WALK THIS WAY...

BY JUSTINE INNS

We commented last year on the Environment Court's decision in South Kaipara Harbour Environment Trust v Auckland RC, in which the court overturned the Auckland Regional Council's granting resource consents for a 30ha mussel farm in the South Kaipara Harbour.

The decision struck us as possibly representing the high-water mark (no pun intended) in examples of the difficulties in establishing new marine farms under the pre-reform legislation.

In that decision, the Environment Court acknowledged that the proposed farm would have economic, social and cultural benefits, and that its effects on marine ecology and birdlife would be no more than minor.

Notwithstanding these positives, the court quashed the resource consents that had been granted. It did so based on the potentially adverse effects the farm would have on the landscape and visual amenity, particularly from a proposed, but as yet non-existent, public walkway.

The decision seemed to typify the antipathetic view of aquaculture held in some quarters. Despite economic, social and cultural benefits and negligible ecological effects, the proposed marine farm was thwarted because it was deemed that it would "pollute" the views from a public walkway that the council proposed to develop in the future, but which did not yet exist.

As well as quashing consent for the proposed farm, the Environment Court's decision led the ARC to withdraw a proposed variation to its Coastal Plan, which proposed establishing aquaculture management areas in the South Kaipara.

The good news is that the farm's proponents have been partly successful in appealing the Environment Court's decision. In Biomarine Limited v Auckland Regional Council, Williams J in the High Court found the Environment Court's decision to be in error on one point.

The error arose from the fact that the Court of Appeal, in June 2006 (two month's after the Environment Court's decision in this case), specifically ruled on the type of future changes in the environment that can be considered in relation to any resource consent application, subtly changing the previous law.

In its decision in Queenstown Lakes District Council v Hawthorn Estate Limited, the Court of Appeal said that it wasn't every kind of possible future activity that could be taken into account in considering what the future state of the environment might be.

The only future activities that could be taken into account were those designated as "permitted" in the relevant district plan, or for which resource consents had already been granted. The effects of activities for which resource consents might be granted in the future should not be considered.

Applying this principle to the Biomarine case, Williams J concluded that the Environment Court had been wrong to consider the effects of the proposed marine farm on the future users of the walking track, but only because the council would require resource consents to give full effect to the plans for the track.

The council's plans were to upgrade the track to the point that, for example, camping grounds and toilets would be developed, which would require resource consents, making them activities falling outside those that can be considered in accordance with the principle set out in Hawthorn.

The implication was that it was unlikely that usage of the track would increase significantly from its present low levels until such upgrades took place, and at the present low level of usage, the visual impact of the proposed farm would be far less significant, because few people would see it. The matter was referred back to the Environment Court for reconsideration.

While no doubt a victory for the farm's proponents, the decision could be disappointing for those hoping that a more positive approach to aquaculture development might prevail. Williams J did not see any problem per se with considering the farm's visual impact on a potentially increased number of walkers that might result from a planned future upgrade to the walkway.

It was only the technical point that the planned upgrade would require resource consent that cast some of these future possibilities beyond the Environment Court's legitimate considerations.

Nor did the judge have any problems with the Environment Court's view that the proposed farm would have an adverse impact on public access to the adjacent coastline - not because it would physically impede access in any way - but because its existence might make the area less visually appealing for people to access.

Because of the limited extent to which the High Court's decision disagreed with the Environment Court's reasoning, it's possible that it could decide to quash consent for the farm when it comes to reconsider the matter.

Fancy a walk, anyone?

* *Tindall and others v Far North District Council, 20/20/06, Winkelmann J.*