IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

12/11

AP No. 169/93

UNDER the Resource Management Act 1991

A N D

[redacted]

IN THE MATTER of an appeal under section 299 of that Act against an interim decision, and report and recommendation, of the Planning Tribunal dated 11 June 1993

BETWEEN NEW ZEALAND RAIL LIMITED a duly incorporated company having its registered office at 4th Floor, Wellington Railway Station, Bunny Street, Wellington, transport operator

Appellant

A N D MARLBOROUGH DISTRICT COUNCIL a territorial authority pursuant to section 37N of the Local Government Act 1974

First Respondent

A N D PORT MARLBOROUGH NEW ZEALAND LIMITED a duly incorporated company having its registered office at 14 Auckland Street, Picton, port operator

Second Respondent

Hearing: 27, 28 and 29 September 1993

Counsel: P T Cavanagh QC and D H Jenkins for Appellant
R D Crosby for First Respondent
R A Fisher and M MacLean for Second Respondent
Sally Brown for Coal Corporation of New Zealand Ltd

Judgment:

JUDGMENT OF GREIG J

This is an appeal by New Zealand Rail and a cross-appeal by Port Marlborough against the decision of the Planning Tribunal dated 11 June 1993. It concerns the proposals and plans of Port Marlborough to develop and expand the port of Picton into the neighbouring Shakespeare Bay and to construct and establish there a port facility to service the export of bulk products, including timber and coal. New Zealand Rail has opposed the proposal in its entirety throughout. It appealed to the Tribunal against the original decisions of the local authorities concerned giving approval to the development, as far as it related to the expansion of the port for the purpose of the export of timber. That appeal was disallowed by the Tribunal. The Tribunal went further than the original approvals and recommendations and allowed the appeal by Port Marlborough against the refusal at the local authority's level to approve the extension and expansion of the port as a coal export service and approved that subject to some terms. New Zealand Rail appeals against the whole of the decision of the Planning Tribunal. Port Marlborough cross-appeals against that part of the decision which determines some conditions of review which are to be contained in the latter.

The decisions given by the Tribunal were not final but comprised interim decisions subject to amendments, modifications and the settlement of the terms of conditions which were necessary to comply with the rulings and observations of the Planning Tribunal in the course of its decision. Furthermore, a part of the decision is a report pursuant to s 118 (6) of the Resource Management Act 1991 directed to the Minister of Conservation as to the recommendations made by a joint hearing committee. Nothing turns on the formal nature of the decision or the inquiry made by the Planning Tribunal or undertaken by the Planning Tribunal. It was common ground that this Court was properly seized of the issues of law raised on the appeal.

Port Marlborough is a limited liability company established under the Port Companies Act 1988. It has two shareholders, the Marlborough District Council as to 92% of the shares and the Kaikoura District Council as to 8% of the shares. Port Marlborough operates the Picton Harbour which caters for a wide range of recreational and tourism activities, and commercial fishing fleets. It also caters for bulk shipping cargoes including, particularly, outgoing cargoes of logs, sawn timber, salt, tallow, meat and coal, and incoming cargoes of cement. Most importantly, however, it is the railhead for the top of the South Island with a ferry terminal for the New Zealand Rail Service between Wellington and Picton for passengers, roll-on/roll-off cargo, stock and other general cargo. Approximately

99% of the tonnage of cargo going through the port is carried through the rail ferries.

Shakespeare Bay is adjacent to Picton Harbour, separated by a peninsula. The bay, which is said to comprise between 60 and 70 hectares, is described in the decision as something of a backwater. Upon the isthmus of the peninsula in a saddle there is a derelict freezing works. There are a few dwellings but the greater part of the area seems to be taken up by reserves and rural uses. The bay has natural deep water. The Port Marlborough proposal is to excavate the saddle on the isthmus to provide road access from the Picton Harbour to Shakespeare Bay, to reclaim an area of some 8 hectares at or near the base of the peninsula. That will, in the end, provide a total area of flat land of approximately 11.4 hectares. It is then intended to provide storage, marshalling back-up areas and other facilities for two deep water berths, one to be dedicated to the export of timber and the other for bulk products generally but in particular for coal.

To obtain the necessary approvals under the Act, Port Marlborough made application to what was then the Nelson/Marlborough Regional Council and to the Marlborough District Council for a number of resource consents. They included applications for coastal permits for the reclamation and development and for the disposal of storm-water into Shakespeare Bay. An application was made for a discharge permit to discharge contaminants to the air and land use consents for the various earthworks and land clearance and for non-complying activity. These applications were duly notified.

In the course of the procedure, beginning with these various applications, the Director-General of Conservation, acting pursuant to s 372 of the Act, issued a direction which required the activities for the two coastal permits to be treated as applications for restricted coastal activities. This transferred the decision to grant these consents to the Minister of Conservation after considering the recommendations of a committee of the Regional Council made pursuant to s 118. As a result it was decided that a joint hearing committee should deal with all the applications and in due course a public hearing was held by that joint hearing committee on 2 and 4 March 1992. Evidence and submissions from a large number of bodies and persons, who had given notice of their desire to take part in the procedure, were heard. The joint hearing committee made its recommendation to the Minister of Conservation that the two coastal permits should be granted except insofar as the consent was sought for the construction of a coal berth and

an associated mooring dolphin. Other consents, as applied for, were granted subject to detailed conditions which were then promulgated. The matter came before the Planning Tribunal by way of appeal against the grant of consents and inquiries against the recommendation of the restricted coastal activity which is treated in all respects as if it was an appeal pursuant to s 118 (6) of the Act.

