Pigeon Bay Aquaculture Ltd and Ors v Canterbury Regional Council

Environment Court Christchurch
18 March 1999 C 32/99

Environment Judge Jackson, Environment Commissioners Tasker and Burley

Coastal permit — Applications for consent to establish and operate marine farms — Category of activity — Weight attributable to proposed regional coastal plan — Relevance of precedent effects and cumulative effects — Determining the significance of a landscape — Resource Management Act 1991, ss 6, 12, 28, 56, 88, 88A, 104, 105, 113, 290, First Schedule cls, 16A, 16B, 19

Pigeon Bay Aquaculture ("the applicant") applied to the Canterbury Regional Council for resource consent permitting two marine farms to be established and operated in Pigeon Bay on Banks Peninsula. The marine farms were proposed to be used mainly to grow mussels, but also dredge oysters and scallops. The latter two species were not found naturally in the area. Views of the land around Pigeon Bay were described as being of a "predominantly pastoral landscape". The Regional Council granted resource consent for one farm and refused consent for the other. In November 1997 the applicant appealed against the refusal of consent, and a number of submitters appealed against the grant of consent. Subsequently, the Minister of Conservation ("the Minister") joined the proceedings by giving notice under s 271A, taking a position similar to that of the submitters.

After the applicant applied for resource consent, the Regional Council had notified a variation under the proposed Canterbury Regional Coastal Environment Plan ("PRCEP") and the Resource Management Amendment Act 1997 had been enacted, introducing s 88A into the RMA. The Court therefore had to decide the category of the activity for which consent was sought in the context of those changes. In addition, because the Minister had challenged much of both the PRCEP and the variation, the weight to be attributed to the provisions of those documents was at issue.

The appeals were the first about marine farming in a bay of Banks Peninsula to be argued before the Environment Court, and questions of precedent effect and landscape significance were accordingly at issue.

Held (allowing the applicant's appeal):

(1) The general effect of s 88A is that, in the circumstances it describes, subs (1) indicates that the type of activity for which consent is sought is defined by the unamended plan; but that subs (2) makes it clear that any plan or proposed plan which exists when the application is considered must be "had regard to" under s 104.

(2) Section 88A must be read as creating a partial exception to cl 16B of the First Schedule as to when a variation takes effect. That is, although cl 16B(2) states that a variation has effect from the date of public notification, s 88A(1) creates a limited exception in that categorisation of an activity must take place under an unvaried proposed plan.

(3) The category of the activity for which consent was sought was therefore defined by the unamended PRCEP, but the application was to be considered under the variation which had been notified. However, because the appeals were filed before s 88A came into effect, the case was to be decided as if s 88A had not been enacted. Pursuant to cl 16B, the PRCEP as varied was therefore applied in categorising the marine farms.

(4) Provided the Minister had made a submission on the relevant part of a proposed regional coastal plan, s 28(b) and cl 19 of the First Schedule enabled the Minister to over-ride the participatory and judicial process of hearing by the Council and the Court and "substitute his own decision for theirs". Because the Minister had made submissions challenging much of both the original PRCEP and on the variation to it, no weight could be given to the challenged provisions.

(5) The outcome of the case could be considered as "other matters" under s 104(1)(i), and in particular in terms of two general outcomes:

(a) New activity changes the character of an area, such that some further scheme or activity may find it easier to establish simply because the character has already changed (*Kemp v Queenstown-Lakes District Council*); and

(b) The question of whether a principle has been established by the first grant.

(6) Granting consent for a non-complying activity could create a substantive precedent in other cases (*Stark v Auckland Regional Council* and *Coleman v Tasman District Council*), in that granting one resource consent may lead to difficulties in refusing another on the grounds that equals should be treated equally.

(7) Although there is a tension between a precedent created by allowing an activity and a territorial authority's ability to control cumulative effects (*Coleman*), if the cumulative effects have not passed the threshold where they are unacceptable, then a later application may not be able to be refused because there are no reasons to distinguish it.

(8) The applicant's proposal was not out of scale for the location, and did not set any precedent that could usefully be relied on. There were few or no other suitable areas for development in the bays around Banks Peninsula, and any application in another bay would first have to be considered on its own facts, and then in respect of cumulative effects on the landscape/seascape of Banks Peninsula as a whole.

(9) A number of factors are relevant in assessing the significance of a landscape:

(a) Natural science factors — geological, topographical and dynamic aspects of the landscape;

(b) Aesthetic values including memorability and naturalness;

(c) Expressiveness — how obviously the landscape demonstrates the formative processes leading to it;

(d) Transient values — occasional presence of wildlife; or its values at certain times of the day or year;

(e) Whether the values are shared and recognised;

(f) Value to tangata whenua;

(g) Historical associations.

(10) In recognising aesthetic values/natural character, it is important to distinguish between a completely subjective assessment and a less subjective (but not value-free) assessment of the "naturalness" of a landscape or the coastal environment.

(11) The proposed marine farms would not substantially damage or modify the naturalness of Pigeon Bay. It was not proper to concentrate on any one aspect of the seascape or landscape of Pigeon Bay (unless it was itself an outstanding natural feature within the meaning of s 6(b)). The proposal was rather to be looked at in the whole context of the location, as an issue of scale.

(12) Any potential effects on the values of the coastal environment both on sea and on land were minor and temporary, and accordingly the marine farms were appropriate developments. As the proposed term of the marine farms was only 15 years, if Pigeon Bay had become a major recreational area and the marine farms an inconvenience, nuisance or hazard by the end of that period, then their presence could be reviewed. Consent was granted for both sites, but the applicant should not presume that further resource consents would be granted when they expired; granting consent would not mean that marine farming was established in Pigeon Bay forever.

(13) In the absence of any evidence about the effects of dredge oysters and scallops in Banks Peninsula's bays, those species should not be permitted to be grown (*Greensill v Waikato Regional Council*).

Observations

(1) It was hard to see the point of the exception to the general scheme of the Act occasioned by s 28(b) and cl 19 of the First Schedule. It gave one party to the process a no-lose solution: the Minister could take citizens through the Council hearing and appeal process, and at the end substitute his or her own decision for the judicial decisions of (possibly) both the Council and this Court. That process was fundamentally unfair to the public.

(2) Clause 19 breached the constitutional convention of the separation of powers whereby the legislature, the government and the judiciary do not interfere with each other's proper workings. Because cl 19 was an exception to judicial independence, attention was drawn to this aberration in the hope that the RMA might be amended.

(3) Any resource consent creates some sort of precedent. It creates a psychological precedent for further applicants which, although without legal significance, serves to remind the Court that to do justice it must, if

it is treating later applicants differently, give reasons why it is distinguishing their case.

Cases referred to in the judgment:

Baker v Franklin District Council (Environment Court, A 70/98, 19 June 1998)
Baker Boys Ltd v Christchurch City Council [1998] NZRMA 433
Browning v Marlborough District Council (Environment Court, W 20/97, 10 March 1997)
Coleman v Tasman District Council [1999] NZRMA 39
Gill v Rotorua District Council (1993) 2 NZRMA 604
Greensill v Waikato Regional Council (Environment Court, W 17/95, 6 March 1995)
Harrison v Tasman District Council [1994] NZRMA 193
Kemp v Queenstown-Lakes District Council (Environment Court, C 95/94, 14 October 1994)
New Zealand Marine Hatcheries (Marlborough) Ltd v Marlborough District Council (Environment Court, W 127/97, 18 December 1997)
New Zealand Marine Hatcheries (Marlborough) Ltd v Marlborough District Council (Environment Court, W 46/98, 30 June 1998)
Paykel v Northland Regional Council (Environment Court, A 8/99, 3 February 1999)
Ruddlesden v Kapiti Borough Council (1986) 11 NZTPA 301
Stark v Auckland Regional Council [1994] NZRMA 337
Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2) (1993) 2 NZRMA 574

Resource Management Act 1991

These are appeals under s 120 of the Act

D J Clark for Pigeon Bay Aquaculture Ltd
E J Chapman for A S Hay and others
M Perpick for Canterbury Regional Council
E Alty for the Minister of Conservation under s 271 of the Act

JUDGE J R JACKSON.

