

**BEFORE THE HEARINGS PANEL  
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

**IN THE MATTER** of the Resource  
Management Act 1991

**AND**

**IN THE MATTER** of Hearing Stream 03 –  
Historic Heritage and  
Protected Trees  
chapters

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**CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL**

**Hearing Stream 3  
Historic Heritage and Protected Trees**

**24 June 2016**

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Decision No: C38/97

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for interim enforcement orders under section 316 and orders under section 315 of the Act

BETWEEN HAURAKI DISTRICT COUNCIL

ENF : 164/96

Applicant

AND

GARY MOULTON

Respondent

AND

BETWEEN WAIKATO REGIONAL COUNCIL

ENF : 217/96

Applicant

AND

GARY MOULTON AND MARY NYREEN JACOBSEN

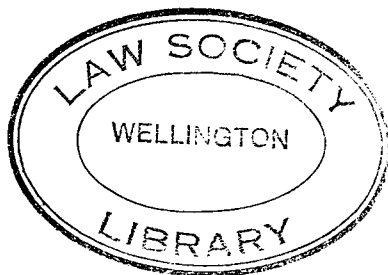
Respondents

BEFORE THE ENVIRONMENT COURT

Environment Judge J.R. Jackson (presiding)  
Mr J.R. Dart

HEARING at THAMES on the 30th day of April 1997

APPEARANCES



Ms K.J.L. Cameron for Waikato Regional Council  
Miss M.J.L. Dickey and Mr N.D. Wright for Hauraki District Council  
Mr G. Moulton for himself

## DECISION

### *1. Background*

These proceedings are two applications heard together under section 316 of the Resource Management Act 1991 ("the Act") for enforcement orders in respect of the boats "Zeus" and "Phoenix". The first proceeding is by the Hauraki District Council (the "district council") against Mr Moulton alone. The second proceeding is by the Waikato Regional Council (the "regional council") against Mr Moulton and also against Ms M.N. Jacobsen. There was no appearance by Ms Jacobsen at the hearing. The reason for her joinder is that in an earlier proceeding between the regional council Mr Moulton had stated he was no longer the 'Master' of the vessels but that Ms Jacobsen was. He did not pursue that line of defence at this hearing, and indeed he handed to us certificates of Shipping Registration showing that he is a part-owner of the vessels.

The "Zeus" is a 30 metre yacht and the "Phoenix" is a rather shorter trimaran. Since September 1996 the vessels have been tied together and to the foreshore in the estuary of the Piako River close to the Firth of Thames. At low tide they sit on the bed of the Piako River. They arrived there following a series of decisions of the Environment Court which required Mr Moulton to remove the vessels from the coastal marine areas of both the Auckland and Waikato regions.

### *2. Overlapping Jurisdictions*

Due to the moon, there is an overlap of territorial jurisdictions in this case. The vessels are not within the coastal marine area but they are still within the



jurisdiction of the regional council because section 13 of the Act imposes restrictions on certain uses of the beds of rivers. We examine those restrictions later. Similarly, the vessels are within the jurisdiction of the District Council because the definition of land in the Act states:

“ *‘Land’ includes land covered by water ...*”<sup>1</sup>

and therefore section 9 of the Act (restrictions on the use of land) applies.

It may be that the vessels are within the jurisdiction of the district council when the tide is high enough to float them, and within the jurisdiction of the regional council at low tide. Or they may be within the jurisdiction of both councils simultaneously. We do not have to decide these issues, but merely to consider whatever of each or both council’s bases for the orders sought are made out, at some stage of the tide.

### 3. *Regional Council’s Case*

We deal first with the regional council’s application. There is an outstanding enforcement order against Mr Moulton in respect of the vessels being located in its coastal marine area. As we have said, they are no longer in the coastal marine area<sup>2</sup> but within the regional council’s jurisdiction anyway under section 13 of the Act which states (relevantly):

“13. *Restriction on certain uses of beds of lakes and rivers -*

- (1) *No person may, in relation to the bed of any lake or river, -*  
 (a) *... place ... any structure or part of any structure in, on ... or over the bed; or*

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<sup>1</sup> section 2(1)  
<sup>2</sup> which is governed by section 12 of the Act



(b) ... or otherwise disturb the bed; or

... -

*Unless expressly allowed by rule in a regional plan and in any relevant proposed regional plan or a resource consent."*

The transitional regional plan is constituted by the former Hauraki Catchment Board Bylaws<sup>3</sup>. The relevant bylaw states<sup>4</sup>:

*"26. Except with the precedent written consent of the Board, no person shall erect or cause to be erected any building, structure ... within sixty-six (66) feet of the banks of any watercourse, or in any place where such is likely to or will obstruct the freeflow of floodwaters in any existing flood channel."*

Thus the transitional regional plan does not allow the activities referred to in section 13(1), rather it disallows them unless consent is obtained. No such consent has been obtained.

