

Decision No. W67 /2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under section 120 of the Act

BETWEEN

JIM and ROSE ELKINGTON FAMILY TRUST and TE KAWAU A TORU DEVELOPMENTS LIMITED

(RMA 0437/03)

Appellants

AND

MARLBOROUGH DISTRICT COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Principal Environment Judge R J Bollard (presiding)

Environment Commissioner P A Catchpole

Deputy Environment Commissioner O M Borlase

HEARING at **Blenheim** on 16, 17, 20 and 22 June 2005

COUNSEL

Q A M Davies and H Seyb for appellants

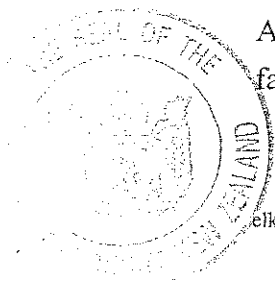
B P Dwyer for respondent

K E Mitchell for Friends of Nelson Haven and Tasman Bay Inc.

P C Mitchell and E Jamieson for Director-General of Conservation

DECISION

[1] Jim and Rose Elkington Family Trust and an associated company Te Kawau A Toru Developments Limited (the appellants) wish to establish a 30.25ha marine farm at the southern end of Penguin Bay on the eastern side of D'Urville Island in



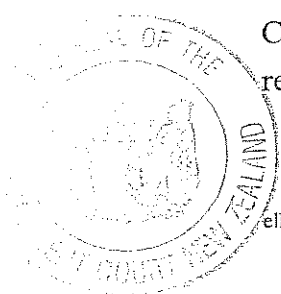
the Marlborough Sounds. The proposed location is just north of Bonne Point which is an easterly projection from the geographical feature known as the D'Urville Peninsula – a tongue of land that juts southwards and effectively creates a broad semi-circular enclosure to the south-west called Catherine Cove.

[2] Before proceeding to describe the proposal and the area surrounding more fully, we note that the appeal was lodged in June 2003, prior to the date on which the Resource Management Amendment Act 2003 took effect (1 August 2003). It is therefore common ground that the case falls to be determined in accordance with the principal Act as it previously stood. Moreover, by reference to s.50 of the Aquaculture Reform and Transitional Provisions Act 2004, it is accepted that the present application falls within the pre-moratorium and pre-commencement category that was not subject to the moratorium placed on marine farm applications. That being so, s.50(2) of the reform legislation provides for the continuation and determination of these proceedings under the RMA.

[3] Five marine farms are presently located in Catherine Cove, with a potential for the development of two more under consents granted by the Marlborough District Council. The existing farms have been established by Ngati Koata or by individuals with links to that iwi. The rohe of Ngati Koata (with whom the appellants are connected) is said, according to the evidence presented, to include (amongst other areas elsewhere or beyond) French Pass and Admiralty Bay (extending northwards to Catherine Cove), D'Urville Peninsula, and Penguin Bay from Bonne Point to Half Way Point at the northern end. On the northern side of the peninsula, more or less mid-way between Bonne Point and Half Way Point, lies Penguin Island, a small land feature that lies about 200m offshore.

[4] The marine farm as proposed would be square in shape, with sides measuring 550m, and positioned in what was described in evidence as a mid-bay location, 330m from D'Urville Island at the closest point. The proposed site lies within the Coastal Marine 2 zone under the Council's Marlborough Sounds Resource Management Plan (MSRMP) which is now operative. The proposal is non-complying in that zone.

[5] Broadly to the north-west and north of the site lies a scenic reserve, gazetted as such under the Reserves Act 1977, and administered by the Department of Conservation. As viewed from the water in the general vicinity of the site, the reserve features indigenous bush-covered slopes that ascend from the coastline and



constitute a spectacular landward outlook. In short, from a visual perspective the bush-covered slopes of the reserve viewable from the subject site present a striking picture of scenic beauty. However, the quality of the outlook overall is tempered to some degree by the presence of less impressive vegetation cover on slopes of generally lower elevation facing the south-west side of the proposed marine farm.