The distinctive nature of the various appeals and inquiries posed some potential problem to the Planning Tribunal, but if I may say so, with respect, they decided sensibly and properly that all matters should be considered together and be reported upon in one document. As was made clear in their decision, the principal issue in the case was whether land use consent should be granted to allow the port facilities to be established.

After a number of pre-hearing conferences which assisted in clarifying the issues and the parties who remained interested in the matter, the substantive hearing before the Tribunal took place between 1 and 18 February 1993. The principal parties were all represented by counsel. The Tribunal heard detailed evidence from 39 witnesses who were subjected to cross-examination by counsel. As the Tribunal in its decision was able to say, with confidence, "... this proposal has now been the subject of close scrutiny in the course of two detailed hearings, ..." The decision of the Tribunal is set out in 203 pages and deals fully and in close detail with every issue, whether of fact or law, which had been raised before it.

The appeal and the cross-appeal are brought pursuant to s 299 of the Act. They are limited to a point or points of law and that must never be lost sight of. It is often appropriate and necessary for an understanding of the issues at law that the facts should be canvassed but the decisions on the facts are for the Tribunal and not for this Court. It is seldom the case that a decision on the facts can qualify as a question of law or a point of law. In particular, the weight to be given to the evidence is especially a matter for the Tribunal alone.

New Zealand Rail raised a number of points of appeal which, as is not unusual, became refined in the course of submission and one of the points originally raised was not pursued at all. I will deal with each of the points in order but not necessarily the order in which they were presented by Mr Cavanagh Both the District Council and Port Marlborough opposed the appeal, supported the Tribunal's decision and made independent submissions. Coal Corporation joined

the appeal late and without opposition. It adopted the agreement and submissions of the other respondents.

The first point, as presented in Mr Cavanagh's submissions, was "whether the Planning Tribunal misdirected itself or erred in law when holding that a relevant resource management instrument for the purposes of its decision, and report to the Minister of Conservation, was the proposed Regional Coastal Plan as it existed prior to Variation 3."

It was common ground on this appeal that the Tribunal correctly dealt with all the five resource consents as integral parts of the one development, all as non-complying activities, and that the tests to be applied in respect of each are substantially the same except for two small particulars. In that event, therefore, s 105 (2) (b) of the Act applied as a threshold or a prerequisite to the Tribunal's consideration of the other matters to be considered pursuant to s 104. Sections 104 and 105 have been amended by the Resource Management Amendment Act 1993 (see ss 54 and 55 (2)) but the original versions of these sections still apply to this appeal. Section 105 (2) (b) is as follows:

> " 105. (2) A consent authority shall not grant a resource consent— ...
>
> (b) For a *non*-complying activity unless, having considered the matters set out in section 104, it is satisfied that—
>
> (i) Any effect on the environment (other than any effect to which subsection (2) of that section applies) will be minor; or
>
> (ii) Granting the consent will not be contrary to the objectives and policies of the plan or proposed plan; .... "

The Port conceded, as clearly was the case, that the effect on the environment by the proposed development would not be minor so that the objectives and policies of the plan or proposed plan became important.

There were five planning instruments against which the applications were to be considered under this subsection. The first of these was the Marlborough Regional Planning Scheme. On the coming into force of the Act on 1 October 1991 the scheme ceased to have effect pursuant to s 366A except that pursuant to s 367 (1) in carrying out its functions under ss 30 and 31 of the

Act, a territorial authority shall have regard to its provisions. The second was the Marlborough County District Scheme and the third was the Picton Borough District Scheme Review No. 1. Those were deemed to be transitional district plans by virtue of s 373 (1) of the Act, for the Marlborough District Council and divided into the two sections. The last and most relevant to this particular point of appeal, was what was the former proposed Marlborough Sounds Maritime Planning Scheme which was being undertaken pursuant to Part V of the Town and Country Planning Act 1977. Under s 370 of the Resource Management Act that became a Proposed Regional Coastal Plan.

That scheme was publicly notified in July 1988 by the Marlborough Sounds Maritime Planning Authority. The Planning Authority was, at the time, the Marlborough Harbour Board which was the predecessor of Port Marlborough. From November 1989 until 30 June 1992 the scheme was administered by the Nelson/Marlborough Regional Council and thereafter has been administered by the Marlborough District Council. There were a number of objections made to the scheme as originally notified. Some of these objections and submissions were heard by the Planning Authority and appeals were lodged with the Planning Tribunal in some instances. In September 1991 a document described as Variation No. 3 to the proposed maritime scheme was publicly notified. The purpose of this variation was to withdraw all those parts of the scheme that were still the subject of objections that had not been heard. Among other things, parts of the scheme that were withdrawn were those parts which included proposals and policies for port development generally and particularly in relation to Shakespeare Bay. In October 1992 the Marlborough District Council, as Planning Authority, resolved, pursuant to s 104 (6) of the Town and Country Planning Act, to withdraw all proposed variations including Variation 3. By that means it purported to reintroduce into the proposed Regional Coastal Plan the proposals originally included for port development in Shakespeare Bay.

In essence, it is the appellant's contention that the Planning Authority had no jurisdiction to withdraw Variation 3 for two reasons. The first is that, in accordance with s 104 (6) of the Town and Country Planning Act, the Planning Authority's jurisdiction was limited to withdrawal of the whole of the proposed scheme and not just a part of it. The second reason is that, pursuant to Reg 48 (3) of the Town and Country Planning Regulations 1978, the variation had merged with the proposed Regional Coastal Plan. In other words Variation 3 had ceased to be an independent document and could only be withdrawn by withdrawal

of the whole of the proposed scheme or by another variation which was not the step taken.

