IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1730

	IN THE MATTER OF	the Resource Management Act 1991
	BETWEEN	BAYSWATER MARINA HOLDINGS LTD Appellant
	AND	NORTH SHORE CITY COUNCIL Respondent
	AND	AUCKLAND REGIONAL COUNCIL Interested Party

Hearing: 27 August 2009

Counsel: R Brabant for Appellant
P M S McNamara and B S Carruthers for Respondent
A M B Green and L S Fraser for Auckland Regional Council

Judgment: 9 September 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 9 September 2009 at 3.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Russell McVeagh, PO Box 8, Auckland
Simpson Grierson, Private Bag 92518, Auckland
Brookfields, PO Box 240, Auckland
Counsel:
R Brabant, PO Box 1502, Shortland Street, Auckland

Contents

Introduction

[1] Bayswater Marina Holdings Ltd (BML) appealed to the Environment Court against a decision of the North Shore City Council (the City Council) that determined the most appropriate planning conditions for reclaimed land, on which the Bayswater Marina complex is situated. The Environment Court (Judge J A Smith, Commissioner Menzies and Commissioner Stewart) upheld the City Council's decision.

[2] BML appeals to this Court against the Environment Court's decision. Appeals may only be brought to this Court on questions of law: s 299 of the Resource Management Act 1991 (the Act). Five discrete points of appeal were initially advanced but, during the course of the hearing, it became clear that they could be distilled into a single point. BML contends that the Court made an error of law, in rejecting BML's submission that, once a certificate had been issued under s 245 of the Act confirming that the reclamation had been completed, the terms of a deemed coastal permit ceased to have effect.

[3] Mr Brabant, for BML, submits that, because of that error, the Court proceeded to determine the appeal on a false premise; namely, that the starting point for consideration was the need to preserve full public rights of use over reclaimed land that was formerly within the coastal marine area.

[4] Mr McNamara, for the City Council submits that, on the approach taken by the Environment Court, there was no material error justifying interference with that Court's decision.

[5] The Auckland Regional Council (the Regional Council) has jurisdiction over the coastal marine area. The Regional Council had standing as an entity that appeared before the Environment Court. Mr Green, on its behalf, supported the submissions made by Mr McNamara, with some modifications to reflect his own client's own perspective.

Background to the appeal

[6] On 24 February 1989, planning consents were given, under s 110 of the Town and Country Planning Act 1977, for a development involving the reclamation of land and creation of a marina at Bayswater, on the North Shore. The proposal involved the creation of reclaimed land by excavating the Waitemata Harbour at O'Neill's Point, near Bayswater. This consent represented the relevant planning approval for the development.

[7] On 28 February 1989, the (now defunct) Takapuna City Council granted consent for the construction and use of buildings on Bayswater Wharf. At that time, the wharf stood on land that had, previously, been reclaimed. This consent was allowed to lapse.

[8] On 26 June 1989, an Order in Council was promulgated, under s 175(3) of the Harbours Act 1950, to authorise one of the developers to reclaim land. The Order in Council imposed conditions that went beyond the scope of the work to be undertaken to carry out reclamation. The conditions imposed included the amelioration of any detrimental effect caused to the hydraulics or sedimentation in the bay in front of the Takapuna Boating Club, as well as the development and implementation of landscaping and public open space on the areas of new reclamation.

[9] All counsel agreed that the conditions imposed by the Order in Council were within the powers conferred by s 175 of the Harbours Act. I proceed on that basis, without further inquiry.

[10] On 24 November 1989, the Minister of Transport's authorised delegate approved plans for the marina. Construction was deferred until all necessary approvals and licences had been obtained and the Harbourmaster had accepted the proposed plan and any amendments.

[11] On 5 March 1990, the Minister of Conservation issued a conditional certificate of approval for the construction of the marina. Clause 14 of the conditions dealt with public access to the marina area and provided:

> 14. Upon completion of all construction works the public shall have full rights of access to the main reclamation area and the northern reclamation and shall have rights of access at all reasonable times to the marina piers and the floating breakwater. Access to the floating breakwater may be restricted when weather conditions make it likely to be unsafe for use by the public.

[12] The approvals by the Ministers of Transport and Conservation were given under s 178 of the Harbours Act 1950. The combined effect of the approvals was to allow Bayswater Marina Ltd to construct the marina, in accordance with the plans that had previously been prepared.

