evidence they gave to be basically motivated by concern for air safety. Those concerns were backed by independent assessment such as the evidence of Mr Payne and the evidence of Mr I R Fergusson, now retired, but previously chief pilot operation manager of the calibration flights of the CAA. Essentially we find that the proposed heliport with its ATZ would disrupt existing traffic patterns and, if for any reason such as for instance air turbulence on the face of the hills to the west of the proposed heliport, helicopters were forced away from the ATZ zone, then there was a potential for air conflict.

Turning now to the evidence of the applicants we had the evidence of Mr C S Tuck who is a director of Glacier. He gave us extensive evidence concerning the operations of his company on the West Coast and the ability of his pilots to operate in close proximity to other operations that proximity existing in the Franz Josef and Fox areas. We record that that particular evidence was not disputed by witnesses for the appellants and we record further that Mr Tuck's comments in that regard were supported by Mr E N Scott who operates Garden City Helicopters Limited from a site adjacent to Christchurch International Airport. We record however that that operation is under air traffic control. Whilst accepting the comments of Mr Tuck we found that other evidence indicated there was a "no man's land" type of fringe operation in which the proposed heliport was located. When the Franz Josef/Fox scenario was put to witnesses for the appellants they virtually all agreed that there were three situations -

(a) the situation as between Glentanner and Mount Cook Airfields with a separation of some 17 km

(b) the Garden Helicopters, Helicopter Line, Franz Josef, and Fox, operations where everyone was fairly close together and could visually keep an eye on the operations of the others and

(c) the situation where an operation was far enough away from other operations as to be not observable but yet close enough to be a potential interference. The Glacier proposal was in this category.

There was one addition to that particular proposition whereby one witness for the appellants was of the opinion that even were the heliport to be removed further from Glentanner he would still not wish to see it on the flight path between Pukaki and Glentanner. That would virtually remove it from the whole of the western shores of Lake Pukaki.

We do not accept that Mr Tuck had the same degree of dispassion towards air safety as did the witnesses to whom we have previously referred because he fairly

conceded that the closer he could get to the area in which he wished to operate the more viable would be the operations of Glacier. Turning to the evidence of Mr Lewis we have previously made some comment upon this and we fully agree with Mr Lewis that if everyone strictly adheres to the requirements of CAA and to the inter-group arrangements often reached but unenforceable as between operators then all should be well. However with the greatest of respect to Mr Lewis we must give greater weight to those with more extensive flying hours in this area provided we have formed the opinion as we have done that their evidence is not motivated by elements of trade competition.

We lastly heard from Mr J S O'Dowd appearing under witness summons on behalf of the Civil Aviation Authority who told us of the matters concerning conditional determinations granted by CAA to Glacier.

In the course of the hearing we compared the situation now proposed with the situation on the roadway outside the proposed heliport where Transit New Zealand had suggested traffic control conditions for the purpose of preventing conflict with through-traffic. Transit could never say that an accident would not eventuate. We find the situation with the conditional determination granted to Glacier much the same. The absence of an accident cannot be assured but in this case we would go further and state that an accident could occur in conditions of turbulence and sudden inclement weather causing snow showers, rain squalls etc. and that the potential for such an accident is within the potential recognised by s.3 of the Act when defining the word "*effect*". We have further concluded that the effects of such an accident upon the environment namely the communities in this area and their economies could be catastrophic.

To perhaps use another example more akin to the high country area with which we are dealing we could observe that despite the best attempts of hill country farmers to secure stock within their own properties there are occasions when stock can stray from one property to another. We are by no means satisfied on the evidence we have heard that aircraft may not stray from the ATZ into other flight paths or that aircraft within a flight fan may not stray into the ATZ of the proposed heliport.

We therefore find when considering the effect of this proposal upon the environment that although an accident may be of low probability its potential effect is such as to militate against the grant of a resource consent for a heliport at Ferintosh Station.

Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan (d)

The district plan is generally supportive of tourism. As we have recorded this is a discretionary activity and requires to be considered as such in terms of the plan. The council found in favour of the consent but in doing so set aside questions of air safety which is essentially the crux of our decision and has caused us to disagree with the council. Assessing the matter in terms of the district plan (and

the regional plan contains nothing to the contrary) we consider all matters of environmental concern (excepting safety) could adequately be addressed by conditions and the council has done so in a positive and realistic manner. It has addressed questions of transport, signs, design and other matters of a like nature. The council also took into account the National Park management plan which contained various statements including some statements positively promoting the use of aircraft for tourism in this area. We heard also from Miss A S Robson on behalf of Glacier Helicopters who is an experienced planner. We have no argument with her evidence which, as was the case with Mr McCracken the council planner, carefully and positively analysed the provisions of the Act and the district plan. In particular she led us through the conditions relating to conditional uses and with the exception of our comments in relation to possible hazards to the operation of aircraft from the Twizel/Pukaki Airfield we take no issue with her conclusions. We do not intend to address these matters further because essentially if the application were to be determined solely in relation to the provisions of the district plan then, subject to the reservation we have just expressed concerning flight paths, it appears to be more in accord with the provisions of the plan than contrary to them.