Under Part V of the Act, after the constitution of a maritime planning area and its planning authority, a preliminary statement of intention to prepare a maritime planning scheme was to be published within six months or within such further time as the Minister might allow. Unlike District Schemes, there was no express obligation to provide and maintain a scheme. Under that part of the Act there was no power for the District Authority to withdraw a proposed scheme in its entirety. The next step was the preparation and public notification of the Draft Scheme pursuant to s 104. The scheme had to make provision for the matters referred to in the Second and Third Schedules of the Act and to be prepared in accordance with regulations. Under s 105 of the Act the provision of ss 45 to 49 of the Act were applied so far as they were applicable and with the necessary modifications. Those sections provided for submissions and objections, alterations and variations of the schemes and the way in which consideration and hearing of submissions and objections should be made and, finally, a right of appeal to the tribunal.

Section 47 (4) of the Act, dealing with variations, provided that:

> " The Council may at any time before a proposed variation is approved, or (if an appeal has been lodged in respect of it) before the Tribunal has made a decision on the appeal, withdraw the proposed variation. "

Following the hearing of the submissions and objections, in accordance with the regime applicable to District Schemes and subject to any amendments required, the Planning Authority then approved the scheme and it became operative.

Section 109 provides authority or jurisdiction to alter by way of change, variation and review of any planning scheme Subsection (4) of s 109 provides:

> " All the provisions of this Part of this Act relating to the preparation and approval of maritime planning schemes shall, so far as they are applicable and with the necessary modifications, apply to every review "

And subs (1) provides likewise in respect of any variation or change.

On a proper reading of the Act the Planning Authority had jurisdiction to change and vary and to withdraw a variation at any time. By reference, the power to withdraw a variation contained in s 47(4) was incorporated into the scheme of maritime planning and applied, expressly, pursuant to s 109 (1) and 105. The provision of s 104 (6) as to withdrawal of the whole of the scheme was an additional right or authority, a right which was not available to District Councils or other Authorities under the earlier part of the Act, whose obligation was to provide and maintain a scheme. It is not the intention of subs (6) of s 104 to limit but is to extend the jurisdiction and rights of the Maritime Planning Authority so that it could withdraw the whole of a scheme and start anew.

Regulation 48 of the Town and Country Planning Regulations 1978 provides as follows:

> " 48. (1) Where the Maritime Planning Authority wishes to vary the draft maritime planning scheme or to change an operative scheme it shall, so far as it is applicable and with the necessary modifications, follow the procedure set out in regulations 46 and 47 of these regulations:
>
> Provided that the time for receiving submissions and objections shall be not less than 6 weeks after the date of public notification.
>
> (2) Every variation and every change shall include a report setting out the reasons for the variation or change and the likely economic, social and environmental effects. Copies of the report shall be included with the public notice and a copy of the variation or change sent to the bodies and persons referred to in regulation 46 (5) of these regulations.
>
> (3) Every variation of a draft scheme shall be merged in and become part of the scheme as soon as the variation and the scheme are both at the same stage of preparation:
>
> Provided that, where the variation includes a provision to be substituted for a provision in the scheme against which an objection or appeal has been lodged, that objection or appeal shall be deemed to be an objection or appeal against the variation. "

Paragraph (3) is to be compared with the corresponding regulation about the variation of district schemes, that is to say reg 28 (3). That opens with the words, "Except as expressly provided in the Act," and instead of referring to the stage of preparation speaks of the same procedural stage. The authority and effect of reg 48 is procedural but it cannot alter or amend the effect of the statute to which it is subordinate. There is nothing in the regulation which expressly provides against a withdrawal of a variation. It is implicit, so it is said, that by requiring merger then the withdrawal is no longer possible but that does not follow dramatically or logically. Although a variation has merged it can still be extracted and excised from what has gone before.

In any event the powers of regulation-making under s 175 of the Town and Country Planning Act were limited to those regulating the procedure to be adopted with respect to the preparation, recommendation, approval, variation and change of maritime planning schemes. That would not permit a regulation which provided substantively for the or against the withdrawal of a variation once made.

There was an argument as to whether, in the circumstances of this case, the scheme, as far as it had gone, and the Variation 3 were at the same stage of preparation. However I have already noted the distinction in the regulations and the reference on the one hand to the stage of preparation and the procedural stage. In Part V there is particular reference to preparation and approval in various sections, as I have already cited, and that seems to point to a particular distinction. It is not necessary to make a decision on this point but I would incline to the view that the variations and the scheme itself were at the same stage of preparation although not at the same factual procedural stage.

In the result the Authority had jurisdiction to withdraw Variation 3 and there being no further challenge to what it did that variation was properly withdrawn and the Tribunal made no error of law in considering that planning instrument in its condition with Variation 3 withdrawn, that is to say in its original terms.

The next point of appeal was whether the Planning Tribunal misdirected itself as to the interpretation of the relevant objectives and policies of the relevant plans when holding that the development was not contrary to those objectives and policies. In its decision the Tribunal, having identified the relevant

resource management instruments and dealt with the question of Variation 3, then undertook a lengthy discussion of the particular parts of those instruments and the evaluations proffered in evidence by the planning witnesses. There is a detailed comparative discussion of the evidence, in particular of Mr R D Witte, Senior Planner with the Marlborough District Council and later Senior Strategic Planner with the unitary authority on the one hand, and on the other of Mr D W Collins, Planning Consultant called by New Zealand Rail.