[13] On 3 May 1991, an extension was granted to the period of two years in which, otherwise, the planning consent was to be given effect.

[14] On 16 September 1991, a *Gazette Notice* was issued to amend the Order in Council of 26 June 1989. The amendment allowed reclamation to be undertaken in five years, rather than the period of two years permitted by the original Order. Later that month, a further extension of time was granted, by the Director-General of Conservation, to both developers, to complete the project, subject to three additional conditions.

[15] The Act came into force on 1 October 1991. While, at that time, reclamation work had not been completed, authority to undertake that work remained on foot.

[16] Section 384(1) of the Act is a transitional provision designed to ensure that permissions granted under the Town and Country Planning Act 1977 or the Harbours Act 1950 (including the Orders in Council) remained valid, notwithstanding the new

regime for resource management created by the Act. It provided that relevant existing authorities in respect of any area in the coastal marine area shall be:

> … *deemed to be a coastal permit granted under this Act on the same conditions* (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act) by the appropriate consent authority; and the provisions of this Act shall apply accordingly.

[17] Section 425 is a savings provision, designed to keep alive planning consents granted before the new regime, prescribed by the Act, came into force. Section 425(3) of the Act provided:

> **425 Leases, licences, and other authorities under Harbours Act 1950**
>
> …
>
> (3) Except as provided in section 384(1)—
>
> > (a) Every licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950; and
> >
> > (b) Every Order in Council made under section 175 of that Act; and
> >
> > (c) Every approval granted under section 178(1)(b) or (2) of that Act—
>
> shall, notwithstanding the amendment of that Act by this Act, continue in force after the date of commencement of this Act on the same conditions and with the same effect as if that Act had not been so amended.
>
> ….

[18] Section 30 of the Act gave regional councils jurisdiction in respect of coastal permits. Section 31 of the Act required territorial authorities to deal with issues relating to land within its jurisdiction. This meant that, once the Act came into force, the work to be carried out to complete the marina development fell under the auspices of two different bodies. The Regional Council had responsibility for the coastal area, while the City Council had jurisdiction over land based activities.

[19] On 7 May 1993, the Regional Council granted a coastal permit, under s 12(2) of the Act, to permit occupation of the land comprising the marina structures and to operate the marina.

[20] On 17 October 1994, the City Council notified its proposed district plan. A decision on that plan was made on 20 September 1996.

[21] During this period, the Regional Council also extended the period of approvals granted to Bayswater Marina Ltd, under both the Town and Country Planning Act and the Harbours Act.

[22] On 23 December 1996, the Regional Council gave permission for a passenger access facility to be constructed in the area of the marina and for the operation of a passenger ferry service to Auckland. On the same day, the Regional Council varied conditions set out in the Town and Country Planning Act consent to allow one of the marina berths (near the entrance to the marina) to be used for the purposes of the passenger ferry service.

[23] On 13 March 1997, the Regional Council granted coastal permits, authorising the discharge of storm water. On 18 March 1997, it varied the Town and Country Planning Act consent again, this time to amend conditions relating to the number of cars or trailers parking on the reclamation site. On the same day, a coastal permit was issued to allow works to be undertaken within the authorised reclamation.

[24] On 10 August 2001, the Regional Council granted coastal permits for a sail board ramp, a storm water pipe, pedestrian access ramps, a beach and sand retaining groyne, as part of the northern reclamation.

[25] On 7 September 2001, the City Council notified Variation 65 of its proposed operative district plan. That plan became operative, in part, on 19 November 1994, in respect of those proposals to which no objections had been notified. Variation 65 was one of the provisions that became operative.

[26] Variation 65 comprises part of Special Purpose 7 Zone. The reclaimed land forming the marina is now the only land within that zone. Rule 20.7.2 of Variation 65 provides for permitted, controlled and discretionary activities: namely,

a) **Permitted activities**:

- Facilities associated with launching of pleasure craft where these are above mean high water springs
- Maintenance of pleasure craft
- Storage of pleasure craft
- Carparking and car/trailer parking areas
- Open recreational space and reserves
- Alterations to existing buildings not involving additional floor area

b) **Controlled activities**:

- Ships chandlery
- Retailing of pleasure craft and pleasure craft hire and brokerage
- Exterior lighting
- Public toilets and changing rooms
- Facilities associated with ferry and bus services
- Offices associated with the marina (with a floor space limitation) and
- Staff or caretaker accommodation

c) **Discretionary activities**:

- New buildings or additions to existing buildings involving additional floor area

- Club houses for marine-related organisations

- Activities directly related to the adjoining coastal marine area, not otherwise provided for

- Restaurants and cafes

- Water transport facilities for the public

- Subdivision

- Staff or caretaker accommodation

- Accessory buildings for permitted, controlled or discretionary activities.

