Kemp v Queenstown-Lakes District Council — [2000] NZRMA 289

New Zealand Resource Management Appeals · 1 Pages

Environment Court Queenstown

C 229/99

22 December 1999

Judge Jackson

Headnotes

Commercial jetboating — Resource consent — Outstanding natural landscape — Worth of surveys — Priority of resource consent applications — Water conservation orders — Resource Management Act 1991, ss 5, 6, 7, 8, 88A, 92, 94, 104, 105, 120, 122, 129, 139, 199, 200, 215, 217, 274, Fourth Schedule — Ngai Tahu Claims Settlement Act 1998, ss 87, 91, 206, 209, 215, 217, 237, 238, 249, 290 — National Parks Act 1980 — Conservation Act 1987 — Reserves Act 1977 — Town and Country Planning Act 1977 — National Development Act 1979 — Resource Management (Forms) Regulations 1999, reg 8.

The Kemps and a Mr Billoud separately applied for resource consent for commercial jetboat operations in the Rees and Dart Rivers at the head of Lake Wakatipu. The area was popular for tramping, was an outstanding natural landscape, and was also important to tangata whenua (particularly Ngai Tahu). The Kemps held an existing resource consent for two jetboat trips per day for tramping and angling purposes, and sought consent for ten trips per day for sight-seeing. Mr Billoud did not have a right to run jetboats, but did have resource consent to take paying customers down the Dart River in canoes. He sought consent for four trips per day. Another company, Dart River Safaris ("DRS"), held resource consent allowing it to run up to 20 jetboat trips per day and objected to both applications. Ngai Tahu had purchased a controlling share in the owner of DRS. Ngai Tahu opposed the significant increase in jetboat activity, and saw the Kemp's application as detrimentally affecting the river's intrinsic values and their spiritual and cultural relationship with the catchment, together with a number of related concerns.

The respondent Council had refused both consents and maintained that position on appeal. The Council's first consideration was safety, and the second was to allow customers of the commercial operations to have a wilderness experience allowing a separation time of five minutes between boats. Because the Council's bylaws required all jetboat drivers to be licensed before they could operate, and following a 1993 Planning Tribunal decision expressing concerns that there were no proper procedures in place for commercial operators, the Council prepared a memorandum as to operation of commercial jetboats on the Dart River. That was done with the agreement of all parties. It provided for a total number of 20 trips per day, and the Kemps were subsequently allocated a further two trips per day although the memorandum was not expressly altered to take account of that.

Federated Mountain Clubs of New Zealand Inc was concerned about the ecological aspects of the proposals, and the effect on amenities for trampers and other recreational users of the area. The Department of Conservation also opposed both applications on the grounds of their effect on the intrinsic values and characteristics of the Dart River and its environs and on riverbed bird species.

Held (allowing the Kemp appeal in part, and refusing the Billoud appeal):

(1) The criteria for measuring the worth of surveys were as discussed in *Shirley Primary School v Telecom Mobile Communications Ltd,* and set out in *Imperial Group plc v Philip Morris.* In the case of a survey of Dart River users, it was clear that neither of the groups of interviewees selected represented a relevant cross-section of the public. In addition the survey was not carried out fairly, and leading questions were used. Nor were the other criteria in the

Imperial Group case followed. Whilst those criteria were not necessarily completely appropriate in all circumstances for surveys of public opinion under the RMA, in the circumstances the survey evidence given was of minimal weight.

(2) Despite the fact that the appeals were heard together, they were to be considered separately and on their own merits (pursuant to *Fleetwing Farms Ltd v Marlborough District Council*). That meant an important issue was as to who should have priority. The date on which a completed application was received by a Council was the determining date under the first come first served test. An application was “completed” when it was notifiable. There must be (a) a full application; (b) an adequate AEE; and (c) adequate answers to any request by Council for further information. In this case the Kemps first received and answered requests for further information, so they had a completed application ready first. They therefore had priority even though Mr Billoud's application was filed first.

(3) Although DRS already had resource consent for 20 trips (which was all that was contemplated by the Council memorandum), and its rights under that resource consent were valuable property rights in an economic sense, they were neither real nor personal property in a legal sense. There was therefore no automatic bar under the law of property preventing grant of further resource consents. Further, the memorandum contemplated change, and was not part of the DRS consent, but was referred to in a condition that expressly contemplated changes to the memorandum.

(4) The effect of s 199(1) is that the purpose of the RMA loses primacy if there is a conflict between that purpose and the purpose of a water conservation order (Buller Conservation Order).

(5) Under s 200 a water conservation order is:

(a) designed to impose restrictions or prohibitions in the exercise of the powers of regional councils, but not district councils;

(b) designed to relate to qualities and quantities of water; and

(c) (a) and (b) are reinforced by the effect of an order being to prevent or control, by imposition of conditions, the grant of water permits, coastal permits, or discharge permits, but not land use consents.

Therefore the Court only has regard to a water conservation order under s 104(1)(g).

(6) The ten trips sought by the Kemps might affect the values protected by the water conservation order. But four extra trips (or six in total if the existing two were surrendered) would not affect the valued characteristics. That conclusion was reached bearing in mind that jetboat activities do very little to the water that could be seen as harmful. The effects of ten jetboat trips would be more than minor given that the Dart River flowed through an outstanding landscape that was also of special significance to Ngai Tahu. However, if the Kemp's application was reduced to four trips daily to mitigate the adverse effects, then those effects would be only minor. The first threshold test under s 105(2A) would be met if that were done. Both the Kemp and Billoud proposals also passed the second threshold test.

(7) The approach to balancing Maori issues with other relevant matters described by the Court of Appeal in *Watercare Services v Minhinnick* was equally correct in respect of resource consent applications.

(8) Whilst DRS continued operating, it would add very little harmful effect on to the amenities to allow four new trips. The Court was constrained from adding any more (ie, up to the ten sought by the Kemps) because of concerns over the cumulative effects of noise, safety, and amenities, and for fear of increasing the risks to wildlife. Accordingly, resource consent should be granted only for four trips. The Kemp's appeal was therefore successful in part, and Mr Billoud's appeal was declined.

Observation:

The reasoning in *Stokes v Christchurch City Council* that the Court of Appeal in *Bayley* meant de minimis to be an interpretation of “minor” was wrong. The Court of Appeal was considering the interpretation of s 94(2)(a)and (b), and stated a two-step test for a local authority. The reference to “de minimis” effects was to s 94(2)(b) only, and “minor” effect in s 94(2)(a)may mean more than “de minimis”. The test of “more than minor” was as stated in *Bethwaite v Christchurch City Council*, and whether effects are more than minor in any given situation is a matter of context.

Cases referred to in judgment:

Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc [1988] 1 NZLR 78; (1987) 12 NZTPA 298

Auckland Acclimatisation Society v Waikato Valley Authority (1985) 11 NZTPA 33

Baker Boys v Christchurch City Council [1998] NZRMA 433

Bayley v Manukau City Council [1999] 1 NZLR 568; [1998] NZRMA 513

Bethwaite v Christchurch City Council (Planning Tribunal, C 85/93, 10 November 1993)

Buller Conservation Order (1996) (Environment Court, C 32/96, 31 May 1996)

Caltex Ltd v Auckland City Council (1997) 3 ELRNZ 297

Campbell v Southland District Council (Environment Court, W 114/94, 14 December 1994)

Cash v Queenstown-Lakes District Council (1993) 2 NZRMA 347

Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257

Fleetwing Farms Ltd v Marlborough District Council [1997] NZRMA 385

Imperial Group plc v Philip Morris Ltd [1984] RPC 293

Mangakahia Maori Komiti v Northland Regional Council [1996] NZRMA 193

Marlborough Mussel Company Ltd v Marlborough District Council (Environment Court, W 169/96, 3 December 1996)

Medical Officer of Health v Canterbury Regional Council [1995] NZRMA 49

Minister of Conservation v Kapiti District Council [1994] NZRMA 385

Minister of Conservation re Kawarau River (Environment Court, C 33/96, 13 June 1996)

New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70

North Taranaki Environment Protection Association Inc v Governor-General [1982] 1 NZLR 312

Pigeon Bay Aquaculture Ltd v Canterbury Regional Council [1999] NZRMA 209

Robert Holt & Sons Ltd v Napier City Council (1977) 6 NZTPA 132

Shirley Primary School v Telecom Mobile Communications Ltd [1999] NZRMA 66

Stokes v Christchurch City Council [1999] NZRMA 409

Wakatipu Environment Society Inc v Queenstown-Lakes District Council [2000] NZRMA 59

Watercare Services Ltd v Minhinnick [1998] 1 NZLR 294

Resource Management Act 1991

In the matter of an appeal under s 120 of the Act.

Mr G M Todd for G R and E E Kemp

Mr B A Boivin for E A Billoud

Mr N S Marquet and Mr A J Logan for the Queenstown-Lakes District Council

Mr G L Elwell-Sutton for himself

Mr M Sleigh and Ms J M Appleyard for Dart River Safaris

Ms A Dewar for Te Runanga O Ngai Tahu

Ms D M Llewell for the Department / Minister of Conservation

Dr M J S Floate for Federated Mountain Clubs of New Zealand Inc

Mr R E Bakhuis for himself

JUDGE JACKSON.

Decision

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[A] Introduction

[1] These are two appeals about commercial jetboating in the Dart River (Te Awa Whakatipu) - a large glacier-fed braided river flowing into the head of Lake Wakatipu. By consent the two appeals under s 120 of the Resource Management Act 1991 (“the Act” or “the RMA”) were heard together. The hearing took considerably longer than the parties estimated, partly because several interested persons came into the case after the pre-hearing conference and partly because of other circumstances causing the need for further submissions and evidence. By consent, the Court also held a site inspection on the Dart River.[1]

[2] The area in which both the appellants wish to operate the jetboats for which they seek consent is at the head of Lake Wakatipu. It is clearly (this was common ground) an outstanding natural landscape within the meaning of s 6(b) of the RMA.[2] Two rivers flow into Lake Wakatipu close to Glenorchy: the Dart River and the Rees River. They are joined by a popular walking track whereby trampers walk up one river and down the other. The usual route is up the Rees River over Rear Saddle into the head waters of the Dart and down the length of the Dart River to the head of the road at Chinaman's Bluff. The track circumnavigates the Mount Earnslaw massif. This impressive range, almost 3000 metres high at the peaks of Mt Earnslaw itself, stands at the head of the lake on the eastern side of the Dart River. West of the Dart River are a series of mountain ranges including mountains worthy of their classical names, Momus, Somnus, Nox, Minos Peak and Poseidon Peak and the twin Cosmos Peaks. Of particular relevance in this case is that the area is very important to the tangata whenua and there are features of the landscape redolent with more direct legendary meaning than the classical allusions we have already recited. Pikirakatahi (Mt Earnslaw) and Te Koroka (the Cosmos Peaks) are, to some Ngai Tahu, not “merely” mountains but real figures in the landscape.

