

BETWEEN PORT OTAGO LIMITED

Appellant

AND CL HALL and EA STEVENS

First Respondents

AND OTAGO REGIONAL COUNCIL

Second Respondent

AND DUNEDIN CITY COUNCIL

Third Respondent

Coram: Henry J
Thomas J
Blanchard J

Hearing: 12 February 1998

Counsel: LA Andersen for Appellant
PJ Page for Second Respondent
NS Marquet for Third Respondent

Judgment: 9 March 1998

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

Port Otago Limited (POL), which operates the port at Port Chalmers in Otago harbour, holds a coastal permit granted by the Minister of Transport under s384A of the Resource Management Act 1991 for an area alongside its wharves used for berthing and loading of ships. The shipping operations in this area create noise which sometimes exceeded the limits imposed under

r12.6(1)(a) of the Transitional Coastal Plan of the Otago Regional Council. The issue in the appeal is whether the coastal permit exempts POL from compliance with that rule and other rules in coastal plans. As it happens, the present plan has now been replaced by a new regional coastal plan which can be treated as operative under s19 and does not impose any noise limits in the coastal marine area. POL pursues its appeal because of a concern that its activities in the area may be affected if the Regional Council should reintroduce noise controls.

Subsection (1) of s12 of the Resource Management Act prohibits certain activities in a coastal marine area. Subsections (2), (3) and (4)(a) at the time this proceeding commenced read as follows:

(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 the land and any related 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.

(3)Without limiting subsection (1), no person may carry out any activity -

(a)In, on, under, or over any coastal marine area; or

(b)In relation to any natural and physical resources contained with any coastal marine area,-

in a manner that contravenes a rule in a regional coastal plan or a proposed regional coastal plan unless the activity is expressly allowed by a resource consent or allowed by section 20 (certain existing lawful activities allowed).

(4)In this section...-

(a)"Occupy" means occupy the land and any related part of the coastal marine area necessary for the activity,-

(i)To the exclusion of other persons who do not have a right of occupation to the space by a resource consent or under a rule in a regional coastal plan; and

(ii)For a period of time and in a way that, but for the rule in the regional coastal plan or the holding of a resource consent under this Act, a lease or licence to

occupy that part of the coastal marine area would be necessary;-
and “occupation” has a corresponding meaning:

With reference to subs(3), POL does not hold a resource consent (other than a coastal permit, as defined in s87(c)) and does not rely on s20.

POL is a port company under the Port Companies Act 1988. Section 384A(11) of the Resource Management Act gives the expression “port company” the same meaning as in the Port Companies Act and gives the expression “occupy” the same meaning as in s12(4)(a) of the Resource Management Act. Section 384A authorises a port company which considers that it had a right to occupy a coastal marine area adjacent to any port related commercial undertaking when the Resource Management Act came into force, and considers such occupation is required for any purpose associated with the management and operation of that undertaking, to prepare a draft coastal permit to authorise that occupation and submit it to the Minister of Transport for approval. Sub-section (2) provides that a draft permit is to state that it is to expire on 30 September 2026 or such earlier date as the port company specifies. In determining the extent of the permit the Minister is required, *inter alia*, to consider the port company plan approved or determined under s22 of the Port Companies Act 1988. This details the facilities of the port and its management and operation. The Minister must consult with the Minister of Conservation.

The Minister’s approval constitutes a coastal permit. Such a permit is held by POL and, consistently with s384A, is worded in the following way:

Consent is hereby granted, pursuant to section 384A of the Resource Management Act 1991, to Port Otago Limited to occupy until 30 September 2026 that part of the coastal marine area identified in the following manner on the attached maps to enable the company to manage and operate the port related commercial undertakings that it acquired under the Port Companies Act 1988:

- in respect of navigation aids, an area of 10 metres radius around each of the navigation aids sited in the coastal marine area and identified in the attached maps A,B,C and D;
- areas of the coastal marine area coloured red and marked on the attached Maps E,F and G.

The area now in question is Area A.

Both the Planning Tribunal (as it then was) and a Full Bench of the High Court (Ellis & Doogue JJ), reported at [1987] NZRMA 193, came to the conclusion that the existence of the coastal permit does not allow POL to contravene a rule in a regional coastal plan but they gave different reasons. The Planning Tribunal took the view that s12 distinguishes between *occupation* of land in a coastal marine area and *activities* therein. The Minister was consenting to occupation, with the result that POL would not be in breach of s12(2), but was not consenting to its activities.

The High Court did not think this was the issue. It rejected POL's submission that the coastal permit entitled it to contravene noise performance standards in the plan notwithstanding the express provisions of s12(3). It said:

The coastal permit does not expressly allow Port Otago Ltd to contravene any rule in the proposed regional coastal plan relating to noise control as a result of its activities. It certainly permits Port Otago Ltd to occupy the particular land for the purposes of its activities, but, in the absence of any words which extend such permission to expressly authorise the contravention of the rules in the proposed regional coastal plan, the permit must be read as one which is in conformity with the law and not one which authorises a breach of the law.

