...BUNAL Decision No: W 6 /95

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application for a declaration under s.311
BETWEEN	**THE MARLBOROUGH DISTRICT COUNCIL**
	(Application: ENF76/94)
	Applicant
AND	**SOUTHERN OCEAN SEAFOODS LIMITED**
	Respondent

BEFORE THE PLANNING TRIBUNAL

His Honour Judge Willy presiding
Mr R G Bishop
Ms J D Rowan

HEARING at Blenheim on the 13th day of October 1994

DECISION dated the 7th day of February 1995

COUNSEL

Mr P J Radich for applicant
Mr J R Jackson for respondent
Ms C M Owen for Ministry of Agriculture and Fisheries

DECISION

INTRODUCTION

This is an application for a declaration made by the Marlborough District Council. It arises in the context of a dispute between the council on the one hand and the Minister of Agriculture and Fisheries and Southern Ocean Seafoods Limited (the respondent) on the other, as to whether or not the respondent needs a Resource Consent to carry out certain activities relating to Marine Farm Licence Number 239 of which it is the current holder by way of assignment registered on 14 March 1994.

FACTS

We take the following narrative from the affidavit of Mr Snowden, a Resource Officer employed by the applicant council.

On 30 June 1982 a Marine Farm Licence, Number 239, was issued by the Minister of Agriculture and Fisheries pursuant to the Marine Farming Act 1971 to one Suzette Fisher.

The licence relates to six hectares of seabed in Forsythe Bay in the Marlborough Sounds and the water column above it. It has passed by various assignments into the hands of the present respondent. Pursuant to clause 1(d) of the licence the licensee was empowered to *"utilise and cultivate in a proper manner the area for the purpose of farming mussels and shall comply at all times with the Act and any regulations, notices and requirements made or issued pursuant to the Act"*. The licence then goes on to set out in some detail what are the rights, obligations and privileges of the licence holder. It enures for a term of 14 years from 1 October 1982.

Clearly the licence is a valuable document entitling the holder to carry on a sought after commercial activity and we understand that the various licence holders have farmed the property in terms of the licence from the date of its grant down to the present time.

On 14 February 1994, (which we note to be before the date of registration of the current assignment, but infer that nothing turns on the chronology) the

respondent applied to the Minister of Agriculture and Fisheries at Nelson as follows:

> *"I, Southern Ocean Seafoods Limited, 11-18 Bullen Street, Nelson, being the holders of Marine Farming Licence Number 239, hereby make application to include Chinook Salmon and Paua (Hiris, H.Australis, H Virginia) within the above marine farming area".*

The method of farming and structures intended to be used is described in the application as follows:

> *"Chinook Salmon will be reared in nylon net pens suspended within a floating steel structure. Each structure is 40 metres by 40 metres and contains 4 by 20 metres square net pens. Three of these structures will be on site. A feed accommodation barge will be moored alongside to service the farm unit. Paua will be reared with caged structures approximately one metre by one metre containing sub-state plates.*
>
> *The application then goes on to describe how the farm will be established and developed. Clearly it is a significant venture. The applicant advises the Minister that in year one it will spend approximately $600,000.00 and in year two a further $600,000.00. The application goes on to say harvesting and marketing "in-house" finance from within operating revenues of Salmon Smith Bio-Lab. Paua rearing is expected to be pilot scale for the first two to three years, producing up to 50 tonnes after three years.*
>
> *Smolt supply ex our own hatcheries at Takaka and Blenheim. Paua will be from Rainbow Abalone Limited, New Plymouth. Food type dry compressed fish meal based pellets for salmon and extruded feed for paua".*

That application drew a response from the Minister in which he said:

> *"The Marine Farming Act 1991 provides for the variance of conditions, covenants and agreements of the lease or licence pursuant to s.13 of the Act. Section 13 gives the Director General the discretion to determine the terms and methods used in determining variations of conditions, covenants and agreements".*

The writer advised the applicant of the Minister's current policy, which favoured the application, insofar as it referred to paua, but went on to say in relation to the salmon:

> *"However, because the method of farming salmon will be by holding stock in sea cages it will be necessary for you to advertise your proposal for this species. The rationale for requiring the application for salmon to be advertised is that such public feed-back is necessary in order for the Director General to make an informed decision on the variation request".*