[6] That land is in Maori ownership under the Te Ture Whenua Maori Land Act 1993. Comparative to the scenic reserve, the vegetation is immature and less varied, while featuring the occasional wilding pine. Even so, the scenic backdrop in general is impressive, given the proximity and quality of the scenic reserve. In summary, assessing the landscape quality in relation to the area proposed for siting the marine farm against the evidence adduced from qualified and experienced landscape architect witnesses called for the Council and the Director-General of Conservation, and aided by a visit to the area by sea undertaken by consensus in the course of the hearing, we find that the landscape quality overall is notably high. The natural character of the scenic reserve is outstanding, and despite a lesser degree of visual impressiveness as the eye passes from the reserve to the land in Maori ownership as mentioned, the general impression that the area as a whole presents is one of high natural character and an outstanding landscape, sufficient in our judgement to bring both s.6(a) and (b) of the Resource Management Act 1991 (RMA) into play.

[7] On the landscape quality/coastal character aspects, evidence was adduced from two qualified and experienced landscape architects – Mr A M Rackham on behalf of the Marlborough District Council as respondent, and Ms D J Lucas for the Director-General of Conservation. Their evidence was persuasive, both individually and cumulatively. We accept their appraisals. As Mr Rackham observed:

The application site sits within an embayment partially enclosed by Bonne Point Peninsula, Penguin Island and the steep hillside of the eastern coast of D'Urville Island. It is located in an area of the Outer Sounds that has a high natural character. The coastal waters are largely natural and the surrounding land, while it has been partially modified in the past, is still dominantly natural and lacks any obvious modification along the coast towards Penguin Island. The site is physically and visually separated from Catherine Cove by the D'Urville Peninsula.

The proposed farm will be dissimilar in scale and setting to the existing inshore marine farms in Catherine Cove. It will be more than 300 metres off the nearest coastline and visually separated from the farms in Catherine Cove. When fully developed it may have as many as 2000 service buoys on 54 long-lines. This will inevitably reduce the natural character of the immediate area of the coast and introduce a utilitarian appearance to the otherwise natural water surface. It will not be an extension of any existing farms. It will introduce a new feature into this part of the coast.



[8] And according to Ms Lucas:

The Bonne Point to Halfway Point section of the D'Urville coastal environment is distinguished as being the most natural length of outer coastline on the Island. It is entirely naturally vegetated with substantial forest cover almost the entire length. Toward D'Urville Peninsula there is substantial wilding pine cover that has colonised open areas. These detract from the otherwise almost entirely natural elements experienced within Penguin Bay.

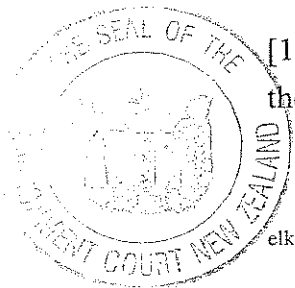
[9] And later:

Considering the waters between D'Urville Peninsula and the coast up to Halfway Point, out to the Trio Islands and to Clay Point, these waters of Greater Admiralty Bay in total are exceptionally natural. The enclosing lands are variously natural. There are no structures throughout, excepting [a] toilet tucked away at the camp site, and high on the ridge above, [a] power line and hall building. Other than some power poles high above, these are not evident from the water, these structures are experienced only when closeby from within the reserve lands of the shore and ridge high above. Other than along the tracking high on the slopes above Penguin Bay, eroded sites to D'Urville Peninsula and the pastoral Clay Point of the mainland some 6km distant, for the other lands, native vegetation clothes all available surfaces.

The camp site referred to by Ms Lucas lies at the shoreline of the scenic reserve between Bonne Point and Penguin Island. It is administered by the Department of Conservation as a facility of the reserve and is not visually obtrusive from off-shore.

[10] Evidence as to ecological values pertaining to the lands in the vicinity of the proposed marine farm was adduced from Dr P G Simpson on behalf of the appellants and from Mr S H Moore for the Director-General. Using what he described as his "usual criteria for assessing natural areas on D'Urville", Dr Simpson assigned rankings to considerations of representativeness in terms of vegetation, rarity as to species or eco-systems, diversity of species and habitats, distinctiveness, size and shape, connectivity and sustainability. Accounting for all factors, his ultimate ranking was "medium-high". When questioned as to why the ranking was at the level mentioned rather than "high" without qualification, Dr Simpson pointed to the sporadic pine growth at the south-western (Bonne Point) end of Penguin Bay, while acknowledging the ecological value of the area within the scenic reserve as one proceeds northwards, parallel to and then past the subject site, in the direction of Penguin Island.

