THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY **M.2020/97**

UNDER	**the Declaratory Judgments Act 1908**
IN THE MATTER	**of the Rating Powers Act 1988**
BETWEEN:	**PORTS OF AUCKLAND LIMITED**
	Plaintiff
A N D:	**AUCKLAND CITY COUNCIL**
	Defendant

Hearing: 22, 23 June 1999

Judgment: 31 August 1999

Counsel: *Robert Fardell* and *Sarah Keene* for plaintiff
Richard Worth and *Graeme Palmer* for defendant

RESERVED JUDGMENT OF WILLIAMS J

Solicitors:
Russell McVeagh McKenzie Bartleet & Co., DX CX10085 Auckland, for plaintiff
Simpson Grierson, DX CX10092 Auckland, for defendant

INDEX

GENERAL

The points in issue in this application for a declaratory judgment are, on the claim, the extent to which the Downtown Wharves in Auckland are exempt from local body rates and, on the counterclaim, whether the jetties, pontoons, piles and other facilities at Westhaven are within Auckland City

They are both questions of no little complexity where a sizable liability or exemption from rates will result.

DOWNTOWN WHARVES

(i) Description

The Downtown Wharves are, from east to west, the Fergusson Container Terminal, Freyberg Wharf, Jellicoe Wharf, Bledisloe Terminal, Marsden Wharf, Capital Cook Wharf and Queen's Wharf ranged along the southern side of Waitemata Harbour to the north of the Auckland Central Business District and the Railway Station and yards It is common ground that parts of the Downtown Wharves are exempt from rates. Rather than laboriously describe the parties' differing contentions, plans are attached as schedules to this judgment depicting the parties' views **Schedule 1** shows the Port Company's view which is, broadly put, that the exemption extends to the whole of the Downtown Wharves other than buildings and areas used for administration and similar purposes **Schedule 2** shows Auckland City's view which, again broadly, confines the rating exempt area to strips either 32m or 20m wide along the breastworks of most wharves. Those distances were agreed between the parties' valuers as representing the area directly used by cranes and derricks working vessels berthed at the wharves.

The following description of the background is taken from the statement of facts on which the parties sensibly agreed

Since the passing of the Rating Powers Act 1998 ("the Act") there have been a number of differences of view between the parties as to the rateability of certain property owned by Ports of Auckland. The process culminated in Auckland City advising Ports of Auckland on 16 March 1996 that it contended that the rating exemption was only as shown in **Schedule 2**

As is well known, containerisation has revolutionised shipping Cargo ships are now larger and generally containerised To maximise throughput cargo needs to be waiting for the ship when it berths so that the vessel spends minimum time in port Cargo loading now operates not, as formerly, parallel to the berth but at right angles to it, requiring increasingly large areas of back-up land.

In Auckland, the development of the Fergusson Container Terminal over the past 30 years demonstrates the trend. The berthage available and the area of back-up land has been extended on a number of occasions, specialised quayside "portainer" cranes have been installed and the container handling capacity of the facility considerably increased. That capacity also includes refrigeration facilities ("reefer points") for refrigerated containers. The Fergusson Container Terminal now contains 610m of quay, 20.2ha of general operating area, a 2 8ha area for stacking refrigerated containers, 1.96ha of depot and .3ha of container wash area, truck transit areas, road and rail exchange booths, roads, container movement lanes for trucks and straddle carriers, and the portainer cranes and tracks. Those constituent parts were shown on a

coloured overlay to Exhibit 10 The administration office, carparks, wash area and rail exchange office was agreed to be rateable

Containers begin to arrive at the Fergusson Container Terminal up to 7 days before ships berth and continue to be received until 12 hours before arrival with most arriving 2 5-4 days beforehand. Containers unloaded remain in storage for an average of 2.4 days depending on being cleared by Customs or the Ministry of Agriculture & Fisheries

Freyberg Wharf is predominantly used for the export of containers, perishables and general cargo It is also used as a Customs controlled area under the Customs Act 1996 for imported motor vehicles. Its loading facilities are suited to conventional vessels It has 426m berthage on each side, 5 9ha operating area and 8361m^2 covered storage The coloured overlay to Exhibit 13 showed the constituents as cargo shed, container bays, transit motor vehicle parking areas, roads, manoeuvring lanes, 40 reefer points and two areas on the seaward side of the Monash Street store for dangerous goods It also showed the Seapack administration office and stores which were agreed to be rateable Most outward bound cargo remains at Freyberg Wharf between 2-3 days

Jellicoe Wharf is used mainly by conventional vessels for the export of non-containerised goods particularly to the Pacific Islands It, too, is used for the importation of motor vehicles Cargo remains on Jellicoe Wharf for much the same time as for Freyberg though loading and unloading is slower than at Fergusson. It has 335m of berthage each side, 8.2ha of operating area and a general cargo shed. The coloured overlay to Exhibit 12 showed the constituents as the cargo shed, cargo bays,

roads and railway tracks It also showed the general wharves administration, no.1 store and plant services, which were accepted as rateable.

The Bledisloe Container Terminal has three berthage facilities The two wharves comprising Bledisloe East have a roll-on roll-off facility and a cargo shed especially designed for the importation of motor vehicles, their primary use Those wharves have a 137m and 224m quay length respectively with a back-up area of 4.8ha. Bledisloe West has a 260m quay length with 2 8ha of back-up area including a specialist timber shed The coloured overlay, Exhibit 15, showed its container bays, road exchange points and registration area, the special purpose motor vehicle shed, together with other covered sheds, 200 reefer points, lanes, roll-on roll-off facilities and train tracks in much the same way as the Fergusson Container Terminal for containers and Freyberg Wharf for vehicles It also showed the administration, machinery wash area, and office and carparking areas all of which were accepted as rateable

Marsden, Captain Cook and Queen's Wharves are all finger wharves built towards the turn of the last century Marsden and Captain Cook Wharves are mainly used for motor vehicle imports with berthage of 398m and 478m each side respectively and 1ha and 2.2ha of operating area The coloured overlay, Exhibit 17, showed their uncovered cargo areas, cargo shed and cargo movement areas plus the rateable administration office. Queen's Wharf has two 516m berths, 3 2 ha of operating area and a 2300m^2 coolstore Exhibit 19 was the coloured overlay showing its cargo sheds, coolstore, cargo areas and movement areas. It is mainly used for car and fruit imports and is a back-up cruise ship berth Cargo remains on these wharves

for much the same period as Freyberg and Jellicoe or, in the case of vehicles, until cleared The Harbour Control Office on Queen's Wharf was accepted as rateable

To the south of the service buildings for Jellicoe and Freyberg Wharves is the rail grid which is on 3.7ha of Ports of Auckland land running east-west immediately to the north of Quay Street. Containerised cargo arrives for export at the grid and is unloaded into stacking areas pending removal to the stacking areas on the relevant wharves. The process is reversed for imported containers. Trans shipment in each case occurs within a few hours The coloured overlay to Exhibit 21 showed the constituent rail tracks, cargo areas and movement lanes

The agreed statement of facts concluded ·

> "The process of operating a commercial port in the modern shipping environment requires that wharves have substantial amounts of back-up land available on the wharves International shipping operators require modern ports to have all cargo ready on the wharf awaiting arrival of the vessel.
>
> most cargo of necessity spends some time, usually an average of two to three days, stacked in transit areas on the wharf awaiting despatch.
>
> The size and weight of containers, breakbulk cargo, and vehicles, and the continuous flow of cargo in and out of the port (Fergusson and Bledisloe operating 24 hours a day, seven days a week), mean that it would be practically impossible for POAL to continuously relocate cargo to and from "storage" areas off the wharf, even if POAL had areas of land available to it for that purposes. It is an operational necessity for the cargo stacking areas to be on the wharves themselves and for cargo to be loaded onto vessels directly from those areas "

(ii) Scheme of the Act

In considering the Act, Ports of Auckland submitted that it was effectively a taxing statute and should be construed restrictively but acknowledged the well established principle that rating exemptions should be similarly construed.

Section 3 of the Act deems all land to be rateable property other than as elsewhere provided and it was common ground that the Downtown Wharves are "land" and "rateable property" in terms of the Act They are, therefore, rateable unless they come within a statutory exemption

Section 6(1) relevantly provides that land described in Part II of the First Schedule is deemed not to be rateable property.

