

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.400/83

IN THE MATTER of Part I of the
Judicature Amendment
Act 1972

AND

IN THE MATTER of an application for
review of a Notice by
GEORGE F. GAIR
Minister of Transport
purportedly pursuant
to Section 241C,
Harbours Act 1950

BETWEEN

MARINE ENTERPRISES
LIMITED a duly
incorporated Company
having its registered
offices at Queenstown

Applicant

A N D

GEORGE F. GAIR of
Wellington, Minister
of Transport

Respondent

Hearing: 2 April 1984

Counsel: T.J. Shiels for Applicant
A. Black for Shotover Gorge Jet Boats Ltd
W.R. ~~M.~~ Flaus for Respondent
A.J. Forbes for Lakes District Waterways Authority

Judgment:

16 APR 1984

JUDGMENT OF ROPER J.

This is a motion for review in which the validity of
certain regulations made pursuant to the Harbours Act 1950, and

a Gazette Notice which purports to be made under the authority of those regulations is challenged. The hearing was limited to a consideration of the Applicant's purely legal grounds of objection to the regulations and notice, with allegations as regards the notice of unfairness, breach of natural justice and mistake of fact to be determined at a later hearing when the factual background will have to be considered in detail.

All that need be said on the facts at this stage is that the Applicant company is anxious to conduct commercial jet boating operations on the Shotover River between Tucker Beach and Edith Cavell Bridge, where presently a rival company, Shotover Gorge Jet Boats Limited has a virtual monopoly of the tourist trade.

By an Order in Council of the 20th June 1983 the control of the riverbed and waters of the Shotover River (and other areas) was granted to a committee of nine, to be known as the Lakes District Waterways Authority, and made up of members appointed by local County or Borough Councils and the Commissioner of Crown Lands or his nominee. The Order in Council was made pursuant to s.8A (which deals with the control of waters) and s.165 (which deals with the control of sea, lake and navigable river beds).

S.8A(1) provides:-

" (1) Where any harbour or area of the sea or lake or river that is not under the control or management of a Harbour Board borders on the district of any public body or on the districts of 2 or more public bodies or is contained within any such district, then, on the request of the public body or on the joint request of 2 or more such public bodies (whether or not of the same

kind) the Governor-General may, by Order in Council, grant to the public body, or, as the case may be, to one of those public bodies or to those public bodies jointly, the control, for such period not exceeding 21 years as is specified in the order, of that harbour or area of the sea or lake or river, or of such part or parts thereof as are specified in the order."

S.8A(3) provides:-

" (3) Any Order in Council under this section may be made subject to such terms, conditions, and limitations as the Governor-General thinks fit, including (but without limiting the generality of the foregoing provisions of this subsection) provisions authorising the public body or, as the case may be, the public bodies jointly, for and within the limits of the harbour or area of the sea or lake or river under its or their control or any part or parts thereof -

(a) By bylaw to do anything which a Harbour Board may do by bylaw under section 232 of this Act:

(b) To appoint harbourmasters and other officers and to define or limit their powers and duties:

(c) To exercise and perform such of the powers, functions, duties, and authorities of a Harbour Board as the Governor-General thinks fit."

The Order-in-Council authorized the Authority, by bylaw to do anything which a Harbour Board may do by bylaw under s.232 of the Harbours Act; and to appoint harbourmasters and other officers. The only power of a Harbour Board granted by the Order-in-Council to the Authority pursuant to s.8A(3)(c) is the power to borrow money for harbour works.

The Otago Inland Harbour Regulations 1969 Amendment No. 4. (referred to hereafter as the September regulations) made on the 19th September 1983 provide, so far as is relevant:-

" 4. Activities in lower Shotover River -

(1) In this regulation and regulation 4A of these regulations -

'Harbourmaster' means the Harbourmaster of Lake Wakatipu Harbour; and includes his deputy:

'Lower Shotover River' means that part of the Shotover River between Tucker Beach and the Edith Cavell Bridge that is within the limits of Lake Wakatipu Harbour.

(2) The Minister may, by notice in the Gazette, reserve the use of the lower Shotover River for the use of any class of vessel, and may prohibit bathing, fishing, or waterskiing, and the use of any other class of vessel in the lower Shotover River.

(3) Every person shall comply with any notice given under subclause (2) of this regulation.

" 4A. Powers of Harbourmaster in respect of lower Shotover River -

(1) The Harbourmaster may, in respect of the lower Shotover River (being an inland harbour where special hazards exist), -

(a) Give directions to the owner or to the person for the time being in charge of any vessel of a class for which the use of the lower Shotover River is reserved as to the launching, landing, positioning, or securing of that vessel, or as to the time and manner in which that vessel may enter into, depart from, or be in, the lower Shotover River:

(b) Give directions in respect of any such vessel carrying passengers for hire or

reward for the purpose of the safety of those passengers as to the manner in which the vessel may be operated in the lower Shotover River; including directions as to the speed and equipment of that vessel and the establishment and maintenance of communications between that vessel and the shore or other vessels.