The regional council therefore argues that Mr Moulton is in breach of section 13(1) of the Act in that:

- he has placed (and used) structures (the vessels) over the bed of the Piako River<sup>5</sup>
- he has disturbed the bed of the river by anchoring and/or settling the vessel on it<sup>6</sup>

There is no proposed regional plan.

<sup>3</sup> Bylaw No. 1 1949 and amendments made in 1960

<sup>4</sup> *ibid*, Bylaw 26

<sup>5</sup> section 13(1)(a)

<sup>6</sup> section 13(1)(b) and (c)



#### 4. *District Council's Case*

The district council has two relevant plans: a transitional district plan and a proposed plan publicly notified under the Act on 18 October 1994. The affected land is zoned Rural under the transitional plan and subject to a designation for river control works. The mooring of a vessel is obviously not for the purposes of the designation.

The district council seeks orders under section 314 on the grounds:

- “(a) That the occupation of the land is contrary to a rule in a proposed plan;  
and/or
- (b) The occupation of the affected land is offensive and objectionable to the extent that it is having an adverse affect on the environment; and/or
- (c) The visual impact of the occupation of the affected land is having an adverse affect on the environment which the respondent has a duty under the Act to avoid, remedy or mitigate.”

Mr Carter showed us photographs of the boats and expressed his view that there is a visual impact which is adverse. He also claimed that the occupation of the Piako River and the adjacent bank is offensive and objectionable. We agree with Mr Moulton that the visual impact, if adverse at all, is minor. Nor do we have sufficient evidence to establish on the balance of probability that the ‘occupation’ of the river is offensive or objectionable. Accordingly, we are not prepared to make an order on either of grounds (b) or (c). We find, however, that the occupation is contrary to a rule in the proposed plan and hence there is jurisdiction to make an order for the following reasons.

The land on either side of the Piako River is also zoned rural under the proposed plan. The plan then provides:



### “8.10.6.1 Zoning

1. *Where the following zones ... apply to both sides of rivers, then the surface of [the river] shall have the same respective zoning as the surrounding land zoning:*
  - *Conservation (Indigenous Forest).*
  - *Conservation (Wetland).*
  - *Reserve (Passive).*
  - *Reserve (Active).*
2. *[Rivers] not covered under 1. above shall be zoned Rural.*
3. *The performance standards applicable for the zone in 1. and 2. above shall apply to surface of water activities.”<sup>7</sup>*

This means the surface of the water is also zoned rural.

The vessels are lived on, but appear to be incapable of being moved under their own steam or sail. We find they are “houseboats” within the meaning of the proposed district plan<sup>8</sup>. The relevant rule in the proposed district plan provides that discretionary activities in the rural zone include:

*“Rafts, houseboats and other floating structures.”<sup>9</sup>*

Therefore a resource consent is required.

<sup>7</sup> Proposed plan rule 8.10.6.1 (p.8.60)

<sup>8</sup> As did the Planning Tribunal in *Waikato Regional Council v Moulton Decision* A65/96

<sup>9</sup> Rule 8.10.6.4 Proposed plan p.8.61





## 5. Defences

Mr Moulton, as we understood him, had four arguments against the enforcement orders. These are:

1. The vessels are not "*structures*" within the meaning of the Act;
2. If his vessels need a resource consent then *all* vessels tied to the land need a resource consent;
3. The "*freedom of the seas*" means that he should not require a resource consent to moor or tie up;
4. He is subject to *force majeure* - there are other orders of the Environment Court which stop him leaving since he would be breaching those orders once he returned to the coastal marine area of either the regional council or the Auckland Regional Council.

### 1. *Are the vessels "structures"?*

The relevance of this question is that the restricted acts in section 13 which are relied on by the regional council require there to be a structure which is placed in, on or over the bed of in this case the Piako River. "*Structure*" is defined in section 2 of the Act as meaning:

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

There are four components in that definition. A structure must be:

- a building, equipment, a device, or other facility
- made by people
- fixed to land



- and the definition expressly includes any raft.

