IN THE DISTRICT COURT
AT AUCKLAND

CIV 2017-044-072
[2018] NZDC 4351

BETWEEN	GLASS BOTTOM BOAT LIMITED Plaintiff
AND	MARITIME NEW ZEALAND Defendant

Hearing:	23, 24 January 2018
Appearances:	H Campbell for Applicant R Schmidt-McCleave for Respondent
Judgment:	8 March 2018

RESERVED DECISION OF JUDGE M-E SHARP

Introduction

[1] On 31 January 2017 under ss 101 and 105 respectively, Health and Safety Work Act 2015 ("HSWA"), in his role as a designated (agency) health and safety inspector, Maritime officer Scott Patterson ("the Inspector") of Maritime NZ ("MNZ") issued to Glass Bottom Boat Limited ("the Appellant") an Improvement Notice and a Prohibition Notice.

[2] Section 191 HSWA designates MNZ an agency for the purpose of performing the functions and exercising powers under it in respect of the maritime sector. The designation allows Maritime New Zealand to perform all the functions and exercise all the powers of the regulator under HSWA in respect of:

(a) work on board ships; and

(b) ships as workplaces.

[3] Section 190 HSWA provides a regulator with functions which include:

(a) developing codes of practice, providing guidance, advice and information on work health and safety legislation to persons who have duties;

(b) engaging in, promoting and co-ordinating the implementation of work health and safety initiatives by establishing partnerships or collaborating with other agencies or interested persons in a coherent, efficient and effective way.

[4] Section 192(2) HSWA provides that a designated agency ("MNZ") must not perform any functions unless WorkSafe has given its consent although a failure to obtain consent does not affect the validity of the performance of any function or exercise of power (s 192(3).

[5] The Inspector did so, he said, having considered and analysed the information available to him including about the Appellant's operation and the Goat Island Marine Reserve.

[6] The Appellant applied to MNZ for internal review and stay of the Inspector's decisions to issue the Notice. Both Notices were "reviewable decisions" under the definition of that term in s 130(a) HSWA. An internal review was completed by MNZ on 27 March 2017. One amendment was made to the Improvement Notice but otherwise the Reviewer's decision confirmed the Notices which required the Appellant to operate the glass-bottomed boat Aquador on a route that "does not involve transiting or entering the Goat Island channel area as detailed on the appendix to the Prohibition Notice". Stays were declined.

[7] The Appellant has appealed under s 135 HSWA on the grounds that the decisions appealed are unreasonable.

Appeals under s 135 HSWA

[8] Section 135 HSWA allows Appeal to the District Court against "an appealable decision." That term is defined in s 130(a) and includes a decision which has been

subject to internal review and on which the Regulator has made a decision. The statutory grounds of Appeal are that the decision appealed is unreasonable.

[9] On such an Appeal the Court is empowered to enquire into the decision and may:

(a) confirm or vary the decision;

(b) set aside the decision; or

(c) set aside the decision and substitute another decision that the Court considers appropriate (s 135(3)).

[10] There has been argument over whether this Appeal is an Appeal by way of rehearing under Part 18 District Court Rules 2014, or an Appeal de novo as the Appellant argues. An Appeal de novo involves an entirely new hearing where the Appellate court goes back to the beginning and hears the evidence afresh. Generally speaking, the parties to the Appeal are entitled not only to call the witnesses originally called but also further witnesses as they choose. In this kind of Appeal the Appellate court approaches the case entirely afresh without a presumption that the decision appealed from is correct. Essentially, the party that bore the onus of proof at first instance still does so on appeal.

[11] Whether an Appeal is by way of rehearing or de novo was discussed in some detail in *Housing NZ Corporation v Salt* DC Auckland CIV 2007-004-002875 by Judge Roderick Joyce QC. He considered "the bodies appealed from in *Hammond v Hutt Valley & Bays Metropolitan Milk Board* [1958] NZLR 720 and *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) (and the nature of their processes) were such as to place them in an entirely different category" i.e. the body was administrative and there was no hearing, therefore an Appeal had to be full, de novo.

[12] In the present case, there was no hearing on which the decisions are based. The Appellant had no real opportunity to put its case forward. The authority which made the decision was administrative. I agree with counsel for the Appellant: in such cases,

natural justice requires that the opportunity to put its case forward must then be available on Appeal.

[13] Pursuant to s 135(3) HSWA, the Court must enquire into the decision. Again I agree with counsel for the Appellant that this requires the Court to look beyond what was before the Inspector at the time he made the decision. The Court cannot satisfy that requirement by treating this matter an Appeal by way of rehearing, where it would consider the record before it to determine if the decisions appealed from were reasonable. To this end, I have read, heard and considered all the evidence proffered by the parties including the Appellant's two affidavits, viva voce evidence of Mr Pennington and an affidavit on behalf of the Respondent.

[14] As I consider that s 135(3) of the HSWA provides for a de novo Appeal, Rule DCR 18.19 does not apply to this Appeal.

[15] The Respondent neither seeks to defend or justify the decisions to issue the Notices. It assisted the Court by explaining the decision-making record and provided statutory context to MNZ's role under the relevant legislation.

[16] In order for the Court to enquire into the decisions in this case, it must assess the grounds on which the Improvement Notice and the Prohibition Notice were issued and ask:

(1) Did the Inspector have a reasonable belief that the Appellant was contravening or likely to contravene a provision of the Act or regulations? (s 101-Improvement Notice); (did he identify a specific breach?)

(2) Did the Inspector have a reasonable belief that an activity was occurring at a work place:

(i) that involves or will involve a serious risk to the health or safety of a person?

(ii) arising from an immediate or imminent exposure to a hazard (s 105 – the Prohibition Notice)?