Clause 22 of Part II of the First Schedule is of pivotal importance on this aspect of the case Under the heading "Land . Not Rateable for the Purposes of this Act", it reads

> "22 (1) Land occupied by a Harbour Board, port company, or other person, and used as a wharf, but excluding any such land used for administrative or other ancillary purposes.
>
> (2) For the purposes of this clause the term "wharf" means any quay, pier jetty, or other land or premises in, on, or from which passengers or goods are taken on board of or landed from vessels; but does not include any land not so used notwithstanding that it is within the limits of any wharf as defined in or pursuant to the Harbours Act 1950 "

"Ancillary purposes" is defined in the Interpretation provision of the First Schedule in the following terms

> "In this Schedule the term "ancillary purposes", in relation to any land, includes land used for parking, the storage of freight or machinery, maintenance, cleaning, freight consolidation, passenger waiting areas, and booking and ticket selling "

Pursuant to the Harbours Act 1950, Harbour Boards, as they then were, had power to define the limits and boundaries of a wharf and "wharf" was defined by s 2 of that Act in the following terms

> "'Wharf' includes wharves, quays, piers, jetties, land, and premises in, on, or from which passengers or goods may be taken on board of or landed from vessels."

Clauses 21, 23 and 24 of Part II of the First Schedule are also of assistance for comparative purposes in construing para 22. They read .

> "21 Land vested in a territorial authority, regional or united council, or the Auckland Regional Authority which is formed and used as a road, access way, or service lane.
>
> 23.(1) Land vested in and occupied by any airport authority, being within the operational area of the aerodrome, and used solely or principally –
>
> (a) For the landing, departure, or movement of aircraft; or
> (b) For the loading or unloading of goods and passengers onto or from aircraft –
>
> but excluding any land used for administrative or other ancillary purposes in relation to such use
>
> 24.(1) Land occupied by a railway operator that is –
>
> (a) Used as part of the permanent way of the railway, being land upon which is sited any railway line together with such contiguous areas of land as are occupied incidentally thereto, and are not otherwise used, or
>
> (b) Used, or upon which is sited any structure or premises used, solely or principally for the loading or unloading of goods or passengers on to or from any train situated on a railway line –
>
> but excluding any land used for administrative or other ancillary purposes in relation to such use "

Counsel for Ports of Auckland submitted that those exemptions showed clearly that in passing the Act Parliament intended that transport facilities of national importance were intended to be exempt from rates because of the services they provide Whilst that submission is not difficult to accept, it remains the case that, as the passages from "*Hansard*" put in evidence plainly demonstrate, in passing the Act Parliament was also clearly intending to restrict the breadth of the wharf exemption by comparison with that which formerly applied and altered the way in which the exemption was defined to try to achieve that object

Counsel for Ports of Auckland submitted that on principles of straightforward statutory construction, cl 22 extended to the whole of the marked area in **Schedule 1**

He submitted that for Parliament to exempt "land .. used as a wharf" and then exclude from that exemption "land used for administrative or other ancillary purposes" meant that Parliament was intending that entire wharves, not merely parts, should be exempt, otherwise the exclusion would be unnecessary. He submitted the same process, when applied to cl 22(2), yielded the same result and that this interpretation was consistent with the definition of "wharf" in the Harbours Act 1950 Mr Fardell submitted that that part of cl 22(2) which followed the semicolon, simply excluded land not used as part of a wharf even if it was defined as a wharf under the Harbours Act 1950.

That "wharf" under the Harbours Act 1950 meant the whole wharf was, it was submitted, confirmed by sections of that Act which empowered Harbour Boards to construct various items on or through wharves (s 173 (h) (i) (j)), the various powers to make bylaws appearing in s 232 and the powers in relation to vehicles on wharves in ss 250A and 250B. Of interest, it was contended, is the absence from the Act of any provision comparable to the defining powers in the Harbours Act 1950 s 190

Mr Fardell also drew attention to the inclusive nature of the definition of "wharf" in the Harbours Act 1950 by comparison with cl 22 and the textual differences between the definitions to support his submission that a structure which is a "wharf" under the Harbours Act 1950 may not come within cl 22 and vice versa.

For Auckland City, Mr Worth, leading counsel, submitted that the scheme of the Act is that all land is rateable unless specifically exempted. The relevant exemptions in Part II are, generally speaking, for public good or charitable uses He submitted that the transportation exemption should therefore be restricted to lands

solely used for transporting people or goods to avoid imposing additional rating on all other ratepayers He, too, relied on the speech of the Acting Minister of Local Government on the second reading of the Bill that "exemptions from rates will apply only to the operational areas of the transport system" (489 NZPD 4164). Mr Worth also drew attention to the substantial amendments, including restrictions on the scope of the exemptions, which occurred during the passage of the bill through the House of Representatives From that, he submitted that cl 22 should be so construed as to restrict the exemption to that part of the structure from which goods or passengers are loaded or unloaded, embark or disembark, a submission which, he suggested, was firmly based on the way in which cl 22 is phrased and on its literal meaning (***Mayor etc of Dunedin v Baird*** (1913) 33 NZLR 149, 153, ***Telecom Auckland Ltd v Auckland City Council*** [1995] 3 NZLR 489, 505) Mr Worth also drew attention to the absence from cl 22 of the limitation "solely or principally" appearing in cl 23 and 24

Though acknowledging that each case depends on its own facts – more perhaps in the present instance than normally – Auckland City relied on the following authorities

(a) In ***Berry v London Chatham & Dover Railway Company*** (1884) 4 Ry & Can Tr Cas 310, 320 it was held in a railway context that loading and unloading did not mean "anything more than the labour of packing or unpacking a .. train whether done by hand or by machinery"

(b) In ***Haddock v Humphrey*** [1900] 1 QB 609, 616 it was held that injuries suffered in storage yard some 150 yards from the water's edge did not occur on

a "wharf" because the yard was for storing goods rather than their loading and unloading That decision was followed in ***Brooks v South Australian Stevedoring Co Ltd*** [1920] SALR 207, 222

(c) In ***Cotton Controllers (Liverpool) Ltd v Secretary of State for Employment and Productivity*** [1969] 2 Ll LR 323, 326 it was held that the phrase "unloading of vessels" meant "only the discharge from the vessel of its cargo".

(d) ***New Zealand Association of Waterfront Employers v New Zealand Harbours' IUOW*** (1989) 2 NZELC 97, 105 was a demarcation dispute between waterfront workers and harbour workers unions over who had the right to drive forklifts between a ship or container and the place on the wharf where cargo was stacked Holding that the waterfront workers had coverage, the Labour Court, in a painstaking judgment adopting in large part Australian authority which spoke of the changes in the working of wharves from slings and hooks to portainer and other cranes, straddle trucks and forklifts, held (at 97, 137)

> " the advent . of more sophisticated vessels, such as side-port loaders, coupled with or without conventional cargo stowage; containerised vessels of the roll on/roll off type, whether operating quarter-ramp or stern-ramp loading/discharging means, did not fundamentally change the meaning to be naturally assigned to the expression, the loading/discharging of a vessel. This term or expression . consonant with its plain ordinary meaning, *comprises the entire* discharging or loading process from ship to stack, to the final point of rest *in a discharging operation*, or where the cargo was at rest, that is to say assembled, before the loading process commenced This final point of rest, in a discharging operation, should comprise within wharf limits, where the cargo is available for collection by the consignee thereof or his authorised agent, and in a loading process, the assembly point of the cargo within wharf limits from whence the loading process is undertaken by a stevedore. Similarly, we firmly conclude that, in a devanning process of LCL containers, the process of *unloading such containers* ... must reasonably mean the movement of cargo in the devanning process to *its final point of rest, that is to say*, assembly/storage area within wharf limits where it is uplifted by the consignee thereof, or his authorised agent."

(e) In ***Fletcher Panel Industries Ltd v Ports of Auckland Ltd*** [1992] 2 NZLR 231 containers were consigned to Tauranga for export to Melbourne but because of a strike were transported to the Fergusson Container Terminal for onward transmission. Cargo was left at the container terminal and damaged. In an action to recover the loss, it was held that the limiting provisions of the Carriage of Goods Act 1979 applied and the facts did not come within the definition of "international carriage" in s 2 of that Act which defines "carriage from a port" as "commencing when the goods are loaded onto a ship and ending when they are discharged from a ship". After referring to the standard texts and the statutory definitions, Hillyer J held (at 236) "the holding of the goods in the container terminal was prior to the commencement of the loading and therefore it was within the terms of the definition of domestic carriage".

(iii) Discussion

The Court turns to construe cl 22 as a matter of statutory interpretation in the light of those authorities and submissions

The first point to be noted is that what is sought to be exempt must be "land" That was a matter of admission.

Secondly, it is to be noted that the exemption may apply even if the land is merely occupied by a Port Company That also applies in relation to the rail exemption The land does not have to be vested as required by cl 21 nor vested and occupied as required by cl 22

Thirdly, and critically, the land must be both occupied by the Port Company and "used as a wharf". In deciding on use, the meaning of "wharf" in cl 22(2) must be taken into account

In relation to the Downtown Wharves, there was no dispute that all the area which Ports of Auckland contended was exempt as coming within the definition of "wharf" could also come within the phrase "any quay, pier, jetty, or other land or premises" provided that it also met the requirement that it was a quay, pier, jetty or other land or premises "in, on, or from which passengers or goods are taken on board of or landed from vessels"

The parts of the Downtown Wharves which Auckland City contended came within the exemption of a "wharf" are clearly parts from which passengers and goods embark or disembark or are loaded or unloaded

However, in construing the phrases "used as a wharf" and "wharf", in this Court's view contemporary changes in the manner of loading, unloading, embarking and disembarking require to be taken into account.