> Any other matters the consent authority considers relevant and reasonably necessary to determine the application (i)

If for some reason we should be wrong in considering that in law the potentially catastrophic effects of an air accident upon the economics of tourism is an effect upon the environment then we would consider it to be of sufficient importance for consideration under this subsection. We do not intend to repeat any of our comments but merely reiterate the concern we have for safety in this area in relation to the tourist industry which is not only of local but of regional and national importance.

The only other matter which could perhaps be brought into a consideration under this subsection is the curious provision which now appears in s.9 of the Act relating to restrictions on use of land. Section 9(8) now states:-

> *"The application of this section to overflying by aircraft shall be limited to any noise emission controls that may be prescribed by territorial authority in relation to the use of airports."*

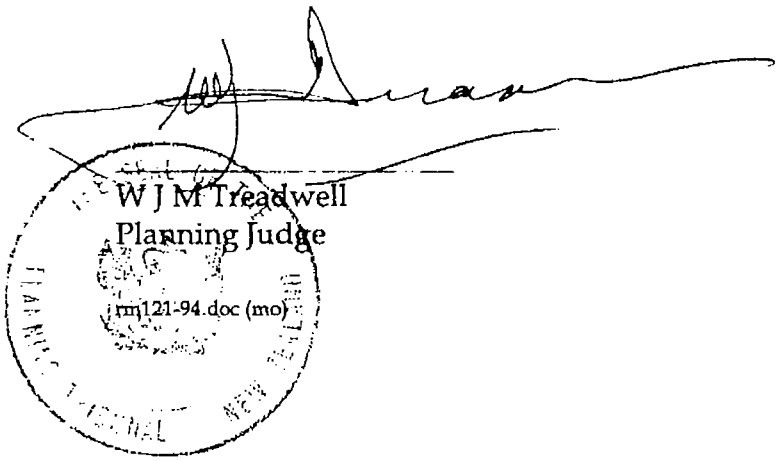
Section 9 relates to restrictions on use of land and is essentially a section setting forth the situations in which various types of resource consent should be obtained. We agree that in the context of that section the applicant does not need a resource consent to overfly. Whether the definition of "*airport*" (which is a different word from the word aerodrome used in the Civil Aviation Act) is intended to restrict the ambit of this subsection we do not know. That definition refers to an airport as being "*any defined area of land ... designed to be used ... for the landing, departure, movement, or servicing of aircraft.*" The Act is not clear whether there is intended to be a differentiation between aircraft overflying and aircraft landing or departing. The definition of "airport" also leaves out part of the definition of "*aerodrome*"

under the Civil Aviation Act, the definition under that Act including buildings, installations and equipment etc. We do not find it necessary to resolve those issues because our decision in this case is not based on the question of overflying, it is based on the effects of a potential accident.

CONCLUSION

For the foregoing reasons we have concluded that a resource consent should not be granted and the decision of the respondent council is accordingly cancelled and the appeals allowed. The question of costs will be reserved and in that regard we record that the Tribunal would be most unlikely to make an award of costs against an applicant who was successful at council level and who chose to appear before this Tribunal for the purpose of defending a consent which was properly given to him. We also record that the council decision was a careful and reasoned decision based on the evidence it heard and the advice it received.

DATED at WELLINGTON this 15th day of June 1994



W J M Treadwell
Planning Judge

rm121-94.doc (mo)

APPENDIX - PART EVIDENCE OF P G McGAHAN

International visitor arrivals are currently estimated to have increased by approximately 9.75% per annum for the last two years. Growth at these levels may continue to the end of the decade. Tourism growth for the Pacific-Asia region is estimated to grow at 6.8% per annum, while the forecast for growth world-wide is estimated at between 3-4.4% for the same period. (Base figure of 967,000 supplied orally).

Statistics from several sources, confirm the general trend, that there are significant increases in tourism and that this is likely to continue.

The most recent international visitor arrival statistics indicate that 1,191,088 visitors came to New Zealand to the year ended February 1994. This represented a 10.5% increase on the same period for the previous year. For the month of February there were 140,616 international visitor arrivals, an 18.3% increase upon the previous February. These figures are the latest unofficial statistics released by the New Zealand Tourism Board on a monthly basis.

Tourism receipts in New Zealand increased during the year by 11% in real terms compared to OECD average of 3%. To the year ended September 1993 New Zealand had 1,157,000 overseas tourist arrivals, an increase of 10%, compared to the OECD average of 2%. The number of nights visitors spent in hotel and similar accommodation rose by 9% compared to the OECD average of 1%.