[27] Between notification of Variation 65 and the time at which the relevant provisions of the proposed operative district plan came into force, a certificate was issued on behalf of the Minister of Conservation, under s 245 of the Act.

[28] Section 245 deals with consent authority approval of a plan of survey of a reclamation. Section 245(1), (4) and (6) provide:

> **245 Consent authority approval of a plan of survey of a reclamation**
>
> (1) The holder of every resource consent granted for a reclamation shall as soon as reasonably practicable after completion of the reclamation, submit to the consent authority for its approval a plan of survey in respect of the land that has been reclaimed.
>
> …
>
> (4) A consent authority shall approve a plan of survey submitted to it under subsection (1) if, and only if, it is satisfied that—
>
> > (a) The reclamation conforms with the resource consent and any relevant provisions of any regional plan; and

(b) The plan of survey conforms with subsections (2) and (3) and the resource consent; and

(c) In respect of any condition of the resource consent that has not been complied with—

(i) A bond has been given under [section 108(2)(b)]; or

(ii) A covenant has been entered into under section 108(2)(d).

…

(6) After signing the certificate referred to in subsections (5)(a)(ii) or (5)(b)(ii), the consent authority shall forward a copy of that certificate to the relevant territorial authority.

[29] The "plan of survey" to which s 245(1) refers must be prepared in accordance with regulations made under the Survey Act 1986. The object is to define the areas reclaimed and the position of all boundaries: s 245(2).

[30] The certificate was issued in the following terms:

THE MINISTER OF CONSERVATION hereby certifies that:

(1) The two areas of reclamation of part of the Waitemata Harbour that are more particularly described in the Schedule, conform with the deemed resource consents (coastal permits) held by the Bayswater Marina Development Limited and the relevant provisions of the Proposed Regional Plan Coastal; and

(2) In respect of any condition of the deemed coastal permits that has not been complied with, a bond has been given under section 108(2)(b) of the Act. ….

The Schedule did no more than to provide the correct legal description for each of the two areas of reclamation to which para (1) of the Certificate refers.

[31] The practical effect of the s 245 certificate is to delineate the boundaries of the area of reclaimed land, in respect of which jurisdiction is transferred from the Regional Council (as the authority responsible for the coastal marine area) to the City Council (as territorial authority responsible for the land).

[32] Before the s 245 Certificate was given, both the Regional Council and the City Council took steps which, *prima facie,* were inconsistent with the jurisdiction

reposed in each at the relevant time. For example, it appears that the Regional Council gave consents in respect of land based activities between 1996 and 2001: see paras [22]-[24] above. On the other hand, the City Council notified Variation 65 before the Certificate was issued: see para [25] above. Because no counsel took issue with the *vires* of any of those decisions, I do not consider that aspect further.

The City Council's decision

[33] The City Council's decision, from which the appeal was brought, was summarised in the introductory portions of the Environment Court's judgment. What follows is taken from that source.

[34] All parties who appeared before the City Council agreed that a Special Purpose Zone was appropriate. However, BML had contended for a "significantly higher level of development" including residential activities, than was envisaged by Variation 65.

[35] The Council's decision appears to have been premised on its view that the reclaimed land had significant public value as open space and for recreational values, particularly boating. BML had attacked that basic premise by contending that the reclamation was, essentially, for private use. It submitted that more intensive development would fulfil transport objectives, as well as other relevant policies. Relevant plan provisions could, BML contended, address adequately any adverse effects. In making those submissions, BML recognised that a degree of public access over the reclamation was justified.

[36] Many residents and community groups appeared before the City Council, all emphasising the public recreation aspects of the reclamation. There was widespread community opposition to any significant residential development on the reclaimed land. The particular concern was that residential development of the type advocated by BML might lead to a gradual (or immediate) erosion of public use of the area, both as an open space and for marine based recreation.

What did the Environment Court decide?

