IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 306/98

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of the Resource Management Act 1991
BETWEEN	PORTS OF AUCKLAND LTD Applicant
A N D	AUCKLAND CITY COUNCIL First Respondent
A N D	SOUTHERN TRADING COMPANY LTD Second Respondent
A N D	BROADWAY DEVELOPMENTS LTD Third Respondent
A N D	CITY WISE PROJECTS LIMITED Fourth Respondent
A N D	COVINGTON CORPORATION LIMITED Fifth Respondent
A N D	MAGELLAN ORAKEI LTD Sixth Respondent
A N D	NGATI WHATUA O ORAKEI MAORI TRUST BOARD Seventh Respondent

Hearing: 7 - 9 September 1998

Judgment: 18 September 1998

Counsel: J R F Fardell & T Pritchard for Applicant
D Kirkpatrick and K N Phillips for First Respondent
K F Gould for Third Respondent
B O'Callahan for Fifth Respondent
K F Gould for Sixth Respondent
D L Wackrow for Seventh Respondent

INTERIM JUDGMENT OF BARAGWANATH J.

Solicitors
Russell McVeagh McKenzie Bartleet & Co., DX CX10085, Auckland for Applicant
Simpson Grierson, DX CX10092, Auckland for First Respondent
K F Gould, DX CP20513, Auckland for Third and Sixth Respondent
Carter & Partners, DX CP21005, Auckland for Fifth Respondent
D L Wackrow, DX CP20503, Auckland for Seventh Respondent

INDEX

This case concerns the law's reconciliation of conflicting public interests in land use planning. One is to implement a decision reached by statutory planning processes that industrial land should convert to residential use. A second and related interest is that of the owners and lessees of the land who have embarked upon large scale residential development in reliance upon the planning decisions. A third is the interest that future residents of the land should be free of intolerable noise from neighbouring wharf operations. The fourth, which has precipitated the proceedings, is the maintenance and development of the Port of Auckland as a facility of regional and national importance, necessarily involving noise day and night, without risk of claims by residents that its activity must be restrained as interfering with their enjoyment of reasonable standards of amenity. The reconciliation requires analysis of the respective roles of the planning authorities (here a City Council) and the Court.

Introduction: interim judgment

New Zealand's largest commercial wharf complex, which is in the course of expansion, is sited on the southern side of the Waitemata Harbour, in the centre of the City of Auckland. Immediately to the south across Quay St is

the former Railway Precinct (the Precinct), its western side some 600m from Auckland's main street, Queen St. The Precinct land was returned by the Crown to the Seventh Respondents (Ngati Whatua), the Maori tribe who had been deprived of their ancestral lands in the course of European settlement. Following a decision of the Auckland City Council (the Council) to rezone the Precinct so as to permit within it residential development as a controlled activity under the Resource Management Act 1991 (RMA), Ngati Whatua granted a series of 150 year leases of subdivided parcels to the Sixth respondent (Magellan), which assigned several of its leases to the remaining Respondent developers.

Each developer made successful application to the Council under the RMA for resource consent, to permit the erection of multi-storey residential buildings (in the case of Covington the substantial redevelopment of the existing Railway Station building). Ports of Auckland Limited (the Port company) which operates the wharf complex alleges in this proceeding that the Council erred in law by treating each application as "non-notified" under s94 of the RMA and granting building consents to the developers without notice to the Port company, which would have contended for more stringent noise insulation procedures and so averted the prospect of claims against it by future residents . The proceedings against Southern and Covington have been settled and they have been dismissed as parties; City Wise abides the Court's order; the Council, Broadway, Magellan and Ngati Whatua have defended.

The case is one of "reverse sensitivity". The Port company contends that by granting such consents without the precautions which it would have sought if given notice of the applications, the buildings will be erected without adequate sound proofing. The result, it says, will be the entry into the Precinct of large numbers of residents who will be adversely affected by the noise of the port's 24 hour a day operations in close proximity. They may be expected to react by seeking relief in the High Court or the Environment Court by way of injunctive or other constraints upon the 24 hour operation of an industry of major national importance or, at best, interruption of the port's operations by complaints and opposition to any future developments it may wish to make.

The proceeding is by way of judicial review, seeking the intervention of the Court to restrain conduct of the Council alleged to be unlawful. The essential issues are whether in terms of s94 of the RMA the Council was entitled to form its opinion that the Port company could not be adversely affected by the grant of the resource consents and whether adequate conditions have been imposed in terms of s 105(1)(a). The Council denies the Port company's allegation, asserting that it had solid basis for forming its opinion that the Port company was not "a person who may be adversely affected " by the granting of the resource consents, and denying that there are grounds for the Court to intervene. Broadway, Magellan and Ngati

Whatua support the Council's position and argue in addition that the Court's discretion should be exercised against the grant of relief.

The issues were refined in the course of argument to the extent that the Port company accepts that if the Council can ensure that the noise entering the buildings is no greater than 35dBA $_{L10}$ (35 decibels for no more than 10% of the time) it will have performed its duty. The Council and the other represented respondents agree that the Council should both reserve and exercise the power to prevent the noise from exceeding such level.

The matter in difference has reduced to whether the present protections give the Council such authority. Counsel have undertaken to provide me with a draft form of conditions which their clients agree would give the Council sufficient authority to ensure provide proper protection for the interests of future residents and of the Port company, while avoiding unreasonable imposition upon the developers and Ngati Whatua. They agree that I should deliver an interim judgment, required in any event because City Wise is not represented, which will allow the parties to seek further directions should that be required to secure satisfactory resolution.

It is a matter for congratulation of all parties that the differences in a matter of such importance and difficulty are now limited to whether they can now be resolved by simple directions under s4(5) of the Judicature Amendment Act 1972 making a little more precise the conditions already imposed, or

whether there should be a declaration that on the true construction of the existing conditions they provide adequate protection. I will reserve my decision upon that question until I have seen the draft conditions.

II

Background facts

The plan attached as Appendix 1 shows the general geography of the area.

The Port of Auckland

To the north of the plan is the Port of Auckland, which handles some 52% of New Zealand's container trade, as well as RORO and conventional traffic. Some 70% of the container business relates to the Auckland region.

The importance of the Port to the regional and national economy is recognised by the statutory planning documents having effect under the RMA, namely the Waitemata Harbour Maritime Planning Scheme, the transitional operative Auckland City Council District Plan, the recently notified Central Area section of the Council's proposed district plan and the proposed Regional Coastal Plan. On 24 June 1998 the Environment Court delivered judgment authorising the extension of the Fergusson Wharf container terminal to the east (shown as "NOTE 3" on Appendix 1), because the development of the commercial port on the scale needed to meet the growth

of container cargoes generated by the economic activity of the Auckland region justifies the consequential loss of valuable open public harbour and resulting visual effects.

It is undisputed that the maintenance and development of the Port as a 24 hour a day operation is a fundamental datum of any planning decision.

