Lambert v. Min. Ag. & Fish

IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

M 32/78 Set 1

(Admin)

IN THE MATTER of the Judicature Amendment Act 1972

A N D

IN THE MATTER of the Marine Farming Act 1971

BETWEEN ROBERT and PAMELA LAMBERT of Maori Bay, Farmers

Applicants

A N D THE MINISTER OF AGRICULTURE & FISHERIES the Controlling Authority for the area in question under the Marine Farming Act 1971

First Respondent

A N D GRAEME HAZLEY-JONES of Christchurch, Real Estate Agent

Second Respondent

Hearing: 3 and 4 July 1980 (at Blenheim)
and 4 May 1981 (at Wellington)
followed by arguments submitted in writing

Counsel: P J Radich for applicants
R B Squire for first respondent
Second respondent in person (at first hearing)

Judgment: 30th of October 1981

RESERVED JUDGMENT OF WHITE J

This is a motion pursuant to s 4 of the Amendment Act 1972 for review of a decision of the first respondent made on 3 May 1978 declining to uphold the objection by the applicants. The objection was to an application by the second respondent for a Marine Farming lease. In fact a licence was granted. Orders were sought by the applicants that the objection

be upheld or that the matter be referred back to the first respondent with a direction that the applicants "be given a full and proper right to be heard in support of their objection" or such other relief as may be just.

Unfortunately the case was not completed at the hearing in Blenheim and no new fixture could be made until 4 May 1981. As a result it was necessary at the resumed hearing to cover again the argument on behalf of both parties. Even then there was further delay to enable the applicant to submit a reply in writing. That was completed on 19 May 1981 but Mr Squires sought leave to make a further submission regarding the jurisdiction of the controlling authority to issue the second respondent with a licence when the latter had applied only for a lease. A further written submission on this point was submitted on 13 August 1981. A copy was sent to Mr Radich. I have now had the opportunity of reconsidering the affidavits and the memoranda together with my notes of evidence and the argument.

The applicants own a property in the Maori Bay-Nydia Bay area of Pelorous Sound. In 1975 the second respondent gave notice by advertisement of having applied for a lease under the Marine Farming Act 1971 for the purpose of farming mussels in a specified area of seabed comprising 3 hectares of seabed on the southern side of Nydia Bay. The applicants gave notice of objection. There had been other applications for leases or licences in respect of which notices of objection were given, none of which was upheld. The present application is regarded as being in the nature of a test case. I was informed that it is the first case of its kind relating to the Marine Farming Act.

The delays and nature of the case make it necessary to state the issues and the course of events in some detail in this judgment.

First, it will be helpful to refer to events set out in the useful chronology, prepared by Mr Radich, based on material contained in the affidavits:

7.8.75 Application made for lease by second respondent

23.9.75 Notice of first advertisement received by applicants' former solicitors

9.10.75 Applicants wrote to Department seeking information re leases

5.11.75 Department's reply claimed to be wrongly addressed

6.11.75 Applicants gave notice of objection

10.12.75 Acknowledged

1. 1.76 Applicants wrote to Department re letter of 5.11.75

30. 1.76 Department replied

5. 2.76 Reply to objection despatched on behalf of second respondent to applicants

29. 3.76 Letter from Department to applicants

11. 5.76 Department advised applicants that second respondent required to re-advertise and that further objection by applicants not required

18. 6.76 Applicants wrote to Department expressing concern and asking for information as to form of objection

3.12.76 Applicants received copy of second advertisement from second respondent

17.12.76 Department required second respondent to advertise for third time

27. 1.77 Applicants wrote further objection to Department and recorded applicants not advised of date of publication and also no marker buoys in position

27. 2.77 Applicants wrote further letter to Department seeking information and drawing attention to deficiencies. Receipt of third set of notices recorded and question asked whether further objection required.

16. 3.77 Department acknowledged objections already received

4. 4.77 Applicants wrote to Department complaining that matters raised in earlier letters had not been dealt with

Date unknown	Minister received departmental report
3. 5.78	Minister made decision
18. 5.78	Department advised applicants that objection disallowed
3.12.78	Present proceedings commenced
21. 4.80	Department advised applicants of [illegible]
Date unknown	Licence issued

In their amended statement of claim the applicants state as the ground for their objection, notice of which was given on 6 November 1975, that the grant of the proposed lease and the establishment of a marine farm would adversely affect unduly the use of the applicants' land adjoining or in the vicinity of the area proposed for marine farming. In giving further notice on 27 January 1977 they repeated the above ground and drew the attention of the Director-General of Agriculture and Fisheries to the absence of marker buoys in respect of the area which was the subject of the application.

The amended statement of claim goes on to state that on some date prior to 18 May 1978 (but otherwise not known to the applicants) a report on behalf of the Director-General was submitted to the Minister with the applicants' objection dated 27 January 1977, a letter from the applicants to the Director-General (relating to land values) and certain correspondence from another objector, a Mr J H Mead. It was claimed that the applicants neither saw nor had any opportunity to see or comment upon the report or matters raised in it. The statement of claim then refers to the notification of the Minister's decision not to uphold that objection:

> "....being satisfied that the issue of a lease or licence in respect of the area applied for would not:
>
> (a) interfere unduly with any existing right of navigation;

(b) interfere unduly with commercial fishing;

(c) interfere unduly with any existing or proposed usage for recreational or scientific purposes of the foreshore or the sea in the vicinity;

(d) otherwise be contrary to the public interest or adversely affect unduly the use by the proprietor thereof of any land adjoining or in the vicinity of the area or the interests of the holder of any mining interest in any such land."

Up to this point the allegations in the amended statement of claim were admitted.

The grounds on which the applicants sought relief are set out in the amended statement of claim as follows:

"(a) Their objection was determined by the Minister of Fisheries rather than by the Minister of Agriculture & Fisheries as required by the Marine Farming Act 1971.