Currently, income from tourism is the greatest of any industry sector at $3.37 billion. It provides for an estimated 68,000 jobs. Within the last two years 14,300 full-time jobs have been added to the New Zealand economy as a result of growth in the industry.

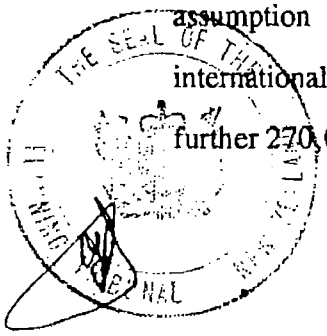
The New Zealand Tourism Board have set a target of three million international visitors to New Zealand by the year 2000, however current forecasts indicate that the figure is more likely to be around the two million mark. That represents huge growth for the industry and the need for additional infrastructure and services in order to meet such demand.

New Zealand's desirability as a tourism destination can be highlighted by a recent article in a German travel magazine "Globo". It showed that in a readership survey that New Zealand and Bali were chosen ahead of 50 other destinations, as the top travel destinations, based upon the readers own experiences. Almost 95% said they would make a return visit.

Mount Cook is rated the top 10 tourism attractions in New Zealand. It has been identified by the NZTB as one of the premier tourism "icons" of this country. As a destination it is likely to receive a significant proportion of international visitor arrivals to New Zealand.

There is not a great deal of detailed research on visitation, specific to the Mount Cook region. The NZTB - IVS however, reveals that Mount Cook National Park is the second most visited of the National Parks by international visitors within New Zealand. This is estimated to be approximately 220,000, as compared with 150,000 in 1985. This represents a 46% increase over that period.

According to the Department of Conservation Draft Recreational Strategy (1991), an assumption is made that if Mount Cook continues to receive 24% of the total international visitors to New Zealand, as it did in 1985, then the park can expect a further 270,000 visitors by the end of the decade.



The NZTB - IVS (1993) study also indicates that scenic tourist flights have been rated as the fourth most popular activity undertaken by international visitors to New Zealand, after short bush walks, scenic boat cruises and jet boating. Approximately 180,000 international visitors undertook a scenic flight of some sort while visiting New Zealand.

A further report: Review of Tourist Scenic Flying Safety (Ministry of Tourism, Civil Aviation Authority of New Zealand, New Zealand Tourism Board - May 1993) supports the general trends of growth in scenic tourist flights;

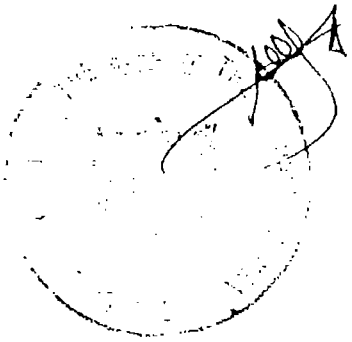
- that the tourist scenic flying industry is presently in a growth phase

- that the Mount Cook area is one of the premier areas for this type of activity

- that the vast majority of tourist scenic flight passengers are overseas visitors and that the overall numbers of flight passengers has steadily increased and this trend is expected to continue to the year 2000 and beyond.

- in the South Island the projected increase in demand for this type of service has been estimated at between 55% and 96%. The approach used to estimate the likely increase in scenic flight activity is based upon the survey undertaken by the review team, and the projections of visitor arrivals using NZTB projections of visitor arrivals from their IVS (1991/92). A main assumption for this approach is that the number of tourist scenic flights will increase in proportion to the overall increase in visitor nights. The 55% projected increase is based upon the Forecast Visitor Arrivals by 2000 i.e. (2 million visitors by 2000), and the 96% based upon Target Visitor Arrivals i.e. (3 million visitors by 2000).

- the information in the report shows that the Mt. Cook area experiences the greatest number of scenic tourist flights of any of the localities listed in the report. This is listed at 426 flights (25.28%) during the peak period (November to April) of the total number of such flights in New Zealand and 137 flights (23.95%) during the off peak period. This indicates that there is a high demand for scenic tourist flights in the Mt. Cook area.



IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 35/00

IN THE MATTER of the Resource Management Act 1991

BETWEEN DART RIVER SAFARIS LIMITED

Appellant

AND G.R. & E.E. KEMP

First Respondents

167

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Second Respondents

Hearing: 9th February 2001

Appearances: J.N. Appleyard for the Appellant
G.M. Todd for First Respondents
N.Z. Marquest for Second Respondents

Date of Judgment: 8th March 2001

RESERVED JUDGMENT OF HON. JUSTICE JOHN HANSEN

Solicitors
Chapman Tripp Sheffield Young for Appellant
Macalister Todd Phillips Bodkins, Queenstown for First Respondents
Ross Dowling Marquet Griffin, Dunedin for Second Respondents

[1] This is an appeal against the Environment Court decision C151/200, delivered on the 8th day of September last year.

