IN THE SUPREME COURT OF NEW ZEALAND SC 82/2013

[2013] NZSC Trans 21

BETWEEN **ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**

Applicant

AND **THE NEW ZEALAND KING SALMON COMPANY LIMITED**

First Respondent

SUSTAIN OUR SOUNDS INCORPORATED

Second Respondent

MARLBOROUGH DISTRICT COUNCIL

Third Respondent

MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES

Fourth Respondents

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Hearing: 16 October 2013

Court: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

Appearances: D A Kirkpatrick, R B Enright and N M de Wit for Environmental Defence Society Incorporated
D A Nolan, A S Butler and D J Minhinnick for New Zealand King Salmon Company Limited
M S R Palmer and K R M Littlejohn for Sustain Our Sounds Incorporated
P A McCarthy for Minister of Conservation and Director-General of Ministry for Primary Industries

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APPLICATIONS FOR LEAVE TO APPEAL

MR PALMER:
Tēnā koutou katoa, I appear for Sustain Our Sounds, one of the appellants, together with me is Mr Littlejohn.

ELIAS CJ:
Tēnā koe Mr Palmer, Mr Littlejohn, thank you.

MR KIRKPATRICK:
May it please the Court, my name is Kirkpatrick. I appear with Mr Enright and Ms de Wit, on behalf of Environmental Defence Society.

ELIAS CJ:
Thank you Mr Kirkpatrick, Mr Enright, Ms de Wit.

MR BUTLER:
May it please the Court, Butler together with Nolan and Minhinnick for the prospective respondent, New Zealand King Salmon.

ELIAS CJ:
Thank you Mr Butler, Mr Nolan and Mr Minhinnick.

MR McCARTHY:
As the Court pleases, my name is McCarthy, I appear for the Minister of Conservation and the D-G of the Ministry of Primary Industries.

ELIAS CJ:

Thank you Mr McCarthy. Counsel, thank you very much for your submissions and also for the memorandum in response to the queries that the Court had. We think that we would be assisted if, as a preliminary matter, each of you would address us on the function that the legislation imposes on this Court under section 149V because it's the first time we've had occasion to consider it. So I wonder whether I can call on you in turn to address us briefly on that point. Yes Mr Palmer?

MR PALMER:

Ma'am, dealing with this threshold question of leave. As the Court will be aware this is an unusual appeal provision, section 149V, of the Resource Management Act 1991. It was inserted in the Act by the Resource Management (Simplifying and Streamlining) Amendment Act 2009, and it was passed effective from the 1st of October 2009. It is worth noting that it has been picked up as a precedent subsequently. It is also the same sort of leave provision now also appears in the Rugby World Cup 2011 (Empowering) Act 2010.

ELIAS CJ:

Well that's not likely to bother us.

MR PALMER:

I don't think so Your Honour. The point is though that sometimes once Parliament thinks it might have had a good idea it may decide to apply that good idea in further circumstances.

ELIAS CJ:

Yes.

MR PALMER:

The effect of the appeal provision appears to be that there is no right of appeal to the Court of Appeal from the High Court. There is a right to apply for leave from the Supreme Court, to the Supreme Court for leave –

ELIAS CJ:

Yes.

MR PALMER:

The Supreme Court can decide to grant leave or can remit the question to the Court of Appeal but not both. So if it goes to the Court of Appeal it cannot come back to the Supreme Court and the legislative purpose of this provision appears to have been to speed up the process, consistent with the Streamlining and Simplifying part of the title of the Amendment Act, to speed up the process so that here when you have a Board of Inquiry there is an appeal to the High Court and then only one other appeal further on. There is, as far as I can tell, nothing helpful in Hansard, in the Parliament debates, about what Parliament intended, other than what is evident from its text. I would suggest that the legislative purpose, apart from trying to speed up the process, also envisages that the Supreme Court may hear appeals, if it determines that it should, and that the legislation does not weigh down the Court with the necessity of hearing all such appeals, so that it has this ability to remit to the Court of Appeal.

Now it does appear that section 14 of the Supreme Court Act 2003 applies so the leapfrog threshold is relevant and that, of course, requires that there have to be exceptional circumstances for the appeal to come to this Court. That leapfrog threshold of exceptional circumstances usually applies in a context where it will still be possible, if a further appeal is taken, or a further application is made for appeal, it will still be possible for this Court to hear that matter. So it is not surprising that in that context where what is exceptional needs to be seen in the context where otherwise it is still possible that the Court will be able to hear the matter.