(b) The area applied for was not marked out in accordance with the claims made in the various notices to that effect.

(c) The first respondent (if it be held that the Minister of Fisheries was the Controlling Authority) in dealing with the application by the second respondent and the objection of the applicants thereto, failed to comply with his statutory duty to have regard to the rules of natural justice in:

(i) not permitting the applicants a hearing on their objection beyond consideration of their two letters dated 27 January 1977 and 31 December 1977;

(ii) failing to submit to the applicants the said report given on behalf of the Director-General and permitting the applicants the opportunity to comment on the contents thereof before making his decision;

(iii) taking the contents of the report into account;

(iv) failing to give adequate grounds for his decision.

In his affidavit dated 27 November 1978 the first-named applicant describes the applicants' property as "largely rugged and scrub covered land ideally suited for afforestation". It has no road access. Mr Lambert's evidence was that the establishment of marine farms around the property would adversely affect unduly the use of the land. He raised the following matters which, it was claimed, had prejudiced the rights of the applicants in making their objection to the controlling authority:

"(a) No opportunity has been given to enable our case to be put fully and adequately before the Controlling Authority.

(b) I have no knowledge of the matters which were placed before the Controlling Authority preparatory to his making his decision.

(c) In particular I do not know whether there was any departmental recommendation or report in respect of our objection and if there was I have certainly not been given any opportunity to comment on the matters referred to therein.

(d) I have raised with the Ministry of Agriculture and Fisheries matters which I consider to be deficiencies in the procedure of application followed by the second respondent and I do not know whether these matters have been taken into account by the Controlling Authority.

(e) Generally I say that the procedure for consideration of objections to Marine Farming applications is inadequate, unfair and contrary to natural justice."

An affidavit of Mr Paul William Currie employed as executive officer (Marine Farming) in the Fisheries Division of the Department was filed on 3 August 1979. He deposed that his division was responsible for dealing with "leases and/or licences under the Marine Farming Act...affecting areas of seabed and foreshore and superjacent waters vested in the Crown." He refers in his affidavit to the application made and the objection lodged by the applicants and the correspondence which ensued. It was stated that the objection was six days out of time. Copies of the correspondence were exhibited to his affidavit. Referring to the Minister's decision, Mr Currie states in his affidavit that it was reached after having regard to the following:

"(1) a report on the objections of the applicants and Mr J Mead of Nydia Bay from the Assistant Director-General of Agriculture and Fisheries

and

(2) the actual objections made by the applicants and Mr Mead which were submitted to him in conjunction with the report referred to in (1) above."

It was noted that the applicants' objection dated 31 December 1977 related to each of the applications made for marine farming and was included with the papers submitted to the Minister for his decision.

In his affidavit in reply, dated 3 August 1979, Mr Lambert took issue over the statement that the applicants' objection was six days out of time. It was claimed that, due to errors and confusion for which the applicants had no responsibility, it was difficult for the applicants to know whether further objections were

required. In my view, there were difficulties from the applicants' point of view but, as I have noted, it was duly placed before the Minister. Another point referred to in more detail in this affidavit was the placing of the buoys for only "a brief period". I am satisfied that there were in fact no buoys marking the area except (and there is some doubt about this) for a short time when the first notice of application was given by the second respondent in 1975. The affidavit also refers to the undated departmental report to the Minister annexed to Mr Currie's affidavit which Mr Lambert states he saw for the first time on 3 August 1979. It was claimed that the case for the applicants was inadequately stated and overlooked relevant material and issue was taken over opinions expressed in the report. Having been advised to that effect, Mr Lambert refrained from traversing various matters of opinion but did refer to points which it was claimed were properly raised as issues in the case. He noted that the report stated:

> "....there appears to be no conflict with the planting and tending of young trees, the thinnings at six and ten years' growth, and the expected harvesting after a twenty-five to thirty years' growth period, since the lease, if granted, would be for a maximum term of fourteen years."

The first-named applicant commented that in fact thinnings are not extracted at "six and ten years' growth". He then referred to the reference in the report to "wholesale logging across Sounds Foreshore Reserve". It is important, in my view, to record the witness's comment in his affidavit, which was more fully explained in evidence:

> "It is not my intention to do this, and my intentions have obviously been misunderstood. My true proposal is for extraction of logs by aerial cable over the Sounds Foreshore Reserve and I believe that this would not be objectionable to the Park Board".

The significance of such matters was that the applicants had no opportunity to correct what they felt were errors in the report leading to the Minister being asked to determine the matter on incorrect and inadequate evidence and accordingly reaching a decision on a wrong basis. A further complaint, as developed in argument, was that the applicants were not given an opportunity of presenting evidence or commenting on the matters in issue.

On 7 May 1980 Mr Currie filed a further affidavit stating that on 21 April 1980 he wrote to the applicants a letter "to amplify the reasons" for the Minister's decision as set out in the letter dated 18 May 1978. The letter stated that it was written on legal advice. For completeness, and in view of the submissions made, it will be useful to quote the relevant portion of the letter:

> "Your objection to the application and the grounds therefor were contained in three letters to the Director-General of the Ministry of Agriculture and Fisheries namely letters of November 6, 1975; January 27, 1977; and December 31, 1977. Each of these letters was considered by the Minister in reaching his decision.
>
> In declining to uphold your objection the Minister was influenced by the fact that insofar as mature timber would not be harvested until at least 25 years after planting there was no real likelihood of the grant of a marine farming lease interfering with such harvesting, given that the lease expires after 14 years, and the situation would be considered afresh if there were an application for its renewal. As to the extraction of thinnings the Minister was not satisfied that the grant of a lease would interfere with that work, given the alternative means by which this might be accomplished. In any event it was understood that you had been advised that it was unlikely that the Maritime Park Board would permit

thinnings to be removed directly into the water except at specified sites.

With regard to your objection that the granting of marine farming leases would devalue your land, the Minister was not satisfied that this contention could be borne out given the length of time the leases would be granted for, and the opportunities available for reassessment before the leases would be renewed in the event of an application being made accordingly.