The wharf exemption is ancient, stemming originally from the Royal Prerogative (*Chitty: "Prerogatives of the Crown"* (1820) p 174-175) but has been progressively restricted over the years. The Municipal Corporations Act 1886 s 341, the Rating Powers Act 1908 s 2(k) and the Rating Act 1925 s 2 all provided exemptions for rates in largely similar terms for "... wharves ... and harbour works under the control" of harbour boards whilst the Rating Act 1967 First Schedule cl 21

exempted "land . on which are situated any harbour works within the meaning of the Harbours Act 1950" other than land on which were erected buildings used for office purposes "other than a building erected on any wharf within the meaning of the Harbours Act 1950" The Harbours Act 1950 defined "harbour works" as including " . generally any works for the ... utilisation of the harbour and in particular ... includes any basin, graving dock, slip dock, pier, quay, wharf, jetty ..."

The Rating Powers Bill and the Act must therefore be approached as restricting the former broad exemption to avoid increased charges on other ratepayers but nonetheless preserving the exemption in the national interest of what is properly regarded as included in the term "wharf"

Whilst it remains possible for passengers and goods to be loaded and unloaded, and to embark and to disembark within the relatively narrow strip of the wharf which Auckland City contended was exempt, the evidence shows that as a result of the way in which those activities have changed over the years since the enactment of the Rating Act 1967, those activities are no longer confined to those areas. Whilst passengers can still embark and disembark by a gangway at the ship's side, they also embark and disembark by means of bridges into an adjacent covered space. Whilst goods can still be loaded and unloaded by derricks at the ship's side, the volume, numbers and speed of loading or despatch required by modern port operation, especially containerisation, means that it is no longer possible for those activities to be confined to and completed within, a narrow strip of quayside That area is nowadays incapable of handling the numbers and volumes required in the time available With the wharves with which this case is dealing, the entire cargo of several ships needs to be able to be accommodated to achieve the throughput required. In extending the

term "wharf" beyond the quayside to include "other land or premises" provided that the loading and unloading, embarkation and disembarkation condition can be satisfied Parliament must have recognised this in passing the Act only just over a decade ago

In the Court's view, the phrases "used as a wharf" and "wharf" must, at least as far as the Downtown Wharves are concerned, extend beyond the quayside to the "other land or premises" mentioned That "land or premises" is, however, limited to "land or premises" where passengers and goods "are" taken on board or landed from vessels That is to say, the "other land or premises", to amount to "land or premises used as a wharf", must have a link in fact to the embarkation and disembarkation or loading and unloading of vessels It is insufficient that land or premises occupied by the Port Company is capable of being used for those purposes· it must in fact be so used That is made clear by contrasting the first section of each of cl 22(1) and 22(2) which focus on actual use of land as a wharf for the stated purposes with the final section of cl 22(2) which excludes land not used for the purposes of embarkation, disembarkation, loading and unloading even if it may be within the defined limits of a wharf under the Harbours Act 1950, that is to say "land or premises which is capable of such use" even if it is not in fact so used

In summary, therefore, on this point, for "land" to qualify for the rating exemption because it is "used as a wharf", it must be a quay, pier or jetty within the normal meaning of those words which is factually used for embarkation, disembarkation, loading or unloading as those functions are carried out in contemporary terms, or it must be "other land or premises" which, again, is factually used in that way for those purposes Potential use for those purposes is insufficient.

The final interpretation question is to consider the extent to which that finding may be affected by the exclusion from cl 22(1) of "any such land used for administrative or other ancillary purposes", the definition of which was set out earlier Auckland City relied on it to support its view of the ambit of the wharf exemption In particular, Mr Worth submitted that by including parking and freight and machinery storage within the definition, Parliament had intended that cl 22 storage should not exempt land used in any way for the parking of imported or other vehicles or the storage of containers and other freight.

Focusing first on cl 22(1), it is clear that the parliamentary intention was that "land . used as a wharf" should be exempt from rates but that the Legislature, in intending to restrict the exemption by comparison with former definitions, was concerned to ensure that only land used as a working wharf should be exempt and not land devoted to supporting purposes such as administration, offices and other purposes ancillary to the working wharf itself.

That view is supported by the concluding terms used in the definition of "ancillary purposes" In cutting down the former wharf exemption, Parliament clearly intended functions going beyond those necessarily undertaken as part of the working wharf itself should not be exempt It took a similar view in relation to the railway and airport exemptions But the critical factor is that the Legislature has taken the view, in phrasing cl 22 as it has, that usage of land as a wharf may well involve usage of part of that land for administrative or ancillary purposes, that is to say for purposes other than the loading or unloading of goods and embarkation and disembarkation of passengers In drawing that distinction, Parliament has intended that the rates exemption be restricted so that land used for "administrative or other ancillary

purposes" is not exempt That must mean administrative or other purposes ancillary to the use of the land as a wharf That is to say land used in the working of a wharf for purposes in cl 22 is exempt but land used as a wharf but used for purposes which are not critical to the functioning of a working wharf should not be entitled to the exemption

When the definition of "ancillary purposes" is seen in that light, it becomes apparent that land used for forms of parking which are ancillary or not essential to the use of land occupied by a port company for use as a working wharf, is not entitled to the exemption Parking for employees might be an example as opposed to parts of the wharf used to park imported vehicles pending Customs clearance Similarly, land used for storage of freight or machinery where such storage is ancillary to the use of other land occupied by a port company for the essential purposes of a working wharf is not entitled to the exemption Land used for the storage of freight for the port company's administrative purposes, or machinery utilised in maintenance might be an example as opposed to land used for the storage of freight and machinery unloaded or to be loaded on ships The same applies to land used for maintenance, cleaning and the other purposes listed in the definition including "freight consolidation" which is ancillary to such usage. The distinction between land covered by the exemption and land excluded by the definition of "ancillary purposes" may often be that the exemption applies to land devoted to furthering the interests of users of the port as opposed to land used for the purposes of the port company itself

Seen in that light, exemption from local body rates pursuant to cl 22 of Part II of the First Schedule to the Act is available for .

1. "Land" within the meaning of s 2 of the Act which is occupied by a port company and is "used as a wharf"

2 The phrase "used as a wharf" includes quays, piers and jetties and "other land or premises" which are actually used for the loading or unloading of goods or the embarkation or disembarkation of passengers. Land used for those purposes in a contemporary working port includes land or premises which is not confined to the quayside but is factually used as part of the process of loading or unloading, embarkation and disembarkation Its potential use or its capability for use for those purposes is insufficient

3 The exemption is confined to land or premises used strictly for the purposes of working the wharf and does not extend to land which might otherwise be regarded as being "used as a wharf" but where its usage is for purposes ancillary to a working wharf such as those listed in the definition of "ancillary purposes".

The remaining question is to define the demarcation point when land occupied by a port company is "used as a wharf" and when it is used for "ancillary purposes". Given the accepted approach to the construction of rating statutes, in this Court's view the crossover point in the case of outgoing goods is the point at which the Port Company as wharfinger becomes responsible for those goods, that is to say, the point at which the Port Company assumes custody of the same and they are placed ready for loading In the case of inbound goods, the crossover point is at the stage where the Port Company relinquishes custody of the goods to a carrier or consignee In the

case of both inbound and outward bound passengers, that crossover point is where the Port Company assumes or relinquishes responsibility for the welfare and safe-keeping of passengers through the provision of its facilities

Standing back and looking at the operation of a contemporary wharf in general and the Downtown Wharves in particular, that distinction reflects the division between the essential functions of the use of land or premises as a working wharf for the loading or unloading, or embarkation or disembarkation of goods and passengers and the functions or facilities provided by the Port Company on land occupied by it which are ancillary or secondary to the working of the wharf itself.

That division also reflects the limits of the railway and airport exemptions. Clause 23 draws distinctions between the "operational area" of an airport used for the movement of aircraft, passenger and areas used for freight and administrative or ancillary purposes The distinction in cl 24 contrasts land used for those purposes with the permanent way and structures "used solely or principally" for the loading or unloading of railway freight and passengers

That distinction also broadly reflects the distinction drawn in different circumstances by the Labour Court in ***Waterfront Employers*** *(supra)*.