ELIAS CJ:

So do you suggest some weighting for that factor, that in – applies to the assessment of exceptional circumstances?

MR PALMER:

Well, Your Honour, it could be a weighting or it might be that what is exceptional is different.

ELIAS CJ:

Yes, “weighting” is the wrong word, yes.

MR PALMER:

I’d prefer to avoid questions of weighting actually –

ELIAS CJ:
Yes, I know.

MR PALMER:
– in this appeal. What is exceptional is I think different where it is not possible for this Court to hear this matter –

ELIAS CJ:
Yes.

MR PALMER:
– if it denies leave to come here.

McGRATH J:
Is there a general principle, Mr Palmer, that in the normal course the matter, if it is to be the subject of appeal, would go to the Court of Appeal? I mean, just trying to give the word "exceptional" some content, is there a principle that we would start on the basis it will go to the Court of Appeal unless there is something particular to which we would ascribe the nature exceptional?

MR PALMER:
That would be a possible way of interpreting it but I think it would also be possible to interpret it the other way as well, and the reason for that is this.

GLAZEBROOK J:
The "other way" meaning that there would be a weighting, that it would come here if it was sufficiently important –

MR PALMER:
A default –

GLAZEBROOK J:
– for it to do so?

MR PALMER:

A default presumption that if there is a matter of general or public importance then you would expect this Court to deal with it unless there is a reason why not.

WILLIAM YOUNG J:
But what is the test for the appeal to the Court of Appeal?

GLAZEBROOK J:
That's what I was going to ask as well.

ARNOLD J:
It's the same.

McGRATH J:
Yes. What's left –

MR PALMER:
That's right, and the problem here, I think –

GLAZEBROOK J:
No, no, but in the statutory scheme, what's the test for sending it to the Court of Appeal generally?

MR PALMER:
Well, the test would require section 14 to be satisfied of exceptional circumstances.

ELIAS CJ:
But what about section 13?

MR PALMER:
And section 13.

WILLIAM YOUNG J:
But say this was just a straight out appeal from a High Court decision under the Resource Management Act, what's the test for the Court of Appeal to grant leave there?

ARNOLD J:

General and public importance. It's section 144 of the Summary Proceedings Act or now the Criminal Procedure Act.

MR PALMER:
Yes.

WILLIAM YOUNG J:
Okay, so you're looking – so we shouldn't grant a further appeal at all unless it's a matter of general public importance?

MR PALMER:
That's – I think that is correct, Sir.

WILLIAM YOUNG J:
Yes, and we shouldn't take it directly unless as well – unless it is both a matter of general public importance and the circumstances are exceptional.

MR PALMER:
That would appear to be the effect of the requirement to satisfy section 14 but then the question is, well, what does exceptional mean in this context where it is not possible for the Court to hear the case at all.

ELIAS CJ:
Well, but –

MR PALMER:
And the reason why I'm emphasising that is that it seems to me that you have – if you're wanting to preserve some consistency in this Court's ability to review questions of law, then what you would have here, if you took that super-threshold approach, if you like, what you would have here is an area of law where when there is a matter of general public importance this Court would be preventing itself from looking at that issue unless there is something else. Now it seems to me that in terms of the function of the Court of guiding the development of New Zealand law, it may be that you consider it not desirable to take that approach.

ELIAS CJ:

Well, the section 149V tells us to apply sections 13 and 14 with necessary adaptions and section 13(1) may provide some assistance because perhaps if it's necessary in the interests of justice for this Court to hear and determine the proposed appeal that might constitute exceptional circumstances within the scheme of this provision.

MR PALMER:

Well, I think that is an available argument. I think that the reasoning would go I think that it is not – if this Court is to examine issues at the same level across the statute book then it would want – it would expect to take a case where it considers there is a matter of general public importance, and it could –

ELIAS CJ:

But not necessarily every case.

MR PALMER:

No, not necessarily every case –

ELIAS CJ:

And the points will arise in future cases, and that must be an important consideration for us, that it may be better for us to wait until a case has had a trot in the Court of Appeal because second appeal is a bit brutal and you can put the law wrong very easily if you come to it without sufficient background.