[3] The lower Dart River is freely accessible to private jetboaters but any commercial operators require resource consent under both the operative transitional district plan ("the transitional plan") of the Queenstown-Lakes District Council ("the Council") and the proposed plan under the RMA. In addition, above an area called Sandy Bluff the river is inside the Mount Aspiring National Park. No operator drives jetboats on the river inside the National Park. Below Sandy Bluff there are three existing resource consents for commercial activities on the river. Dart River Safaris Ltd ("DRSL") holds a resource consent allowing it to run up to 20 jetboat trips per day up to Sandy Bluff with each trip lasting about two hours. The appellants, Mr and Mrs Kemp[3] have a resource consent for two jetboat trips per day for tramping and angling purposes. Mr E Billoud[4] does not have a right to run jetboat trips but does have a resource consent for his operation which is to take paying customers down the Dart River in plastic Canadian canoes - called "funyaks" - under his trading name "Funyaks". The jetboat trips are noisy, exciting and spectacular. The funyaks, although we cannot speak from direct experience of this, appear to be equally exciting but considerably quieter. The funyak operations however depend on jetboats to move the funyaks themselves and some of their passengers across Lake Wakatipu and up the Dart River.

[4] All commercial operations on the Dart River are based in Glenorchy. There is a small harbour there into which the jetboats are launched. They then tie up at a small jetty to load passengers. It is a short trip across the head of Lake Wakatipu's milky blue waters to the mouth of the Dart River. In its lower stretches - the 8 or 9 kms below the Dart River Bridge - the Dart River is braided in a way more typical of rivers in Canterbury. The road to the Route Burn crosses the Dart River immediately west of Mount Alfred at a point in the river called "The Hillocks". Another four kilometres upstream from the bridge the Route Burn enters on the western side and above that (hidden in beech forest on a terrace) is a walking track to Lake Sylvan inside Mount Aspiring National Park. That track runs further north to the Rock Burn and has a loop back to the car park on the Route Burn Road.

[5] Just over eight kilometres north of the Route Burn the Rock Burn enters the Dart, again on the western side. When there is enough water it is possible to travel by jetboat a few hundred metres up the Rock Burn to the start of a chasm in that river into which Mr Billoud regularly takes his funyak clients. Two kilometres further upstream in the Dart but on the eastern side is Chinaman's Bluff. Immediately downstream of this impressive bluff is a Department of Conservation ("DOC") car park which is the termination point of the Glenorchy/Paradise Road and the start or finish point for walkers on the Dart/Rees Track. One and a half or two kilometres upstream of Chinaman's Bluff is the entrance of the Beans Burn. Above this point the Dart River closes in - losing its braided character - and flows in one channel with a few deeper pools located between fast runs and rapids. Approximately three kilometres upstream of the Beans Burn is a rock that the jetboaters call "Pinnacle Rock" or "Pyramid Rock". The latter name is more appropriate in view of its shape, although it is only a baby pyramid. A further two kilometres upstream is an area known as Survey Flat. Two further kilometres upstream is another rock imaginatively called "Cathedral" Rock. This is hyperbole since the rock cannot be more than five or six metres high. Finally, two kilometres north again is Sandy Bluff which is where the riverbed becomes part of the National Park. About 400 metres downstream of Sandy Bluff at Slip Stream is the furthest point upstream where the commercial jetboats turn around. Slip Stream is an important place. The slip - Te Horo - which gives the stream its name falls off the eastern face of the Cosmos Peaks (Te Koroka) and that area is of great significance for Kai Tahu[5] because of its association with pounamu.[6]

[6] Kai Tahu, in the form of Te Runanga O Ngai Tahu ("TRoNT"), was a party to the hearing - opposing the application by Mr and Mrs Kemp and supporting that by Mr Billoud. Just as we were close to finalising our decision in July it came to the Court's attention via a public news release that TRoNT or one of its trading entities had purchased a controlling share in Shotover Jet Ltd which is the owner of Dart River Safaris Ltd ("DRSL"). Because that was potentially of significance we invited further submissions (and if necessary evidence) from the parties.

[B] The Evidence

General Evidence

[7] At the hearing the first witness to give evidence was Mr G R Kemp, one of the appellants in RMA 418/98. He and his wife operate a tourist business including a motor camp and bus service based in Glenorchy. They already have a resource consent to operate two jetboat trips on the Dart River per day. This is restricted by conditions to taking hunters, fishers and trampers up the river to where they wish to land. There was some evidence that Mr and Mrs Kemp have been running their jetboat trips as a tourism sightseeing venture, rather than as transport.

[8] Mr C M Keogh, a resource management consultant who has lived in Glenorchy and worked in the area but is now resident and practising in Taupo in the North Island, gave evidence in support of Mr and Mrs Kemp's application. We will refer to his evidence, and that of the other resource managers who gave evidence, later.

[9] Mr W A Cook, a jetboat operator with many years experience, also gave evidence for Mr and Mrs Kemp. None of the other witnesses criticised his abilities as a jetboat driver and obviously he has a reputation for being very skilful and careful. He felt that safety issues could be resolved readily enough. While he tended to answer some questions relying on instinct rather than thought he may be right about that because it appears most jetboat accidents involve a single boat. There was minimal evidence of two boat collisions from any witness.

[10] The only witness for Mr Billoud (RMA 430/98) was Mr Billoud himself. He is seeking to obtain resource consent for four jetboat trips per day to run up the Dart River with his passengers and funyaks. Mr Billoud said that he has no interest in owning or running the trips himself. He simply wishes to hold the resource consent to ensure that he can get his passengers up the river. He has traditionally relied on DRSL or its predecessors to give transport up the river but it is now increasingly busy and not necessarily able to commit itself to taking his passengers. He said that he needed certainty for his customers and we can understand that. We found Mr Billoud to be a compelling witness: he was sincere, honest and thoughtful in his response to questions. We also add that in some ways his activities seemed to be rather more in harmony with some of the qualities of the river and the landscape through which it runs. The point should not be overstated, bearing in mind that he needs jetboats to get his passengers up the Dart River, but it is a relevant factor when (and if) we come to consider the effects of his proposed operations on the area's amenities.

[11] The only person who was opposed to Mr Billoud's application but not to Mr and Mrs Kemp's was Mr R Bakhuis. He gave evidence for himself and his family. They reside at Glenorchy next door to the headquarters of DRSL. He had two concerns – one specific and one general. The specific concern was that his house[7] is next door to the DRSL headquarters. He is concerned that if Mr Billoud's consent is granted and Mr Billoud uses DRSL for his services then there will be increased intensity of noise at the adjacent property. His more general concern[8] is that all jetboats on the Dart River and indeed on the waters of the Queenstown-Lakes District area generally use leaded aviation fuel. He alleged that they discharge lead to water. This occurs either because there is a liquid component to the exhausts for each jetboat engine which contained lead or because to control noise the jetboat has an underwater exhaust outlet (or possibly for both reasons). He raised the issue as to whether the jetboat operations (and this would apply to those of the Kemps too) will need a further resource consent from the Otago Regional Council and we will deal with that issue later.

[12] By contrast there were two parties who did not oppose Mr Billoud's application but did oppose Mr and Mrs Kemp's. They were TRoNT and DRSL.

[13] Mr E W Ellison, a farmer of Otakou (Otago) and Deputy Chairperson of TRoNT was sworn and gave evidence on behalf of TRoNT and the local runanga Kati Huirapa Runanga Ki Puketeraki and outlined the importance of Te Awa Whakatipu (the Dart River). To them the river is a taoka (taonga).[9] Mr Ellison stated the whole region, and in particular Te Awa Whakatipu, is of spiritual importance to Kai Tahu based on these reasons:

- Reverence of the deeds of Gods and the creation stories as relayed from generation to generation;
- Whakapapa which places us in an equal context within the natural world;
- Mana of our ancestors who were prodigious explorers as they searched for resources or new trails;
- Waahi tapu and other taonga;
- Names on the landscape.

He stated that the name Te Wai Pounamu, the traditional name for the South Island, originates from this catchment. That is because of the important pounamu source located here. The mountain Te Koroka (the Cosmos Peaks) is the source of the pounamu. The actual slip after which Slipstream is named was called Te Horo. Te Horo is tapu to Kai Tahu. The waters of Te Awa Whakatipu are also imbued with spiritual qualities to Kai Tahu. He described the mauri[10] of Te Awa Whakatipu as being of “high note”.

[14] Under the recent Ngai Tahu claims settlement with the Crown he said that Kai Tahu negotiated to include “topuni”[11] to cover Pikirakatahi (Mt Earnslaw) and Te Koroka. Pikirakatahi is perceived as the kaitiaki (guardian) of the pounamu resource so important to Kai Tahu. The concept of topuni derives from the traditional custom of persons of chiefly status extending their mana and protection over a person or area by placing a cloak over them or it. In its new application a topuni under the *Ngai Tahu Claims Settlement Act 1998* places what Mr Ellison described as an overlay of Kai Tahu values on specific pieces of land managed by DOC. We were given the maps which showed the topuni Mr Ellison referred to. It was interesting to see that the topuni over Te Koroka included only land

in the National Park down to the edge of the Dart River which is not part of the National Park. The topuni for Pikirakatahi (Mt Earnslaw) however, extends to the middle line of the river. It was explained that it was important to Kai Tahu for the mountain to have its feet in the water.

[15] Mr Ellison said that Kai Tahu opposed the significant increase in jetboat activity. They saw the Kemp application as:

- Detrimentally affecting the river's intrinsic values and the spiritual and cultural relationship Kai Tahu have with the catchment;
- Accelerating a feeling of incremental alienation of Kai Tahu from their taoka;
- Detrimentally affecting the wildlife which would diminish Kai Tahu's role as kaitiaki which in turn would have the effect of decreasing the mana of Kai Tahu;
- Not dealing with concerns over safety which is not merely concern over loss of life or injury, but concern over the effect a human tragedy would have on Kai Tahu spiritual values;
- Diminishing a place of tranquillity peace and quiet;
- Diminishing the quality of a place where cultural relationships are recharged.

Mr Ellison said:

> To us Te Awa Whakatipu and its surrounds are a bit like Mecca is to the Muslims in that we too undertake a spiritual trail in order to learn, associate and strengthen on our visits to this special area.

[16] The other party that gave evidence and made submissions only in respect of Mr and Mrs Kemp's application was DRSL. It called a number of witnesses: Mr P Warwick, the local manager of DRSL's owner Shotover Jet Limited; Ms A S Robson, a resource manager; and Mr G Jackson, a jetboat driver and manager of the DRSL operations. Mr Warwick's evidence was mainly of a general nature, although he did state and we accept (in the absence of evidence to the contrary) that DRSL does not have a true monopoly on jetboating in the Dart River because it has to compete with the other attractions for tourist dollars in the area. We accept that DRSL does not have a monopoly in the sense that it can charge what it likes for the trip. Its market is wider than just the Dart River. Mr Jackson gave evidence of his concerns about safety. In the end his answers in cross-examination were not significantly better than Mr Cook's. He conceded that:

- The majority of jetboat accidents involve only one boat;
- Prior to DRSL purchasing their businesses two companies operated successfully on the Dart River for several years;
- DRSL had on occasions in the past been prepared to hire some of the Kemps' drivers;
- Private jetboat operators pose more of a threat to safety on the water;
- DRSL did not oppose Mr Billoud's application.

[17] As for the Council it had refused both consents and maintained that position as being appropriate on these appeals. The Council called three witnesses: Mr C Vivian, a policy planner who explained the developments of the proposed plan and its history to the date of the hearing; Mr J B Edmonds, a resource manager of an independent company which provides services on resource consent to the Council; and finally Mr M A Black, the Council's Harbourmaster (under contract).

[18] Mr Black stated that under the Council's bylaws all commercial jetboat drivers need to be licensed before they can operate. He described the criteria for being licensed which includes driver training, a theoretical test and then a practical test supervised by Mr Black himself.