[37] Before the Environment Court, Mr Brabant submitted that the City Council was obliged to embark upon its decision-making process with no predisposition favouring full public access to the use of reclaimed land. That submission was based on the proposition that, once the s 245 certificate had been issued, the conditions imposed by coastal permits were spent. Therefore, for example, the "full rights of access to the main reclamation area and the northern reclamation" specified in cl 14 of the Minister of Conservation's conditional Certificate of Approval of 5 March 1990 (see para [11] above) had no continuing effect, notwithstanding s 384(1) of the Act.

[38] Mr Brabant placed reliance on *Northland Port Corporation (NZ) Ltd v Whangarei District Council* [1996] NZRMA 180 (PT), a decision of the Principal Planning Judge. In that case, Northland Port Corporation intended to carry out an extension of port facilities at Marsden Point, part of which was to be on land above mean high water springs. It relied on s 420 of the Act, which provided for continuation, in the district plan, of designations in its favour and deeming a designation within the coastal marine area to be a coastal permit authorising the work to which the designation related. One of the declarations sought was that the coastal permit remain in force, after the proposed reclamation had risen above the mean high water springs, so as to be applicable to and authorise the proposed development on the reclaimed land.

[39] The port company's position that the terms of the coastal marine permit continued to have effect even after the reclamation had risen above mean high water springs, was taken, notwithstanding an earlier decision to the contrary: *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449 (PT) at 455. As it happened, counsel appearing for the port company had been counsel in both cases and was able to advise the Principal Judge that the point in issue had not been argued in the *New Zealand Rail* case.

[40] On analysis, Judge Sheppard rejected the port company's contention. He said, at 119-120:

> *The deemed coastal permit does authorise the use of land for the purposes of the former designation to the extent that it applies. That extent is specifically limited by the description in s 87(c) of "coastal permit" to "consent to do something in a coastal marine area". There is nothing to suggest that a coastal permit provides authority to do anything outside a coastal marine area. However, once reclamation of former foreshore or seabed has risen above mean high water springs, that land is no longer within the coastal marine area, being to landward of mean high water springs* - see *Gisborne District Council v Falkner Decision* A 82/94, (1994) 3 NZTPD 842; on appeal *Falkner v Gisborne District Council* [1995] NZRMA 462; (1995) 3 NZTPD 844a.
>
> There are other indications in the Act of an intention that a coastal permit is not to apply to reclaimed land. Applications for resource consent in respect of land in the coastal marine area are made to the regional council; but the Act contemplates that applications for resource consent in respect of land to be reclaimed are to be made to the territorial authority even before the reclamation has been carried out - see s 89(2). *Reclaimed land falls within the territorial authority's district (to which its district plan applies) once a certificate has been given under s 245(5), even though the reclaimed land has not yet formally been included in the district - see the definition of district in s 2(1).*
>
> I recognise that under the former regime, the designation may well have continued to authorise the uses described even in respect of land that had been reclaimed. A savings provision could have been enacted to continue that position during the transitional period of the Resource Management Act. However that was not done, and in my opinion, the port company's deemed coastal permit does not authorise any of the proposed activities on the reclaimed land. With respect, I consider the attitude taken by the Tribunal in *New Zealand Rail Ltd v Marlborough District Council* at 455 to have been correct; and I hold that the third declaration ought not to be made. (my emphasis)

[41] It is unclear whether the Court decided the point raised on behalf of BML. After explaining the nature of Mr Brabant's submission, the Court continued:

> [30] We note the following:
>
> (1) Mr Brabant does not submit that the coastal permits which apply to the marina itself, berths and marina piers and breakwater cease to apply. Accordingly this raises a partial cancellation of consent. If so what conditions are cancelled?
>
> (2) The authorisation provides for not only the works in the coastal marine area but also the marina and associated facilities adjacent to the existing wharf and the reclamation at O'Neill's Point. If Mr Brabant's submission is correct then it appears that the works

conducted as soon as the reclamation reached the mean high water mark are not authorised.

(3) The coastal decisions and consents address many issues beyond the creation of the land to mean high water springs. These decisions discuss end users of the reclaimed land and justify the words (both the dredging and the reclamation) by the extent of end use of the Bayswater Reclamation.

