IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2018-412-000094
[2019] NZHC 2278

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	OTAGO REGIONAL COUNCIL Respondent
	PORT OTAGO LIMITED, ROYAL FOREST AND BIRD PROTECTION SOCIEITY OF NEW ZEALAND INC MARLBOROUGH DISTRICT COUNCIL Interested Parties

Hearing:	5 – 6 June 2019
Appearances:	D A Allan for Appellant A J Logan and T M Sefton for Respondent L A Andersen for Port Otago Limited P D Anderson for Royal Forest and Bird Protection Society of New Zealand Inc J Maasen and B Mead for Marlborough District Council
Judgment:	11 September 2019

JUDGMENT OF GENDALL J

This judgment was delivered by me on 11 September 2019 at 3:30 p.m. pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: 11 September 2019

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Introduction

[1] This is an appeal from a decision of the Environment Court issued on 28 September 2018 and described as an "Interim Decision". The appeal is brought pursuant to s 299 of the Resource Management Act 1991 (the Act).

[2] At the heart of this appeal is a question as to what rules should be in a proposed plan governing the specific management of resources in the Otago region.

[3] The Act in s 60 requires the respondent, the Otago Regional Council (the Regional Council), to have a Regional Policy Statement for the Otago Region. A Regional Policy Statement is an overview of the policies and methods required to manage the natural and physical resources of that region.

[4] The Act provides for a hierarchy of planning documents providing direction on how use, development, and protection of resources can occur. As observed by the Supreme Court in *Environmental Defence Society v New Zealand King Salmon Company*[1] (*King Salmon*), the hierarchy of planning documents goes from the more general to the more specific, with each level being required to "give effect to" (meaning to implement) those above it. Under the Act, a Regional Policy Statement must give effect to the New Zealand Coastal Policy Statement (NZCPS).[2]

[5] At issue in this appeal is how to provide for the ports in the Otago region in a manner which gives effect to the NZCPS. The answer lies in a broad reconciliation of the policies of the NZCPS.

Background

[6] The Regional Council prepared a Proposed Otago Regional Policy Statement (PORPS) which was publicly notified on 23 May 2015. Businesses, environmental groups and others made submissions on the PORPS. The Regional Council released a decision which specified the rules it was to adopt in October 2016.

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1 *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (*King Salmon*).

2 Resource Management Act 1991, s 62(3).

[7] The contentious provision is in relation to the ports in Otago. This is Policy 4.3.7 in the PORPS which provides:

> **Policy 4.3.7 Recognising port activities at Port Chalmers and Dunedin**
>
> Recognise the functional needs of port activities at Port Chalmers and Dunedin and manage their effects by:
>
> (a) ensuring that other activities in the coastal environment do not adversely affect port activities;
>
> (b) providing for the efficient and safe operation of these ports and effective connections with other transport modes;
>
> (c) providing for the development of those ports' capacity for national and international shipping in and adjacent to existing port activities;
>
> (d) providing for those Ports by:
>
> (i) recognising their existing nature when identifying outstanding or significant areas in the coastal environment;
>
> (ii) having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;
>
> (iii) considering the use of adaptive management as a tool to avoid adverse effects;
>
> (e) where the efficient and safe operation of port activities cannot be provided for while achieving the policies under objective 3.1 and 3.2 avoid, remedy or mitigate adverse effects as necessary to protect the outstanding or significant nature of the area; and
>
> (f) otherwise managing effects by applying policy 4.3.4.

[8] The appellant, the Environmental Defence Society Incorporated (EDS), and 24 others appealed to the Environment Court the Regional Council's decision regarding the PORPS. It said that the rules in the PORPS governing the established ports in Otago (one at Port Chalmers and one at Dunedin) failed to give effect to the NZCPS. In particular, this was with respect to what are known as the "Avoidance Policies" set out in the NZCPS.

[9] The issue went to mediation run by the Environment Court in 2017. When that did not resolve the issues between the parties, it went to hearing in the Environment Court in 2018.

[10] Before the Environment Court, EDS, the Regional Council and the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) argued that the PORPS was in breach of the NZCPS. This argument, they said, was advanced in reliance on the statutory provisions in the Act, the directive nature of the "Avoidance Policies" and particularly the interpretation and application of those policies by the Supreme Court in *King Salmon*.

[11] In response, Port Otago Limited (Port Otago) argued that there was no requirement that the provisions of the POPRS required port activities *in all cases* to avoid the effects in the "Avoidance Policies". The Environment Court adopted that view in its 28 September 2018 Interim Decision (the Interim Decision).[3]

[12] The present appeal is from that Interim Decision. It is brought by EDS and the appeal is supported by Forest and Bird and the Regional Council.

[13] The grounds for this appeal are that the Environment Court erred in failing to give effect to the NZCPS and misinterpreted the NZCPS in material ways. Consequently, it is said the policy for the Dunedin and Port Chalmers Ports formulated by the Environment Court failed to give effect to the NZCPS and was unlawful. In considering these issues, the question put to this Court is as follows:

> Must the provisions of a Regional Policy Statement like the PORPS require port activities to:
>
> (a) Avoid adverse effects on the values/areas listed in the NZCPS;
>
> policy 11(a) regarding specified coastal biodiversity;
>
> policy 13(1)(a) regarding areas of outstanding coastal natural character;
>
> policy 15(a) regarding coastal outstanding natural landscapes;
>
> policy 16 regarding nationally significant surf breaks.

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3 *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183.

(together the Avoidance Policies)

(b) Avoid significant adverse effects in terms of Policy 11(b) (regarding specified coastal biodiversity) and other landscape and natural character values under Policies 13(1)(b) and 15(b) of NZCPS?

[14] EDS in this appeal maintains the Interim Decision was in error and that in the coastal environment the PORPS directly requires the avoidance of adverse effects on what are described as outstanding coastal sites. This, it says, is in order to "give effect to" the NZCPS as required by the Act. The only exception to that obligation it is suggested would arise if the NZCPS contained an equally directive provision that would enable activities that had such effects. EDS says that no such provision is present in the NZCPS with respect to the position of the Otago Ports. EDS, and the other parties that support this appeal, submit that it was the intention of Parliament in passing the Act that it would establish environmental bottom lines or limits set at the point necessary to ensure the capacity of the environment to sustain itself. In the coastal environment those limits, it is said, are set by the NZCPS, and, in particular in the "Avoidance Policies". The interpretation put on all this by EDS is that these Avoidance Policies require that the PORPS makes provision that Port Otago *must* avoid adverse effects on the environment.