MR PALMER:

Yes I can see that that is a consideration Your Honour but the alternative is that if the Court of Appeal – the Court of Appeal will be in the same situation and if it delivers a judgment that is, dare I say it wrong, then this Court has no immediate opportunity to correct that where as if an issue satisfies the criteria that are generally the criteria for this Court to use, of general and public importance, then it's not immediately clear to me why this Court wouldn't decide to look at that issue –

McGRATH J:

It's hard to see –

MR PALMER:

– it's similar –

McGRATH J:
You're articulating a principle on which a case should be referred to the Court of Appeal –

MR PALMER:
Yes that is a problem, there is a problem with that, with that way of looking at it.

McGRATH J:
And it's the, it's not, as I think is being put to you, it's not one way for the Court to look at it, to try and identify those cases of which there is a point which this Court should look at sometime there, but in all the circumstances it might be better to allow in this particular case, any particular case, the Court of Appeal to decide it so that we have a body, a decision, or perhaps even a body of decisions in a future appeal to examine the matter.

MR PALMER:
I think that would be a way of looking at it Your Honour but I – and I think what that means is that the threshold that this Court expresses would be quite factually, or contextually oriented in all the circumstances.

McGRATH J:
Yes.

MR PALMER:
And that would then leave the Court some flexibility in developing that threshold further in the future.

There is one comparison which maybe used and that is with the situation where in the normal test you have an application for leave which is time bound or where time is of the essence, and I'm thinking frankly of the Maori Council challenge to the Mighty River Power sale, and in that case you had a particular time reason why this Court might not want to look at it again in the future. So it, because of timing, it would have been a, it was really almost a question of, should it go to the Court of Appeal or the Supreme Court there and –

WILLIAM YOUNG J:
Or should it go to the Court of Appeal first, was the issue in that case, because it –

MR PALMER:

Yes it was technically but there clearly would have been significant difficulties for the Crown if it did and then came here.

McGRATH J:

But I think what you're saying is that exceptional circumstances could be covered by urgency.

MR PALMER:

Yes.

McGRATH J:

That's really the point –

MR PALMER:

Urgency would be one sort.

McGRATH J:

Urgency in a public sense.

MR PALMER:

But when I was drawing the comparison with a situation where there is a reason to take the case either to the Court of Appeal or the Supreme Court, just for a different reason. Here it's the law, there it was timing, and the question was where it should go and exceptional circumstances could be demonstrated.

WILLIAM YOUNG J:

Might it not simply be that we should adopt the approach that would we take this case if section 149V didn't exist?

MR PALMER:

Yes and that is the effect, I think Sir, of reading down the exceptional circumstances or if you like reading exceptional circumstances in this context of a choice. I mean the pragmatic solution to this question of the threshold is should the Court of Appeal or the Supreme Court hear this case. And that really drives you back to the usual leave criteria in essence.

WILLIAM YOUNG J:

Because you're looking for a sort of a middle slot somewhere between general and public importance but not necessarily ordinary exceptional circumstances.

MR PALMER:

I think that's correct Sir.

WILLIAM YOUNG J:

Yes.

MR PALMER:

Of course we would say that this case satisfies any of those criteria.

WILLIAM YOUNG J:

Except that if it were not for section 149V you wouldn't be here. You'd just – you would apply to the Court of Appeal.

MR PALMER:

We'd be in the Court of Appeal, yes.

ELIAS CJ:

Or you'd make an application for leapfrog appeal.

WILLIAM YOUNG J:

But you wouldn't make an application for leapfrog appeal, would you?

MR PALMER:

I couldn't predict what my clients would instruct me to do, Sir.

WILLIAM YOUNG J:

No, but there's no reason why you would've because you would – in the ordinary course of events, but for section 149V, you would have applied for leave to the Court of Appeal.

MR PALMER:

I think that's correct.

ELIAS CJ:

Which really means –

GLAZEBROOK J:

Well, there may have been an urgency issue though.

ELIAS CJ:

Yes, but leaving that aside, but which means that if Justice Young is right, and I must say I'm rather attracted to that view, that section 149V doesn't really add anything very much to the legislative scheme beyond saying that the matter stops with the Court of Appeal. So that would have to be factored in –

MR PALMER:

Yes.