The letter went on to note that the applicant was required to *"advise a number of people ... by registered mail"*. It required the applicant to *"furnish to MAF Fisheries an environmental and site characterisation assessment for your proposal"*. The letter included a copy of the MAF policy for the issue of salmon sea cage farming licence. That policy document deals with matters relating to the Environment Act 1986, consents to be obtained from the Ministers of Conservation and Transport, approvals as to marine farm structures under the Harbours Act 1950, mentions the need to protect *"Maori values"*, sets out in some detail the siting guide-lines considered appropriate, deals with a range of matters affecting the farming methods to be undertaken, but nowhere does it mention the Resource Management Act. The only reference to *"planning requirements"* is that contained in paragraph 2 of the document headed Marine Planning. It reads:

> *"Where a marine farming plan is entered under the Town and Country Planning Act 1977 specifying areas available for marine farming for an acceptable draft plan does not exist. The following additional environment impact assessments will be required ... identify application of the Town and Country Planning Act 1977 and any restrictions apply".*

An appendix to that document directs advertising of the application and service on a number of people including *"Marlborough District Council"*.

On 30 March 1994 the Administration Officer (Aquaculture) wrote to the General Manager, Marlborough District Council saying:

> *"An application to vary Marine Farm Licence Number 239 to include salmon ... has been received from Southern Ocean Seafoods Limited, the licence is located in Forsythe Bay, Pelorus Sound. For your information attached is a copy of the application and a plan showing the location of the licence.*

Presumably, as a result of that notification, the applicant council considered its position and decided to bring the present application. In it it seeks the following declaration:

> *a) That Southern Ocean Seafoods Limited, being the holder of a Marine Farming Licence Number 239, is required notwithstanding the holding of such licence to obtain a Resource Consent under the Resource Management Act 1991 before being able to farm salmon in the area of the licence.*
>
> *b) To the extent that the effects produced from farming salmon are different from those produced from farming mussels, the respondent may not farm salmon in the area of Marine Farming Licence Number 239 without first having obtained a Resource Consent in respect of such effects".*

Mr Snowden, in his affidavit says:

> *"The Ministry of Agriculture and Fisheries takes the view that it continues to be the controlling authority in respect of Marine Farming Licences, and that it is entitled to vary such licenses. That applications for variation do not trigger a requirement for a Resource Consent in any circumstances".*

Mr Snowden goes on to say that he understands the Minister to base his view on the provisions of s.426 of the Resource Management Act 1991. He then sets out the provisions of that section. Interestingly he does so in a form which omits subs.1(A), which was introduced into the Act by virtue of the provisions of the Marine Farming Amendment Act 1992. It came into force on 28 April 1992, but did not reach Mr Snowden or, be it noted, the texts from which this Tribunal conventionally works until early October 1994. In the result, for reasons we will give later, we are satisfied that the provisions of ss.1(A) are not relevant to the outcome in this case, but the

omission serves to illustrate yet again how difficult it is to work with this disparate and frequently amended legislation.

As amended the relevant provisions of s.426 read as follows:

"Leases and licence executed under Marine Farming Act 1971-

1) Every lease or licence executed under s.8 of the Marine Farming Act 1971 and in force immediately before the date of commencement of this Act, and every such lease or licence executed under s.397(1) shall, notwithstanding the amendment of that Act by this Act, but subject to subs.5, continue in force after the commencement of this Act on the same conditions and with the same effect as if this Act had not been enacted; and, except as provided in s.1(A) all the provisions of that Act relating to any such lease or licence or conferring or imposing any right, power, privilege, function, duty or liability on any party to any such lease or licence shall continue to apply in respect of that lease or licence accordingly.

(1(A)) The provisions of the Marine Farming Act 1971 shall apply to leases and licences referred to in subs.1 with the following modifications:

a) Section 13(2) of that Act (as amended by s.6(1) of the Ministry of Agriculture and Fisheries Amendment Act 1972) shall be read as if the words "before expiration of the lease" and the proviso were omitted:

b) Section 13(4) of that Act (as so amended) shall be read as if the words "before the expiration of the licence" and the proviso were omitted:

c) Every application for the extension of the term of any such lease or licence is required to be made not more than two years before the expiration of that lease or licence and not

later than the date of the expiration of that lease or licence.

2) Is not relevant.

3) Is not relevant.

4) Is not relevant.

5) Notwithstanding subs.1, on the date of commencement of this Act, the right of any leasee or licensee under s.22 of the Marine Farming Act 1971 to be offered any new lease or licence shall expire; and

b) From the date of commencement of this Act s.124 shall apply to those leases and licenses described in subs.1 when such lease or licence is due to expire as if every reference in the said s.124 to a Resource Consent or an Original Consent were a reference to such lease or licence".