[11] As to potential effects were the marine farm to proceed, Dr Simpson foresaw the possibility of indirect impacts occurring through more people visiting the



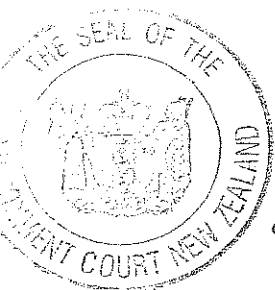
coastline adjacent to the marine farm. He thought that would have both negative and positive consequences – negative through greater fire risk and level of surface soil disturbance through coming ashore; positive through an increased interest in the area “perhaps raising the level of potential management activity (deer control, weed control, surveillance)”. He also surmised that “improved access from landing sites and formal tracks would assist any educational activities on the plants of the bush”.

[12] Mr Moore, in a detailed brief of evidence, discussed the ecological values of the scenic reserve and lands generally in the vicinity of the proposed marine farm. He differed from Dr Simpson in the ranking of the area within the vicinity as “medium-high”. However, while assigning a “high” ranking instead, he acknowledged that his definition of the “vicinity” extended further north and encompassed “a greater proportion of primary or old growth vegetation types”. In summary, he regarded the ecological values in the vicinity of the proposed farm as high, and considered (consistently with Dr Simpson) that there would not be any direct impact upon the terrestrial ecological values identified in his evidence were the marine farm to proceed. He noted, however, that those values are “inextricably linked with the natural character of the coastal environment where the farm will be located”.

[13] As to the range of vegetation and ecological value of the scenic reserve overall, Mr Moore observed:

D’Urville Island Scenic Reserve contains many of the indigenous vegetation types representative of the D’Urville Island flora and provides habitat for a large number of nationally threatened flora and fauna. These outstanding values make it a nationally significant protected area. It is managed primarily for conservation.

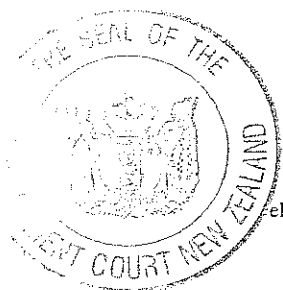
[14] Evidence was presented from other witnesses as to the variety of birdlife and the marine fauna in and about the application site – although we were left in some doubt over the extent of fish species and benthic communities within the area. It was Mr J Elkington’s assertion, contrary to the view of Mr R Schuckhard, called on behalf of Friends of Nelson Haven and Tasman Bay Inc., that from diving investigation on Mr Elkington’s part, the area was not one of obvious habitat quality, the seafloor being basically muddy in nature. It was therefore asserted that the marine farm could be suitably established without any likely adverse effect upon existing marine life. We return to this aspect of the case later.



[15] In declining the appellants' proposal, the Council concluded that the adverse effects were more than minor, but held that while there were particular policies of the plan with which the proposal was inconsistent, it could not be said conclusively that the proposed farm would be contrary to the overall policies and objectives of the plan, viewed as a whole. We propose to adopt that view as well. In other words, we will assume in the appellants' favour that the second gateway test could be satisfied and proceed to assess the proposal in overall terms, as though it were a discretionary activity. We are satisfied and hold, however, in the light of the compelling evidence of Mr Rackham and Ms Lucas on the landscape quality aspect, and other evidence adduced on the natural attributes and character of Penguin Bay towards Bonne Point, that the conclusion reached by the Council over the first gateway test was correct. The size and nature of the proposal would create adverse visual effects in particular of more than minor degree in relation to the combined sea/landscape, and undermine the natural character of the coastal waters and the outlook over those waters to the scenic reserve, extending, in turn, from the shoreline to the skyline.

[16] Evidence was adduced for the Council from Ms S M Dawson, an independent resource management consultant. An experienced planner, Mr M J Garland, was called for the appellants. In developing her evidence, Ms Dawson relied upon the landscape quality assessment of Mr Rackham, as well as the evidence of Mr Moore and Dr Simpson bearing on ecological values. She assessed natural character by reference to s.6 of the RMA, policy provisions of the New Zealand Coastal Policy Statement (NZCPS) and further provisions of the Regional Policy Statement (RPS) and MSRMP – relevant provisions of the latter instruments being reflective of the RMA's intent to preserve the natural character of the coastal environment. Ms Dawson went on to assess landscape, seascape and amenity values by reference to ss.6(b), 7(c) and (f) of the RMA, policies of the NZCPS and provisions of the RPS and MSRMP. Here again, her analysis was thorough and convincing. A further section of her evidence dealt with boating passage and navigational safety, with our attention being drawn to relevant provisions of the RPS and MSRMP.