(3) What specific breach was alleged to have been occurring? (breach of the s 30 duty to manage the risks to the extent to which the Appellant had or would reasonably be expected to have had, the ability to control and influence the matter to which the risks related, and a breach of the duty under s 36(2) that the Appellant was to ensure, so far as reasonably practicable, that the health and safety of other persons was not put at risk from work carried out as part of the conduct of the business).

The facts

[17] The Respondent's Rule 18.14 bundle provides the factual background and chronology before the Notices were issued:

(14.1) On 25 February 2015 the Appellant underwent a deemed Maritime Transport Operator certificate ("MTOC") and a report was produced by MNZ on 27 February 2015. The scope of the audit was "[verify] compliance to appendix 6 of Maritime 21 and all other applicable rules. While Maritime Rule 21 is partially revoked by Maritime Rule Part 19, s 2 of Part 21 continues to apply to maritime transport operators who are operating under a deemed maritime operator certificate (the safe ship management certificate held prior to 1 July 2014) after 1 July 2014 until their deemed maritime transport operator certificate expires on 18 October 2017. The report notes that "the scope of the deemed MTOC audit was to verify that GBB adheres to their deemed MTOP (Maritime Transport Operator Procedure) and in general covered the following areas:

- responsibilities, accountability and commitment of persons in positions of authority including shore-based personnel
- understanding and appropriateness of the safety management system
- implementation of the operator plan
- administration of the system, including reviews, improvements and providing adequate resources to implement the system

- survey and other certification requirements
- emergency and safe operating procedures
- hazard identification and appropriateness of the controls adopted to manage the above
- crewing requirements including training and certification
- communication within the operation especially for safety – critical issues
- safe operating procedures, trip reports, maintenance plans
- environmental protection
- accuracy of the information provided
- legislative compliance including recording and reporting all accidents, incidents, mishaps, discharge or escape of harmful substances and serious harm incidents in accordance with s 30, 31 and 227 of the Marine Transport Act 1994 and s 25 of the Health & Safety & Employment Act 1992

(14.2) The audit found that the Appellant had developed and implemented a deemed Maritime Transport Operating procedure ("DMTOP") which meant the functional requirements of Maritime Rule 21 Appendix 6. Some non-conformities and observations were made resulting in the conclusion that amongst other things, "due to the number of non-conformities the owner needs to invest some time and effort into the safety management system. The maritime officer gave education to assist the operator in developing a good system".

(14.3) On 7 December 2016 the Respondent's "intelligence support" team received a complaint about an incident involving the Appellant near Goat Island Marine Reserve. It was passed to the compliance team;

(14.4) On 24 December 2016 the Respondent received a complaint about the Appellant from the leader of a guided snorkel experience. On 10

January 2017, the compliance team and a complainant met about the issue. The compliance team corresponded with the acting harbour master about it, framing it as the Appellant's "use of the channel between the island and the mainland and calling right of way over swimmers in the water";

(14.5) On 12 January 2017 Inspector Scott Patterson was the maritime officer tasked with investigating these complaints. He commenced a "working document" Memorandum to the Northern Regional Compliance Manager. The January entries recited below reveal his investigative communications with Mr Scott Pennington, the director of the Appellant and skipper for the Aquador. Below I recite in full the Inspector's January entries:

> 19/01/2016 update
>
> I attempted to meet with Scott Pennington, he was not available. During discussion over the phone Mr Pennington was very defensive when requested to provide information regarding his of his [sic] operation. He also insisted he was in communication with The Harbour Masters office and that government departments need to liaise more.
>
> 19/01/2017 Update
>
> Mr Scott Pennington was requested to provide information regarding the operation of the vessel Aquador in close proximity to swimmers via Email. A time frame of seven days was provided for reply.
>
> 24/01/2017
>
> Mr Scott Pennington responds to the request and provides information regarding the operation
>
> 25/01/2017 Update
>
> A review of the information is undertaken by Myself on the 25/01/2017. As the information provided is scanty and appears not to adequately address the risks of swimmer and vessel interaction, the operator appears not to be meeting provisions of the HSWA 29015. I call a meeting between Neil Rowarth, Ian Howden, and myself to review my work and seek recommendation of further enforcement options.

26/01/2017

Meet as described above decide to request more information, operator replies with no further supporting documentation

30/01/2017 Update

Email operator requesting to meet and discuss matter

31/01/2017 Update

Mr Pennington replies declining meeting request decision is made to issue notices, Mr Pennington contacted via phone and verbally informed of issue of prohibition and Improvement Notice. Notices emailed to Mr Pennington's contact email and delivered to service address. Contact received from Mr Pennington re; meeting with Harbour Master to be held on 01/02/2017

(14.6) On 13 January 2017, the Inspector received another complaint by email from a reserve user.

(14.7) On 19 January 2017, the Inspector issued an information request to the Appellant under s 168(e)(i), (ii) and (iii) HSWA asking to be "provided information about assessment of the hazards and risks and the associated procedures and processes relating to the operation of the vessel Aquador MNZ 130216 in the close proximity to swimmers". The Inspector stated that he believed "that the present operation of the vessel MNZ 130216 in close proximity to swimmers may pose a risk;

(14.8) On 20 January 2017, the Inspector received another complaint by email from a reserve user. That incident was also raised with the Harbour Master and copied to the Inspector in an email from the Appellant on 21 January 2017. The Harbour Master advised that its involvement was restricted to navigational safety or breach of bylaws and that all other aspects are dealt with by MNZ;

(14.9) On 24 January 2017 the Appellant responded to the Inspector's information request attaching Chapter 3 of the Aquador's operation manual;

(14.10)The Inspector responded on 26 January 2017 advising that he believed the information provided did not adequately demonstrate the risks associated with the operation of the vessel Aquador in close proximity to swimmers were being managed by the Appellant as required under the HSWA. He requested further information about assessments of hazards and risks within 48 hours. The email advised that if the Appellant was unable to provide any further information directly related to the management of that risk then MNZ may undertake compliance action against the Appellant;