Section 124 relates to Resource Consents that are due to expire and provides that a holder of an existing Resource Consent may continue to operate it under the original grant until the application for the new resource consent or any appeals have been determined.

Section 22 of the Marine Farming Act 1971 confers preferential rights on lease or licence holders. Where the lease or licence does not contain a right of renewal there is a statutory privilege to obtain such renewal. By virtue of s.426(5) that right is lost from 1 October 1991, being the date of the coming into force of the Resource Management Act and in its place the licence holder has rights pursuant to s.124 of the Resource Management Act.

It is necessary to refer to the provisions of s.13 of the Marine Farming Act. It provided as follows:

"Variation etc of lease or licence-

1) Subject to this Act the parties to a lease may, from time to time,

by instrument in a form provided or approved for the purposes by the [Director General] vary any of the conditions, covenants or agreements of the lease.

2) Subject to subs.9 of this section, at any time before the expiration of the lease the controlling authority may, notwithstanding that the lease may not contain a right of renewal, grant an extension on the term of the lease ... for any period not exceeding 14 years on the same conditions, covenants and provisions as the existing lease, or on such varied conditions, covenants or provisions not inconsistent with the requirements of this Act or any Regulations made under this Act, as may be agreed between the controlling authority and the leasee.

3) Subject to this Act the parties to a licence may, from time to Time, by memorandum in writing in a form provided for the purpose by the Director General, vary any of the conditions, covenants or agreements contained in the licence.

4) Deals with licences as distinct from leases and is therefore not relevant to this case.

5) Deals with the obligations of the leasee to give notice to designated persons of its intention to seek an extension of the lease".

The discretion to extend the lease is vested in the controlling authority. Where the area in question is not vested in a local authority or Harbour Board, (as is the case here), the controlling authority is the Minister of Agriculture and Fisheries.

Section 2 of the Marine Farming Amendment Act 1992 provides that:

"3) Section 426(1) of the Resource Management Act 1991 (as amended by s.5 of this Act) shall be deemed to apply in respect of every lease and licence that is subject to an application to which this section applies and the provisions of the principle Act (including s.13) shall apply to such leases and licenses in the

manner specified in the said s.426(1) (as so amended) as if the Minister were the controlling authority".

The application referred to in subs.3 is defined in subs.2 to be applications which seek "*the extension of the term of a marine farming lease or licence*" (that definition would appear to be extended by the provisions of subs.3 as set out above, by including the provisions of s.13 which relate to the variation of leases or licenses.

The legislative trail is a tortuous one, but it seems tolerably clear that in the end it all comes back to a question of the meaning of s.426 of the Resource Management Act insofar as it affects applications such as are made in this case to vary the terms of an existing lease. That is the way counsel approached the matter and we proposed to do the same.

THE RIVAL CONTENTIONS

Mr Radich accepts that s.426 allows the holders of existing leases executed under s.8 of the Marine Farming Act to continue to operate those leases according to their tenor without the necessity of applying for any Resource Consent pursuant to the Resource Management Act. Where counsel joins issue with the Minister is on the question of whether or not the holder of such a lease can apply to the Minister for a variation pursuant to s.13 of the Marine Farming Act without, in addition, seeking a Resource Consent for the proposed varied activity.

Mr Radich submits that if such were the case it is entirely contrary to the philosophy and thrust of the Resource Management Act and would give rise to significant problems for territorial local authorities who have to administer coastal marine areas in ensuring that any change in the activities carried on under a marine farming lease are not contrary to the philosophy and objects of the Resource Management Act. Counsel further submits that, although the Minister does consider a range of matters in deciding whether or not to grant a variation of a lease and does insist on service on some affected or potentially affected persons, the process harks back to the past and is not the open participatory process which is provided for in the Resource Management Act. Mr Radich describes the contrast as being between a

democratic open public process on the one hand and a "*bureaucratically driven process*" on the other. In particular counsel points to the fact that there is no requirement for a hearing of any objections or rights of appeal in relation to a decision by the Minister to grant the type of significant variation of the marine farming lease which is sought in this case.

Both Mr Radich, and Ms Owen for the Minister agree that the resolution of this matter is of national significance affecting regional councils and unitary councils such as the applicant, in all those parts of New Zealand where the council has responsibility for administering coastal marine areas.