The Precinct

To the south of the wharf area and separated from it by Quay Street is what is called in the proposed district plan the Former Railyard Precinct (comprising the areas denoted Res 9C, Ind 6B and Com 8H on Appendix 1), until recently serving as a railways complex including shunting yards as well as the large Station building which is the subject of the Covington application. The Government policy of withdrawing from commercial business resulted in the release of the former Railway station and surrounding land within the Precinct, apart from the existing rail corridor that bisects the Precinct and a further corridor for a proposed extension to the west. The Precinct forms part of the Harbour Edge Strategic Management Area in the Council's proposed district scheme which is all reclaimed land bounded to the south by the former cliff line (generally to the south of the Strand and to the west of Beach Road) and to the north by the wharves. The Council's policy is to plan redevelopment of the area to blend visitor, business, residential, and

recreational activities in a way that will both promote the waterfront's natural advantages and reintegrate the harbour and the City. One of its consequences is to remove the former cordon sanitaire between the Port area and residential uses, which had been confined to the high land to the south and east (such as York Street and Balfour Street shown on Appendix 1).

Ngati Whatua have inhabited what is now the City of Auckland since before European contact. Having been deprived of their land by the European settlement they claimed restoration of such part of the land held by the Crown as was not required for public purposes. In the result the fee simple of the Railyard Precinct was vested in them. They made successful application to the Council for rezoning the land (by Variation 11) from Industrial to the range of Commercial and Residential uses indicated on Appendix 1.

The long term leases

Ngati Whatua decided that the most effective use of the land was to lease it *long term for the purpose of large scale development.* It granted a series of 150 year leases to Magellan, which in turn assigned a number of them to Southern, Broadway, City Wise and Covington as shown on the plan. Each transaction was made on the basis of the new zoning of the relevant land, with a view to its development.

The applications for resource consent

Each developer decided upon a project entailing residential use, being a *"controlled activity"* in terms of Variation 11, and made application to the Council for a resource consent for the purpose.

The Council's decisions to treat the applications as non-notified

The Port company urged the Council that it should require applications for resource consent to be publicly notified, to give it the opportunity to be heard as to the conditions to be imposed. The Council decided to treat the applications as non-notified and granted consent to each developer without complying with the statutory notification procedures.

The Port company's claim

The Port company asserted in its pleadings that the Council's decision not to notify the applications was unlawful and that each purported resource consent was unlawful and invalid. That claim being denied by the Council, supported by Ngati Whatua and the developers, this application came on for trial last week.

III

The legislative provisions

These are reproduced to the extent applicable to the case. Important passages are emphasized.

The purpose of the RMA is stated in section 5:

> "SECT. 5. PURPOSE–
>
> (1) **The purpose of this Act is to promote the sustainable management of natural and physical resources.**
>
> (2) **In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–**
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment"

By s9, no person may use land in a manner that contravenes a rule in a district plan or a proposed district plan unless the activity is expressly allowed by a resource consent granted by the Council.

In terms of s76(2) of the RMA the rules included by Variation 11 prohibiting, regulating or allowing activities have legislative effect as a regulation: ***Ashburton Borough v Clifford*** (1969) 3 NZTCPA 173 (CA). Rule 14.8.8 of

the Port Precinct Rules provides that between 11pm and 7am measured noise levels shall not exceed $_{L10}$ 60dBA ($_{Lmax}$ 85dBA) on the southern side of Quay Street and $_{L10}$ 50dBA ($_{Lmax}$ 75dBA) at or within the boundary of any property with a residential activity zoning.

Rule 5.5.184 of the Waitemata Harbour Maritime Planning Scheme noise controls provides that between the same hours noise from any use, activity or work in the Port shall not exceed $_{L10}$ 45 dBA as measured on the boundary of any residentially zoned site (which includes those of the respondents). By s88 an application may be made for a resource consent for a controlled activity. The application is required to include a description of the activity for which consent is sought, its location, and an assessment of any actual or potential "effects" that the activity may have on the environment, and the ways in which any adverse effects may be mitigated.

The term "effect" is defined by s 3:

> "SECTION 3. MEANING OF "EFFECT"--
>
> In this Act, unless the context otherwise requires, the term "effect" [ ] includes--
>
> (a) Any positive or adverse effect; and
>
> (b) Any temporary or permanent effect, and
>
> (c) Any past, present, or future effect; and
>
> (d) Any cumulative effect which arises over time or in combination with other effects--
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes--

(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a high potential impact."

By s92 the Council may require the applicant to provide further information. Where it is of the opinion that any significant adverse effect on the environment may result from the activity for which consent is sought it may require an explanation of any possible alternative methods for undertaking the activity and of the consultation undertaken.

By s93 once the Council is satisfied that it has received adequate information it is required to ensure that notice of the application is served on

> **"such persons who are, in its opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land,** where appropriate... **unless the application does not need to be notified in terms of section 94."**

"Adjacent" land is not confined to land which is adjoining but includes places which are nearby: ***Wellington v Lower Hutt*** [1904] AC 773. I do not doubt that the Port company is an "adjacent occupier" in relation to the applications for resource consent in this case.

By s94(1) an application for a resource consent that relates to a controlled activity need not be notified if

> "(i) **The activity to which the application relates is a controlled activity; and**

(ii) **Written approval has been obtained from every person who, *in the opinion of* the [Council], may be adversely affected by the granting of the resource consent unless, in the [Council's] opinion, it is unreasonable in the *circumstances to require the obtaining of every such approval.*"**

Further, notwithstanding s94(1),

"(5) **if *[the Council] considers special circumstances exist* in relation to any such application, it may require the application to be notified..., even if a relevant plan expressly considers that it need not be so notified."**

[ibid 467]

By s96

"Any person may make a submission to [the Council] about an application that is notified..."

Section 100 provides for a hearing if requested by a person making a submission.

By s104, when considering an application for a resource consent and any submissions received the Council is required to have regard to

"(a) **Any actual and potential effects on the environment of allowing the activity; and**

(i) Any other matters the [Council] considers relevant and reasonably necessary to determine the application."

By s105(1)

"...after considering an application for -

(a) **A resource consent for a controlled activity, [the Council] shall grant the consent, but may impose conditions under section 108 in respect of those matters over which it has reserved control:**

(3) ...the matters described in section 104 shall be relevant only in determining the conditions, if any, to be included in the consent.

(5) [The Council] shall not grant a consent if the application was made without notice and the application should have been made with notice."

By s108:

> *"...a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of the kind referred to in ss. (2).*
>
> (2) A resource consent may include any one or more of the following conditions: ...
>
> (b) A condition requiring that a bond be given in respect of the performance of any one or more conditions of the consent ...
>
> (c) A condition requiring that services or works... be provided;
>
> (d) In respect of any resource consent ... a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent"

In the case of the whole of the Precinct, the Council has *"reserved control ... in respect of"* all uses, including the developments proposed by the respondents. Rule 2.02:5.3 empowers the Council in granting consent to an application to impose conditions which relate to noise control. In the case of the Industrial 6B zoning, which affects the Broadway application, the rules provide:

> "In considering any application within the ... Industrial 6b zones ... the following specific criteria apply.
>
> i) It shall be demonstrated to the satisfaction of the Council that,
>
> ...
>
> d) Particular regard shall be had in the design of buildings to mitigate the possible effects of noise and glare from adjacent land uses."

In the case of the Residential 9C zoning, which affects the City Wide proposals, the scheme statement provides:

> "This zone applies to part of the former central railyards in The Strand. The purpose of the zone is to further the Scheme's objective to encourage a nucleus of permanent residential accommodation within the Central Area. The zone is also particularly suitable for student accommodation. The zone has advantages for a comprehensively planned development with suitably designed traffic and pedestrian paths and housing clustered about a common open space area, designed to mitigate the possible effects of adjacent land uses. Accordingly, all uses are classed as controlled or conditional uses ..."