(iv) Findings

It remains to endeavour to apply those findings to the Downtown Wharves although, as the overlays to the various exhibits were somewhat imprecise, it is appropriate to reserve leave to the parties to apply further in this regard if what follows fails to give a clear enough indication of the division between exempt and non-exempt

parts of the wharves. In particular, the Court acknowledges that the connecting roads (coloured dark blue) may be partly exempt and partly non-exempt

Fergusson Container Terminal

As a result of the application of the foregoing definition, the following parts of the Fergusson Container Terminal are exempt from rates :

> The container stacking areas, refrigeration units, portainer crane track and interconnecting roads (coloured green, purple, yellow and dark blue respectively on **Exhibit 10**) but not the truck transit areas, road exchange booths and truck registration areas (coloured red and brown on **Exhibit 10**) nor the connecting roads (more clearly shown outlined on **Exhibit 9** on the eastern and south-eastern sides of the terminal) nor the structures coloured black which are agreed to be rateable).

Freyberg Wharf

The exemption extends to the cargo shed, container bays, transit motor vehicle parking areas, reefer points and the dangerous goods shelters and interconnecting roads (coloured purple, green, red, yellow and dark blue respectively on **Exhibit 13**) but not the buildings (coloured black) which are agreed to be rateable.

Jellicoe Wharf

The exemption extends to the cargo shed, cargo bays and roads (coloured purple, green and blue on Exhibit 12) but not to the building (coloured black) agreed to be rateable This is one wharf where the further inquiry into the function of the

connecting roads to the south of the container bays may result in their not being exempt.

Bledisloe Container Terminal

The exemption extends to the container bays, special purpose motor vehicle shed on B1 and coloured sheds on B2 and B3, reefer points, lanes and roll-on roll-off facilities and crane tracks (coloured green, purple, dark blue, light blue and yellow respectively on Exhibit 15) but not to the road exchange points or truck registration areas (coloured red and brown on Exhibit 15) Again, given the placement of the road exchange points and truck registration areas, some of the roading leading to those facilities may not be entitled to the exemption

Marsden and Captain Cook Wharves

The exemption applies to the uncovered cargo areas, cargo sheds and cargo movement areas (coloured green, blue and light blue on Exhibit 17)

Queen's Wharf

The exemption extends to cargo sheds and coolstore, cargo areas and cargo movement areas (coloured green, blue and light blue on Exhibit 19)

Rail Grid

The exemption extends to the cargo areas and cargo movement lanes (coloured green and light blue on Exhibit 21) but not to the rail tracks (coloured red) but again the connecting roads may require further consideration

WESTHAVEN

General:

Auckland City's counterclaim sought a declaration that the whole or parts of Westhaven as defined in a coastal permit dated 28 July 1994 were within Auckland City and accordingly rateable. Alternatively, for reasons which will appear, it sought a declaration that the "land and/or structures comprising the jetties, pontoon and piles at Westhaven" were within Auckland City and were also rateable because they were not within the wharf exemption In fact, as will appear, the parties dealt with a large number of different aspects of facilities in the Westhaven area.

(i) Description

A plan of the Westhaven area is attached as **Schedule 3** The area can be divided into the Western Reclamation shown to the east or right of the commercial channel, the commercial channel itself giving access to the entire area, Westhaven East comprising the grids, charter boat base, work berths, launching ramps and the recreational water space to the west up to the beach and the Rowing Club, and the balance being the Westhaven Marina itself including the berths on the lettered fingers, piles, swing moorings, grids and other marina facilities and fairways

In more detail, the facilities within Westhaven are ·

(a) Berthage for pleasure boats on marina berths, pile moorings and swing moorings. Berths are with or without fingers at right angles to the central pier with boats secured to the pier or the fingers or to moveable rings on piles at the outer end. The piers are held in place by piles passing through metal rings attached to floating pontoons and driven into the seabed which allow vertical but not horizontal movement with the ebb and flow of the tide. Access

between the piers and the land is by hinged bridges fixed to the ground at the landward end and resting on wheels on the pontoon Attached to the bridges are electricity and water supply running through pipes and hoses which can be disconnected for maintenance.

(b) Pile moorings in the north-eastern quarter to which boats are secured fore and aft Access is by dinghies housed in shore racks There are swing moorings in the south-eastern corner to which vessels are secured by bow line They swing with the tide Access is by dinghy as for pile moorings.

(c) Berths and moorings are covered by berth licences in favour of boat owners but there are also some berths and moorings held by Ports of Auckland for casual or complimentary berthage, sales berths and events berths 1859 boats can now be accommodated in Westhaven.

(d) In the south-western corner of the marina are nine yacht cleaning grids with access jetties. These cover and uncover with the tide to allow access to yachts on the grids below water line at low tide for cleaning The grids are fixed to the seabed The access jetties are fixed to piles driven into the seabed

(e) Westhaven East piers provide 18 marina style work berths. The fixing is similar to other marinas

(f) Z Pier provides 28 charter boat berths. The fixing is again similar to the rest of the marina.

(g) A public launching ramp for trailer boats in Westhaven East

(h) There are another 14 tidal cleaning grids in Westhaven East all with access jetties similar to those in the south-western corner.

(i) Westhaven East also includes an area of land and water space leased to the Royal New Zealand Yacht Squadron, including a trailer boat parking area, concrete landing deck connected to the land above mean high water mark ("MHWM") and supported by piles plus a floating pontoon similar to marina berths and connected by a similar hinged bridge arrangement

(j) West End Rowing Club has its clubhouse together with a launching pontoon to the south of Piers R and S

(k) All the land in the Western Reclamation is owned by Ports of Auckland (and is shown in the two photographs *attached* as **Schedule 4**)

- **Area 1** is leased to Europa/BP and includes a licence over the adjacent area of seabed and water space covered by the floating pontoon shown in the photograph
- **Area 2** is leased to Vos and Brijs Shipyards Limited for use as a ship repair and maintenance facility with the water space shown in the photograph licensed to the company The structures comprise a fixed wharf, concrete slipways and floating pontoons all owned by Vos & Brijs
- **Area 3** is leased to Anton's Seafoods Limited with a licence of the water space to the same company but both lease and licence will expire on 31 October 1999 and will be replaced by a lease to Pacific Ferries. The wharf

and gantries in the photograph are owned by Ports of Auckland and used as a workshop and for berthing.

- **Area 4** is leased to Marine Steel Limited for vessel repair and maintenance with the adjacent water space licensed to the same company The lease and licence include a slipway and piers.
- **Area 5** is the "cement wharf" owned by Ports of Auckland
- **Area 6** is a floating dock owned by Ocean Steel Limited which has a licence over the relevant seabed As with the pontoons, the dock moves vertically with the tide and is secured by driven piles
- **Area 7** is leased to Westhaven Boatyards The northernmost structure in the photograph is a refuelling jetty which is fixed and owned by Ports of Auckland To the south is the floating structure owned by Caltex Oil which has a sublease of the area for refuelling and to the south of that is a travel lift owned by Westhaven Boat Yards for hauling boats from the water
- **Area 8** is leased to Oram's Marine (Auckland) Limited and is used for vessel repair and maintenance The water space is licensed The structures comprise three concrete slipways, two piers and a floating pontoon
- **Area 9** has been sold but is leased to Westhaven Properties Limited for boat sales and storage with a licence over the adjacent water space, covering a travel lift, four floating pontoons and a dry boat store which overhangs the water.

(l) Ports of Auckland owns the roads, carparks and other land surrounding Westhaven Marina and Westhaven East and is responsible for their

maintenance and cleaning. It supplies power, garbage collection, security and other services to that land Water and waste water is provided by Auckland City's subsidiary, Metro Water. As the Court understood it, it was accepted that Ports of Auckland does not own the roads giving access to the Western Reclamation but it is of importance to note that the agreed statement of facts accepted that there was access over Ports of Auckland roads, carparks and other land from the piers, jetties, grids and other facilities in the Marina and Westhaven East and direct access from the Western Reclamation to land within Auckland City

Ports of Auckland is the lessee of the seabed at Westhaven for 21 years from 1 October 1988 pursuant to two leases dated 29 September 1988 The lessor was originally the Auckland Harbour Board but the seabed was then vested in the Auckland Regional Council and, following the enactment of the Foreshore and Seabed Endowment Revesting Act 1991, in the Crown (but with the leases continuing to have effect pursuant to s 6) (See also ***Lextrum Marina Limited (In Receivership) v Rodney District Council*** (27/8/97, HC Auckland, M.2287/91, Smellie J, p3), ***Manukau City Council v Ports of Auckland Limited*** (19/5/98, CA 252/97, p3). Further, Ports of Auckland has a permit issued under the Resource Management Act 1991 s 384A entitling it, until 30 September 2026, to manage and operate its port-related commercial undertaking (Resource Management Act 1991 s384A(11) and "occupier" as defined in s 12(4)(a)) which, so far as is relevant to this case, includes Westhaven Marina, Westhaven East and the land adjacent to the Western Reclamation leased or licensed to third parties (***Viaduct Harbour Holdings Ltd v Auckland Regional Council***(22/2/99 Environment Court, Auckland, A 4/99).