(14.11) On 27 January 2017 the Appellant responded to that request advising that it had put the recommendations of the 2016 MTOC audit in place and that it had provided MNZ with necessary requirements .... it "has a safe management structure in place";

(14.12) On 30 January 2017 at 7.01pm, the Inspector invited the Appellant to meet with him the following day to discuss the information request and the Inspector's concerns and intentions in relation to the assessed hazards and risks around the operation of Aquador in close proximity to swimmers;

(14.13) On 31 January 2017 at 7.42am, the Appellant advised that he would not be available to meet with the Inspector;

(14.14) On 31 January 2017 at 11.20am the Inspector updated the relevant persons within MNZ and advised that he was moving to issue Improvement Notice and Prohibition Notices. He gave his reasons;

(14.15) On 31 January 2017 another complaint was lodged with MNZ and there was some internal email discussion within MNZ compliance staff;

(14.16) The Inspector issued the Improvement Notice on 31 January 2017. It outlined the contravention of the HSWA as "limited or inadequate risk assessment and implementation of process and procedures for the hazards associated with the operation of a vessel in the vicinity of swimmers". It recommended as prevention or remedial measures that

the Appellant "conduct a risk assessment of the hazards arising from operating a vessel in the vicinity of swimmers and implement controls for risks the identified. It is recommended the assessment of risks associated with the hazards arising from the operation of the vessel in the vicinity of swimmers and the mitigation of these risks, focus on the areas swimming density, and consider restricting the operation of the vessel in areas where these risks exist." The remedial period began on the date of issue and ended on 28 February 2017;

(14.17) The Prohibition Notice (also issued on 31 January 2017) relied on the matter or activity giving rise to the risk as being "propeller strike or vessel strike due to the operation of a vessel into the vicinity of swimmers". As the basis for his belief, the Inspector said there was "insufficient or inappropriate risk assessment and mitigation provided by PCBU, observation by Inspector of site and work being undertaken". The Prohibition Notice stated that until the Inspector was satisfied it had been remedied:

> "The operator is not to conduct vessel operations by way of transiting or entering the area termed "Goat Island channel" between Goat Island and the immediate foreshore as detailed on the attached appendix labelled Glass Bottom Boat Limited restricted operational area."

The Appellant

[18] Through its sole director and shareholder Scott Pennington, the Appellant deposes and I accept (uncontested) the following:-

[19] The Appellant is an incorporated company. It purchased the Glass Bottom Boat and business in October 2013. The Glass Bottom Boat (Aquador) has operated in the Goat Island Reserve since 1979. It is specifically designed to operate within the Leigh Marine Reserve and through the Goat Island Channel. It has a glass bottom to enable passengers to view the "secrets of the reserve" while remaining dry, and a shallow draught to enable it to safely traverse the channel at all times. (Para [30] Scott Ivan Pennington first affidavit).

[20] Scott Pennington is the master of the Aquador. He completed his maritime skipper's course and holds a local launch operator certificate issued 7 May 2014.

[21] Aquador is an educational facility which enables hundreds of people to enjoy the reserve in ways they may otherwise be unable to. It provides a service to those who are otherwise unable to experience and enjoy the diversity of the marine reserve through for example diving and snorkelling. It also serves as a point of first contact for visitors to the reserve. It provides information, directions and other assistance. Employees of the Appellant are certified in first aid and are often the first responders to any incident at the beach. In the past, the Aquador has served as a recovery vessel for swimmers and snorkelers in distress and for people who find themselves stranded on the island.

[22] In the time that Aquador has been operating in the Goat Island Marine Reserve, including before October 2013 when not under the ownership of the Appellant, there have been no accidents. Every year there have been a few complaints, generally either from or instigated by local commercial users of the reserve who are in competition.

[23] At paras [6] to [11] of his first affidavit Mr Pennington gives information about the Goat Island Marine Reserve and in particular the Goat Island channel. At para [10] he notes that there are no notified restrictions on the Goat Island's channel's use. Boats varying from kayaks to 30 foot launches pass through it. The boats are mainly recreational; occasionally the Appellant records the number of people at the beach or in the channel in the Glass Bottom Boat diary.

[24] In June 2002, there was a Leigh Reserves complex conservation management plan ("CMP") formulated but it was revoked in 2006 without a replacement plan. It was useful because it set out objectives for the management of the area after consulting interested parties and other agencies. Without the CMP, there is no co-ordinated approach to management of the reserve. Mr Pennington is strongly of the view that there needs to be "a co-ordinated approach and a traffic management plan to address the competing needs and rights of the various users of the reserve".

[25] As a commercial ship, Aquador was originally required to be operated pursuant to a safe ship management certificate ("SSM certificate") under Maritime Rule Part 21 (safe ship management systems). From 1 July 2014, the successor to Part 21 (Maritime rule, Part 19) came into force, requiring maritime transport operators to hold a Maritime Transport Operator Certificate (MTOC) to lawfully conduct a maritime transport operation. Under the transitional arrangements for Part 19, where an SSM certificate was held by any person on the commencement of Part 19, it was deemed to be an MTOC under Part 19, with an expiry date which was the expiry of the SSM certificate. This is referred to as a deemed MTOC.

[26] Holders of deemed MTOCs were not required to comply with Subpart B and Subpart C of Part 19 if:

(a) they had a current certificate of survey (or deemed certificate of survey under r 44.81); and

(b) they continued to meet the requirements associated with the SSM certificate (excepting membership of an SSM system which no longer existed).

[27] SSM certificates were subject to periodic audits required by r 21.13(8); and inspections required by 21.13(10). The purpose of such periodic audits was to ensure ongoing safety compliance by the operator, and continued under the transitional provisions of Part 19. The audit of the Appellant which took place in February 2015 was carried out to verify compliance with Appendix 6 of Maritime Rules Part 21 (the New Zealand Safe Ship Management Code) and addressed a number of matters covered by Part 21. The Appellant had an extension until the end of January 2018 but has completed all its requirements to enter into MTOC.