Mr Radich submits that the Tribunal should not adopt a narrow approach to this question of statutory interpretation by focusing exclusively on the provisions of s.426. Counsel submits that s.426, which is a transitional provision, should be seen in the context of those other sections of the Act which set its philosophy and thrust. We agree, and as invited to do, begin the enquiry at s.5. It provides that:

> *"1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
>
> *2) In this Act sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people in communities to provide for their social, economic and cultural well-being and for their health and safety while-*
>
> *a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
>
> *b) Safe-guarding the life-supporting capacity of air, water, soil and eco-systems; and*
>
> *c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment".*

It is clear from the judgement of Greig J in New Zealand Rail Ltd v Marlborough District Council (HC) 2NZPTD [1994] NZRMA 70 that:

> *"This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not I think a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way".*

That general approach has been followed in Peninsula Watchdog Group Inc v Waikato Regional Council and Or. decision 2 October 1993, and in Plastic and Leather Goods Company Ltd and Others v Horowhenua District Council (W26/94) where the Tribunal said:

> *"The provisions of ss.5(2)(a), (b) and (c) may be considered cumulative safe-guards which exist in order to ensure that the land resource is managed in such a way or at such a rate which enables the people of the community to provide for the various aspects of their social well-being and for their health and safety. They are safe-guards which must be met before the Act's purpose is fulfilled".*
>
> *"The promotion of sustainable management has to be determined therefore in the context of these qualifications which are to be accorded the same weight".*

It is **sustainable management** not merely **management** of natural and physical resources that is at the heart of the philosophy of this legislation. One of the relevant meanings of "*sustain*" is "*to endure without failing or giving way*" (Shorter Oxford English Dictionary Vol. 11 1980). That places the emphasis on ensuring that resources are not used up at a rate greater than their recuperative properties allow. The overriding intention of the legislation is to ensure that successive generations husband the available resources and pass them onto the next in no lesser state than was available to the donor generation. If the resource consent sought will result in the resource not enduring, or failing or giving way then the proposed activity is contrary to s.5. The onus of showing that it is not is on the applicant. Against this

frame work s.6 establishes five matters as being of national importance. One of them is

a) *"The preservation of the natural character of the coastal environment (including the coastal marine area) wetlands, and lakes and rivers and their margins and the protection of them from inappropriate subdivision use and development.*

b) The protection of outstanding natural features and landscapes from inappropriate subdivision use and development.

Section 7 requires all persons exercising functions and powers under the Resource Management Act in relation to managing the use, development and protection of natural and physical resources shall have regard to eight separate considerations. They include:

b) The efficient use and development of natural and physical resources;

c) The maintenance and enhancement of amenity values;

d) Intrinsic values of eco-systems;

f) Maintenance and enhancement of the quality of the environment;

g) Any finite characteristics of natural and physical resources.

The duty to have particular regard to these matters has been described in one case as *"a duty to be on enquiry"* Gill and Others v Rotorua DC 2 NZPTD 1993 2 NZRMA 604. With respect in our view it goes further than the need to merely be on enquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

In addition to those matters of general principle set out in part II of the Act there are a number of definitions which are also relevant in understanding the thrust of the legislation. These include the definition of amenity value. It is:

"those natural and physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, ascetic coherence and cultural and recreation attributes".

"Environment" is given an extended definition which includes:

a) *Eco-systems and their constituent parts, including people and communities; and*

b) *All natural and physical resources; and*

c) *Amenity values; and*

d) *The social, economic, ascetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:*

For the sake of completeness it needs to be said that the area with which we are concerned in this case is a coastal marine area, as defined in s.2 of the Act and coastal water as defined in that section.

It is also relevant to the understanding of Mr Radich's argument that we keep in mind the extended definition of the word "*effect*" as that is used in the context of s.426. It is defined as follows:

"In this Act unless the context otherwise requires the term "effect", includes:

a) Any positive or adverse effect; and

b) Any temporary or permanent effects; and

c) Any past present or future effect; and

d) Any cumulative effect which arises over time or in combination with other effects - regardless of the scale, intensity, duration or frequency of the effect, and also includes;

e) Any potential effect of high probability; and

f) *Any potential effect of low probability which has a high potential impact".*

Section 12 imposes a range of restrictions on the use of a coastal marine area, as earlier defined, and clearly applies to the activities which form the subject matter of the application to the Minister to vary this marine lease. The section stops any person from *"erecting, reconstructing, placing, altering, extending, moving or demolishing any structure or any part of a structure that is fixed in or under or over any foreshore or seabed"* (s.12(1)(b)). It also contains a prohibition against disturbing any foreshore or seabed in a manner that has or is likely to have an adverse effect on the foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) (s.12(1)(c)). In addition there is a prohibition against depositing in or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed (s.12(1)(d)). That subsection is relevant because it is accepted by all parties that both faeces and un-eaten food materials will be deposited on the seabed in the vicinity of the proposed salmon farming operation.