The Tribunal gave its summary and conclusions at p 164 to 166, referring to each of the planning instruments and coming to a conclusion as to their overall effect, concluding at p 167:

> " It is our judgment that, taken overall, the relevant objectives and policies earlier discussed support such a development in this locality. Indeed, in the proposed regional coastal plan which is relevant to the land use consent because it refers specifically to port development as well as an associated reclamation, it is indicated that Shakespeare Bay might be developed to a much greater extent than Port Marlborough's present proposal. "

And concluded that the -

> " ... the consent to port development ... would not be contrary to those objectives and policies. "

Mr Cavanagh, in the course of his submissions, dealt in some considerable detail with the provisions of the various resource management documents, drawing attention to various parts of them and contending for their meaning and effect. By way of submission he interpreted and demonstrated the various policies and objectives, either expressed or implied in those various documents, analysing each of them and making submissions overall about them individually and collectively. He conceded that the appellant cannot challenge the Tribunal's factual findings in themselves or any value judgment, as he put it, that the Tribunal made as a result. The way he put it, however, was that this was not a challenge on the facts or the findings on the facts, but asserted that the Tribunal had misdirected itself in its interpretation of the relevant objectives. It was the appellant's submission that a proper consideration of the totality of the objectives

and policies in the relevant resource management documents did not support the establishment of such a major project as that proposed by Port Marlborough.

It was not suggested that the Planning Tribunal had failed to have regard to any of the documents or the content or any part of the content of them. It was not contended that the Tribunal had made any error in law in construing s 105 (2) (b) (ii), or that it had incorrectly construed the words "objectives and policies" and the word "contrary", or at least there was no challenge to that. It was not suggested that this was a case of unreasonableness in the *Wednesbury* sense (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223) although Mr Cavanagh did express himself in his submissions that the finding by the Tribunal was not one open to a reasonable tribunal properly directed as to the correct interpretation of the objectives and policies in the various relevant documents.

In the end what the appellant submitted was that the proposed development is contrary to the policies and objectives of the relevant resource management documents and that the Tribunal was in error in reaching the opposite conclusion. That was no more and no less than a challenge on the factual findings. It was a challenge as to the inferences and the conclusions drawn by the Planning Tribunal from the facts before it. It was for them to give the weight that they thought fit, both to the evidence that was given and to the very words and meanings of the documents before them. That they attended to the evidence and the documents is plain. That they came to conclusions upon them without error in law is equally plain.

I have myself considered the various words and documents and the tenor of the conclusions reached by the Tribunal. Among the matters that have to be borne in mind, and which I think was clearly in the minds of the Planning Tribunal, as the essential question was whether the consent to the proposed use and development was "contrary" or not to the relevant objectives and policies. The Tribunal correctly I think, with respect, accepted that that should not be restrictively defined and that it contemplated being opposed to in nature different to or opposite. The Oxford English Dictionary in its definition of "contrary" refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying.

It is relevant here to observe what was said by the Court in *Batchelor v Tauranga District Council (No. 2)* (1992) 2 NZRMA 137 at p 140:

> " There are likely to be difficulties in reconciling the regime of the new Act to an operative district scheme created under and treated as a transitional plan, for plans under the new Act are intended to be different in concept and form from the old district schemes. Yet during the transitional period, the old must be treated as if it were the new. That is a necessary consequences of the statutory situation and must be dealt with in a pragmatic way. "

In my view this point is not a point of law at all but is a question of fact. Insofar as it might be described as a point of law, I am satisfied that there was ample material before the Tribunal which justified the factual finding and the conclusion that it came to, namely, that the proposal and the development was not contrary to the policies and objectives of the plans and the documents.

The next point of appeal was whether the Planning Tribunal misdirected itself in holding that the Act "does not require the proposed development to be dealt with by way of plan change procedure". This issue was a fundamental plank of New Zealand Rail's position in its opposition to the proposed development. It had submitted, as it did before the Court, that it was inappropriate that a proposal of this magnitude and nature should be advanced and concluded by way of a resource consent application as a non-complying activity. As a major development with substantial impact on Picton, Marlborough and the whole of the South Island it was said that it needed to be assessed in the context of a plan change procedure under which, in particular, the provisions of ss 74 and 32 would have been important matters for consideration and disposal.

This was dealt with at some length by the Planning Tribunal. In particular the Planning Tribunal compared the provisions which apply to the plan change procedure under the new Act with the former provisions under the Town and Country Planning Act and concluded at the top of p 458 as follows:

> " Whereas under earlier legislation a disappointed developer had no recourse if consent to a specified departure was refused, unless the territorial authority was prepared to take the initiative by promoting a

> scheme change. Now, if a resource consent is refused, a disappointed developer can itself take steps to have the Plan changed. This is entirely consistent with a finding that to grant a resource consent would be contrary to the relevant objectives and policies of the Plan. "

The Tribunal concluded that the Act does not exhibit a preference for plan change procedures over resource consent procedures.

I think that little assistance is to be gained in this regard from a consideration or a comparison with the previous legislation. This is new legislation which, as the full Court in *Batchelor* said, imposes a significantly different regime for the regulation of land use by territorial local authorities. The Court went on to refer to the concept of direction and control under Town and Country Planning Act and distinguished the movement towards a more permissive system of management focussed on control of the adverse effects of land use activities. The Act expresses importantly the objectives and the purposes of the Act in Part II which sets the scene overall for the construction and application of the Act.

What the appellant submitted was that, where a planning consent application will have implications of significance beyond the proposed site, the matter should be dealt with by way of plan change or review. As noted by the Tribunal and in the submissions before the Court, the Resource Management Act now authorises any person to request a change of a district plan: see s 73 (2). At the same time application for resource consent may be made in accordance with the particular procedure set out in Part VI of the Act. There is nothing in that part of the Act or elsewhere which provides any limitation but, as is crucial in this case, a resource consent application which fails to meet s 105 (2) will not be granted. Thereafter the applicant, if the matter is to be pursued, would have to proceed by way of a request for a change of the plan. That is not to say, however, that that shows any tendency to require an application for plan change in cases in which that threshold might not be passed or where, although it was passed, there could be said to be some significant impact otherwise in the scheme. The legislation authorises the distinct procedures. I agree, with respect, with the conclusions of the Tribunal.