ELIAS CJ:

– to whether we would take the case.

MR PALMER:

Yes. Yes, Ma'am. I note, and I'm not sure what effect this has, but I note that my friend in his submissions said that if the Court considered that leave should be granted then King Salmon has no objection to the appeal being determined by this Court, but I'm not sure whether that's a factor the Court want to take into account or not.

ELIAS CJ:

Well, it's not likely to be determinative.

MR PALMER:

That was really all I thought I should say on that.

ELIAS CJ:

Yes. No, thank you, that's been extremely helpful. Mr Kirkpatrick, would you like to be heard on this?

MR KIRKPATRICK:

Very briefly. With respect and thanks, I respectfully adopt everything that my learned friend has just addressed you on. I would add one matter in relation to the question which Your Honour asked him about whether or not this Court considers that it may be better to ventilate certain issues through the system and through the Court of Appeal rather than bringing them here, and in my submission that would be a matter for consideration but in my respectful submission that could be done in the manner that's been addressed by seeing whether the issue is of such public and general importance that it would be desirable to have high authority on it. I also offer, for what it is worth, the comment that there is a relative paucity of higher level authority, and I appreciate that time may be necessary and that 149V has only come into effect quite recently, but certainly in relation to EDS's appeal the question it wants to raise is in relation to an amendment that was made as long ago as 2003 on the interpretation of section 67 and on which there is no higher authority.

ELIAS CJ:
Of course, that cuts both ways –

MR KIRKPATRICK:
Yes.

ELIAS CJ:
– because if there is a paucity of authority one would think a second Court of Appeal would have to be even more cautious.

MR KIRKPATRICK:
Yes, I appreciate that, Your Honour, and again I think it does come back to a context which may be both factual, such as matters of urgency, or legal in terms of what is the question that has been raised.

ELIAS CJ:
Yes.

GLAZEBROOK J:
Although, of course, if you're looking for a build-up of authority before the second Court looks at it and there is unlikely to be a build-up –

MR KIRKPATRICK:

Yes.

GLAZEBROOK J:

– of authority then what you may have is to create more uncertainty in the meantime if eventually in another 10 years another case gets here.

MR KIRKPATRICK:

Yes, Your Honour, that's really the point I'm trying to make. Unless I can assist further, having adopted my friend's submissions.

ELIAS CJ:

Thank you, Mr Kirkpatrick.

MR KIRKPATRICK:

Thank you.

ELIAS CJ:

Yes, Mr Butler.

MR BUTLER:

Thank you, Your Honours. My general approach to this particular issue I think reflects the views adopted or represented by His Honour, Justice William Young. It seemed to me when I was reading these provisions they didn't add very much, in my submission, to the provisions of sections 12 to 15 of the Supreme Court Act itself. The major innovation was to indicate that there is a one-stop shop further appeal from the High Court, either the Court of Appeal or the Supreme Court, and in determining whether or not exceptional circumstances justify a leapfrog from the High Court to this Court what is anticipated is there will be a factorial approach to the assessment of exceptional circumstances. The factors that Your Honours have touched on in exchanges with my learned friends earlier are the relevant factors, it seems to me here. Paucity of authority. Is it appropriate for this Court to take on the determination of the questions of law, assuming there are any, that have been laid forth by the prospective appellants? Do you want to have the benefit of input from the Court of Appeal or, indeed, the High Court before you yourselves come to consider these issues for the reasons that you, that the Chief Justice touched on. So that's one important factor. The second other important factor is this question of urgency speed and the avoidance of delay. That is a strong theme in the Act. There

is the general provision in the early part of the Act around trying to avoid delay when determining Resource Management Act matters and there's also the very specific provisions around avoiding delay in relation to matters determined by a Board of Inquiry of the type that's before –

McGRATH J:
Given that there's only one appeal, is that really an important question for us?

MR BUTLER:
It's only relevant in this sense, and it really is a very pragmatic judgment that would have to be made by the Court as to whether as between this Court and the Court of Appeal, if this Court had the capacity to hear appeals significantly advanced, for example, of the Court of Appeal, whether that is a factor that might, in the particular circumstances of the case, not setting a precedent, but in the particular circumstances of this case would tip the balance one way or the other. So I'm agreeing in that sense with what I understand to be the submissions of my learned friends, but that is just one factor that this Court can legitimately take into account and by taking it into account one is simply engaging in a factorial case specific evaluation of what the exception – of whether there are exceptional circumstances in terms of section 14 of the Supreme Court Act.