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DECISION

[A] Introduction

(1) This is the first case about marine farming in a bay of Banks Peninsula to be argued before the Environment Court. It concerns

applications by Pigeon Bay Aquaculture Ltd ("the applicant") to the Canterbury Regional Council ("the Regional Council") under s 12 of the Resource Management Act 1991 ("the Act") to enable two marine farms to be placed and operated in Pigeon Bay, Banks Peninsula. The Regional Council granted resource consent for one marine farm and refused consent to the other in 1997. The applicant then appealed against the refusal of consent and Mr A S Hay and others (together called "the submitters") appealed against the grant of the other. The Minister of Conservation ("the Minister") joined the proceedings by giving notice under s 271A of the Act.

(2) Pigeon Bay is approximately 8 kms in length and runs approximately north/north east to the Pacific Ocean. It is a typical bay in Banks Peninsula in that it has long parallel ridges running down to the sea from the central summit ridge. The entrance to the bay is 8 kms east of the entrance to Lyttelton Harbour and is separated from it by Port Levy, another long and rather more irregularly shaped bay. Pigeon Bay is generally between 1 kilometre and 1.5 kms wide and has a surface area of 927 h. Except at its head the bay has steep shores which become progressively steeper closer to its entrance to the open sea. There are no large indentations in the bay, the only significant ones are Whisky Cove which is approximately one third down the west side of the bay, and Holmes Bay on the western side of the bay at its head.

(3) The first marine farm ("site 1") applied for is for a 9.5 hectare parallelogram and is located with its south western corner 95 metres from the rocky foreshore at Whisky Cove. Site 1 then runs 600 metres north/north east from that point, never coming closer than 60 metres to the foreshore. It was 157.75 metres wide. Site 2 is 190 metres north of site 1 and comprises a 9.8 hectare site which is 700 metres long and 140 metres wide. It is a rectangle with its long side parallel to the shore and again is never closer than 60 metres to the shore. The bay is approximately 7-11 metres deep in the vicinity of the sites.

(4) The applicant proposes to use the marine farms mainly for mussel farming but also to grow dredge oysters[1] and scallops[2]. While green[3] and blue[4] lipped mussels, and rock oysters[5] are found naturally in the area, scallops and dredge oysters are not (according to the evidence we heard) and the implications of that we will consider later. Standard surface longlines the same as those used extensively elsewhere in the mussel industry will be installed. Scallops and oysters would be held in "Yealands" trays on lines dropping off the longlines. The area occupied by buoys and long lines on the surface of the water will be less than the

1. *Tiostrea chilensis.*
2. *Pecten novaezelandiae.*
3. *Perna canaliculus.*
4. *Mytilus edulis.*
5. *Saccostrea glomerata*

total area applied for, to allow for the necessary hanging of the warps holding the long lines and buoys to the anchors on the seabed.

(5) From any distance the views of the land around Pigeon Bay are of a predominantly pastoral landscape. There are more areas of woodlots and individual trees towards the head of the bay and in the gullies rising up to the crest of the summit ridge of the peninsula, and an exposed pastoral landscape as the ridges fall to the sea. Closer to the sites, from Whisky Cove out to Pigeon Point at the entrance to the bay, the shore is considerably steeper above the mean highwater mark. Whisky Cove itself runs back up into Whisky Gully which has a wilder, more unkempt landscape of native plants and introduced weeds. Above those and slightly closer to the heads is an exotic woodlot (Pinus radiata) approximately four years old. Above the shore from that point out to the heads there is an increasingly steep sequence of bluffs changing into cliffs and sea caves.

(6) Approximately 4 kms from the sites, at the head of the bay there is a small rural community comprising many of the submitters, some of whose families have been living in Pigeon Bay since the 1840's. Just to the west of the Pigeon Bay community is Holmes Bay, the home of Mr E J C Aitken and his family. Mr Aitken is one of the shareholders in the applicant company. Mr Aitken's family owns almost all of the land on the ridge from Holmes Bay down Little Pigeon Bay Road, a gravel road which runs down the crest of the ridge.

(7) The submitters, supported by the Minister, had three general grounds for opposing a grant of any resource consent to the applicant. These were:

- First, that granting coastal permits for the sites to the applicant would breach Part II of the Act, the New Zealand Coastal Policy Statement ("NZCPS") and various subordinate statutory instruments;
- Secondly, that the adverse effects of the proposal are more than minor and are unacceptable. Those alleged adverse effects were specifically on the natural character of the coastal environment; also on amenity values, especially recreation, boating and fishing, and finally – this was rather an afterthought at the hearing before this Court – an effect on the ecology of the area by the introduction of two new marine species (dredge oysters and scallops);
- Thirdly, that the applications should be deferred until there was an operative regional coastal plan covering the issue of marine farming for the region as a whole and Banks Peninsula in particular. At present there is only a proposed regional plan – the proposed Canterbury Regional Coastal Environment Plan ("the PRCEP").

(8) In making our decision we have to:

(1) decide the status or category of the activities under ss 88 and 88A of the Act;

(2) identify the relevant matters in s 104 of the Act; and then

(3) weigh those under s 105 in order to achieve sustainable management of the resources involved.

We deal in [B] below with the categorisation point. Then the relevant s 104 matters are identified in parts [C] – [F] of this decision. Our assessment and determination are in parts [G] and [H] respectively.

[B] Categorisation of the Activity

(9) The first step in considering any application for resource consent is to decide what category or type the activity for which resource consent is sought falls into, ie. is it a controlled, discretionary or non-complying activity[6] or is it within the 'innominate category' identified in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)* (1993) 2 NZRMA 574.

(10) There is an important preliminary step in this case because since the applicant applied for resource consent in 1997, the Regional Council notified a variation of the PCREP plan in October 1998. Section 88A of the Act (enacted by the Resource Management Amendment Act 1997)[7] states:

> **88A Description of type of activity to remain the same** —
> (1) Where —
> (a) An application for a resource consent has been made under section 88; and
> (b) The type of activity (being controlled, discretionary, or non-complying) for which the application was made is altered after the application was made as a result of —
> (i) A proposed plan being notified; or
> (ii) A decision being made under clause 10(3) of the First Schedule; or
> (iii) Otherwise, the application continues to be processed and completed as an application for the type of activity specified in the plan or proposed plan existing at the time the application was made.
> (2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section 104.

The general effect of s 88A seems to be that given the circumstances it describes, firstly[8] subs (1) indicates that the type of activity is defined by the unamended plan, but secondly s 88A(2) makes it clear that:

> any plan or proposed plan <u>which exists</u> when the application is considered must be had regard to. (our underlining)

under s 104. In short: the activity is <u>defined</u> by the unamended (proposed) plan[9], but it is <u>considered</u> under the

6. Section 88(3).
7. 1997/104; operative 17 December 1997.
8. See *The New Fowler's Modern English Usage* 3rd Ed (1996).
9. In this case the PRCEP.

variation which has been notified.

(11) Section 88A must be read as creating a partial exception to cl 16B of the First Schedule as to when a variation takes effect. Clause 16B(2) states:

> (2) From the date of public notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.[10]

Section 88A and cl 16B(2) are largely consistent so far as they both apply the relevant proposed plan as varied. The limited exception created by s 88A(1) is that the categorisation of the activity for which consent is sought must take place under the unvaried proposed plan.