[2] It is the second time this particular matter has been before the High Court.

[3] The background to this matter is the use of the Dart River at the head of Lake Wakatipu for commercial jet boating operations.

[4] It is unnecessary to set out the facts of this matter, as it is comprehensively reviewed in the original Environment Court decision (C229/99), the High Court decision of Panckhurst J. (Christchurch AP6/2000 unreported decision of 15th June 2000), and the second Environment Court decision mentioned above.

[5] At the centre of this controversy are attempts by the first respondents to expand their very limited existing commercial jet boat operation on the Dart River.

[6] The appellant's opposition has come in numerous guises at various stages of these proceedings. The Environment Court, in its original decision, found there was at least an element of trade competition in the case put up by the appellant. Panckhurst J. found this was well open on the evidence. It is a view I would concur in. However, I must judge the matter on the material in front of me.

[7] At the heart of this dispute is an attempt by the Environment Court to put in place a system that would allow two operators to be present on the Dart River. It is abundantly clear that the appellant does not have exclusive rights to that river.

[8] The matter that gave rise to the first High Court appeal comes from the conditions imposed in the Environment Court. The relevant condition is condition 3 which reads:

> "(3)(a) The parties shall file an agreed draft operating memorandum for the total 26 jetboat trips; such scenario is
>
> (i) to give priority for choosing the time of the morning trips for up to four jetboats to whichever operator has an agreement satisfactory to Mr Billoud;
>
> (ii) to be agreed after consultation with the harbourmaster; and
>
> (iii) subject to(i) we note that it would be fair to have Mr and Mrs Kemp's trips approprtioned equally in the agreed number of windows.
>
> (b) Failing agreement any party may refer the setting of an operating memorandum back to the Court. "

[9] It is this condition that caused concern to the appellant. The reason for that is obvious.

[10] The appellant already held an existing resource consent. It authorised 20 boat trips per day, between the hours of 8.30am and 6.30pm. It was granted subject to eleven conditions, and of particular relevance was condition 9, which reads:

> "That the memorandum from the Harbour Master, dated 5 May 1993, and any subsequent amendments thereto, shall be complied with at all times.."

[11] This was a reference to a memorandum prepared by the harbourmaster, Mr Black, which recorded agreed procedures binding upon all commercial operators on the Dart River in the interests of public safety. The background to this matter is that there were previously two operators on the Dart River,

and they were parties to the agreement. Subsequently, in 1996, the appellant purchased the assets (including the resource consents) of both Dart River operators. Effectively, this amounted to a transfer and consolidation.

[12] In front of Panckhurst J., the appellant's position was that condition 3 was invalid, as it contemplated the appellant being required to agree to a new operating memorandum.

[13] Panckhurst J. considered this matter, and concluded at paragraph 27:

> "Regardless of the merits of the situation, the fact remains that DRSL has legal rights by virtue of its resource consent. I do not accept that such rights may be depreciated because they are not founded in land law. They remain rights which may not be denied or eroded by imposition of a condition on another person's resource consent. But the narrow point for present purposes is whether the obligatory terms in which condition 3(a) is cast render it invalid. I accept it is invalid to the extent that an obligation to reach agreement is assumed. On the other hand it was entirely competent of the Court to provide the opportunity for operators to negotiate and agree to a new operating memorandum. In these circumstances I do not propose to strike out condition 3(a), bur rather to make a finding that to the extent it is expressed in obligatory terms the condition is invalid. "

[14] Apart from that limited extent, the appeal was unsuccessful.

[15] It should be noted that condion 3 always left it open for the matter to be referred back to the Environment Court where there was a failure to agree.

[16] There was a failure to agree, and the matter was referred back to the Environment Court. The Environment Court approached the matter on the basis that any decision made could not impinge on the existing resource consents enjoyed by the appellant.

[17] The appellant took a somewhat "scatter gun" approach to this appeal. No fewer than 13 errors of law were said to be identified.

[18] However, in the course of the hearing of this appeal the matter became more focussed. The grounds of appeal were grouped into the following:

(a) That the Environment Court was functus officio.

(b) That under the Resource Management Act ensuring safety for jet boat operations on the river was an issue to be determined by the Environment Court, and could not be delegated to the Queenstown harbourmaster.

(c) That the Court could not direct the Queenstown harbourmaster in the exercise of his power.

(d) That the Environment Court proceeded in its hearing on the 31st August 2000 simply on the basis of legal submissions, and there was no evidence before it.

(e) That the decision in any event abrogated the appellant's existing resource consents.

(f) Finally, that the Court erred in disregarding relevant evidence.