*"Building"* is defined in the *Heinemann New Zealand Dictionary*<sup>10</sup> as:

*"Building - anything which is built or constructed, especially for a particular use, such as a house, office etc."*

Another source showing that vessels and houses are in the same category, that is buildings, is the famous first line of *Racundra's First Cruise* in which Arthur Ransom proudly declaimed:

*"Houses are but badly built boats so firmly aground that you cannot think of moving them."*

A vessel is also a facility. The *New Fowler's Modern English Usage*<sup>11</sup> states of 'facility':

*"The entry (sense 2b) in OED 2 'covers' the use of the word in the sense 'the physical means for doing something; frequently with qualifying words e.g. educational, postal, retail facilities; also in singular of a specified amenity, service, etc.'*

But it gives no indication of the extraordinary proliferation of the word in the second half of the 20th C. Typical examples:

*Other features include sound facilities - Which Micro, 1984; the Colombo Street Sports and Community Centre ... had converted a derelict building into a thriving indoor sports and recreational facility - Community Development Journal, 1988; ..."*

<sup>10</sup>

H.W. Orsmann and C.C. Ransom, Revised Version 1989

<sup>11</sup>

Third Edition, edited by R.W. Birchfield (1996)



The last example quoted shows that a building can be a facility and we hold that a vessel can be also.

We therefore find that a vessel meets the first component of the definition of a structure both as a 'building' and as a 'facility'. It obviously meets the second because it is made by people. As to the third component - that it is fixed to land - the evidence, unchallenged by Mr Moulton, is that the vessels are tied to old poles in the bed of the Piako River and that they also appear to be anchored to the bed of the river.

The fourth component to the definition - that a structure "*includes any raft*" - is of no particular assistance to the Council because they did not argue that the vessels were rafts, although when tied together side-by-side yachts are often said to be 'rafted' together. On the other hand, Mr Moulton said that if the definition needed to expressly include rafts, then by implication it must exclude other floating structures such as boats. As we understood him, he was in effect relying on the principle of statutory interpretation that referring to one specific floating item (rafts), excludes others. We do not see that as a correct interpretation of the definition of "*structures*" in the Act. A raft may in some cases not actually be made by people, it may be 'found', i.e. an object simply used for the purpose. In other cases it may not be fixed to the bed of a lake or river (or the sea) even by anchor. In either of those circumstances it would not be a "*structure*" within the definition in the Act if not expressly included as such. Since a raft has no independent means of propulsion, presumably the statutory draftsmen considered that it should be made clear that a raft is nevertheless a structure so that the use and location of rafts can be controlled under the Act.

2. *Do all moored vessels require a resource consent?*



Mr Moulton claimed that if his vessels need a resource consent then *all* vessels tied to the land (or anchored) need a resource consent. He argued that was so absurd it cannot be the intention of the Act.

The answer is that all vessels do not require a resource consent (or a permissive rule in a plan) unless they are fixed to the land and thus meet that part of the definition of "*structure*". To borrow a rather ugly phrase from land law, the factor which determines whether a vessel is fixed to the land is the "*degree of annexation*". In the case of a vessel the degree of annexation would involve two, possibly three, aspects:

- the method of mooring; and
- the duration of the mooring; and
- and (possibly) whether the vessel can move under its own steam or by sail.

Mr Moulton claimed that if he needed a resource consent then every boat which is moored needs a resource consent. That is incorrect: if boats are temporarily moored or tied up they are not "*fixed to the land*", but there may come a time when the duration of mooring indicates that the vessel is fixed (depending on the circumstances in each case). Similarly the method of mooring (e.g. bolting to a jetty) might show a vessel is fixed.

3. *Freedom of the seas.*

Mr Moulton complained that requiring him to move took away his right to sail freely. This was a slightly illogical submission in view of the permanence of the vessels' occupation of the Piako River and indeed of his submission that the boats are not seaworthy and therefore it would be unsafe to order him to sea.



However, Mr Moulton is supported to some extent by the common law in that there is a public right of navigation<sup>12</sup>. That right of navigation:

*“includes the rights in the ordinary course of navigation, to anchor, to remain for a convenient time, to load and unload, to moor and fix temporary moorings in the waterway or on the foreshore and to ground.... A vessel is also entitled to temporarily remain in one place until the wind or weather permits it to leave or until it has obtained a cargo or completed repairs, but not to remain permanently moored as this would violate the right of the public to free passage” (our emphasis)”<sup>13</sup>*

Thus sailors do have the rights that Mr Moulton claimed for their vessels, in a general way, but subject to the qualification that the vessels can only stay in one place temporarily.