(2) The Harbourmaster shall exercise the powers conferred on him by subclause (1) of this regulation fairly and without bias."

And on the 13th October 1983 the Minister, acting under the authority of regulation 4(2) above, gazetted this notice:-

"I, George Fredrick Gair, Minister of Transport, acting under the authority contained in regulation 4A of the Otago Inland Harbour Regulations 1969, hereby declare that part of the Shotover River between Tucker Beach and Edith Cavell Bridge is reserved for the use of jet boats plying for hire or reward or for the training of operators of such jet boats and that the use of any other vessel or class of vessel or bathing, fishing, waterskiing are prohibited within the aforesaid area."

(The notice actually refers to the authority contained in regulation 4A which is obviously a drafting error.)

'On the 21st December the Minister gazetted this notice (hereafter referred to as "the notice"):-

"I, George Frederick Gair, Minister of Transport acting under the authority contained in regulation 4(2) of the Otago Inland Harbour Regulations 1969, hereby declare that the part of the Shotover River between Tucker Beach and Edith Cavell Bridge is reserved for the use of jet

boats operated by Shotover Gorge Jet Boats Limited or any other vessel authorised by them, and that the use of any other vessel or class of vessel, or fishing or bathing are prohibited within the aforesaid area, and I hereby revoke the Shotover River Notice 1983, published in the New Zealand Gazette, 13 October 1983."

That notice effectively excluded the Applicant company from operating its jet boats on the Shotover as it had been doing in a limited way up to that time because the prospects of Shotover Gorge Jet Boats Limited authorising it to operate pursuant to the notice must be so remote that they can be disregarded.

Mr Shiels' first submission concerned the September regulations. He argued that they were void and invalid as there was no jurisdiction for their making. They purport to be made pursuant to Sections 6 and 241C of the Act. Subsections (1) and (2) of s.6 provide:-

" 6. (1) Subject to any Order in Council made under subsection (2) of this section, the Minister shall, in relation to any harbour where there is no Harbour Board, have all the powers, functions, duties, and authorities that are conferred by this Act on Harbour Boards in respect of harbours.

(2) The Governor-General may, by Order in Council, exercise in relation to any harbour where there is no Harbour Board any power that could be exercised by bylaws by a Harbour Board if a Harbour Board had jurisdiction over the harbour."

And s.241C(1) and (2) read:-

" (1) Where the Governor-General in Council has power under section 6(2) or under any other provision of this Act to make regulations in respect of harbours, navigable lakes, or navigable rivers, or particular harbours, navigable lakes, or navigable rivers he may, in exercise of that power but subject to section 241(2) of this Act, make regulations applicable only to inland harbours or a specified inland harbour.

(2) Any such regulations may empower the Minister, by notice in the Gazette, to prohibit bathing, fishing, or waterskiing in any inland harbour and the use or mooring of any vessel or any class of vessel or any raft in any inland harbour, or reserve any part of an inland harbour for any of the foregoing activities and prohibit any other of the foregoing activities therein; any such prohibition may be either absolute or conditional upon observance of conditions prescribed by the Minister by notice in the Gazette."

The Lakes District Waterways Authority does not come within the definition of a "harbour board" as enacted in s.2, as Mr Shiels accepted, so that prima facie it was open to the Governor-General to exercise his powers under s.6(2) in relation to the Shotover River as he did in making the September regulations. Mr Shiels' point was that if it was open to the Governor-General to so act there was then a duplication of powers, with both the Governor-General (pursuant to s.6(2)) and the Authority (pursuant to s.8A(3)(a)) having full bylaw making authority in respect of the same waters. He submitted that this impractical situation could not have been intended by the Legislature, and that the only reasonable interpretation was that when the control of waters was granted to a public body under s.8A there was no reservation of the Governor-General's bylaw making powers under s.6(2) in relation to those waters.

The difficulty Mr Shiels faces on this submission is that his interpretation of s.6(2) requires doing violence to its clear terms, either by giving the term "Harbour Board" an extended interpretation, or treating the subsection as though it read "no Harbour Board or grant of control to a public body". That is too bold a step for me. Furthermore, as Mr Flaus pointed out, the Act recognises that dual control can arise. S.8A(9) provides:-

" (9) On the commencement of any bylaws made pursuant to this section and relating to the matters specified in paragraph (42) of section 232 of this Act, and so long as they remain in force, the Water Recreation Regulations 1979 and any regulations made in amendment thereof or in substitution therefor or made under the authority of section 241A of this Act shall not apply within the area to which the bylaws apply.

