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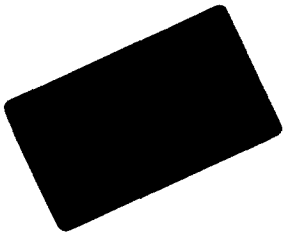
IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY



CIV 2003-485-1072

BETWEEN	MINISTER OF CONSERVATION
	Appellant
AND	TASMAN DISTRICT COUNCIL a local authority constituted under the Local Government Act 1974
	Respondent

CIV 2003-485-1073

AND	FIRST WAVE LIMITED AND WESTHAVEN SHELLFISH LIMITED
	Appellants
AND	TASMAN DISTRICT COUNCIL a local authority constituted under the Local Government Act 1974
	Respondent

CIV 2003-485-1074

AND	NGATI TAMA & ORS
	Appellants
AND	TASMAN DISTRICT COUNCIL a local authority constituted under the Local Government Act 1974
	Respondent

Hearing: 13, 14, 15 and 16 October 2003

Counsel: J Ironside & M Scally for Tasman District Council
G Downing for Golden Bay Marine Farmers
T Castle and A Stallard for Challenger Scallop Enhancement Co Ltd
R J Somerville QC and Q Davie for Ring Road Consortium
C Owen for Tasman Mussels Ltd
J K MacRae and W B Rainey for First Wave Ltd
B Arthur and P Routledge for the Minister of Conservation
J G Hardie for Ngati Tama Manawhenua Ki Te Tau Ihu Trust

Judgment: 9 December 2003

RESERVED JUDGMENT OF RONALD YOUNG J

Solicitors:
Fletcher Vautier Moore, Richmond, for Tasman District Council
McFadden McMeeken Phillips, Nelson for Golden Bay Marine Farmers
Daniell-Smith Stallard & Hunter, Nelson, for Challenger Scallop Enhancement Co Ltd
Gascoigne Wicks, Blenheim, for Ring Road Consortium
Hunter Ralfe, Nelson, for Tasman Mussels Ltd
Phillips Fox, Auckland, for First Wave Ltd
Crown Law, Wellington, for the Minister of Conservation
Pitt & Moore, Nelson, for Ngati Tama Manawhenua Ki Te Tau Ihu Trust

[1] These three appeals arise from the Environment Court's consideration of the Tasman District Council's proposed Resource Management Plan as it affects the coastal marine area in Tasman Bay and Golden Bay. Clause 14 of the 1st Schedule of the Resource Management Act entitles any person who made submissions to the local authority on the proposed plan to refer it to the Environment Court for consideration. That Court has broad jurisdiction by way of inquiry and reports to the parties and the Ministry of Conservation at the end of the inquiry (clause 15). The challenges before the Environment Court to the Tasman District Council's proposed plan related only to the aquaculture provisions of that plan. The Environment Court heard all matters under challenge *de novo* over a period of 15 weeks. Much of the inquiry centred around plan proposals to allow aquaculture and particularly mussel farming on a larger scale in Tasman Bay and Golden Bay.

[2] Part way through the Environment Court appeal it was decided to defer consideration of specific provisions of the proposed plan until a second hearing stage. The first stage would find the facts and the second stage would consider what the Court described as the specific provisions of the plan including "objectives, policies, rules, described methods, development controls, performance standards and criteria" of the proposed plan.

[3] At the completion of the first hearing the Court reached the general conclusion that the proposed plan should allow further development of aquaculture 3 nautical miles offshore in specific Aquaculture Management Areas (AMAs). These areas came with specific controls. The parties were invited to develop plan provisions to reflect the detailed factual conclusions reached by the Court and to provide for detailed rules as to how the AMA's would be formed.

[4] The second stage of the inquiry involved the parties presenting a proposed set of plans which "...proposed objectives, policies, rules and methods to promote aquaculture in the identified AMAs". The Court would then report findings with respect to these proposals to the parties and the Minister.

[5] Some of the Environment Court's findings as to the proposed rules are the subject of each of these three appeals. I consider each of the three appeals separately.

I. Appeal by Minister Of Conservation

[6] The appellant's appeal has two parts divided in this way: an allegation that the Environment Court wrongly interpreted s 12(d) of the Resource Management Act by misinterpreting the definition of "occupy". The Crown says this error gives rise to two questions of law expressed by them in the following way:

> 3.1 It is possible to provide for the grant of a resource consent for the activity of occupying land of the Crown in the coastal marine area when that occupation is not reasonably necessary for another activity, but is to remain "fallow"?
>
> 3.2 Is a consent authority able to grant a resource consent to occupy part of the coastal marine area for activities related to marine farming/aquaculture in circumstances where, by virtue of a rule in the plan, the activity of marine farming/aquaculture is not able to be carried out?

[7] The second part involves a submission that an error of law arises from a misinterpretation of s 128 of the Resource Management Act.

[8] The questions of law said to arise as expressed by the Appellant are:

> 7.1 Is it possible to deal with adverse effects on the environment which may arise at a later stage by a review of the conditions that result in either:
>
> 7.1.1 the activity not expanding even though the resource consents contemplate such expansion; or
>
> 7.1.2 the activity being reduced, even below the level specified in the initial resource consent?
>
> 7.2 At the extreme, is it possible for a consent authority to cancel a resource consent when monitoring shows that the adverse effects on the environment are such that the activity should not continue?

[9] The respondent, Tasman District Council, supported the Crown on the first part of the appeal but opposed the Crown on the second part of the appeal.

Ring Road Consortium, First Wave Limited and other parties who gave the appropriate notice all opposed these appeals.

Section 12 : The definition of occupy

[10] Some limited factual background is necessary before considering this part of the appeal. As I have observed the Court gave approval in a broad sense for the development of aquaculture in the AMA areas. The essential proposal was that blocks of up to 250 hectares could be the subject of resource management consent applications for aquaculture and in particular mussel farming. Applicants could apply for licenses for up to and including the whole of the 250 hectare block. If the application was for the whole 250 hectares then a whole block management regime was expected. And the Court approved an adaptive management technique to apply to the whole of block applications. Applications for resource consent for smaller blocks was also possible.

[11] As counsel for the Ring Road Consortium said "adaptive management is a precautionary approach for managing risks. It is a policy response to potential adverse effects which are unable to be assessed by considering the primary or adjudicative facts." This management plan was said to be necessary and appropriate given the complexity of coastal environments and the lack of intimate knowledge about the exact environmental effects of allowing AMAs. A staged and therefore precautionary approach to development was agreed. This approach was intended to be reflected in how development of 250 hectare AMA areas was to occur. Resource consent applications for 50 hectares or less were to be controlled activities. There would therefore be an entitlement to marine farm the 50 hectare or less blocks subject only to conditions. Where development of more than 50 hectares was desired then this was to be a discretionary activity. Consent in those circumstances was not guaranteed but would be at the discretion of the Council.

[12] To return to the appellant's case, as I have recounted this appeal was supported by the Tasman District Council but opposed by all other participating parties.

[13] An applicant for mussel farming in the AMA areas requires a number of Resource Management Act consents before full mussel farming is possible. The consents required will include the right to occupy the area (s 12)(2), the right to erect structures necessary for the farming (s 12(1)(b)), and to disturb the seabed (s 12(1)(c)) and there may be others. The appellant's submissions relate to the need for resource consent for occupation of the AMA areas.

[14] When an applicant sought consent for the full 250 hectares the Court saw a staged development as appropriate. The appellants submit the Court saw an appropriate development of the 250 hectares as essentially:

(a) approval for only 50 hectares for mussel farming at stage 1

(b) analysis of environmental effect of the 50 hectares of farming over 12-18 months

(c) if the environmental effect was acceptable then further staged development of the remaining 200 hectares with environmental effect assessment at each stage.

[15] They say that each stage of the development of the 250 hectares depends upon a green light from ongoing environmental impact analyses. The appellants submit that this proposed method of approval of consents for marine farming is beyond the power of the Court to recommend because it is outside the statutory criteria set out in s 12 of the Act.

[16] As relevant s 12(2) states:

> (2) No person may, in relation to land of the Crown in the coastal marine area, or land in the coastal marine area vested in the regional council,—
>
> (a) occupy any part of the coastal marine area; or
>
> (b) remove any sand, shingle, shell, or other natural material from the land—
>
> unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent.

[17] And s 12(4) states:

> In this Act, -
>
> (a) occupy means the activity of occupying any part of the coastal marine area –
>
> (i) where that occupation is reasonably necessary for another activity; and
>
> (ii) where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and
>
> (iii) for a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense; -
>
> and occupation has a corresponding meaning.