[19] It seems to me that the real focus of the appeal was on the Environment Court's obligation to consider safety matters, and also the allegation that it attempted to direct the harbourmaster in his function.

[20] Mr Marquet advised that the council would abide the decision of the Court. He said there was some concern that the harbourmaster was restrained by the Environment Court decisions. He said the council's view was essentially "a plague on both their houses". Given the protracted litigation that is not surprising.

THE ENVIRONMENT COURT DECISION

[21] When the matter came back before the Environment Court, I understand the first respondents did not pursue the idea of a tandem operation, which had been raised in front of Panckhurst J. There was no additional evidence called at the second hearing, although it seems to me the Court was perfectly entitled to take into account the evidence heard originally. Consent was granted for the first respondents to operate six trips on the river, and no time table was imposed.

[22] Rather than setting out an operating memorandum, as contemplated by condition 3(b), of the first decision, the Environment Court determined that safety would be dealt with by requiring a Safe Operational Plan under Part 80 of the Maritime Rules. Those rules relate specifically to marine craft used for adventure tourism.

[23] In its second decision, the Environment Court said at paragraphs30 and 31:

> "[30] We have only quoted the most relevant parts of the requirements of a safe operating plan but it is clear that the requirements are quite comprehensive and they apply within a more 'general 'Code of Practice' for jet boat operators constituted by Appendix 1 to the Part 80 rules. In the light of the above we think it may not be necessary for the resource consent to specify times for the operation of Mr and Mrs Kemp's jet boats either. Clearly they will need to have a safe operational plan under the Part 80 rules. Now we have had our attention drawn to this requirement of the Part 80 rules we consider 'operating practice' we identified as necessary in paragraph 20 of the substantive decision will exist if Mr and Mrs Kemp comply with the Part 80 rules.
>
> [31] We consider that does not contradict any part of the substantive decision. It may be contrary to condition 3, but condition 3 is clearly inconsistent with the intent and spirit of the decision it is unworkable (as the High Court has ruled). Obviously there is a huge incentive for the parties to comply with Part 80 rules. If they do not and there is an accident they will lose both lives (potentially) and also business in a major way. We conclude that for Mr and Mrs Kemp's resource consent the only necessary operating practice we should require is the 'safe operational plan' under the Part 80 rules. '

FUNCTUS OFFICIO

[24] Ms Appleyard cited from ***R v Nakhla (No.2)*** [1974] 1 NZLR 453, where functus officio was defined as:

> "Once a judgment of the Court (which is not a nullity) has been finally recorded the Court is functus officio and its inherent powers to vary its judgment is lost."

[25] In my view, there is nothing in this ground. I agree with the comprehensive reasons given by the Learned Environment Court Judge in his second decision, and do not propose to add to it further.

[26] In my view, the saving provision of condition 3(b) clearly allows the Environment Court to consider the matter further in any event.

SAFETY

[27] The next two alleged errors of law effectively run together. Essentially, the appellant argues that under the Resource Management Act it is the responsibility of the Environment Court to consider and decide safety issues in relation to the resource consent applied for, and it cannot be delegated to anyone else.

[28] The starting point for this argument is Part II of the Act.

[29] Section 5 reads:

> "5 Purpose
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a

way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and ***for their health and safety*** while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment." (My emphasis)

[30] In ***Lee v Auckland City*** (1995) NZRMA 241 at 248 Judge Kenderdine said:

"In effect s.5 of Part II of the Act is the only section in the present Act which contains the philosophy of sustainable management as its purpose, and the proscriptive criteria against which effects (as defined in s3) and the plan provisions may be measured. Section 5 under the 1993 amendment to the Act may be considered the lodestar which guides the provisions of s.104 and in this appeal we are guided by the over-arching purpose of sustainable management as defined."

[31] Resource consents are dealt with by Part VI, and where relevant the sections are:

105 Decisions On Applications

[(1) Subject to subsections (2) and (3), after considering an application for—

.....

(c) A resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108."

[32] The Court conducts a hearing de novo, but only has the same powers under s.290(1) as the council. In a case such as this where there is an appeal against a resource consent, the Environment Court's powers are to grant or decline the consent, or grant it subject to conditions.

[33] The consent authority must take into account the factors set out in s.104(1):

> "104 Matters To Be Considered
>
> (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to—
>
> (a) Any actual and potential effects on the environment of allowing the activity; and....."

[34] It seems to be common ground between the parties before the Court that "subject to Part II" means that Part II matters are given primacy in the exercise of the discretionary judgment. It is, therefore, necessary for the Court to take into account the health and safety matters set out in s.5.

[35] Section 104(1)(a) requires the Court to have regard to any actual and potential effects on the environment of allowing the activity.