[17] In addition, we heard evidence from Mr A Van Wijngaarden, who holds the position of Harbourmaster (since 1994) as an officer of the Council. His position was that he could not go as far as to lend active support to the proposal. Rather, he stated his opinion "in terms of less than outright opposition" on the basis that-



- The bay where the marine farm would be situated does not contain recognised anchorages or moorings.
- An adequate navigation channel would be left between the shore and the marine farm structures.
- The farm would not be located on a recognised navigational route, although possibly would lie “quite close to that route”.
- There would be ample manoeuvring room around the farm, particularly to the seaward side.
- The farm would be “by no means the worst situated marine farm proposal...” encountered.

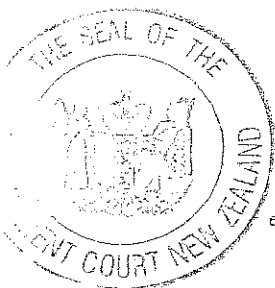
[18] Nevertheless, the following points were also made:

- Generally mid-bay marine farms are not compatible with navigation safety or convenience.
- Collisions between vessels and marine farms area are a recognised hazard.
- In collisions of this kind significant damage or injury is possible.
- The marking and lighting of marine farms is not a complete answer to the problem.

[19] Evidence was also adduced from a retired ship’s master, Mr A J Wagg, called on behalf of Friends of Nelson Haven and Tasman Bay Inc. He was of opinion that-

If a mid-bay marine farm were placed in the position proposed, during the hours of daylight it would be only an inconvenience to...boating activities, but during the hours of darkness quite a different situation would exist, as the risk to safe navigation would be more than minor.

It must be appreciated that sitting in a courtroom in daylight looking at a map showing a plan view of a proposal clearly laid out with all the various lights in position and in working order is very different to seeing an actual elevated view of the same area on a dark night in less than ideal conditions from a small boat steering by compass or land silhouette and trying to identify a number of flashing lights that may or may not be working. These lights are flashing and as such are off for 90% of the time so relating one



light to another can be confusing as they are not synchronised, and if any one light is not working it can be particularly confusing.

[20] Viewing the harbourmaster's and Mr Wagg's evidence collectively, we are not confident that small craft in varying night-time conditions would be assured of safe navigational passage, making due allowance for the presence of flashing lights and markers as proposed, were the marine farm to be established at the location and to the scale intended.

[21] Returning to Ms Dawson's evidence, further parts involved discussion of tangata whenua values by reference to relevant provisions in Part 2 of the RMA, the NZCPS and the regional and district planning instruments earlier mentioned. Regard was also had to provisions of the Ngati Koata iwi management plan which she addressed.

[22] In bringing a broad judgment to bear against the range of considerations covered in her evidence, Ms Dawson concluded in the light of the evidence of Mr Rackham, Mr Moore and Dr Simpson that-

...the proposed marine farm would not achieve the type of change appropriate for the uncompromised and predominantly high natural character of this environment. It will cause, and not avoid, significant adverse effects on the existing, and foreseeable future, natural character of the area. In a physical and visual sense, the marine farm would constitute a sporadic development in this coastal environment.

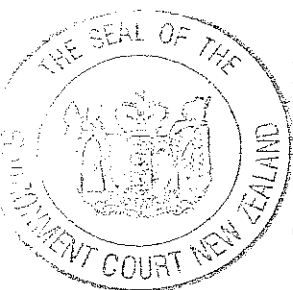
[23] And later:

The marine farm would adversely affect the visual and other recreational qualities that would be valued by visitors to, and recreational users, of the scenic reserve and camping area, and the coastal waters of this bay, and these effects could not be avoided, remedied or mitigated.

[24] As to cultural values she had this to say:

Whilst I fully acknowledge and respect the importance of the ability of Ngati Koata to use and benefit from traditional coastal resources, and that this marine farm may assist to provide for the social, cultural and economic well-being of Ngati Koata, I do not consider that this outweighs the adverse effects on the environment, particularly significant adverse effects on natural character and outstanding landscape to be avoided, remedied or mitigated as required by section 5(2)(c).