(12) In the case of the PRCEP we have a situation where the activities proposed by the applicant need to be categorised under the PRCEP as notified rather than the PRCEP as varied. Looking first at that, we find that while Chapter 8 of that instrument acknowledged that marine farming could lawfully be conducted in the coastal marine area (ie, as a permitted activity) there were difficulties with how the Chapter intended that to be given effect. Consequently, we raised at the hearing the question whether under the PRCEP as notified, marine farming is in the innominate category of resource consent.

(13) We consider the approach outlined above would be correct (and will be in future cases) except for one small matter of timing: the two appeals we are considering were lodged in November 1997. The Resource Management Amendment Act 1997 ("the RMAA 1997") which introduced s 88A came into force on 17 December 1997. We have heard no argument that s 88A was retrospective. Indeed in the face of s 78(5) of the RMAA 1997 which states:

> (5) Where an appeal has been lodged or an objection has been made before the commencement of this section, but the hearing of that appeal or consideration of that objection has not commenced, or where an appeal is lodged or an objection is made within the time referred to in subsection (4), the appeal or objection must be considered and completed under the principal Act as if this Act had not been enacted.

We consider that we must decide this case as if s 88A had not been enacted.

Thus we have the slightly anomalous result that under cl 16B of the First Schedule we must apply the regional coastal plan as varied in our categorisation of the resource consents. We now turn to the rules in the varied PRCEP sought. As for the application of and weight to be given to the PRCEP, we leave that to our discussion of the s 104 matters – in particular

10. As added by s 27 of the Resource Management Amendment Act 1996 (1996/160), ie before s 88A was enacted.

s 104(1)(d).[11]

(14) As far as the rules of the PRCEP[12] are concerned it is common ground that the structures of the marine farms are not sufficiently minor to be permitted activities. Therefore they are discretionary activities under Rule 8.3 which states:

> Except as provided for by Rules 8.1, 8.2, 8.4, 8.5, or 8.6 of this plan; the erection, reconstruction, placement, alteration, extension, removal or demolition of any structure, or part of any structure, fixed in, on, under, or over any foreshore or seabed; is a Discretionary Activity.[13]

We record in passing that Mr Alty, in opening, had made submissions that the activities had to be treated as non-complying. But his argument referred to the wording of the notified plan, and not to the varied plan we now have to consider.

(15) The corresponding rule for occupation states (relevantly):

> The following activities are Permitted Activities:
>
> (a) The occupation of the Coastal Marine Area that is directly associated with any erection, reconstruction, placement, alteration, extension, removal or demolition of a structure that is authorised as a Permitted Activity in accordance with Rule 8.1 of this plan, or by a resource consent, provided that the Regional Council is informed in writing of the nature of the structure and its occupation at least ten working days before the occupation of the Coastal Marine Area by any new structure commences.
>
> (b) The occupation of the Coastal Marine Area by any authorised Structure.[14]

Thus it may be that no resource consent is needed for occupation of the marine farms if their structures are allowed under a resource consent (as discretionary activities). We feel uneasy about this mechanism in the PRCEP: defining a permitted activity by reference to whether a resource consent is obtained for a related activity is a known (albeit relatively untested) technique but it seems fraught with difficulties.[15]

[C] Effects [(Section 104(1)(a))]

Visual and amenity effects

(16) We heard useful evidence from three landscape architects. Mr P Rough, for the applicant, and Mr G Densem, for the submitters, both made computerised photo-simulations of the site. Of these we prefer Mr Rough's for their verisimilitude and because of the defects in Mr Densem's. These were pointed out by Mr Rough and readily conceded by Mr Densem in answer to questions

11. Part [E] of this decision.
12. All references hereafter are to the PRCEP as varied.
13. PRCEP Rule 8.3 (p 8–25).
14. PRCEP Rule 8.23 (p 8–45).
15. It is not a million miles from the error in *Ruddlesden v Kapiti Borough Council* 11 NZTPA 301 (HC).

from their respective counsel. The defects in Mr Densem's simulation were that:

- the corners of the sites were not accurately located by Mr Densem, whereas they had been accurately located on the water by Mr Rough before he took his photographs;
- it does not show internal clear lines within each mussel farm;
- it covered the whole area of each site rather than the smaller visible area of buoys and longlines in each;[16]
- it included no proper perspective effect, especially from any height.

(17) Despite the justified criticism of Mr Densem's simulations, and because of his candidness, his evidence was still useful. Indeed he and Mr Rough were largely in agreement relating to the visibility of the marine farms if located on the sites. They believed the sites would have:

(a) a significant visual impact when viewed from sea-level at anywhere between 300 m and 500 m distance; and from an elevated viewpoint at between 700 m and 1000 m;

(b) some impact at sea level at distances of up to 1 km and from elevations at up to 2 kms; and

(c) no impact when viewing from sea-level at more than 1.3 kms and from elevation at 2.5 kms.

Those distances are important because there are three classes of viewers who are potentially likely to have views of the marine farms if placed on the sites. They are the residents of Pigeon Bay, users of the walkway on the east side of Pigeon Bay and people on boats.

(18) As for residents of Pigeon Bay, those who live on the western side of the bay – that is to the west of Pigeon Bay Road (which runs onto the foreshore from the south) – are likely to have their view of site 1 obscured by the hillside running down from Mt Holmes. Site 2 will be visible but at a distance of 5 kms which means it is highly unlikely that the marine farms will be seen with unaided eyes. Residents to the east of Pigeon Bay Road will be able to see the area of site 1 but the marine farm will have, according to the experts, no impact. We accept their evidence on that issue. As for effects at night time, we think it unlikely that the lights on the marine farms will be able to be seen (unaided) from houses in Pigeon Bay, but if they are it will only be faintly.

(19) As for the walkway along the eastern side of Pigeon Bay, people there will view the sites from 70 m above sea level and at a distance of over 1.4 kms. There will be some visual impact on the views. The degree of impact will vary markedly according to lighting conditions. There may be lighting which spotlights the sites or part of them. Equally, and we were given photographs by Messrs Densem and Rough showing these effects, they may

16. See para 4 above.

be much less visible if they are in shadow, or in the reflection of the hills behind them.

(20) We find that boat users will be able to see the buoys as they approach them. The buoys will have a significant impact from under 500 m distance especially in calmer conditions. The marine farm on site 1 will occupy 14.5 per cent of the width of the bay (1.5 kms) and the marine farm on site 2 (which is slimmer) 15.5 per cent of the distance to the eastern shore opposite (1.25 kms). From closer to the eastern shore it will be nearly impossible to see the marine farms from sea level in most light conditions.

(21) The third landscape architect was Ms Lucas who was concerned not so much with the landscape as seen but its characteristics as a whole. We return to consider her evidence later in our evaluation under s 105 since it is not readily reducible to findings of fact.

Ecological effects

(22) The only scientific evidence we heard on the biological effects of the marine farms was from Mr A D Ritchie, a marine biologist called for the applicant. He said that the depth of the sea bed averages 7-11 metres from mean low water mark and that the flat bottom of the bay is predominantly silt and mud. Such mud/silt substrate is common in the bays of Banks Peninsula and supports a relatively low diversity of marine species.

(23) Mr Ritchie said that the proposed species are all bivalve filter feeders which feed on phytoplankton.[17] He said that phytoplankton levels are not significantly reduced downstream of an operational mussel farm and within 80 metres have returned to the upstream level. He accepted that there would be shell deposit under the marine farm which might affect the few species present there but could attract different species such as starfish. However he said that that had to be measured against the ongoing deposit of sediment, particularly from land run-off. He noted that shell material is to be found naturally at the site in any event. Over time he expected it would break down.