[18] The appellants stress s 12(4)(a)(i). They submit that s 12 allows occupation of a coastal management area if the occupation (amongst other requirements) is reasonably necessary for another activity. They submit that the Court's proposed rule provides that if resource consent is granted to use the whole 250 hectares then no other activity will be permitted to take place on 200 of the 250 hectares until further approvals are given. These approvals will be based on assessment of environmental impact obtained from the 50 hectare development. Until then the 200 hectares must remain "fallow". There would therefore be no occupation rights of the 200 hectares at the time the resource consent was granted or later until the environmental analysis gave the green light. Thus they submit a rule allowing 250 hectare applications for resource consent is outside the statutory provision which requires occupation for another purpose. The appellants submit that all that is authorised by the Resource Management Act is the grant of resource consent for the 50 hectare block. If further development is recommended by environmental examination then an application for the remaining 200 hectares could be made. They say it is outside the intention of s 12(2) and (4) to allow a 200 hectare block to be tied up when no activity can be undertaken on it. They say such an area should

remain available to be used by all New Zealanders if and until occupation is approved by way of resource consent application for mussel farming on the remaining 200 hectares. The appellants submit that reserving space in the 200 hectares for future development is not carrying out any other activity in terms of s12(4)(a)(i). Thus they say whole of block approvals where they involve staged development with no right to proceed to the next stage are not authorised by statute and should not therefore be contemplated in the plan.

[19] This submission is said to be reinforced by s 6(a) of the Act which stresses the importance of public protection of the coastal marine area. Section 6(a) states:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

[20] These submissions were supported by the Tasman District Council. They stress that what the Environment Court has effectively done is to reserve space for possible future development in the AMA area. This they said was not permissible given the definition of "occupy" in s 12(4) as requiring another activity.

[21] Rather than detail the respondents' submission I incorporate many of their submissions into my conclusions on this aspect of the appeal. I consider that the appellant's case misapprehends both the facts and the legal position. Essentially the respondents submitted:

(i) The challenge to the Environment Court's interpretation of s 12(2)(a) is "based on a factual analysis which is speculative" and therefore was not a question of law,

(ii) the Environment Court's interpretation of s 12(2)(a) in any event was correct in the context of this case, and

(iii) this exercise is academic because the thrust of the Environment Court's conclusions could be given effect to in resource consent conditions rather than plan rules and thus achieve the same ends.

[22] The Environment Court's approval of resource consent applications for the whole 250 hectares was, as I read it, driven by the need for an adaptive management regime. Thus the Court considered whole block management was itself consistent with an adaptive management regime. The proposed plan approved by the Court anticipated consent to marine farming in the whole block by allowing the initial application to be framed for the whole block. The applicant will, in making such a whole block application, need to convince the Tasman District Council that resource management consent should be granted for such an application. This will be onerous.

[23] And as counsel for the respondents observed there will be other activities undertaken in the 200 hectares in the early stages of marine farming development which are also within the definition of marine farming. These will include obtaining baseline environmental information, monitoring sites and effect from the 50 hectare development on the whole 250 hectares.

[24] Section 2 of the Resource Management Act defines marine farming as:

> Marine Farming
>
> (a) means breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest; and
>
> (b) includes any operation in support of, or in preparation for, marine farming; but
>
> (c) does not include any of the things in paragraph (a) –
>
> (i) done under regulations made under section 301 of the Fisheries Act 1996; or
>
> (ii) if the fish, aquatic life, or seaweed are not within the exclusive and continuous possession or control of the holder of a marine farming permit; or
>
> if the fish, aquatic life, or seaweed cannot be distinguished or kept separate from naturally occurring fish, aquatic life, or seaweed.

[25] Thus activities such as analysis of environmental effect clearly come within the activity of marine farming. They are "operations in support of or in preparation for, marine farming" and therefore other activities.

[26] The appellants in answer to this proposition submitted that testing and monitoring would not by itself require any resource management consent and therefore categorising it as another activity was not appropriate. I reject that proposition. The "test" whether there is another activity being carried out as part of the occupation requires a factual analysis of what is proposed. The Environment Court undertook this analysis and reached the conclusion that there was another activity in the remaining 200 hectares. This conclusion was open to them. There was no error of law in this.

[27] As the respondents say, putting the proposition in the opposite way the question of law as posed by the Minister is "founded on a factual premise which is speculative." The speculative factual premise is that there is no "other activity" going on in the 200 hectares. In fact there was evidence there would be other such activity.

[28] Nor do I consider the Court misconstrued s12. The Court in considering s 12(4) said:

> The definition of occupation in s 12(4)(a)(i) requires that occupation takes place in conjunction with an activity. The phrase **whether in a physical or legal sense** in s 12(4)(a)(iii) indicates however that the option provides a legal right to occupy, even if the space is not physically occupied.

[29] The physical occupation of the space of the 200 hectares was not to occur (in the sense of building of the structures for mussel farming) in the proposed plan until the result of the environmental effect of the 50 hectare farm was clear. However equally clearly there will still be activity associated with marine farming throughout the whole block. The activity of marine farming does not have to "occur" in every square centimetre of space before there can be said to be marine farming and therefore another activity in the area. Nor do all of the activities have to go on at the same time before it can be said that the occupation is reasonably

necessary for another activity. So much will depend upon an analysis of the facts. I see no error of law in the Court's interpretation.

[30] The error of law identified here by the appellants arises from the identification by the Environment Court that in the appellant's words "one can occupy space legally (although not physically) without the occupation being for another purpose." However that is not what the Court found. As the quote in paragraph 28 reveals the Court did not conclude the occupation need not be for another purpose. It effectively paraphrased the words of s 12(4) while acknowledging that "legal" occupation may not involve physical occupation. This does not mean that s 12(4)(a)(i) does not need to be complied with. The Court did not suggest otherwise.

[31] This is not a case, as has been claimed, of reserving the 200 hectares for future development. By identifying the AMA areas and approving the whole 250 hectare block for mussel farming development the Court acknowledged that 250 hectare marine farms were an option. They gave permission for such development with the caveat that within the block staged development was required. By giving approval to the AMAs they approved (conditionally) development of the whole block. And they said before each stage within the block is confirmed there would need to be environmental analysis and a conclusion which would not prohibit such further development. The Court no doubt deliberately expressed this development in this way. They identified valuable adaptive management principles for whole block development. Thus they invited whole block applications.

[32] The appellants also submitted that the effect of the Environment Court's proposed rules could result in tying up the 200 hectares not immediately approved for mussel farming from public use. This they said was contrary to s 6(a). However a validly granted resource consent based on a lawful plan will often have this very effect. That is the statutory regime. Once it is established that the whole block scheme is within the Resource Management Act then the consequences of limiting public access to some areas is inevitable. It is only if the proposal unlawfully restricted public access that it would be objectionable.

[33] I therefore conclude:

(1) The question of law posed is not a question of law but a question of fact resolved by the Environment Court. The Environment Court was satisfied on the evidence that the 200 hectares would be "occupied" for another purpose within s 12(4). This conclusion was open to them on the facts.

(2) In any event I do not consider the Court has misinterpreted s 12(4) and the meaning of occupy in the context of this case.

(3) There is no need and I have not considered the respondents' third point in opposition.

Section 128

[34] The appellant expressed the question of law in this way:

> 7.1 Is it possible to deal with adverse effects on the environment which may arise at a later stage by a review of the conditions that result in either:
>
> 7.1.1 the activity not expanding even though the resource consents contemplate such expansion; or
>
> 7.1.2 the activity being reduced, even below the level specified in the initial resource consent?
>
> 7.2 At the extreme, is it possible for a consent authority to cancel a resource consent when monitoring shows that the adverse effects on the environment are such that the activity should not continue?

[35] Although not expressed as errors of law by the Court they capture the essence of the s128 issues.

[36] Brief background facts are necessary. After the Court concluded that it supported whole block management of the AMA zones it considered the position if, as a result of environmental research, there were warning signs of danger to the environment from the 50 hectare farming. The Court anticipated that by the time actual applications for whole block developments came to be considered by the

Tasman District Council the "information base" would be considerably expanded and the likelihood of environmental surprises from development greatly reduced.