[25] Earlier in her evidence, Ms Dawson considered the land use potential of the land under Maori ownership and the extent to which forestry planting and possible dwelling house development could undermine the natural outlook, thus rendering the





area proposed for the marine farm less worthy of retention in its current state. Considerable stress was placed upon the possibility of some landward development being able to occur on a non-fanciful footing. However, given that a dwelling house would be permitted following a subdivision at a density of no more than one house per 30 ha allotment, and bearing in mind the isolated nature and steepness of various parts of the land in question, we basically agree with Mr Dawson that, while the level of naturalness would be reduced, the marine farm as proposed would still have a notable effect upon the general outlook in relation to the scenic reserve.

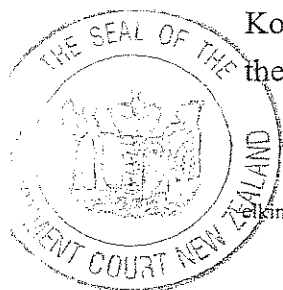
[26] The appellants' point particularly to ss.6(e), 7(a) and 8 of the Act on the basis that whatever importance one attaches to other considerations founded upon the natural character of the coastal environment and landscape quality, the appeal should be allowed in their favour because of their special ancestral position and affinity with the area. The appellants are candid in asserting that, were any "outside" applicant seeking to establish a marine farm within the subject area, or for that matter elsewhere within the sphere of influence of Ngati Koata, such an application would be opposed. But because of the appellants' particular position in connection with Ngati Koata, it is contended that they should receive particular consideration against the background of the statutory provisions mentioned – sufficient to warrant upholding the resource consent they seek. They assert that the application under appeal is advanced to a material degree on behalf of Ngati Koata overall, as opposed to themselves as entities, but no actual intended breakdown between the wider iwi interest and the appellants' personal interests was proffered.

[27] Senior counsel for the appellants summarised his clients' position vis à vis Ngati Koata as follows:

Ngati Koata has a very limited economic base. There is not a critical mass of iwi members on (D'Urville Island) to construct a marae. Without a marae, the iwi lacks a focal point on the island. They lack a place where the young can experience the culture. They lack significant employment opportunities to keep the tamariki on the island.

The appellants do not submit that this marine farm will be a complete panacea. That would be to have unrealistically high expectations. What is submitted, however, is that this development, coupled with other opportunities, will stoke the home fires of Ngati Koata on (D'Urville Island) in a crucial manner to support Ngati Koata into the future.

[28] While understanding of the appellants' desire to assist and enhance Ngati Koata's economic base through the proposed marine farm, the Council, supported by the Director-General of Conservation, and the public interest body represented by



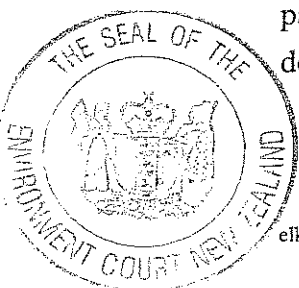
Ms Mitchell, all contend that the application is not consistent with the Act's purpose, because, however much its implementation might assist the economic well-being of Ngati Koata, that cannot be achieved against the background of an unsatisfactory environmental outcome founded upon an inability to avoid, remedy or mitigate adverse effects in a manner that such an area warrants. The marine farm as proposed, albeit reduced from an even larger area intended originally, is opposed, both on account of its scale, and because it would represent the only such farm north of Bonne Point within Penguin Bay, or indeed on the eastern side of the Island proceeding further northwards. It is not without significance in our view that the marine area facing the coastal length of the scenic reserve is unaffected by the visual intrusion of any marine farm development.

[29] Those opposed point out that considerations founded on ss.6(e), 7(a) and 8 are matters to be weighed in conjunction with other relevant matters for assessment in order to come to an overall judgment. They are not matters to be invoked on a basis that effectively trumps all else, with a result that falls short of the RMA's single purpose under s.5 of promoting the sustainable management of natural and physical resources, with particular reference to the definition of "sustainable management".