The Minister also decided that on the evidence before him the issue of a lease would not unduly interfere with navigation, or with existing or proposed usage for recreational or scientific purposes the sea or foreshore in the vicinity, or be contrary to the public interest. He noted that the application was not opposed by the Marlborough Harbour Board which is responsible for the safety of navigation in the Marlborough Sounds, or the Marlborough County Council or the Marlborough Sounds Maritime Park Board who are responsible for the balance of commercial and recreational activities in the Sounds and the establishment and oversight of public reserves, amenities and facilities for recreational purposes.

Commercial fishing would not be unduly interfered with because of the massive siltation which had occurred since 1978.

Accordingly your objection was not upheld."

Cross-examined, Mr Lambert agreed that "putting it broadly" his objections to the granting of leases in the area shown"would adversely affect proposals...for logging trees..." and, secondly, that the marine mussel farming would lead to a depreciation in the value of his property. In the course of questions regarding an application by a Mr Mellish he pointed out that the latter had discussed his proposed marine farm with Mr Lambert and had applied for an area opposite an area [illegible]

steep for afforestation. Regarding the method the applicants proposed to use, Mr Lambert said all other proposed farms were opposite areas where trees had been planted or where it was intended to plant trees. Mr Squire asked a number of questions regarding the time at which thinnings from the trees would be made. There appears to have been some misunderstanding regarding the point Mr Lambert was endeavouring to make that "thinnings are extracted at six and ten years' growth". The trees were 1½ years old in 1976.

Mr Currie was cross-examined as to the requirement that buoys be placed in position to mark out a proposed claim. He agreed that both the second and third notices referred to buoys being in position. Asked whether he agreed that they should have been in position, he answered that this "would depend upon the advice of the Harbour-master of the Marlborough Harbour Board" and the comment was made that "his requirements are paramount". I should record here that I consider this surprising in view of the evidence of Mr Hazley-Jones that, apart from requirements as to how areas should be marked, he had received no notices from the Harbour Board at any time about the removal of buoys. He stated in his evidence that, as far as he was aware, no buoys were in position at the time of the second and third advertisements. Mr Currie was not able to say whether the buoys were in position at relevant times nor did he have any direct knowledge of the Harbour Board's actions in the matter. In the circumstances, the inference I draw is that at the times when the second and third advertisements were published the buoys should have been in position and were not.

There was evidence in cross-examination regarding the "sifting" of material which was placed before the Minister including correspondence regarding the marker buoys. It was not disputed that some letters from the applicants were not referred to the Minister and there was a letter from Mr Hazley-Jones relating to the objections which had not been included, Mr Currie said, because it was "out of time". For completeness, it should be

recorded that Mr Currie accepted that the applicants had written on 18 June 1976 concerning their confusion over the proceedings and that he was unable to say that any reply had been sent to them. Regarding lack of acknowledgment of letters, Mr Currie did not agree that it would have been "prudent" to reply but he accepted that it would have been "courtesy" to have done so.

Mr Currie was asked about the date of the Minister's reply which he said was given on 3 May 1978 and which was worded, "Objection not upheld". As there were two objections to separate applications to farm, Mr Currie was asked about the form of the reply. His evidence was that the Department had accepted it as the reply to both objections. Mr Currie agreed that a lease had been asked for and that a licence had been granted.

Mr Currie was asked questions regarding his interpretation of s 7 (2), the evidence being that the letter of 21 April 1980 setting out the grounds for the Minister's decision was written by the Department without further reference to the Minister and was simply a departmental statement of the grounds for the decision as viewed by the departmental officer concerned. Mr Currie said this was the normal practice followed, based, in the present case, on the Minister's decision as quoted above. Mr Currie agreed that it was assumed as a matter of commonsense that the Minister had acted on the departmental report. Mr Currie did not agree that in setting out the grounds for the decision the meaning of the report had been departed from. Pressed on the matter, Mr Currie agreed that it was possible in such a situation that a reason given as a ground in the department's letter could have been a reason which was not in the Minister's mind. That I think was a fair answer. A significant point brought out in cross-examination was that there was no reference to the question of thinnings in the report to the Minister which Mr Currie appeared to have thought was there. And Mr Currie also agreed that there was certainly no reference in Mr Lambert's

objection to "the extracting of thinnings not being a problem". Mr Currie was asked whether there was any reason why the departmental report was not made available to the applicants. His answer was that, so far as he was aware, there was no specific requirement for that to be done and it was not the practice.

In re-examination as to marker buoys, Mr Currie said that on the second and third occasions advertisements were required there was no separate requirement for marker buoys to be repositioned. As to that topic, I am not satisfied that there was any requirement by statute that the buoys be replaced when there was a re-advertisement but, on the other hand, I accept that the manner in which the advertisements appeared was likely to cause doubt and confusion.

It is now necessary to summarize the very comprehensive arguments presented in this case in order to recapture the issues which emerged in the long drawn out matter. Basically the attitude of the applicants is that they have partly developed their property for forestry purposes and were wishing to continue with afforestation. They believe that the presence of the marine farms will prevent them from extracting timber from their property. They propose to take the timber from their property by means of cables to barges moored near the shoreline. It is this matter which has become the primary issue on the basis that it has not been considered, or not been considered by the Minister, with relevant information and explanations. Under this head a breach of the rules of natural justice was alleged. In addition, there were the preliminary procedural questions.