The noise rules are to the same effect as those for Industrial 6B zones.

By s 120:

> "SECTION 120. RIGHT TO APPEAL–
>
> (1) Any one or more of the following persons may appeal to the [Environment Court] in accordance with section 121 against the whole or any part of a decision ... the Council ... on an application for a resource consent."

IV

The central issue

In terms of s105 of the RMA residential uses within the Precinct are controlled uses. The central issue is whether consent for such uses should have been given either at all, at least in the terms adopted, or without public notification pursuant to s 93.

The Port company asserts and the Council denies

- that it was "likely to be directly affected" by each application, and that (s 93) the Council had necessarily to form the opinion that the Port company applications did need to be so notified
- that (s 94)(1)(ii)) the Council was bound to determine that it might be adversely affected by the granting of the consent
- that (s 94(1)(ii)) it was not unreasonable to require the obtaining of the Port company's approval
- that (s 94(5)) special circumstances warranted the requirement of notification
- that the failure to give notice entailed procedural error that requires quashing the consents
- that the consents were granted on the basis of a serious mistake of fact, namely that the conditions attaching to them reserved sufficient power to the Council to prevent noise from the wharves from unduly interfering with the comfort of residents of the apartments.
- alternatively, that because the conditions are inadequate to reserve such power, the decisions to grant consent are unreasonable.

V

Summary of the evidence as to noise effects

Evidence on affidavit was given by expert acoustic engineers, Mr Day for the Port company and Mr Hegley for the Council. It is considered in Parts IX and X. No application was made for leave to cross-examine. Both agreed that

for New Zealand conditions the maximum level of noise that may reasonably be permitted to enter residential premises, if the occupiers are to enjoy a tolerable standard of enjoyment of life, is 35 dBA $_{L10}$. The apparent difference between the experts related largely to whether, as Mr Day stated, the noise level is to be measured with the windows open or whether, as Mr Hegley said, the noise is to be measured with the windows closed. That difference was analysed and resolved in argument.

The Waitemata Harbour Maritime Planning Scheme includes noise controls for the Port as recorded on page 13 above, implemented through the transitional operative Auckland City District Plan and the transitional operative Auckland Regional Coastal Plan.

Despite an invitation by Mr Gould to draw contrary conclusions from limited evidence, it was common ground between Mr Fardell and Mr Kirkpatrick that the emission by the Port company of noise within these limits will result in an internal noise level within the developers' residential apartments significantly in excess of the 35dBA level, unless the windows are closed. Mr Fardell initially contended that such result presented the Council with a dilemma: if the windows were open the acceptable noise level would be exceeded; but if they were closed there would be infringement of the regulatory Building Code (SR 1992/150 Regulation 3 and Clause G4) established pursuant to the Building Act 1991, in that there would be inadequate ventilation. In argument he recognised that the stipulation of a 35dBA internal maximum for

externally generated noise would be acceptable, provided that the ventilation was planned on a closed window basis.

His concern, on that footing, was that the current conditions do not give the Council adequate power to enforce concurrent maintenance of both the internal 35dBA level and adequate closed-window ventilation. Whether that submission is made out is crucial to the determination of the case.

VI

The role of the Court

The function of the Court in judicial review, as distinct from appeal, is limited to ensuring that the decisionmaker whose decision is challenged operates within the law. It is the Council, not the Court, whom Parliament has deputed to form the opinion whether (here) the Port company "may be adversely affected by the granting of the resource consent" in terms of s 94(1)(c)(ii). While the verb "affected" is not defined, it must take its colour from the very wide definition of the equivalent noun "effect". Unless a Council could reasonably conclude that the Port company could not be adversely affected by the grant of the particular consent, it is its duty to

notify. The reasons are discussed in ***Murray v Whakatane District Council*** [1997] NZRMA 433 at 467 and 474-5.

Mr Kirkpatrick argued that the test of reasonableness is what may be called the stringent Wednesbury test employed in the rating cases: ***Mackenzie District Council v Electrocorp*** [1992] 3 NZLR 41 at 44-45 and ***Wellington City Council v Woolworth NZ Ltd (No 2)*** [1996] 2 NZLR 537 at 545. There the standard was that of:

> "... A decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person had applied his mind to the question to be decided could have arrived at it."

The reason for that approach is stated by Richardson P at 546, lines 37-42:

> *"There are constitutional and democratic constraints on judicial involvement and wider public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decisionmaking is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to re-weigh considerations involved and the less inclined they must be to intervene."*

In this case I am relieved from considering the outer limits of reasonableness in a sphere beyond the ordinary experience of the Court. There is no dispute between the experts on both sides that a noise level above 35 dBA $_{L10}$ inside a residential property is unacceptable. What is in dispute is whether the conditions imposed by the Council are sufficient in law and in practice to maintain that result and thereby remove any substantial grounds for the residents to bring a proceeding in nuisance in this Court or proceedings for an enforcement order by the Environment Court under ss 314 and 319 of the RMA, or resist reasonable proposals by the Port company for further

development. While Judges of this Court do not in general claim the specialist qualifications and experience of the Environment Judges appointed under s 250 of the RMA, who have the benefit of sitting with Environment Commissioners contributing the qualifications described in s 253, the business of construing documents and of assessing the prospects of success in injunction proceedings is very much the business of the High Court. The present case is towards the opposite end of the spectrum considered by the President in ***Wellington City Council v Woolworths***. I prefer therefore to employ the lower level test applied in ***Re Erebus Royal Commission*** [1983] NZLR 662 (PC) at 681, namely whether the decision is "based upon an evident logical fallacy". See Walker *What's Wrong with Irrationality?* [1995] Public Law at 556 and 559-561 and reference to the "hard look" approach employed in the USA in ***Pharmac v Roussel Uclaf Australia Pty Ltd*** [1997] NZAR 58 at 59 (CA).

The Port company pleads that in exercising its s 94 power not to notify:

> "Council erred in law and/or acted unreasonably and/or based its decision on mistakes of fact, ...
>
> (b) [The Port company] was likely to be adversely effected by the granting of the .. application in terms of s 94(2)(b)."

It contends that in failing to publicly notify the applications in accordance with s 93 and in granting consents without more stringent condition, the Council acted unlawfully and both the non-notification decision and the consents are *ultra vires* and invalid, because of the prospect of litigation or objection to developments by future residents of the Precinct.

Whether that is so turns upon the application to the facts of the test which I have adopted.

The Environment Court

Section 314(1)(a)(ii) describes as "an enforcement order" an order made under s 319 by the Environment Court which may require a person to cease conduct that in the opinion of that Court:

> "Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment".

That term is defined by s 2:

> "'Environment' includes-
>
> (a) Ecosystems and their constituent parts, including people and communities; and
>
> (b) All natural and physical resources; and
>
> (c) Amenity values; and
>
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:"

The term "amenity values" is also defined by s 2:

> "Amenity values" means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes:"

The jurisdiction of the Environment Court to make orders under s 314 is limited by s 319(2), providing that it shall not make a restraining order under

s 314(1)(a)(ii) against a person (here the Port company) acting in accordance with a rule in the plan or a resource consent if the adverse effects in respect of which the order is sought were expressly recognized by the person granting the resource consent at the time of the grant unless, having regard to the lapse of time and any change of circumstances, is a ground the Court considers it appropriate to do so.