[19] Mr Black said that in May 1993, following concerns of the Planning Tribunal[12] that there were no proper procedures in place for commercial operators on the Dart River, and with the agreement of all parties, he prepared a memorandum as to operation of commercial jetboats on the Dart. He said the first consideration was safety and the second was to allow customers of the commercial operations to have a wilderness experience allowing a separation of five minutes between boats. The memorandum gave a total number of 20 trips in each day.

Subsequently, a further two jetboat trips up the river were allocated to Mr and Mrs Kemp although the memorandum was not expressly altered to take account of that. We heard detailed and conflicting evidence from witnesses about subsequent changes to the memorandum. Indeed, it appears that DRSL is now operating under a four window system whereby jetboats leave Glenorchy four times a day for a trip up the river and that does not accord with any of the memoranda we were given. In the circumstances, since the Harbourmaster's memoranda have no particular significance, and don't appear to be adhered to in any event, we will regard them as a guide only. We should mention here that Mr Sleigh argued for DRSL that regardless of merit, the memoranda were binding on all commercial operators. That argument and the alleged consequences that flow from it we will consider in the next part of this decision.

[20] However, we do agree with Mr Black's evidence that for commercial operators some kind of agreed or imposed operating practice is necessary and we will consider that later. We consider that safety issues can be dealt with by conditions and the Council may then need to give consideration to reviewing[13] the conditions of the resource consents of the current operators (Mr and Mrs Kemp for two jetboat trips per day and DRSL for 20 jetboat trips per day).

[21] Mr Black emphasised that keeping radio contact between operators was an essential part of safety. He agreed that the system appeared to be working at present, and also agreed in cross-examination that it had worked in the past although not without initial hiccups.

[22] Mr Elwell-Sutton appeared for himself and filed two briefs of evidence opposing both applications on the grounds that it was completely inappropriate to have more jetboats operating in the area. He also raised the question as to whether further resource consents for discharge to water were required. Mr Elwell-Sutton was concerned about the effects of the jetboat operations on the ecology of the Dart River, especially the bird species in the lower braided section of the Dart and the invertebrate species on which they feed.

[23] Dr M J S Floate appeared and gave evidence for the Federated Mountain Clubs of New Zealand Inc (“FMC”). He was concerned about the ecological aspects of the proposals and was also concerned about the effect on the amenities for trampers and other recreational users of the Dart River. Dr Floate's position was that it is a pity that there are any jetboats above Chinaman's Bluff since they are such an intrusion into the National Park. He quite candidly admitted that the first jetboat is the worst for the tramper or recreationalist on the river banks and that a second jetboat does not double the nuisance of noise. Notwithstanding that up to 22 jetboat trips are at present allowed up the Dart River per day he was opposed to any extension of the numbers.

[24] Finally DOC, which opposed both applications, called three witnesses: a planner, Ms R M Littlewood; a scientist, Mr B McKinlay; and a researcher, Mr O J Graham. We refer to all the planning and survey evidence later.

[25] The scientific/ecological evidence for DOC was given by Mr B McKinlay who is a technical support officer for DOC. He has a post-graduate diploma of Wildlife Management from the University of Otago and has worked in Otago and Southland on Conservation tasks since 1981. He was concerned that the applications, if granted, are likely to have an adverse effect on the outstanding intrinsic values and characteristics of the Dart River and its environs and on the riverbed bird species. He described braided rivers as a rare type of river found only in the eastern South Island and Alaska as far as he knew. They result from substantial amounts of material eroded from high rainfall areas being deposited in dry land country. He described the wrybill, black fronted tern and banded dotterel, all of which are bird species which exploit the habitats of braided rivers as being threatened. He referred us to bird counts which have been conducted on the Dart River. The counts show that populations of different species varied over time without any marked trend. He said that the exception was the wrybill which was first recorded on the river in 1984 and since then has increased in numbers. He described the wrybill, black fronted tern and banded dotterel as being rare because of their restricted distribution and specialised use of habitat. That is they are vulnerable because the species is overall declining and unless the causal factors are reversed then the species is likely to become endangered.

[26] He described the Dart's braided river system below Chinaman's Bluff as being a site of special wildlife interest of outstanding value. It is outstanding because of its large size (about 2000 hectares on the braided riverbed) and because there are few introduced plants modifying the habitat. Mr McKinlay said that he had not found any banded dotterel or black fronted tern nests in the area, although that does not mean that they do not breed there. He did find breeding locations for wrybill on shingle bars bare of vegetation. Wrybill also use the habitat for feeding along the water's edge of the main channels and secondary channels. By contrast banded dotterel use bare ground and black fronted terns feed over water in the major channels and ripples.

[27] He said that jetboats disturb the threatened species in the following way. Black fronted terns “hawk” for small fish and insects directly over the water. They are directly displaced from feeding by the presence of a boat. In the case of banded dotterel, wrybills and indeed black billed gulls and South Island pied oystercatcher those birds are displaced from their feeding grounds by the wake from a jetboat. He summarised the effect on wildlife by saying that:

> Wildlife cannot feed in the same space that is occupied or has recently been occupied by a jetboat.

Effectively the finite resource that is the wet edge along channels is reduced in the presence of jetboats. Mr McKinlay did not mention this point specifically but we consider that a certain amount of energy must be used by birds moving away from the water's edge and returning to it after jetboats pass by.

[28] Mr McKinlay's survey was thorough and careful so far as it goes. His conclusions would be quite plausible except that there is no evidence that bird numbers are in fact decreasing. To the contrary, at least in the case of wrybills, there is some evidence the number of birds is increasing. We cannot therefore be satisfied that there would be an adverse effect from further jetboats on the birds' feeding activities - except for the minor displacement of the terns. In the circumstances we consider the appropriate course of action (other things being favourable and assuming we grant one or more consents) to overcome this potential adverse effect would be to impose monitoring conditions so that a proper study can be carried out. If independent objective study shows there is an effect on the feeding or breeding habits or survival of any of the bird species in the area or indeed any of the other biota of the Dart River then the conditions of the resource consent(s) might have to be varied.

[29] In addition we consider that the Council should consider varying the existing resource consents held by Mr and Mrs Kemp and by DRSL by adding a monitoring condition in respect of those resource consents also with respect to effects on birdlife (and other fauna).

Survey Evidence

[30] We heard evidence from Mr O J Graham a witness from DOC and from Mr R P McMeeken, another witness for Mr and Mrs Kemp, of their surveys of users of the Dart River. The criteria for measuring the worth of surveys was discussed briefly by this Court (differently composed) in *Shirley Primary School v Telecom Mobile Communications Ltd* [*[1999] NZRMA 66*](#) at para 138. The Court adopted a list of criteria for the validity of a market survey set out in the English case *Imperial Group plc v Philip Morris Ltd* [1984] RPC 293 at 294. Those criteria are:

(a) The interviewees must be selected so as to represent a relevant cross-section of the public;

(b) The size must be statistically significant;

(c) It must be conducted fairly;

(d) All the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved;

(e) The totality of the answers given must be disclosed and made available to the defendant;

(f) The questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put;

(g) The exact answers and not some abbreviated form must be recorded;

(h) The instructions to the interviewers as to how to carry out the survey must be disclosed; and

(i) Where the answers are coded for computer input, the coding instructions must be disclosed.

[31] In this case it was clear that neither of the groups of the interviewees selected represented a relevant cross-section of the public. To the contrary they represented:

- In the case of the DOC witness' people who did not use jetboats on the Dart River; and
- In the case of Mr and Mrs Kemp's witness' people who had used jetboats on the Dart River, but not necessarily used other methods of transport in the area.

Not surprisingly, more of the former opposed further jetboats being put on the river and more of the latter were not opposed to the idea. Nor was there any evidence as to whether the surveys were statistically significant. Further we are concerned that the surveys were not carried out fairly and that there were leading questions put to the witness. Nor were the other criteria identified in the *Imperial Group plc* case followed (with any necessary changes).

[32] We emphasise that the criteria in the English case are not necessarily completely appropriate in all the circumstances for surveys of public opinions under the RMA but until someone puts up a different list of criteria with reasons for the methodological differences and justifies it to our satisfaction that is the best list of criteria we have. In the circumstances we consider the survey evidence given to us is of minimal weight for those reasons and because the two surveys effectively cancel each other out.

Resource Management Evidence

[33] We heard general "planning" or resource management evidence from:

- Mr C M Keogh for Mr and Mrs Kemp;
- Mr J B Edmonds for the Council;
- Ms A S Robson for DRSL; and
- Ms R M Littlewood for DOC.

All identified and discussed what they considered to be the relevant considerations in their evidence. Mr Edmonds and Ms Littlewood then concluded that in their opinions resource consent should be given to neither Mr and Mrs Kemp, nor to Mr Billoud. Ms Robson did not consider Mr Billoud's application, but was of the opinion that Mr and Mrs Kemp's application should be refused.

[34] All the resource management evidence was well set out, and ostensibly thorough. However, we give it little weight for two reasons. First, while all four witnesses recognised that there were matters of national importance[14] in this case, none of them considered in their evidence-in-chief the relevance of the Council's function to maintain and enhance[15] public access to *and along* the Dart River. We therefore find that we cannot rely on their views on the ultimate issue. Secondly, on most of the other relevant issues we heard direct evidence from people with direct knowledge of the issues.

[35] Ms Robson overlooked the issue of access twice. In addition to omitting any reference to, or discussion of, s 6(d) in her evidence-in-chief she gave some written supplementary evidence in which she stated:

> I have examined the Otago Regional Policy Statement . . . to find whether [this] document . . . [has] any provisions that are relevant to the consideration of the application. No new concepts are introduced that I have not discussed in the main body of my evidence . . . .

She then referred to and quoted two objectives in the RPS:

> Objective 6.4.4
>
> To maintain and enhance the ecological, intrinsic, amenity and cultural values of Otago's water resources.[16]
>
> Objective 6.4.8
>
> To protect areas of natural character, outstanding natural features and landscapes and the associated values of Otago's wetlands, lakes, rivers and their margins.[17]

It is conspicuous that she did not refer to the objective between those two, which reads:

> Objective 6.4.7
>
> To maintain and enhance public access to and along the margins of Otago's water bodies.[18]

[36] Mr Keogh, for the Kemps, gave relatively balanced evidence. While he did not expressly identify the relevant parts of ss 6 and 7 of the Act, he did cover all the important matters (other than s 6(d)) in his evidence. For the Minister of Conservation, Ms Llewell cross-examined Mr Keogh on why he had not taken the Water Conservation Order into account. He suggested that it was of little relevance since there were already 22 boats operating, and he considered ten more would have little effect. For the Council, Mr Marquet spent considerable time cross-examining Mr Keogh on the effects if 50 (or more) commercial jetboats were permitted to use the river. We regard that cross-examination as largely irrelevant. Mr Keogh recommended grant of a resource consent for the full ten jetboat trips sought by Mr and Mrs Kemp. However, he did not take into account the difficulties of fitting a further ten (or 14 jetboats) into the permitted hours. Consequently, while we accept the overall thrust of Mr Keogh's evidence we are not prepared to act on his opinion on the number of trips.

[37] In summary, we are not prepared to give much weight to any of the resource managers' evidence and prefer to decide this case on the other evidence we heard, as enlightened by our impressions from the jetboat inspection of the Dart River, as it relates to sustainable management of the resources.