Such activities may only be carried out if it is *"expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent".*

Section 14 is also relevant. It restricts the right on any person to use any water, (other than open coastal water, which this is not), unless the use is allowed by subs.3. The applicant's activities in this case do not come within any of the provisions of subs.3 because in introducing a significant number of salmon for the purposes of marine farming those fish will use the water resource in which they live.

Mr Radich therefore submits, that marine farming cannot be undertaken unless the necessary consents are granted, pursuant to s.12 of the Resource Management Act or there is a rule of a relevant plan, allowing it to take place. Counsel submits that given the fact that the Resource Management Act is *"effects oriented"* rather than concerned with activities, the effect of salmon farming on the environment is so different from that of farming mussels that the holder of any Resource Consent to establish a mussel farm issued after the coming into force of the Resource Management Act should

have to apply for a new resource consent to change that activity from mussel farming to salmon farming. In that context counsel draws attention to the fact that, although there is an exception for marine farming contained in s.12(1)(c) and 12(1)(e) there is no such exception contained in s.12(1)(b) or 12(1)(d).

It is against that background that counsel submits that the Tribunal should construe the provisions of s.426. The basic proposition is that if there are two possible constructions, one which would lead to a negation of the principles of the Act and safe-guards for the environment for which it provides, and one which gives effect to those principles and safe-guards then the latter is to be preferred. On the other hand Ms Owen is content to contend on behalf of the Minister for a narrow construction of s.426, and Mr Jackson for the lease holder supports her in that view. We now come to consider this section in detail.

SECTION 426 - RESOURCE MANAGEMENT ACT

The nub of the debate is whether or not in saving the rights of existing marine farming lease holders Parliament intended to include the right to seek a variation of such leases notwithstanding the enactment of the Resource Management Act. If that argument is to be accepted as expressing Parliaments intention, then the practical outcome will be for two parallel systems of management of this resource. There will be one relating to those Resource Consents to establish marine farms granted after the enactment of the Resource Management Act. Those marine farmers will be governed by the terms and philosophies of that Act. All others will be governed by the provisions of the Marine Farming Act and s.67(j) and (k) of the Fisheries Act.

In contending for the wider interpretation Mr Radich draws attention to the fact that s.426 refers to leases in force immediately prior to the commencement of the Resource Management Act and allows such leases to continue in force **on the same conditions and with the same effect as if this Act had not been enacted** (counsel's emphasis). As previously indicated Mr Radich is prepared to accept that Parliament intended that these valuable property rights acquired before the enactment of the Resource Management Act must be allowed to continue according to their tenor until they expire. Ms Owen and Mr Jackson do not contend to the contrary. We agree that

this is clearly the thrust of s.426(1) reinforced by the strong language used that those rights shall continue *"as if this Act had not been enacted"*. The draftsman at that point interrupted the sentence by the use of a semicolon and then proceeded to describe a related matter being all the provisions of that Act relating to any such lease, providing that those provisions *"shall continue to apply in respect of that lease or licence accordingly"*. Ms Owen and Mr Jackson submit that those words must incorporate the right to apply under s.13 of the Marine Farming Act for a variation of the lease. One can make out a respectable case for either construction, but in the end we consider that the practical outcome of so construing the provisions of s.426 is so at variance with the philosophy and objects of the Resource Management Act as we have described them that we would only come to that conclusion if driven to by the unequivocal wording of the legislation.

We are unable to say that the provisions of s.426 are free from ambiguity and we therefore think it appropriate that we apply a purposive approach to its interpretation which has regard to the basic philosophies of the legislation and the significantly different emphasis on effects rather than activities which marked the earlier Town and Country Planning legislation. In doing so we conclude that had Parliament intended to preserve the provisions of s.13 of the Marine Farming Act *"as if the Resource Management Act had not been enacted"* then it would have said so and those words would have appeared at the end of s.426(1) rather than at the end of that part of the sentence dealing with the keeping in force of leases granted under repealed provisions of the Marine Farming Act. Instead the draftsman chose to conclude the second part of the sentence by the use of the word *"accordingly"*. We are unable to construe that as showing an unequivocal intention on the part of Parliament to preserve the otherwise repealed provisions of the Marine Farming Act including s.13 as if the Resource Management Act had not been passed. To the contrary we conclude that to the extent that s.13 is preserved at all it then becomes subject to the provisions of the Resource Management Act and that an application for Resource Consent is necessary in those cases where the holder of a lease granted under the Marine Farming Act seeks to vary that privilege.