[37] The appellants' position which was opposed by all respondents in this appeal was that consideration of the Resource Management Act powers for reviewing "conditions or provisions" revealed that the Act was not designed to deal with adaptive management. The Crown submitted that the adaptive management approach requires feedback from ongoing research which in turn requires changes to resource consents given to reflect the new information. This the Crown says may work when the research accords with the expected development but when the research suggests limiting or reducing future development the Resource Management Act falls short in enabling consents to be "unwound". Thus the Crown says the essence of adaptive management, namely its capacity to require adaptation of resource consent conditions cannot be accommodated by the provisions of the Act where the adaptation required is a reduction in entitlement of the resource consent holder.

[38] The appellant's case focused, although not exclusively, on s 128. This section deals with review of conditions of a resource consent grant. The Crown submits s128 could not be used, for example, to prevent any marine farming on the 200 hectares given the appellants would have resource consent approval for mussel farming for the whole 250 hectares. Preventing mussel farming in the remaining 200 hectares would, in the Crown's view, be more than a review of conditions of resource consent. It would be a review which went to the fundamental aspects of the consent itself not authorised, they say, by s 128.

[39] Section 128 states:

> **128 Circumstances when consent conditions can be reviewed**
>
> (1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—
>
> (a) At any time or times specified for that purpose in the consent for any of the following purposes:

(i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or

(ii) To require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment; or

(iii) For any other purpose specified in the consent; or

(b) In the case of a water, coastal, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; or

(ba) in the case of a water, coastal, or discharge permit, when relevant national environmental standards have been made under section 43; or

(c) If the information made available to the consent authority by the applicant for the consent for the purposes of the application contained inaccuracies which materially influenced the decision made on the application and the effects of the exercise of the consent are such that it is necessary to apply more appropriate conditions.

(2) Except in accordance with section 234, this section does not apply to a subdivision consent in respect of which the survey plan has been deposited by the District Land Registrar or Registrar of Deeds in accordance with Part 10.

[40] If this argument is correct, it would require a reconsideration by the Environment Court of the adaptive management regime, the cornerstone of the Court's decision on how the AMA should be allowed to be developed. That by itself would not be reason to dismiss the appeal, however it does give the Crown's submissions their true perspective. While the Crown are not opposed to the principle of adaptive management they submit it can only be done if it directly and indirectly complies with the Resource Management Act.

[41] The Environment Court decision envisages that within a whole block development initially only 50 hectares would be directly developed for mussel farming. After 2-3 crop cycles (between 18 month—2 years) there would be environmental analysis. If all went well then further approval for the remaining 200 hectares could be given on a staged basis. I note that applications for 50 hectares or less would, in terms of the plan be controlled activities where approval must be given but can be subject to conditions. And if more than 50 hectares, discretionary activity where resource consent may not be granted.

[42] The Crown's concern is best expressed in this way, can the proposed development be contained if it turns out environmental impact reports recommend no further mussel farming in the 200 hectares or indeed suggest the 50 hectare areas may be too large. As to this the Court concluded:

> [478] We are satisfied marine farming developments may be halted or reversed if necessary through the various legal mechanisms which exist in the RMA.

[43] It is worth noting that the Court's conclusion was based on more than just s 128 of the Resource Management Act. In summary the Court concluded:

(1) Section 128 does not allow consents to be terminated.

(2) Section 128 amendments to conditions are only limited by the proposition that such amendments cannot have the "effect of preventing the activity for which resource consent has been granted".

(3) In changing conditions the Council would need to consider whether, as a result of the change, the consent remained "viable" although this did not imply a limit on the power to amend.

(4) Reducing the extent of the marine farm still meant the applicants would "have an overall permit to marine farm".

(5) Section 132(4) of the Act entitles review of resource consents where the application contained "material inaccuracies".

(6) The terms of the consent itself could be framed in such a way as to achieve the necessary protection should the ecological assessments turn out unexpectedly poorly, for example the term of consent.

[44] To these propositions I would add an additional method of achieving control over consents:

(7) Section 17 and s314 of the Act gives power to local authorities to control adverse environmental effect through enforcement orders or abatement notices.

[45] I agree with the Court's approach to s 128 and the other mechanisms identified to restrict , where necessary, the use to be made of the whole block consent. There is no need to limit the meaning of s 128 in any artificial way. Beyond identifying that it is intended to allow modification to conditions and therefore could not have the effect of wholly removing a consent, the language used is broad. The following sections, ss 129, 130, 131 and 132 provide a comprehensive process with guidelines for any such review. And worthy of note, s 133 states:

> 133 Powers under Part 12 not affected -
>
> Nothing in sections 127 to 132 limits the power of the [Environment Court] to change or cancel a resource consent by an enforcement order under Part 12.

Part 12 includes s314.

[46] The case for the appellant here has too narrow a focus considering as it does only s 128. I am satisfied that as the Environment Court identified, a combination of statutory provisions and conditions associated with the granting of consent would allow adaptive management, whole block consents and properly protect the environment as identified through environment research and the adaptive management regime.

[47] There is nothing to prevent s 128 being used to limit actual harvesting of mussels (which would include the construction of structures) within the 250 hectares. Such a restriction would need to take into account viability of the farm

itself. As the Court observed the restriction does not take away the essential entitlement to mussel farm. All parties have accepted that the Tasman District Council itself is likely to impose conditions on the extent of structures, numbers of lines and other methods of limiting the volume of harvesting. And if this is insufficient s 128 can on review further restrict any newly identified effects. And finally, if the position is sufficiently serious then the difficulties can be attacked either by the inaccuracies section [s128(1)(c) and s132(4)] or the enforcement section (s17). It is possible that if there are serious environmental effects identified that there will have been material inaccuracies in the initial application.

[48] The questions posed by the appellants in paragraph 7.1.1. and 7.1.2 of their submissions can therefore be answered yes as can the question posed in paragraph 7.2. This was as the Environment Court found and there is in my view no error of law.

II. Appeal by MIG

[49] This part of the appeal arises from the Environment Court's invitation in its first interim decision for the parties to provide detailed draft plan provisions based on its findings. Two sets of plan provisions were provided which the Court considered in its second interim decision. One plan was from the group which represented all mussel industry parties known as MIG (Mussel Industry Group). The other was from the Tasman District Council supported by Challenger (a scallop farming company in the relevant AMAs) and the Crown. The MIG plans contained proposals to deal with what it considered to be the problem of existing spat catching rights over part of the AMAs and incentives to those who hold or had applied for spat catching consent. These "rules" were described as the deeming rules or the transitional rules. The first part of this appeal deals with the way in which the Environment Court dealt with the proposed transitional rules proposed by MIG.

[50] The question of law posed by the appellants is:

> 4.1 The appellants pose four questions of law in this appeal. They are:

(a) Whether the Court erred in law in failing to state the basis for its consideration of the transitional rule/MIG transitional provision.

(b) Whether the Court erred in law in failing to give reasons for its conclusion that the MIG transitional provision is ultra vires the RMA.

(c) Whether the Court erred in law in concluding that the MIG transitional provision is ultra vires the RMA.

(d) Whether the Court erred in law in deciding that the transitional rule/MIG transitional provision be deleted.

[51] I consider that essentially the first two proposed questions of law ((a) and (b)) come down to the allegation that the Environment Court failed to give reasons for its conclusion that the MIG transitional provision was ultra vires the Resource Management Act. If I conclude that the appellants are correct in this then I do not need to consider the other questions of law posed. I consider that, based on the facts of this case, if the appellant succeeds on (a) and (b) the proper course is invite the Environment Court to give its reasons. The Environment Court's intimate knowledge of the complex facts in this case make it uniquely able to address this question. I turn therefore to the arguments.

[52] There was essentially no difference between the parties that the Environment Court was obliged to give reasons for its conclusions when considering the various proposed plan provisions. And it was common ground that if I concluded that the Environment Court had failed in its duty to give such reasons in relation to its conclusion that the transitional rules were ultra vires the Resource Management Act then this would be an error of law.

[53] To return to the duty to give reasons - s 290(1) of the Resource Management Act states:

290 Powers of Court in regard to appeals and inquiries

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

[54] The duty imposed on a local authority (whose decision the inquiry relates to) is set out in part I of the First Schedule of the Act. Part I is concerned, amongst other matters, with preparation of plans by local authorities. Regulation 10 states:

> **10 Decision Of Local Authority**
>
> (1) Subject to clause 9, whether or not a hearing is held on a proposed policy statement or plan, the local authority shall give its decisions, which shall include the reasons for accepting or rejecting any submissions (grouped by subject-matter or individually).]
>
> (2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.

[55] Thus the Environment Court is statutorily bound to give "reasons for accepting or rejecting any submissions". There seems no doubt that the proposed MIG transitional provision was a submission and was rejected.