It is not a question, as submitted to us, of determining, as was asked of the Planning Tribunal, whether the coastal permit authorises an activity, but a question of the extent to which the permit issued expressly authorises an unlawful activity. Certainly there is nothing in the coastal permit which expressly authorises an unlawful activity, and it is entirely

consistent with being read as authorising only lawful activities.
(p203-4)

A declaration has been made in the following form:

All rights granted by any section of the Resource Management Act 1991 for activities carried out within the area marked 'A' on Appendix '1' attached to the interim decision of the Planning Tribunal dated 24 May 1996 authorising activities that do not comply with rule 12.6(1)(a) of the transitional regional coastal plan of the Otago Regional Council expired on the 25th day of March 1996.

The reference to 25 March 1996 is to the last possible date on which existing use rights could have existed under s20 of the Resource Management Act.

As we understood the argument for POL, it contended that it should not be prejudiced because it had been unable to obtain existing use rights prior to the commencement of the Resource Management Act, because its activities in the coastal marine area were not at that time subject to planning controls. We have reservations about this proposition but certainly all or any such rights have lapsed under s20(2). POL submits that the provision enabling a coastal permit to be issued with the status of a resource consent must have been intended to give port companies equivalent rights; that they were not to be required to run the risk that local authorities might restrict port related commercial undertakings by the imposition of rules made under plans or even, theoretically, might adopt plans which made no provision for the operation of a port. It is argued that port companies were given a lengthy breathing space - 35 years (the maximum length of any resource consent) till 2026 - before that could happen. Otherwise, each coastal permit under s384A would have been expressed so as to terminate when the first coastal plan for the area became operative under the Resource Management Act. POL's submission is that the only form of control until that time is to be found in the Act itself or is to be by means of such conditions (if any) as the Minister of Transport may think fit to impose in the coastal permit itself. This argument was supported by reference

to s39 of the Port Companies Act which preserved existing use rights for land transferred to port companies from harbour boards. It is said that it must have been intended that port companies have all necessary authority to continue the efficient operation of their ports.

The contrary view, espoused by the Regional Council, is that no such dispensation was intended and that it is very unlikely that planning functions, concerned with effects on the environment, would have been entrusted to the Minister of Transport whose role in relation to the coastal marine area is one of ensuring maritime safety and the proper management of harbours and harbour works. This includes allocation of occupation rights within harbours. A coastal permit is analogous to a statutory licence or lease and does not confer any right to do more than exclude persons from the area over which it exists for the purpose of the activity named in the permit. The port company had existing use rights which have lapsed. POL must not now contravene any rule in a coastal plan unless authorised to do so by a resource consent other than a coastal permit. The effect of a coastal permit is to authorise occupation that would otherwise be unlawful by reason of s12(2). It does not authorise activities.

The Dunedin City Council adopts a neutral stance. It has some concern that because the area in question is outside its jurisdiction it cannot control noise from ships as it can do for noise coming from the wharf area. Resolution of the long standing problem of noise from the port operation is of importance to the residents of Port Chalmers but the council is also conscious that the port contains the only deep water berthing facilities south of Christchurch. Some noise is inevitable in the operation of a port. The City's aim is to ensure the continuing functioning of the port whilst accommodating the reasonable concerns of residents. Its counsel, Mr Marquet, advises that the City is promoting the resolution of the difficulties by supporting purchase by POL of affected lands, especially on Observation Point Hill, and by appropriate provisions in its new Proposed District Scheme Plan.

Mr Marquet drew attention to amendments to s12 under the Resource Management Amendment Act 1997 which came into force on 17 December 1997 but, by virtue of a transitional provision (s78), have no application to this proceeding. In particular, there is a new definition of “occupy” which puts beyond any doubt a question which counsel have asked us to determine, namely that occupying constitutes an activity. The new definition begins:

“Occupy” means the activity of occupying any part of the coastal marine area -

(i) Where that occupation is reasonably necessary for another activity...

It is Mr Andersen’s argument for POL that under the former definition with which we are concerned a coastal permit cannot be approved except in respect of an activity and that the activity so approved in this case was the whole of the management and operation of the port related commercial undertakings acquired by POL under the Port Companies Act.

Mr Andersen submitted that “occupation” and “occupy” in s12 are to be read as linked to an activity. Section 87(c), defining the types of available resource consent, refers to a coastal permit as “*a consent to do something* in a coastal marine area that would otherwise contravene sections 12, 14 and 15” (in Part III). Under s88(3)(b) any application for a resource consent under Part III of the Resource Management Act is necessarily “for any activity for which consent is required” under that Part. Occupation is no more than an ability to exclude others from the area in question but to the extent only as is “necessary for the activity” in respect of which the permit is given (s12)(4)(a)); and under s122(5) a coastal permit can provide no authority to occupy except to the extent that is reasonably necessary to achieve the purpose of the permit.