[28] Mr Pennington gave evidence of the policies and practices which were in place for the glass bottom boat business when the Appellant purchased it. After purchase the Appellant created an Operations Manual to ensure that there were measures in place for health and safety of his staff, customers and other users of the reserve. Exhibit L to Mr Pennington's first affidavit is Chapter 3 of the Operations

Manual called "Boat/Beach Ops". This is used to train staff to make them familiar with the New Zealand Report, Maritime New Zealand – Safety Guidelines for Commercial Vessels Involved in Swimming Operations, December 2014.

[29] Throughout that chapter there is reference to the various tools which are important in ensuring the health and safety of other water users:

(i) The sign on the beach at the boat ramp informs people of the tour schedule

(ii) 15-20 minutes before the boat departs confer with skipper for answers regarding weather conditions, density of reserve visitors, daily forecast, presence of other operators and boating schedule – how many trips are planned

(iii) Clear the path - guide people in water out of the path of the 'Aquador' as it leaves and returns to the beach. This is for their own safety. Use the whistle along with voice and arm gestures to gain attention

(iv) If any issues or feedback please attach note to the daily sheets

(v) Communication and co-operation is key – it is up to all of us to ensure that everyone has a safe visit to the marine reserve

(vi) It is our job as a team to keep an eye out for problems before they occur

(vii) Communication between boat and shore crew is vital

(viii) Radio contact must be made when:

(a) The Captain arrives enquire about water conditions – visibility, wind, swell, swimmers etc;

(b) The tour returns to inform the skipper of any snorkelers/kayakers/etc in the water as the Glass Bottom Boat returns through the channel

(c) Communicate with the skipper when clearing the beach

(ix) Other companies use Goat Island beach too, it is a good idea to talk to any snorkel, kayak or dive groups as they arrive at the beach. Find out where they plan to go and inform the skipper;

(x) The more people with eyes on the water the better;

(xi) Swimmer alert: ensure that swimmers arse kept at a safe distance from the propellers at all times, taking into account water and vessel movements;

(xii) Alert: be clear and directional towards human activity in the water, you can alert people by way of whistle and hand signals for the direction you are heading and the heading you would prefer them to head, in failure to that a steel bar tapped on the aluminium surface of the boat

(xiii) use distance as a guide: 15m beware, 10m alert the skipper, 3m neutralise the engines – same when loading or unloading keeping swimmers at a safe distance – recommend 3m at least

(xiv) Inform the skipper of any snorkelers/kayakers/divers/etc in the water as the Glass Bottom Boat is in motion, loading and unloading

(xv) Do not assume the skipper has seen what you have and always confirm

(xvi) Make clear contact with people in the water and ensure signals are clear

[30] The Aquador is said to only travel at 5 knots because bubbles accumulate under the glass if that speed is exceeded, making it difficult to see through to the bottom. Especially through the channel, the Aquador generally travels at a speed of only 3 knots.

[31] In October 2016, the Appellant engaged Employsure, a workplace relations specialist, offering reviews of workplace processes and documents, to audit its health and safety procedures and provide solutions for non-compliance particularly in light of recent legislative changes to Health and Safety in the Workplace.

Relevant Maritime Safety provisions

[32] With thanks to counsel for the Appellant's helpful submissions, I now adopt her analysis of the relevant Maritime Safety provisions in her first Memorandum:-

[33] Operation of vessels and water activities within the Goat Island reserve was, at the relevant time, subject to the Maritime Rules Part 21, 22 and 91, the Auckland Navigation Safety bylaw 2014 and the Marine Reserve Regulations 1993.

[34] The relevant parts of the Maritime Rules, the Navigation Safety bylaw and Marine Reserve Regulations focus on the safety of vessels, navigational safety, and safety obligations in relation to other water users, while the HSWA focuses, for the most part, on the health and safety of the vessel as the workplace, the people on board the vessel (both passengers and workers) and applies also to people in the vicinity of the vessel (workplace). There is a degree of overlap in the operation of the different provisions.

[35] The Navigation Safety bylaw and the Maritime Rules, part 91, both provide that:

> No vessel shall be operated at a speed and excess of five knots within 50m of any other vessel or person in the water; or 200m of the shore; or within 200 metres of any vessel flying a dive flag.

[36] Under the Marine Reserve Regulations 1993, reg 3 provides that:

> No vessel shall be operated in a reserve at a speed in excess of five knots if the vessel is within 30m of any other vessel or person in the water; or 200m of the shore; or within 200 metres of any vessel flying a dive flag.

[37] Although the Marine Reserve Regulations provide that the speed limit applies within 30m as opposed to 50m of people in the water, the Maritime Rules and Navigation bylaws also apply in the Goat Island Marine Reserve, requiring a maximum five knot speed limit at least 50m from any person in the water.

[38] The Navigation Safety bylaws also provide at Clause 18:

> Swimming
>
> A person must not jump, dive or swim: (b) in an area that would interfere with the berthing or departure of any vessel. That would tend to indicate that in those circumstances, swimmers do not have the right of way.

[39] Part 22 Maritime Rules provides for collision prevention applying to all New Zealand vessels including pleasure craft. Rules 22.4, 22.6 apply to vessels in all conditions of visibility and provide:

> 22.5 Look-out
>
> Every vessel must at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions, so as to make a full appraisal of the situation and the risk of collision
>
> 22.6 Safe speed
>
> Every vessel must at all times proceed at a safe speed so that proper and effective action to avoid a collision can be taken and the vessel can be stopped within a distance appropriate to the prevailing circumstances and conditions.
>
> In determining a safe speed, the following factors must be among those taken into account –

(1) For all vessels –

(a) the state of visibility:

(b) the traffic density, including concentrations of fishing vessels or any other vessels:

(c) the manoeuvrability of the vessel, with special reference to stopping distance and turning ability in the prevailing conditions:

(d) at night, the presence of background light such as from shore lights or from the back scatter of the vessel's own lights:

(e) the state of wind, sea, and current, and the proximity of navigational hazards:

(f) the draught in relation to the available depth of water.