[56] More broadly, the Court of Appeal has recently emphasised the importance of reasons for judicial decisions in *Lewis v Wilson & Horton* [2000] 3 NZLR 546. And the nature of the Environment Court's work emphasises the need for its reasoning to be exposed. The Environment Court often deals with matters of broad public interest rather than narrow private rights. This is especially obvious in this case where there will be high public interest in the competing issues of resource exploitation and conservation. I also keep in mind that the ultimate responsibility for approval of any coastal plan is the Minister of Conservation (see Clauses 18 and 19 First Schedule). These features underline the importance of the Environment Court giving full reasons for rejecting any proposed plan provision.

[57] The extent of reasons required to be given has often posed difficulties in particular cases. Typically, the extent of reasons required will depend upon the issue. In the context of this case the obligation of the Court can best be expressed in this way.

> (1) It needed to illustrate it understood the proposed rule.
>
> (2) It needed to illustrate that it understood the essential arguments for an against the proposed rule.

(3) When concluding the proposed rule was ultra vires it needed to explicitly give reasons.

[58] Thus here, one would expect an analysis of the rule and comparison with the relevant statutory provisions and a conclusion identifying why the provision was outside that authorised by the statute.

[59] I turn now to the proposed transitional rule - I set it out in full.

Either – 25.1.X1 – TRANSITIONAL RULE.

Either – 25.1.X1

(a) The Council shall not grant consent to an application for mussel farming within any AMA blue block unless the applicant has, before consent is granted:

(i) obtained a consent for the occupation and disturbance of the coastal marine area by structures; and
the use of those structures for the purpose of catching spat within that block; and

(ii) undertaken mussel spat-catching pursuant to that consent for at least one spat-catching season; and

(iii) prior to disturbing the site with spat-catching or any structures, carried out a baseline assessment of benthic conditions to a standard suitable for mussel farming under Rule 25.1.X4.

(iv) obtained monitoring data of any effects of spat-catching on the benthic environment.

(b) This rule shall not apply to any AMA blue block for which a resource consent for mussel farming has been granted pursuant to this Transitional Rule.

(c) Where a resource consent or lease or licence under the Marine Farming Act 1971 for mussel farming is held in any AMA 1 blue block, then Rule 25.1X1(a)(ii)-(iv) shall not apply.

[60] I note that the transitional rule itself does not appear anywhere in the Environment Court decision.

[61] The transitional rule was proposed because the appellant's claimed there needed to be some form of transitional provision to control initial applications for resource consent for mussel farming in the newly identified AMA areas.

[62] Some background facts are necessary. For more than a decade there has been a moratorium on mussel farming in the Tasman Bay/Golden Bay area. This did not included mussel spat catching. And thus the Tasman District Council, the regional authority responsible for the area, has received and granted a number of applications for spat catching within the AMAs and beyond. Other applications for spat catching have been made but not yet dealt with by the local authority. Other parties have filed appeals challenging the resource consents granted for spat catching. And still others have filed applications for spat catching to give them status to "argue about the suitability of specific areas for marine farming".

[63] The MIG proposals are designed, they claim, to reflect the Court of Appeal judgment in *Fleetwing Farms Ltd v Marlborough District Council and Aqua Ltd* CA [1997] 3 NZLR 257. The Court held that in the absence of plan provisions providing otherwise the first in time to apply for resource consent for an activity has priority as long as the application is complete in all necessary respects. MIG proposed what were said to be three alternative methods to avoid what it claimed would be administrative chaos (and other reasons) if it was open slather for applicants for mussel farming once the moratorium was lifted and the plan settled. MIG claimed a transitional provision was required. It proposed either a deeming rule or a transitional rule.

[64] It also proposed that if it was found that these rules were not authorised by the Act then a non-rule method covering either the same deeming or transitional provisions could be developed. Thus a set of provisions (or non rules) would be developed to regulate the process. They would not be rules but would have the same thrust as the deeming or transitional rules.

[65] At paragraphs [25] and [26] of the Court's second interim report the Court said:

> [25] It was explained that the three alternative rules proposed by the MIG for consideration at stage II are designed to give parties who have applied for the (on hold) resource consents for spat catching in any area the Court identified as available for mussel farming or spat holding, a "first in time" priority in gaining a consent for mussel farming or spat holding in these same areas.

> [26] We intend to evaluate the question of deeming and non method in this chapter of the decision as a proposed two *methods* for achieving the purpose of the RMA. The transitional rule and method rule we analyse elsewhere.

[66] I note the Court mentioned three alternative methods. Although the deeming and transitional rules are alternatives the non rule method is essentially another way of achieving either the deeming or transitional rules.

[67] The Court in Chapter Two of its report considered the deeming rule. It quoted the rule in full, identified MIG's submissions in support; detailed the Tasman District Council, the Crown's and Challenger's response, identified the issues and reached conclusions in regard to each identified issue. In particular, amongst a number of other conclusions, it stated:

> [188] The deeming proposal is not intra vires the relevant provisions of the RMA.

And further,

> [195] The proposed MIG 'non rule' method is ultra vires the provisions of the RMA.

[68] Given the conclusions in paragraph [188] and the reasons behind that conclusion, the conclusion in paragraph [195] was inevitable.

[69] The Environment Court said in its second interim report it proposed to consider the transitional rule when it considered spat catching in the blue sub-zone areas at Chapter 4. Again, some factual background is necessary to explain this. There was a dispute between the parties to this litigation concerning the content of the Environment Court's first report and in particular as to whether the report proposed to prohibit spat catching in what are known as the blue sub-zone areas, part of the AMAs. These areas were to be part of the new AMAs, and were subject to existing spat catching consents and to spat catching applications.

[70] Challenger and TDC believe the first interim report proposed to prohibit spat catching in the blue sub-zones of the AMA areas. The mussel industry representatives disagreed. The first part of chapter 4 of the second interim report

therefore contains an analysis of the Court's first report, the parties' submissions and the Court's conclusions that the first stage report did not prohibit spat catching in the blue sub-zone areas. This, as far as MIG were concerned, seemed to support their transitional rules which, as the Court identified (paragraph [299]), was predicated on spat catching being allowed in the AMA blue sub-zone areas.

[71] The next question posed by the Court in chapter 4 was whether spat catching should now be prohibited as part of mussel farming. After analysis it concluded that it should not. A question arose as to whether spat catching was really no more than an integral part of mussel farming and whether it therefore needed to be separately provided for. The Court concluded that mussel farming did not include spat catching and adopted MIG's definition of both mussel farming and spat catching in its proposed plan.

[72] Finally in chapter 4 the Court considered what activity status spat catching as opposed to mussel farming should have in the blue sub-zones given spat catching was not prohibited. It concluded that because spat catching had less environmental effect than mussel farming it could not be given a more restrictive classification than mussel farming. It essentially settled on the same classification as mussel farming. It then said:

> [357] The practical consequence of this finding for the industry participants' current spat catching applications in the blue subzones, and our finding in respect of the industry's proposed deeming and transitional and "non-rule" method, is that existing applications for mussel spat catching will have *Fleetwing* priority for mussel spat catching only. If the applicants wish to proceed with their mussel spat catching applications in the blue subzones then, if granted, those consents would prevent the take up of affected mussel farming blocks until the mussel spat catching consents expired.

[73] Chapter 4 ends without any direct consideration of the vires of the transitional provision. The Court came back to the transitional provision in chapter 10 under the heading "Main Findings". As to the deeming provision and the transitional provision it said in chapter 10:

- None of the references to the inquiry provide an adequate foundation for the MIG deeming provisions.

- Neither the references nor the relevant RMA provisions envisage creating priorities to allow parties to substitute one activity (spat catching) for another (marine farming) in order to be first in time with mussel farming applications.

- The MIG deeming and transitional provisions are ultra vires the RMA.

[74] On the face of it therefore there was no analysis of the transitional provision, nor any analysis as to why the Court concluded it was ultra vires. Thus, despite the promise of consideration of the question in chapter 4 the transitional rules proposal was hardly mentioned. At paragraph [299], [300] and [301] the Court said (chapter 4).