[15] In response, both Port Otago and the Marlborough District Council (MDC), who oppose this appeal, contend that there is only a conflict where the provisions cannot be resolved without one taking precedence over the other. They say that is not the case here. They seek to advance an interpretation of the Avoidance Policies that the Port can *avoid those effects as far as practicable and otherwise remedy, mitigate, or use adaptive management* to address those effects.

[16] The essential issue for this court is to determine whether the PORPS complies with the NZCPS. This issue, as I have noted, requires a broad reconciliation of the provisions of each. Underlying this case is what is essentially a trade-off between broad commercial interests involving development and the wellbeing of the community on the one hand and preservation of the coastal environment on the other.

[17] The competing issues are broadly encapsulated in submissions advanced before me on behalf of the EDS as follows:

> The environmental context for the question asked is the Otago Region, which is endowed with habitats of indigenous coastal species such as Otago Harbour's seagrass beds which act as nursery grounds and its unique string of shell islands which provide seabird roosts; with unique natural character formed through volcanism; spectacular landscapes and natural features like Hayward Point; and four nationally significant surfbreaks; The Spit, Karitane, Whareakeake, and Papatowai. At the same time the Port Activities undertaken at Port Chalmers and Port Otago are of regional if not national importance due to their logistical function, economic benefits and employment benefits.

The Environment Court Decision

[18] In its Interim Decision, the Environment Court reiterated that the "general issue" here was "how to provide for ports under the Proposed Otago Regional Policy Statement ... in a manner that gives effect to the New Zealand Coastal Policy Statement".[4]

[19] The Environment Court set out the port-specific policy proposed in the PORPS by Port Otago (the appellant in the Environment Court) which I have outlined at [7] above and which was used as the starting point of analysis.

[20] The Court identified the points of contention as (d), (e) and (f) of Policy 4.3.7. Those points are usefully repeated:

> …
>
> (d) providing for those Ports by:
>
> (i) recognising their existing nature when identifying outstanding or significant areas in the coastal environment;
>
> (ii) having regard to the potential adverse effects on the environment when providing for maintenance of shipping channels and renewal/replacement of structures as part of ongoing maintenance;
>
> (iii) considering the use of adaptive management as a tool to avoid adverse effects;
>
> (e) where the efficient and safe operation of port activities cannot be provided for while achieving the policies under objective 3.1 and 3.2 avoid, remedy or mitigate adverse effects as

[4] *Port Otago Ltd v Otago Regional Council*, above n 3 at [1].

necessary to protect the outstanding or significant nature of the area; and

(f) otherwise managing effects by applying policy 4.3.4.

[21] The key issue before the Environment Court was whether Policy 4.3.7 had to require port activities to avoid adverse effects on Outstanding Coastal Sites. The EDS and Forest and Bird said (e) – with its options to "avoid, remedy or mitigate adverse effects as necessary" – did not give effect to the avoidance provisions of the NZCPS, specifically Policies 11(a), 13(1), 15(a) and (b), and 16. It said those provisions were framed in absolute terms and that the Environment Court's interpretation did not give effect to them.

The context

[22] Before outlining the scheme of the PORPS, the Environment Court set out the context of the appeal. It described the Otago Harbour, Port Otago and Port Dunedin, key habitats, potential high or outstanding natural landscapes, and the two proximate "nationally significant surf breaks". It outlined the activities undertaken in those ports and the resource consents recently granted to Port Otago which cover extension of the port and maintenance activities and gave some example scenarios.

[23] The Court outlined four scenarios which Port Otago said would need to be prohibited if the Avoidance Policies were given effect to according to their terms. The effect, Port Otago submitted, would be that the Port might have to shut down. The Court accepted there were factual difficulties but acknowledged they proved useful illustrations.

[24] It went on to summarise the Act and Regional Policy Statement requirements. These included the requirement for the PORPS to "give effect to" the NZCPS which the Interim Decision recognised "is intended to constrain decision-makers". This is followed by a summary of the policy evaluation process required under ss 32 and 32AA of the Act.

[25] The Environment Court then went on to provide a summary of *King Salmon* including an outline of the relevant NZCPS policies. The Interim Decision sets out:

(a) Policy 6 (Activities in the coastal environment),

(b) Policy 7 (Strategic Planning),

(c) Policy 9 (Ports),

(d) Policy 11 (Indigenous biological diversity),

(e) Policy 13 (Preservation of natural character),

(f) Policy 15 (Natural features and natural landscapes),

(g) Policy 16 (Surf breaks of national importance).

Policies 6 and 7

[26] The Environment Court set out Policies 6 and 7 and quoted Policy 15 to provide a flavour of the policies requiring avoidance of adverse effects on particular coastal values. Of Policy 6 it quoted certain parts:

> **Policy 6 Activities in the coastal environment**
>
> (1) In relation to the coastal environment:
>
> > (a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;
> >
> > (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;
> >
> > …
> >
> > (j) where appropriate, buffer areas and sites of significant indigenous biological diversity, or historic heritage value.
>
> (2) Additionally, in relation to the coastal marine area:

(a) recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, including the potential for renewable marine energy to contribute to meeting the energy needs of future generations:

(b) recognise the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

…

[27] The Environment Court described Policy 6 as directing local authorities to consider the rate at which public infrastructure should be enabled without compromising the other values of the coastal environment.

[28] Policy 7 expands Policy 6 in scope. It stipulates that regional policy statements (and plans) should consider where, how and when to provide for "other activities" in the coastal environment, and to determine areas where they reasonably could be placed and others where they might be inappropriate. It states:

Policy 7 Strategic planning

(1) In preparing regional policy statements, and plans:

(a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level, and:

(b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:

(i) are inappropriate; and

(ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process;

and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

(2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[29] The Environment Court referred to statements of the Supreme Court in *King Salmon* which addressed Policy 7:

> [54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.
>
> [55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be assessed against the nature of the particular area under consideration in the context of the region as a whole.

[30] The Environment Court noted that Policy 15(a) states in part that:

> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; …

[31] The Court suggested that, while at first blush there is a conflict between such policies, it quoted *King Salmon* which said:

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where

particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

Policy 9

[32] The Environment Court said that essentially, Policies 6 and 7 provide for development in the coastal environment, and Avoidance Policies provide for general limitations of inappropriate coastal development. However, the Court considered this case was different to the others as it pertained to ports, which were specifically dealt with in Policy 9. That provision states the Regional Council must:

(**Policy 9 Ports**)

Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes, including by:

(a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and

(b) considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping, and their connections with other transport modes.