Since the Environment Court visited the issue of port noise as recently as June of this year, there would be a strong submission available to the Port company in terms of s 319(2).

On the other hand, future applications to the Port company to develop further might well be open to objection by residents if they were already suffering intolerable noise.

The High Court

As regards proceedings in this Court the tort of private nuisance has recently been considered by the House of Lords in ***Hunter v Canary Wharf Ltd*** [1997] AC 655. Lord Cook of Thorndon paid tribute to the major advance in the symmetry of the law of nuisance achieved by the members of the appellate committee with whom he sat. Lord Goff of Chieveley at 685 gave as the

classic instance of conduct giving rise to an action in private nuisance in respect of interference with the plaintiff's enjoyment of his land:

> "... something emanating from the defendant's land. Such an emanation may take many forms - noise, dirt, fumes, a noxious smell, vibrations and suchlike."

It is not without significance that noise is the first item mentioned. Their Lordships differed as to whether a right in the land was required for the plaintiff to sue. But there can be no doubt that very many of the potential plaintiffs whom the Port company has in mind will have standing to sue.

It is no defence that the plaintiff has come to the nuisance: ***Sturges v Bridgman*** (1878) 9 Ch D 852.

The law of nuisance developed prior to the town and country planning legislation in New Zealand and, of course, long before the more sophisticated regime of the RMA. The common law is described by Lord Hoffmann in ***Hunter v Canary Wharf Ltd*** at 705 where he referred to:

> "... an important distinction drawn by Lord Westbury LC in ***St Helen's Smelting Co v Tipping*** (1865) 11 HL Cas 642. In that case, the plaintiff bought a 1,300 acre estate in Lancashire. He complained that his hedges, trees and shrubs were being damaged by pollution from the defendants' copper-smelting works a mile and a half away. The defendants said that the area was full of factories and chemical works and that if the plaintiff was entitled to complain, industry would be brought to a halt. Lord Westbury said, at pp 650-651:
>
> > 'My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's

> personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply in circumstances the immediate result of which is sensible injury to the value of the property.'
>
> ***St Helen's Smelting & Co v Tipping*** was a landmark case. It drew the line beyond which rural and landed England did not have to accept external costs imposed upon it by industrial pollution."

Counsel have in the past tended to treat the common law and statutory planning law as independent of one another, despite the obvious relevance of Parliamentary policy as expressed in statute to the development of the common law. (See ***M v L*** [1997] 3 NZLR 424 at 443-4.) So in ***Gillingham Council v Medway Dock Co*** [1993] QB 343 at 359 Buckley J observed:

> "I have not been referred to any case which has directly concerned the interplay between planning permission and the law of nuisance."

The point is of immediate importance here where the Port company has been at pains in planning cases over the years to maintain its protection from the incursion of incompatible uses that might lead to nuisance claims. The question arises - what is to happen what is to happen if residents are

exposed to internal noise from the Port exceeding 35dBA, which exceeds the acceptable limit, and yet results from Port activity which as a result of exhaustive statutory process has been determined to be in the public interest within the 60 dBA boundary limit?

The answer is that such dilemma cannot be permitted to arise. It is the task of the Court and other bodies with responsibility for construing the RMA to recognise that planning decisions are a form of delegated legislation, which must be internally consistent in order to promote sustainable management as Parliament has directed. There must be created a seamless whole within the operation of this single statute that reconciles the competing uses which our sophisticated society requires.

The time should be long past when statute law and common law were seen as occupying different planes. Decision makers, including planning authorities and the Court on judicial review, must consider what construction of the legislation and what development of the common law will avoid anomaly and provide a sensible result.

The time to look at the whole picture is as each statutory decision is made. Otherwise there will occur the kind of bungle seen in ***Gillingham Council v Medway Dock Co*** where the Chatham Royal Naval Dockyard on the River Medway, covering some 500 acres, was granted planning permission to operate a 24-hour commercial port, attracting heavy goods vehicles along the

approach roads at all hours. The Judge found that the use by heavy vehicles of the approach roads between 7.00 p.m. and 7.00 a.m. constituted a substantial interference with the residents' enjoyment of their property, namely, disturbing their sleep and their general comfort, *leaving them tired* through lack of an undisturbed night's sleep. It was admitted that enough residents were affected to constitute a public nuisance if it were not for the other defences.

The Judge expressed the view:

> "... Parliament is presumed to have considered the interests of those who will be affected by the undertaking or works and decided that benefits from them should outweigh any necessary adverse side-effects. I believe that principle should be utilized in respect of planning permission. Parliament has set up a statutory framework and delegated the task of balancing the interests of the community against those of individuals and of holding the scales between individuals, to the local planning authority. There is the right to object to any proposed grant, provision for appeals and inquiries, and ultimately the Minister decides ... The Planning Authority grants permission for a particular construction or use in its area. It is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their property. Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? ... The Planning Authority can, through its development plans and *decisions, alter the character of a neighbourhood.* ... The disturbance complained of in this case is not actionable." (pp 359-361)

In ***Hunter v Canary Wharf Ltd*** Pill LJ, in the Court of Appeal, stated at 669:

> "If ... Buckley J was deciding the case on the basis that where planning consent for a development is given and implemented, the question of nuisance will thereafter fall to be decided by reference to a neighbourhood with that development and not as it was previously, I have no difficulty with it. ... If, however, as the defendants content, Buckley J was purporting to broaden the defence of statutory authority so as to include the authority conferred by a planning permission under delegated powers, I have respectfully to disagree."

He cited with approval ***Wheeler v JJ Saunders Ltd*** [1996] Ch 19, 35 where Peter Gibson LJ, having stated:

> "The defence of statutory authority is allowed on the basis of the true construction of the scope and effective of the statute."

added:

> "(i) In the case of planning permission granted pursuant to the statutory scheme contained in the Town and Country Planning legislation it is far from obvious to me that Parliament must have been presumed to have intended that in every case it should have the same effect on private rights as direct statutory authority, regardless of the circumstances that were in fact taken into account ... I am not prepared to accept that the principle applied in the ***Gillingham*** case must be taken to apply to every planning decision. The court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge."

Mr Kirkpatrick referred to s 23(1) of the RMA which provides:

> "Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, ***and rules of law.***" (Emphasis added.)

It would be simplistic to say that because the Port company has its position recognized by the relevant planning documents it cannot be the subject of a successful claim for nuisance. In ***Wheeler v JJ Saunders Ltd*** planning permission to accommodate pigs for breeding did not insulate the defendants from an injunction and damages relating to strong smells emanating from the premises.

In ***Hunter v Canary Wharf Ltd*** it was held that:

> "... more is required than a mere presence of a neighbouring building to give rise to an actionable private nuisance" (685G per Lord Goff) [referring to the ordinary] right of a citizen to build on his own land ... although this may seriously detract from the enjoyment of the [neighbour's] land (ibid D-F)."

It was rightly not argued in this case that emission of noise within the limits of an ordinary and reasonable user and compliance with the Council's rules as to noise levels will be characterised as an unalienable right, whatever the consequences to residents of new apartments within the precinct.

If such a state of affairs were allowed to occur, it would be too late. Such a result would be contrary to the orderly planning that is the general theme of the RMA.

I am not myself prepared to hold that ***Sturges v Bridgeman*** has been emasculated to such extent and I prefer the approach of Pill and Peter Gibson LJJ to that of Buckley J.