> [299] The transitional provisions of the MIG plan are predicated on spat catching being provided for in the AMA blue subzones. The transitional rule requires that prior to making an application for a mussel farming consent within any AMA blue block, an applicant must already have a consent for the occupation and disturbance of the CMA by structures and for the use of those for mussel spat catching. Prior to utilising the mussel spat catching consent a baseline assessment of benthic conditions must be undertaken. Any applicant must undertake mussel spat catching pursuant to that consent for at least one spat catching season to enable monitoring data of the effects of spat catching in the benthic environment to be obtained.
>
> [300] The MIG proposed provisions allow spat catching in the blue blocks as a controlled activity for six months of the year only (Rule 25.1.X3) and otherwise as a restricted discretionary activity (Rule 25.1.X4).
>
> [301] The transitional provisions are supported by the evidence of Dr Gillespie at stage II. He now sees some ecological benefit in having a season of spat catching before full production mussel farming is undertaken in the blue subzones instead of after. He indicates the monitoring data obtained would provide some information about the effects of structures and the activity on the benthic environment. But he stresses it is important that baseline conditions are determined before spat catching structures are installed – that the scientists would have to think not only of spat but also biomass and filtration capacity. And he also considers sufficient buffer zones/separation distances would need to be maintained around areas developed for mussel on-growing. He considers spat catching will have some effect – less than mussel farming/holding – but cannot say precisely what – until the work is done. Dr Gillespie also explained he had assumed that spat catching

> would be permitted as a controlled activity in all subzones in which mussel farming was permitted, which is why he made the distinction between marine farming and spat catching and spat holding. This clarified some of the difficulties we had with Attachments C, D and E to the SMW submissions mentioned earlier.

[75] Essentially, this was the evidence that MIG claimed supported the transitional rule as vires and appropriate. However the Court undertook no analysis of this evidence nor does it seem to have reached any conclusions about it.

[76] The respondents to this appeal submitted that an analysis of the Court's reasoning relating to the deeming rules and an understanding of the spat catching analysis in chapter 4, would reveal the reasons why the Court concluded the transitional rules were ultra vires.

[77] Firstly, they referred at paragraph [25] of the judgment (see paragraph 65 of this judgment).

[78] And further, paragraph [161] and [162]:

> [161] In this context, the MIG are entitled to have their outstanding applications dealt with in accordance with the RMA, and the Court of Appeal's findings in *Fleetwing* discussed elsewhere. Any proposed rule which would have the effect of giving the industry's applications for spat catching an advantage or priority over applications for marine farming, goes well beyond any legitimate expectations the MIG may claim.
>
> [162] Clearly too, the MIG can have no legitimate expectation that a provision such as paragraph (a) in the proposed deeming rule will be recommended to be inserted in the plan by the Court, if it creates a priority where there is none. If it simply reflects an existing priority created by the Act's resource consent application provisions, or *Fleetwing*, then it is unnecessary.

[79] And finally, paragraph [167]:

> [167] SMW submits, however, that the existing applications for mussel spat catching consents create priority over all later applications for the same water space, whether the later applications are spat catching or mussel farming. SMW considers that this follows from the *Fleetwing* principle, and the fact that, if granted, an application for spat catching will confer rights of occupancy of the water space. In this SMW appears to be supported by Mr Brierley who was questioned about which entity would have priority to go mussel farming thus:

Q thos who hv applied on a first in first succeed [sic] basis will hv prior or priority position wont they if the area the Court fixes if any for marine farming is voer [sic] the top of where theyv acquired?

A Thts corr.

[80] The respondents point out that the Court in the context of the deeming rule was not satisfied in any event that there would be administrative chaos. As to this it said:

> [173] In as far as the proposed deeming rule is advanced to prevent "administrative chaos," that is not a valid resource management reason for inclusion of the rule. We suggest that such 'chaos' may not occur. The MIG is now indicating whole block development with applications to be made by one entity. And as will become apparent in the section on spat catching in the blue subzones, those with interests, rights and permits will have a range of options by which to further those – or not – as the case may be.

[81] Thus the respondents say with this background the Court turned to spat catching in the blue sub-zones. After concluding that spat catching was not prohibited in these areas, it went on to consider existing spat catching consents and existing applications and how they would fit in with the desire for mussel farming in these areas. This, the respondents say, was with the perspective that the transitional rule required existing spat catching before mussel farming consents could be applied for. The respondents say the critical findings appear in paragraphs [322] and [323] of the Court's judgment where it said:

> [322] We turned to the remaining applications. The subzones identified for mussel farming in Appendix ZZ are only there because there has been in industry agreement that other applications outside the AMAs are to be withdrawn. The areas that remain will help form a viable industry once mussel farm applications take effect. *How* that happens is up to the industry and is not for the Court. We concluded that any unresolved applications may either be finalised or withdrawn. The permit holders may go spat catching for the life of the permit should they wish or they may seek short term consents. But they will not be able to go mussel farming unless they relinquish their permits and make fresh applications for mussel farming.
>
> [323] Should the former happen, the mussel farmers will be precluded from mussel farming until those consents expire, are surrendered or provided for as short term consents. This will render the AIP ratio meaningless because this will reduce the marine farming area and increase the spat catching areas. The choice is in the industry's hands. The Court has no jurisdiction to bring about the

> transformation of spat catching applications into mussel farming ones. It would need a Consent Order, as in the Waikato model, or legislative intervention for that to occur.

[82] And at paragraph [324] it said:

> [324] Spat catching as a stand alone activity is therefore accepted in the blue subzones if it is utilised as part of an existing consent, a replacement to s.124 consents or obtained by way of applications before the proposed plan becomes operative and even after. This approach recognises and affirms the industry parties' involvement in this inquiry – an issue we consider of importance in this case.

[83] The respondents submitted that while the Court concluded that spat catching was not prohibited it did not go so far as to say that spat catching would be a prerequisite for mussel farming as the transitional rule required. And the respondents say the Court concluded that there was no need for initial consents to be limited to spat catching to identify environmental effect. Thus the respondents submit the Court concluded *Fleetwing* priority for applications was all that was required.

[84] The respondents say that the ultra vires question was essentially dealt with when the Court considered the vires of the deeming provision. The Court, when considering its powers pursuant to ss 67 and 68 of the Resource Management Act said:

> [177] There is nothing in the section which confers any jurisdiction for the allocative rules required by the MIG to transform spat catching consents to mussel farming ones. Further, s.67(1) does not relate to rules. They arise pursuant to s.68(1) which requires the TDC to include rules in a plan to achieve the purpose of the RMA (sustainable management) through providing rules which prohibit, regulate or allow activities. Under s.68(3), the provision specifies:
>
> > In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect; and rules may accordingly provide for permitted activities, controlled activities, discretionary activities, non-complying activities, prohibited activities and restricted coastal activities.
>
> [178] In making rules, therefore, the TDC may consider the effect on the environment of activities and rules may provide for a range of activities.

[85] The respondents submit therefore;

> "...At the very least it must be implicit that the reasons for the finding that the transitional rule is ultra vires are those same reasons that apply to the deeming rule. The similarity in the language used in paragraphs [177] and [323] speaks for itself. See also the reference to the transitional rule at paragraph [179].

[86] I accept the thrust of the appellant's submission that the Environment Court has neither overtly shown that it considered the transitional provision nor has it exhibited its reasons for rejecting the transitional rule as ultra vires the Resource Management Act. The transitional rule was an important part of the transitional provisions proposed by MIG. Appropriately, the deeming provision had extensive consideration by the Court. Essentially the whole of chapter 2 was devoted to a consideration of the deeming rule. The deeming itself rule was fully set out, an extensive summary of MIG's case for such a provision was identified over three pages and the replies by the Tasman District Council, the Crown and Challenger were extensively and individually considered over some 4 ½ pages. The Court then identified six issues which arose from the evidence and legal submissions. It considered each issue in turn in detail and reached a conclusion with respect to each. It considered and resolved such vital matters as; whether the deeming provision was within the scope of the references; whether the Court in its first report had allocated areas of the CMA to identified parties; what was to happen with existing rights in the AMAs; and whether (over several pages) the deeming proposal was intra vires the Act.

[87] As to the latter section, under the subheading "Evaluation" the Court at paragraph [179] said:

> [179] What the MIG are endeavouring to achieve with its transitional rule is not a focus on the effects on the environment of undertaking an activity but a focus on the effects on those who have already made applications.

[88] I raised with counsel during submissions my concern that the word "transitional" seemed to be a typographical error and should have been "deeming".

