

Environmental Defence Society v Otago Regional Council

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In this recent case, the High Court dismissed Port Otago's argument that remediation or mitigation (including adaptive management) is available to ensure the safe and efficient operation of the port, when the avoidance policies of the New Zealand Coastal Policy Statement (NZCPS) are triggered. The High Court found the avoidance policies take precedence over the port policies. This is similar to previous decisions of the High Court that held the avoidance policies take precedence over the infrastructure and development provisions of the NZCPS.

Of particular note, the High Court commented that the avoidance policies require absolute avoidance of (and "inevitably" prohibit) adverse effects on the stated values. This does not reflect how the Courts have applied the Supreme Court's judgment in *King Salmon* to date; that minor and transitory effects may be acceptable and that mitigation and remediation can be taken into account when determining if adverse effects are avoided. It is a strict approach to the requirement to 'give effect to' the NZCPS in lower planning documents and is a further evolution of the *King Salmon* approach in RMA planning.

***Environmental Defence Society v Otago Regional Council* [2019] NZHC 2278**

Factual background

This was an appeal to the High Court of an interim decision of the Environment Court (Interim Decision).[1] The Environment Court considered what rules should be in the Proposed Otago Regional Policy Statement (PORPS). The key issue on appeal was:

"How to provide for the ports in the Otago region in a manner which gives effect to the NZCPS [New Zealand Coastal Policy Statement 2010]".[2]

The NZCPS provisions at issue were:

- The following policies to avoid adverse effects on certain values or in certain areas:
 - Policy 11(a) regarding specified coastal biodiversity
 - Policy 13(1)(a) regarding areas of outstanding coastal natural character
 - Policy 15(a) regarding outstanding coastal natural landscapes / features
 - Policy 16 regarding nationally significant surf breaks (together, the "Avoidance Policies")
- Policies to avoid significant adverse effects, namely Policy 11(b) regarding biodiversity and Policies 13(1)(b) and 15(b) regarding other landscape and natural character values
- Policy 9, providing for the efficient and safe operation of ports.

The core PORPS policy (4.3.7(e)) at issue was:

"Where the efficient and safe operation of port activities cannot be provided for while achieving the policies under objective 3.1 and 3.2 [related to the Avoidance Policies] avoid, remedy or mitigate adverse effects as necessary to protect the outstanding or significant nature of the area..."

Environment Court interim decision

The Environment Court described the environmental context of the Otago region; its specific values and character (relating to key habitats for indigenous species, ecosystems, volcanic landforms, potential high and outstanding landscapes, and two proximate nationally significant surf breaks), and the port activities of regional and possibly national importance (as described by Environmental Defence Society's (EDS) submissions).

The Court considered the primary legal issue was whether Policy 9 (Ports) of the NZCPS was less deferential to the Avoidance Policies than Policy 8 (the aquaculture policy relevant in *King Salmon*) and Policy 6 (the infrastructure policy relevant in *Royal Forest and Bird Protection Society v Bay of Plenty Regional Council*)[3] (BOP Regional Council). Port Otago explained it would need to shut down if the Avoidance Policies created, in effect, prohibited activities (examples of which the Court provided, relating

to core port activities).

The Court reconciled the policies in the NZCPS by interpreting Policy 9 as requiring an “efficient national network of safe ports”.[4]

The Court found that “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 – but not all – circumstances. The Court concluded that “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”.[5]

While the Court found conflict between Policy 9 and the Avoidance Policies, it resolved it by looking within the NZCPS. It applied Policy 7 (Strategic Planning), describing it as a “procedural resolution for a substantive conflict”. Policy 7 sets out what a regional council shall do when preparing a regional policy statement and plan, including considering where, how and when to provide for future development in the coastal environment and identifying areas of the coastal environment where specified activities and forms of subdivision, use and development are or may be inappropriate. (The High Court eventually considered this to be an ‘overall broad judgment’ approach to implementing the NZCPS, which had been rejected by the Supreme Court in *King Salmon*.[6])