(2) Additionally, for vessels with operational radar –

(a) the characteristics, efficiency, and limitations of the radar equipment:

(b) any constraints imposed by the radar range scale in use:

(c) the effect on radar detection of the sea state, weather, and other sources of interference:

(d) the possibility that small vessels, ice, and other floating objects may not be detected by radar at an adequate range:

(e) the number, location, and movement of vessels detected by radar:

(f) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity

[40] At the relevant time, Part 21 Maritime Rules, being safe ship management systems for operators operating under a deemed MTOC from 1 July 2014, were applicable to the operation of the Aquador.

[41] Part 21 requires certain New Zealand commercial ships to establish safe ship management procedures consistent with the duties of participants in the maritime system stated in s 17(4)(a) Maritime Transport Act 1994. Appendix 6 sets out the New Zealand safe ship management code which was also applicable to the operation of the Aquador at the relevant time.

[42] As provided by the Maritime Rules Part 21, the Skipper/Master is legally responsible for the vessel and for complying with all relevant rules and regulations.

[43] Ships' Masters must be certified. Under the Maritime Transport Act 1994 MTA") they have significant responsibilities:- the Master is responsible for the safe operation of the ship on a voyage, the safety and wellbeing of all passengers and crew, and has final authority (while in command) to control the ship. The Master is responsible for compliance with all relevant requirements of MTA, Regulations and Maritime Rules, regardless of whether or not reiterated in a Health and Safety document.

[44] Section 19 MTA provides that it is an offence to operate a vessel in such a way that causes unnecessary risk or danger to persons or property.

The Enquiries under the Act

(a) The Improvement Notice

[45] The respondent submits that the Court's role is not to enquire into whether the Inspector identified a specific breach was occurring. However, given that the section specifically provides that it applies if "an inspector reasonably believes that a person is contravening or likely to contravene a provision of this Act". (s 101 HSWA) I consider the Court must do so.

[46] The Improvement Notice which the Respondent issued to the Appellant stated "you are contravening a provision of the Act or Regulations under the Act ... by ... limited or inadequate risk assessment and implantation of process and procedures for the hazards associated with the operation of a vessel in the vicinity of swimmers".

[47] On 19 January 2007, the Inspector issued an information request to the Appellant under s 168(e)(i)), (ii) and (iii) HSWA in which he asked to be "provided information about assessment of the hazards and risks and the associated procedures and processes relating to the operation of the vessel Aquador MNZ 130216 in the close proximity to swimmers." The Inspector advised Mr Pennington that in the first

instance he wished to engage with him to ensure the suitability of the assessment and mitigation process. He also advised that he would provide any education about those obligations.

[48] On 24 January 2017 Mr Pennington provided the Inspector with Chapter 3 of the Appellant's Beach/Boat Ops Manual and invited the Inspector to make any suggestions. From the Inspector's email, Mr Pennington believed that he was willing to work with the Appellant to improve the measures that were already in place to eliminate and mitigate risk.

[49] On 26 January 2017, the Inspector responded by stating that he believed that the information provided did not adequately demonstrate that the risks associated with the operation of the vessel were being managed by the Appellant. He requested that Mr Pennington forward any further information about assessment of the hazards and risks and associated procedures and processes relating to the operation of the vessel in the close proximity to swimmers. He gave the Appellant 48 hours to provide this further information (Exhibit S to Mr Pennington's first affidavit).

[50] On 27 January 2017 Mr Pennington responded by again directing the Inspector to the Operations Manual and also referred him to the Industry Guidelines for vessel operations in the vicinity of swimmers. He sought any further suggestions that the Inspector might have. Mr Pennington was somewhat "baffled as to what it was he was asking of me". Later, he received from a different officer, a document called "Risk Management in the National System, a practical guide": an Australian Government Australian Maritime Safety Authority document (Exhibit U to Mr Pennington's first affidavit).

[51] Mr Pennington misunderstood the purpose for which this document (which he had never seen before) had been sent to him, thinking that he was expected to comply with it by completing and returning it to the Inspector.

[52] On 30 January 2017 at 7.01pm, the Inspector emailed Mr Pennington advising that he would be in the area and available to discuss the matter the next day, Tuesday

31 January 2017. Mr Pennington found the notice short and said he was unable to meet up that day.

[53] By this time, the Inspector was in possession of complaints against the Appellant but did not disclose the substance of them to the Appellant or give him what I consider to be a reasonable opportunity to provide evidence of "implementation of process and procedures for the hazards associated with the operation of a vessel in the vicinity of swimmers". No meeting with the Appellant took place. The Inspector should have given more notice to the Appellant or, when he ascertained Mr Pennington's unavailability, should have attempted to arrange a meeting that Mr Pennington could attend.

[54] The Appellant should have been given the opportunity to answer the four complaints that the Maritime Transport Authority had received. The Inspector should not have acted on the basis of those four complaints without giving the Appellant the opportunity to answer and defend itself. These failings amount to a breach of the principles of natural justice.

[55] There is no provision in HSWA relating to a risk assessment. The Inspector's view that the Appellant's risk assessment was not up to his standard or in the form that he preferred was irrelevant as lack of a risk assessment was not and could not of itself be a breach of HSWA.