The Westhaven water space has been extensively developed over the past century with the marina berths being installed progressively since the early 1960s.

Ports of Auckland was incorporated in October 1988 under the Port Companies Act of that year and purchased Westhaven from the Auckland Harbour Board, with the assets being transferred to it on 11 October 1988 pursuant to a Port Company plan prepared under s 23 of the Act. In 1992 Ports of Auckland put the marina and related facilities into the Westhaven Trust to protect berth-holders The trustee is Westhaven Marina Trust Limited, a wholly owned subsidiary of Ports of Auckland, with the directorate equally divided between nominees of Ports of Auckland and community interests Two subsidiary trusts were later set up

Prior to 1989 the boundary of Auckland City was delineated by definition notices in the "*New Zealand Gazette*" and with effect from 1 April 1978 the Local Government Act 1974 s 50(1) effectively provided that the boundary of any coastal district should be MHWM On 22 July 1988 the Local Government Amendment Act (No 3) 1988 came into force It placed a duty on the Local Government Commission to prepare final reorganisation schemes for local bodies Drafts were published in December that year which, so far as is relevant to this matter, proposed that Auckland City's seaward boundary should again be MHWM The Local Government Reform Bill of December 1988 followed the same formula Following submissions on the Bill, the Local Government Commission resolved in a meeting held on 8-12 May 1989 that the boundary of the Waitemata Harbour should be MHWM. Their recommendations, as amended by Parliament, were subsequently included in the Local Government Amendment (No.2) Act 1989, particularly ss 5 and 47

(ii) Local Government Commission Determinations

On 7 June 1989 final reorganisation schemes were published by the Local Government Commission and two days later the Local Government (Auckland Region) Reorganisation Order 1989 was gazetted It included reference to a number of SO plans as delineating the seaward boundaries of the region

SO63512 showed the seaward boundary at Westhaven as being MHWM

On 27 August 1991 Auckland City formally asked the Local Government Commission to clarify the "Auckland City boundary where it abuts the Waitemata Harbour" and if necessary amend its formal determination The request arose because of disputes between Auckland City and Ports of Auckland over the wharves and the "floating jetties inside Westhaven Marina" and a further dispute as to the rateability of properties such as that of the Auckland Marine Rescue Centre Trust whose property was partly to the landward of MHWM but projected seaward of that mark As far as Westhaven was concerned, the letter said that the Council accepted that the Marina was subject to the wharf exemption but that Ports of Auckland took the view that the jetties were below MHWM and therefore outside the City boundary

Following submissions from both parties, the Local Government Commission issued its formal determination on 23 April 1992. The Local Government (Auckland Region) Reoganisation Amendment Order (No 2) 1992 putting that determination in place was promulgated on 20 July 1992. In a certain sense, this case, particularly as regards Westhaven, is about which parts of the Commission's determination related to each of the three questions asked

As is clear from the decision, the Commission was asked to resolve three disputes, two with Ports of Auckland relating, first, to the wharves and, secondly, to the "floating jetties inside the Westhaven Marina" and a third relating to properties such as that of the Rescue Centre Trust For the most part, the Commission's determination maintained separation between the three as is shown by a perusal of the whole of the decision For present purposes it is sufficient to cite the concluding paragraphs which read :

> "19. **Downtown Wharves:** While the Commission was of the view that the true location of the seaward boundary of Auckland City was identified by an interpretation of the various notations on S O Plan No 63510, it would be appropriate, in this case, to issue a clarifying determination to remove any possible doubt The Commission intended that land and/or structures contiguous to the seaward boundary of Auckland City be included within the boundary of Auckland City Thus was particularly so as the Commission sought to create a long term boundary identity which would avoid the kind of jurisdictional arguments so much an historical feature of the interface between harbours and the land Therefore an appropriate amendment will be made to clause 102 of the Final Reorganisation Scheme for the Auckland Region to enable or better enable the intention of the scheme to be put into effect.
>
> 20 **The seaward boundary at the Westhaven Marina:**
> In the Commission's view this was quite clearly delineated on S O Plan No 63512 The land beneath the floating jetties was not intended by the Commission to be included within the boundary of Auckland City, and this is clearly shown on the Plan In this case the Commission was of the view that there was no need for any further action as the S O Plan clearly recorded the Commission's intention
>
> 21. **Land and/or structures which are now or in the future may be adjacent to the seaward boundary of Auckland City, with access onto streets or properties within the City:** It was accepted by all parties that any doubts about whether or not such land and/or structures were within the City could not be resolved by reference to an S.O. plan It had been the Commission's intention that such land and/or structures should be included within the boundaries of Auckland City To achieve this the Commission accepts that a further provision is necessary to enable the intention of the Final Reorganisation Scheme to be put into effect To achieve this a further amendment will be made to clause 102 of the Scheme
>
> **Determination**
> 22. Pursuant to section 37ZZVB of the Local Government Act 1974, the Commission hereby determines that clause 102 of the Final Reorganisation Scheme for the Auckland Region shall be amended by adding the following two subclauses –
>
> "(2) For the avoidance of doubt, it is hereby declared that the boundary of the Auckland City follows the seaward edge of those wharves depicted on S O Plan No 63510
>
> (3) Notwithstanding anything in this clause or clause 105 of this scheme, the Auckland City shall include all land and/or

> structures which are now or in the future may be adjacent to the seaward boundary of Auckland City, with access to streets or properties within the City"
>
> for the reason that these further provisions are necessary to enable or better enable the intention of the scheme to be put into effect
>
> **23.** The Commission declines the application from the Council to issue a determination pursuant to section 37ZZVB of the Act to alter the boundary of Auckland City to include within it the area of Westhaven Marina which is covered by sea water, for the reason that S.O. Plan 63512 correctly records the Commission's intent."

The question of the wharves was dealt with in paras 2(a), 4, 5, part of 12, generally in 13(a) and partly in 14 with the decision appearing in the first part of para 19 and the formal amendment to cl 102(2) of the final reorganisation scheme for the Auckland region appearing in para 22 earlier cited

The Commission dealt with properties to the seaward and landward of MHWM in the second para 1(b), 3, 8, part of 9, parts of both para 13(a) and in particular 13(b), the first sentences of paras 14 and 15 and para 21 It is of some importance to note that neither the Rescue Centre Trust nor the Kohimarama Yacht Club, the two bodies whose properties were the examples used, were present at the meeting with the Commission to which paras 10-16 referred so that the third and fourth sentence of para 13(a) and the whole of para 13(b) were, as the prefatory words make it clear, Auckland City's submissions Importantly, the formula proposed by the City Surveyor cited in para 13(b) formed part of Auckland City's submission on the dispute relating to "land and/or structures contiguous to the seaward boundary of Auckland City [which] are extensions to the City and rely upon the Council for services and support facilities". The second matter of importance to be noted in relation to this dispute is that the Commission used slightly varying formulae in its references to it. Clause 102(3) used the formula "all land and/or structures which are now or in the future may be adjacent

to the seaward boundary of Auckland City, with access to streets or properties within the City".

The heading to para 8 substituted "buildings" for "land" (and used "onto" instead of "to" in the definition of access) whilst the City Surveyor's formula also referred to "buildings" instead of "land and/or structures" and contained nothing about access to streets or properties within the City and the heading on para 21 mirrored the formal determination (apart, again, for the substitution of "to" for "onto").

The Commission dealt with the third dispute, the "floating jetties inside the Westhaven Marina", initially in paras 2(b) and 7 Para 6 spoke of the dispute being centred on the "actual area within the marina" and set out the competing views as to whether it was an inlet or was below MHWM. Westhaven Marina is mentioned in paras 9 and 12 and obliquely mentioned in paras 13(a) and (b) Para 14 made it clear that at the meeting there was disagreement concerning Westhaven Marina and it was argued that "this was an area in which the general statement that the boundary was to be mean high water mark would continue to apply" However, para 15 makes two matters clear, namely, that Ports of Auckland was arguing the case for properties both inland and to seaward of MHWM and, secondly, that its acceptance of the City Surveyor's formula was in relation to those properties not Westhaven Marina. Westhaven Marina was expressly dealt with in paras 20 and 23 earlier recounted.