The first submission was that the decision on the objection was not taken by a person authorized to take it and that accordingly the decision was invalid. Referring to s 7 of the Act, it was pointed out that the statute empowers "the Controlling Authority" to decide

whether or not the objection is to be upheld. In the circumstances of this case "Controlling Authority" means, according to s 2 (1), "The Minister". "The Minister" is "the Minister of Agriculture and Fisheries". It was pointed out that the letter of 13 May 1978 notifying the applicants of the decision to reject the objection follows the wording of s 7 (1) very closely, even to the point of saying that the decision was taken by the Minister of Agriculture and Fisheries. The Minister was not named then nor in the recent letter of 21 April 1980 purporting to remedy the failure to provide grounds for the decision. In fact, the decision was taken by the Honourable Mr Bolger who signed as "Minister of Fisheries" and who indeed was at the relevant time the Minister of Fisheries and was not then or at any other time the Minister of Agriculture and Fisheries (nor the Minister of Agriculture). In short, it was submitted that there was no person who had that title at that time.

The history of appointments of the Ministers concerned shows that the Honourable Mr MacIntyre was the Minister of Agriculture and Fisheries until 8 March 1977. On that day the Governor-General accepted his resignation from that office and appointed him to be Minister of Agriculture and Mr Bolger (who until then had been his Parliamentary Under-Secretary) to be the Minister of Fisheries. That remained the situation until 13 December 1978 when the Governor-General accepted the Honourable Mr Bolger's resignation from the office of Minister of Fisheries and appointed the Honourable Mr MacIntyre to be Minister of Fisheries. Accordingly, it was argued, the Act authorized the Minister of Agriculture and Fisheries to take the decision, but the "decision" was taken by another person. It was submitted that accordingly it was invalid unless it could be shown that another provision in the Act, or some rule of law, allows one person to act for another. It was submitted that there was none. Mr Radich submitted that s 25 (e) of the Acts Interpretation Act 1924 could be invoked only if the office of Minister of Agriculture and Fisheries was vacant.

After considering the legislation, Mr Radich submitted that at the relevant time the office of Minister of Agriculture and Fisheries had no existence at all; that it was not a case of an existing office in respect of which there was a vacancy but that "there was no such office". It was submitted that the office had been disestablished by the action of the Governor-General on 8 March 1977. The Governor-General was able to disestablish the office of Minister of Agriculture and Fisheries because it was his creation; it was a prerogative or common law creation. It was not created by statute.

Mr Radich's second main submission was that the applicant for the marine farming lease in question had failed to "mark and keep marked the area applied for". He referred to s 5 (8) of the Marine Farming Act 1971 which reads:

> "Every applicant for a lease or licence shall if so required by the Secretary or, as the case may be, the principal administrative officer of the controlling authority, mark and keep marked the area applied for in such manner and for such period as the Secretary or principal administrative officer may specify to the applicant."

It was argued that the requirement that an applicant mark and keep marked the area is a mandatory requirement and that a failure to comply invalidated the application.

In his submissions on natural justice, Mr Radich contended that the decision on the objection was not taken in accordance with "the rules of natural justice generally" and was accordingly invalid. It was pointed out that ss 5 and 6 provide in some detail for the procedure to be followed by an applicant for a licence or lease and by the objector. Then s 7 (1) requires that, while the controlling authority is not bound to follow any formal procedure, he is to have regard to all submissions made by or on behalf of the objector and

the applicant, and to the rules of natural justice generally. It was contended that, as far as the submissions are concerned, the Minister was not provided with the applicants' comments on the objections nor with all the correspondence from the objectors. Material omitted included the letters of 27 January 1977, 27 February 1977 and 4 April 1977, in which the objectors drew attention to the failure of the applicant properly to mark out the area and asked (without reply) for an indication of the procedure to be followed.

The case for the applicants was that they wished to present their case and to answer that brought forward to their detriment. It was submitted that a Minister alert to his obligation to comply with "the rules of natural justice generally" might well have decided to follow a different course had matters been fully presented. It was argued that the Minister might well have acted differently had he known first of the applicants' complaints about the marking out and, secondly, of their requests that they be involved in the objection procedure. It was argued that the primary failure related to the second requirement of s 7 (1), in that the procedure followed did not comply with the "rules of natural justice generally". It was submitted that Parliament had by those words clearly indicated that it is not enough for the Minister to consider the letter of objection and any other submissions made by the objectors and the submissions of the applicant. The Minister must, in addition, it was claimed, comply with the "rules of natural justice generally". Mr Radich then relied on the statement of Lord Loreburn in Board of Education v Rice (1911) AC 179, 182, quoted with approval by Viscount Haldane in Local Government Board v Arlidge (1915) AC 120, 132-133:

> "...I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the

controversy for correcting or contradicting any relevant statement prejudicial to their view."

It was submitted that the Minister was in essentially the same position as the two Boards; that his basic task was administrative and executive and not judicial; he had no power to administer an oath; he need not - in general at least - examine witnesses; he was not subject to any particular formal procedure, but he must, it was submitted, give a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. It was submitted that there had been a failure in this respect.

Mr Radich then reviewed leading authorities as to the obligation to disclose reports, namely, Local Government v Arlidge (supra) where the House of Lords held that the Board did not have to disclose the report made to it, and Denton v Auckland City (1969) NZLR 256; South Otago Hospital Board v Nurses and Midwives Board (1972) NZLR 828, and James Aviation Ltd v Air Services Licensing Appeal Authority (1979) 1 NZLR 481, where the failure of the body making the decision to disclose a report was held to be a breach of natural justice.

The second branch of Mr Radich's argument as to natural justice was that the applicants "did not receive a 'hearing' in the proper sense." It was submitted they should have been given a proper opportunity to state their case to the Minister.

It was pointed out that s 6 (5) sets out the procedure to be followed by a person wishing to object to a Marine Farming application. He must:

(i) Within two months notify the Director-General in writing of his objection together with the grounds on which it is based.

(ii) Serve a copy on the applicant.

(iii) The applicant may then within 28 days

make written submissions on the objection.

(iv) If the applicant makes submissions he must serve a copy on the objector.