[36] Section 3(f) defines "effects" as including "any potential effect of low probability which has a high potential impact."

[37] Counsel for the appellant referred to authorities dealing with these provisions.

[38] The first was ***Te Aroha Quality Appeal Protection Appeal Group v Waikato Regional Council (No.2)***(1993) 2 NZRMA 574, where consent was refused for a meat by-products rendering plant on the basis that a mechanical failure could result in odour being released from the plant, where the probability of such failure was low, but the impact on the surrounding environment would be very high. Ms Appleyard submitted that even where the activity did not involve life threatening matters, the Environment Court was prepared to refuse consent.

[39] The second case referred to by the appellant was (W50/94). In that case, the Court considered the potential for an air accident arising from the establishment of a proposed heliport on the western banks of Lake Pukaki. The applicant relied on the fact that it had been granted approval from the Director of Civil Aviation in terms of the civil aviation rules.

[40] Notwithstanding, the Environment Court stated it was "competent for this Tribunal to consider whether a risk remains and whether any particular accident even if improbable would have environmental consequences which warrant refusal of a resource consent."

[41] Counsel then relied on two passages from that decision:

> "In order to set the stand for the matters we are now about to discuss we have included from the evidence that the potential for an air accident is present even if caused by human error as a result of not complying with the requirements of Civil Aviation. If there were an air accident involved in the loss of tourist lives we are satisfied from the evidence that such an accident would have an effect upon the communities to which we have referred in an economic sense. The evidence showed that following a similar accident in Milford Sound area tourist operators and in particular Mount Cook Group suffered an substantial economic loss by the reluctance of Japanese and other tourists to use tourist aircraft. There is thus a potential 'effect' on the 'environment' with particular reference to economic well being of the community. We hold and will later expand upon the fact that this potential effect may be of low probability but that the potential impact is high.
>
> In the course of the hearing we compared the situation now proposed with the situation on the roadway outside the proposed heliport where Transit New Zealand had suggested traffic control conditions for the purpose of preventing conflict with through-traffic. Transit could never say that an accident would not eventuate. We find this situation with a conditional determination grant by [Director of Civil Aviation] to Glassier [the Appellant] is much the same. The absence of an accident cannot be assured but in this case we would go further and state that an accident could occur in conditions of turbulence and in sudden and inclement weather causing snow showers, rain squalls etc and that the potential for such an accident is within the potential recognised by Section 3 of the Act when defining the word 'effect' We have further concluded that the effects of such an accident upon the environment namely the communities in this area and their economies would be catastrophic. "

[42] Counsel also referred to the Environment Court decision in ***McKay v North Shore City Council*** (W146/5) where consent was refused for a child care centre where safety issues were such, the Court considered the proposal had a potential to endanger the lives of young children, their parents, and road users in the vicinity.

[43] Finally in this regard counsel referred to the decision of the Environment Court in ***Cash v Queenstown Lakes District Council*** (A3/93) where the Court stated:

> "We find that the more jet-boats use that stretch of river, the more safety is compromised. The effect of each additional boat and trip, while small in itself, is cumulative on the effect of the existing numbers, and although the probability of potential effect (a collision or accident occurring in avoiding a collision) is low, the potential impact on passengers (injury, or in extreme case death) is high. ....The positive effects of allowing the appeal.....[including] increase competition in the industry and improved economic well-being for the appellant do not deserve to be advanced at the expense of the adverse cumulative effects of low probability of reducing the safety of passengers on boats in the lower Shotover river."

[44] Ms Appleyard submitted that this passage was to the effect that it was the duty of the Court to consider safety issues, and it is not something that can be delegated. In other words, she submitted, the Court could not satisfy itself of the safety of the proposal by simply passing that responsibility to the harbourmaster under the Maritime Rules, Part 80.

[45] Next Ms Appleyard attacked the Court's finding at paragraph 23 that "the real issue is whether we can find an operating practice or condition for Kemp's consent which ensure reasonable safety." She submitted that this was in circumstances where there is no additional evidence available to the Court, and nothing was different from the first hearing.

[46] Ms Appleyard referred to paragraph 10 of the High Court decision, where Panckhurst J., stated:

> ".....The Court accepted Mr Black's evidence that some form of agreed or imposed operating regime, binding upon commercial operators, was essential. This conclusion was not challenged on appeal and indeed it was common ground that for the safe operation of commercial jet boats on the Dart River a co-ordinated operational plan was necessary. "

[47] It was submitted that paragraph 23 of the Environment Court decision did not state the real issue, because the High Court and the Environment Court, in the first decision, had found that a memorandum binding on all operators was required to ensure safety. With respect, this seems to me to be carping.

[48] The Environment Court was conscious that in its second decision it must not impinge on the existing rights. Its task was to find a formula that would allow the Kemps consent to operate with reasonable safety, and not impinge on existing use rights. Given the Court's consciousness of this, I think Ms Appleyard reads too much into paragraph 23.