[C] Jurisdictional issues

[38] There are three issues relating to our power to act in respect of the two applications for resource consent:

(a) The status of the applications under the relevant district plans;

(b) Ascertaining the relative priority of the Kemps' application versus the Billoud application; and

(c) Whether, if further resource consents are to be granted, they can be reconciled with the existing operations which hold resource consents.

Status of the application

[39] As for the status of the resource consent, the applications made by the two appellants were as follows:

(a) Mr and Mrs Kemp applied for consent to run ten jetboat trips[19] per day up to Sandy Bluff and back for tourism purposes.

(b) Mr Billoud has applied for consent to run four jetboat trips per day up to Sandy Bluff in order to take his boats, guides and passengers to the point where they can funyak down the river.

[40] The activities are non-complying under the transitional district plan. They are also non-complying under the proposed plan as notified. Under the proposed plan as decided by the Council jetboating activities are discretionary. However the effect of s 88A(1) of the RMA is that we have to consider the status of the activity as defined in the proposed plan as *notified*. In this case that means the jetboating is non-complying under this plan also. When it comes to assessing the activities under the proposed plan however, the effect of s 88A(2) is that we are to consider the proposed plan as *decided*. [20]

[41] We consider that if any resource consents are to be granted, then in each case a separate consent is needed under each of the transitional plan and the proposed plan: *Stokes v Christchurch City Council* [1999] NZRMA 409 at 417.

Priority

[42] Despite the fact that we are hearing the appeals together we have to consider them separately and on their own merits: *Fleetwing Farms Ltd v Marlborough District Council* [1997] NZRMA 385 at 393. That means an important issue in this case, if we consider some extra jetboating is sustainable but find that we cannot grant enough trips to satisfy both applications, is as to who should have priority. In *Fleetwing* the Court of Appeal considered the relative priority for water permits of two applications for marine farms in the same piece of the coastal marine area. It stated that the relevant principle was “first come first served” and continued:[21]

> It is not necessary to determine what factors might in other factual situations need to be considered in order to decide who had priority after the Council stage.
>
> In the present case it seems clear that Fleetwing lodged its completed application first; that its application was first to be

formally received and then publicly notified by the council; that it was allocated the earlier hearing time; and that its application was heard first.

. . . we are inclined to the view that receipt and/or notification by the Council is the critical time for determining priority in such case but in the absence of extended argument and of any need to do so, we prefer not to express a concluded opinion.

[43] In this case counsel for Mr Billoud and Mr and Mrs Kemp have cooperated to give us an agreed chronology of events. The relevant parts of it are set out below (with our notes included):

CHRONOLOGY OF EVENTS

	Billoud	**Kemp**
31.10.96	Application to operate four jetboat trips per day [Note: (a) no formal AEE.[22] (b) Solicitors' letter states “no adverse effects . . .”.]	
4.11.96	Council seeks report from Harbourmaster as to safety Issues.	
29.4.97		Fresh application to operate ten jetboat trips per day [Note: AEE identifies potential noise and safety effects]
13.5.97		Request for further information from the Council[23]
16.5.97		Kemp advises that information was already provided
18.6.97		Kemp application for ten jetboat trips notified
16.7.97	Meeting with Council suggests Billoud should file “Environmental Impact” report	
22.7.97	Billoud files separate AEE	
11.8.97		Advice to Council that independent AEE prepared
8.9.97	Billoud application notified	
19.9.97		Request further information from Council
26.9.97	Updated AEE filed	
21.10.97		Received from Council request for further information
31.10.97	Request by Council for further information	
3.11.97		Hearing set for 27.11.97

CHRONOLOGY OF EVENTS

	Billoud	Kemp
13.11.97	Hearing date vacated and consultation with Ngai Tahu required	Hearing date vacated and consultation with Ngai Tahu required
16.2.98		Hearing by Council
17.2.98	Hearing by Council	
15.4.98		Council decision reserved
16.4.98	Council decision reserved	

[44] Mr and Mrs Kemp apparently made an application dated 23 August 1996 for two jetboat trips per day on the Dart River. However, we have not seen that application, nor did their application for ten jetboat trips dated 29 April 1997 refer to it. The Council decision only referred to an application for ten jetboat trips. Accordingly we disregard the earlier application, on the basis we have no jurisdiction to consider it.

[45] Our difficulty in assessing priority is that the Court of Appeal's decision in *Fleetwing* is at first sight of no assistance in the situation disclosed by the chronology. The crucial “and/or” in the passage quoted leaves the issue before us unresolved on the facts:

(a) If the date of *filing* with the Council is the crucial date to fix priority, then it appears the priority is (in diminishing order):

Billoud	4	jetboats
Kemps	10	jetboats.

(b) If the date of *notification* fixes priority, then the WCO is:

Kemps	10	jetboats
Billoud	4	jetboats.

[46] However the Court of Appeal did suggest that other factors might be relevant. Except for one factor in *Fleetwing* it is difficult to identify what they might be. The exception is that Richardson P, giving the decision of the Court, referred to a *completed* application being lodged. We consider that the date a completed application is received by a Council is the determining date under the first come first served test. That is because there may be accidental delays – as there appear to have been in the Billoud case – in the notification of the application. We consider an application is “completed” when it is notifiable (as opposed to notified). There must be:

(a) A full application[24]

(b) Plus an adequate Assessment of Environmental Effects[25]; and

(c) Adequate answers to any request by Council for further information.[26]

[47] In this case Mr and Mrs Kemp first received and answered requests for further information.[27] So they had a completed application ready first, and as it happens their application was notified first. Mr Billoud's application was filed first. But it was not complete – the only information that could be deemed to be an AEE is a sentence in an accompanying letter from his solicitor stating: “There will be no adverse effects”. Mr Billoud did not receive a request for further information for a long time and he answered it even later. Until he did so his application was not complete. Accordingly we hold that Mr and Mrs Kemp's application has priority.

Relationship with existing resource consents

[48] As for the third jurisdictional issue, Mr Sleigh for DRSL submitted that the Court had no power to grant a

resource consent to Mr and Mrs Kemp because that would conflict with the existing resource consents held by the Kemps (two jetboats), DRSL (20 jetboats) and Billoud (for Funyaks). He said that compliance with the Harbourmaster's memorandum precluded other consents being granted.

[49] The regime for commercial operators on the Dart River is set out in a memorandum from Mr Black, the Harbourmaster, dated 5 May 1993. It states:

> **DART RIVER — OPERATING PROCEDURES**
>
> Following discussions with parties currently operating on the Dart River, it was agreed the following procedures shall apply in the interests of public safety.
>
> These procedures are effective immediately.
>
> (1) The number of commercial jetboat trips on any one day *shall be* limited to 20.
>
> (2) Parties agree they shall operate on the Dart River between the Beans Burn and Sandy Bluff within the times in the *attached* schedule or such other times as by *mutual agreement* and liaison with the Harbourmaster.
>
> (3) Drivers must radio, or make contact on a daily basis with the other company to ensure each operator is aware of proposed daily operations.
>
> (4) No driver shall pass the Beans Burn confluence unless:
>
> (a) Contact has been made by radio telephone to arrange a passing area; or
>
> (b) The operator on the river is aware the other operator is not operating on that day.
>
> (5) No commercial jetboats shall operate between the Beans Burn and Sandy Bluff whilst any rafts/funyaks/kayaks or private jetboats are known to be on this section of river.
>
> (6) Drivers on the Dart River shall provide other drivers of the position of any other crafts on the river when requested.
>
> (7) All drivers shall obey the collision regulations.
>
> (8) Boats passing shall, to the extent possible, slow down to avoid wetting or disrupting any stationary craft.
>
> (9) Appropriate signage will be placed at the Glenorchy Marina and Dart River Bridge advising private jetboaters to obtain clearance from Dart River Jet before proceeding above the Beans Burn confluence. Signage will clearly show the location of the Beans Burn confluence.
>
> (10) All company principals will ensure that their staff are fully aware of the requirements.

[50] There are a number of important features in the memorandum:

(a) It is an agreement not a regulation;

(b) It is not comprehensive in that there are in fact resource consents for 22 jetboats (including the Kemps' two) to operate on the Dart River;

(c) It contains a schedule which:

(i) Allows jetboats to operate in three windows through the day;

(ii) Stops jetboats operating above the Beans Burn between 1130 and 1330 each day.

We find as facts that: the closed period over midday is to give peace and safety to Funyak operations of Mr Billoud; that DRSL has not been operating according to the memorandum, but has been operating up to four windows daily; and further that all the existing operators have been discussing matters with the Harbourmaster to work out alternative operating arrangements.

[51] DRSL's own resource consent contains a condition:

> (9) That the memorandum from the Harbourmaster, date 5 May 1993, and any subsequent amendments thereto, shall be complied with at all times.

For DRSL, Mr Sleigh submitted its rights under the resource consent ("the DRSL consent") were absolute and that the Environment Court could in these proceedings:

(a) Neither alter any of the existing arrangements under the memorandum, without DRSL's consent;

(b) Nor impose a condition requiring that the Kemps communicate with other commercial operators.

Both actions would, on his argument, be unlawful. He referred to *Campbell v Southland District Council* (Environment Court, W 114/94, 14 December 1994) where the Planning Tribunal considered it would be ultra vires to impose, as a condition of resource consents relating to a proposed international airport, a condition requiring noise insulation to be installed off site when the applicant had not obtained consents from the third party landowners (referring to *Robert Holt & Sons Ltd v Napier City Council* (1977) 6 NZTPA 132).

[52] We do not disagree with *Campbell* but distinguish it because the facts in this case are so different. In *Campbell* other well-defined property rights - in land law - were involved. Those property rights raise questions in the *Campbell* situation such as: how does the Court know whether a consent-holder will be able to obtain a third party consent? (It is preferable for such consents to be obtained in advance). How can a condition be imposed if a consent-holder has no right to go onto a third party's land and insulate buildings? - a landowner's right to exclusive possession makes that impossible.

[53] However in the present case, all the rights of DRSL are under its own resource consent. Those rights may be valuable property rights in an economic sense, but they are neither real nor personal property[28] in a legal sense. Thus there is no automatic bar under the law of property, preventing grant of further resource consents.

[54] Mr Sleigh, as an alternative submission suggested that *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49 was authority for the proposition that a condition cannot negate its own resource consent. Again we do not disagree with that proposition, but the situation in this case is different. Here Mr Sleigh is arguing that if we grant consent to the Kemps, that would interfere with the exercise of the DRSL consent.

[55] Apart from the general answer above, we consider that Mr Sleigh's arguments are wrong for three reasons particular to the facts of the relevant resource consents and the surrounding circumstances:

(a) Nothing in the DRSL consent suggests it gives exclusive possession of the Dart River to DRSL;

(b) The first (1993) memorandum contemplates change, and the addition of other commercial parties;

(c) The memorandum is not part of the DRSL consent (nor incidentally was DRSL an original party to the memorandum) but is referred to in a condition which *expressly* contemplates changes to the memorandum.

[D] Section 104(1) matters

"Subject to Part II . . ."