During the hearing in this case, extensive argument was addressed by both parties as to whether the various facilities at Westhaven fell within or without cl 102(3) However, during the course of preparing this judgment, the Court invited further submissions as to whether cl 102 (3) had any application to Westhaven Marina

or whether the Commission's determination as far as the Marina was concerned should be regarded as appearing only in paras 20 and 23, namely that the City boundary at Westhaven was intended in the 7 June 1989 final reorganisation scheme to be MHWM and that no clarification or change was warranted in the 23 April 1992 determination. Further submissions were sought. Perhaps predictably, they differed widely

However, having reflected on the matter further in the light of those additional memoranda, this Court is of the view that the Commission's determination was clear. It had three matters before it In all essential particulars it dealt separately with each of the three So far as Westhaven Marina was concerned, it reached the view that its previous determination and plan S O 63512 were clear and no amended determination was required to clarify the position. The seaward boundary of Auckland City at Westhaven Marina was shown on S O 63512 as MHWM The Commission intended as much in its formal determination of 7 June 1989. It saw no need to disturb or clarify that determination It remained in force It followed that, at least as far as Westhaven Marina was concerned, the Commission was of the view that MHWM was and remained the seaward boundary of Auckland City at that point

That finding does not conflict with the parties' approach to the Commission which preceded its determination of 23 April 1992 in the sense that the thrust, detail and particularity of the parties' approach to this Court was not a feature of the earlier submissions

That finding is also consistent with other events. First, following the Commission's determination Auckland City wrote concerning the determination for Westhaven Marina and on 21 May 1992 receive a reply (only put in evidence with the

supplementary memoranda) saying that whether or not the floating jetties were a "structure" as referred to in the determination was a question of fact and that in determining the question about properties both inland and to the seaward of MHWM "the Commission clearly had in mind structures of a permanent kind, attached to the land, and adjoining building or the seabed, and not something that was 'floating'".

Secondly, on 11 March 1996 Auckland City sought a further formal amendment covering the floating jetties at Westhaven held in position by piles and the piles themselves On 21 February 1997 the Commission declined to make a further determination after the Commission had visited the site on the ground that the circumstances had not changed and "observed that there are no permanently fixed structures apart from poles which allow the jetty to float up and down with the tide".

Thirdly, to hold that the seaward boundary of Auckland City at Westhaven Marina is MHWM would appear, from the plans before the Court, to align Westhaven with other marinas in Auckland City though that view must be tentative as argument was not addressed to the issue

Fourthly, to hold that the seaward boundary is MHWM at Westhaven is consistent with what has been the position since at least 1978

From 1991 onwards the parties have been in correspondence as to whether the various facilities at Westhaven are rateable On 2 February 1994 the City advised that the marina structures were to be included in the valuation along with the rateable value but would be treated as non-rateable under the wharf extension. Ports of Auckland

objected but Auckland City has consistently issued valuation notices and rating demands since

In the light of all of that, the Court reaches the view that the seaward boundary of Auckland City at Westhaven Marina is MHWM as determined by the Local Government Commission's formal determinations which remain in force and it so holds.

It is also appropriate to observe that the Court's view is that the parties' submissions to the Commission, S O 63512, the Commission's determination and its subsequent correspondence all indicate that, had the facilities at Westhaven been dissected as closely as they have been in this case, the Commission would have held that its finding that the seaward boundary of Auckland City at Westhaven Marina is MHWM was also intended to exclude from the City the pile and swing moorings, the Rowing Club pontoon, the launching ramps, work berths and Z Pier in Westhaven East by analogy with the reasoning which led it to its conclusion Although Z Pier may be commercial there seems no reason in principle to differentiate between them. The Court accordingly holds that the seaward boundary of Auckland City in Westhaven East is also MHWM

Though admittedly of less certainty, the Court is also of the view that, if expressly asked, the Commission would have held that its finding that the seaward boundary of Auckland City at Westhaven was MHWM also applied to the Western Reclamation and in particular to the pontoons, including the fuelling pontoons and the floating dock below MHWM That certainly seems to be the position from S O. 63512 and its notation that "all seaward boundaries follow MHWM". The one

exception is that the cement wharf, Area 5, owned by Ports of Auckland, appears on the plan to have been included in Auckland City. The Court accordingly holds that the seaward boundary of Auckland City in the Western Reclamation is also MHWM but that the cement wharf is in the City.

Is any part of Westhaven nonetheless within clause 102 (3)?

In its supplementary memorandum, Auckland City submitted that even if the Commission had determined that the seaward boundary at Westhaven Marina was MHWM, Westhaven was still rateable as coming within the terms of cl 102(3) and that, for the Court to hold that the seaward boundary of Auckland City at Westhaven Marina was MHWM would in effect be re-writing the Order in Council

With respect to counsel, this Court is unable to accept that argument For the reasons earlier outlined the Commission held that there was nothing for it to amend or clarify as far as the Marina was concerned and therefore in adopting the Commission's view the Court is not re-writing the Order-in-Council. Clause 102(3) clarifies the situation for structures such as the Marine Rescue Trust building. It has nothing to do with Westhaven Marina where the Commission's views are in paras 20 and 23 The Order-in-Council is therefore not affected by the Court's decision

However, in deference to the detailed argument presented by counsel, the possibility that that view might be thought erroneous and the fact that the position concerning the various facilities at Westhaven was never argued before the Commission with anything like the degree of particularity with which it was argued in this case the Court turns to consider whether cl 102(3) might nevertheless apply to the whole of Westhaven or to any parts of the same and, if so, to which

Auckland City made it clear that when its counterclaim referred to "land and/or structures comprising the jetties, pontoons and piles at Westhaven" it was only intending to assert that the floating pontoons at Westhaven Marina, and the piles at Westhaven East and the Western Reclamation and the fixed piers and grids were fixtures and therefore "land" as defined in the Act. There was no intention to include the seabed or the waterspace which, if accepted, could create an inconvenient horizontal stratification Auckland City submitted that all of those facilities which it sought to include were "land and/or structures which are adjacent to the seaward boundary of Auckland City with access to streets or properties" within it

Are the facilities at Westhaven "land"?

In determining whether the various facilities at Westhaven are within cl 102(3), the first question is whether they are "land" pursuant to the Act since s 3 makes all land rateable property subject to the statutory exemptions and s 12 limits a local body's rating power to "rateable property" which is defined in s 2 as "land deemed to be rateable property"

"Land" is relevantly defined by the Act as follows :

> " "Land" means all land, tenements, and hereditaments, whether corporeal or incorporeal, and all chattel or other interests therein, "

Both parties agreed that the only basis on which the facilities could be "land" was if they were fixed to the seabed or dry land and thereby became real property. Ports of Auckland accepted that the fixed piers and jetties, locating piles, grids, slipways, launching ramps and other facilities permanently affixed to the land were

fixtures but contended that the pontoons and the floating dock were outside the definition

Traditionally, the tests for whether a facility is a fixture are the degree and purpose of the annexation In ***Holland v Hodgson*** (1872) LR 7 CP, 328, 335, one of the leading cases on the topic, Blackburn J held·

> "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz , the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, than by its own weight it is generally to be considered a mere chattel But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee or the spot where the anchor was dropped An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel..

The case was followed in ***Lockwood Buildings Limited v Trust Bank Canterbury Limited*** [1995] 1 NZLR 22 and is accepted as authoritative by the learned authors of Hinde and McMorland *Land Law in New Zealand* ((1997) para 12.033ff. p918)

When considering the intention of those who brought the pontoons and piles to Westhaven, the degree of annexation and its purpose, this Court is left in no doubt that they were intended to be fixtures, even though they are not physically attached to the

shoreline (other than by the access bridges resting on the pontoons). They were plainly placed in position with no intention that they be moved Although the piles are not physically attached to the pontoons that should be regarded as being integral and functionally parts of the same structure. It would be artificial to regard the piles as separate from the jetties and the pontoons: the latter would float away without the former and the position and use of the former is only to provide stability for the latter. Movement of the pontoons is only intended to be vertical as part of their function like a ball-cock in a cistern It is not independent movement. The piles are embedded in the sea floor They were plainly intended to be annexed to it The pontoons have a design life of about thirty years which also indicates that they were intended to be fixtures and the berth licences all have lengthy terms They are also transferable which indicates their enduring nature

The Court is therefore of the view that all pontoons, piles and floating facilities are "land" as defined by s 2 of the Act The piles and swing moorings are not "land" as so defined

Auckland City argued in the alternative that the pontoons and piles might be corporeal or incorporeal tenements or hereditaments or a chattel interest in land and accordingly, rateable (***Telecom Auckland Limited v Auckland City Council*** [1999] 1 NZLR 426, 430)

Auckland City submitted that Ports of Auckland's interest in the pontoons and piles under its agreements to lease and the s 384A permit was an exclusive right to use and occupy the area covered, for a limited purpose and was accordingly "land" for the purposes of the Act (***Telecom*** (supra) at 440-441)