[89] Not surprisingly, counsel for the appellants agreed and counsel for the respondents disagreed. I consider the word "transitional" as it appears in paragraph [179] must be a typographical error. The chapter (chapter 2) in which the paragraph appears is concerned with the deeming provision although there are occasional references to the transitional rules. The Court observed at the beginning of chapter 2 that it would consider the transitional rules in chapter 4. At paragraph [73] it said it would consider (amongst other matters) the question of whether the deeming provision was intra vires the Resource Management Act in chapter 2. The heading for paragraphs [174] to [187] was "Is the deeming provision intra vires the Act?" Paragraph [179] is the evaluative part of this section. And paragraph [179] deals directly with the very issue raised about the deeming provision, namely that in the Court's view its focus was on who made the applications rather than as required by the Act the effects on the environment of undertaking an activity. I am satisfied therefore that when in paragraph [179] the Court said "transitional rule" it meant the "deeming rule". Finally in chapter 2 there was brief consideration of the non-rule methodology.

[90] This detail can be contrasted with chapter 4 where consideration of the transitional rule is said to occur. The contrast is stark. While obviously the Court was not obliged to deal with the transitional rule proposal in the same way as the deeming rule, certain aspects in common could be expected. Identifying what the transitional rule said and what the parties said was its purpose from both sides of the argument was vital. Recounting even in brief form the competing factual and legal arguments was essential, including the specific evidence called by the MIG on the environmental need for the transitional provision. Analysing, as had been done with the deeming provision, whether the transitional provision was within the scope of the references seems essential. And finally, considering whether the transitional rule was intra vires the Act. This required an analysis of the purpose(s) of the transitional rule and comparing that with the proper focus of such rules guided by s68 of the Act.

[91] The appellant's argument was that the proposed transitional rule did focus on environmental effects of the proposed mussel farming and therefore was intra vires the Act. They claimed the potential benefit to existing spat catchers or spat catching applicants was essentially coincidental. If that was to be rejected then the appellant

groups were entitled to know why. In this regard the deeming and transitional rules are different. The deeming rule is overtly intended to give pre-existing spat catching applicants priority rights of application from mussel farming simply because of their status as spat catchers. Not surprisingly, this rule was rejected by the Court as ultra vires the Act. The transitional rule, the applicants say, had an environmental focus designed to analyse spat catching effect first and only then proceed to mussel farming. It was open to the Court after analysis to conclude that this proposal was essentially a sham to hide the rule's true purpose, namely the giving of illegitimate priority to spat catchers or spat catching applicants. No such analysis appears in the judgment.

[92] The respondents say that the Court concluded that spat catching effect on the environment was modest and therefore did not require an analysis of effect prior to mussel farming. Thus they say the transitional rule was not required. This may be so, however, it is not possible from reading the Environment Court's decision to be clear on this. And if the transitional rule was unnecessary as claimed, then it could be rejected for this reason rather than the chapter 10 conclusion that the rule was ultra vires.

[93] If the Court concluded that the purpose of the transitional rule was to deal with the effects on the environment of the activity then the fact the rule coincidentally advantaged a particular group would not affect the vires of the rule. It might invite reconsideration of the terms of the rule and whether it could be redrafted another way or whether such environmental protection was essential. However, again the vires of the rule would remain unaffected.

[94] Chapter 4 of the report which purports to deal with the transitional rule does not contain any paragraph heading explicitly dealing with the transitional rule. The chapter deals with spat catching in the blue sub-zones. Whilst a resolution of whether spat catching was to be prohibited in these zones was a prerequisite to consider the transitional rules, the Court does not seem to have gone on to consider the rule after it had resolved the entitlement to spat catching in these zones. The Court concluded that there was no reason to prevent spat catching in the blue sub-zones and it also resolved conflicting proposed definitions of mussel farming as

between the MIG and TDC definitions, accepting the MIG definition. Its next logical step was analysis of the transitional rule.

[95] The final section of chapter 4 is headed "Activities status spat catching in the blue subzone". This section concludes the proper status of spat catching is a controlled activity for up to 50 hectares of the CMA and a restricted activity if the application is for more than 50 hectares. The Court then said:

> [357] The practical consequence of this finding for the industry participants' current spat catching applications in the blue subzones, and our finding in respect of the industry's proposed deeming and transitional and "non-rule" method, is that existing applications for mussel spat catching will have *Fleetwing* priority for mussel spat catching only. If the applicants wish to proceed with their mussel spat catching applications in the blue subzones then, if granted, those consents would prevent the take up of affected mussel farming blocks until the mussel spat catching consents expired.

[96] That paragraph is based on the proposition that there had been a previous "finding" in respect to the transitional rule. I do not consider that there had been either a finding or a rationale for any finding that the transitional rule was ultra vires.

[97] There are other references to the transitional rule throughout the judgment. For example, at paragraph [229] within chapter 3 which deals with Iwi concerns the Court said:

> [229] Secondly, because Court has disallowed the deeming and transitional rule, as both outside the First Wave reference and/or as being ultra vires, Iwi may well end up with 30% of allocated space under the AMAs. But only if they make application for a number of blocks on a first-in-first-served basis through the resource consents processes of the RMA – and are successful in their applications.

[98] This statement adds nothing by way of analysis and seems to anticipate the conclusion in chapter 4.

[99] I have already referred to other references in chapter 2 and chapter 4 to transitional rules. In one of those references the Court summarises the evidence called by the appellants to support the transitional rule and its claimed environmental focus. The Court records the evidence of Dr Gillespie, regarding the "ecological benefit of a season of spat catching before full mussel production". This was

obviously important evidence to the appellants' case. Apart from acknowledging what Dr Gillespie said there is no analysis made or conclusion reached in relation to this evidence nor any analysis of its relevance to the transitional rule. This was required of the Court given its importance to the appellants' case.

[100] I am satisfied therefore that the Environment Court was obliged to consider the transitional rule and, in concluding it was ultra vires was required to give reasons for this conclusion. I am satisfied that it did not adequately do so and in failing to do so it committed an error of law. Given those conclusions in this case I consider the proper course is to refer the matter back to the Court. I do not propose to consider or answer any of the other questions of law posed which now seem to me to be superfluous. The Environment Court heard extensive evidence in this case. It is for that specialist Court, having heard and understood the evidence, to reconsider the matter. Although the appellants invited me to go on to consider the vires of the transitional rule I am not prepared to do so. I repeat, the Environment Court is in the best position to understand the facts here. The question which I must address and will do so after consideration of the second part of this appeal (relating to the vires non-rule method) is whether I should quash the finding by the Court that the transitional rule was ultra vires and invite it to reconsider the matter giving full reasons, or whether I should allow the conclusion of the Court to remain (that the rule is ultra vires) and invite the Court now to give full reasons for that conclusion.

Non-rule method

[101] The Ring Road Consortium gave s 305 Resource Management Act notice in relation to the First Wave appeal that it wished raise what it alleges was the parallel failure by the Environment Court to give consideration to and reasons for the finding that the transitional non-rule method was also ultra vires.

[102] The non-rule method of dealing with proposed plans is inherent within s 67 the Resource Management Act. That section states:

> **67 Contents of regional plans**
>
> (1) A regional plan must state—

(a) the issues to be addressed in the plan; and

(b) the objectives sought to be achieved by the plan; and

(c) the policies for those issues and objectives, and an explanation of the policies; and

(d) the methods (including rules, if any) to implement the policies; and

(e) the principal reasons for adopting the objectives, policies, and methods of implementation set out in the plan; and

(f) the information to be included with an application for a resource consent; and

(g) the environmental results anticipated from the implementation of those policies and methods; and

(h) the processes to be used to deal with issues that cross local authority boundaries, and issues between territorial authorities and between regions; and

(i) the procedures used to monitor the efficiency and effectiveness of the policies, rules, or other methods contained in the plan; and

(j) any other information required for the purpose of the regional council's functions, powers, and duties under this Act.

[103] Although described in the Environment Court's decision as an alternative to the deeming and transitional rule proposals, the non-rule method is essentially an alternative way of achieving the same end as those rules. Such methodology can be necessary where a rule may be technically prohibited in some way but the object of the proposal is appropriate and within the Resource Management Act. Thus the intention of the rule can be achieved without a rule through, for example, the methods to implement policies (see for example s 67(1)(d)).

[104] The Court did not directly consider at all the non-rule method in relation to the proposed transitional provisions. As to the deeming provision, it concluded that generally a "non-rule" as a method was intra vires the Act but the particular proposal was ultra vires the Act as contrary to clause 4(a) Part I Second Schedule of the Resource Management Act. The Court in relation to this said:

> [193] The matters identified are also inclusionary, requiring that **any matter relating to the use, development, protection** of any natural and physical resources. There is no suggestion in the phrase **any matter** that this encompasses, includes handing over to a small group of industry members deemed applications to go mussel farming. Clause 4 of the Second Schedule relates to:
>
> > Any matter relating to the management of any actual or potential effects of any use development etc
> >
> > (a) The community or any group within the community (including minorities, children and disabled people).