In any event it must be recognised that in this case the proposals and the opposition to them was given a very close and detailed consideration by two tribunals over an extensive period of time. Many, if not all, of the various

considerations which would be relevant to a change of plan procedure were canvassed before the Tribunal and were considered by it. The Tribunal identified ten particular topics for discussion and consideration in the course of the decision and these were each given careful consideration. The ten topics were:

Forestry
The Coal Trade
Log Marshalling and Stevedoring
Coal Transportation
Construction of a Bund Wall and Reclamation
Wharf Construction
Visual Air Quality and Water Quality Effects
Shipping and Navigation
Tourism
Economics

The Tribunal correctly concluded that, although the application had not been the subject of s 32 procedures, it had not suffered as a result. Alternatives were considered, as were economic consequences. It is, I think, difficult to see what other matters or considerations could be effectively pursued simply by adopting the change of plan procedure.

The next point of appeal that I deal with, though not in the order that was presented, is whether the Planning Tribunal in holding that the provisions of Part II of the Resource Management Act are not to be given primacy when considering resource consent applications pursuant to s 104 of the Act. Section 104 sets out the matters to be considered in an application for a resource consent. Part II is particularly referred to and is one of the matters which the consenting authority should have regard to. It is referred to in subs (4) (g) which is the second last of that list, the last being any relevant regulations. That section is now made expressly subject to Part II by virtue of s 54 of the Resource Management Amendment Act 1993, but the Act must be construed for this case in its original form. It was suggested that the 1993 amendment made explicit what was previously implicit in the Act generally and in s 104 specifically. Equally, however, it may be contended that such an amendment is intended to remedy a defect in the Act and is intended to alter what was there before.

Part II of the Act sets out the purpose and the principles which include, among other things, matters of national importance and the Treaty of Waitangi. This matter was the subject of submission and it is an issue in *Batchelor's* case. At p 141 the Court said:

> " In carrying out that exercise, [namely, the regard to the rules of a plan and its relevant policies or objectives], regard must also be had to the other relevant provisions of s 104, including the general purpose provision as set out in s 5. Although s 104 (4) directs the consent authority to have regard to Part II, which includes s 5, it is but one in a list of such matters and is given no special prominence. "

Citing that view the Planning Tribunal in this case noted also the distinguishable decision in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 which depended upon the provisions in the Town and Country Planning Act which made the matters, to which regard was had, subject to the provisions in ss 3 and 4 of the 1977 Act which related to the matters of national importance and the general purposes of planning. Here, in the present Act as it was, in the absence of any such provision and with the provisions of Part II merely being one of a number of matters to which regard was to be had, it could not be said that any primacy was given to Part II over all the other Parts. That, I think, must follow from an ordinary reading of the Act.

Mr Cavanagh went on to submit that s 5 and the other sections in Part II set out the central theme of the Act, declaring a specific purpose and principles. This was, he argued, an unusual provision setting a statutory guide-line creating a primary goal and a basic philosophy which controlled and governed any and all exercise of functions and powers under the Act. It was said that the opening words of ss 6, 7 and 8 emphasised that imperative with the words, "In achieving the purpose of this Act, all persons exercising functions and powers under it, ... shall" recognise and provide for the matters of national importance (s 6), have particular regard to the matters in s 7 and take into account the Treaty of Waitangi (s 8).

Reliance was placed on the decision of the Court of Appeal in *Ashburton Acclimatisation Society v Federated Farmers of NZ Inc* [1988] 1 NZLR 78. That was a case under the Water and Soil Conservation Act 1967 to which was added, in an amendment in 1988, a section setting out the object of the Act.

The Court, in a judgment delivered by Cooke P, at p 87, having noted the unusual step of declaring a special object, said, at p 88:

> " A statutory guide-line is thus provided; and I think that the code enacted by the Amendment Act is to be administered in its light. With all respect to the contrary arguments, to treat s 2 as surplusage or irrelevant or mere window-dressing would be, in my opinion, as cynical and unacceptable a mode of statutory interpretation as that which was rejected in *New Zealand Maori Council v Attorney-General* [1978] 1 NZLR 641. The duty of the Court must be to attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment. "

I am told that that case was not cited to the full Court in *Batchelor.*

That case is, however, distinguishable because there there was no reference back to the object of the Act in the matters for which consideration had to be given. In this case, however, Part II is specifically referred to as one of a number of items. Whatever its importance and its guidance in the Act generally, s 104 must be taken to have deliberately brought it in as one of the matters without any indication whatsoever that it was to be given any particular primacy and, indeed, it does not even head the list let alone a section which begins with the necessity to have regard to actual and potential effects of allowing the activity. I am in respectful agreement with the view of the full Court and with that of the Tribunal in this case.

The next point was whether the Planning Tribunal misdirected itself as to the interpretation of s 6 (a) of the Act by holding that natural character of the coastal environment could justifiably be set aside in the case of a nationally suitable or fitting use or development.