[33] The Environment Court then said the primary legal issue for its decision was whether Policy 9 (Ports) was less deferential to the Avoidance Policies than Policy 8 (the Aquaculture Policy relevant in *King Salmon*) or Policy 6 (the Infrastructure Policy in the later decision of this Court, *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council*[5] (*BOP Regional Council decision*). The Environment Court held that:

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5 *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, (2017) 20 ELRNZ 564.

(a) While much of the language of Policy 9 is discretionary or flexible rather than prescriptive, a prescriptive verb – "requires" – is used to ensure an efficient national network of safe ports. The core of Policy 9 is strongly prescriptive even if there is some discretion as to where, how and when ports are to be located and developed.

(b) Policy 9 contemplates not only the existing ports around New Zealand in their current state but also the potential development of new ports and the development and improvement of existing ports.

(c) Policy 9(b) requires consideration of "where, how and when" to provide for the safe and efficient operation of ports, the development of their capacity for shipping and their connections with other transport modes. There is no discretion about "if" they must be put in place to ensure New Zealand shipping services can continue. While Policy 9 is more resolute than Policies 6 and 7 it is not wholly prescriptive. New ports need to be supplied but not in any particular place or at any particular time, and existing ports cannot necessarily expand indefinitely and whenever their operators want. All these are part of the questions "where, when and how?"

The Avoidance Policies – Policies 11, 13, 15, and 16.

[34] The Environment Court then went on to set out the Avoidance Policies. By way of example, Policy 11 provides:

> **Policy 11 Indigenous biological diversity (biodiversity)**
>
> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists:
>
> (ii) taxa that are listed by the International Union for conservation of Nature and Natural Resources as threatened;

(iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

(v) areas containing nationally significant examples of indigenous community types; and

(vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

(i) areas of predominantly indigenous vegetation in the coastal environment;

(ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

(v) habitats, including areas and routes, important to migratory species; and

(vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[35] The Environment Court found that the strong avoidance thrust of Policy 11 needs to be given full weight because it is a well-known fact that New Zealand's indigenous biodiversity is generally declining.

[36] A further example is Policy 16 which addresses surf breaks and states:

Policy 16 Surf breaks of national significance

Protect the surf breaks of national significance for surfing listed in Schedule 1, by:

(a) ensuring that activities in the coastal environment do not adversely affect the surf breaks; and

(b) avoiding adverse effects of other activities on access to, and use and enjoyment of, the surf breaks.

[37] As to Policy 16, the Environment Court considered that only sub-policy (a) relates to activities in the coastal environment (and their effects). Sub-policy (b) deals with the effects of activities outside the coastal environment. The Court noted that Policy 16(a) used the phrase "do not adversely affect" the surf breaks. It considered it notable that the usual formula of "avoid adverse effects" was not used here (but is in Policy 16(b)). The Court was of the view that the phrase "do not adversely affect" is deliberately used to allow some flexibility over the way it is to be applied given both the complexity of the coastal marine area and the nature of human activities in the coastal environment.

The relationship between the NZCPS Policies

[38] The Court also considered the decision of the High Court in the *BOP Regional Council decision*.[6] That case was not dissimilar to the present case. It was concerned with policies in the NZCPS and certain objectives, policies and rules in a proposed regional plan relating to the provision of "regionally significant infrastructure". There Wylie J held:[7]

> In *King Salmon*, the Supreme Court reconciled policies 8, 13 and 15 (policy 8 recognises the contribution of aquaculture and provides for it to be recognised in regional policy statements and plans in appropriate places). The majority considered that policies 13 and 15 are in more directive terms, and that they carry greater weight than policy 8 - which is in more [sic] prescriptive terms. The majority held that policy 8 does not permit aquaculture in areas where it would adversely affect an outstanding natural landscape.
>
> It is difficult to see that policies 6 and 7, which provide for regionally significant infrastructure, are stronger or more directive than policy 8. There are differences in wording, but I doubt that those differences are sufficient to justify a decision-maker reaching an outcome different from that reached by the Supreme Court in relation to policy 8.
>
> As I have noted, the Environment Court's consideration of the NZCPS policies was brief and incomplete. The Court concluded that policy 11 (a) is "not absolute or binary" but it did not attempt to reconcile policy 11, or policies 13

6 The *BOP Regional Council decision*, above n 5.
7 At [120]-[123].

> and 15, with those policies which recognise regionally significant infrastructure and development in the coastal marine area.
>
> In my judgment, the Environment Court erred in approving policies and a rule that do not give effect to the requirements set out in policies 11 (a), 13(1)(a) and 15(a).

[39] The Environment Court endeavoured to suggest that the *BOP Regional Counsel decision* was potentially in conflict with *King Salmon*. It noted that *King Salmon*, as a decision of the Supreme Court, was authoritative but held that the present case could be distinguished on the basis of the direct application of Policy 9.

[40] It reached the view that if the NZCPS Avoidance Policies are considered only with Policy 9, "then there appears to be a conflict". Its reasoning was that "Policy 9 does not have the deferential qualification that the infrastructure policy (6(1)(b)) has (the phrase "… without compromising the other values of the coastal environment")".

[41] The Environment Court was of the view that it would be difficult to see that Policy 9 could be read as deferring to Policies 11 and 16 whenever there is a probability of more than minimal adverse effects on the values protected by Policies 11 and 16. Instead, it considered that Policy 7 could be used to identify areas where development is appropriate and others where it is inappropriate.

[42] Ultimately it said, when read as a whole, the NZCPS contemplates that adverse effects of port structures on certain landscapes or ecosystems are to be avoided in almost all circumstances but not in all. It concluded "we consider provision should be made in Policy 4.3.7(e) [in the PORPS] for port activities for safety and transport efficiency to be able to override the policy for surf breaks"

[43] The Environment Court concluded that there should be an "extension" to proposed Policy 4.3.7 in the PORPS to give effect to Policy 9 NZCPS. It said that it would be useful if the Policy was to give guidance as to the "different standards" that might be expected of port activities in relation to different resources (where the seriousness of the potential for adverse effects increases from surf breaks, to natural character and to biodiversity). The Court concluded that Policy 4.3.7 need not require port activities to avoid adverse effects on Outstanding Coastal Sites, and suggested a reformulation of Policy 4.3.7 (Port Activities) from (d) onward to that effect:

(d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply policy 4.3.4 which relates to naturally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;

(e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in policy 4.3.4(1)(a)(i) to (iii) then, through a resource consent process, require consideration of those effects and whether they are caused by safety considerations which are paramount or by transport efficiency considerations and avoiding, remedying or mitigating the effects (through adaptive management or otherwise) accordingly;

(f) in respect of naturally significant surf breaks to avoid, remedy or mitigate the adverse effects of port activities.