VII

The eight basic constraints on adjudication

Here it is a given that the Port must remain where it is; other options have been ruled out as impracticable.

A second given is that the Port must be able to operate 24 hours a day and be permitted to emit noise of up to 60 dBA at the boundary of the south of Quay Street.

In ***Winstone Aggregates Ltd v Papakura District Council***, decision A.96/98, 14 August 1998, Environment Judge Whiting and his Commissioner colleagues sitting on an appeal stated at paragraph 98:

> "We consider that in controlling undesirable effects, territorial authorities should impose restrictions to internalise adverse effects as much as reasonably possible. It is only where those effects cannot be reasonably controlled by restrictions and controls and internalisation, that ... restrictions on ... other sites ... might be appropriate."

The observation, made in the circumstances of that particular case, focuses on the logical enquiry - whether the Port company could be expected to reduce its noise. The answer is clearly, no.

A third given is that the rezoning of the Precinct has removed the former railway yard buffer between the Port and the existing residential uses to the south and east of the Precinct by introducing such uses into it.

A fourth given is that (by s105) the Council must grant consents for such controlled activities; the only constraint is the imposition of conditions.

A fifth given is that the wharf-derived (and other external) noise must not generate more that 35dBA of internal noise within the resulting residential apartments.

A sixth is that the apartments must conform with Building Code ventilation requirements with their windows closed, since otherwise the maximum internal noise level will be exceeded.

In the leading reverse sensitivity case ***Auckland Regional Council v Auckland City Council*** [1997] NZRMA 205 at 214, Principal Environment Court Judge Sheppard and his fellow Commissioners, again sitting on an appeal, rejected:

> "... the submissions based on leaving promoters of enterprises to judge their own locational needs, not protecting them from their own folly, or failing to consider the position of those who come to a nuisance. We consider that those submissions do not respond to the functions of territorial authorities under the Resource Management Act ... To reject provisions of the kind proposed, on the basis of leaving promoters to judge their own needs, on not protecting them from their own folly, and of failing to consider the effects [on] those who may come to the nuisance, would be to fail to perform the functions prescribed for territorial authorities. It would also fail to consider the effects on the safety and amenities of people who come to premises ..."

It would, in my view, be unreasonable, in the relevant sense, to suggest that future occupants of the apartments should be left to negotiate the installation of additional insulation to bring the internal noise level down to an acceptable standard. Nor did counsel for any respondent so contend. That is the seventh given.

Finally, nor is it an answer to try to impose as a condition under s 105(1)(a) restraining owners and occupiers of the apartments from seeking injunctive relief against the Port company.

I am of the view that while a Full Court has decided that a party may surrender personal rights (see ***Christchurch International Airport Ltd v Christchurch City Council*** [1997] NZRMA 14 at 157), neither a Council nor this Court may order an unwilling party to surrender, as a condition under s108, the right as affected party to receive notice of an application under s93(1)(e), to make submissions under s96, and to appeal under s120. Pointers to this conclusion are first that the statute is to be read as a whole, and its provisions as consistent with one another. No condition may be imposed which would abrogate the rights conferred by the statute. Secondly, the principle that a citizen is not lightly to be deprived of access to justice is deep-seated. In ***Regina v Lord Chancellor ex parte Witham*** [1998] QB 575, the Divisional Court struck down as being unconstitutional and *ultra vires* fees increased by the Lord Chancellor with the concurrence of the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice Chancellor which infringed the fundamental right of access to Courts. That principle applies equally in New Zealand. There is no jurisdiction under the guise of a condition to protect the Port company in that fashion. That is the eighth given.

I therefore do not accept the proposal by Mr Day in respect of both the Broadway and City Wise cases that such a covenant might be employed, at least without the consent of the applicant which has not been forthcoming.

One is therefore left, inexorably, with the logical result that it is at this stage when the conditions for the buildings are being set that specific standards must be fixed and sufficient authority reserved by the Council to ensure that the apprehended trouble can never arise.

The Council must retain power, at the time of considering conditions under s105(1)(a), to ensure that the 35 dBA limit is not infringed and that there is proper ventilation with the windows closed. The latter is not in doubt, having regard to its powers under the Building Act. But unless the former are reserved at the time of imposition of conditions on grant of consent there is high prospect of a planning disaster.

These matters require no specialist knowledge; they raise logical questions with which the Court can and must engage to exercise its constitutional role to ensure that the law laid down in Parliament - to achieve rational planning - is given effect.

Mr Fardell did not dispute that, if the Council has imposed conditions sufficiently stringent to allow it to enforce the 35dBA internal limit, there would be no need for notification of an application, because the desired result of notification would have been achieved. His contention was that the present conditions are inadequate.

Equally Mr Kirkpatrick did not challenge the contention that it was the Council's duty to retain power sufficient to enforce the 35 dBA limit. His contention was that the existing conditions are adequate.

I am of the view that if the conditions are inadequate the Port company has made out its case, subject to the issue of discretion. That is because, if they are not, it will be faced with the advent into the Precinct of a very large number of future residents, all of whom will be aggrieved if their internal noise level exceeds 35dBA. They will be likely to seek legal advice and apply for abatement of the noise by procedures which may very well include an application for injunction to restrain the Port from operating at night. At the least they will inhibit the sensible development of the Port by opposing future planning applications. I fancy that the metaphor used in argument, of creating an inadequately insulated hive and introducing numerous angry bees, is not far from the mark, as was so plainly the case in ***Gillingham***.

VIII

Approach to the individual claims in this case

It is necessary to consider the cases individually. Southern having settled its case was struck out as a party prior to hearing. Covington having settled with the Port company applied to be treated similarly. For a time Mr Gould

resisted its application and I deferred ruling until I was fully able to determine the implications. I advised Mr O'Callahan that, the Court having become seized of an issue of public law, and the case continuing against other parties, the overall public interest might point against dismissal: there would be risk of unlike treatment of Mr Gould's clients if relief could not be ordered against Covington in the event that the claim against other parties succeeded. The significance upon the joinder and dismissal of parties of what Fuller called the polycentric nature of public law has yet to be definitively considered (see Allison *The Procedural Reason for Judicial Restraint* [1994] Public Law 45). Ultimately however Mr Gould withdrew his objection and I dismissed Covington from the proceedings. They continued in relation to the applications of City Wise, which abides the Court's decision, and Broadway. The principles are of importance to Magellan, which holds a number of 150 year terms, and Ngati Whatua whose rental may, I am told, be affected by the result.

I turn to the two unsettled cases. The claims must be considered against the constraints discussed in Part VIII.

IX

Broadway

Broadway's site is marked as 6 on Appendix 1, with Industrial 6B zoning under Variation 11. It proposes the development of 140 residential units over 4 levels in the shape of 3 sides of a pentagon, open to the north/north east.

A report dated 23 December 1997 signed by Mr SF Havill, town planner, recorded that Broadway had considered at length the issue of noise and the impact of Port operations. It commented that the building would contain a concrete frame with acoustic rated gib internal lining and insulation in walls and ceilings. It is screened to the north east by the 5 storey railway station and 3 storey adjoining building. It is set at the minimum flood plain 5 metres below the railway line. Only 10 metres will sit above the Quay Park ground datum.