[31] For practical purposes we conclude that in the event that Mr Brabant's submission is correct this would mean that there is no authorised activity being conducted on the Bayswater Reclamation at all. On its face this could prejudice marina berth holders' access to marina berths, rentals received by BML for occupied berths, public carpark holders and other structures. Although it is not necessary for us to determine this point for the current hearing, it is our tentative view that the decisions in *Northland Port Corporation* and the case *Ports of Auckland Ltd v The America's Cup Planning Authority* [Decision A100/1991] can be distinguished.

…

[35] We see a significant distinction between the *Northland Port Corporation* case and one where the conditions of the consent under s 110 of the Town and Country Planning Act 1977, now a deemed coastal permit under s 384, by their very nature must and do relate to the justification for the excavation and reclamation. Furthermore the works including the Bayswater Reclamation are expressly allowed by a consent granted under the Town and Country Planning Act. This was still a resource consent under the Resource Management Act by virtue of the transitional provisions of the Act [see s 384 of the Resource Management Act particularly s 384(2)].

…

[40] On Mr Brabant's proposition there would then be no right of use whatsoever and consents would need to be obtained retrospectively for all activities. Such activities are currently innominate as the Plan provisions are in dispute (not operative) and thus would require a general discretionary consent. It seems inevitable public access would be addressed as part of such consents.

…

[42] With respect, we consider this issue is misconceived by the appellant for the purposes of the planning regime and the plan review. The arrangements between the lessor and lessee do not dictate to the Court the appropriate planning arrangements which should apply to the land. We do not understand Mr Brabant to go so far as to say that the lease is determinative of that relationship. Rather he suggests that there can be no presumption that the land must be public land and that the resource consents may not have the effect envisaged by the appellant or the other parties.

[43] We have a clear view that the resource consents do continue to affect the property and accordingly reserve public access rights. However we consider in the first instance the outcome as if there is no resource consent preserving public access rights.

[42] I begin with para [43]. Its language is equivocal. The first sentence suggests that the Court considered but rejected Mr Brabant's submission. But, the second suggests that the Court decided not to determine the point; rather, it indicates that the Court decided to consider the appeal on the assumption that there was no starting point involving the existence of full public access rights, without resolving Mr Brabant's point.

[43] The extracts set out in para [41] above tend to support the statement made in the first sentence of para [43] of the judgment. But, there are other parts of the reasoning that suggest that the second sentence more aptly captures the Court's approach; for example:

> [7] The clear conclusion to which we have come is that the approach of the Council is correct. The emphasis in Variation 65 upon recreation, open space and public access to the boating facilities is one of significant importance. We conclude for the reasons set out that the recognition of these purposes in terms of the Act and relevant planning instruments is significantly more important than providing for residential development in this particular coastal area.
>
> [8] Although some objectives and policies of the regional and district documents would be met by the BML Proposal, an integrated consideration of all the provisions of the various plans leads to an overwhelming conclusion that a cautious approach to intensification of use within SP7 is appropriate.
>
> [9] We have concluded that the Council provisions are clearly better in achieving that purpose than those of the BML Proposal. In fact, we consider that the provisions of Variation 65 are possibly liberal given the importance of this site for its open space, recreational and maritime functions.
>
> …
>
> [44] This history of the existing environment is relevant to establish the appropriate outcome for the site putting aside existing consents, (we cannot ignore that Bayswater Reclamation was former harbour bed). Nor can we ignore the reasons of the Bayswater Reclamation creation or the reasons it was approved in the terms and to the size shown in the Maritime Planning Authority's decision. In other words, this site has been envisaged from inception as an area for use both by marina users (which has a public aspect given that it replaced existing swinging moorings) and by the general public, particularly those with an interest in boating.
>
> [45] The public recreation and open space aspect of the marina has always been a consideration in the size and purpose for which it was created irrespective of the consents issued.
>
> ….

[44] Read as a whole, I consider it is likely (but not clear) that the Court used the public access consideration as a starting point for its analysis. In those circumstances, I propose to consider the other issues on an assumption that the Court did determine Mr Brabant's argument in a manner adverse to BML.

Did the Environment Court err?

[45] On the assumption that the Court had a predisposition towards retaining the type of "full public access" to which cl 14 of the Minister of Conservation's Certificate referred (see para [11] above), the question is whether it was justified in so doing.

[46] The argument advanced by Mr Brabant has the advantage of simplicity. It boils down to the proposition that once reclamation is completed (in a practical sense) and consummated by the issue of a s 245 certificate, there is nothing in a coastal area to which the deemed permit continues to apply.