The authorities – King Salmon and the BOP Regional Council decision

[44] The question at issue here is not a new one. EDS, the Regional Council and Forest and Bird contend that the question has been answered by the Supreme Court in the context of aquaculture in *King Salmon*[8] and subsequently by the High Court in relation to regionally significant infrastructure in the *BOP Regional Council decision*.[9]

[45] In these decisions the Supreme Court and the High Court respectively found that the specific and unqualified Avoidance Policies in the NZCPS prevailed over its less directive provisions, those less directive provisions being relevantly Policy 8 (Aquaculture) and Policy 6 (Activities in the coastal environment). Accordingly, both those last-mentioned activities, it was said, must avoid adverse effects on outstanding coastal sites. In the present case, the words used in NZCPS Policy 9 (Ports), being the policy that is to be reconciled with the Avoidance Policies in this case, it is suggested are analogous to those of Policies 8 and 6.

King Salmon

[46] At issue in *King Salmon* was a proposed change to the Marlborough Sounds Resource Management Plan. The proposal was to change salmon farming from a prohibited activity to a discretionary activity in eight locations. A Board of Inquiry

8 *King Salmon*, above n 1.
9 The *BOP Regional Council decision*, above n 5.

was established which considered the NZCPS and also Part 2 of the Act. It made an assessment of Policy 8 (aquaculture) and compared it to Policies 13 and 15. The Board considered that these policies conflicted, and that it was therefore required to balance their requirements and make a broad overall judgment.

[47] The Board found that there would be adverse effects on areas with outstanding natural attributes, but nonetheless decided to grant the application for a plan change in respect of four of the sites, and to grant the resource consents sought for the same four sites, subject to conditions. The Environmental Defence Society and others appealed. The appeal was unsuccessful in the High Court.[10] The appeal then went directly to the Supreme Court.[11]

[48] The majority in the Supreme Court allowed the appeal. The Court held that the Act provides for a hierarchy of planning documents providing direction on how the use, development and protection of resources can occur. The hierarchy of these planning documents goes from the more general to the more specific with each level being required to "give effect to" those above it. The Supreme Court held that to "give effect to" means to implement. It is a strong directive creating a firm obligation on the part of those subject to it.[12]

[49] The decision of the Supreme Court in *King Salmon* confirms that a council like the Regional Council here is constrained in preparation of its PORPS by the requirement to give effect to the NZCPS in its Policy Statement. The Court said the NZCPS gives substance to the provisions in Part 2 (i.e. the purpose and principles) of the Act in relation to the coastal environment.[13] Therefore, by giving effect to the NZCPS, in principle a regional council is necessarily acting "in accordance" with Part 2 of the Act and there is no need to refer back to that part when determining a plan change.[14]

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10 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371.
11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 1.
12 At [77].
13 At [85].
14 At [85].

[50] In doing so, the Supreme Court rejected the "overall broad judgment" approach to interpreting and giving effect to the NZCPS's objectives and policies, which had commonly been applied prior to its judgment in *King Salmon*. Instead, it held that the NZCPS objectives and policies are not merely "a listing of potentially relevant considerations, which will have varying weight in different fact situations". Rather the NZCPS "is a carefully expressed document" that "reflects particular choices" for coastal management at a national level, and the difference between those choices matter:[15]

> [90] To illustrate, s5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. *The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.*
>
> (emphasis added)

[51] The Court in *King Salmon* held that the proposed plan change would have significant adverse effects on an area of outstanding natural character, and that the directions in Policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the applications were to be granted. Sections 62(3), 67(3) and 75(3) of the Act require that a Regional Policy Statement, a regional plan and a district plan respectively must give effect to the NZCPS. The Supreme Court held that the Board in *King Salmon* had failed to give effect to the NZCPS and the plan change therefore did not comply with s 67(3)(b) of the Act.

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15 At [127].

[52] The significance of the PORPS in the present case is that, when rules are developed for the coastal marine area in Otago, then those rules need to be in accordance with the policies in the NZCPS. Implementation of the Avoidance Polices in the NZCPS inevitably results in rules creating prohibited activities that cannot obtain a resource consent unless the NZCPS itself allows less than absolute compliance with the Avoidance Policies because of some conflict with another policy in the NZCPS. The Supreme Court noted in *King Salmon* that the requirements of the Act for regional and district planning documents like the PORPS to "give effect to" the NZCPS, "is a strong directive, creating a firm obligation on the part of those subject to it"[16] It was "intended to constrain decision-makers"[17] The Supreme Court also stated at [80]:

> There is a caveat however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[53] In some instances, a choice has been made in the NZCPS to allow regional councils flexibility in implementing objectives and policies in lower order planning documents and in others it has not. A NZCPS policy may be so specific and directive that it has "the effect of what in ordinary speech would be a rule". The statutory framework confirms it is intended that the NZCPS can "contain policies that were not discretionary but would have to be implemented if relevant", and which are "binding on decision-makers" The majority in the Supreme Court observed that policies 13(1)(a) and (b) and 15(a) and (b) in the NZCPS are so directive that they "provide something in the nature of a bottom line".[18]

[54] On all of this, Port Otago responds here that it needs to ensure an activity required for safety or operational purposes at the two ports is not prohibited by a rule. Its position is that it would not have any difficulty with compliance with the Avoidance Policies if minor breaches were permissible or potential adverse effects could be avoided or managed, as it contended in its submissions before the Environment Court.

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16 At [77].
17 At [91].
18 At [126] – [132].

[55] That submission, however, does not fit easily with the decision in *King Salmon*. In that decision the Supreme Court confirms that Avoidance Policies will inevitably result in prohibited activities.[19] The prohibition is not just of an activity that breaches the Avoidance Policies but also of a potential breach. Most significantly such a prohibition does not allow the use of adaptive management whereby predicted effects that carry an element of risk are avoided or managed by having monitoring and changing behaviour in accordance with that monitoring.

[56] Port Otago has relied on this adaptive management process to manage in particular its dredging of channels and harbour areas and the disposal of spoil at sea it says to avoid or mitigate adverse effects in an uncertain and changing environment.