Para. (42) of s.232 and s.241A both provide for the regulation and control of, and the prohibition of nuisances arising from the use of all types of small craft including yachts, motor-boats and rafts, and are in very similar terms. It is to be noted that s.8A(9) does not limit the application of s.241C, for the very good reason in my opinion (and here I am anticipating Mr Shiels' next submission) that s.232, which is the bylaw section, does not provide for the type of control envisaged by s.241C(2).

I therefore reject Mr Shiels' first submission. His next concerned the effect of s.241C(2). He submitted that that subsection did not of itself confer the powers referred to therein but simply conferred on the Minister a delegated authority to exercise the powers that could be exercised by bylaw, pursuant to s.232, to bring about the aims of s.241C(2). As said earlier I have already anticipated this submission. In my opinion there is no jurisdiction provided

by any of the many paragraphs of s.232 to do what is envisaged by s.241C(2). The September regulations have empowered the Minister to do precisely what the Act provides for, and I think that is the end of the matter. In short s.241C(2) creates a source of power to make regulations which is in addition to the bylaw power of s.232.

I turn now to Mr Shiels' submissions on the notice and it is convenient to set out again the relevant power conferred on the Minister by the September Regulations. It is this:-

" (2) The Minister may, by notice in the Gazette, reserve the use of the lower Shotover River for the use of any class of vessel, and may prohibit bathing, fishing, or waterskiing, and the use of any other class of vessel in the lower Shotover River."

What the Minister has done by the notice is to reserve the use of the lower Shotover "for the use of jet boats operated by Shotover Gorge Jet Boats Limited or any other vessel authorised by them" and prohibited all other vessels or class of vessel, fishing and bathing. (Whether intended or not it appears that rafts and surfboards do not by definition come within the prohibition. Further, although all classes of vessels are prohibited, waterskiing is not, a circumstance which could raise an interesting argument.)

Mr Shiels submitted that the reservation of use for Shotover Gorge's jet boats, or any other vessel authorised by it, did not amount to a reservation for the use of "a class of vessel" as provided by Reg. 4(2). An affidavit by Mr T.D. Gamble, Managing Director of Shotover Gorge, has been filed giving details of the hull design and motive power of the company's jet boats, but that is unhelpful. In terms of the

notice it would seem that the use of any type of jet boat, and in any numbers, provided they were operated by Shotover Gorge, would be reserved; and vessels authorised by it could be of any type.

Mr Shiels submitted that "class" in this context referred to physical characteristics and not ownership. Mr Flaus, on the other hand, relied on this definition in the Shorter Oxford Dictionary:-

"A number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division."

Mr Flaus made the point that the urgency of the situation, with river safety at stake, called for the type of "class" referred to in the notice. I would agree that when a "class" is spoken of it is necessary to ascertain the purpose for which, or the respect in which, the classification is to be made, but I cannot agree that the term can vary in meaning depending on the urgency of its application. I just cannot accept that mere ownership or authorisation by a named individual of vessels, which could be of all shapes and sizes, could constitute a "class" of vessel for the purposes of s.241C(2). It could hardly be said even in terms of Mr Flaus' preferred definition that the vessels had "common attributes", or could be "grouped together under a general or 'class' name". If Mr Flaus is right it would be equally open to the Minister to prohibit bathing or fishing except by named persons, and the September Regulations then become in effect a vehicle for licensing, a subject which is more appropriately dealt with under the Transport Act.

It is to be noted that the order appears to authorize Shotover Gorge to do something which is not within the

Minister's own power. By the September Regulations the Minister may only reserve the use to, or prohibit the use of "classes" of vessels. S.241C(2) provides for the control of "any vessel or any class of vessel" but the Minister has not been given power to deal with individual vessels by the September Regulations although the notice gives Shotover Gorge that power.

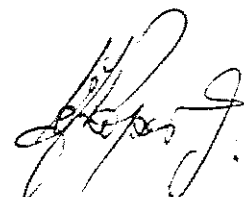
The question of severance was raised by Mr Flaus in the event that I should find that "jet boats operated by Shotover Gorge" constituted a class, while "any other vessel authorised by it" did not. For reasons already stated I am of the opinion that the second category could not stand in any event, and in the light of my conclusions that the first category does not constitute a "class" no more need be said on the question of severance.

In the light of my findings it is unnecessary to consider Mr Shiels' further submissions on sub-delegation (which could have been met by severance if I had found that jet boats operated by Shotover Gorge constituted a class) and repugnancy.

It follows that the Applicant is entitled to the order sought, namely that the order is void and invalid, but in the light of submissions made by Mr Flaus and Mr Black I do not propose to make the formal order at this time.

I leave it to Counsel to decide the next step.

Solicitors:
Paterson & Lang, Dunedin for Applicant
Crown Law Office, Wellington, for Respondent

A handwritten signature in black ink, appearing to be 'A. P. J.', is located in the bottom right corner of the page.