[56] We are to have regard to the matters in s 104(1). They are all relevant except s 104(1)(e) and (h). We do not overlook that Part II is relevant in this case and that we must be sure that the matters considered below are not in conflict with the over-riding Part II matters.[29] The issue that made us pause about the application of the words "Subject to Part II . . ." was the consideration of the issues raised by Ms Dewar for TRoNT. She referred us to the provisions of the *Ngai Tahu Claims Settlement Act 1998* ("the NTCSA"). The long title to the NTCSA states that it is:

An Act —

(a) To record the apology given by the Crown to Ngai Tahu in the deed of settlement executed on 21 November 1997 by the then Prime Minister the Right Honourable James Brendan Bolger, for the Crown, and Te Runanga o Ngai Tahu; and

(b) To give effect to certain provisions of that deed of settlement, being a deed that settles the Ngai Tahu claims.

[57] The NTCSA is a large statute which we shall not attempt to summarise, but part of it (including its related schedules) is of relevance here. Part 12 deals with mahinga kai[30] and contains various statutory acknowledgments by the Crown. Section 206 of the NTCSA states:

> **206** . . . The Crown acknowledges the statements made by Te Runanga o Ngai Tahu of the particular cultural, spiritual, historic, and traditional association of Ngai Tahu with the statutory areas, the texts of which are set out in Schedules 14 to 77.

Schedule 51 contains a statutory acknowledgment for Pikirakatahi (Mt Earnslaw).

[58] While recognising the real psychological and cultural importance of these statutory acknowledgments their main legal purpose seems to be procedural and/or consultative because s 215 of the NTCSA states:

> **215. Purposes of statutory acknowledgements** — Without limiting sections 216 to 219, the only purposes of the statutory acknowledgements are —
>
> (a) To require that consent authorities forward summaries of resource consent applications to Te Runanga o Ngai Tahu, as required by regulations made pursuant to section 207; and
>
> (b) To require that consent authorities, the Historic Places Trust, or the Environment Court, as the case may be, have regard to the statutory acknowledgements in relation to the statutory areas, as provided in sections 208 to 210; and
>
> (c) To empower the Minister of the Crown responsible for management of the statutory areas, or the Commissioner of Crown Lands, as the case may be, to enter into deeds of recognition, as provided in section 212; and
>
> (d) To enable Te Runanga o Ngai Tahu and any member of Ngai Tahu Whanui to cite statutory acknowledgements as evidence of the association of Ngai Tahu to the statutory areas, as provided in section 211.

[59] The obligation of various authorities, including the Environment Court, to have regard to statutory acknowledgments has to be read together with s 217 of the NTCSA. That states:

> **217. Exercise of powers, duties, and functions** — Except as expressly provided in sections 208 to 211, 213, 215, and 216, —
>
> (a) Neither a statutory acknowledgement nor a deed of recognition affects, or may be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw; and
>
> (b) Without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under any statute, regulation, or bylaw, may give any greater or lesser weight to Ngai Tahu's association to a statutory area (as described in the relevant statutory acknowledgement) than that person or entity would give under the relevant statute, regulation, or bylaw, if no statutory acknowledgement or deed of recognition existed in respect of that statutory area.

So the statutory acknowledgments are expressly stated to have no substantive effect under the RMA. Parliament intended that their effect was to be procedural: to ensure that TRoNT was always an interested person and should be consulted whenever land referred to in one of the relevant schedules of the NTCSA was the subject of an application. Section 274 RMA was amended[31] to provide TRoNT with special status, but its substantive interests (and those of other iwi) are protected by Part II of the Act – ss 6, 7 and 8 in particular.

[60] The NTCSA also provides for topuni as Mr Ellison described in his evidence. These are defined[32] as being areas administered under the *National Parks Act 1980*, the *Conservation Act 1987*, or the Reserves Act 1977 which are acknowledged to have Kai Tahu values and is declared under s 238 of the NTCSA to be Topuni in one of 13 schedules. Both Pikirakatahi (Mt Earnslaw)[33] and Te Koroka (Slipstream)[34] are topuni. The consequence of having topuni status is that[35] the NZ Conservation Authority and Conservation Boards have to agree on specific management principles and actions and to consult with Kai Tahu. There are no obligations on other parties, nor on local authorities.

[61] In the circumstances we find there is a conflict between the matters raised in Mr Ellison's evidence - and which are relevant under ss 6-8 of the Act - and the effects of jetboating which we are to consider below. However since the question of access to and along rivers is itself a matter of national importance[36] we consider balancing or reconciling those matters is a task that Parliament has left to local authorities (and on appeal, to this Court). We

now turn to consider the specific paragraphs in s 104(1) of the Act.

(a) Effects

[62] There are obvious positive effects if the applications are allowed to proceed. Not only will the applicants' respective businesses be able to make bigger profits (potentially) but more people will enjoy the exhilarating experience of jetboat travel on the Dart River in its outstanding natural landscape. There are four types of potentially adverse effects identified in this case: noise; intrusion on amenities; ecological effects; and effects on safety. There is in a sense a fifth effect: the effect on the tangata whenua's values. This is an amalgam of the above effects - as seen through Kai Tahu eyes with their particular cultural and spiritual overlay. At the risk of making a dualistic division in what may be essentially a monadic world-view we consider the effects on the mauri[37] of Te Awa Whakatipu (the Dart River) in two ways - first under the headings of the effects identified above; and secondly in relation to the relevant Part II matters under s 105.

[63] As far as noise is concerned it is a subjective issue in this case. None of the parties suggested that the noise limits of the transitional or proposed district plans would be infringed. In our view this subjective aspect of noise is the kind of effect where the initial introduction of the activity has the worst effect.[38] There is some objective basis for this in that two jetboats do not make twice as much noise as one jetboat. The other significant aspect of the noise issue is that because the jetboats cannot overtake readily and have to operate in single file, there are pulses through the day. In each pulse there is a nearly continuous procession of jetboats with as little as three minutes between boats. The issue then becomes whether, as opposed to the existing 22 jetboats, the operation of say 32 jetboat trips per day (if the Kemp appeal is permitted), or 36 if both appeals are granted is so much of an increase as to be unacceptable in terms of the Act because it creates further adverse subjective noise effects.

[64] It was suggested by counsel in submissions and in cross-examination that one way in which the effects of jetboats could be reduced upon trampers, walkers and picnickers on the Dart track above Chinaman's Bluff would be to prevent the jetboats operating above that point over the middle of the day – ie from about 1130 to 1330 hours. It appears that the Harbourmaster's memorandum was designed to achieve no jetboats above Chinaman's Bluff within that period. The primary rationale behind those hours was that it would benefit walkers on the Rees/Dart track. There was uncontested evidence that most trampers of the circuit walk it widdershins: up the Rees, over the saddle and down the Dart; and that their last night is usually spent at Daleys Flat hut. The last day is then spent walking out to Chinaman's Bluff and if the walkers are relying on public transport, then the buses (run by Mr and Mrs Kemp among others) leave Chinaman's Bluff for the return trip to Queenstown at about 1330 or 1400 hours. It is about five to six hours steady walk from Daleys Flat to the Chinaman's Bluff carpark. So the theory was that most walkers would be between Sandy Bluff and Chinaman's Bluff during the hours 1130 to 1330, and they would have peace if there were no jetboats in the river at that time.

[65] Two further advantages would follow from a restriction on jetboats operating over the middle of the day. First, Mr Billoud's funyaks would have their enjoyment of the river enhanced and their safety increased by having no jetboats competing for river space. Secondly, day-walkers and picnickers could lunch or enjoy themselves beside the river without invasive noise.

[66] Intrusion on trampers and recreationalists is also largely a question of noise. For trampers the problem is reduced in that a proportion of them like to use the jetboats to travel the last few kilometres of the track down to road-head at Chinaman's Bluff or indeed go even further out to Glenorchy by prior arrangement with the jetboat operators. One further, less important, but still significant issue, is to enable the jetboat operators to give their clients an experience that is not ruined by being too hasty, or noisy.

[67] In relation to ecological effects we find that the lower Dart River below about the Rock Burn, is a significant habitat of indigenous fauna, specifically the endemic wrybill and black fronted tern, and the native banded dotterel. Several other native species also use the river bed. The invertebrate fauna of the river has not been studied but we also have to consider the effects on it. The complication in respect of the native fauna is that there is no evidence that the existing jetboats are causing any harm. Indeed the only objective (but limited) statistical evidence shows that since the jetboats have been operating the number of birds seen in the area has increased. As Ms Llewell, counsel for DOC, put to a number of the witnesses, there could be a number of explanations for that including climatic conditions or one-off flood events during the seasons in which the first bird counts were taken. That is not the point, which is that there is no evidence that there is a harmful effect from jetboating activities. We take this issue very seriously as indeed we have to, since there is a matter of national importance involved,[39] but consider that this issue should not at the moment by itself bar any increase in jetboat activities. The appropriate way of dealing with this problem is to impose monitoring conditions and to ensure that a review of conditions can be carried

out as rapidly as possible if there is demonstrable harm or risk of harm to the birds on the braided section of the river. Ms Llewell submitted that such conditions would be unenforceable and ultra vires but gave no reason for those submissions so we reject them. We consider that a precautionary approach raises a presumption that there should be monitoring, so that our knowledge of potential adverse effects can be improved.

[68] The final set of alleged adverse effects relate to safety. The relevance of public safety raised by navigation was confirmed by the Environment Court in *Marlborough Mussel Company Ltd v Marlborough District Council* (Environment Court, W 169/96, 3 December 1996). with particular reference to health and safety of people under s 5(2) of the RMA. Mr Jackson for DRSL gave evidence as to past problems coordinating use of the river by radio; radio blackouts; the limited passing space on the river, difficulties in bad weather conditions or after floods. His evidence was confirmed to some extent by Mr Black, the Harbourmaster. However they both conceded in cross-examination that there have been very few two-boat collisions in the district, and a private jetboat was usually involved. There was only one record of two commercial jetboats colliding and that was many years ago.

[69] The issue of introducing further jetboats to a situation where some were already operating was raised in *Cash v Queenstown-Lakes District Council*[40] The Planning Tribunal (as this Court then was) 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 . . . . In our judgment the positive effects of allowing the appeal, ([including] increased 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.

While we agree with the general propositions in that passage, we note the different facts in that case. In *Cash* there were several (up to six) operators with consents to use up to 16 boats. Mr Cash wanted to add two more and the Tribunal decided that was two too many. We also note that there was no operating memorandum or joint code of practice discussed in that case, and that use of radios for communication has improved technologically since then.

[70] On the evidence of this case we find that jet boat safety issues can be resolved by limiting numbers so that the jet boats operating at roughly the same time can convoy up and down the river. To a certain extent the limiting factors for safety tend to parallel those for amenity issues. On the Dart River, if a consent is granted to the Kemps there will still only be two operators. If they cooperate in the ways Mr Cook described we believe they can operate safely as two operators have in the past on the Dart River. We accept that Mr Billoud contemplated his trips being carried out by DRSL so there might be fewer potential communication problems. However the whole point of Mr Billoud's application was to make him independent so we have to consider safety if someone other than DRSL was to operate the trips he has applied for. Further, we consider that the risks of two commercial jetboats colliding is very small compared with the potential risk of an accident occurring between a private jetboat and a commercial jetboat, but caused by the former; and both risks are small compared with the risk of single boat accidents.

(b) Regulations

[71] The only relevant regulations are some bylaws mentioned in the context of the Harbourmaster's evidence, but they are of no direct relevance to this case since, as we understand it, they do not apply to the Dart River.