[57] According to Port Otago, there is a difference in approach here adopted by those supporting the appeal:

(a) The EDS and the Regional Council claim there is no conflict despite the planners before the Environment Court agreeing there was a conflict at the conference undertaken by that Court. According to Port Otago, the EDS and the Regional Council do not address the situation where the Avoidance Policies do not allow the safe and efficient operation of the ports.

(b) It is said that Forest and Bird accepts the conflict, but elevates the Avoidance Policies so that it is a requirement that the ports operate safely and efficiently without breaching those policies, even if that means, as Port Otago contends, that they might for a time be unable to operate.

The Supreme Court's correct approach to interpreting NZCPS Policies

[58] In *King Salmon* the Supreme Court stated the correct approach when "giving effect to" the NZCPS is to look at the language and how prescriptively or flexibly the words are expressed.

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[19] At [132].

[59] In its decision, the Supreme Court said that the policies are "not inevitably in conflict or pulling in different directions". Apparent conflict between policies is likely to dissolve "if close attention is paid to the way in which policies are expressed"[20] The Supreme Court concluded that the requirement to "avoid adverse effects of inappropriate subdivision, use and development" on areas of outstanding natural character and on outstanding natural landscapes in NZCPS Policies 13 and 15 was more specific and directive than the requirements of NZCPS Policy 8 (aquaculture). As I have noted above, it found that "Policies 13(1)[a] and [b] and 15[a] and [b] do, in our view, provide something in the nature of a bottom line" which were "intended to, and do, have binding effect".[21]

[60] The Supreme Court added that the word "avoids" in NZCPS Policies 13 and 15 is "strong, meaning 'not allow' or 'prevent the occurrence of'"[22] So interpreted, it was of the view that NZCPS Policies 8, 13, and 15 do not conflict. And the Supreme Court said:[23]

> Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area.

BOP Regional Council decision

[61] Recently, the Supreme Court's approach to interpreting and reconciling NZCPS policies has been applied by the High Court in the *BOP Regional Council decision*.[24] This was in the context of determining the effects of a management regime applying to regionally significant infrastructure, including ports, in areas of outstanding natural character, outstanding natural landscapes, and areas with NZCPS Policy ll(a) biodiversity values. It related to the Bay of Plenty Region's proposed Regional Coastal Plan. The relevant NZCPS policies here were Policies 6, 7, 11, 13, and 15.

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20 At [126] – [129].
21 At [126] – [132].
22 At [126].
23 At [131].
24 Above, n 5.

[62] In his decision in the High Court, Wylie J considered whether the Environment Court had erred in its interpretation and implementation of the requirements of the NZCPS. This was in relation to confirming a policy framework that did not *require* adverse effects of regionally significant infrastructure on areas of outstanding natural character and outstanding natural landscapes, to be avoided but rather allowed for them to be avoided, remedied, or mitigated. The issue before the Court in that case was broadly similar to the one at hand.

[63] In this decision Wylie J started by examining the Act. His Honour summarised the relevant statutory provisions and considered the Supreme Court's decision. In that case, as here, the Environment Court had sought to limit the ratio of *King Salmon* to the specific policies it discussed. Wylie J, however, held that:[25]

> While strictly obiter, all of the majority's observations which led to the conclusions I have set out are highly persuasive. They are observations made by our highest Court, discussing some of the provisions and issues which are directly at issue in the present case. They cannot, in my judgment, be ignored or glossed over."

His Honour concluded that *King Salmon* could not be distinguished or dismissed as being of limited assistance.

[64] Wylie J noted too that NZCPS is an instrument at the top of the planning hierarchy. As the Supreme Court had observed, it is a document which reflects particular choices, and the notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances "does not fit readily into the hierarchical scheme of the [Act]".[26]

[65] His Honour set out the provisions he considered relevant. He carefully went through NZCPS Policies 6 and 7. He concluded that Policies 6 and 7:[27]

> are broadly about planning, providing for growth, and the associated provision of infrastructure, in a sustainable and interpreted way. They are less prescriptive policies.

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25 At [80].
26 At [108].
27 At [113].

[66] He then stated that "In contrast, Policy 11 seeks to protect indigenous biological diversity in parts of the coastal environment, by avoiding adverse effects ..." and avoiding significant adverse effects in other areas.[28] NZCPS Policies 13 and 15 require avoidance of adverse effects on outstanding natural character areas and outstanding natural landscapes. His Honour said:[29]

> [120] In *King Salmon*, the Supreme Court reconciled policies 8, 13 and 15 (policy 8 recognises the contribution of aquaculture and provides for it to be recognised in regional policy statements and plans in appropriate places). The majority considered that policies 13 and 15 are in more directive terms, and that they carry greater weight than policy 8 – which is in more prescriptive terms. The majority held that policy 8 does not permit aquaculture in areas where it would adversely affect an outstanding natural landscape.
>
> [121] It is difficult to see that policies 6 and 7, which provide for regionally significant infrastructure, are stronger or more directive than policy 8. There are differences in wording, but I doubt that those differences are sufficient to justify a decision-maker reaching an outcome different from that reached by the Supreme Court in relation to policy 8.
>
> [122] As I have noted, the Environment Court's consideration of the NZCPS policies was brief and incomplete. The Court concluded that policy 11(a) is "not absolute or binary" but it did not attempt to reconcile policy 11, or policies 13 and 15, with those policies which recognise regionally significant infrastructure and development in the coastal marine area.
>
> (citations omitted)

[67] His Honour considered the same hierarchy and the direct language used here applied to NZCPS Policy 11 as they did to Policies 13 and 15. He considered those Policies were directive and noted the Supreme Court's comments that there is "no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed."[30]

[68] His Honour held that the Supreme Court's approach to reconciling NZCPS Policies 8, 13, and 15 should be applied. He said Policies 6 and 7 are no stronger or

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28 At [114].

29 These passages were also quoted with some approval by Gordon J in this Court in the recent decision of *Auckland Council v Cabra Rural Developments Limited* [2019] NZHC 1892 (the Auckland Council decision) which also adopted and followed *King Salmon* and the *BOP Regional Council* decision.

30 At [118] citing *King Salmon* at [146].

more directive than Policy 8. There are differences in wording, but those differences are not sufficient to justify a different outcome to that reached by the Supreme Court.