(24) Mr Ritchie considered that the presence of the marine farms would cause no adverse effect on the Hectors dolphins or little blue penguins[18] which live in the area. He was not aware of any recorded incident of a dolphin or penguin being caught in a marine farm in the Marlborough Sounds. As for the effect on fishing he stated that a marine farm creates an artificial reef over a period of time and is therefore an attraction to predatory species. He confirmed that in the Marlborough Sounds it is now common to see smaller vessels tied up to marine farms to fish for species such as blue cod.

17. A microscopic plant found in sea water.
18. The Canterbury race: White-flippered penguins.

(25) As we have said, Mr Ritchie's evidence was essentially uncontroverted. To that extent we accept it. The one big omission from his evidence however was to discuss the effect of introducing scallops and dredge oysters. He said nothing about that issue at all. We are concerned about the introduction of species to Banks Peninsula without some assessment of the environmental effects. We will consider later the absence of such assessment both from the formal assessment of environmental effects required under the Fourth Schedule, and from the evidence.

(26) We heard evidence of the native species of flora along the western side of Pigeon Bay adjacent to the sites from one of the submitters, Dr E Godley, who is a retired director of the Botany Division of the former DSIR. His knowledge came from an inspection of the land area adjacent to the sites and from a botanical survey of Banks Peninsula to which he referred.[19] He said that Whisky Gully supports a woodland including a number of native species.[20] The steeper exposed slopes further towards the entrance of the bay include tussocks, scattered kanuka, *coprosma* species and native broom. In addition there are introduced herbs and other weedy species.

(27) For the applicant Dr B M Molloy gave evidence. He did not disagree with the botanical makeup of the area but pointed out that the whole landscape was not natural but culturally induced first by Maori occupation and use, especially by burning, and subsequently by European clearances and conversion to pasture. We have no reason to doubt, and indeed no one challenged, his description of the processes by which the current landscape has developed. However we think Dr Molloy is being too purist in describing it as not a "*natural*" landscape. In the sense in which the word "*natural*" occurs in s 6(b) we find that the landscape is natural. Admittedly he was using the distinction in the PRCEP,[21] but that is not (as we shall see) the test in the Act with which we are concerned.

Navigational issues

(28) On navigational issues we heard first from Captain W V Wood, a master mariner from the Marlborough Sounds. Captain Wood has also been a harbour pilot around the South Island including at the ports of Lyttelton, Bluff and Picton. He is actively involved in yachting and is familiar with the whole of Banks Peninsula, including the subject site. He first visited Pigeon Bay on a yacht in 1954 and has sailed in a number of yacht races since that time. He has inspected the sites after ascertaining by sextant where they were to be located. He pointed out that

19. Carried out by Mr Hugh Wilson (a local botanist with wide knowledge of the South and Stewart Island flora) in 1987 and 1988.
20. Mahoe, ngaio, ikiraho, narrow leaved lacebark, lowland ribbonwood, common broadleaf.
21. PRCEP at Appendix 1/7.

Pigeon Bay was most exposed to north easterly winds and in those situations where the western side of the bay is a lee shore (of concern to mariners) it is recommended to follow the eastern shore of Pigeon Bay. His conclusion was that establishment of the two marine farms on the western side would not create a navigation hazard or even a navigation inconvenience because they are both on a lee shore and out of normal courses of transit in and out of the bay.

(29) As far as yachting is concerned he considered that the proposed marine farms would not cause any significant inconvenience. He pointed out that the outer physical edge of the marine farms would be approximately 200 m from mean low water and therefore in an area unlikely to be used by sailing craft. If a sailing vessel was in difficulty in Pigeon Bay it could actually make fast to a marine farm. He considered that the width of Pigeon Bay adjacent to the sites was seven-tenths of a nautical mile which gave plenty of room for a sailing vessel to manoeuvre and tack in. From his experience of the Marlborough Sounds he pointed out that they contain approximately 500 marine farms, established over the last 27 years, and there is only one known incident of a vessel colliding with a marine farm[22] and actually causing damage. He concluded that there would be no significant effect on sailing in Pigeon Bay, either casually or on race conditions. There was some conflict between Captain Wood and the lay witnesses called by the submitters. With due respect to the latter's local knowledge and their keen interest in sailing we prefer Captain Wood's expert evidence to their amateur knowledge.

[D] The New Zealand Coastal Policy Statement [Section 104(1)(c)]

(30) The relevant instruments under this paragraph are the New Zealand Coastal Policy Statement ("the NZCPS") and the Canterbury Regional Policy Statement (the "RPS"). The relevant provisions in the NZCPS are identified below. The relevant general policies are:

> Policy 1.1.1
>
> It is a national priority to preserve the natural character of the coastal environment by:
>
> (a) encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;
>
> (b) taking into account the potential effects of subdivision. use, or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and
>
> (c) avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

22. He said the master was intoxicated at the time.

and

Policy 1.1.3

It is a national priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:

(a) landscapes, seascapes and landforms, including:
  (i) significant representative examples of each landform which provide the variety in each region;
  (ii) visually or scientifically significant geological features, and
  (iii) the collective characteristics which give the coastal environment its natural character including wild and scenic areas;
(b) characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and
(c) significant places or areas of historic or cultural significance.[23]

Consideration of how the application measures against these policies is left to section [G] of this decision.

The more specific policies relating to use and development of the coastal marine area and referred to by counsel are policies 3.1 and 3.2:

3.1 **Maintenance and Enhancement of Amenity Values**

Policy 3.1.1

Use of the coast by the public should not be allowed to have significant adverse effects on the coastal environment, amenity values, nor on the safety of the public nor on the enjoyment of the coast by the public.

Policy 3.1.2

Policy statements and plans should identify, (in the coastal environment) those scenic, recreational and historic areas, areas of spiritual or cultural significance, and those scientific and landscape features, which are important to the region or district and which should therefore be given special protection; and that policy statements and plans should give them appropriate protection.

Policy 3.1.3

Policy statements and plans should recognise the contribution that open space makes to the amenity values found in the coastal environment, and should seek to maintain and enhance those values by giving; appropriate protection to areas of open space.

3.2 **Providing for the Appropriate Subdivision, Use and Development of the Coastal Environment**

Policy 3.2.1

Policy statements and plans should define what form of subdivision, use and development would be appropriate in the coastal environment, and where it would be appropriate.

Policy 3.2.2

Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.[24]

23. NZCPS, pp 4 and 5.

Mr Alty for the Minister expressly relied on these policies and, in particular, on policy 3.2.1. He said:

> The NZCPS is a solemn statement of policy from the Executive arm of Government . . .

But we accept Mr Clark's submission that the NZCPS must still be consistent[25] with Part II of the Act. Mr Clark also submitted that policy 3.2.1 is ultra vires ss 6(a) and 6(b) of the Act. However, we do not have to decide this point as policies 3.1.2, 3.1.3 and 3.2.1 are specifically identified as being policies for the development of policy statements and plans rather than as policies of direct application to an application for resource consent. The remaining two policies 3.1.1 and 3.2.2 are directly relevant and of crucial importance in this case. We consider them in part [G] of this decision.