The Tribunal's decision on this topic noted the wording of the present section and its difference from that of the previous corresponding section. The section now requires that persons exercising the functions and powers under the Act in relation to development shall recognise and provide for -

> " 6. (a) The preservation of the natural character of the coastal environment (including the coastal

> marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development: "

Section 3 of the 1977 Act set out the matters which were declared to be of national importance which shall "in particular be recognised and provided for" including, in s 3 (1) (c), "The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:". Having referred to the construction of that previous provision in *Environment Defence Society v Mangonui County Council* and after discussing the meaning of the word "appropriate" the Tribunal said, at p 465:

> " Having regard to the foregoing, it is our judgment that s 6 (a) of the Act should be applied in such a way that the preservation of the natural character of the coastal environment is only to give way to suitable or fitting subdivision, use, and development. Here, of course we only have to consider development. But this does not mean to say that *any* suitable or fitting development will qualify. Although the threshold, as Mr Camp put it, may be passed earlier when considering appropriateness as distinct from need, it has to be remembered that it is appropriateness in a national context that is being considered. It is not, for example, appropriateness in either a regional or a local context. This is made clear by Somers J in the passage from his judgment in *Environmental Defence Society v Mangonui County Council* that we referred to earlier.
>
> Consequently, the development being considered for the purposes of s 6 (a) of the Act would have to be *nationally* suitable or fitting before preservation of the natural character of the coastal environment could justifiably be set aside. "

Later the Tribunal concluded that the provision of log and coal export trade facilities in Shakespeare Bay was suitable or fitting on a national level and the setting aside of the preservation of the natural character of the bay was thus justified to the extent required by the development.

The appellant contended that s 6 and in particular para (a) must be read with reference back to s 5, the purpose and the promotion

> of sustainable management of natural and physical resources. It was suggested that Parliament intended that the primary object is that the effect of any modification to natural character must be adequately mitigated wherever possible and development is to occur only where it is appropriate. It was the environment which was placed in a pre-eminent position in light of the purpose of sustainable management. Preservation of natural character must be achieved even in the case of appropriate development. As Mr Cavanagh put it, an appropriate development must require the coastal location chosen for that activity to be such that it cannot be accommodated elsewhere; its effect can be so mitigated as to minimise its impact on the natural character of that environment and that the permanent modification of a coastal environment can only be justified if the development in question has significance of national importance and the economy of the nation as a whole.

I have somewhat extensively, but I hope accurately, expressed the submissions made in this matter. I have done so because I found some difficulty in understanding precisely what the appellant's contention is, particularly as the last part of the submission that I have described appears to coincide with the tenor of the Tribunal's view that national suitability would justify the setting side of the preservation of the natural character of a coastal environment. The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6 (a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose.

"The protection of them", which in its terms means and refers to the coastal environment, wetlands, lakes, rivers and their margins, the items listed, but the protection is as part of the preservation of the natural character. It is not protection of the things in themselves but insofar as they have a natural character. The national importance of preserving or proteceting these things is to achieve and to promote sustainable management.

"Inappropriate" subdivision, use and development has, I think, a wider connotation than the former adjective "unnecessary". In the *Environmental*

Defence Society v Mangonui County Council case that expression was construed by considering "necessary" and the test therefore was whether the proposal was reasonably necessary, although that was no light one: see Cooke P at p 260 and Somers J at p 280 when he said that preservation, declared to be of national importance, is only to give way to necessary subdivision and development and to achieve that standard it must attain that level when viewed in the context of national needs.

"Inappropriate" has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those which are said to be reasonably necessary. It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

In the end I believe that the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was necessary or essential to depart from it. That is not the wording of the Act or its intention. I do not think that the Tribunal erred as a matter of law. In the end it

correctly applied the principles of the Act and had regard to the various matters to which it is directed. It is the Tribunal which is entrusted to construe and to apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

The next point of appeal was whether the Planning Tribunal misdirected itself or erred in law in holding that financial viability of the proposed development was not relevant to consideration of the application for resource consents or, alternatively, in failing to take into consideration the financial viability of the proposed development when considering the application for resource consents.

One of the planks of New Zealand Rail's challenge of the proposed development was a claim which it supported by evidence and cross-examination that the cost of the whole development was likely to be significantly greater than had been estimated. The result of this would mean that, in order to service the costs, port fees would have to be increased but because, for competitive reasons, it would be necessary to hold the costs to the users of the timber and coal berths the costs would therefore fall on other port users and, in particular, on New Zealand Rail as the predominant and principal user of the port.

The Tribunal was satisfied that it was feasible from an engineering point of view to construct and complete the necessary reclamation and wharf constructions. There was no suggestion that Port Marlborough would be unable to complete the works or to obtain the necessary finance for it. Thus there was no suggestion that the development would not take place for lack of funds or because of engineering or other construction difficulties. The Tribunal did express itself, however, that the port might have under-estimated the costs of achieving the results and that it would be advised to reconsider and to review its costings.

Under the heading of economics the Planning Tribunal discussed and considered the evidence of Dr R R Allan who was called as the witness by New Zealand Rail to demonstrate, from his calculations and evaluations, the thesis that New Zealand Rail might, in the end, be required to subsidise the costs of the use of the timber and coal facilities. The Tribunal noted, as they said, Dr Allan's impressive credentials in the field of transport engineering and economics and found him to be a sound, careful witness to whose opinions they paid a good deal of attention. It was noted, however, that the economic analysis depended upon the

proper calculation as to the costs and the variations which were involved in that. The Tribunal returned to this topic and, at p 172 of its decision and thereafter, said this:

> " On the matter of additional port charges, which of course applies to both timber and coal, although Dr Allan presented an attractive argument to support NZ Rail's case in this regard, in the end we do not think it was sufficiently persuasive to justify refusing consent on economic grounds.
>
> Whether increased port charges will occur depends on several variables, including importantly the final cost of the development. Then too there was no evidence about how Port Marlborough proposes to go about setting its charges for the use of these facilities, except to the extent that with regard to the log trade it intends to be competitive with the port of Nelson. However, by the time this development comes to fruition what that will mean in practical terms is unknown.
>
> It is possible as Dr Allan demonstrated to construct a scenario from which one might conclude that NZ Rail, being the single most important port user at the present time, could face increased port charges to subsidise this development. However, again as his evidence and his cross-examination demonstrated, Dr Allan's scenario is no more than one possibility. We think too that Mr Camp made a strong point when he submitted that the financial viability of a development, as distinct from its wider economic effects, is more properly a matter for the boardroom than the courtroom. "

It was the appellant's submission that financial viability, in the words used by Mr Cavanagh, is a relevant consideration under Part II of the Act. Mr Cavanagh said if the proposal is not viable then it is in conflict with Part II. With comparative reference to the decision in *Environmental Defence Society v Mangonui County Council* it was submitted that there was an onus on an applicant to establish the economic practicability of the proposal. In the result, it was said, the evidence before the Tribunal which showed some doubts as to the costings and the possibility of increased port charges, resulting in undue charges and subsidy by New Zealand Rail, put in doubt the financial viability of the proposal. It was

submitted that the Tribunal had been dismissive of the economic topic and therefore had not taken appropriate consideration of it into account.

It was Mr Cavanagh's contention that, in order that the Court should have a proper understanding of this question, it was necessary that it should consider the evidence given by Dr Allan. To that end Mr Cavanagh applied for leave to produce, as evidence, the transcript of that part of the evidence which included Dr Allan's evidence-in-chief and his cross-examination. That application was opposed by the respondents. I rejected the application on the ground that it would not be necessary or helpful in deciding the question of law, if any, involved in this topic to read or to consider the particular evidence given in the matter. The tenor of the evidence and the material before the Tribunal was, in my view, adequately described in the Tribunal's decision.

Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5 (2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7 (b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104 (1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom. In the *Environmental Defence Society* case the particular consideration to which Mr Cavanagh referred was the absence of any evidence that the proposed development would actually take place. There was no developer, there was no evidence as to any actual development proposal or their costs. In this case plainly there was a considerable body of evidence given on each side as to the costs and as to the economics and the potential viability of the proposal for the reclamation and construction of all works and buildings required.

The contention that the Tribunal was dismissive of this economic evidence is, I think, to misunderstand what the Tribunal was doing. Clearly it considered all the evidence that was put before it but in the end it dismissed the contentions and opinions of Dr Allan and set them aside It was not satisfied, on

the evidence before it, that the apprehensions of that witness and thereby of New Zealand Rail would be realised. This was a judgment on the facts, on the weight of the evidence before it. The Tribunal took into account economic questions, as it was bound to do, in a broad sense and in a narrower sense upon the projected development itself. In the result they came to the conclusion that that evidence was not "sufficiently persuasive to justify refusing consent on economic grounds". That does not raise a question of law but is a decision on the merits after considering the material before it. It is wrong to suggest, as Mr Cavanagh did, that the economic effects were not addressed. The Tribunal addressed the evidence and came to a conclusion contrary to that of New Zealand Rail. New Zealand Rail has no appeal in law against that finding.

The final point of appeal was directed to the Tribunal's decision upholding the appeal by Port Marlborough and granting resource consents for the provision for the coal export trade. The ground of appeal was expressed, in terms, as to misdirection by the Tribunal of the interpretation of ss 5 and 6 which enabled it to grant the resource consents. The essence of the case of the appellant on this ground was its submission that it is an inappropriate use or development of a coastal environment to impose a development of this nature and significance in circumstances where there is no evidence that the facilities will be used once built.

It was common ground that the proposed development involved reclamation which would be suitable for both the timber and coal facilities although the coal berth and its associated dolphin mooring would not be constructed until it was required. There was therefore no immediate intention to proceed with the coal terminal construction though the whole of the reclamation would take place to provide the necessary flat land for the further expansion into the coal berth. It was the contention of New Zealand Rail that if the coal was excluded the size of the reclamation could be reduced and thus the effect on the land could be reduced proportionately.

The Tribunal gave, as it did to all other aspects of the case, extensive consideration to the coal trade, describing and assessing the evidence given on each side in that regard. As the Tribunal said in its concluding paragraphs on its discussion of this evidence at p 47:

> " ... we have referred at times to some of the evidence about the transportation of coal because that

> evidence is relevant to the principal question here, namely whether there is sufficient justification for granting resource consents to enable a dedicated coal export berth and back-up area to be established in Shakespeare Bay. "

The Tribunal noted the submission on behalf of New Zealand Rail that this was a "straw" proposal, simply a device to enable coal exporters, principally Coal Corporation, to drive a harder bargain with New Zealand Rail for the cartage of coal by rail using the threat of a dedicated coal berth at Shakespeare Bay as a bargaining point in New Zealand Rail's need to maintain the Midland Line for the transport of coal between the West Coast and Lyttelton. The Tribunal noted, however, the evidence on the other side that, while there was no clear-cut intention as was the case with the log exporters, Coal Corporation was looking for a convenient alternative export port facility. The Tribunal concluded that it was unable to say with any degree of confidence that New Zealand Rail's view of the matter was correct. The Tribunal went on, at p 48:

> " The evidence about the need for a dedicated coal berth is less convincing than the evidence about the need for additional log exporting facilities in the Picton/Shakespeare Bay area, but the reasons for this are largely to do with the uncertainties that surround future markets. This no doubt is the reason why Port Marlborough does not propose constructing a coal berth immediately, but it does not follow from this that it is unnecessary to make provision for such a facility. Whether provision should be made as a matter of overall resource management evaluation is of course another question and one that we are not attempting to answer here. On balance, we think that the case made by Port Marlborough and Coal Corp is just sufficient to justify further consideration of this part of the proposed development under later headings. "