[56] Counsel have referred the Court to the Australian decision of *Rovera Scaffolding ACT Pty Ltd v Director General of the Chief Minister, Treasury and Economic Development Directorate (administrative review)* [2016] AC at 127 where in respect of very similar legislation, the Court said:

> Section 191 expressly requires a breach of the Act or Regulations ... if the perceived risk to health and safety is not of itself a breach of the Act or Regulation, then the Improvement Notice was not properly issued.

[57] I concur. As the Inspector failed to identify a specific or likely breach of HSWA, he could not be said to have reasonably believed that the Appellant was contravening or likely to contravene a provision of HSWA.

(b) Prohibition Notice

[58] Section 105(1) HSWA applies if:

(a) an Inspector reasonably believes that:

(i) an activity is occurring at a work place that involves or will involve a serious risk to the health or safety of a person arising from an immediate or imminent exposure to a hazard or;

(ii) an activity may occur at a work place that, if it occurs, will involve a serious risk to the health or safety of a person arising from an immediate or imminent exposure to a hazard.

[59] The Prohibition Notice issued to the Appellant stated that an activity was occurring at the work place involving, or "will involve a serious risk to the health and safety of a person arising from an immediate or imminent exposure to a hazard". The risk was referred to was "propeller strike due to the operation of a vessel in the vicinity of swimmers". The expressed basis for believing that grounds existed was "insufficient or inappropriate risk assessment and mitigation provided by PCBU, observation by Inspector of site and work being undertaken".

[60] At tab 5 of the R.18.149 documents there is a Memorandum dated 12 January 2017 from the Inspector to Neil Rowarth, Regional Compliance Manager MNZ. It records his findings and his actions in this matter.

[61] From this Memorandum, it appears that the Inspector conducted a risk gap analysis, was guided by the document entitled "Maritime New Zealand Prohibition Notices under the Health & Safety at Work Act 2015 guidance for maritime officers" (11 November 2016) (MNZ Guide) which referred to the WorkSafe "enforcement decision-making model (WorkSafe document July 2016) ("EDM").

[62] The MNZ guide "provides guidance for maritime officers on issuing Prohibition Notices under the HSWA .... (it) covers when to issue a Prohibition Notice, who to issue it to, the content of the Notice, how to issue the Notice, follow

up." The MNZ guide describes a Prohibition Notice as a serious enforcement tool, used when there is "an imminent and serious risk to the health and safety of a person." The MNZ guide states it is appropriate to issue a Prohibition Notice if (the Maritime Officer) considers that:

(a) the risk gap indicates a serious risk to health and safety from exposure to a hazard and;

(b) exposure to the hazard is imminent or immediate.

[63] A health and safety risk gap is described as "the difference between a risk you actually observe and what the situation would have been if the duty holder had taken reasonably practicable steps to comply" (MNZ guide page 3 attached – Exhibit AI first affidavit of Mr Pennington).

[64] The EDM expresses itself as providing a framework that "guides WorkSafe's Inspectors through the necessary thought process to decide on an enforcement response appropriate to the circumstances ... this supports Inspectors to reach enforcement decisions that are consistent, proportionate, transparent, targeted and accountable".

[65] The MNZ guide does not specify how a risk gap is to be identified, however the EDM sets out a three stage process to be undertaken by an Inspector, described at para 2.38 Appellant's outline of submissions on Appeal.

[66] The Inspector established that the primary risk is propeller or vessel strike with contributing factors: high density of swimmers in the water, the aggressive nature in which the operator interacts with the swimmers, no apparent alteration in operating process to accommodate high swimmer density, (giving an indication of) poor health and safety management process. (It should be noted that this appears to be all anecdotal). The Inspector reached the conclusion that the bench mark risk had a severe consequence and a possible likelihood and the actual risk, a severe consequence and probable outcome.

[67] The Inspector determined that the risk gap was substantial but did not record his observations of operating practice. He had not been in contact with the Appellant or discussed any measures that were in place, with Mr Pennington. He did not describe which health and safety principles he applied, how or what the bench mark standard would be (i.e. what he considered reasonably practicable measures to reduce the likelihood or the consequence, only what he considered the risk).

[68] In the Memorandum, the Inspector stated that the exposure to the risk could be described as imminent or immediate and therefore the issue of a Prohibition Notice was prescribed by the guidance material. However, it is unclear how the Inspector considered that the exposure was imminent or immediate and I do not understand how or why he reached that conclusion.

[69] The activity that creates the risk is the operation of the Aquador in Goat Island Marine Reserve, particularly within the channel. The risk was properly identified by the Inspector as propeller strike. The consequence (the outcome or potential outcome of the event) of the risk occurring can range from death and severe injury to minor injury. The likelihood (i.e. the chance of the outcome happening) is dependent on the actual presence of people near the vessel. The likelihood is nil, negligible or remote where there are no people in the immediate vicinity of the vessel.

[70] The risk of propeller strike applies to all vessels operating within the marine reserve and particularly within the channel. In my view, recreational vessels will pose a greater risk as they are not subject to the Maritime Rules Part 21 which provide for safe ship management of vessels. They may not be subject to HSWA.

[71] In his Memorandum, the Inspector recorded that "although there had been a number of reported incidents of the vessel operating in close proximity to swimmers, snorkelers and guided groups within the marine reserve ... investigation of the reported incidents over the last six years have determined there were no compliance-based issues ..."

[72] Despite that, the Inspector reached these conclusions:

- "there is an element of risk based issues via the operation of the vessel in the close vicinity to the swimmers

- a contributing factor to some of the complaints is based on the attitudinal aspects the Operator (sic) the vessel Aquador presents, who it appears yells and behave aggressively towards the swimmers if the vessel approaches too close to the swimmers, or vice versa

- the timings of the complaints appear to be seasonal and associated with large visitor numbers in the summer months

- Mr Pennington has been somewhat fructuous (sic) to deal with during the investigation of any of the reported incidents

- Overall, I would not describe the health and safety management of the duty holder as good or of high quality

- Many of the complaints have an element of personal or business focus. Due to the nature of the Duty Holder, the Inspector in completing this report has attempted to where possible disregard these elements and focus solely on the risks presented by the scenario."