[105] As can be seen therefore, having concluded that the purpose of the deeming provision was to advantage "a small group of industry members" in their applications for mussel farming, the Court found the Act did not allow for such an approach. This was essentially the same rationale for rejecting the deeming rule.

[106] The appellant submits the Court did not consider the non-rule method at all as a way of incorporating the transitional approach into the proposed Tasman District Council plan.

[107] In my view when the Court considered the non-rule method in chapter 2 (paragraphs [189]-[195]) it did so only in the context of the proposed deeming provision. The Court did not expressly consider the non-rule method for the transitional rule at all. There are therefore no separate reasons given for its conclusion that the non-rule transitional proposal was ultra vires.

[108] Part of the complaint of the Ring Road Consortium is that the relevance of clause 4(a) Part I Second Schedule was not a matter specifically raised by any counsel at the hearing and therefore the Court did not have the benefit of counsel's submissions on the relevance of the clause.

[109] While acknowledging Ring Road Consortium's submissions regarding the effect of Part I Clause 4 Second Schedule and s 67, I consider the preferable course is to refer this matter back to the Court for reconsideration given its link to the transitional rules/vires question. For the reasons given therefore I also propose to refer this matter back to the Court for reconsideration.

[110] The final question on which I heard no detailed argument, was whether I should

(1) Quash the Court's conclusion that the transitional rule and the non-rule method was ultra vires and require the Court to reconsider the vires question with reasons; or

(2) To require the Court to take as its existing order the conclusion that the transitional proposals were ultra vires and to give full reasons for this conclusion in relation to the rule and non-rule method.

[111] Both options are open based on r 718A High Court Rules which states:

> **718A. Powers of Court hearing appeal**
>
> (1) In allowing an appeal, the Court may–
>
> (a) Set aside or quash the decision appealed from:
>
> (b) Substitute any decision which ought to have been given by the tribunal or person whose decision is appealed from:
>
> (c) Make such further or other orders as the case may require.
>
> (2) Notwithstanding subclause (1), the Court may remit to the tribunal or person whose decision is appealed from, for further consideration and determination by the tribunal or person, the whole or any part of the matter to which the appeal relates.
>
> (3) In remitting any matter to the tribunal or person under this rule, the Court shall–
>
> (a) Advise the tribunal or person of its reasons for so doing; and
>
> (b) Give to the tribunal or person such direction as it thinks just as to any rehearing or to the reconsideration or determination of the whole or any part of the matter that is so referred.

[112] The competing arguments in an administrative law sense are well summarised in *de Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed., (1995) at para 9-055 as follows;

> Difficult questions also arise where the failure to give reasons is held to be unlawful, whether for illegality or procedural impropriety. If no collateral unlawfulness is established, it is not yet clear whether a court should simply quash the substantive decision as procedurally flawed, or should only afford relief in the form of an order of mandamus to give reasons. On the one hand, it may be argued that a failure to give reasons infects the legitimacy of the entire decision-making process such that the decision should be retaken; on the other hand, it will often be the case that the decision-maker does possess reasons, and need merely be required to produce them.

[113] Recently in the context of a criminal case and appeal the Court of Appeal in *R v Jeffries* [1993] 3 NZLR 24 said:

> [22] It follows that faced with an absence or insufficiency of reasons for the decision of the District Court the High Court may, on hearing and determining the appeal, adopt whichever of the statutory courses it considers feasible and best calculated to meet the interests of justice in the particular circumstances, those interests including Bill of Rights considerations. The statutory options are: (1) hearing and determining the appeal on the material before the Court, including rehearing any part of the evidence and receiving further evidence; (2) directing the District Court to provide adequate and proper reasons; (3) remitting the matter to the District Court for rehearing; and (4) simply quashing the conviction. That final option will be exercisable where the High Court concludes that the interests of justice so require, notwithstanding the other courses available. As it was put in Awatere, there may be cases where the appellant would otherwise be unduly prejudiced or where the High Court could infer that there were in fact no adequate reasons to support the District Court decision.

[114] In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 383 the Court of Appeal said:

> It should not be assumed that the court that, for whatever reason, failed to give reasons had no reasons. Here, for example, it seems likely that the judge believed he had said enough. In that we differ from him. But one alternative remedy to quashing the decision is to invite or require the court to give reasons: see, where this is done in the administrative law context, *de Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed., pp. 469-470, paras. 9-054 and 9-055. We considered that here. But by the time we were seised of the case, more than a year had passed since the hearing. It would not have been realistic for the judge to reconstitute his reasons. But, in accordance with *Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)* [1999] 1 W.L.R. 2, leave should be sought from the trial judge, if a "no reasons" point is being taken, the potential respondents should consider inviting the judge to give his reasons, and his explanation as to why they were not set out in the judgment, in an affidavit for use at the leave application and at the hearing if leave be granted.

[115] In fact s303 of the RMA provides for such a process. As relevant it states (s303(1)(c)):

> **303 Orders of the High Court**
>
> (1) The High Court may, on application to it or on its own motion, make an order directing the [Environment Court] to lodge with the Registrar of the High Court at Wellington any or all of the following things: . . .
>
> (c) A report setting out, so far as is reasonably practicable and in respect of any issue or matter the order may specify, any reasons or considerations to which the [Court] had regard but which are not set out in its decision or report and recommendation.

[116] It is unfortunate that such a procedure was not adopted soon after the release of the decision by the Environment Court.

[117] In this case as I have observed, the Environment Court is uniquely placed given its extensive knowledge of the facts to give reasons for its conclusions. It is not a situation where the whole case needs to be sent back for reconsideration. It is in my view perfectly realistic to ask the Environment Court to reconstitute and express their reasons. It would be somewhat artificial in these circumstances, therefore, to expect the same Court to reconsider the vires issue they have already decided. I consider, therefore, I should simply send the matter back to the Court to give reasons for its conclusion that the transitional rule was ultra vires the Act and to give reasons for its conclusion the non-rule transitional provision was ultra vires. To this extent, therefore, the appeal is allowed.

III. Appeal by Ngati Tama

[118] This part of the appeal involves three appellants, Ngati Rarua, Ngati Tama and Te Atiawa. They hold status as was acknowledged by the Environment Court as tangata whenua and mana whenua (and here mana moana) in Golden Bay and Tasman Bay.

[119] The appellants' case (in summary) is that the Environment Court erred in failing to provide priority rights for mana whenua to apply for consents for mussel

farming in the AMAs. This, the appellants say, was their entitlement arising from s 6(e) of the Resource Management Act. Section 6(e) states:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: . . .
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[120] Chapter 3 of the Environment Court's report dealt with "Treaty Issues". The Court identified the proposal by Iwi which required the Court's evaluation by quoting Iwi's claim to be involved in aquaculture in this way;

> [208] In the rules, the Iwi now seek to be actively involved in the aquaculture industry in Tasman and Golden Bays on the following basis:
>
> *Included in the area of application is a special provision, being a minimum of 30% of the water space in the area of application, for the use of Manawhenu Iwi in explicit recognition of their relationship with their traditional lands and waters.*

[121] The Court considered the first question to be resolved was whether it had jurisdiction to even consider such a provision in the plan. The Court concluded it did not have such jurisdiction. The Court said,

> [209] In the Court's Directions of the 2 November 2001 issued before the Stage II hearing, we queried whether the plan amendments sought by iwi were within the scope of the relief sought in the references.
>
> [210] All interested parties on the question of jurisdiction including, significantly, that of counsel for the three Iwi, submitted on the issue, acknowledging that the Ngati Tama reference (to which all three Iwi are affiliated) does not support the relief Iwi now seek.
>
> [211] The observation that Iwi lack the legal protection of a reference was a significant concession by the Iwi counsel. Contrary to his oral submission, it is the Court's view that the reference **is** everything on an inquiry like this and it is one of our ***Findings*** in the Interim Report where we stated:
>
> - *On references interested parties are limited to matters that should be taken into account in determining the proceedings – that is matters that are within the ambit defined by the*

submissions and the references and reasonably within the TDC's amended plan: see ***Vivid Holdings Ltd.***

[213] ...The Iwi provisions have introduced a fundamental new issue to proceedings which has no legal foundation, and the Court clearly has no jurisdiction to grant the relief sought.

[122] And the Court therefore concluded:

[214] The Iwi allocation issue is not within the scope of the reference.