Auckland City submitted that a coastal permit is a statutory right of occupation analogous to a statutory lease or licence (***Port Otago Limited v Hall*** [1998] NZRMA 199 203, 205) and that it was comparable with the statutory right to occupy land granted to telecommunications operators under the Telecommunications Act 1987, accepted in ***Telecom*** (supra) as amounting to a rateable interest in land (and see also ***Telecom Auckland Limited v Auckland City Council*** [1995] 3 NZLR 489, 496). As Smellie J put it in ***Lextrum Marina*** (supra at 11) in a case where the public had guaranteed reasonable access to the marina in question

> "Despite the boating public's rights of navigation, the defendant's bylaws and the way the second plaintiff manages the marina, it is in my judgment unrealistic to contend that the second plaintiff does not have 'an exclusive right to occupy' the seabed land upon which the marina is established.
>
> The evidence adduced shows very clearly that the seabed land is massively piled in order to provide the 969 berths and allied facilities There is no room for any other occupier of the seabed land Furthermore, because the land cannot be used for any purpose other than a marina and individual berth holders have an exclusive right to occupy their designated berths, the rights of navigation are very limited "

Ports of Auckland submitted that rights under the seabed leases could not be wider than under the s 384A permit, the leases (which expire in 2009) and that the permit only gives priority of use to the extent necessary to manage Westhaven It submitted that it did not have a "broadly permanent and exclusive right to the use and occupation" of the space as in ***Telecom*** (at first instance [1995] 3 NZLR 489, 496 *supra* on appeal at 430) to a holding that the land occupied by telephone booths was "land" under the Act

However, with respect to counsel, this Court takes the view that at least during the currency of the leases of Westhaven and the s 384A permit, there can be no doubt

in light of authorities discussed that Ports of Auckland has an exclusive right of occupation of the whole of Westhaven.

Westhaven is accordingly an incorporeal hereditament in Ports of Auckland's possession and accordingly is also "land" under the Act for that reason (***Telecom*** on appeal *supra* at 441)

Are the Facilities at Westhaven "structures"?

Given that cl 102(3) uses the conjunction "and/or" (see the strictures on the use of that conjunction in ***Bonitto v Fuerst Bros & Co Ltd*** [1944] AC 75, 82, ***Re Lewis, Goronwy v Richards*** [1942] 1 Ch 424, 425) it is arguably unnecessary to consider this question

That notwithstanding, Ports of Auckland pressed for a narrow construction of the word "structure" drawing attention to a number of definitions of that term in various statutes and to varying judicial interpretations of the word

Auckland City pressed for a broad construction drawing attention to Ports of Auckland's licences which give licensees the "right to tie up to the allocated berth structures" (cl 11 1) and the definition section of their schedules which defines "structures" as meaning the "finger forming the berth together with the structures giving access to the berth" and also defines "Westhaven Boat Harbour" as including the "floating structures, fingers and jetties"

The word "structure" is variously defined in a number of statutes Those most closely allied with the present context is the Marine Farming Act 1971 s 2 which reads:

> "Structure" means any platform, pontoon, jetty, building, dam, or trestlework, or any other erection constructed of rocks or other solid material, which has foundations in or on, or which is placed on, the foreshore or seabed within a leased or licensed area.
>
> (2) For the purposes of this Act, land shall be deemed to adjoin any area, notwithstanding that the land and the area are separated by any foreshore, foreshore reserve, road, roadway, or road reserve, if the land would adjoin the area but for the existence of the foreshore, foreshore reserve, road, roadway, or road reserve, as the case may be."

The Foreshore Licence Regulations 1960 Reg (2) defines "structure" as including landing places and wharves and other erections "affixed to or resting on the soil or floating in the water"

In ***Canterbury Regional Council v Lyttelton Marina Limited*** (15/3/99, Hansen and Young JJ, HC Christchurch, AP 248/98, Wellington Registry CP 16/98and p20) a marina was held to be a "structure which is fixed to the bed of the harbour". In ***Northland Regional Council v Fletcher Construction New Zealand and South Pacific Limited*** (24/4/97, Tompkins J, HC Whangarei, CP 41/96) held that a floating marina required a building consent

Several English cases to which counsel drew attention have considered the word "structure" in a rating context. In ***South Wales Aluminium Co Limited v Assessment Committee for the Neath Assessment Area*** [1943] 2 All ER 587, 592 cells to convert alternating to direct current were not "buildings or structures". In ***Mills & Rockleys Limited v Leicester City Council*** ([1946] 1 All ER 424, 427) "structure" was held to mean something which is constructed and included a wall of a house and in ***Cardiff Rating Authority and Cardiff Assessment Committee v Guest***

Keen Baldwin's Iron and Steel Co Limited ([1949] 1 KB 385), tilting furnaces in a steel works were held to be in "the nature of a structure", Denning LJ (as he then was) observing (at 396):

> "A structure is something which is constructed, but not everything which is constructed is a structure A ship, for instance, is constructed, but it is not a structure A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a *structure*, but it may be 'in the nature of a 'structure'' if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus, a floating pontoon, which is permanently in position as a landing stage beside a pier, is 'in the nature 'of a structure,'' even though it moves up and down with the tide and is occasionally removed for repairs or cleaning It has, in substance, all the qualities of a landing stage built on piles "

In the *Oxford English Dictionary* (2nd ed Vol 16, p 959) one definition of "structure" is "that which is built or constructed, a building or edifice of any kind" (See also ***Black v Shaw and Official Assignee*** (1913) 33 NZLR 194, 196 "a structure has been defined as a 'single construction of related parts'")

Those authorities and definitions demonstrate the unsurprising truism that a general word such as "structure" has a variety of definitions and takes colour from its context The context in this case, is the use of the phrase "land and/or structures" in the Commission's determination in association with the other conditions appearing in cl 102(3)

Seen in that context, as far as the jetties and pontoons are concerned, they, together with the piles which hold them in place, have been built or constructed as a "combination of mutually connected and dependent parts or elements" (*OED ibid*). For the reasons earlier noted, they are integral parts of the same structure which are one functional entity. So to hold comes within the dicta in the ***Cardiff Rating Authority*** case and the other authorities referred to They are so described in the

berth licences. So to hold is also consonant with the more relevant statutory definitions of the word The jetties, pontoons and their piles are accordingly "structures" within cl 102(3)

It was not seriously doubted that the grids, launching ramps and the facilities in the Western Reclamation below MHWM are also "structures". However, in this Court's view, the pile and swing moorings are not structures within cl 102(3) Their being driven into the seabed does not come within the dictionary or precedent definitions of the term They are unitary in nature and not comprised of components

Is Westhaven "adjacent to the seaward boundary of Auckland City"?

The Court having reached the conclusion that Westhaven comes within both "land and/or structures" in cl 102(3), the next question is whether it is "adjacent to the seaward boundary of Auckland City"

As is apparent from the Commission's determination earlier cited, the Commission was not wholly consistent in the terms it used in describing the matters under its consideration, using "contiguous", "abutting" and "adjacent" at different stages

Both "abut" and "contiguous" connote, in their dictionary definitions, two things touching (*Oxford English Dictionary*, 2nd Ed Vol 1 p 60, Vol 3 p 822) whilst "adjacent" is defined as "lying near or close; adjoining continuous bordering (not necessarily touching though this is by no means precluded)" (*op.cit.*. Vol 1 p. 155). "Adjacent" was held by the Privy Council not to be a word to which a "precise and uniform meaning is attached by ordinary usage" in ***Mayor Councillors and Citizens***

of the City of Wellington v Mayor Councillors and Burgesses of the Borough of Lower Hutt [1904] AC 773, 775 The degree of proximity required was held to be entirely a matter of circumstance. (See also ***Claney v Bland*** [1958] NZLR 760, 763)

In this case, the Local Government Commission partly adopted the formulation put forward by the Auckland City's surveyor. It also spoke of structures which were contiguous to the seaward boundary and when the whole of the determination is read together, it is relatively clear that the Commission drew a distinction between the seabed and the sea water and the land or structures adjacent to the seaward boundary In so holding, the Court's view is that the Commission intended that for land or structures to be included in Auckland City, they needed to have a connection to land or structures which were part of Auckland City to the landward side of MHWM but not necessarily a direct physical connection

On that basis, the grids being on land adjacent to the seaward boundary of Auckland City fall under cl 102(3) As far as the pontoons and floating dock are concerned, the Court's view is that it would be artificial not to regard them as being connected to land or structures which are part of Auckland City simply because the connecting bridge merely rests on rollers on the pontoon. That is no more than a practical solution to what would otherwise be the problem of access arising from the ebb and flow of the tide Had it been relevant, the Court's view would have been that all the jetties, pontoons, piles and the floating dock are sufficiently connected with land or structures which are adjacent to the seaward boundary of Auckland City to come within cl 102(3).

The same applies to Westhaven East.

It could not be doubted that Westhaven Reclamation above MHWM is adjacent to the seaward boundary of Auckland City.

Does Westhaven have access to streets or properties within Auckland City?