[69] Wylie J concluded that the Environment Court had erred in its interpretation and implementation of the NZCPS, in adopting a "proportionate response" to giving effect to the NZCPS (effectively adopting an overall broad judgment approach), and in "approving policies and a rule that do not give effect to the requirements set out in Policies 11(a), 13(1)(a) and 15(a)".[31]

The present appeal

Appeals under s 299 of the Act

[70] Section 299 allows for appeals against interim decisions. The decision at issue here is interim as the parties have been directed to redraft PORPS Policy 4.3.7 to "correct concerns expressed by the court over the versions put forward by the parties." Despite the interim status of the Environment court decision, it is appropriate that the appeal is brought at this time. The Interim Decision finally determines substantive issues, as I see it, in a way that brings an appeal in that regard within the scope of s 299 of the Act.

[71] An appeal under s 299 is limited to questions of law. Both Port Otago and MDC argue that there is no error of law in the Environment Court's Interim Decision that would give rise to the current appeal. I disagree.

[72] I am satisfied that in determining that avoidance of "adverse effects" was not required, the Environment Court failed to "give effect to" the NZCPS as required by s 62(3) of the Act. In this case, the Environment Court would have reached a legal finding and not a factual one. This finding, arguably based on an incorrect legal test, materially affected the outcome and may have given rise to an error of law that can properly be appealed to this Court. The Environment Court Interim Decision was not one reached simply by applying different weighting to the policies of the NZCPS. Rather, an issue arises here as to whether the Environment Court failed to properly

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[31] At [123].

implement the NZCPS in the Regional Council's PORPS contrary to the guidance provided by the Supreme Court in *King Salmon*. I am satisfied this constitutes an error of law.

[73] On a question of law like the present, this Court will interfere with decisions of the Environment Court only if it considers that the Court:

(a) applied a wrong legal test;

(b) came to a conclusion without evidence or one to which on the evidence, it could not reasonably have come;

(c) took into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.

[74] The first alleged error here is that the Environment Court erred in its interpretation of the NZCPS (in particular NZCPS Policies 6, 7, 8, 9, 11, 13, 15 and 16), as a consequence of which it wrongly concluded that:

(a) There is a "conflict" between NZCPS Policy 9 (Ports) and the Avoidance Policies.

(b) The perceived conflict between NZCPS Policy 9 (Ports) and the Avoidance Policies can be resolved by recourse to "procedural" NZCPS Policy 7(1)(b)(ii) (Strategic planning).

(c) The direction in NZCPS Policy 16(a) (Surf breaks) that activities "do not adversely affect" identified surf breaks of national significance is less directive than a requirement to avoid adverse effects.

[75] The second alleged error is that as a consequence of the first error, the Environment Court failed to "give effect to" the NZCPS in the PORPS, as it is required to do pursuant to s62(3) RMA, including by:

(a) Finding adverse effects on Outstanding Coastal Sites are to be avoided in almost all circumstances but not all.

(b) Finding that the proposed PORPS may give some effect to NZCPS Policy 9 (Ports) without giving full effect to the Avoidance Policies.

(c) Finding that reference back to Part 2 of the Act was required to resolve a perceived conflict between NZCPS Policy 9 (Ports) and the Avoidance Policies.

(d) Undertaking a cost-benefit analysis under s 32 of the Act to decide whether the PORPS must require adverse effects on Outstanding Coastal Sites to be avoided.

(e) Recommending amendments to PORPS Policy 4.3.7 (Port Activities) to provide for adverse effects of port activities, in particular those associated with safety and efficiency, on Outstanding Coastal Sites to be avoided, remedied, or mitigated rather than simply to be avoided.

First alleged error of law – is there a conflict?

[76] At the outset, I note here, as did Wylie J in the *BOP Regional Council decision* that the NZCPS is an instrument at the top of the planning hierarchy.

[77] As to this first alleged error of law outlined above at [74], EDS maintains here that, in terms of the conflict between NZCPS Policy 9 and the Avoidance Policies, the Environment Court did consider the approach of the Supreme Court in *King Salmon* but failed to apply it correctly. EDS says that, contrary to *King Salmon* and the *BOP Regional Council decision*, the Environment Court did not look carefully at the verbs used in each NZCPS policy, at the objects/outcomes to which they apply, and then compare them.

[78] EDS submits that the language in NZCPS Policies 11, 13 and 15 all requires "avoidance of adverse effects" on the elements identified in Policy 11(a) (Indigenous biodiversity), Policy 13(1)(a) (Areas of outstanding natural character), and Policy 15(a) (Outstanding natural landscapes). Avoidance of significant adverse effects is required on elements addressed in NZCPS Policy 11(b) and on other coastal natural character and landscape values under Policies 13(1)(b) and 15(1)(b).

[79] As I have noted above, in *King Salmon* the Supreme Court has confirmed that "avoid" in the context of these policies means "not allow" or "prevent the occurrence of". The word "avoid" is "specific and directive".

[80] NZCPS Policies 13 and 15 go on to state that the adverse effects of "inappropriate" development must be avoided. What is inappropriate is to be assessed against the characteristics of the environment that Policies 13 and 15 seek to preserve.

[81] The words used in NZCPS Policy 16 are different but they have the same meaning. Protection of surf breaks of national importance is to be achieved by:

> (a) ensuring that activities in the coastal environment do not adversely affect the surf breaks; and
>
> (b) avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.

[82] NZCPS Policy 16 requires that adverse effects are avoided, despite using slightly different formulation to that which is specified in Policies 11, 13, and 15. The requirement in Policy 16(a) to "ensure" is directive. It requires the decision-maker to "make certain that something will turn out in a particular way". Under Policy 16(a), what decision-makers must make certain is that activities in the coastal environment "do not adversely affect" important scheduled surf breaks. A requirement to "ensure" activities "do not adversely affect" part of the environment has the same meaning as a requirement to "avoid adverse effects" on that area. The Environment Court's finding to the contrary was in error.

[83] Adopting the Supreme Court's approach, whether NZCPS Policy 9 provides an exception to the environmental bottom line in the Avoidance Policies for ports depends on the specificity of the words used. If Policy 9 is more specific and directive

with respect to the provision of ports and the management of their effects on Outstanding Coastal Sites, then the requirement to "avoid" or "not allow" adverse effects will not apply. If it is not, then avoidance is required.

[84] EDS submits that NZCPS Policy 9 is less directive than the Avoidance Policies. To reiterate, it states in part:

> **Policy 9 Ports**
>
> Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with efficient connections with other transport modes, including by: …

[85] EDS says that the word *recognise* is flexible and not directive. By analogy, in the *BOP Regional Council decision* the High Court reached the same conclusion with respect to the same policy direction in NZCPS Policy 6 (i.e. to "recognise" or "consider") applying to regionally significant infrastructure.