GLAZEBROOK J:
You're not suggesting that the urgency or speed changes the test if it were merely going to the Court of Appeal in the sense of merely a question of law and I understand that we're – that you say there are no questions of law –

MR BUTLER:
Correct.

GLAZEBROOK J:
– or no questions of law that are of this nature –

MR BUTLER:
Correct.

GLAZEBROOK J:
– but a question of law of general or public importance, there's no change to the test?

MR BUTLER:
No change to the test.

GLAZEBROOK J:
Thank you.

MR BUTLER:
Exactly right. So that's why I'm agreeing with what His Honour Justice William Young put to, I think it was my learned friend Dr Palmer earlier. I don't think the object of section 149V is to change those substantive tests set out in sections 13, or indeed to some extent in section 14, accepting that section 14 itself is designed to a case specific evaluation of whether or not the circumstances of that particular case reach a threshold of being exceptional, which can only be assessed in the context of the particular case.

In terms of section 308, I don't know whether that's helpful. Section 308 is the provision which applies generally speaking in terms of appeals from the High Court to the Court of Appeal and as Justice Arnold has mentioned it adopts section 144 of the Summary Proceedings Act, whatever that now is in the Criminal Procedure Act 2011, and does set a requirement, a threshold of it being a question of law, general and public importance.

In terms, if I could just very briefly address an additional issue which my learned friends didn't touch on, was the curious phrase or word used of whether a further appeal to the Court of Appeal is "justified". It's interesting, in my submission, that there's no immediate tie back to section 308 of the Act. In my submission the use of that word "justified" does elevate the standard that's got to be met before deciding that it's appropriate to remit a question of law of general, even if one is convinced there is a law of general and public importance at that level, one still has that extra consideration as to whether or not remitting the matter for determination by the Court of Appeal is justified in all the circumstances.

ELIAS CJ:
Well do you mean that we'd have to undertake an assessment of whether the point is arguable?

MR BUTLER:

I think you're going to have to take an assessment as to whether the point is arguable, whether it's strongly arguable, and part of the assessment there, Your Honour, is brought in by that context of the importance of these sorts of matters being dealt with speedily and quickly.

WILLIAM YOUNG J:

This is really the downstream issue, isn't it, of where we are now, whether we are of the view that a further appeal is appropriate?

MR BUTLER:

Yes but it just, it was, it seemed to me to be appropriate to flag now that there is that word that's used "justified" is not a direct reference to section 308 and I just want to be, to lay my cards on the table, if I can put it that way at this stage, since those provisions – you've asked for our submissions in relation to those submissions. I think it is an extra elevated threshold –

GLAZEBROOK J:

So you are actually suggesting there's a different test for putting it to the Court of Appeal?

MR BUTLER:

Yes, no, sorry, to be clear, that's exactly what I'm saying.

GLAZEBROOK J:

You just said that, it's just that when I asked you, you said no but you are suggesting that?

MR BUTLER:

Sorry if I misled you in that sense. Yes, yes I am –

GLAZEBROOK J:

Which is fine –

MR BUTLER:

– I am suggesting it's elevated.

GLAZEBROOK J:

– you corrected it immediately.

MR KIRKPATRICK:

Thank you. That's all I wanted to submit on those points if that's helpful Your Honours.

ELIAS CJ:

Yes, thank you, Mr Butler. Yes, I'm sorry, Mr McCarthy.

MR McCARTHY:

Ma'am, I don't have anything much to add to what Mr Butler's already covered with the Court, so I'd adopt his submissions.

ELIAS CJ:

Thank you very much. We think we'll take a short break to discuss the submissions to this point but before we do, Mr Palmer and Mr Kirkpatrick, is there anything you want to say on that section 308 test point because it might be useful for us to know that?

MR PALMER:

Ma'am, the only point that I think I would make in relation to the question of the word "justified" is that my reading of that is that it is simply – it does not add anything more to the test that exists anyway.

ELIAS CJ:

It would have to be justified in the statutory context.