The Tribunal returned to this topic, and having noted that it had entertained some reservations about granting consent to provide the opportunity for the coal part of the proposed development to take place, and having referred to the Midland Line as a resource for the purpose of s 5 and making a conclusion as to that, the conclusion made was, at p 172:

" ... we think that permitting provision to be made in Shakespeare Bay for a coal export trade which we also accept is important nationally, is justified. The additional environmental impacts associated with such a development over and above those that will already occur with the timber trade are not such as to warrant refusing consent on those grounds. To the extent that they are different from those arising from the timber trade, and here we are referring in particular to the matter of coal dust, we are satisfied that they can be mitigated by management practices that can be required to be put in place through the conditions of a consent.

On the matter of additional port charges, which of course applies to both timber and coal, although Dr Allan presented an attractive argument to support NZ Rail's case in this regard, in the end we do not think it was sufficiently persuasive to justify refusing consent on economic grounds. "

Once again this is a finding of fact in which the Tribunal has assessed the evidence before it and reached a conclusion in favour of the applicant and against the opposition. This is not a case where there is no evidence, although the evidence was to the effect that there would be no immediate use of the proposed facility. It was the Rail case that this was a prospective application without any real expectation of use. The Tribunal, after considering the matters put before it, concluded that was not the case but that the case made by Port Marlborough and the Coal Corporation was sufficient to justify the further consideration which the Tribunal gave to the matter. I can see no question of law in this and so it too must fail.

I turn then to the cross-appeal by the Marlborough District Council. Only one of the points raised in the notice of cross-appeal was pursued. That was against the terms of a review condition proposed by the Tribunal which it required be incorporated in each of the resource consents. This is a requisite of s 128 which provides as follows:

" 128. A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

> (a) At any time specified for that purpose in the consent for any of the following purposes:
>
> (i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
>
> (ii) To require a discharge permit holder to adopt the best practicable option to remove or reduce any adverse effect on the environment; or
>
> (iii) For any other purpose specified in the consent; .... "

I omit the remaining parts of this section as being irrelevant to the question in issue here.

There had been proposed review conditions which were couched as to their relevant parts in these terms:

> " 5. Review of Conditions
>
> At any time after the first six (6) months of the exercise of any resource consents granted for the development of a port facility at Shakespeare Bay by Port Marlborough New Zealand Limited, the Marlborough District Council may review the conditions of consent(s) for any of the following purposes: ... "

The Tribunal took the view that the condition did not comply with s 128 because it did not specify a time with the precision required under the proper meaning of the Act. The Tribunal referred to a decision of the Planning Tribunal in *W P van Beek trading as Christchurch Pet Foods v Christchurch City Council*, Decision No. C 9/93, in which a review condition, pursuant to s 128, was worded as follows:

> " That the Council may review condition (ii) by giving notice of its intention so to do pursuant to section 128 of the Resource Management Act at any time within the period commencing one year after the date of this consent and expiring six months thereafter, for the purpose of ensuring that condition (ii) relating to vibration is adequate. "

The Planning Tribunal, in this case, then said:

> " In our view a condition authorising a consent authority to review should contain this degree of specificity, both as to time and if possible as to purpose. "

It was then left for the parties to review and to rewrite the review conditions.

It was the contention of the District Council on its cross-appeal that the Tribunal had construed s 128 and the phrase "at any time specified for that purpose" incorrectly and that the proposed terms which referred simply to "at any time after six months" was sufficient as it specified any and every day after the expiry of that first period. It was said that, contrary to the approach required under s 5 (j) of the Acts Interpretation Act 1924 and the need to ensure the Council's power to review and monitor the construction and operation of the development on a continuing basis, the Tribunal's decision was unduly restrictive.

No other party took part in this cross-appeal, it being left entirely to the cross-appellant. There was, therefore, no contrary argument put to the Court.

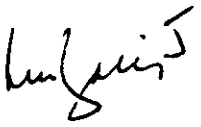
In *Sharp v Amen* [1965] NZLR 760 the Court of Appeal construed the words in s 92 of the Property Law Act 1952 "a notice specifying ... a date on which the power will become exercisable" so as to require the precise time or date to be specified. As a result the notice which expressed the date as "within one calendar month from the date of the receipt of this notice by you" was insufficient. As was said in that case, the construction of a particular statute will be controlled by the text of it and its subject matter. But it cannot be said that an expression which means that every day after a particular time complies with the meaning or purpose of this statute. Review, as the word implies, requires a consideration from time to time but the parties and the persons concerned should not be subject to the daily possibility of review under this provision. I think the Tribunal was perfectly correct in requiring a specification with greater specificity than is provided for in the draft. The proposal that has been made by the Tribunal appears to provide a reasonable guide-line. It would give scope for repeated review in months or years to come.

I think care has to be taken to ensure that what is set down by this condition is not just another policing provision to ensure compliance with the

conditions and the terms of the consent granted. It is for the purpose of reconsidering the conditions of the consent to deal with matters which arise thereafter in the compliance exercise of the consented activity. It is not, I think, in place of the other provisions in the Act for the control and enforcement of the conditions of consent.

In the result, then, the appeal and the cross-appeal are dismissed.

The respondents are entitled to costs which I fix in the sum of $5,000 for each of the first and second respondents together with reasonable travelling and accommodation expenses for counsel and all other disbursements and necessary expenses to be fixed by the Registrar. I make no order for costs in respect of Coal Corporation which took no active part in the matter.



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