[73] I concur with counsel for the Appellant when she submits that there was a dearth of facts on which those conclusions were based. For example, who and when were the reported incidents investigated and to what did they relate? Despite the Inspector's finding there were no compliance-based issues in the past six years, he still reached an unfavourable conclusion in respect of the Appellant regarding health and safety management without providing any basis for it.

[74] With the benefit of hindsight and an email of Friday 27 January from Neil Rowarth to Harry Hawthorne (Exhibit W to Mr Pennington's first affidavit), Mr Pennington believes that the Inspector never had any intention of discussing the measures that were already in place and whether they mitigated the risk to the extent that he considered was required. That email indicates the Inspector planned to try to

meet with Mr Pennington on Tuesday failing which Prohibition and Improvement Notices would be issued.

[75] Various Respondent file notes which Mr Pennington exhibited to his first affidavit (X and Y), that as at 25 January 2017 "Sean working with Bruce to issue prohibition notice to this operator", certainly indicate it likely that the Respondent had predetermined the outcome.

Was it then reasonable for the Inspector to issue the Prohibition Notice?

[76] In order to answer this question, the Court must enquire whether due process was followed and the correct tests were applied (in respect to authority to issue a Prohibition Notice and the Appellant's duties).

[77] Did the Inspector have a reasonable belief that an activity was occurring at a work place:

(i) that involves or will involve a serious risk to the health or safety of a person?

(ii) arising from an immediate or imminent exposure to a hazard?

[78] That requires the Court to enquire into the specific breach that was alleged.

[79] In HSWA the scope of unreasonableness is undefined. There are however two major categories of unreasonableness – substantive and procedural unreasonableness.

[80] I agree with Ms Campbell that the use of the word "unreasonable" as the ground of Appeal for decisions (s 105) should be interpreted as carrying the ordinary meaning of something which goes beyond the bounds of what is reasonable as opposed to the public law definition of decisions taken in bad faith, irrational decisions or giving inappropriate weight to irrelevant considerations (Wednesbury unreasonable).

[81] The Inspector alleged the specific breach he relied on was of s 36(2) and s 30.

> Section 30 provides that, to the extent to which the Appellant has or would reasonably be expected to have, the ability to control and influence to matter to which the risks relate the Appellant is required to:
>
> (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
>
> (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.
>
> s 36 imposes a duty on the Appellant as a PCBU to ensure, so far as reasonably practicable that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business.

[82] The expressed purpose of the HSWA being "to provide for a balanced framework to secure the health and safety of workers and work places by (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work ..." the Appellant is required to secure the health and safety of workers and the work place by giving other persons, so far as reasonably practicable, the highest level of protection available from the risk of (in this situation) exposure to the propellers.

[83] The definition of 'work place' in the HSWA has been extended to mean a place where work has been carried out, or is customarily carried out, for a business or undertaking, and includes any place where a worker goes, or is likely to be, while at work. In the context of this definition, a place includes a vessel and any waters – the Goat Island Marine Reserve included. The marine reserve therefore falls within the realm of a work place, albeit one that is also a public area and simultaneously the work place of a number of other converging operators.

[84] In relation to a PCBU duty, s 22 HSWA provides that doing what is reasonably practicable means doing that which is, or was, at a particular time, reasonably able to be done to ensure health and safety, taking into account and weighing up all relevant matters. An operator does not need to take every identified step to meet the reasonably practicable requirement. Not taking all the steps does not mean that a PCBU is not taking reasonably practicable steps to ensure the health and safety of persons.

[85] Section 30 provides that a person must, to the extent to which they have, or could be reasonably expected to have, the ability to influence and control the matter

to which the risks relate, eliminate, or minimise, risks to health and safety, so far as is reasonably practicable. The duty to manage risks (in this case swimmers) therefore is qualified.

[86] Section 36(2) provides that a PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

[87] The word "ensure" means to guarantee, secure or make certain, within the limits of the qualifying phrase "so far as is reasonably practicable. In relation to other people, the provision is further qualified by the use of "not put at risk": (Mazengarb's Employment Law (NZ) Health & Safety at Work Act 2015, HSWA 36.5).

[88] Although the definition of "work place" in the Act includes the Aquador and can be extended to the Goat Island Marine Reserve, the Appellant neither manages or controls the waters of the marine reserve which are greatly used by recreational boats, particularly during the very busy six weeks of the summer season.

[89] MNZ has jurisdiction over recreational vessels under Part 91 of the Maritime Rules and s 65 Maritime Transport Act 1994. Recreational vessels are subject to the requirement not to cause unnecessary danger or risk to other boats or people. Counsel for the Appellant submits that if the passage of the Aquador through the reserve, even with mitigation measures in place, is a breach of the duty to not put others at risk, and exposes a person to imminent or immediate risk, then a passage of recreational vessels through the channel must also put swimmers at an unnecessary risk. I agree.

[90] The Auckland District Council is responsible for navigation safety and has the power to make bylaws relating to these things, in particular under the Maritime Transport Act.

[91] Whilst the Appellant must at all times be conscious of its duty not to put at risk the health and safety of other persons in the marine reserve, recreational boats there and particularly in the channel (which seems to be the problem area) may not be under the same obligation. They may not be subject to the HSWA although I note the

interesting argument proffered by Ms Campbell that given that the marine reserve is a work place (of at least the Appellant and other commercial users), all users of it may owe duties under the HSWA. In that case, interestingly, the Marine Authority may also be able to issue prevention notices to any of them if they and their conduct meet the statutory test (by virtue of s 46 which imposes a duty on other people who are at work places, to take reasonable care for their own health and safety, take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons; and comply, as far as they are reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with this Act or regulation).