In coming to this conclusion we are assisted by the decision of the High Court in Minister of Works and Development v Tauranga County Council 12 NZTPA 385 (Davison CJ). In that case His Honour found that the Fisheries Act 1983 and the Marine Farming Act 1971 are not exclusive codes

governing the control of marine farming and commercial fisheries in New Zealand coastal waters. The Court therefore upheld rules and ordinances made by the respondent council regulating these activities. To the extent that the appellant relied upon Stewart v Grey County Council [1978] 2 NZLR 577 His Honour distinguished the case and held that there was no inconsistency between the provisions of the Marine Farming Act and the Town and Country Planning Act. Reliance was placed upon the approach taken by the Privy Council in Associated Minerals Consolidated Ltd v Wyong Shire Council (1975) AC 538,554 that:

> "*Planning by its nature, presupposes the possibility of competing uses for land (and I add - water) and endeavours to regulate these in the public interest.*"

That is an approach which is in harmony with the provisions of Part II of the Resource Management Act and one which we think more preferable than removing regulation of this competing use of water resource entirely from the ambit of the relevant marine consent authority. We propose to apply it to the task of statutory interpretation in this case.

Although we have come to a clear view, we think we should record a further submission made by Mr Radich. Counsel approaches the matter in a slightly different way. Counsel submits that the focus in s.426 is upon preserving the lease on the same *"conditions and with the same effect"*. That is clearly a reference to the lease document itself and shows no intention to incorporate any statutory rights of renewal or variation. Renewal is dealt with in s.426(5) and there circumscribed. Counsel submits that Parliament cannot have intended to create such an important exception to the new Resource Management Regime by leaving extant the right to seek, outside of the framework of the Resource Management Act, a fundamental departure from the marine farming lease granted under previous and partly repealed legislation. We further agree that by way of analogy to approach the matter as contended for by counsel for the applicant is consistent with the way in which existing use rights are treated under the RMA s.10 (although of course s.10 does not apply to coastal marine areas. It is s.20 which preserves existing use rights in those places.) It is not just any right which may continue in the face of an otherwise statutory proscription, but only those rights which were similar in character or kind, scale or intensity to those carried on before the proscription was enacted. As Mr Radich explained the

council has no difficulty about accepting that existing marine farm licence granted under the partly repealed legislation be allowed to continue to operate until the expiry of their leases because they create the same effect on the environment as existed before the Resource Management Act was enacted. Counsel submits that is an activity which is expressly recognised by the council in its *"proposed Marlborough Sounds Maritime Planning Scheme"*, which was publicly notified in 1988 but did not become operative before the Resource Management Act came into force. In that document marine farming is dealt with at paragraph C(20), as follows:

> *"Objective to achieve the economic, social and environmental benefit available from marine farming with the Authority's overall goal of providing for the multiple use of the Marlborough Sounds. Policies, farming of filter-feeding bi-valve shellfish indigenous to the Marlborough Sounds by the long-line method in areas identified for marine farming on the planning maps will be permitted under this scheme.*
>
> *Where farming of new species or by new techniques is proposed, the Authority may impose conditions of consent, requiring an assessment of the existing environment of this site and its vicinity prior to the commencement of marine farming and subsequent monitoring of environmental effects, especially water quality in the local marine ecology".*

We do not place any reliance on this proposition for the reasons given in Regular Developments Limited v Marlborough District Council. In that judgment we concluded that very little weight should be given to this document. However we note the submission.

Fiinally, we add that to construe s.426 as contended for by the Minister and Mr Jackson's client would remove any control by the council over these activities entirely. The regulation of them would be left to the Minister pursuant to the provisions of partly repealed legislation. In our view that cannot have been the intention of Parliament. We are satisfied that the appropriate interpretation to be given to s.426 is that it allows for existing leases to run their term, but to the extent the holder wishes to vary the activity carried on under that lease, a Resource Consent in the form of a Coastal Permit is required.

That is sufficient to dispose of the case. We will grant a declaration to that effect if called upon by the applicant so to do, in which case we invite the parties to submit a draft. We would point out however, that the decision itself is probably sufficient to dispose of the matter and a formal declaration would not add anything to what we have already said.

A A P Willy
Planning Judge

76-94.doc (DC)