(31) Turning to the regional policy statement, the most relevant policy in the RPS is in the chapter on Coastal Environment Policy. It states:

Policy 1

To avoid, remedy or mitigate, to an extent not inconsistent with the New Zealand Coastal Policy Statement, the direct and indirect adverse effects of land uses or activities and new or additional uses, development or protection inland of or within the coastal marine area where, either singly or cumulatively they would significantly affect:

(a) the life-supporting capacity of coastal ecosystems and the natural processes which sustain them;
(b) areas of significant indigenous vegetation and significant habitats of indigenous fauna;
(c) natural character (including associated natural processes), outstanding natural features and landscapes;
(d) amenity and recreational attributes;
(e) areas of special significance to Tangata Whenua;
(f) people's health;
(g) heritage values of sites, buildings, places or areas.[26]

We do not find that this policy adds much, if anything, to the NZCPS. It could even be seen as diminishing the effect of the NZCPS because the policy speaks of remedying or mitigating the adverse effects of development in the coastal environment, whereas the NZCPS is rather stronger in requiring only the avoidance of cumulative adverse effects[27]. The other objectives

24. NZCPS, p 7.
25. Section 56 of the Act.
26. RPS Chapter 11: The Coastal Environmental Policy 1 (p 172).
27. NZCPS Policy 1.1.1(c) – quoted above.

and policies of Chapter 11 do not add to the NZCPS either.

[E] The Proposed Regional Coastal Plan [Section 104(1)(d)]

(32) The last statutory instrument in the hierarchy to be considered is the Proposed Canterbury Regional Coastal Environment Plan. This was first notified in 1994 but the process of notification, submissions and hearing by the Regional Council has only recently been completed and then only partially. We were advised by Ms Perpick in a memorandum to the Court prior to the hearing that Chapters 7 and 8 of the PRCEP were likely to be withdrawn and a variation notified shortly after the hearing. Since the proposed Chapters 7 and 8 as they stood at the commencement of our hearing obviously did not have the confidence of the parties we decided to adjourn the hearing to allow for notification of the variation, and then hear submissions on the effect of that variation. We were reluctant to discount all reference to Chapters 7 and 8 of the regional coastal plan because of the generality of the NZCPS and the Canterbury RPS. However, as will be seen, nothing turns on our decision to adjourn, because in the end we are thrown back on the other statutory instruments already identified.

(33) As stated earlier[28] by cl 16A of the First Schedule to the Act, the variation once notified merges with and becomes part of the PRCEP. Consequently, all references hereafter to Chapters 7 and 8 of that document are to the chapters introduced by the variation; references to Chapter 6 are to the instrument as amended by the Council's decisions on submissions – together they are called "PRCEP".

(34) The PRCEP contains three chapters of relevance:

- Chapter 6: Coastal Protection and Enhancement
- Chapter 7: Coastal Water Quality
- Chapter 8: Activities and Occupation in the Coastal Marine Area

(35) There are two aspects of Chapter 6 of the PRCEP – "Natural Character and Appropriate Use of the Coastal Environment" – which are of particular interest. First it contains a general objective and policy which are relevant as an overall guide in the coastal marine area. These are (relevantly):

> Objective 6. 1
>
> (a) To protect and where appropriate enhance Areas of Significant Natural Value (identified in Schedule 1 and shown on the planning maps in Volume 2) and areas of high natural, physical, heritage or cultural value (in particular those listed in Schedules 2 and 3) including:
>
> . . .
>
> (v) coastal landforms and landscapes, submerged platforms and seascapes that are regionally, nationally or internationally representative or unique;

28. See Part [B] of this decision.

> . . .
>
> (vii) areas of significant amenity value, including recreational attributes;
>
> (viii) areas having natural character in the coastal environment; and . . .[29]

(36) The relevant policy is:

> Policy 6. 1
>
> (a) Within the Coastal Marine Area the Canterbury Regional Council and the Minister of Conservation . . . will:
>
> (i) control activities which have or are likely to have an adverse affect on the identified values of areas of significant natural value and areas of high natural, physical, heritage or cultural value.
>
> (ii) adopt a precautionary approach when considering applications for resource consents where the effects are as yet unknown or little understood or where the functioning of marine ecosystems is poorly understood.[30]

(37) The second relevant aspect of Chapter 6 is contained within the objective and policy just mentioned. It is that the PRCEP envisages protection of "Areas of Significant Natural Value" and a general categorising of (amongst others) areas of high natural, physical or cultural value. It is common ground that the sites in this case are not adjacent to an "Area of Significant Natural Value"[31] although site 1 is adjacent to an area valued for its coastal land form[32] in Whisky Gully on the west side of Pigeon Bay.

(38) Chapter 7 of the PRCEP is only relevant to the issue as to whether the applicant will need a separate discharge permit (not yet applied for) for the harvesting of mussels. The discharge of silt etc associated with that activity appears to be a discretionary activity under rule 7.2.[33]

(39) The scheme of Chapter 8 is complex. There is a general enabling objective[34] and then because various activities are forbidden by s 12 of the Act unless permitted by a plan or a resource consent, the first policy is to list permitted activities. These are:

> The Canterbury, Regional Council will authorise as Permitted Activities, subject to conditions that ensure they only have minor adverse effects, activities that take place in the Coastal Marine Area, including:
>
> (a) the reconstruction, alteration, removal or demolition of structures, the erection of minor structures, and extensions to existing structures in port areas;
>
> (b) limited disturbance of the foreshore or seabed and deposition of natural material;

29. PRCEP, pp 6-4 and 6-5.
30. PRCEP, p6-5.
31. Identified in Schedule 5.5 (p 5-9 et seq) to the PRCEP (var).
32. Identified in (now) Scedule 2 to the PRCEP (var).
33. PRCEP, p 7–19.
34. Objective 8.1 PRCEP (p 8-5).

(c) limited occupation of the Coastal Marine Area; and[35]

(40) It will be seen that the policy is that only minor or limited activities be permitted activities. There is then a policy to regulate other more significant activities:

> The Canterbury Regional Council, and the Minister of Conservation in relation to Restricted Coastal Activities, will regulate activities in the Coastal Marine Area that may have adverse effects on the environment. These activities include:
>
> (a) the placement of swing moorings;
> (b) the introduction or planting of exotic plants;
> (c) the emission of noise;
> (d) reclamations;
> (e) the transfer of petroleum products between vessels;
> (f) the use of vessels or buildings for habitation;
> (g) activities involving: structures, foreshore and sea bed disturbance, deposition of material, occupation, or taking of water or heat or energy from water; where those activities are not authorised as a Permitted Activities; and
> (h) activities that are of sufficient scale or effect to be a Restricted Coastal Activities;[36]

(41) The matters to be had regard to on any application "to undertake activities" in the coastal marine area are specified as being:

> (a) the existing level of use and development in the area and the national priority in the New Zealand Coastal Policy Statement to preserve the natural character of the coastal environment; and
> (b) the need to protect characteristics of the coastal environment of special value to Tangata Whenua; and
> (c) effects on the public use and enjoyment of the coast, including public access to and along the Coastal Marine Area, and the contribution of open space to the amenity value of the coast; and
> (d) cumulative effects of such activities on the coastal environment both within and outside the immediate location; and
> (e) existing agricultural and other use and development of the adjacent land area, and any adverse effects on that activity; and . . .[37]

(42) By contrast a different set of criteria are to be considered for the purpose of assessing an application to occupy[38] the coastal marine area. These are to:

> (a) give priority to maintaining safe anchorages for vessels; and
> (b) avoid impeding navigational channels and access to wharves, slip and jetties; and
> (c) avoid displacing existing public recreational use of the area where there are no safe adjacent alternative areas available; and
> (d) have regard to existing commercial use of the area and any adverse effects on that activity; and
> (e) have regard to any adverse effects on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and
> (f) have regard to any adverse effects on the cultural, historic, scenic, amenity, Tangata Whenua, and natural values of the area; and
> (g) have regard to available alternative sites and the reasons for the applicant's choice of site; and
> (h) have regard to existing use and development of the area and the extent to which the natural character of the area has already been compromised; and
> (i) only provide for the period or periods of occupation that are reasonably necessary to meet the purposes for which occupation is sought.[39]

35. Policy 8.1 PRCEP (p 8–5).
36. PRCEP Policy 8.2 (p 8–6).
37. PRCEP Policy 8.3 (p 8–7).
38. It appears Policy 8.3 is directed towards s 12(1) and Policy 8.5 to s 12(2).