A report dated 12 February 1998 by the Council's Manager, Central Area Planning, proposing that he application be non-notified recorded:

> **"2.2 Reverse Sensitivity Issue**
>
> Although residential accommodation has been provided for on the railway land for a number of years under the Operative Plan, no development has occurred. Following the subdivision of the land in late 1996, the Council has approved two applications for residential development on Quay Park. One proposal is associated with a retail, fast food and service station development on a site zoned Industrial 6b on Quay Street and another is on land fronting The Strand and zoned Residential 9C under the Operative Plan. The Ports Company has recently expressed concern regarding the proximity of all residential developments on Quay Park with respect to the compatibility of such developments with the 24 hour port operation. A letter from POAL's legal advisers is attached as Annex A for the information of the Committee.
>
> The issue is whether the Ports of Auckland would be adversely affected by the granting of the consent on the grounds that future residents might object to the noise and glare associated with the normal port operations. This has been referred to in the Environment Court as 'reverse sensitivity' and arose out of ***Auckland Regional Council v Auckland City Council*** (A10/97) and ***Wellington International Airport Ltd & Others v Wellington City Council*** (W102/97).
>
> The general principle that can be applied from the decisions is that reverse sensitivity is an effect that should be taken into account. The former case gives some guidance in terms of the assessment of specific proposals with respect to the location of the site, the type of building proposed and the local conditions. The location of the proposal and the extent to which the building construction may mitigate any effects of noise and glare are addressed in

other sections of this report. To determine the local conditions with respect to the noise environment a survey has been carried out (refer Appendix 2). The report sets out the results of noise level readings taken over two periods. The readings for this site on the corner of Ronayne Street and The Strand indicate that traffic noise rather than noise from the port functions is the dominant factor at night. the overall conclusion is that the level of acoustic amenity likely to be experienced in the Former Railyards Precinct is acceptable, particularly given the central city location.

2.3 Affected Persons

For this particular proposal it is considered that the written approval of POAL is not required as the Company is not considered to be a party adversely affected by the granting of the resource consent for the following reasons:

1 the site is located some distance away from the port on the southwest corner and future land uses could be expected to provide a buffer from the effects of the noise and glare of the port activity

2 the orientation of the development is towards The Strand and Ronayne Streets rather than to the port

3 the height and bulk of the scheduled railway station building forms an effective barrier between development on the subject site and the port activities.

In addition the applicant has addressed the issue of the compatibility of these adjacent land uses as required by clause 5.7:2.3 of the Operative Plan and 14.13.4 of the Proposed Plan. Acoustic measures and design features as detailed in the additional information in Appendix 2 are considered to meet the criteria in this regard.

It is also noted that the Plan provisions emphasise that the proximity to the port results in a reduced environmental standard and lower amenity within the Quay Park land. While measures have been applied within the Port Precinct provisions to mitigate the generated effects of the port activity on the surrounding environment, no specific measures are adopted to protect residential amenities on the railway land apart from the more stringent noise standards applied within residential buildings in the Proposed District Plan (clause 7.6.3). The provisions also acknowledge the location of the land and the issue of the existing port activity and associated heavy vehicle movements on the major transport routes surrounding the site. Although the Plan provides a wide range of activities to encourage development the importance of the port operation to both the region and city is acknowledged and is protected through the special Port Precinct that is applied in the proposed Plan. In summary, it is considered that conditions of consent can be imposed on this application ensuring adequate noise mitigation measures and acoustic glazing, and that such measures would address the generated effects of the port operation and therefore the matters of concern that are relevant to the Council's determination under s 94."

It recommended approval.

The noise report referred to concluded with the summary:

> "Depending on the site, the noise likely to occur in apartments built on the railway land, arising because of port activities between the hours of 2am and 5am, should be between 35 and 40dBA with windows in the apartment open. This is an acceptable level of acoustic amenity especially in a central city location. In the absence of intrusive port noise from the operation of cranes or straddle carriers there appears to be little if any difference in the noise levels compared to when this equipment is operating.
>
> It should be noted that the proposed Central Area Plan will only require that the noise measured outside the building is a residential precinct to not exceed a $_{L10}$ of 55dBA (and a Lmax of 75dBA). When measured inside the same building with the windows and door closed the noise must not exceed a $_{L10}$ of 45dBA or a Lmax of 65dBA. Noise levels before 2am and after 5am will be higher but this will not be due to the port noise but as a result of higher traffic volumes in the roads around the railway land.
>
> I conclude by suggesting that existing port activities will not have a detrimental effect on residential use of the railway land and the port is unlikely to be affected by any use of the railway land for residential developments which the Council determines to be a non notified application."

Despite vigorous calls by the Port company and its solicitors to deal with the application as notified, on 24 February 1998 the Planning Fixtures Sub-Committee resolved to deal with the application as non-notified. That report formed part of a later s 94 report recommending the grant of consent. On 17 April 1998 counsellors sitting as Planning Commissioners resolved to grant the non-notified application subject, in relation to acoustics, to the following condition:

> "(20) The consent holder shall submit to the Manager: City Planning a report prepared by an acoustic engineer confirming that **appropriate noise attenuation measures** (eg double glazing); sound resistant walls and screening) for residential accommodation in this locality **have been incorporated into the construction standards of the building.**" (Emphasis added)

The resolution included:

"**Advice Notes:**

1 This development is located on land adjacent to or close in proximity to the main container operations area of the Port and to the rail transfer yard serving it. These activities operate 24 hours of the day and can generate a level of noise, glare and traffic not normally found elsewhere in the Central Area. No special or additional measures have been adopted to protect residential activities from the generated effects of the Port or railyards, except for those applied in the Port area itself. Complaints which result from failure to recognise or mitigate against the impact of legitimate operations of the Port and railyards will not be accepted by the Council"

It is unclear to me what is meant by the final sentence. If the decision was lawful there would be no legal ground for complaint; if unlawful the status would not be improved by that statement.

I have referred to the Port company's contention.

- that the application should have been publicly notified
- that the consents should not have been granted except on more stringent conditions.

Mr Fardell accepted that both complaints disappear if the external noise entering the building is in fact limited to 35dBA $_{L10}$.

The author of the noise report, Mr Craig, is a senior planner employed by the Council. While he has academic qualifications, including a distinction pass in the University of Sydney course on Noise Assessment and Control, he did not set out in his affidavit to qualify himself as competent to speak as an expert on matters of judgment about internal noise levels. The important part of his evidence was the provision of test results and other information. While his noise report stated:

"This report was reviewed by Neville Hegley, acoustical engineer, who agrees with its conclusion"

neither Mr Craig nor Mr Hegley confirmed that statement on oath. A statement by Mr Havill contains further reference to Mr Hegley's involvement and retainer as Broadway's acoustic engineer and his being confident that the design would comply with the Advice Note.

Overall, however, the material before the Council Committee is not proved to have included an expert opinion that the external noise entering the apartments would be less than the 35 dBA $_{L10}$ figure which is now agreed to be essential.

Further, the terms of condition 20 are in a form that Mr Day later criticized as inadequate to ensure that the effects of the development in the port on others would be satisfactorily mitigated. In his view, the condition leaves considerable uncertainty as to what constitutes "appropriate noise attenuation measures" and as to what acoustic performance standards should be adopted. Included in the bundle as document 211 is what appears to be Annexure A to Mr Day's affidavit, from which the annexure is missing. He describes it as:

> "A draft of a type of insulation rule which I consider to be suitable for this purpose."