We are not persuaded by this argument but, in the view we take, it is unnecessary to resolve the question. And, in any event, Parliament has now done so for the future. It is plain from the definition that occupation is more

than a mere right to exclude. It means “occupy the land and any related part of the coastal marine area necessary for the activity.” To occupy a part of a coastal marine area is to do something in that area in terms of s87(c) namely, to go into occupation so as to be able to exclude others. Sub-section (1) of s88, appropriately to the wide definition of resource consent in s87, permits any person to apply for a resource consent. As the High Court said, such applications normally relate to activities, but we do not think they are entirely restricted to them.

However, even if it is necessary to read down the broad provision of subsection (1) because of the subsequent references to activity in sub-sections (3) and (4), we are satisfied that the Legislature must have intended the occupying of an area to be regarded as itself an activity. Section 12(2), which prohibits occupation, says nothing about any activity yet it contemplates a resource consent as one way of obtaining approval of an otherwise forbidden occupation. The definition of “occupy” appears to contemplate that there will be an activity going beyond the act of occupying but that does not mean that occupation cannot itself be an activity.

Nor does it follow that the further activity is the subject matter of the permit. The permit was issued to enable POL to occupy Area A. It was intended that it could do so for the purpose of carrying on its undertaking, but we accept Mr Page’s submission that the approval given by the Minister under s384A does no more than authorise the occupation. The cross-reference to s12 in s384A indicates the intention of preserving the distinction drawn in sub-sections (3) and (4) of s12 between rights of occupation and rights to carry out an activity, both of which require the sanction of a rule in a plan or a resource consent. Controls in respect of a coastal marine area, including noise controls, are a function of the Regional Council by virtue of s30 (1)(c) of the Resource Management Act. We do not read the Port Companies Act and s384A as expressing any parliamentary intention that port companies be exempted from the need to comply with planning rules in relation to coastal marine areas. They are not exempt from complying with such rules applicable to their land

based activities. We agree with Mr Page that it would be unusual if the Minister of Transport, whose Ministry has no expertise in relation to environmental effects, nor statutory ability to assess them, had power to authorise activities which, unlike occupation *simpliciter*, have such effects.

A permit issued under s384A authorises the carrying on of a port operation and may impose conditions upon that right of occupation. This does not, in our view, amount to an authorisation of the proposed activities for other purposes. There is still a need to comply with other legal requirements, as there is when any landowner grants a lease or licence to occupy land for a specified purpose. The lessee or occupier must comply with the regional and district plans. It follows that we do not read s384A as an indirect method of creating or preserving existing use rights for an extended period. That would seem to be quite inconsistent with s20, particularly as there would be no restriction upon the intensity of user.

We cannot, with respect, accept the reasoning of the Full Court to the effect that there is nothing in the coastal permit which expressly authorises an unlawful activity, and it is consistent with being read as authorising only lawful activities. The coastal permit does not authorise any activity or activities at all, other than to the extent that occupation is itself an activity. The permit, as the Full Court elsewhere accepts, is a permit for Port Otago Ltd to occupy the area specified in it. That right of occupation is conferred for the purpose of allowing the port company to manage and operate the port related commercial undertaking it acquired under the Port Companies Act 1988, and it is limited to that purpose. The company does not have a right to occupy the area for any other purpose. But the port related commercial undertaking is not authorised by the coastal permit as such; that undertaking is the purpose of the grant of the right of occupation and not itself part of the grant. Consequently, once it is accepted that the coastal permit confers only a right to occupy the area in question, it is inappropriate to speak of it as authorising any activities, whether lawful or otherwise. Port Otago Ltd's authority under the Resource Management Act to carry out its activities is limited to its existing use rights under the Act and

therefore subject to the requirement that the scale and intensity of any adverse effect cannot be increased without approval or approvals granted pursuant to that Act.

We mention also, but merely to reject it, Mr Andersen's suggestion that if the port company's manner of conducting part of its operation is in breach of a planning rule, its permit, and thus its right to exclude persons from Area A, is endangered. The right of occupation and the right to conduct port operations are separate and distinct. The port company may from time to time be unable lawfully to carry out part of its operations until a planning problem is resolved but its right of occupation continues because the permit is not thereby invalidated.

The appeal is accordingly dismissed with costs of \$3,500.00 to the Regional Council. POL is also to pay the reasonable disbursements (including travel and accommodation costs of counsel for both the Regional and City Councils) as fixed by the Registrar. Costs in the High Court have been reserved and are for that Court to fix.

Solicitors

Hall Cotton Lawrence, Dunedin for Appellant
Cook Allan Gibson, Dunedin for Respondent