[47] I agree with Mr Brabant that that proposition is consistent with Judge Sheppard's decision in *Northland Port Corporation (NZ) Ltd.* The highlighted portions of the extract from his judgment, set out at para [40] above, support that view. Having considered the interpretation issue independently, I cannot improve on Judge Sheppard's explanation of the reasons why that conclusion is correct. I adopt the Judge's reasoning. Once coastal activities cease, it is incongruous to suggest that conditions relating to a coastal marine area continue in force, notwithstanding the conversion of coastal waters into land.

[48] Mr McNamara sought to distinguish *Northland Port Corporation (NZ) Ltd* because, in that case, it was unnecessary for the Planning Tribunal to determine the relationship among ss 245, 384 and 245 because the relevant transitional provision was different, s 240. Instead, Mr McNamara relies on statements made in this Court and the Court of Appeal in relation to the interpretation of ss 384(1) and 425(3).

[49] In *Port Otago Ltd v Hilder* [1995] NZRMA 497 (HC), Rabone J considered the meaning of both provisions. Mr McNamara referred me to the following extract from his judgment, at 502:

> … In my view the ordinary meaning of the words in s 425(3) is that the authority given by the Order in Council is to continue in effect, ie continue to authorise the reclamation. If the intention of the legislature in s 425(3) was only that the conditions attaching to an Order in Council, the reclamation authorised in which had been completed, would continue in force, then it would have been easy enough to say so, and that is not what the provision conveys.

[50] In contrast, Mr Brabant referred me to a different passage, at 503, where Rabone J said:

> In my judgment both s 384 and s 425(3) have application. One deems the Order in Council to be a coastal permit, the other says it has effect according to its tenor. As Mr Marquet submitted, had Parliament wished to say in the latter provision "Every Order in Council authorising the reclamation of land except in a coastal marine area . . .", it could readily have done so. I think the words used mean "Except in so far as there is something to the contrary in s 384(1)" and, when the two sections are compared, such a meaning has sensible effect. Section 425(3) says that the Order in Council shall continue in force on the same conditions as if the Harbours Act had not been amended by the Resource Management Act. By way of example, conditions of authorisation were in fact imposed by the Order in Council made on 23 September 1991. It is s 384(1) which contains the limitation, which one would expect, that the conditions are deemed to be conditions imposed by the appropriate consent authority under the Resource Management Act except to the extent that they are inconsistent with the provisions of the Resource Management Act. (The Judge's emphasis)

[51] An appeal from Rabone J's judgment was dismissed: *Hilder v Port Otago Ltd* [1996] 1 NZLR 289 (CA). The Court concluded that s 384(1) operated as a transitional provision, whereas s 425(3) was a savings provision. At 294-295, Thomas J, for the Court, said:

> We believe that it is tolerably clear that Orders in Council were deleted from the term "permission" and that subs (3) of s 425 was inserted in the Act as enacted for the express purpose of providing that Orders in Council under s 175 (together with the other specified licences, permits and approvals) would continue in force as if the Harbours Act had not been repealed. It is a specific amendment intended to preserve the force and effect of the Orders in Council and the licences, permits and approvals already granted under the Harbours Act.
>
> The construction which the Court has adopted serves to achieve the recognised objective of savings and transitional provisions. Generally

> speaking, the function of savings provisions, where a substantive statute replaces another, is to preserve any rights, powers or privileges which may have accrued under the earlier enactment and which would or might otherwise cease to have effect. It is used to "save" what already exists. The function of transitional provisions, on the other hand, is to make special provision for the application of the new legislation to the circumstances which exist at the time the legislation comes into force. In other words, such provisions regulate and modify the provisions of the new statute during the period of transition. (See, eg G C Thornton, Legislative Drafting (2nd ed) at p 297.)
>
> No hard and fast distinction between the two types of provision need be drawn, however, as the meaning of each tends to overlap in practice. Both generally evidence the legislature's desire to avoid the retrospective operation of legislation and ensure that the activities of citizens are governed by the law which is current at the time. The interests of persons with existing rights, powers and privileges are thereby protected. The New Zealand Parliament's endorsement of these principles is readily apparent in ss 20 and 20A of the Acts Interpretation Act 1924.
>
> As to be expected in such major and far reaching legislation, the Resource Management Act contains extensive savings and transitional provisions. Although Part XV is entitled "Transitional Provisions", many of the sections in that Part are in the nature of savings provisions. Section 425(3) is clearly intended to be such a provision. On the other hand, s 384(1), which is also included in Part XV, is equally clearly intended to be a transitional provision. Reading them together so that the Order in Council remains in full force with the same effect as if the Harbours Act has not been repealed, but is yet deemed to be a coastal permit for the purposes of having the appropriate provisions of the Resource Management Act applied to it, best meets the objective of such provisions. The retrospective operation of the Act is avoided and the rights which the port company obtained under the legislation which existed at the time are protected. There is no derogation of the right conferred by the Order in Council.