(43) Before we consider the application of the PRCEP to the facts of this case we have to consider the weight to be attributed to it. For the Minister, Mr Alty urged us to give little or no weight whatsoever to the challenged parts of recently notified Chapters 7 and 8 of the PRCEP on the grounds:

- that they had not yet been tested;
- the submission period has not yet closed; and
- the proposed Chapters 7 and 8 are inconsistent with the NZCPS[40] and therefore ultra vires the Council.

Mr Chapman supported that position. For the applicant, Mr Clark wished to have more weight put on the PRCEP. He submitted that we should bear in mind that the new Chapters 7 and 8 are made in response to submissions on the earlier versions, including a submission from the Minister of Conservation. Further the new Chapters 7 and 8 have been approved by the Council prior to notification. Therefore we should give them some weight because the PRCEP is the only indication we have from the wider community (or its elected representatives) as to how it wishes to approach marine farming on the Canterbury coast.

(44) Initially Mr Clark's argument had some attraction, but at the reconvened hearing in November Mr Alty drew our attention to s 28(b) and cl 19 of the First Schedule to the Act. Section 28 defines the functions of the Minister of Conservation as including:

> (b) The approval of regional coastal plans in accordance with the First Schedule.

Clause 19 of the First Schedule then provides for approval in the following way:

> (1) Prior to his or her approval of a regional coastal plan, the

39. PCRCEP Policy 8.5 [p 8–9].
40. In particular he said that they breached NZCPS Policy 3.2.1 in that they do not define the form of development (eg marine farming) and where it would be appropriate.

> Minister of Conservation may require the regional council to make any amendments to the plan specified by that Minister.
>
> (2) The Minister of Conservation may not require a regional council to make an amendment to a regional coastal plan that is in conflict or inconsistent with any direction of the Environment Court unless the Minister made a submission on the provision concerned when the provision was referred to the Court.
>
> (3) When the Minister of Conservation requires a regional council to make changes under subclause (1), the Minister shall give reasons.
>
> (3A) If all submissions or inquiries relating to part of a regional coastal plan have been disposed of; the Minister of Conservation may approve that part.
>
> (4) Every approval of a regional coastal plan under this clause shall be effected by the Minister of Conservation signing the regional coastal plan.

(45) It is thus clear that, provided that the Minister made a submission on the relevant part of a proposed regional plan, the Minister may over-ride the participatory and judicial process of hearing by the Council and the Court and substitute his own decision for theirs. It is hard to see the point of this exception to the general scheme of the Act. It is giving one party to the process a no-lose solution: the Minister can take citizens through the Council hearing and appeal process, and at the end substitute his or her own decision for the judicial decisions of (possibly) both the Council and this Court. That process seems fundamentally unfair to the public. We imagine the public might ask "why bother?" when invited to be a part of the process of regional coastal plans.

(46) An important constitutional convention is breached by cl 19: that of the separation of powers[41] whereby the legislature, the government and the judiciary do not interfere with each other's proper workings (subject always to the supremacy of Parliament as legislature). The Act largely upholds the idea of judicial independence but cl 19 of the First Schedule is an exception. Having drawn attention to the aberration (in the hope the Act may be amended) we now consider the consequences of cl 19.

(47) Clause 19 is directly relevant in this case because the Minister has made submissions on both the original PRCEP (indeed he has now referred aspects of it to this Court) and on the variation of Chapters 7 and 8. Since the Minister has challenged much of Chapters 6-8 of the PRCEP we consider we should give no weight to the challenged provisions. That will disappoint the applicant which hoped to rely on them, but there is no point in putting any weight on provisions which the Minister may set aside and over which this Court has no ultimate control. The only parts of the PRCEP we consider are policies 8.2 and 8.3 which the Minister apparently accepts.

41. See *Halsbury's Laws of England* (4th Ed) Vol 8(2) *Constitutional Law and Human Rights*, para 8, last sentence.

[F] Other Matters [Section 104(1)(i)]

(48) The most significant additional matter to be considered is whether the grant of these marine farms would lead to further marine farms being granted in Pigeon Bay, or in other bays around Banks Peninsula. Under s 104(1)(i) we can consider as "other matters" the outcome of the case in terms of future applications for similar marine farming. There are two general outcomes to be considered:

(a) New activity changes the character of an area, thus some further scheme or activity may find it easier to establish simply because the character has already changed. This is the "thin end of the wedge" argument identified by the Planning Tribunal in *Kemp v Queenstown-Lakes District Council* (Environment Court, C 95/94, 14 October 1994).

(b) Secondly there is the question of whether a principle has been established by the first grant.

(49) If another aspiring marine farmer comes to the Regional Council and argues that the Environment Court granted consent in Pigeon Bay and that his/her circumstances are the same in all material respects should a further consent be granted 'automatically', because of the precedent having been set? That is a matter the Court can consider. The High Court held, in *Stark v Auckland Regional Council* [1994] NZRMA 337 that granting a consent for a discretionary activity may well be a precedent in other cases. A link between precedents and cumulative consequences was recently considered by the Full Court in *Coleman v Tasman District Council* (High Court, Wellington AP 224/97, 19 November 1998, Doogue and Neazor JJ) another case about subdivision as a discretionary activity. The Court stated:

> If the controlling authority has to ignore the potential effect of granting an application when a grant would establish a principle upon which other applicants could reasonably be expected to rely, then the controlling authority would be unable to deal with the cumulative consequences of applications such as the present. Regardless of whether the effect in question comes within s 3 and s 104(1)(a), it is certainly a matter which the Environment Court was entitled to take into account under s 104(1)(i).

The case identifies the tension between a precedent created by allowing an activity and a Council's ability to control cumulative effects.

(50) There are decisions of the Environment Court suggesting that for land use consents the grant of one **non-complying** resource consent cannot be a precedent for the establishment of another (*Kemp v Queenstown-Lakes District Council* (Environment Court, C 95/94, 14 October 1994), *Baker v Franklin District Council* (Environment Court, Environment Court, A 70/98)). A similar principle is that "existing degradation of part of a landscape should not be regarded as an excuse for additional

development" (*Paykel et ors v Northland Regional Council* (Environment Court, A 8/99, 3 February 1999), *Gill v Rotorua District Council* (1993) 2 NZRMA 604). We understand the reason for those propositions is that two resource consents, especially for non-complying activities, are necessarily always different. If the second ever comes into existence it does so only in the context of the existing (first) resource consent. However we consider the idea that a non-complying activity can never be a precedent might be an overstatement for the following reasons. First it is possible to imagine a land use consent in the middle of a rural zoning in the Canterbury Plains for say, a non-complying rural-residential subdivision, and then a further applicant makes a similar application. It may be difficult to distinguish the second from the first. For example, if the area in which they are establishing is sufficiently large and their proposals are modification rather than degradation of the landscape.

(51) Further, in our view any resource consent creates some sort of precedent. First, it creates a psychological precedent for further applicants: "if Smith (or Coleman) has a resource consent, why not me (Jones) since I'm in the same position?" This is the subjective shadow of the objective issue which is at the heart of the concept of justice. If there are no cumulative effects, or rather, the cumulative adverse effects have not passed the threshold where they are unacceptable, then the second case may not be able to be refused because there are no reasons to distinguish it. This, as we understand it, is the 'principle' referred to in *Coleman*. It is an application of the Aristotelian formula of justice that "like should be treated with like."[42] The psychological precedent has no legal significance but its existence serves to remind the Court that to do just justice it must, if it is treating later applicants differently, give the reasons[43] why it is distinguishing their case.