Mr Radich repeated that the Minister was obliged in terms of s 7 (1) to take into account "all submissions" and that, as had already been noted, he did not do this in this case. It was further submitted, however, that the procedures set forth in s 6 (5) do not exclude any further participation before the Minister by the parties involved. Because of the reference to natural justice included in s 7 (1), it was submitted that the Minister must grant a "hearing", independant of the obligation to give one party an opportunity to see and comment upon information put before him by another party.

It was accepted that opportunity to state one's own case, or being given a "hearing", does not necessarily mean that an oral hearing must be given. The submission was that whether a particular type of hearing is or is not adequate in the circumstances must depend on the circumstances and, in particular, upon the matters in issue. If the matters in issue are simple and without any contentious facts then a simple hearing without witnesses and in the form of an exchange of letters might be adequate. In the present case, however, it was argued many contentious matters of fact and opinion were involved so that it would have been almost impossible to determine those matters on the basis of correspondence being exchanged preparatory to the matter going before the Minister. It was submitted that the issues were such that expert evidence was required. To adequately determine the matter, it was contended, the Minister should have had before him evidence as to logging techniques, topography, water and soil conservation matters and the like.

Mr Radich, in stating the course of events, mentioned specifically that in their letter of 18 June 1976 the applicants wrote:

"In these circumstances it would be appreciated

if you would advise the form in which our objection will be forwarded to the Minister ",

a request which was not answered. It was submitted that having regard to the way in which the legislation has been enacted there could be no escape from the fact that a full and proper hearing must be given in accord with principles of natural justice.

Finally, under the heading of natural justice, it was submitted that the decision did not state the grounds of that decision and was accordingly invalid. It was noted that under s 7 of the Marine Farming Act 1971 the controlling authority may uphold an objection to an application for a marine farming licence if the authority was satisfied (inter alia) that the grant of the licence would "....adversely affect unduly the use by the proprietor thereof of any land adjoining or in the vicinity of the area...." It was submitted that a duty to provide the grounds for a decision can be fulfilled only by providing proper, adequate grounds, and cannot be fulfilled by merely reciting the matters in s 7 (1) upon which the authority could uphold an objection. Consequently, it was submitted, the letter dated 18 May 1978 informing the applicants of the Minister's decision cannot be said to have stated the "grounds" of the decision. It was argued that the duty to notify an objector of the grounds for a decision arises at the same time as the duty to give notice of a decision.

It was submitted that the nature of the "grounds" issued in April 1980 shows clearly that the report was of fundamental importance in the decision-making process and that it becomes apparent from the grounds stated that the Minister accepted what was in the report. It was submitted that a statutory duty to state the grounds for a decision has always been regarded by the Courts as mandatory - see Brayhead (Ascot) Ltd v Berkshire County Council (1964) 1 All ER 149. This was not disputed.

Presenting the argument for the first respondent, Mr Squire followed the order adopted by Mr Radich. First he dealt with the question whether the decision could be validly made by the Honourable Mr Bolger. Mr Squire pointed out that s 7 requires the decision as to whether an objection should be upheld to be made by the "controlling authority" who, under s 2, is the "Minister of Agriculture and Fisheries". Mr Squire accepted that the Minister of Fisheries (The Honourable Mr Bolger) was not at the relevant time the Minister of Agriculture and Fisheries. It was submitted, however, that Mr Radich's submission that s 25 (e) of the Acts Interpretation Act 1924 could only apply if the office of Minister of Agriculture and Fisheries was vacant at the relevant time was misconceived. The fallacy in the argument, it was submitted, lay in the notion that the resignation of the Minister of Agriculture and Fisheries resulted in the abolition of the office held by him. It was argued that at the time when the resignation of the Minister was accepted the Department was governed by the Ministry of Agriculture and Fisheries Act 1953 which provided, and continues to provide, that it will be under the control of the Minister of Agriculture and Fisheries. Mr Radich, in reply, submitted that the fact that the Act recognized the existence of a particular Minister, namely, a Minister of Agriculture and Fisheries, did not amount to the statutory creation of the office. The reality of the matter, it was submitted, was that the office of Minister of Agriculture and Fisheries was no longer in existence. In short, it was argued the statute was defective and needed amendment.

Section 25 (e) provides that "words directing or empowering a responsible Minister of the Crown to do any act or thing...include any member of the Executive Council of New Zealand acting for, or, if the office is vacant, in the place of such Minister..." The conclusion I have reached is that s 25 (e) is sufficiently wide to cover the present case. By statute the "controlling authority" is the Minister of Agriculture and Fisheries.

At the relevant time two different Ministers were in fact responsible for a portfolio sometimes held by one Minister, namely, a Minister of Agriculture and a Minister of Fisheries. Both were members of the Executive Council and I am satisfied that s 25 (e) is wide enough to cover a case such as the present where the act of one Minister in carrying out a function of the controlling authority was questioned. Mr Radich's submission was that the office of Minister of Agriculture and Fisheries had ceased to exist. In my view, that submission is met by the last words of s 25 (e). By dividing the responsibility for the portfolio of Agriculture and Fisheries and appointing a Minister of Agriculture and a Minister of Fisheries those Ministers, in my opinion, are the "successors in such office." Accordingly, in my view, the Honourable Mr Bolger was entitled to consider the objection as a member of the Executive Council acting for the controlling authority. In my opinion, applying the language of s 25 (e), the intention of the Legislature is clear but, assuming there is any doubt, I consider that s 5 (j) of the Acts Interpretation Act may be invoked to "ensure the attainment of the object" of the Marine Farming Act.

Regarding Mr Radich's second submission as to the absence of marker buoys, Mr Squire dealt with the evidence and submitted that on the occasions when further advertisements were necessary the applicant was not required to have marker buoys in position. He also stressed that the applicants had been informed by letter that no further formal objection was required from them. As to the facts, I do not agree that the evidence supports the view that buoys were kept in position. Mr Squire's basic submission, however, was that marking by buoys should not be treated as more than a means of identifying the area at the time when the application was made in 1975 and that the evidence was sufficient to show that the buoys were in position at that time.