[49] However, she also criticised the use of the term "reasonable safety" saying that the Courts had taken a precautionary approach in these areas. The cases, particularly ***Glentanner Park (Mount Cook) v McKenzie District Council*** (supra) support this.

[50] The related question was the rule against delegation.

[51] I have already set out paragraph 31 of the second judgment.

[52] Ms Appleyard referred to the leading texts on judicial review and administrative law . She submitted it was a fundamental principle that a discretion must be retained and any power must be exercised by the authority upon whom it is conferred and no one else. She cited from ***Wade on Administrative Law*** 7th Ed at page 353:

> "Closely akin to delegation, and scarcely distinguishable from it on some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitted to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them. In this class might be included the case of the cinema licensing authority which, by requiring films to be approved by the British Board of Film Censors, was held to have surrendered its power of control and also the case of the Police Complaints Board, which acted as if it were bound by a decision of the Director of Public Prosecutions when only required to 'have regard to it.' This doctrine has even been applied to voting by local councillors."

[53] 8.2 of the Martine Rules Part 80 reads:

> "8.2 The requirements in Part 80 are additional to and not in place of navigational limits or other operating requirements on a specific river included in any resource consent granted by a local authority under the Resource Management Act 1991."

[54] It was submitted that this recognised that it was the legitimate function of the Environment Court to consider and impose navigational limits or other operating requirements notwithstanding the Maritime Rules Part 80. It was also submitted on behalf of the appellant that questions of safety in terms of s.5 of the Resource Management Act was a duty of the Environment Court, even though it may have shared that with, and overlapped with, the Marine Transport Act, and the provisions under Part 80. That is obviously so.

[55] On the other hand, Mr Todd submitted that the Court had not delegated its function, and had properly considered health and safety, as required by s.5. He submitted that the evidence before the Court at the earlier hearing was relevant to that, and he referred to paragraph 22 of the later decision which stated that a common operating memoranda for all operators was not the only way of ensuring safety. He pointed out that the Court there referred to its earlier decision at paragraphs 101 and 107 as relevant to other ways of bringing into effect safe operating procedures.

[56] I have read the section of the second decision dealing with safe operating practice from paragraphs 23 to 31 with great care. Regrettably, I reach the conclusion that the Court has not considered safety requirements, as it is obliged to do under s.5. It seems to me from reading the decision, particularly paragraph 20, that it has delegated that role to the harbourmaster under the Maritime Rules Part 80.

[57] There was obviously a considerable amount of evidence relating to safety at the first hearing. No additional evidence was called at the second hearing. It is clear the Environment Court found in the first hearing that safety required an integrated plan. That was noted in the first appeal. In the light of that finding, it was for the Environment Court, in the absence of fresh evidence, to satisfy itself that there was a safe integrated plan. The only thing that changed through the High Court decision was that any such integrated plan could not be imposed upon the appellant in such a way as to impinge upon its existing resource rights.

[58] Whether or not that was possible was clearly a matter for the Environment Court, as Panckhurst J., recognised in paragraph 28, where he stated:

> "Counsel for DRSL contended that since the issue of safety was of such fundamental importance, were condition 3 to be held invalid, the consent must also be quashed. I disagree. The Environment Court was alive to the possibility that an impasse may develop, hence it ordered that *'failing agreement any party may refer the setting of an operating memorandum back to the court'*. What it had in mind is not altogether clear. *I assume the Court considered it could if need be prescribe by way of a condition to Mr and Mrs Kemps' consent operational terms which were compatible with the existing agreement, and thereby achieve a safe system."* (My emphasis)

[59] The terms of any Safe Operational Plan are not before the Court, nor were they before the Environment Court. This is particularly relevant when one considers the last sentence of paragraph 28 of Panckhurst J's decision I have just cited above. Without knowledge of the exact terms of the Safe Operational Plan it is impossible to say that it is compatible with the existing resource consents.

[60] In my view, it was for the Environment Court to ensure safe operation compatible with the existing consents. It was required to do this in meeting its obligation to take into account health and safety matters under s.5. It needs to do so to give primacy to Part II.

[61] In ***Minister Trust Limited v Traps Tractors Ltd*** [1954] All ER 136 at 145, Devlin J., (as he then was) stated:

> "What has to be satisfied in each case is whether the agent is or is not intended to function independently of the principal. The mere use of the word 'certificate' is not decisive. Satisfaction does not necessarily alter its character because it is expressed in the form of a certificate. The main test appears to be whether the certificate is intended to embody a decision that is final and binding on the parties. If it is, then it is in effect an award, and it has the attributes of its arbitral character. It cannot be attacked on the ground that it is unreasonable, as the opinion of a party or the certificate of one who is merely an agent probably can....."