(52) The concept that a consent for a non-complying activity should not be a precedent has to be considered in the light of different patterns of accumulating effects. For example there are effects where either:

(a) the accumulated effects grow approximately exponentially[44] (in an ever-increasing curve) or

(b) they grow steadily followed by a discontinuity and abrupt rise when a threshold is reached.

These scenarios occur quite frequently for ecological effects. But it is also possible to imagine effects – often on amenities rather than on ecosystems – where the first cut is the deepest: a new house in a spare landscape, the first helicopter pad in a wilderness area; the first apartments in a suburban area. If there is one new house, helicopter pad or apartment block, does that not set a precedent in that the second may have much less effect than the first?[45] The amenity effects may be radically decelerating[46] with increasing numbers of activities so that once the first resource consent is granted, there is no good reason under the Act for refusing further applications (until the accumulation of ecological effects comes back into play). In this example the first non-complying consent may be a valid precedent for further consents.

(53) Thus we respectfully adopt the reasoning in *Stark* and *Coleman* and hold that granting a resource consent even for a non-complying activity may create a substantive precedent. Granting one resource consent may lead to difficulties in refusing another on the grounds that equals should be treated equally. This is so especially where adverse ecological effects are not greatly in issue, but amenity effects are.

42. The Nichomachean Ethics is usually cited as the source for this.
43. Of course this is required by the Act – s 113.
44. For example, as an approximation y=x (squared) where 'x' measures the number of activities and 'y' measures the effects.

[G] Considerations [Section 105(1)(b)]

(54) We consider we now have to exercise our discretion under s 105(1)(b) and consider whether granting the resource consents sought will achieve the single purpose of the Act having regard to the matters in Part II. We apply the procedure and weighting set out in *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433 at 462.

We bear in mind and give appropriate weight to the fact that there are matters of national importance in this case.

(55) Banks Peninsula as a whole may well be an outstanding natural feature and landscape.[47] It is a set of extinct and drowned volcanoes which until the very recent geological past[48] was an island. It has since been joined to the mainland by the gravel outwash which forms the Canterbury Plains. Of course its naturalness has been affected by human activities since the first human inhabitants arrived, and much more swiftly and radically since the arrival of Europeans in the 19th century. The issue as to how to protect it from inappropriate use and development[49] is related in the context of this case to the preservation of the natural character of the coastal environment.[50] In fact the scale and visual impact of the marine farming (under 20 h) is so small compared with the size of Banks Peninsula as a whole that this case is most usefully considered in terms of the local character of Pigeon Bay but not overlooking the contribution that has to the overall landscape.

(56) Some of the aspects identified in this case as relevant to assessment of the significance of a landscape are:

45. We do not overlook that issues as to the integrity of a plan might also arise.
46. For example, y = [unhandled character]x approximately.
47. In terms of s 6(c) of the Act.
48. 15,000–20,000 years ago.
49. A matter of national importance under s 6(b) of the Act.
50. Section 6(a) of the Act.

(a) the natural science factors – the geological, topographical and dynamic aspects of the landscape;
(b) its aesthetic values including memorability and naturalness;
(c) its expressiveness how obviously the landscape demonstrates the formative processes leading to it;
(d) transient values occasional presence of wildlife; or its values at certain times of the day or of the year;
(e) whether the values are shared and recognised;
(f) its value to tangata whenua;
(f) its historical associations.[51]

One only has to list these aspects to realise how subjective they are and we return to that shortly. On the other hand, some of the advantages of the list are that it emphasises:

- the richness of human response to landscape and the existence of differing cultural responses;
- that landscapes are an important component of the environment; and
- most importantly, that landscapes are the context of all activities on Earth, and thus cannot be readily separated from them.

(57) There is an element of duplication between aspects (a) and (c) in the previous paragraph in that every landscape is an expression of those natural science factors which caused it. Of course some landscapes are more legible than others even from a scientific perspective – a volcano is often more obvious than a dissected peneplain. Many other landscapes are expressive of a high amount of human interference with nature and not necessarily the worse for that even when assessed under Part II of the Act. There is also some overlap between the aesthetic values of a landscape [aspect (b)] and whether those values are widely shared and recognised [aspect (e)]. These aspects lead to several potential difficulties – first that landscape evidence can turn into a treatise on landscape aesthetics, and secondly that it can become a hearsay survey of attitudes of people affected by any proposal. And both aspects reinforce the subjectivity of these issues.

(58) As for the subjectivity of an aesthetic response, in *Browning v Marlborough District Council* (Environment Court, W 20/97, 10 March 1997) the Court stated:

> The experiential recognition of what is natural character and a landscape worthy of protection goes not to the matter of tasteful subjective judgment but to a recognition that the dominant land patterns on the landform consist of scrub and regenerating forest uncluttered by buildings or jarring colours, and an unencumbered land/sea interface.

51. Items (a)-(d) are from the explanation to Policy 3 in the Canterbury RPS [pp 108-110]. Items (e) and (f) are from Ms Lucas' evidence and we have added item (g) as a response to the discussion in NZ *Marine Hatcheries Ltd v Marlborough District Council* (Environment Court, W 127/97, 18 December 1997) and (Environment Court, W 46/98, 30 June 1998).

That passage is, in our respectful view, important because it distinguishes the completely subjective aesthetic assessment from a less subjective (but by no means value-free) assessment of the 'naturalness' of the landscape or, in this case, coastal environment. We consider the aesthetic criterion needs to be qualified in that way by Councils and by this Court. In a sense the really difficult (political) question has been answered by Parliament – if not in the clearest terms – in enacting Part II of the Act.

(59) Turning to the facts of this case, the first and most important alleged adverse effect is the effect of the proposed mussel farms on the "natural character of the coastal environment". This of course is a matter of national importance under s 6 of the Act. That section obliges us to recognise and provide for three relevant matters of national importance:

> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), . . . and the protection of [it] from inappropriate . . . use, and development:
> (b) The protection of outstanding natural features and landscapes from inappropriate . . . use, and development.
> . . .
> (d) The maintenance and enhancement of public access to and along the coastal marine area . . . .

The first two of these both have, at least in the present context, a strong visual or landscape component.

(60) The fullest recent discussion of "natural character" comes in *Browning*. There the Environment Court stated of Forsythe Island – a small island at the entrance to Pelorus Sound:

> In our conclusion therefore, the natural character of this area is to be assessed in its own maritime context which is one uncluttered by buildings, jetties or exotic forestry blocks or different textural land patterns apart from those caused by the erosion. We agree with Ms Lucas that because it is a small island and because it is in one ownership it is not one to be compared with other landscapes throughout the Sounds; Nor do we disagree with her that the area has a high degree of coherence in landscape form in spite of the farm tracks and slips. There is, in fact, no disruption to the landform apart from these. It is not for example the kind of 'working environment' which includes pastoral farming or forestry such as contributed to our approval of marine farm sites elsewhere in other parts of the Sounds.
>
> The evidence established that the island has a benign climate and the next five years will see significant regeneration of the bush as long as the browsers, such as the goats continue to disappear. The experiential recognition of what is natural character and a landscape worthy of protection goes not to the matter of tasteful subjective judgment but to a recognition that the dominant land patterns on the landform consist of scrub and regenerating forest uncluttered by buildings or jarring colours, and an unencumbered land/sea interface. We find as a fact that the only unnatural features are the farm road tracks which, in the overall vistas of the

landscape, do not overwhelm it to the point where the modification of its natural character is detrimental.