MR PALMER:

Exactly, yes.

ELIAS CJ:

Yes, yes.

MR PALMER:

Exactly, in terms of the usual criteria.

GLAZEBROOK J:

And is the – do you say that effectively because it's just looking at where it is, that effectively because it's a second step after looking at the exceptional circumstances?

MR PALMER:

Yes, in –

GLAZEBROOK J:

So it's really just putting it back into the normal statutory context. Is that –

MR PALMER:

Yes –

GLAZEBROOK J:

Given the second stage nature of it?

MR PALMER:

That seems to be the purpose of that subsection.

WILLIAM YOUNG J:

Pause there. Isn't it – don't we really have to first decide whether we, as Court of Appeal Judges, would grant leave to appeal and then, having decided that, decide whether the exceptional circumstances test is met so that we should take it directly? So isn't the first stage section 308 and…

ELIAS CJ:

Which is the same as section 13.

WILLIAM YOUNG J:

Which is similar, yes, similar.

GLAZEBROOK J:

Yes, well, I'm not sure actually because it seems to be a hierarchy. You seem to decide first whether we would take it, then you seem to, having decided we wouldn't because it's not exceptional, you seem to go down in hierarchy, if you look at the way it's worded, but it would make sense to do it the way round that has been suggested by Justice William Young.

MR PALMER:

I'm not sure whether this is quite the way that Your Honour is suggesting it but reading the words of 149V(7), it's – so (6) says that a party may apply for leave, and that's – and then sections 12 to 15 apply, and then (7) says if the Supreme Court refuses to give leave for an appeal, on the grounds that exceptional circumstances have not been established on section 14, but considers that a further appeal is justified, the Court may remit the proposed appeal to the Court of Appeal. That rather suggests that the Court should first consider whether it gives leave for the appeal to it, and if –

WILLIAM YOUNG J:

I understand. It's just that it's not a very logical way of approaching it though.

GLAZEBROOK J:

No.

MR PALMER:

I agree, Your Honour.

McGRATH J:

It may be more literal than useful.

MR PALMER:

I think I – I would agree with that, Your Honour, but in terms of –

ELIAS CJ:

But I don't see that in substance it's any different.

MR PALMER:

I think the simple choice is does it go to the Court of Appeal or Supreme Court?

WILLIAM YOUNG J:

Well, I think your opponents may have a view as to that.

ELIAS CJ:

No, no, no, but you weren't trying to suggest that the general or public importance standard doesn't apply?

MR PALMER:
Yes.

ELIAS CJ:
Yes, thank you.

GLAZEBROOK J:
You just say it's ordinary test and that was – the word "justified" is just in terms of the ordinary test, or possibly in terms of the section 13 test in fact.

MR PALMER:
Yes, that may be the section 13 test.

GLAZEBROOK J:
So it may actually be the section 13 test rather than the 308 test?

MR PALMER:
Yes, I think that's right.

GLAZEBROOK J:
Which may be a slightly different test from the 308 test.

MR PALMER:
Well, the section 13 test would, I would have thought, been the usual test that you apply as a matter of course, yep.

ELIAS CJ:
Thank you. Mr Kirkpatrick, did you want to be heard?

MR KIRKPATRICK:
I have nothing that I wish to add to that, thank you.

ELIAS CJ:
All right, thank you. Well, we'll take a short adjournment now.

COURT ADJOURNS: 10.34 AM
COURT RESUMES: 10.56 AM

ELIAS CJ:
Thank you. Well, we would like to hear from all counsel briefly but we would be most assisted if you would concentrate on the form of the questions. Mr Palmer?

MR PALMER:
I hear the instruction. In order to understand the form of the questions I think it is – and I'm not going to take the Court to the Board Inquiry Report, which is voluminous – but I do think it is important to understand something of what the Board did and something of probably two points about the RMA which are relevant. So if the Court would indulge me –

ELIAS CJ:
Yes.

MR PALMER:
– in talking firstly about the RMA and then secondly about the Board of Inquiry and then the question. The Court will be familiar, of course, with the scheme and purpose of the RMA but there are two points about it which are relevant to this application.