[86] In analysing the words of NZCPS Policy 9 in the present case, the Environment Court focussed on the word "requires" as a "prescriptive verb ... used to ensure an efficient network of safe ports" and wrongly concluded that "the core of Policy 9 is accordingly strongly prescriptive."

[87] EDS says the word "requires" is an adverb attaching to the "national transport system" describing what the system needs to be sustainable. It is not a direction to decision-makers (i.e. decision-makers are not told to "require" certain actions or outcomes). The verb (or action) directed at decision-makers is only to "recognise", not to "require". Forest and Bird agrees that the word 'requires' is used as part of a description of the attributes required by a sustainable national transport system. Policy 9 directs decision-makers to *recognise* the requirements of a sustainable national transport system and consider where, when and how to provide for ports.

[88] EDS contends that decision-makers must "recognise" that a sustainable national transport system "requires" an efficient national network of ports, and they are told to recognise that requirement in two specific ways in subparagraphs (a) and (b) of Policy 9 by:

a. ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or their connections with other transport modes; and

b. considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping; and their connections with other transport modes.

[89] EDS submits that subparagraph (a) was largely ignored by the Environment Court, apart from noting the use of the word "efficient".

[90] Subparagraph (a) is specific and directive with respect to the interplay between the safe and efficient operation of ports and their transport connections, and other "development in the coastal environment". Decision-makers "must make certain" that other coastal development does "not adversely affect" those specific elements of a port's operation, for example competing boat moorings, aquaculture or marinas that could affect shipping channels. It does not address the interplay between ports and the "protection" required by Policies 11, 13, and 15. Protection is distinct from development. It requires decision-makers to keep identified values "safe from harm, injury or damage". The requirement to "avoid adverse effects" on those areas is not displaced.

[91] The words of subparagraph (a) would likely support a stringent approach to undertaking non-port related development in proximity to a port, for example in an identified Port Zone or an identified shipping channel. Those words do not, however, support the Environment Court's revised Policy 4.3.7 (Port Activities) and its more lenient approach to managing adverse effects on Outstanding Coastal Sites.

[92] The direction to decision-makers in subparagraph (b) of Policy 9 is to "consider". The common meaning of consider is to: "think carefully about". Decision-makers must think carefully about "where, how and when" to provide for the efficient and safe operation and development capacity of ports in planning instruments.

[93] That direction is broad; there are multiple places, methods and times to provide for ports. The phrase implies:

(a) There may be places where ports should not be located, or expansion will not be available (the "where").

(b) That concerns about adverse effects may necessitate controls on intensity, scale, and method (the "how").

(c) That management and provision for ports may require a staged approach (the "when").

[94] Constraints on "where, how, and when" ports are provided for are found in other NZCPS policies, including the Avoidance Policies. EDS says that on its face subparagraph (b) of Policy 9 does not support an interpretation of "where, how, and when" which means that avoidance of adverse effects of ports (or any other coastal development) on Outstanding Coastal Sites is not required.

The words used: no distinction between NZCPS Policy 9 and Policy 6

[95] A second error alleged by EDS here is that the Environment Court erred in distinguishing NZCPS Policy 9 (Ports) from NZCPS Policy 6 (Activities in the coastal environment). This is on the basis that NZCPS Policy 9 does not have the deferential qualification that the infrastructure Policy 6(1)(b) has. The phrase "without compromising the other values of the coastal environment" is included in Policy 6(1)(b) but not in Policy 9. Because of the absence of that phrase the Environment Court concluded there was a "conflict" between NZCPS Policy 9 and the Avoidance Policies.

[96] I am satisfied here that this conclusion reached by the Environment Court was in error because:

(a) NZCPS Policy 8 at issue in *King Salmon* (which uses similar language to Policy 9) does not contain that phrase either, yet this was not considered by the Supreme Court to result in a conflict between that Policy and Policies 13 and 15.

(b) NZCPS Policy 9 must be read on its terms, alongside the Avoidance Policies. There is nothing in Policy 9 which directs that the Avoidance Policies do not apply, regardless of the absence of the phrase "without compromising the other values of the coastal environment".

Proposed resolution of the alleged conflict by recourse to NZCPS Policy 7(1)(b)(ii)?

[97] In my view, the Environment Court erroneously concluded, too, that there was an irreconcilable "conflict" between NZCPS Policy 9 (Ports) and the Avoidance Policies. The Environment Court looked to NZCPS Policy 7 (Strategic planning) as providing "a procedural resolution for a substantive conflict" through a requirement that "a resource consent be applied for and determined having regard to purposively framed objectives and policies"

[98] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level, and:
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[99] EDS explains, and I agree, that NZCPS Policy 7(1)(b) requires the Council to identify areas of the coastal environment where particular activities or forms of development are inappropriate (as specified in subs (i)) or may be inappropriate (as specified in subs (ii)). It says the Avoidance Policies will inform those decisions. Policy 7 is not, however, a means of circumventing an implementation of the Avoidance Policies in a regional policy statement, as the Environment Court has done in this case.

[100] EDS says the requirement to avoid adverse effects on Outstanding Coastal Sites is not contextual. The context will inevitably show whether there will be an adverse effect, but context does not justify a lower standard of protection. In the case of Otago Harbour, the context includes an existing operating port. Outstanding Coastal Sites have been identified in the immediate vicinity, notwithstanding the co-existence of that port.

[101] NZCPS Policy 7 sets out methods and mechanisms to be used in preparing regional policy statements and plans. It relates to the process to be used in giving effect to the NZCPS, but it does not:

(a) Alter the meaning of other NZCPS policies.

(b) Alter the relationship between other NZCPS policies including whether and to what extent one policy should have priority over another in any given circumstance.

[102] The Supreme Court did not see NZCPS Policy 7 as providing a means of circumventing the requirement to avoid adverse effects on those other policies. If it had, it would have reached a different decision.

Second alleged error of law – failure to give effect to NZCPS

[103] As to the second alleged error of law outlined above at [75], EDS summarises the requirement in the NZCPS for the PORPS to "give effect to" as meaning to "implement". As the authorities have noted, it is "a strong direction, creating a firm obligation" on the Regional Council. Its implementation depends on what is being

given effect to. A requirement to "give effect to" a specific and unqualified policy is prescriptive and binding on decision-makers. The statutory framework confirms it is intended that a NZCPS can "contain policies that were not discretionary but would have to be implemented if relevant'", which are "binding on decision-makers".