[52] The facts in *Hilder* were somewhat different. Port Otago Ltd wished to reclaim an area of the Otago Harbour. In 1991 it had been granted planning consent and necessary water rights. Authorisation from the Crown had also been granted under s 175 of the Harbours Act by an Order in Council made under that section. An appeal against the planning consent was not resolved until after the Act came into force. By that time, work had not commenced. Mr Hilder contended that, because the reclamation had not been undertaken within the specified time, the Order in Council, as a deemed resource consent, had lapsed by reason of s 125 of the Act. He argued that s 425 was restricted to areas such as rivers or lakes. The issue before me was not specifically resolved by either of the *Hilder* decisions.

[53] Mr McNamara also referred me to s 123 of the Act, which deals with the duration of all types of consent. Section 123 provides:

> **123 Duration of consent**
>
> Except as provided in section 125,—
>
> (a) The period for which a coastal permit for a reclamation, or a land use consent in respect of a reclamation that would otherwise contravene section 13, is granted is unlimited, unless otherwise specified in the consent:
>
> (b) Subject to paragraph (c), the period for which any other land use consent, or a subdivision consent, is granted is unlimited, unless otherwise specified in the consent:
>
> (c) The period for which any other coastal permit, or any other land use consent to do something that would otherwise contravene section 13, is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116:
>
> (d) The period for which any other resource consent is granted is the period (not exceeding 35 years from the date of granting) specified in the consent and, if no such period is specified, is 5 years from the date of commencement of the consent under section 116.

While s 123 is subject to s 125, the Court of Appeal held in *Hilder v Port Otago Ltd*, that s 125 did not apply to the relevant Order in Council.

[54] I am not persuaded that the combined effect of ss 384(1), 425(3) and 123 of the Act require an interpretation of s 245 that differs from that given by Judge Sheppard in *Northland Port Corporation (NZ) Ltd.* My reasons follow:

a) The starting point is s 425(3). Leaving to one side the text of s 384(1), the various forms of authorities to which s 425(3) refers continued in force on the same conditions and with the same effect, as if the Harbours Act 1950 had not been amended.

b) But, s 384(1) trumps s 425(3). Section 384(1) deems such authorities to be a coastal permit granted under the Act on the same conditions, except to the extent that they are inconsistent with the provisions of the Act, issued by the appropriate consent authority. That meant the prior authorities (in law) became coastal permits that could have been

issued by a Regional Council, in respect of the relevant coastal marine area.

c) Section 123 of the Act deals with the duration of a coastal permit for a reclamation: s 123(a). "Unless otherwise specified in the consent" a coastal permit for a reclamation is unlimited in time. However, a provision of that sort cannot override the clear effect of the s 245 certificate, which is designed to bring to an end the jurisdiction of the Regional Council that existed before completion of the reclamation and to bring the reclaimed land under the control of the relevant territorial authority. The general provision must yield to the specific.

d) The interpretation I favour is consistent with the Court of Appeal's analysis of "transitional" and "savings" provisions in *Hilder v Port Otago Ltd* at 294-295. Section 425(3) preserves the force and effect of the various approvals granted under the Harbours Act, whereas s 384 governs the way in which pre-existing approvals are to be treated once the Act came into force.

[55] I hold that Mr Brabant's submission is correct, for the reasons given by Judge Sheppard in *Northland Port Corporation (NZ) Ltd*, at 119-120.

Materiality?

[56] I have reviewed the whole of the Environment Court judgment to determine whether the error made in respect of the approach advocated by Mr Brabant was material to its decision.