That attachment is reproduced:

> **"PROPOSED SOUND INSULATION PERFORMANCE STANDARDS**
>
> 1. Dwellings shall be designed so that the sound insulation provided by the building envelope can achieve an internal noise level not exceeding 35 dBA (L_{10}) in all habitable spaces (as defined in the Building Regulations 1992), based on the assumed noise level specified below occurring at the facade of the building. Building envelope includes (but is not limited to) windows, doors, walls, roof and airconditioning penetrations.

	Octave Band Centre Frequency (Hz)						
	63	125	250	500	1k	2k	4k
Incident Sound Pressure Level	65	62	60	57	55	54	53

2 A certificate from a recognised acoustic engineer that the proposed acoustic insulation can meet the above internal noise level must be supplied with any application for building consent, and forwarded to the Council and POAL. The above incident sound pressure level shall be used for all facades of the building unless the engineer is able to provide measurements that show to the satisfaction of the Council, that the noise level on the site is normally less than 56 dba (L_{10}) during periods of full port activity.

3 For rooms that contain external windows, the sound insulation requirements specified above can only be achieved with the windows closed. The Council shall ensure that the building is designed and constructed to comply with appropriate ventilation standards with the windows closed.

4 The Council shall ensure, as part of its building inspection procedures, that the building is constructed in accordance with the sound insulation and ventilation requirements specified in the design reports."

Mr Hegley responded to Mr Day's evidence about his Annexure A, stating:

"46 CONDITION 1 is essentially a more detailed wording of the Council's conditions. It is simply a matter of presentation and does not change the essence of what I have covered above.

47 I do not understand why an acoustic design certificate should be provided to Ports of Auckland Limited. Acoustic design is simply another engineering discipline. While the Council requires reports from various designers, such as structural engineers, there is no need at all to provide them to the neighbours of any development. I cannot see why the Port is seeking an acoustic design report when they are not requiring other design reports. Of course, the question immediately raised is what happens if they Port does not agree with any such report. Alternatively, does the Port take responsibility for the design if it is later found to be incorrect.

48 The request to design to the incident sound pressure level (ie the level on the outside of the building facade which would be as high as 60dBA at the Quay Street boundary if Port is operating at maximum level) unless the engineer is able to provide measurements to show the noise level is normally less than 56dBA L_{10} is both unreasonable and open to abuse. It would be very easy to provide such measurements with the full Port operating at the moment but this does not reflect long term Port design levels. However, the design should take into account the long-term development of the Port and

these levels simply are not present at the moment to be measured. However, as set out in the evidence given by Mr Day at the hearing of the Environment Court (and generally accepted by specialists in acoustics) on the Fergusson Container Terminal expansion, there is a drop off of noise over distance across the subject sites and assuming there is 60dBA at Quay Street this drop off can be calculated without any great difficulty."

49 CONDITION 3 as proposed by Mr Day regarding ventilation has already been addressed. I believe this requirement is both unusual and unnecessary for the reasons set out above."

In his reply Mr Day stated:

"Ventilation

2.3 ... Mr Hegley gives some examples of situations where sound insulation has been required, apparently without any requirement for forced ventilation. In each case, he notes that it is necessary for windows and doors to be closed for the acoustic design criteria to be met.

2.4 If windows and doors must be kept shut to achieve an acceptable' internal noise level, then it is reasonable to expect that residents will keep their windows and doors shut in practice. However, if they do, there will be no ventilation (in the absence of some form of forced ventilation).

2.5 The issue of ventilation is addressed by Clause G4 of the Building Code. The objective of Clause G4 is stated to be as follows:

> G4.1 The objective of this provision is to safeguard people from illness or loss of amenity due to lack of fresh air.

2.6 Under the heading "Performance", Clause G4 states:

> G4.3.1 Spaces within buildings shall have means of ventilation with outdoor air that will provide an adequate number of air changes to maintain air purity.

The Code goes on to explain that the flow of outdoor air through the building envelope can be provided with either natural ventilation or mechanical ventilation.

2.7 In my view, it is inappropriate for a residential building to be designed on the basis that the windows must be kept shut to meet one criteria (ie acoustic performance) but must be kept open (or be able to be opened) to meet another criteria (ie ventilation).

2.8 The result is to create a conflict for the residents. Either they have to keep their windows shut, and thereby suffer a loss of air quality, or else they open them, and thereby lose the benefit of the sound insulation.

2.9 In practice, I believe that the latter outcome is more likely, particularly in the Auckland climate. The result, of course, is that the residents become exposed to the full impact of the very noise which the sound insulation was supposed to protect them against. In the present case, this would seriously undermine the effectiveness of any sound insulation as a means of addressing the issue of complaints by residents about port noise.

2.10 The history of complaints by existing residents living near the various ports around New Zealand supports this view. Residents around the ports in Auckland, Tauranga, Nelson and Otago are all exposed to lower noise levels than would be experienced on the railway land, and even with their older style of construction, the buildings would achieve the required internal noise level of 35dBA with windows closed. However, in the absence of forced ventilation, the New Zealand environment requires windows to be opened, and as a result, complaints are received from these residents about port noise.

2.11 In summary, I consider the failure to provide for forced ventilation to be a major design flaw, both in general terms and, in particular, in terms of the effects of the developments on POAL.

2.12 At paragraph 36 of his affidavit, Mr Hegley refers to the Draft Port Noise Standard (DZ6809) and states that the question of ventilation was raised during the development of the standard. In particular, he states that:

> The consensus by this Committee was that the issue of ventilation lay with the Building Industry Authority.

2.13 In my view, the BIA has clearly ruled on the issue through the provisions of the Building Code. As explained above, people must be safeguarded from illness or loss of amenity due to lack of fresh air. Where the implementation of an acoustic performance standard may lead to a loss of amenity through a lack of fresh air, it is my view that forced ventilation should be required."

Mr Kirkpatrick initially relied on the important principle stated by McGechan J in ***Tairoa v Minister of Justice***, CP.99/94, Wellington Registry, judgment 4 October 1994 at page 42:

> "If a decision maker ignores or acts in defiance of an incontrovertible fact, or an established and recognised body of opinion, which plainly is relevant to the decision to be made - in a sense that Parliament must have intended it to be taken into account - the decision may be invalidated. Two points, however, require emphasis. First, the fact 'must be an established one or an established and recognised opinion'; and 'it cannot be said to be a mistake to adopt one of two different points of view of the facts, each of which may reasonably be held'" Cooke P, ***NZFIA v MAF*** [[1988] 1 NZLR 544 at 552]. This is judicial review; and not a statutory appeal on fact with power to

> substitute a preferred view. Second, as Tipping J [***Isaac v Minister of Consumer Affairs*** [1990] 2 NZLR 606 at 638] puts it, the fact or opinion must have been 'actually or constructively within the knowledge of the Minister or the Ministry', constructive knowledge being in the sense that the Minister 'should have been aware of the fact of opinion'; or as Cooke P (supra 552) puts it (in the context of mandatory statutory considerations) facts 'which were or ought to have been known to himself or the Ministry'. Third, the matter is to be looked at as at the date of the impugned decision: ***Secretary of State v Tameside BC*** [1977] AC 1014, 1076 per Lord Russell, as adopted by Cooke P in ***Daganayasi v Minister of Immigration*** [[1980] 2 NZLR 130 at 148], and Tipping J in ***Isaac v Minister of Consumer Affairs*** supra 638. Facts which come to light subsequently, and which it cannot be said the Minister or Ministry should have known at the time, are excluded. Administration does not require clairvoyance."