[104] The Avoidance Policies are prescriptive. NZCPS Policy 9 (and NZCPS Policies 6 and 7) are not. This means that the PORPS must require port activities to "avoid adverse effects" on Outstanding Coastal Sites, including activities associated with safety and efficiency. Ports are treated the same as aquaculture and other regionally significant infrastructure. The Environment Court, in my view, erred in its recommendation otherwise.

[105] EDS submits that the Court made the following errors of law:

Assertion that adverse effects are to be avoided in "almost all" circumstances.

[106] EDS says this points to the Environment Court's conclusion the NZCPS "as a whole contemplates that adverse effects of port structures on certain landscapes or ecosystems are to be avoided in almost all circumstances but not in all ...".[32] It went on to say that "it seems … that effects of port activities on these resources [natural character and outstanding natural landscapes] might have a (slightly) lower standard applied when requiring a resource consent be obtained."[33]

[107] I agree with EDS that those findings are inconsistent with the NZCPS. Policies 11, 13, and 15 require the PORPS to avoid the specified adverse effects. NZCPS Policy 16 uses the alternative formulation of ensuring activities do not adversely affect listed surfbreaks, to similar effect. As *King Salmon* found, these are a bottom line and, indeed, carry greater force under the "environmental bottom line approach" rather than the "overall judgment" type approach that the Environment Court sought to adopt.[34]

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32 *Port Otago Ltd v Otago Regional Council*, above n 3 at [100].
33 At [129].
34 *King Salmon*, above n 1 at [81].

Assertion that the Court may give some effect to the Avoidance Policies without giving full effect.

[108] Similarly, statements from the Environment Court that the PORPS should "give some effect to Policy 9 NZCPS supported by Policy 8 without giving full effect to one or more of the Avoidance Policies in the NZCPS ...", as I see it, do not apply the correct legal test. That is an adoption of the overall broad judgment approach to implementing the NZCPS which was rejected by the Supreme Court in *King Salmon*.

Reference back to Part 2 of the Act to resolve perceived conflict?

[109] The NZCPS gives substance to Part 2 RMA in the coastal environment. This means that "by giving effect to the NZCPS, a regional council is necessarily acting 'in accordance with' Part 2 and there is no need to refer back to that part when determining a plan change"[35], absent one of three exceptions: invalidity, uncertainty, lack of coverage.[36] I agree with submissions advanced before me on behalf of *Forest and Bird* that the *King Salmon decision* represents a sea change in resource management law which is continuing here with decisions such as the *BOP Regional Council decision* and the *Auckland Council decision*. The findings by the Environment Court in its Interim Decision for an overall judgment approach and suggesting that the planning framework should provide for a case by case approach to adverse effects on outstanding or significant coastal biodiversity, landscape and natural character sites and nationally significant surf breaks, which provides for effects on those sites or values to be avoided, remedied or mitigated, is an approach roundly rejected by the majority in *King Salmon* and one that is no longer available.

Undertaking of s 32 of the Act analysis.

[110] As a consequence of what I have found to be its erroneous conclusion that, in terms of PORPS Policy 4.3.7 (Port Activities), adverse effects on Outstanding Coastal Sites needed to be avoided "in almost all circumstances but not all", the Environment Court considered it was able to undertake a s 32 cost benefit analysis to determine the effects management framework for Port Activities in those areas. That conclusion is

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35 *King Salmon* at [33], [85], [90].
36 *King Salmon* at [88].

wrong, in my view. Proposed PORPS Policy 4.3.7 (port activities) must provide for avoidance of adverse effects on Outstanding Coastal Sites

[111] The PORPS's objectives and policies must be evaluated under s 32 of the Act and any changes re-evaluated under s 32AA. In the coastal environment the requirement to "give effect to" the NZCPS limits the objective and policy options available to decision-makers. The requirement for an evaluation report is a procedural obligation and does not remove the necessity for a proposed regional policy statement or plan to "give effect to any New Zealand coastal policy statement".

[112] This is consistent with the scheme of the RMA and the "elaborate" New Zealand coastal policy statement development process. The NZCPS "reflects particular choices" made at a national level for how the coastal environment is to be managed. One of those choices is that, of the effects management options in s 5(2) of the Act, only avoidance should apply to adverse effects of subdivision, use and development in Outstanding Coastal Sites:[37]

> The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

Conclusion

[113] For the reasons I have outlined above, I find that the Environment Court erred in its interpretation of the NZCPS and, as a consequence, failed to "give effect to" the NZCPS in its Interim Decision. Consequently, the Environment Court made errors of law here which were material and affected its ultimate determination. Accordingly, I find that the Environment Court failed to properly implement the NZCPS in the PORPS contrary to the guidance provided by the Supreme Court in *King Salmon*.

[114] The relief sought by EDS here requests that the Interim Decision of the Environment Court be quashed and that this Court either:

(a) confirms the PORPS Policy 4.3.7 as sought by EDS; or

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[37] At [90].

(b) directs the Environment Court to reconsider its decision on those provisions in light of this Court's judgment.

[115] Having due regard to my findings that the Environment Court here erred materially in its interpretation and application of the *King Salmon* decision and of various provisions in the NZCPS and the PORPS, in my view, its Interim Decision should be set aside. But, given that the Environment Court is a specialist Court, as I see the position, it is appropriate that it reconsiders the issues rather than this Court doing so. This is also what occurred in the recent *Auckland Council decision*.[38]

[116] For all the reasons I have outlined, this appeal is allowed and I now make orders:

(a) setting aside the Interim Decision of the Environment Court; and

(b) remitting the matter to the Environment Court to reconsider in light of this judgment.

Costs

[117] My preliminary view is that, as the successful parties here, EDS and the parties supporting it on this appeal are entitled to costs. However, as no formal submissions were made on this by counsel, I reserve the issue of costs. I encourage counsel for the parties to liaise with a view to endeavouring to resolve the question of costs. In the event that costs cannot be resolved between the parties then counsel may file memoranda (sequentially) on the issues which are to be referred to me and, in the absence of any party indicating they wish to be heard on the question of costs, I will decide that issue on the basis of the memoranda filed and all the other material before the Court.

.....
Gendall J

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[38] The *Auckland Council decision*, above n 29.

Solicitors:
Ellis Gould, Auckland
Ross Dowling Marquet Griffin, Dunedin
Leonard Andersen, Barrister, Dunedin

Copies to Interested Parties