[123] This conclusion was based on the Court's view of the limited power accorded it under s 293.

[124] However at paragraph [215] the Court said:

[215] This should be the end of the matter. But because Iwi were not legally represented at stage I of the inquiry (except on the question of Te Atiawa's ownership of customary title to the seabed) we set out below what might be considered the 'new' Iwi case and whether it may have some legal validity.

[125] Thus the Court did proceed to consider the Iwi's claims "on the merits" in the sense of whether in law such a claim as advanced by Iwi could be made.

[126] Chisholm J in *Canterbury Regional Council v Christchurch City Council* (HC Christchurch, AP409/38/02, 9 June 2003) concluded that the power contained in s 293 of the Resource Management Act does allow Courts in limited circumstances to consider plan provisions which have not previously been part of the reference. In particular Chisholm J said:

> Until now the issue whether s293 authorises the Environment Court to grant relief beyond the scope of a reference has not been directly confronted by this Court.
>
> . . .
>
> Secondly, s293(1)-(3) should be regarded as a package. In other words, if the Court decides to utilise those powers it will also have to honour the subsection (3) requirements relating to further public notification and reopening of submissions. In this way the integrity of the public and participatory process is preserved. I reject the appellant's fear that s293 could be used as an alternative procedure to side-step full public participation. If s293 is utilised there *will be* further public participation.

> Thirdly, the Environment Court Judge suggested that in some cases the purpose of sustainable management may positively demand that a solution outside the scope of the reference and that provided this is "*fair and efficient*" it would seem appropriate for the Court to direct such a solution. Later he expressed the view that:
>
> > *"... the jurisdictional test in s293 is simply whether the proposed remedy outside ...scope ...is, objectively, potentially the best option for achieving the purpose of the Act which is open to the Court on the evidence it has read and heard. "*
>
> In my opinion a more conservative interpretation is required. Before the Court has jurisdiction to invoke the section it must consider, first, that a reasonable case has been presented and, secondly, that some opportunity should be given to interested parties to consider the proposed change or revocation. But even if those requirements are satisfied the Court does not have an unlimited ability to pursue what it considers to be the best option for achieving the sustainable management purpose of the Act. By virtue of clause 15(2) of the First Schedule the Court is discharging an appellate function. The Environment Court has frequently reminded itself that it is not a planning authority: see for example *Leith v Auckland City Council* [1995] NZRMA 400; *Kaitiaki Tarawera Inc v Rotorua District Council* (supra); *Hardie v Waitakere City Council* (A69/00, 7 June 2000, Judge Whiting) and *Haka International NZ Ltd v Rodney District Council* (A109/01, 19 October 2002, Judge Newhook). Thus I agree with Mr McCoy that the Environment Court is not entitled to discard its appellate role and take on the planning role Parliament has seen fit to vest in territorial authorities. As mentioned in Kaitiaki this may come down to matters of significance and degree.
>
> [46] Fourthly, within those constraints the Court has power to grant relief beyond the scope of the reference. But as observed by this Court in *Kirkland v Dunedin City Council* [2001] NZRMA 97 at paragraph [14] it is likely that this power that will be rarely used.

[127] I agree with Chisholm J's approach for the reasons he has given. It was therefore accepted by all parties that the Environment Court had erred in concluding that they had no jurisdiction to consider Ngata Tama's proposed rule. However as the appellants accept, the Court did in fact go on to consider in its words the "new Iwi case and whether it may have some legal validity".

[128] The appellants therefore accept they had the burden of establishing that there was an error of law by the Environment Court.

[129] The appellants say the Court's approach can be summarised by considering paragraphs [227], [256], [258], [259] and [260] of the Environment Court's decision;

> [227] Both witnesses fundamentally misunderstand the focus of this reference inquiry. It is not to allocate parts of the CMA to specified

parties, but to identify areas of the CMA through zoning – after analysis of the relevant provisions of the RMA and to define activities which may be pursued within the zones. Through the plan provisions decided upon, the parties will be enabled to go marine farming in its various aspects. But that may occur only after resource consents have been implemented, obtained or renewed, and appeals have been resolved.

[256] The Iwi consider the relief they now seek is solely pursuant to s.6(e) RMA. This provision is singled out as the substantive provision to support their new relief of at lest a 30% allocation of the CMA to Iwi. A similar argument for customary rights of use in respect of s.6(e) appears to have been developed in 1998 by the author of *Developments for Maori under the Resource Management Act* but that article is written in the context of resource use applications – not references.

[258] In our view the Iwi proposals sideline the function of the TDC on a reference inquiry such as this, which is for the purpose of giving effect to the RMA. Under s.66(1) the TDC is required to prepare plan provisions in accordance with its functions under s.30, the provisions of Part II, its duty under s.32, and any regulations. Thus Part II matters are only one aspect of the plan process and even then s.6(e) issues inform those arising under s.5. No such analysis has been provided by Iwi.

[259] In addition, the TDC under s.30(1)(a) in order to give effect to the purpose of the RMA is required to have the following functions – the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region. The issue of 30% allocation to Iwi is not what is required here.

[260] Iwi have made no analysis of s.6(e) in the scheme of the RMA for references. Consequentially there is no case to answer.

[130] I record that counsel for the appellants stated that in contrast to the conclusion at paragraph [260] Iwi did provide such an analysis.

[131] Essentially therefore the Court took the view that its process was to define areas in which aquaculture may take place and not to allocate space for anyone within those areas. This process of allocation they said was the Tasman District Council function.

[132] The appellants' case is that a proper reading of s 6(e) identifies an obligation on all decision makers under the Act including the Environment Court in an inquiry such as this. That obligation the appellants say is expressed as requiring such decision makers when exercising their functions relating to, amongst other matters,

the development of natural and physical resources, to "provide for" the relationship of Maori with their ancestral water. Thus the appellants say the restriction of mussel farming to the AMA areas and the requirement for resource consent to use the AMA areas necessarily will interfere with the relationship of Maori and their ancestral waters. And the appellants submit Maori will lose their customary use with respect to these AMA areas unless coincidentally they are first in the queue of applicants for resource consent and are successful applicants.

[133] The appellants submit that rather than s 6(e) being restricted to a shield to protect rights it can be used by decision makers as a sword to give rights. In this case to ameliorate the loss of rights anticipated from the introduction of AMAs.

[134] The appellants argue therefore that reserving for them a priority right to apply for resource consent in parts of the AMAs (acknowledging that they would have to make the same case as any other applicant for resource consent to the Tasman District Council) would not be allocating an area to them but simply ensuring the loss of rights from the creation of AMAs was in part acknowledged and provided for by giving priority of application rights only.

[135] The respondents in this appeal who made submissions were the Crown, the Tasman District Council and First Wave. They support the Environment Court's position that at this stage of the process allocation of entitlement was not part of the Environment Court's function.

[136] I agree with the Court's analysis and conclusion. The Environment Court's function at this stage of the inquiry was to identify areas where mussel farming may be allowed. In doing so it must take into account in the way s 6(e) contemplates the interest of Maori. There is no question but that it has done so in a comprehensive and detailed way as is revealed in the first interim and second interim reports. Section 6(e) does not require that decision makers "comply" with s 6(e) in a particular way. The Act leaves it to the decision maker with no doubt the benefit of submissions to decide how best to reflect the s 6(e) ideals. The Authority must take s 6(e) matters into account at each stage by recognising and providing for them. How that is to be done will depend upon the facts of each case. The key will be that

it is done, and explicitly identified by the Court in its decision. Appellate Courts will be unlikely to revisit this issue once it is established that the Court below has explicitly acknowledged and taken into account s 6(e) matters in its decision making. It will essentially be up to the Court that heard the evidence to decide what might be the best, or most appropriate way, to give effect to and provide for s 6(e) matters.

[137] My conclusions are therefore:

(i) The Court did comply with s 6(e) of the Act and did consider and take into account these matters in both its first interim and second interim reports.

(ii) The appellant's case was essentially that the Environment Court could only comply with s6(e) by providing for priority of application rights to Iwi. I reject this submission. It is up to the Environment Court to decide what is appropriate, in the context of the facts of the particular case, to comply with s6(e). This Court's appellate jurisdiction is limited to ensuring s6(e) matters were considered and taken into account. This appeal therefore fails.

Costs

[138] I invite memoranda from counsel as to costs. The successful parties in each of the appeals are to file memoranda within 21 days and the unsuccessful parties in reply within a further 14 days.

.....
Ronald Young J

Signed at 2-00 ~~am~~/pm this 9th day of December 2003