Section 5 (8) reads:

> "Every applicant for a lease or licence shall, if so required by the Secretary or, as the case may be, the principal administrative officer of the controlling authority, mark and keep marked the area applied for in such manner and for such period as the Secretary or principal administrative officer may specify to the applicant."

It was submitted that the requirement is discretionary and not so important that non-compliance is decisive as a matter of jurisdiction. Further, it was submitted that there was nothing in the evidence suggesting that the absence of the buoys was prejudicial to the applicants so as to amount to a denial of natural justice. Mr Squire referred to the applicants' complaint that lack of marker buoys had led to confusion and uncertainty as to the area applied but submitted that there was no claim that they were prejudiced or disadvantaged in presenting their objection.

In reply, Mr Radich submitted that the obligation was to mark with buoys and keep the area marked. It was pointed out that all the advertisements referred to buoys being in position. It was unreal, he submitted, to suggest that it was unimportant whether that was correct having regard to the obvious reason for having marker buoys. There is certainly force in that submission as a matter of commonsense. In my view, Mr Radich was also entitled to make the observation that the evidence fell short of establishing that the marking out had ever been carried out as required. It was not unreasonable to say that it was surprising that no affidavit was made by Mr Stonehouse, who was said to be the person who had been responsible for the marking out originally. It must not be overlooked that a

mandatory requirement of a notice is that the area shall be "described so as to enable it to be readily identified." I agree with Mr Radich that where buoys are the only method of marking out their absence should not be dismissed as unimportant. Mr Radich submitted that the applicants were prejudiced by the failure to mark out as required because it added to the "muddlement" and the confusion as to the date for objections and the need for identification in properly making objections. Further, it was submitted that the test was not whether the applicants were prejudiced but whether the failure to mark was likely to have an effect on a reasonable potential objector. It was pointed out that one of the mandatory requirements is that the notice shall:

> "describe the area applied for so as to enable it to be readily identified."

In the present case that depended on the presence of buoys.

The conclusion I have reached is that the absence of the buoys at the time of the second and third advertisements should not be regarded as invalidating the granting of the application to the second respondent. In the present case it has been expressly stated on behalf of the controlling authority that Mr Hazley-Jones was not required to keep the area marked. On the other hand, I consider what occurred does have a bearing (with other matters) on the important question yet to be dealt with, namely, whether this was a case where there was a denial of natural justice. It is helpful, I think, to refer at this point to the words of Cooke J in A J Burr Ltd v Lower Hutt Borough Council (1980) 2 NZLR 1, 4:

> "When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given

> rather to the seriousness of the error and all the circumstances of the case. Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account."

The second stage of memoranda in this case followed the second hearing which, as I have already noted, left the argument unfinished. Mr Radich's first written submission in reply dealt in some detail with the fact that a licence had been granted when the application was for a lease. This matter was not dealt with as an issue in the applicants' case but Mr Squire had argued that, having regard to s 8, the controlling authority was empowered to offer either a lease or a licence. In the circumstances I granted Mr Squire leave to reply on this point and he submitted the final memorandum in the case.

Mr Squire pointed out, first, that the issue did not arise on the pleadings but he conceded that an amendment might be made subject to an order as to costs. In any event it was submitted the Minister may offer either a lease or a licence under s 8 (1) and a lease or a licence is then executed by the controlling authority and the applicant under s 8 (4). Mr Squire pointed out that s 8 (5) provides that an applicant for a lease or licence may be required to supply "...such other information as may be necessary to enable the controlling authority to decide whether or not a lease or licence should be offered to the applicant." As he properly added, the section is wide enough to include a request for information from an applicant to satisfy the controlling authority that proper rights of objection will

not be defeated. The significance of this is obvious in a case where the rights of individuals are in issue.

Mr Radich reviewed the relevant provisions of the Act as to leases and licences. There is no dispute as to most of these matters which show that rights of a lessee are substantially greater. There was no doubt that, on the evidence, the second respondent applied for a lease and on 15 November 1978 he was granted a licence. It may well be, as Mr Radich submitted, that if an application were made for a licence possible objectors might not object to a licence but would object to a lease. I do not agree, however, that that argument has any weight in a case where a licence is issued when the application is for a lease.

For these reasons I reject Mr Radich's submission that on an application for a lease the Minister was not entitled to offer the applicant a licence.

In his submissions regarding natural justice, Mr Squire submitted that s 7 (1) simply gives statutory expression to the rule that where a statute lays down no specific procedure the Courts will require a quasi-judicial or administrative body to follow a procedure consonant with the requirements of natural justice appropriate to its functions - see Lower Hutt City Council v Bank (1974) 1 NZLR 545, and Stininato v Auckland Boxing Association (Inc) (1978) 1 NZLR 1. It was submitted that in that context natural justice simply means fairness as stated in Daganayasi v Minister of Immigration (1980) 2 NZLR 130, 140. It was submitted that in any given case the first and most important consideration is an inquiry into the extent to which the relevant statute necessarily excludes or modifies the broad requirements of natural justice/fairness. At that point Mr Squire submitted that the requirement to observe the rules of natural justice did not arise until after objections have been made and, that being so, it was of special significance that an objector is required

to state the grounds on which the objection is based, in that it must be on the basis of the issues which arise from the written objection and application that the Minister will be required to decide in accord with natural justice within the terms of s 7 (1). In terms of s 7 it was argued the obligation to uphold an objection arises only if the controlling authority is satisfied that the issue of a lease or licence would result in any one or more of the circumstances listed in (a) to (d) inclusive, and that if the controlling authority is not so satisfied no obligation to uphold the objection arises. The significance of that, it was said, is that in exercising his statutory function to decide whether or not an objection in any case should be upheld the controlling authority can properly have regard only to information or submissions which bear on any one or more of the matters listed in (a) to (d). I do not think there is any dispute that that is so but there remains for consideration in the present case the application of the rules of natural justice in considering the question whether the grant of the licence would "adversely affect unduly the use by the proprietor thereof of any land adjoining or in the vicinity of the area."