The next question is whether land or structures adjacent to the seaward boundary have access to streets or properties within Auckland City

As far as Auckland City was concerned, it simply submitted that this aspect of cl 102(3) was satisfied because there is a means of access from all parts of Westhaven to Auckland City They should, therefore, it was submitted, be subject to the City's regulatory power The City submitted that, if cl 102(3) were held not to apply to the various facilities at Westhaven, they would not be under the jurisdiction of any territorial local authority other than to the more general jurisdiction of the Auckland Regional Council It submitted that the concluding provisions of cl 102(3) are complied because the Council's roading network gives access to the marina drawing on the decision in ***Lextrum Marina*** (supra p 13-14) where the following appears:

> It was submitted that if [Gulf Harbour Marina] is obliged to pay rates there is an element of unfairness involved because it gets no advantage from such rates It seems to me that that is not the case The infrastructure which surrounds the marina was not only essential for its establishment but is equally essential for its continued economic viability Roading, power, sewage and water are all to hand and [Gulf Harbour Marina] undoubtedly benefits by their availability "

Ports of Auckland submitted that Auckland City's concern which led to the Commission's determination was to ensure that those structures which enjoyed Council's services were rateable in return and that it was too remote to suggest that cl 102(3) applied merely because those who use Westhaven inevitably use Council's

roading network to arrive at their destination, although it accepted that the facilities in the Western Reclamation other than the floating dock had direct access to Council's facilities and streets In that regard, the ownership of the land surrounding Westhaven Marina and Westhaven East and the services provided by Ports of Auckland need to be borne in mind.

If cl 102(3) was intended to apply to Westhaven, in the Court's view, the phrase "with access to streets or properties within the City" should be interpreted consistently with the similar phrase heading paragraph 8 even though "buildings" in the hearing is replaced by "land" in cl 102(3) That would reflect the Commission's discussion concerning desirable reciprocity between services and rates indicating that properties adjacent to the seaward boundary should only be rateable if they had access onto streets or other properties within the City, thus conveying the implication that they would be directly entitled to City services

Seen in that light, Westhaven Marina and Westhaven East do not have "access to streets or properties within the City" since they do not have direct access to City services Westhaven pontoon users cannot access City facilities directly. They can only do so via Ports of Auckland or other utilities Their access is to roads, carparking areas and land owned by Ports of Auckland and it is Ports of Auckland which supplies those services to them The City is not wholly deprived of rates as Ports of Auckland is no doubt rateable on the land surrounding Westhaven Marina and Westhaven East since the roading exemption in cl 21 of Part II of the First Schedule to the Act applies only to roads vested in local authorities Ports of Auckland no doubt recovers those rates from Westhaven users.

The Court is of the view that access generally by Westhaven users to City streets is insufficient to bring Westhaven Marina and Westhaven East within cl 102(3) since although the roading network is a service provided by Auckland City, it is a service available generally to all road users irrespective of whether they are ratepayers within Auckland City and, to date at least, the cost of the usage of roads is not recoverable from all road users

However, the Western Reclamation was accepted as having direct access to streets and properties within Auckland City

For all those reasons the Court would have concluded that cl 102(3) did not apply to Westhaven Marina or Westhaven East but that it could apply to the Western Reclamation

Does the wharf exemption apply?

Although Auckland City conceded that the wharf exemption applied to Westhaven Marina in its submissions to the Local Government Commission, it argued in this case that cl 22 of the First Schedule did not apply to any of the Westhaven facilities The final question on this aspect of the case is whether any parts of Westhaven are exempt from rates pursuant to the wharf exemption

Auckland City argued that cl 22 was never intended to apply to marinas and that when cl 22 talks of passengers or goods being taken on board or landed from vessels, those words have a stevedoring flavour inappropriate for pleasure craft It was also submitted that the marina would be unlikely to be used for "ancillary purposes", particularly in light of Parliament's evident intention to narrow the wharf

exemption Attention was drawn to the restricted access to the pontoons. It was suggested than an exemption based on the public interest in transport facilities would be wholly inappropriately applied to what was in essence a private parking area for pleasure craft. Although it was acknowledged that the pontoons are used for people and goods to be loaded or unloaded, it was submitted that that is not their primary purpose Specific submissions were made in relation to the various facilities at Westhaven, particularly the Western Reclamation.

Ports of Auckland contented itself with submitting that the various uses in Westhaven come within cl 22 and accordingly all facilities should be exempt

Having regard to the Court's earlier discussion of the proper interpretation of cl 22, this aspect of the case can be dealt with with relative brevity

Westhaven is occupied by Ports of Auckland Though it may have been unintended by Parliament it remains a fact that all the marina pontoons are piers, jetties or other land or premises which are factually used by passengers and their goods, loading, unloading, embarking and disembarking from the yachts and launches berthed there That applies to all marina berths, irrespective of function Since "vessel" is not defined in the Act, it might have applied to the Rowing Club's skiffs.

To this point therefore, and subject to the exclusion for "ancillary purposes", the Court would have found that cl 22 could have applied to all the piers, jetties, pontoons and piles at Westhaven Marina and Westhaven East.

There are two reasons why, in this Court's view, cl 22 would not have exempted Westhaven Marina and Westhaven East from rates The first relates to the necessity that the land be "used as a wharf" and the second relates to "ancillary purposes"

In the first place, as already noted, it is clear that Parliament intended in 1988 to restrict the wharf exemption from that which had previously applied In the Court's view, the passages from *Hansard* put in evidence show clearly that the wharf exemption was intended to exempt national transportation centres which it was in the public interest to free from rates The whole thrust of the wharf exemption was towards exempting the commercial activities of a working wharf but to no greater an extent than required Even use of a wharf for administrative and ancillary purposes was not exempt Seen against that background, it cannot be doubted that Parliament would not have intended to exempt facilities such as Westhaven Marina and Westhaven East from rates

Secondly, the definition of "ancillary purposes" is not exclusive and the functions listed merely examples of non-exempt activities of a working wharf If the use of land for purposes such as those listed renders land used as a wharf rateable, it is clear that Parliament would never have intended that land used for pleasure boating and purposes ancillary to that activity would be exempt from rates

The Court accordingly would have concluded that though Westhaven Marina and Westhaven East may be used for the loading and unloading of goods and the embarkation and disembarkation of passengers, they are not "used as a wharf" and

those uses are ancillary to their use. Accordingly the Court would have held that they were not entitled to the exemption provided by cl 22.

As far as the Western Reclamation is concerned, the facilities in that part of Westhaven are not used for the embarkation or disembarkation of passengers and the loading or unloading of goods other than incidentally They do not therefore come within the term "wharf" In any event, as is shown by the review of the uses to which this part of Westhaven is put, much of the land is used for some of the examples of "ancillary purposes" in cl 22 such as storing freight and machinery, maintenance and cleaning Further, it is an area wholly used for commercial purposes Like any other property used for such purposes, Parliament would have intended it to be rateable

The Court would accordingly have held that the wharf exemption in cl 22 was not available to the Western Reclamation

As with the Downtown Wharves, in case there are details of the application of this judgment to Westhaven which cannot be resolved by the parties, leave is reserved to either party to apply further

SUMMARY

The Court's formal orders are

1 In relation to Ports of Auckland's application for a declaration, the Court declares that the rateability of the Downtown Wharves is as appears on pages 19 to 22 of this judgment

2. In relation to Auckland City's counterclaim, the Court declares that all those parts of Westhaven Marina, Westhaven East and the Western Reclamation below MHWM are, in accordance with the determinations of the Local Government Commission of 7 June 1989 and 23 April 1992 not within the boundaries of Auckland City and are accordingly not rateable by the City in terms of the Rating Powers Act 1988 other than the cement wharf.

3 Had it been relevant the Court would have held –

(a) That Westhaven Marina and Westhaven East were not within cl 102(3) of the Local Government (Auckland Region) Reorganisation Order 1989 and that Westhaven Marina and Westhaven East were not entitled to the exemption provided by cl 22 of Part II of the First Schedule to the Rating Powers Act 1988

(b) That the Western Reclamation was within cl 102 (3) of the Local Government Act (Auckland Region) Reorganisation Order 1989 and was not entitled to the exemption provided by cl 22 of Part II of the First Schedule to the Rating Powers Act 1988. For the avoidance of doubt, the Court holds that all the land in the Western Reclamation above MHWM is rateable property under that Act

4 Leave is reserved to either party to apply further in the terms appearing on page 20 and 51 of this judgment

5. If costs are to be pursued rather than reserved, and if the parties are unable to, memoranda may be filed with counsel certifying, if they consider it

appropriate so to do, that the Court may determine all questions of costs without a further hearing. If memoranda are to be filed, that from the Ports of Auckland is to be filed within 35 days of the date of delivery of this decision, with that from Auckland City within 42 days of that date.

WILLIAMS J.