[30] In the end, we find ourselves in agreement with the very full and comprehensive planning assessment of Ms Dawson, drawing upon the evidence of other witnesses alluded to in her brief. On reviewing Mr Garland's evidence in contrast, we were not convinced by various views which he advanced as a basis for upholding the application. For instance, he commented:

The close location of land ownership and associated marine farming is not "sporadic" in an holistic sense. These activities are often carried out by the people who own the land and in this case the owners of the adjacent land are the applicants. They also have a traditional and cultural attachment to the land going back many centuries. Marine farming itself has high natural character although not in a visual or density sense. Visual matters are only a part of what makes natural character. This location could not be described as sprawling or sporadic. It is has been carefully chosen to integrate closely and holistically with the traditional, cultural and physical elements that are also relevant in a resource management sense.

[31] While these views might hold greater sway in some instances elsewhere involving Maori applicants, the natural quality of the area in this instance, founded particularly on the presence of the scenic reserve, is significant. The "visual or density sense" factor (to use Mr Garland's phrase) is important on this occasion.



[32] Another form of rationale which Mr Garland advanced was expressed in this way:

There are issues relating to marine farming which in many people's views require a new and studied approach. That this should be so after some 30 years of marine farming might well be said to be surprising. One major issue, that of the partial occupation of public space is a matter outside of resource management. The essential characteristic of marine farming that is so important is that it is a temporary activity. The farms can be removed and the sites returned to their previous state. There are examples where such consents have not been renewed and I am certain that with the widespread adoption of AMAs (Aquaculture Management Areas), that there will be more of these.

Marine farms are a productive and renewable use of resources depending upon the maintenance of a benign environment. As I have said they are the outward sign of an inner grace and some liken them in that respect to the coal miner's canary, which being more sensitive than humans to poisonous gas can give an early warning. We know from experiences in the Bay of Islands that marine farms are not able to operate in polluted waters.

[33] We agree with Mr Dwyer, appearing for the Council, that a 20-year term as sought by the appellants would in fact be a significant period of time for the effect that the marine farm would create to persist. As Mr Dwyer noted, all coastal permits are temporary in the sense that they have a finite life (with a maximum of 35 years). This Court in other instances has declined appeals where rather shorter 10-year terms have been sought on the basis that anticipated effects were such that consent ought not to be granted.

[34] Against the background of evidence from witnesses such as Mr Rackham, Ms Lucas, Mr Moore and others, we were left unconvinced by Mr Garland's resource management assessment in contrast to that of Ms Dawson who thoroughly appraised all aspects. We accept her evidence and the reasoning she advanced. We have had regard to the range of provisions from the planning instruments, the iwi management plan provisions, and the New Zealand Coastal Policy Statement drawn to our attention during the hearing, and considered the actual and potential effects on the environment were the activity to proceed. Due consideration has also been applied to all that was said by those who gave evidence for and on behalf of the appellants, including particularly the evidence of Mr J Elkington. We acknowledge his sincerity and concern in seeking to advance the economic base of Ngati Koata; and, in that context, accept the genuineness of his belief that the nature of the seafloor at the subject location and the proximity of the location to the iwi-owned land are factors that lend weight to the appellants' desire to establish the marine farm as proposed.



[35] Fully mindful as we are of the reliance placed upon those provisions of Part 2 of the Act that bear upon Maori values, the case, on the full range of evidence before us, raises other matters of national importance also. The scale of what the appellants seek within a coastal area that is presently absent of marine farm structures, with the backdrop presence of the scenic reserve forming a significant component of the general visual outlook as earlier discussed, leads us to conclude that granting the application would produce a result not in keeping with the Act's purpose. While acknowledging the appellants' desire to provide for the economic well-being of Ngati Koata, viewed in its full resource management context, the proposal in our judgement is unable adequately to satisfy the essential element for achieving the RMA's purpose of "Avoiding, remedying or mitigating any adverse effects of activities on the environment". We therefore uphold the Council's decision at first instance and decline the appeal.

### Costs

[36] Memoranda may be filed within successive periods of 20 working days, although tentatively it appears this may be a case where costs ought reasonably to lie where they fall, the matter having been fully contested with expert evidence adduced on the various sides, and given the appellants' deep-rooted connection with D'Urville Island and its surrounding waters.

DATED at AUCKLAND this 17<sup>th</sup> day of August 2005.

For the Court:



*R. J. Bollard*

---

R J Bollard  
Principal Environment Judge