[62] Ms Appleyard submitted that the approval of a Safe Operational Plan was an aribtral role, and this was delegation not available to the Environment Court. In such a submission Ms Appleyard was essentially promoting that line of cases in resource management dealing with "certifying" and "compliance" conditions. (See ***Turner v Allison & Others*** [1971]NZLR 83; ***Olson v Auckland City Council*** (1998) NZRMA 66).

[63] For myself, I do not consider this approach to be particularly useful in relation to the statutory obligation of the Environment Court to consider health and safety matters.

[64] I have already found that it was an unchallenged finding in the Court below that safe operation required a co-ordinated approach. That is clear from Panckhurst J's decision. It is also clear that any such operating plan cannot impinge on the appellant's existing resource consents.

[65] It seems to me the Environment Court was in error in not addressing the safety issues itself to ensure that the provisions of s.5 were met, that there was a co-ordinated plan in accordance with its earlier findings, and that such plan did not impinge on the appellant's existing resource rights. This cannot be done by leaving safety issues to the harbourmaster under Part 80 of the Maritime Rules.

[66] I have given careful consideration to this matter, and concluded I have no alternative but to find that there was this error of law, that it was material, and the matter must be referred back to the Environment Court in that regard.

[67] That is a decision I have reached with reluctance, because this matter has already occupied considerable time in the Environment Court and this Court.

That reluctance is increased, because I agree with the view of the Environment Court that, in part, the appellant's motives are as a trade competitor, and not the safety issues they so altruistically place before this Court.

[68] Having reached that conclusion, it is strictly unnecessary to go on and consider the further alleged errors of law. However, it may be of assistance to do so.

[69] The next allegation was that the Court could not direct the Queenstown harbourmaster in the exercise of his power. That is obviously correct, but it seems to me the Court did not attempt to do so. There is simply a reference at paragraph 28 to footnote 10 in the Maritime Rules, Part 80, and the Court continued:

> "We infer from the footnote that it is not part of the safe operating practice itself to control times of operations."

[70] For myself, I would not infer that from the footnote. In any event, it is strictly unnecessary to comment. The obligations of a harbourmaster are under a different Act and Regulations. It is for him to exercise his discretion as he sees fit. At this juncture it is not for this Court, or the Environment Court, to attempt to fetter that discretion. If the parties are aggrieved with the harbourmaster's decision, it is possible that review proceedings may be instituted, but until that time the harbourmaster must decide matters as he thinks fit, in line with his statutory and regulatory duties and obligations.

[71] The other three clusters of alleged errors of law are set out earlier in paragraph 18 (d) (e) and (f).

[72] The first relates to there being no evidence on the hearing of the 31st August. While no evidence was called, the Court was entitled to consider evidence from the earlier hearing. However, as I have noted, the earlier decision found that safety required a co-ordinated plan for the river, and this was not challenged on appeal to this Court. It would seem difficult to see how the Court could be satisfied without further evidence, but as there is no analysis of the evidence relied on from the first decision, and no independent safety finding, I would not comment further.

[73] The next complaint is that the decision abrogates the existing resource consents of the appellant. I do not accept this. It is clear throughout the judgment that the Environment Court were conscious of the need to ensure that whatever happened it could not impinge on the existing resource consents of the appellant, in accordance with the High Court decision.

[74] Finally, there is an allegation that the Court disregarded relevant evidence, being a time table presented to the Court by the appellant.

[75] It is for the Court to determine what is relevant and irrelevant. There is nothing to suggest the Court did not have this document in front of it and considered it. I would not have found any error of law in this ground.

[76] It follows that on one limited point the appellant has been successful. The decision relating to safety and reference to the harbour master is quashed and referred back to the Environment Court.

[77] As has been noted at various stages of these proceedings, the issue of safety is one that ought to be resolved between the parties. The fact is that

commercial competition no doubt plays a part in that failure, despite the altruism expressed by both sides.

[78] In an endeavour to save further time, it seems to me that the Safe Operational Plan of the harbourmaster should be obtained before the matter is considered further by the Environment Court. If that comes up with a workable solution that does not impinge on the appellant's right it may well be that the parties can reach agreement in the Environment Court matter, or, alternatively, if the evidence satisfies the Court of safety aspects under s.5 they could endorse the Safe Operational Plan.

[79] The final issue is one of costs. Memoranda as to costs are to be filed within 10 days of the handing down of this decision. Given the limited success of the appellant, and my firm view that they are, in part, motivated by commercial matters, my preliminary view is that costs should lie where they fall. However, if the parties take issue with that they are entitled to file memoranda so the matter can be considered in depth.

Signed at 8.50 am/~~pm~~ on 8TH MARCH 2001

J. W. Hansen J.