It will be useful, I think, at this stage to refer in more detail to Mr Radich's argument having regard especially to the application of the rules of natural justice in the present case. In my opinion Mr Radich is correct that the requirement of s 7 that the controlling authority must observe the rules of natural justice in making his decision does not mean that rules of fairness can be ignored in the stages leading up to the matter going before the controlling authority. This is of importance, of course, having regard particularly to the complaints by the applicants that they were not given any 'hearing' beyond mere consideration of their written objection and did not know the contents of the report to the Minister. As I have said, Mr Squire had argued that, in terms of s 6 (5), an objector has but

one opportunity to put forward such submissions and information as he considers will support his objection. Mr Radich submitted that it was this attitude adopted by the Department which had caused the major problems in the case and it was submitted that such an interpretation of s 6 (5) and s 7 was wrong. It was argued that the language of the sections shows that a hearing (not necessarily oral) is contemplated. It was argued that the reference to no formal procedure, coupled with the requirement as to natural justice, makes it plain that something more than reading the papers is required; it was submitted that "some further exchange of argument after the completion of the preliminary papers was contemplated." It was submitted that s 6 (5) supports that view, having regard to the steps the applicant is required to take and the machinery provided for the applicant to make submissions. It was argued that the issues raised in the present case involving basic questions regarding the competing uses of contiguous water and land between individuals were not the kind of issues which the Legislature would intend should be resolved "peremptorily". It was argued that this was the kind of case where an objector would be likely to call the evidence of an expert to support his grounds of objection and it is unreasonable to suggest that matters of this kind could be included in the original objection, especially when the case for the applicant and the views of departmental officials were not known. That this view is correct was supported, it was submitted, bearing in mind that the controlling authority could be a harbour board or [illegible] authority, and that there were potential conflicts of view between two or more objectors and between objectors and the applicant as well as with officers of the Department.

Mr Squire submitted that the letters dated 27 January 1977, 27 February 1977 and 4 April 1977 did not have any bearing on issues properly arising

under s 7. On the other hand, Mr Radich submitted that had the correspondence been before the Minister he would have been aware that correspondence had not been answered. It was submitted that the Department's answer that that correspondence had nothing to do with the criteria in s 7 would mean that complaints as to procedural deficiencies were irrelevant. It was argued (and I think rightly) that the controlling authority needs to have before him facts which affect the situation leading up to the exercise of his discretion. I do not agree with Mr Squire that there is simply no foundation in fact for the applicants' claim that there was a breach of rules of natural justice as a result of the Minister not having had the opportunity to have regard to the three letters. In my view, it was a factor to be taken into account with other matters.

Regarding the complaint of the applicants that they were given no opportunity to comment on the contents of the Director-General's report, Mr Squire accepted that the test was whether it could be said the applicants were treated unfairly in being denied that opportunity. It was conceded that there are cases, examples of which were cited, where the dictates of "natural justice/fairness", as it was put, require that a report be disclosed. It was submitted that the question of unfairness depends on the statutory framework, the purpose of the report and the part played in the matter by those responsible for its preparation and the contents. The statutory framework is quite clear, as already stated, but Mr Squire submitted again that, as the requirement was that the objection in writing must contain the grounds on which it is based, its clarity and explicit relevant terms are the responsibility of the objector.

Again I shall refer to Mr Radich's submissions in some detail. He contended that the significance of the matter was that Mr Currie felt able in his oral evidence to say that the Minister accepted everything in the report and based his decision on it. Mr Radich submitted that the applicants' case was that the report

clearly contained contentious statements and also errors. It was pointed out that the first respondent claimed that procedural requirements had been complied with but that this was strongly disputed. Secondly, it was said the report was in terms likely to leave the controlling authority with the feeling that there was no conflict regarding the planting and tending and thinning of the trees. On the contrary, it was submitted that the report is unclear and shows that its author had misinterpreted the information. It was submitted that references to reconsideration of the problems at the end of the term of the licence overlooked that the applicants have no right to be heard at that stage. Most importantly, it was submitted, in giving a picture of logging operations "into" the water the Minister was completely misinformed, the actual proposal being to use aerial cables from the bush to a barge. Then there was a reference to the Ombudsman's report which would have been answered by saying that that idea had been investigated and found to be impracticable. Lastly, it was argued, the report had introduced factual material and opinions of others to which the applicants should and would have been in a position to reply. He submitted that it contained new facts and facts and opinions from outside the Department which were not known to the applicants. The attitude of the applicants is that had they known of the contents of the report and been given the opportunity to reply they would have been in a position to satisfy the Minister that the report was seriously wrong. It was submitted that the report must have had "a profound effect" on the decision-maker's thinking.

In my view, Mr Squire's submission that it was for the objector to make out his objection fully and clearly goes too far if it is intended to prevent an objector from complaining that matters set out in the report were inaccurate or required explanation which would have placed a different complexion upon them. I repeat that the crux of the present case was whether the grant of the licence "would adversely affect unduly the

use by the proprietor thereof of any land adjoining or in the vicinity of the area." I am unable to agree that the first respondent can rely on the contents of the objection if it is inadequate as a result of the manner in which the Department (no doubt in good faith) has presented the material to the Minister. As Mr Squire properly conceded, a factor to be considered is "the part played in the matter by those responsible" for the preparation and contents of the report. Mr Squire also conceded that "the role of the Director-General is simply to ensure that all relevant material is before the Minister for his decision," and Mr Squire added that "neither the Director-General nor his Department is a party in any sense to the issues required to be determined by the Minister under s 7 (1)." As he said, the report was prepared to "introduce" the Minister to the matter he has to determine. In my view it is only necessary to state those matters to underline the importance of the Department's role in ensuring that relevant material is before the Minister and that it is complete both as to fact and opinion, if opinions are expressed. It is in these circumstances that the question whether a report containing the material now disclosed, on which the objector made no submission and which he has had no opportunity to see, amounts to a breach of the rules of natural justice.