EDS appealed the Interim Decision, arguing it “erred in failing to give effect to the NZCPS and misinterpreted the NZCPS in material ways”. Forest and Bird joined the appeal.[7]

Questions of law for the High Court

The appeal judge, Justice Gendall, summarised the essential issue for the High Court as “whether the PORPS complies with the NZCPS” and explained that “underlying this case 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”.[8]

Arguments of the parties on appeal

EDS argued that the ‘environmental bottom line’ approach of the Supreme Court in *King Salmon* dictates that the PORPS must require “avoidance of adverse effects on [what are described as] outstanding coastal sites”, including from Port activities.[9] It argued that Policy 4.3.7(e) of the PORPS did not give effect to the NZCPS Avoidance Policies. EDS and Forest and Bird considered that the questions of this case had been answered in *King Salmon* and *BOP Regional Council* such that the Avoidance Policies of the NZCPS prevailed over the less directive provisions.

Port Otago and Marlborough District Council opposed the appeal and argued that there is:

“only a conflict where the provisions cannot be resolved without one taking precedence over the other”, and “that is not the case here”.[10]

The High Court summarised their argument as:[11]

“[advancing] 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”.

Port Otago emphasised its priority was to establish that activities required for safety or operational purposes were not prohibited by a rule. It argued that a difference in approach (to *King Salmon* and *BOP Regional Council*) was warranted in this case because the Avoidance Policies do not allow for the safe and efficient operation of the ports.[12]

High Court decision

Looking back to the Supreme Court’s consideration of the issues in *King Salmon*, Justice Gendall emphasised:

“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”.[13]

Overall, the High Court held:[14]

“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.”

The High Court’s decision thus strictly applies *King Salmon*. Justice Gendall summarised the Court’s judgment as follows:[15]

“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 Policies 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 decision also contemplates whether adaptive management can respond to predicted effects that carry an element of risk (by using monitoring and changing behaviour to avoid or manage that risk). The Court found that the Avoidance Policies will inevitably

result in prohibited activities and this also precludes adaptive management to address potential breach of those policies.^[16]

The High Court concluded that 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 implement the NZCPS in the Regional Council’s PORPS contrary to the guidance provided by the Supreme Court in *King Salmon*”.^[17]

Paying close attention to the way in which policies are expressed in the NZCPS, Justice Gendall concluded that Policy 9 (Ports) should be read in the same way as Policy 8 (Aquaculture) was in *King Salmon*; as subservient to the more directive Avoidance Policies. Consequently, the Environment Court failed to “give effect to” the NZCPS as required by s 62(3) of the RMA^[18] in determining the avoidance of “adverse effects” was not required. There was no actual conflict between the provisions, the Court held, and so it was not necessary to use Policy 7 of the NZCPS or Part 2 to resolve the conflict. This finding materially affected the outcome and may have given rise to an error of law.^[19]

The Court also identified a number of other errors of law within the Environment Court decision:^[20]

- Finding adverse effects on Outstanding Coastal Sites are to be avoided in almost all – but not all – circumstances
- Finding that the proposed PORPS may give some effect to NZCPS Policy 9 (Ports) without giving full effect to the Avoidance Policies
- 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
- 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
- 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.

The Interim Decision was set aside and the matter has been returned to the Environment Court to be reconsidered.

^[1] An interim decision can be appealed under s 299 of the RMA, on a question (or questions) of law. The High Court must determine whether the Environment Court made a material error of law which affected its ultimate determination.

^[2] [5].

^[3] [2017] NZHC 3080, (2017) 20 ELRNZ 564.

^[4] [33(a)]; [13].

^[5] [42].

^[6] [108].

^[7] [13].

^[8] [16].

^[9] [14].

^[10] [15].

^[11] [15].

^[12] [54] and [57].

^[13] [50] in this case and [90] of *King Salmon*.

^[14] [104].

^[15] [52].

^[16] [55].

^[17] [72]

^[18] That a regional policy statement must give effect to a New Zealand coastal policy statement.

^[19] [72].

^[20] [75].

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