If there is a conflict between the common law rights and the Act, then the Act takes precedence: *Falkner v Gisborne District Council*<sup>14</sup>. However, we consider that section 12 of the Act (restricting the use of the coastal marine area) is drafted carefully to allow for rights of navigation. Section 12(2) states:

*“No person may, in relation to land of the Crown in the coastal marine area, or land in the coastal marine area vested in the regional council, -*

*(a) Occupy the land and any related part of the coastal marine area; ... ”*

Subsection (4) then goes on to define “occupy” in the following way:



<sup>12</sup> *Halsbury's Laws of England* (Fourth Edition) Volume 49(2): Water, para. 723

<sup>13</sup> *ibid* para 724

<sup>14</sup> High Court, Gisborne, AP 1/95, Barker J., 26 July 1995

“ ‘Occupy’ means occupy the land and any related part of the coastal marine area necessary for the activity;

- (i) To the exclusion of other persons ... ; and
- (ii) For a period of time and in a way that, but for the rule in the regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary; ... ”

In our opinion sailors exercising their public right of navigation would not be occupying the coastal marine area within the meaning of section 13(4) since they are not occupying any part of the coastal marine area for longer than they are permitted under their common law rights and nor are they doing it in a way that goes beyond the incidental rights of navigation. But there comes a time when sheer duration at one mooring becomes ‘occupation’ for the purposes of the Act and/or the mooring is no longer protected by the common law right since it is no longer ‘temporary’.

4. *Force majeure.*

Mr Moulton’s final point was that the Court should not make an order against him because he has nowhere to go. He claimed that his only method of leaving is by water and to do that he has to enter the coastal marine area of the Waikato Regional Council and the Auckland Regional Council.<sup>15</sup> However, there are extant orders of the Environment Court which forbid him to re-enter those areas. There is, as the regional council admitted, some force in this submission, since the wording of both the extant orders places restraints upon him. For example the regional council’s earlier order states<sup>16</sup>:



<sup>15</sup> This may not be strictly true: it may be possible to move the vessels by crane and transporter.

<sup>16</sup> Decision A77/96 (21 August 1996)

*"1. That the respondent, Gary Moulton, shall cease using any part of the coastal marine area in the Waikato region for occupation by either of the vessels "Zeus" and "Phoenix" or any associated structures or by any other vessel or structure in contravention of section 12(2)(a) of the Act.*

*2. That the respondent shall not occupy any part of the coastal marine area under the jurisdiction of the applicant by utilising either of the vessels "Zeus" and "Phoenix".*

...

*4. Notwithstanding the foregoing, if the respondent removes the vessels "Zeus" and "Phoenix" and their associated structures from the Coromandel Harbour, on or before 19 October 1996 and keeps them away from any part of the coastal marine area at all times after the said removal then the above orders will remain suspended and not take effect. If however the said vessels and associated structures are not removed from the Coromandel Harbour, on or before the date specified, and thereafter kept away from the coastal marine area in the Waikato region, then the above orders will take effect."<sup>17</sup> (our underlining)*

Although Mr Moulton did not word it in precisely this way, the words in paragraph (4) of the order would have the effect that if he were to sail into the regional council's coastal marine area then he would trigger the enforcement order.



We invited Mr Moulton to apply informally for variation of that enforcement order under section 321 of the Act. He did this on the spot, unopposed by the regional council. In fact he went further - he applied for variation of the enforcement orders issued at the request of both the Waikato Regional Council<sup>18</sup> and the Auckland Regional Council<sup>19</sup>.

We told him at the hearing that we would not receive an informal application in respect of the Auckland Regional Council's enforcement order because it was not a party to the proceeding. However, we do consider his application to amend the Waikato Regional Council's earlier order. If the regional council can agree we suggest the amended wording of condition 4 is:

- "4. Notwithstanding the foregoing, if*
- (a) the respondent removes the vessels "Zeus" and "Phoenix" and their associated structures from the Coromandel Harbour on or before 19 October 1996, and keeps them away from any part of the coastal marine area (except for the purposes of navigating coastal water(s) or mooring temporarily in any harbour or anchorage designated for that purpose in the Regional Council's plans) in the Waikato region at all times after the said removal, then the above orders will remain suspended and not take effect.*
- (b) the said vessels and associated structures are not removed from the Coromandel Harbour, on or before the date specified, and thereafter kept away from the coastal marine area in the Waikato region (except for the purposes of navigating coastal water(s) or mooring temporarily in any harbour or anchorage designated for that purpose in the Regional Council's plans) then the above orders will take effect."*

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<sup>18</sup>

ibid

<sup>19</sup>

Order sealed 20 February 1995 pursuant to Decision A6/95





We ask the regional council's solicitors to advise whether or not it agrees. If not, they should advise the Registrar so that Mr Moulton's application can be heard.