In considering the matters of complaint, Mr Squire drew attention to the reference in the objection to the only practicable method of "extracting thinnings and native timber directly to water" and submitted that the comment in the report to the Minister did not introduce new material but expressed a different point of view on the issues. I am quite unable to accept the submission that the comments made (again no doubt in good faith) did not affect the basis of the objection, or that the report as presented did not mean that the objection was considered by the Minister on a wrong basis. The short point, in my view, is that in the course of obtaining material and making comments for the Minister's assistance the method of conveying the timber to barges in the water was not brought to

the Minister's attention. On the contrary, methods which would not have been practicable, and were not proposed by the applicants, were mentioned in a manner which, in my view, would inevitably have supported the decision the Minister reached. Whether the method proposed is practicable, or practicable in areas where mussel farming is being carried out, is not a matter on which there was evidence, nor was it a matter for the Court to decide. In my opinion, the fact that there are real questions of this kind which have not been investigated means that the matter was not considered with all relevant material available. In those circumstances I am satisfied that the preparation and presentation of the report were unsatisfactory and that because the applicants had no opportunity of commenting on it the information before the Minister was incomplete and likely to mislead him.

I do not overlook that Mr Squire submitted that the applicants did not refer to "logging by aerial cable" and that they should not be entitled to complain that the Minister did not know what they proposed. In my view that is an over-simplification of the position, bearing in mind that the report makes an assumption that the proposed logging would be done in a manner which would not have been permitted.

The principles applicable have been referred to above. I think the following observations of Cooke J in Paganayasi's case, referred to by counsel, provide helpful guidance in the present case:

(at p 142)

"....the Minister must be free to obtain the views of his departmental officers on the appeal without having to disclose those views to the appellant,"

and later:

"This is part of the working of the ordinary governmental machinery and would have been expected by the legislature: see Bushell v

Secretary of State for the Environment
(1980) 2 All ER 608.

Cooke J also said, at p 143:

> "The appellant should have a fair opportunity of correcting or contradicting any relevant statement prejudicial to his or her view. Probably the same should apply if the person designated to make inquiries and report happened to be an officer of the department rather than an outsider, for it would then be more than a matter of normal consultation within the department. However, we are not now called upon to rule on such a case."

Applying the accepted principles, I have come to the conclusion that it was unfair in the circumstances of the present case not to disclose the contents of the report to the applicants. That being so, I consider that the position must be regarded as unfair and a breach of the rules of natural justice. This is a case where I respectfully adopt the words of Cooke J - "overall evaluation" already quoted from his judgment in A J Burr Ltd v Blenheim Borough Council (supra) at p 4.

There being other matters relied on under the head of natural justice, it is appropriate that I should deal with them as the order I propose to make is under s 4 (5) of the Judicature Amendment Act 1972. Under that subsection the Court is required to advise the person concerned with "its reasons" and give "such directions as it thinks just as to the reconsideration of the whole or any part of the matter that is referred back for reconsideration."

Mr Squire submitted that the applicants' complaint that they were not given an adequate hearing was a "rigid technical and overly literal" approach to the requirements of natural justice. He submitted that in terms of the Act the stipulated procedure was similar to that required

under s 20A of the Immigration Act 1964. It was submitted that that Act provided that the request to the Minister should set out the full circumstances on which it was based thus negating any suggestion of a need for an oral hearing. He argued that s 6 (5) indicated a similar approach by the Legislature in the present case. In my view the difference in the nature of the statutes is such that it cannot be said there is any close analogy. Section 20A deals with appeals to the Minister against deportation following conviction for an offence as a prohibited immigrant. In the present case the issue is between individuals and the factors affecting the matter are entirely different.

Mr Squire submitted that there was no denial of natural justice in dealing with the matter on the papers. Any deficiency in adequately explaining their objection was no basis, it was argued, for any claim to a denial of natural justice. I do not think it is necessary to deal with the matter in detail having regard to the reasons I have given concerning the report. Mr Radich did not contend that a viva voce hearing was necessary but simply that the Minister should have the circumstances adequately presented to him. For the reasons I have given that was not done.

As to the complaint of "inadequacy of decision", Mr Squire submitted that the statutory obligation was to provide an applicant with written notice of the Minister's decision and the grounds thereof (s 7 (2).). It was submitted that it was significant that the duty to do so was that of the "Secretary" or "the principal administrative officer of the controlling authority". It was also contended that the duty to give reasons for a decision is separate from the duty to observe the rules of natural justice lies in the fact that failure to give adequate or proper reasons in discharge of the statutory obligation does not vitiate the decision itself. Mr Squire conceded, however, that the reasons initially given by letter on 18 May 1979 "are probably not a proper

discharge of the statutory obligations". For that reason, the letter of 21 April 1980 was written when, as Mr Squire put it, the reasons for the objection not being upheld "were amplified".

Mr Radich pointed out that under s 7 (2) there was an obligation on the controlling authority to promulgate the grounds for the decision which produced an implied obligation on the decision-maker to give reasons for his decision. It was submitted that the grounds belatedly issued were of no consequence having been formulated without reference to the Minister. In the result, it was submitted, neither the decision-maker nor the administrator had complied with the statutory obligation in that no reasons have ever been given by the decision-maker.

All that I need say, I think, is that in dealing with the matter on reconsideration what is required is not in dispute.

For the reasons I have endeavoured to set out comprehensively, I make an order pursuant to s 4 (5) (as amended) of the Judicature Amendment Act 1972 that the matter be referred back to the first respondent to reconsider and determine having regard to the matters to which I have referred in considering the rules of natural justice. If necessary, I shall hear counsel as to the form of a more detailed order and as to costs.

Solicitors for the applicants: Hill, Lundon, Radich (Blenheim)

Solicitors for the first respondent: Crown Law Office (Welling