But even a more modified landscape can have natural character. As the Planning Tribunal stated in *Harrison v Tasman District Council* [1994] NZRMA 193:

> The word 'natural' does not necessarily equate with the word 'pristine' except insofar as landscape in a pristine state is probably rarer and of more value than landscape in a natural state. The word 'natural' is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife . . . and many other things of that ilk as opposed to man-made structures, roads, machinery.

(61) We find that Pigeon Bay has a highly natural character in a working landscape sense. When looking from the east and close to the marine farm, it will be highly visible and will detract from the naturalness of the setting against the foreshore and the background which at those distances (up to 500 m from the buoys) will be either of Whisky Gully or the bluffs to seaward. From further away the working landscape becomes much more apparent with two tones of non-native green appearing in the form of introduced grasses and radiate pines. In addition from points north of Whisky Gully, and towards the other side of Pigeon Bay, the house and woolshed on the top of the eastern ridge can be readily seen, thus reducing the 'naturalness' of the landscape but not necessarily its aesthetic coherence.

(62) Turning away from visual effects we consider it is useful to measure the effects of the marine farm in terms of the factors identified in the RPS:[52]

(a) There will not be substantial damage or modification to the naturalness of Pigeon Bay;

(b) Any effects will not be permanent or even long term, since resource consent is only sought for 15 years;

(c) The short term effects (eg during construction) are localised, and in particular will not spread in any significant way to the head of Pigeon Bay;

(d) Ecological resilience will not be affected except for the proposed introduction of scallops and dredge oyster species to the area;

(e) There may be a small increase in scientific value to the community as the marine farms operate;

(f) Such effects as there are will not be widespread within the region;

(g) The issue of cumulative effects we turn to shortly;

(h) We heard no evidence that either of the marine farms will be of concern to tangata whenua;

(i) There will be no irreversible changes;

52. Chapter 20.4(2) [pp 289–290].

(j) We accept Captain Woods' evidence and find that the marine farms will have minimal effects on the ability of yachtsmen to function in a safe and efficient manner.

(63) Because the PRCEP is to be given no weight except for policies 8.2 and 8.3, the NZCPS and the RPS have more specific importance. Because we have found that the objectives and policies of the RPS largely repeat or dilute the NZCPS we consider the latter is the more important instrument, not only in terms of its place at the head of the hierarchy of subordinate instruments, but also for its specific guidance to the Court.

(64) Looking at policy 1.1.1[53] of the NZCPS we find that the natural character of Pigeon Bay has not been highly compromised so, in terms of the policy, development should be encouraged elsewhere. That is a factor which would suggest the resource consent should not be granted if we find the development is inappropriate. On the other hand the natural character, while high for a working landscape as we have already discussed, is not of very high value compared with pristine landscapes so this policy should not be over-emphasised. We also consider the potential effects of the marine farms on the values of the coastal environment both on sea and on land are minor and temporary, and accordingly they are appropriate developments. We find that Ms Lucas in her evidence, and Mr Alty for the Minister in his submissions, have concentrated too much on the seascape and the seacliffs and caves towards the entrance of Pigeon Bay. The proposal must be looked at in the whole context of Pigeon Bay. The issue is one of scale. One cannot look at one aspect of the landscape and exclude all others (unless it is itself an outstanding natural feature within the meaning of s 6(b)).

(65) We have to consider cumulative adverse effects of marine farming: and any precedent which might be set. The cumulative and scale effects have to be considered. On a Marlborough Sounds scale the applications are together equivalent to four average mussel farms. We consider the application is not out of scale. As for any precedent, we consider it sets none that can be usefully relied on. On the evidence given to us there are few or no other suitable areas for development in the bays around Banks Peninsula. Mr Alty urged that more consideration should have been given to alternative sites in other bays. We did hear some evidence, and we accept, that most other bays around Banks Peninsula are inadequate for different reasons eg Lyttelton Harbour is too polluted, and many other bays have unsuitable sea conditions because they are too exposed to wave action. Mr Alty suggested Akaroa Harbour but when he did so he conceded that other difficulties might arise. Akaroa Harbour has other important resource management values that further marine farming may compromise. We are satisfied that adequate examination was given to alternatives and that this case will not

53. Quoted in this decision in para 30.

cause a rush of grants of resource consents. Any application in another bay will first have to be considered on its own facts, and secondly will have to be considered in respect of cumulative effects on the landscape/seascape of Banks Peninsula as a whole.

(66) The national priority in policy 1.1.3 of the NZCPS is also relevant in this context. We consider that significant representative examples of Banks Peninsula bays (with their undoubted visual and scientific significance) are being left. There are enough such bays without marine farms so that their collective significance is protected. Their protection would be a factor militating against further marine farms in other bays between Pigeon Bay and Akaroa Harbour.

(67) Granting this application will not so weaken the natural character of Pigeon Bay as to render it defenceless to further applications because there are questions of balance, scale and location which need to be considered also. We have granted the likely maximum appropriate in Pigeon Bay at present. It is unlikely that this case will be a precedent for any further application in Pigeon Bay because such an application will not only be in a new location, but also will come into a context where 20 h of the Bay is already dedicated to marine farming.

(68) In terms of NZCPS policy 3.1.1 we do not consider that the marine farms will have significant adverse effects on the amenity values of the coastal marine area, or on the safety of the public or on the public's enjoyment of the coast (whether on the walkway on the east side of Pigeon Bay or on the sea surface). The photo-simulations of the marine farms, and the evidence of Messrs Densem and Rough, convince us that the adverse effects will not be more than minor for distances of under 500 m, and very minor at greater distances than that.

(69) Finally policy 3.2.2 states that adverse effects should be avoided as far as practicable, and where not, mitigated. As we have found, the adverse effects are very minor and need no mitigation beyond the design features already present. A main recipe for remedying such effects as these, and indeed the intensification of effects that may arise from increased recreational use of Pigeon Bay, is that the proposed term of the marine farms be only 15 years. If in 15 years time Pigeon Bay has become a major recreational area and the marine farms an inconvenience, nuisance or hazard, then their presence can be reviewed. If we are to grant consent to both sites, the applicant should not presume that further resource consents would be granted when these consents expire. Granting consent would not mean that marine farming is established in Pigeon Bay forever.

(70) Taking all factors into account and weighing the matters of national importance with due seriousness we consider that both the marine farms should be permitted to be established. There is an exception: in the absence of any evidence about the effects of dredge oysters and scallops in Banks Peninsula's bays, we should not permit those species to be grown (following *Greensill v Waikato Regional Council* (Planning Tribunal, W 17/95, 6 March 1995). If we were to refuse these marine farms then we would be saying there should be no more aquaculture around Banks Peninsula. We are inclined to think there should not be much (if any) more, but that is an issue for another day.

[H] Determination

(71) The appeal by the submitters largely fails, and that by Pigeon Bay Aquaculture Ltd largely succeeds. We make the following orders:

(1) Under s 290 of the Act the decision of the Council:

(a) in respect of site 1 is confirmed except that growing of dredge oysters and scallops is excluded (with the effect that only mussels may be grown);

(b) in respect of site 2 is cancelled and a resource consent granted to Pigeon Bay Aquaculture Ltd:

(i) in the same terms as for site 1, with all necessary changes to the conditions; and

(ii) provided that growing of dredge oysters and scallops is excluded (with the effect that only mussels may be grown).

(2) Costs are reserved.

(72) We consider that at first sight – because of the novelty of the issues involved in this area, and because there are matters of national importance involved – this is an inappropriate case for the award of costs.