#### 7. *Section 315 Application*

If enforcement orders were to be made, the two councils also sought "default" orders under section 315 so that if Mr Moulton did not remove his vessels by the appointed time then the council could remove them.

Section 315 states:

*"(2) If a person against whom an enforcement order is made fails to comply with the order, any person may, with the consent of the Environment Court -*

- (a) Comply with the order on behalf of the person who fails to comply with the order, and for this purpose, enter upon any land or enter any structure ... ; and*
- (b) Sell or otherwise dispose of any structure or materials salvaged in complying with the order; and*
- (c) After allowing for any moneys received under paragraph (b), if any, to recover the costs and expenses of doing so as a debt due from that person."*

There have been cases where, in view of a history or failure to comply with previous orders and/or a perceived urgency in having adverse affects remedied or mitigated, the Court, or the Tribunal as it was, has issued anticipatory orders under section 315 at the same time as it has made enforcement orders<sup>20</sup> under section 314. It does not appear that in any of those cases was the question of procedure raised. Section 315 sets out the procedure if an enforcement order is



<sup>20</sup>

*Whangarei District Council v Montreal W94/92, Waitakere City Council v Gordon A13/93*

not complied with. An applicant merely applies to the Environment Court for its consent to carry out the directed actions. In our view the application for that consent is an interlocutory one in the course of the enforcement proceedings. As such the application should be made under Regulation 33 of the Resource Management (Forms) Regulations 1991 and if the respondent does not advise that he wishes to be heard within three working days of service the application can be determined without a hearing. So the councils need not be too concerned about major delays if Mr Moulton does not comply with the enforcement orders. In the circumstances we consider there is no need for an anticipatory order under section 315.

Counsel also stated that there were problems in respect of service. To deal with this we shall give directions as to service under section 352 of the Act.

#### 8. *Orders*

The grounds for enforcement orders being made out, we consider there are no grounds for withholding them. We will however, give Mr Moulton time both to put his boats in seaworthy condition if that is possible, and to wait for spring tides and improved weather. But if the vessels cannot move under their own steam or sail then they may have to be towed or removed by land. Accordingly the Court orders:

##### A. ENF : 217/96

1. That the respondents Gary Moulton and Mary Nyreen Jacobsen shall remove the vessels "Zeus" and "Phoenix" and any associated structures from the bed of the Piako River by 30 September 1997.
2. That the respondents shall not place the vessels "Zeus" and "Phoenix" or any associated structures or any other vessel or structure in contravention of section 13(1) of the Resource Management Act 1991 on or over the bed of any river in the Waikato region.



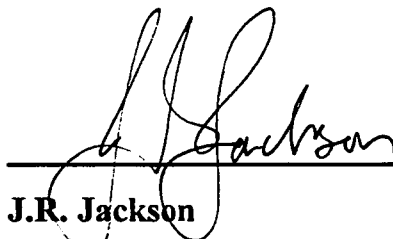
**B. ENF : 164/96**

1. That the respondent Gary Moulton shall remove the vessels "Zeus" and "Phoenix" from the surface of the Piako River by 30 September 1997 so as not to contravene section 10 of the Resource Management Act 1991 and the provisions of the proposed district plan.

**C. BOTH PROCEEDINGS (ENF: 164/96 and 217/96)**

1. Leave is reserved to each applicant to apply for any further order necessary to give effect to the above, and specifically to apply for consent under section 315 of the Act.
2. Service may be effected by both:
  - (a) Sending any documents to be served to Gary Moulton and Ms Jacobsen c/- Post Office, Thames, and
  - (b) Securing a copy of the documents to the mast or wheelhouse door or other prominent place on the deck of one of the vessels "Zeus" and "Phoenix".
3. Costs are reserved.

**DATED** at CHRISTCHURCH this 15<sup>th</sup> day of May 1997.

  
\_\_\_\_\_  
**J.R. Jackson**  
**Environment Judge**