I of course accept that if it was reasonably open to the Council to make its decision on the basis of the material put before it by Mr Craig and that decision did not entail material error, it would have been competent for the Council to make both its non notification decision and its substantive decision in reliance upon it.

Given the quite crucial importance of the issue, there may be some room for doubt whether it was reasonable for the Council to proceed on a non notified basis without the clear opinion of an expert such as Mr Hegley stating categorically that the design would guarantee a maximum of 35 dBA $_{L10}$.

It is, however, unnecessary for me to reach a conclusion upon the point because if the conditions are water-tight, Council retains the power to enforce that limit.

I accept Mr Hegley's response to Mr Day that the ventilation issue is dealt with satisfactorily under the Building Act and it does not need to be separately imposed by condition. I have said that Mr Fardell, in the course of argument, agreed with that position.

But the question as to the sufficiency of the conditions is a matter of more difficulty and is the point which I reserve pending receipt of counsel's joint draft.

X

City Wise

City Wise's site is marked as 7 on Appendix 1, with Residential 9C zoning under Variation 11. It proposes the development of 156 residential units in three level apartment blocks and one five level apartment block. They are located in the form of an L tilted at 45° to the right facing a reverse L tilted at 45° to the left, both orientated towards the central courtyard. A report dated 10 December 1997 signed by John Lovett, Town Planner, recorded that the project architect had been consulted concerning the issues of possible effects of noise and glare from adjacent land uses.

He had advised that consideration had been given in the design of the development to mitigating potential noise and glare from two adjacent land uses - namely the Port and traffic on The Strand, Gladstone Road and Quay Street. He recorded that the physical context of the site provided some mitigation in that it is low-lying, with both Quay Street and that part of The Strand which lies to the east of the site being above the level of the application site. In relation to potential noise from the Port in particular, this will tend to mitigate adverse effects by interrupting the line of sight to most of the existing and future Port area. He considered that the configuration of the proposed development will help further, given its inward focus rather

than being orientated towards the potential sources of noise. He was advised that the design provided for only low level development at the northern end of the site with the medium rise apartment-style block being positioned towards the south and east of the site - away from the Port. He advised that the 6mm glass proposed to be used for the units will be supplemented by the provision of drapes with acoustic insulation properties. The landscaping intended around the periphery of the site should also assist to some extent with mitigation.

He proposed an acoustic condition in the terms:

> "Prior to the issue of a building consent, certification shall be obtained from an experienced acoustical consultant stating that the internal noise levels will not exceed 35 dBA (L_{10}) in bedrooms and 45 dBA in other habitable rooms, based on an external level of 6 d BA (L_{10}) at the site boundaries. This shall be to the satisfaction of the team planner - Special Projects and Monitoring of the Auckland City Council."

A report dated 20 May 1998 by the Council's Manager, Central Area Planning, described the reverse sensitivity issues in much the same manner as in the Broadway report. It added:

> **"2.3 Affected Persons**
>
> For this particular proposal it is considered that the written consent of POAL is not required as the Company is not considered to be adversely affected by the granting of the resource consent for the following reasons:
>
> i) it is proposed that hush glass will be incorporated into the construction of the building;
>
> ii) it is proposed that each unit will contain adequate drapes to mitigate any effects of glare; and
>
> iii) the site is located some distance away from the port on the southeast corner of the former railyard land and future land could be expected to provide a buffer from the effects of the noise and glare of the port activity.
>
> It is also noted that the Plan provisions emphasise that the proximity of the port results in a reduced environmental standard and lower amenity within the Quay Park land. While measures have been applied within the Port

> Precinct provisions to mitigate the generated effects of the port activity on the surrounding environment, no specific measures are adopted to protect residential amenities on the railway land apart from the more stringent noise standards applied within residential buildings in the Proposed District Plan (clause 7.6.3). The provisions also acknowledge the location of the land and the issue of the existing port activity and associated heavy vehicle movement on the major transport routes surrounding the site. Although the Plan provides for a wide range of activities to encourage development, the importance of the port operation to the region and city is acknowledged and is protected through the special Port Precinct that is applied in the Proposed District Plan. In summary, it is considered that conditions of consent can be imposed on this application ensuring adequate noise mitigation measures and acoustic glazing. Further, it is considered that such measures would address the generated effects of the port operation and therefore the matters of concern that are relevant to the Council's determination under section 94."

Again the report recommended non notification. The substantive report bears an **earlier** date - 19 May 1998.

Both approvals were granted by the Planning Fixtures Sub-Committee of the Council on 27 May 1998, the latter recording:

> 3 THE PROPOSAL IS IN ACCORDANCE WITH THE ASSESSMENT CRITERIA ... OF THE TRANSITIONAL DISTRICT PLAN, IN PARTICULAR; ...
>
> (ii) THE CONSTRUCTION OF THE BUILDING INCLUDES NOISE, ATTENUATION AND GLAZING CONTROLS TO MITIGATE ANY GENERATED EFFECTS OF NOISE AND GLARE FROM SURROUNDING ACTIVITIES; ..."

A condition identical to Condition 20 of the Broadway consent was imposed.

Again the decision was made despite vigorous opposition by the Port company and its solicitors.

Mr Fardell submitted that the fact that the s 94 report post-dated the substantive report suggested that the Council was simply performing a meaningless formality. Mr Kirkpatrick responded that the sequence of the officers' reports did not matter: the decision as to notification was not theirs

to make. No allegation of bad faith or improper purpose was pleaded or argued; I regard the point as insubstantial. The crucial issue is again the efficacy of the conditions.

Mr Day's evidence in relation to the City Wise proposal acknowledged that the information permitted a relatively meaningful assessment of the adequacy of the noise attenuation measures and the other features of the development. He considered that the condition offered by City Wise goes a considerable way towards ensuring that satisfactory noise attenuation measures would be adopted.

Mr Day considered there to be two major deficiencies in the City Wise proposal:

(a) The absence of evidence of provision for forced ventilation or air conditioning in the development which would be essential if the noise levels referred to in the condition offered were to be met while providing the quality of air required by the Building Code;

(b) Without a covenant not to sue of the type I have found to be unlawful, the Port company would be vulnerable to complaints regarding its activities.

The former can be disregarded, having regard to the Council's Building Act powers. The latter cannot be imposed.

The evidence did not indicate what changes, if any, Mr Day would propose to the proposed acoustic condition if that is the only protection available.

The strength of City Wise's position is greater than that of Broadway. But having heard no submissions on the matter on behalf of City Wise, I propose to reserve the sufficiency of the conditions in this case also.

XI

Discretion

Submissions against the grant of relief on discretionary grounds were advanced on behalf of Broadway, Magellan and Ngati Whatua. They tended to be in general terms and I think it is likely that, with the building process not having commenced, there would be insufficient basis to decline to give directions under s 4(5) of the Judicature Amendment Act to impose more stringent conditions if that were considered necessary to avoid what I have called the bungle, which it is imperative to avoid. For the purposes of this interim judgment, I reserve my decision of that aspect of the case.

XII

Final resolution of claims

I await receipt of the agreed form of conditions. I reserve leave to all parties to apply for further directions as to the terms of final judgment by memorandum filed and served within 21 days and will hear counsel further if that is requested. In the event of disagreement, I request counsel for the Port company to arrange a telephone conference to timetable further submissions. Costs are reserved.