[57] The law is clear: if the Environment Court made no material error, this Court ought not to interfere on appeal. In *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 45 (HC), a Full Court (Barker, Williamson and Fraser JJ) held, at 153-154, in relation to appeals from the Planning Tribunal (the predecessor of the Environment Court):

> Approach to Appeal
>
> We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> • applied a wrong legal test; or
>
> • came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
>
> • took into account matters which it should not have taken into account; or
>
> • failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, *the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see Environmental Defence Society Inc v Mangonui County Council (1987) 12 NZTPA 349, 353.*
>
> *Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: Royal Forest and Bird Protection Society Inc v W A Habgood Ltd (1987) 12 NZTPA 76, 81-82.*
>
> In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke P in *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament. (my emphasis)

[58] Counsel agreed that the issue for the Environment Court's determination was accurately recorded in para [58] of its decision. The question was whether Variation 65, the BML proposal or some combination of each would better provide for the sustainable management of North Shore City's natural and physical resources. The Court correctly identified the need to consider the provisions of Variation 65, in the context of the existing district plan and the regional and national documents, in light of the specific provisions of the Act.

[59] By reference to ss 74 and 75 of the Act (matters to be considered by territorial authorities and content of district plans), the Environment Court identified a number of documents which ought to be taken into account in determining the issue before it. The Court described these documents as all being relevant to "the framework of an integrated approach to planning issues within the Auckland" region: at para [68]. The documents included the New Zealand Coastal Policy

Statement, the Hauraki Gulf Maritime Park Act 2000, the Operative Regional Policy Statement, Plan Change 6 to the Regional Policy Statement, the Regional Council's Coastal Plan and the District Plan. All were discussed, in varying levels of detail, before the Court evaluated their relative importance in relation to the issue before it.

[60] In reviewing those documents and in considering the submissions put to it, it is clear that the Environment Court was mindful of the effect of BML's proposals and the advantages and disadvantages they had, in particular respects. A good example of that, in the context of a discussion of transport needs, was the Court's findings that, while the BML proposal might increase patronage of the ferry system, it would have an adverse effect on traffic, particularly in the area of Lake Road. On the other hand, the Court considered that Variation 65 had little impact on transport, because, while not increasing patronage dramatically on the ferries, some synergies with the ferry system were apparent. Balancing of competing interests was undertaken in a convincing manner.

[61] In addition to transport, the Court discussed, under different headings, the effect on the landscape, the natural character of the reclamation and the visual effects of the development. The nature of the reclamation (viewed personally by members of the Court on more than one occasion in different weather conditions) formed the backdrop for a detailed discussion of the specific proposals made by BML.

[62] The BML proposal was discussed at some length. That was followed by a (necessarily) more extensive consideration of Variation 65, identifying those aspects of the proposals that were common or different. The Court then evaluated the competing considerations to reach a decision on the question before it.

[63] I summarise the Court's evaluation of the differing proposals:

a) The Court found no support for BML's proposal for extensive residential development comprising floor areas of about 50,000 square metres, plus parking. Nor was there any support for 50% building coverage of the site. For those reasons, the Court concluded that the

objectives of BML's proposal were "well away from an appropriate objective recognising the matters we have discussed".

b) The Court found that the provision for public open space and access was important and that the objective of Variation 65 could be amended "to focus on *recreation, public open space and access, public transport, boating and maritime activites."* The Court took the words "public open space and access" and "maritime" from the BML proposal.

c) The Court considered that the site was not one generally appropriate for residential development. While the need for extensive carparking had a "clear urban element", that was "a necessary and essential adjunct to the marina activity on the site", as well as being "essential for access to the boating and recreation facilities of the area".

[64] Those findings led the Court, inexorably, to the conclusion that Variation 65 provided appropriately for the wide range of activities to be conducted on site and was capable of being adjusted in a manner that reflected, at least, some of the BML proposals. Having regard to its firm factual findings on the topic of residential development, there was no basis on which BML's proposal could have been adopted.

[65] Having reviewed the judgment carefully, I am confident that, even if the public access element had not been used as a starting point for evaluation of the competing proposals, the same result would, inevitably, have been reached. Once the Court determined that residential development was inappropriate, the foundation of the BML proposal collapsed.

Result

[66] The appeal is dismissed.

[67] Costs are reserved. If costs cannot be agreed, a joint memorandum shall be filed on or before 30 September 2009 requesting the Registrar to arrange a telephone

conference before me, so that I can make timetabling orders to resolve those issues promptly.

[68] I thank counsel for their assistance.

_____

P R Heath J

Delivered at 3.00pm on 9 September 2009