(c) The regional policy statement

We have already referred to the Otago Regional Policy Statement which became operative in October 1998. It contains a number of proper, but conflicting objectives as to maintaining and enhancing the ecological, intrinsic, amenity, and cultural values of the region's water resources[41] enhancing access to and along the region's water bodies,[42] and the protection of outstanding natural features and landscapes.[43]

(d) Transitional district plan and proposed plan

[72] As we said earlier, there are two relevant plans in this case: the operative plan prepared under the Town and Country Planning Act 1977 (“the transitional plan”) and the proposed plan notified in 1995. The transitional plan contains very little of relevance to the applications. It was prepared at a time when activities on the surface of water

bodies were not dealt with in district plans. There is a general objective about not mixing incompatible uses.[44] There is another objective:

> To protect areas of tourist attraction from unnecessary and aesthetically disturbing development.

As Mr Keogh pointed out, most people only see the Dart River by jetboats, so the boats' presence is hardly "unnecessary".

[73] By contrast the Council's proposed plan under the RMA contains a relevant objective for a number of policies and rules. The objective states:

> Recreation and activities [are to be] undertaken in a manner which avoids, remedies or mitigates, their potential adverse effects on:
>
> - Natural conservation values and wildlife habitats;
> - Other recreational values;
> - Public health and safety;
> - Takata whenua values; and
> - General amenity values.[45]

The relevant policies in the proposed plan as decided by the Council in its decisions released in 1998 ("the proposed plan 1998") are:

> (1) To identify the different types of lakes and rivers in the District and the different recreational experiences offered by these lakes and rivers, in terms of:
>
> (a) outstanding natural characteristics, wild and scenic beauty, aesthetic coherence, biological diversity, ecosystem form, function and integrity, sense of isolation and recreational amenity;
>
> (b) multiple use and proximity to population centres.
>
> (2) To enable people to have access to a wide range of recreation experiences on the lakes and rivers, based on the identified characteristics and environmental limits of the various parts of each lake and river.
>
> (3) On each lake and river, to provide for the range of recreational experiences and activities which are most suited to and benefit from the particular natural characteristics.
>
> (4) To avoid or mitigate the adverse effects of frequent, large-scale or intrusive activities such as those with high levels of noise, vibration, speed and wash.
>
> (5) To avoid the adverse effects of motorised craft in areas of high passive recreational use, significant nature conservation values and wildlife habitat.
>
> (6) To ensure that any controls that are imposed on recreational activities through the District Plan are certain, understandable and enforceable, given the transient nature of many of the people undertaking activities on the District's lakes and rivers and the brief, peak period of private recreational activity.
>
> (7) To avoid and protect the environment from the adverse noise effects of motorised watercraft.
>
> . . . .
>
> (11) To reduce the adverse effects of noise and intrusion on the remote characteristics of the Dart/Rees tramping track and to retain safe operating conditions between river users on the upper reaches of the Dart River.[46]

Generally policies (2) and (3) support the proposal, whereas policies (4), (5), (7) and (11) are against it (especially the first part of policy (11)).

[74] As far as the rules of the proposed plan are concerned a couple of witnesses referred us to the rules in the

proposed plan as notified by the Council. However at the time of the hearing the Council had released its decision on the proposed plan and thus the document we have referred to as the proposed plan and need to apply in this case is the proposed plan 1998. The question of what weight to give to that plan in view of the fact that there are a number of references to the Environment Court about its terms is another matter.

[75] The relevant rules of the proposed plan 1998 are:

- The Dart River is in a rural area of the district;
- Commercial boating is described as a discretionary activity provided it complies with all the relevant zone standards;[47]
- The relevant zone standards for the surface of lakes and rivers are:

(a) Motorised craft on the surface of lakes and rivers shall be operated and conducted such that a maximum noise level (Lmax) of 77 dBA is not exceeded, when measured and assessed in accordance with Appendix 3.

. . .

(b) Dart and Rees Rivers - No commercial motorised craft shall operate outside the hours of 0800 to 1800, *except* that above the confluence with the [Beans Burn] on the Dart River no commercial motorised craft shall operate outside the hours of 1000 to 1700.[48]

As far as standard (a) is concerned there is no allegation that any of the jetboats proposed will breach the noise standard. We discuss hours of operation later. We can give little weight to the rules because they are the subject of various references.

(e) (Not relevant)

(f) Proposed regional plan

[76] The Dart River is within the region of the Otago Regional Council ("the ORC"). It appears that consent may be necessary for a restricted discretionary activity for any discharge of lead to the water from the operation of the jetboat engines. However, since the ORC's proposed regional plan came into force after the applications were made, if we are prepared to grant these resource consents they will be conditional upon any further discharge permits being obtained (if required). We do not overlook that Mr and Mrs Kemp applied for a certificate of compliance from the ORC and were told that "it was not necessary". We would not have thought that was an adequate answer to such a request. If a person applies for a certificate of compliance and pays the fee, then if they qualify for it they should receive one.[49]

[77] The proposed Otago Regional Water Plan is relevant. It contains a number of objectives which largely reinforce matters in ss 6, 7 and 8 of the RMA. It contains a policy which nicely highlights the conflict between goods represented by these applications and the benefits associated with refusing them. The policy is:

> To have particular regard to the following qualities or characteristics of lakes and rivers, and their margins, when considering adverse effects on amenity values:
>
> (a) aesthetic values associated with the lake or river; and
>
> (b) recreational opportunities provided by the lake or river, or its margins.[50]

(g) The Water Conservation (Kawarau) Order

[78] It was submitted for DOC and other parties opposing the appellants that there is a relevant water conservation order. This is the *Water Conservation (Kawarau) Order 1997* ("the WCO"). It was enacted on 17 March 1997, gazetted on 20 March 1997 and came into force 28 days afterwards.[51] This is the first time this division of the Environment Court has had to consider the application of a water conservation order in the context of an application for a resource consent for a land use. We were referred to no other decision of the Court on the issue. Water conservation orders are, at first sight, of determinative significance in a case like this because s 199 of the RMA

describes their effect as follows:

> **(1)** Notwithstanding anything to the contrary *in Part II,* the purpose of a water conservation order is to recognise and sustain —
>
> (a) Outstanding amenity or intrinsic values which are afforded by waters in their natural state:
>
> (b) Where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding:
>
> **(2)** A water conservation order may provide for any of the following:
>
> (a) The preservation as far as possible in its natural state of any water body that is considered to be outstanding:
>
> (b) The protection of characteristics which any water body has or contributes to, and which are considered to be outstanding, —
>
> (i) As a habitat for terrestrial or acquatic organisms:
>
> (ii) As a fishery:
>
> (iii) For its wild, scenic, or other natural characteristics:
>
> (iv) For scientific and ecological values:
>
> (v) For recreational, historical, spiritual or cultural purposes:
>
> (c) The protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori. (Our emphasis.)

The effect of s 199(1) is that the purpose of the RMA loses primacy if there is a conflict between that purpose and the purpose of a water conservation order: *Buller Conservation Order (1996)* (Environment Court, C 32/96, 31 May 1996) referring to the effect of s 199(1).

[79] In terms of the WCO the waters of the Dart River above the Beans Burn are preserved for various outstanding amenity and intrinsic values. The waters below the Beans Burn - not being in their natural state according to the WCO - are merely protected for similar outstanding values. In neither case do the attributes include recreational values. From this all parties except the appellants argued that the applications offended the WCO and therefore in the light of s 199(1) should be refused. Ms Llewell submitted that other uses of "an area subject to a water conservation order may be provided for to the extent that they are clearly compatible within the required preservation or protection of the natural amenity or outstanding features". She referred to *Ashburton Acclimatisation Society v Federated Farmers of NZ Inc* [*[1988] 1 NZLR 78 (CA)*]; (1987) 12 NZTPA 298.

[80] For Mr and Mrs Kemp, counsel argued that the effect of that para 3(5) of the WCO and s 217 of the Act is that it is only the Otago Regional Council which is bound by the WCO and that we do not have to take it into account. Mr Todd may be right about that. Section 200 of the RMA states:

> **200. Meaning of "water conservation order"** — In this Act, the term "water conservation order" means an order made under section 214 for any of the purposes set out in section 199 *and that imposes restrictions or prohibitions on the exercise of regional councils' powers* under paragraphs (e) and (f) of section 30(1) (as they relate to water) including, in particular, restrictions or prohibitions relating to —
>
> (a) The quantity, quality, rate of flow, or level of the water body; and
>
> (b) The maximum and minimum levels or flow or range of levels or flows, or the rate of change of levels or flows to be sought or permitted for the water body; and
>
> (c) The maximum allocation for abstraction or maximum contaminant loading consistent with the purposes of the order; and
>
> (d) The ranges of temperature and pressure in a water body. (Our emphasis.)

Counsel did not refer to it, but s 217 is also interesting in this context. It states:

217. Effect of water conservation order — (1) No water conservation order shall affect or restrict any resource consent granted or any lawful use established in respect of the water body before the order is made.

(2) Where a water conservation order is operative, the relevant consent authority —

(a) Shall not grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the order:

(b) Shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the water conservation order can remain without change or variation:

(c) Shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the water conservation order are maintained.

[81] The Court of Appeal in the *Ashburton Acclimatisation Society*[52] case was only referring to needs for water as controlled by the (then) relevant catchment board or regional water board. The Planning Tribunal in its decision[53] was even clearer:

> In our opinion, the term “needs” in the context being considered, should be confined to quantifiable physical needs for the water resource.

We conclude that under s 200 a water conservation order (“WCO”) is:

(a) designed to impose restrictions or prohibitions in the exercise of the powers of regional councils, but not district councils;

(b) designed to relate to qualities and quantities of water; and

(c) (a) and (b) are reinforced by the effect of an order being to prevent or control, by imposition of conditions, the grant of water permits, coastal permits, or discharge permits, but *not* land use consents.

Therefore we only have to have regard to the WCO order under s 104(1)(g)[54] and there its impact is limited if the limitations above are considered.

[82] We hold that the ten trips sought by the Kemps might affect the values protected by the WCO, but that four extra trips (or six in total if the existing two are surrendered) would not affect the valued characteristics. In coming to that conclusion we bear in mind that the jetboat activities are (subject to possible emission problems) doing very little to the water that could be seen as harmful. Of course it would be disingenuous to suggest that water being pumped through a jet engine is in an identical natural state, but given that up to 22 boats do that already, four more hardly infringe the WCO. What effects there are would more properly be dealt with on an application for a discharge permit from the ORC, if one is necessary.

(h) (Not relevant)

(i) Other matters

[83] There are two other relevant matters of importance to this case - the question of consultation and the applicability of the precautionary principle. First, for TRoNT, Ms Dewar argued that there was inadequate consultation by Mr Kemp with the relevant hapu or iwi. Section 8 of the Act imposes an obligation on local authorities (and this Court) to take into account the principles of the Treaty of Waitangi. At the procedural level the principles necessitate that an applicant and consent authority are to consult with the relevant hapu or iwi: *New Zealand Maori Council v Attorney-General* [*[1989] 2 NZLR 142*](), at 152 (CA); *Mangakahia Maori Komiti v Northland Regional Council* [*[1996] NZRMA 193*](). That duty is strengthened by the provisions of the [*Ngai Tahu Claims Settlement Act 1998*]() in the way that we have already discussed. Some attempt was made at consultation by both Mr Kemp, and also, on the applicants' behalf, by Mr Keogh. In any event Ms Dewar expressly eschewed relying on

the inadequacy of Mr and Mrs Kemp's consultation as a jurisdictional bar, but raised it as an example of how the Kemps misunderstood what values the Kai Tahu were trying to protect.