[92] The duty to eliminate risks to health and safety so far as is reasonably practicable applies only to the extent that the PCBU (the Appellant) has or would reasonably be expected to have the ability to control and influence the matter to which the risks relate. If the marine reserve becomes a work place by operation HSWA (extended definition of "work place") and the water "a place" in relation to that, any visitor to the marine reserve would owe a duty of care under s 47 HSWA. That would occasion a conflict between s 23 Marine Reserves Act 1971 as well as would "grate with the perception of public freedom in public areas" (para [6.4] counsel for Appellant's submissions).

[93] The Appellant lacks the ability to control and influence who enters the marine reserve or the channel as a work place. There are others who also operate commercial businesses in the reserve. They too, have an obligation to eliminate or minimise the risks to health and safety so far as reasonably practicable, to the extent of their ability.

[94] The duty on the Appellant to ensure so far as reasonably practicable that the health and safety of other people is not put at risk from the work carried out as part of the conduct of the business, needs to be read in light of the duty to manage risk set out in s 30, qualified by the extent to which the PCBU has the ability to control and influence the matter, together with the duty imposed by s 37 on PCBU who have control of a work place.

[95] I find that when the Inspector determined there was a specific breach of HSWA, he failed to take into account the competing and overlapping duties discussed above.

He also failed to take account of the many other recreational boats which provide swimmers with exposure to (arguably greater) hazards. Yet no attempt to modify or regulate their actions appears to have been contemplated.

[96] I agree with counsel for the Appellant that there are many areas where boating and swimming intermingle. If the Aquador is required to have, amongst other things, underwater cameras, signage and underwater acoustic systems as the Respondent appears to suggest, then all other motor-powered vessels (whether recreational or otherwise) should be subject to the same requirements.

[97] If the operation of the Aquador in the channel involves a serious risk to the health and safety of a person arising from immediate or imminent exposure to a hazard, then so too must the operation of any recreational vessel. In addition, other commercial motor-powered vessels operating in or transiting the channel that do not have greater protections against hazards than does the Appellant, should be treated identically. There appears to have been uneven handedness in the manner that the Appellant was treated by the Inspector.

[98] The duty of the Appellant in relation to other persons, and the hazard of the Aquador's propeller, existed under HSEA 1992. It continues under HSWA 2015. The obligations under those Acts were similar. The change in legislation has not made the Appellant's operation more hazardous. Since the implementation of HSWA 2015, the Appellant has taken steps to ensure it meets its obligations under the new Act. The Appellant's operation has only improved – it has more rigorous safety operating procedures. There have been no accidents since the Appellant purchased the Glass Bottom Boat business.

[99] The evidence demonstrates the following efforts by the Appellant to ensure the health and safety of other persons is not put at risk from its work:

(i) the Aquador has propeller guards on the propellers;

(ii) the Appellant ensures employees are familiar with the Beach/Boat Operations Manual, the Maritime New Zealand

guide for operating vessels in the vicinity of swimmers;

(iii)Aquador alerts swimmers to the presence of the vessel and the vessel route;

(iv)The Appellant ensures that a responsible skipper/master, who will meet the health and safety objectives of the business and adhere to the relevant regulations and provisions, is in charge of the vessel at all times;

(v) Aquador maintains the speed of the vessel at or below that provided in the relevant rules, regulations and bylaws.

[100] As there have been no accidents or even what might be described as "close calls", it is hard to see that there was urgency to issue a Prohibition Notice. Equally, I see no evidence of an imminent or immediate exposure to a hazard requiring the immediate cessation of work by the Appellant in the channel.

[101] Accordingly, I conclude there was substantive unreasonableness in the issue of the Prohibition Notice. In addition, as with the Improvement Notice, I consider there was procedural unfairness. The Memorandum and other documents certainly lead me to feel the Inspector predetermined the outcome. I join with Ms Campbell in criticising both the lack of evidence provided for the Inspector's views regarding the Appellant's approach to health and safety and the lack of due process in respect of an investigative process prior to decision. There was no formal investigative process:- the Appellant was unaware of the detail of the complaints against it and given no real opportunity to address them. The Memorandum records the Inspector's reliance on the EDM while the internal reviewer for MNZ stated that the EDM does not apply in relation to MNZ processes under HSWA. (See below)

[102] Lastly, the Prohibition Notice is discriminatory. It excludes from the channel one vessel which has mitigation measures in place but does not address or include recreational vessels with none and possibly without obligation to have them. Recreational vessels are likely to pose a greater risk than the Appellant does.

[103] I consider that there was not proven to be any serious risk, immediate or imminent, associated with the operation of the Aquador through the channel. Other vessels are able to continue traversing the channel without risk, elimination or mitigation measures in place.

The internal review

[104] The Appellant sought internal review of both decisions although the Improvement Notice had actually expired before the Regulator had issued any decision. In response to initial additional information provided to MNZ after the Appellant sought internal review, the Regulator stated "I would like to bring to your attention that Maritime NZ as a HSWA regulator is entirely independent of WorkSafe. We do not use the EDM in our work; we have our own compliance operating model. Information about how compliance operating model is available on the Maritime NZ web site." (Attachment AF to first affidavit of Mr Pennington). This assertion is at odds with Mr Patterson's own Memorandum stating that he used the EDM to make his assessments. Since both regulators are enforcing the same legislation, it is appropriate for them to apply the same principles and standards in their regulatory role. They did not.

Summary and conclusion

[105] I find that the decisions made by the Inspector to issue both Improvement and Prohibition Notices were unreasonable. Pursuant to s 135(3) HSWA I may either confirm or vary them, set them aside or substitute other decisions. There is no other decision that is appropriate to substitute. I grant the Appeal and set aside the decisions to issue an Improvement and a Prohibition Notice.

Dated at Auckland this 8th day of March 2018 at 4.15 pm.

M-E Sharp
District Court Judge