[84] Ms Dewar for TRoNT and Ms Llewell for DOC referred to the "precautionary principle" as a reason for not granting any resource consents. We share the difficulties the Environment Court had in *Shirley Primary School v Telecom Mobile Communications Ltd*[55] with the concept of a precautionary principle. If we use the version - the precautionary approach - in the *Rio Declaration*[56] principle 15 which states that:

> In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Then as our discussion of effects shows, on the evidence given to us we are not convinced that there are threats of serious or irreversible damage in this case.

[E] Section 105

The threshold tests

[85] First we have to consider the application of the threshold tests.[57] Section 105(2A) of the Act states:

> (2A) Notwithstanding any decision made under section 94(2)(a), a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that —
>
> (a) The adverse effects on the environment (other than any effect to which section 104(6) applies) will be minor; or
>
> (b) The application is for an activity which will not be contrary to the objectives and policies of —
>
> (i) Where there is only a relevant plan, the relevant plan; or
>
> (ii) Where there is only a relevant proposed plan, the relevant proposed plan; or
>
> (iii) Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan.

We have to consider whether Mr and Mrs Kemp's application would cause adverse effects that are more than minor (and the same for Mr Billoud's application). In respect of the former, Mr Sleigh for DRSL submitted that the effect of the Court of Appeal decision in *Bayley v Manukau City Council* [1999] 1 NZLR 568; [1998] NZRMA 513 is that if an effect is more than de minimis ie minimal, then it breaches s 105(2A) He submitted that the phrase "adverse effect . . . will be minor" in s 94(2) and (4) means the same as "adverse effects . . . will be minor" in s 105(2A). He did not refer to *Stokes v Christchurch City Council* [1999] NZRMA 409, delivered 14 June 1999 because that decision was handed down later, but the effect of his assertion is that the Environment Court's decision in that case was incorrect.

[86] We consider Mr Sleigh is wrong, and so is the reasoning in *Stokes*. That decision comes to the right conclusion in our view, but for the wrong reasons, because the Environment Court misread *Bayley*. In *Stokes* the Environment Court appears to have construed the Court of Appeal's references to de minimis adverse effects as being an interpretation of "minor". That is wrong as a closer examination of *Bayley* reveals. The Court of Appeal was considering the interpretation of s 94(2)(a) and (b). It stated the two-step test for a local authority under that subsection as being:[58]

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect.
>
> . . .
>
> Then, at the second stage of its consideration, the authority must consider whether there is *any* adverse effect, including any minor effect, which *may* affect any person. It can disregard only such adverse effects as will certainly be de minimis . . .

> . With no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected.

We now understand that the Court of Appeal was considering both paragraphs (a) and (b) of s 94(2) so that the reference to "de minimis" effects is to s 94(2)(b) only. Thus "minor" effect in s 94(2)(a) may, under the Court of Appeal's decision in *Bayley*, mean more than de minimis. It is interesting that the Court reads "effect" in para (a) as if it were plural, but we do not need to consider the significance of that here.

[87] In any event we agree with the decision in *Stokes* as to the result, and the test of "more than minor" as stated in *Bethwaite v Christchurch City Council* (Planning Tribunal, C 85/93, 10 November 1993) which held that:

> adverse effects . . . had to be less than major, but could be more than simply minute or slight.

[88] Whether effects are more than minor in any given situation is a matter of context. We consider that the effects of the Kemp application for ten jetboat trips are more than minor given that the Dart River flows through an outstanding landscape which is also of special significance to the takata whenua. On the other hand the adverse effects from Mr Billoud's application for four jetboat trips - and then only when there is no room on the DRSL boats - are only minor. Further, if we reduce Mr and Mrs Kemp's application to four jetboat trips daily to mitigate the adverse effects we find that its adverse effects are also only minor. Accordingly the first threshold test is met.

[89] The other threshold test is whether the proposals are inconsistent with both the transitional district plan and the proposed plan. We find that they are contrary to Policy 11 of the proposed plan - in particular the need to "reduce" adverse effects. However, we find that both the Kemp and Billoud proposals are not contrary to the transitional plan, and thus they pass the threshold tests. It is sufficient if the applications are not contrary to the objectives and policies of one of the plans.

Overall discretion

[90] As for our discretion under s 105(1)(c) we have to make an overall judgment to achieve the single purpose of the Act. We apply the test in *Baker Boys Ltd v Christchurch City Council* [*[1998] NZRMA 433*]; 4 ELRNZ 297. This is carried out by:

- Taking into account all the relevant matters identified under s 104;
- Avoiding consideration of any irrelevant matters such as those identified in s 104(1)(b)[59] and s 104(8);
- Giving different weight to the matters identified under s 104 depending on the Court's opinion as to how they are affected by application of s 5(2)(a), (b) and (c) and ss 6-8 of the Act to the particular facts of the case, and then
- In the light of the above

> allowing for comparison of conflicting considerations, the scale or degree of them, and their relative significance or proportion in the final outcome.[60]

Part II and effects

[91] There are matters of national importance in this case. In fact, as Mr Edmonds said, *every* matter of national importance in s 6 of the RMA is raised by the applications:

(a) The preservation of the natural character of the Dart River and its margins; and its protection from inappropriate use;

(b) The protection of the outstanding landscape from inappropriate use;

(c) The protection of the braided section of the river which is a significant habitat for indigenous (and endemic) birds;

(d) The maintenance and enhancement of public access to and along the Dart River;

(e) The relationship of Kai Tahu and their culture and traditions with their ancestral waters (the Dart River/Te Awa Whakatipu) and their waahi tapu (Te Horo or Slipstream).

[92] All these factors march together in general opposition to the proposals except para 6(d). We consider that the nationally important issue of increasing access to and along the Dart River will be significantly improved if further resource consents are granted. The principle to be applied in this situation is that where the matters of national importance compete among themselves, it is for the planning authority (or on appeal this Court) to undertake a balancing exercise - see *North Taranaki Environment Protection Association Inc v Governor-General* [1982] 1 NZLR 312.[61] Further guidance was given in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA)[62] which established that where in a particular case there is a conflict between the matters of national importance listed in s 6 it is necessary to weigh the significance of the conflicting interests in the light of the facts of the particular case.

[93] In this case some of the possible adverse effects related to national importance can be avoided or perhaps mitigated under s 5(2)(c). For example, the effects on the significant habitat for wrybills, banded dotterel and black fronted tern is only a potential effect and may be controlled by application of a monitoring condition with a review of the resource consent if the risk of harm is shown to exist and be significant.

[94] However, the issues raised by TRoNT and FMC are not so easily mitigated. Further there are other matters for us to consider under Part II. Section 7 states:

> **7. Other matters** — 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 have particular regard to —
>
> (a) Kaitiakitanga:
>
> (aa) The ethic of stewardship;
>
> (b) The efficient use and development of natural and physical resources:
>
> (c) The maintenance and enhancement of amenity values:
>
> (d) Intrinsic values of ecosystems:
>
> (e) Recognition and protection of the heritage values of sites, buildings, places, or areas:
>
> (f) Maintenance and enhancement of the quality of the environment:
>
> (g) Any finite characteristics of natural and physical resources:
>
> (h) The protection of the habitat of trout and salmon.

Nearly all those matters are relevant in this case and we have particular regard to them. We heard little or no argument or evidence about s 7(b) and 7(h) so we discuss them no further. The other paragraphs of s 7 have been discussed without specifically identifying and categorising them beyond some discussion of amenities.

Issues with Te Runanga o Ngai Tahu

[95] We are also to take into account the principles of the Treaty of Waitangi.[75] These principles work at both a procedural and a substantive level. We discussed the procedural duties under s 104(1)(i). There are also substantive duties which are reinforced and particularised by our duty to recognise and provide for the relationship of Ngai Tahu with their ancestral water and wahi tapu, and their kaitiakitanga of Te Awa Whakatipu, Pikirakatahi and Te Koroka.

[96] In *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 at 305 the Court of Appeal described the approach when considering how to balance Maori issues with other relevant matters as being:

> The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural well-being, while one of the aspects of s 5, is accompanied by social and economic well-being. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of

> New Zealand society as a whole, decides . . . . In the end a balanced judgment has to be made.

While that case was concerned with enforcement proceedings we respectfully consider the same approach is correct in respect of resource consent applications. The facts of this case are, however, very different to *Minhinnick*. In this case the proposed activities are close to but not on a waahi tapu, and on a river which we accept has great significance for Kai Tahu.

[97] In this case we have considered the physical effects identified under s 104(1)(a) as those are perceived by Kai Tahu. We also consider Mr Ellison's evidence more widely, and the effect of extra jetboats on Kai Tahu's values and mana as Mr Ellison assessed it. However there is another matter to be considered.

[98] We mentioned earlier that the trading arm of TRoNT has purchased a controlling interest in Shotover Jet Ltd which controls DRSL. The submissions filed subsequently show that raises two concerns for Mr and Mrs Kemp. First they questioned whether the evidence of Mr Ellison as given at the hearing could be trusted. On that issue Mr Ellison has sworn an affidavit in which he states that at the time he gave his evidence he had no knowledge of the purchase of an interest in Shotover Jet Ltd by Ngai Tahu Holdings Corporation Ltd, and that the latter is a separate legal entity from TRoNT. In his affidavit Mr Ellison is not accurate with his dates - the first time this Court heard this proceeding was on 26 January 1999 rather than in November 1998. That brings the date on which Mr Ellison said he first knew of Ngai Tahu's interest in Shotover Jet back to less than a month, possibly to within a few days, of the Court's hearing. Perhaps we might have expected Mr Ellison to advise the Court through his solicitors that Ngai Tahu had a commercial interest in DRSL, a competitor of the Kemps. However, the Kemps did not seek to cross-examine Mr Ellison. So we do not find that Mr Ellison's evidence should be set aside as unreliable.

[99] Of more concern to the Kemps, if we understand Mr Todd's submissions correctly, is that TRoNT is being inconsistent: on one hand it is forcefully opposing the Kemps application on numerous cultural and spiritual grounds and on the other it controls a company, DRSL, which runs up to 20 trips per day on the Dart River which presumably offend the same cultural and spiritual values. That criticism of TRoNT has some strength at first sight – especially since TRoNT does not oppose Mr Billoud's application and he intends to use DRSL jetboats - but we do not consider we have to reconcile the contradiction. We take the view that if it is acceptable to TRoNT, and does not infringe their mana, for DRSL to operate 20 jetboat trips, and for Mr Billoud to have four more then it should be acceptable to TRoNT instead, for a third party to operate the four extra jetboats provided that all the other effects can be sufficiently mitigated to make it possible for us to grant consent, and provided also of course none of the statutory instruments imposes an insuperable bar when the final weighing is carried out. If we can grant an application then we will only do so on condition that it lasts as long as the DRSL resource consent is operated.

Consideration of effects

[100] Turning to the other adverse effects we find that several of them tend to suggest a limit on the number of jetboats that can visit the Dart River on any one day. These are (in no particular order):

- Our concern that there should be no large percentage increase in jetboats on the braided stretches of the river which might affect the special birdlife;
- The need to preserve as far as possible the peace and naturalness of the Dart River from Chinaman's Bluff upstream especially for trampers below Sandy Bluff between 1130 and 1330 each day, but also for funyaks (and there is a safety component to this);
- That only a finite number of jetboats can travel up the river in the available hours without raising real safety issues (and possibly decreasing enjoyment of the trip by rushing);
- That the expressed preference of the operators is to run in loose convoy, so that except in the upper reaches when boats are turning round, the operators (ie DRSL and Kemps) would be either both travelling upstream or both downstream.

[101] The last points are interesting because they tend to suggest slightly more calculable figures. Mr Cook, for the Kemps, produced various scenarios to the Court. These all had various defects criticised by the other parties. For example:

- It showed boats above the Beans Burn after 1130 which is undesirable for reasons discussed;

- It had boats returning to the Glenorchy marina by 1800 (or even 1830 if the normal one hour's travelling time was allowed for the return from the Beans Burn confluence with the Dart River) which is outside the hours permitted by the proposed plan and therefore not desirable.

To correct that difficulty and to avoid over-intensification of use (and thus diminution of the experience) we decide that four new jetboat trips per day (or six if the Kemps surrender their existing two trips) are acceptable and can be slotted into reasonable and safe operating scenarios. If we decide that other factors allow consent to be granted, we would limit the resource consent in that way. In weighing up the Part II matters, we consider that s 6(d) outweighs the other matters in ss 6 and 7 *if* we only permit six extra jetboats (on the assumption that the Kemp's existing two trip consent will be surrendered).

[102] Ms Llewell, for the Minister of Conservation, made two other submissions about effects in this case. First she referred to *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at 84 where Greig J found that the proposed development would have to be "nationally suitable or fitting" before the matter of national importance could be set aside. However that principle does not really assist us in this case when the evidence of adverse effect on the significant habitat of indigenous fauna is not made out and the other effects on matters of national importance can be made minor by the imposition of limits and conditions. Further, there is a matter of national importance - access to the Dart River - which Ms Llewell overlooked as supporting the applications.

[103] Secondly she relied on a case under the Town and Country Planning Act 1997 - *Auckland Acclimatisation Society v Waikato Valley Authority* (1985) 11 NZTPA 33 where the Court of Appeal referred to the irreversible effects of draining the Whangamarino wetland. But there is nothing irreversible about the granting of the resource consents in this case. They can be cancelled at any time *if* monitoring shows that there are adverse effects.

The statutory instruments

[104] The final factors we need to consider are the statutory instruments – particularly the district plans. We give little weight to the Water Conservation Order and to the proposed Otago Regional Water Plan for the reasons stated when discussing them under s 104(1). The operative Regional Policy Statement is similarly equivocal. At this point we need to consider how the district plans should be applied to the two applications. We follow the approach set out in *Stokes:*[63]

> Basically, the RMA is ambivalent about the correct approach, but the Court of Appeal has decided the issue in a different way to previous practice. . . . Because the consent authority needs to consider whether to issue two resource consents - one under each plan - the correct procedure must be to decide each resource consent separately right up to the point of deciding whether or not to grant consent under s 105(1). Then if the resource consents under each plan are to be both granted or both refused, the other plan does not need to be referred to because its objectives, policies and rules are not relevant. Only if the tendency is to grant one consent, say under the transitional plan, and refuse the other, under the proposed plan (or vice versa) does the correlative plan become relevant and need to be considered. At this point the priority between the plans needs to be considered . . . .

In fact we will not consider the Billoud application at this point, because we find that we cannot grant enough extra jetboat trips to give him (with his second priority) some on top of any granted to the Kemps.

[105] There is nothing in the transitional plan which controls the Kemp application. Thus under this plan and after weighing up all the matters identified in Part [D] and further evaluated in the earlier sections of Part [E], we consider a resource consent for four jetboats should be granted to Mr and Mrs Kemp.

[106] Several of the policies of the proposed plan 1998 are met by allowing more jetboats up the river. Others are not, particularly policy 11 which is to *reduce*[64] the adverse effects of noise and intrusion and to retain safe operating conditions. We consider that safe operating conditions will be maintained. While adverse effects of noise and intrusion will not be reduced, they will not be significantly increased, and in any event there are few characteristics of remoteness in the Dart River below Sandy Bluff. We adopt the statement in *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*[65] where the Court stated:

> . . . (I)t is also possible to imagine effects - often on amenities rather than on ecosystems - where the first cut is the deepest: a new house in a spare landscape, the first helicopter pad in a wilderness area; the first apartments in a suburban area. If there is one new house, helicopter pad or apartment block, does that not set a precedent in that the second may

have much less effect than the first? The amenity effects may be radically deccelerating with increasing numbers of activities so that once the first resource consent is granted, there is no good reason under the Act for refusing further applications (until the accumulation of ecological effects comes back into play). In this example the first non-complying consent may be a valid precedent for further consents.

[107] We consider that is the case here under the proposed plan: while DRSL is operating, it adds very little harmful effect on to the amenities to allow four new trips. We are constrained from adding any more (ie up to the ten sought by the Kemps) because of concerns over the cumulative effects of noise, safety, and amenities (including the value of the trips themselves), and for fear of increasing the risks to wildlife as discussed earlier. Accordingly, taking those and all the other factors into account and carrying out the usual weighing exercise we consider that resource consent should be granted under the proposed plan as well but for four trips only (or six, if their existing resource consent is surrendered as we think desirable).

[F] Outcome

[108] Under s 290 of the Act we make the following orders:

Mr and Mrs Kemp

(1) The appeal by Mr and Mrs Kemp is successful (in part) and the decision by the Council is cancelled.

(2) Resource consents for use of jetboats for six trips per day is granted to Mr and Mrs Kemp under each of the transitional plan and the proposed plan on the conditions set out in (3) and (4) below.

(3)

(a) The parties shall file an agreed draft operating memorandum for the total 26 jetboat trips; such a 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 apportioned equally in the agreed number of windows.

(b) Failing agreement any party may refer the setting of an operating memorandum back to the Court.

(4) The consent holder shall comply with the following conditions:

(a) If any resource consents are required by the Otago Regional Council relating to discharges of contaminants to water then they shall be obtained by the consent holder relating to discharges of contaminants.

(b) The consent holder shall abide by the terms of the operating memorandum in (3) above or as it amended from time to time by agreement.

(c) This resource consent only entitles the consent holder to travel above Chinaman's Bluff so long as Dart River Safaris Ltd (or its assignee) holds a resource consent to do so.

(d) No jetboats shall operate above the Beans Burn confluence between 1130 and 1330.

(e) Monitoring of effects of the jetboats on fauna is to be carried out; however

(i) this condition is only to come into force if and when the DRSL resource consent is varied by the Council and to the same effect; and

(ii) costs of monitoring are to be borne by the consent-holder and DRSL in the proportions 6:20.

(f) The consent holder shall comply with the relevant provisions of the district plan as to noise emissions from its jetboats.

(g) Mr and Mrs Kemp shall surrender their existing resource consent before exercising this consent.

(5) Leave is reserved to any party to suggest amendments or additions to the conditions to be attached to the resource consent to give effect to the spirit of this decision; and/or to ensure that proper monitoring is carried out.

Mr Billoud

(6) Mr Billoud's appeal fails, and the decision of the Council is confirmed.

All parties

(7) Costs are reserved, but we note:

(a) that we consider there was at least an element of trade competition in the case put up by DRSL against Mr and Mrs Kemp;

(b) that we would be open to an argument that the speed with which agreement was reached (or not) on an operating regime might be relevant on the issues of costs.

[109] Finally we should say that we are aware that commercial operators are increasingly going to face restrictions that private jetboaters do not. Perhaps the Council should consult TRoNT over whether a variation is needed to its proposed plan in view of the matters of importance to Kai Tahu raised in the *Ngai Tahu Claims Settlement Act 1998*.

FOOTNOTES

1 For convenience we will shorten the name of the Dart River/Te Awa Whakatipu to "the *Dart River*".

2 See also *Wakatipu Environment Society Inc v Queenstown–Lakes District Council [2000] NZRMA 59*.

3 RMA 418/98.

4 RMA 430/98.

5 "Kai Tahu" is the southern dialect form of "Ngai Tahu"

6 Greenstone.

7 In itself a feature of Glenorchy since it has a grass roof.

8 This of course would also apply to Mr and Mrs Kemp's existing and proposed operations.

9 Mr Ellison said that in the southern dialect the "nga" are characteristic of northern iwi as replaced by "k" both in writing and in pronunciation.

10 "Mauri" means "life force".

11 Literally "dog skin cloak".

12 In *Cash v Queenstown-Lakes District Council (1993) 2 NZRMA 347*.

13 Under s 129 of the Act

14 Section 6 of the RMA.

15 Section 6(d) of the RMA: Mr Edmonds recognized that all of the s 6 matters (and this provision) applied. However he did not consider the significance of s 6(d) separately.

16 RPS p 74.

17 RPS p 75.

18 RPS p 75.

19 All "trips" are return trips.

20 *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council [1999] NZRMA 209*.

21 [1997] NZRMA 385 at 394.

22 "AEE" = Assessment of Environmental Effects under the Fourth Schedule to the RMA.

23 Under s 92 RMA.

24 In Form 5 of the Resource Management (Forms) Regulations 1999 or "to like effect" (reg 8).

25 Under the Fourth Schedule to the RMA.

26 Under s 92 of the RMA.

27 Under s 92 of the RMA.

28 Section 122 of the RMA.

29 See *Minister of Conservation v Kapiti District Council* *[1994] NZRMA 385* at *388*.

30 "Mahinga kai" means "food and other resources, and the areas they are sourced from" *Te Whakatau Kaupapa* (November, 1990).

31 Section 209 NTCSA.

32 Section 237 NTCSA.

33 Schedule 87 NTCSA.

34 Schedule 91 NTCSA.

35 Section 249 NTCSA.

36 Section 6(d) of the Act.

37 Life-force.

38 See *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 at para 52.

39 Section 6(c) of the RMA.

40 (1993) 2 NZRMA 347 at 351.

41 RPS Objective 6.4.4, p 74.

42 RPS Objective 6.4.7, p 75.

43 RPS Objective 6.4.8, p 75.

44 Objective 1.4.03(a) transitional plan, p 21.

45 Objective 4.6.3 Proposed Plan 1998, p 4/31.

46 Policy 4.6.3 Proposed Plan 1998 p 4/31.

47 Rule 5.3.3.3, Proposed Plan 1998, p 5/11.

48 Rule 5.3.5.2 (iv) Proposed Plan 1998, pp 5/15 to 15/6.

49 See s 139(4) of the Act.

50 Policy 5.4.8, Proposed regional water plan p 46.

51 See *Minister of Conservation re Kawarau River* (Environment Court, C 33/96, 13 June 1996).

52 At pp 300-301.

53 Quoted by the CA at p 301.

54 We would have been interested to hear argument on whether the WCO was a "relevant" order as required by s 104(1)(g).

55 [1999] NZRMA 66 at para 219 et ff.

56 *Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992 [1992] International Legal Materials 876.

57 Section 105 (2A) RMA.

58 [1998] NZRMA 513 at 521.

59 Subject to s 104(7).

60 *Caltex Ltd v Auckland City Council* (1997) 3 ELRNZ 297 at 304.

61 That was a case under the National Development Act 1979 but we consider the same principle applies here.

62 A case under the Town and Country Planning Act 1977.

75 Section 8, RMA.

63 [1999] NZRMA 409 at 417, referring to *Bayley v Manukau City* [1998] NZRMA 513.

64 Policy 4.6.3 proposed plan 1998, p 4/31.

65 [1999] NZRMA 209 at 230–231.

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