First, the scheme of the Act. The scheme of the RMA contains a cascading hierarchy of different planning instruments and if you start with the purpose in Part 2 of the Act at sections 5 to 7 of sustainable management, consistent with that have to be then a series of instruments. So a coastal policy statement, a regional policy statement, a regional plan, and each of these has to be consistent with the instruments that are superior in the hierarchy. Each is drafted at a different level of abstraction and for a different purpose, and each governs the instruments that are below it in the hierarchy. So a plan assigns a particular status to different activities. An activity can be permitted or discretionary or prohibited and those making a plan change are concerned – if they are concerned that there needs to be controls on an activity in order for an activity to be undertaken then they would put those controls in the plan in the form of rules or assessment criteria or standards. Consents for particular activities are considered within that framework.

So that's the first point, and the second of two points is that here there are two slightly unusual things going on, two different things. Firstly, you cannot usually apply for a resource consent for an activity which is prohibited under a plan. So here, salmon farming is prohibited by the Marlborough Sounds Resource Management Plan in the areas that King Salmon wanted to farm salmon in, and usually that would mean they couldn't apply for consent, but there were amendments made in 2011 to the RMA Act relating to aquaculture, and this was Part 7A, Subpart 4 of the Act, and under those amendments it is possible to apply for a plan change and a resource consent concurrently. That is so whether or not we're dealing with a Board of Inquiry, so for all of the aquaculture and 150,000 square kilometres of New Zealand's coastal area it would be possible for someone to apply for both a plan change and a resource consent concurrently, and the issue at stake here therefore affects potentially all of those such applications.

Crucially, those 2011 amendments do not alter the scheme of the Act. The intention was to enable efficiencies in the hearing process but not to alter the criteria for decision-making, and one – the most important section in that regard is section 149P of the Resource Management Act, and that says explicitly that, in subsection (8), that a plan change is determined first and the concurrent consent application second. And clearly that sequencing preserves the integrity of the Act.

The second thing that's going on, and I might come back to that section so it would be useful to have it open, the second thing which is going on here is that we have a matter of national significance. So there was another set of amendments to the RMA in 2009, the same amendments that instituted the appeal provision, which created this Board of Inquiry process for matters of national significance, and so instead of the usual consent authority, here the Marlborough District Council, considering an application, instead the Minister referred this matter to a Board of Inquiry. And the Minister of Conservation did that for a number of reasons which are contained in our submissions, and those reasons, which go to why the Minister thought that this was a matter of national significance, also of course goes to the significance of the issue as far as this Court is concerned. I will come to that point again later.

The key focus of my clients, of Sustain Our Sounds, is on the effect of the proposal on water quality, and that was one of the key reasons why the Minister considered that this was a matter of national significance.

The Board has issued a very long report and I don't propose to take Your Honours to it. I think both sides have indicated which passages we consider relevant and if Your Honours have had the opportunity to look at any of those you will have found it a good way of getting to sleep at night, perhaps.

So having made the points I wanted to make about the Act, was there anything that the Court wished to ask me about my view of the Act?

ELIAS CJ:
Your view of the Act?

MR PALMER:
Well, yes, Your Honour. The correct view of the law.

ELIAS CJ:
Yes.

MR PALMER:
In relation to the Board of Inquiry report –

ELIAS CJ:
Well, we are interested. I mean, if there are matters of interpretation or approach which you need to draw to our attention, certainly do so.

MR PALMER:
I will do that but I'll just perhaps deal with the Board of Inquiry Report very briefly first. The Board of Inquiry Report, the structure is evident from its table of contents and the first major thing it did was it evaluated, it considered and made findings on a number of contested issues. This is the bulk of the report. So it goes through, for example, the economic impact of the proposal. It goes through the effect on the seabed, or benthos. It goes through the effect on water quality on natural character of the landscape et cetera et cetera. It goes to all of these contested effects and it makes findings on those and in relation to water quality perhaps I could ask the Court to turn to the SOS submissions for leave to appeal.

ELIAS CJ:

What paragraph?

MR PALMER:

Paragraph 2.3. these submissions attempt to kick out the key aspects of the findings on the contested effects in relation to water quality. So 2.3(a)(i), the Board found that the baseline information available to it about water quality in the receiving environment was insufficient. Secondly it found that the approach taken by King Salmon in modelling the prediction of effects of maximum feed discharge, and this is the key aspect of feeding salmon, that when you feed salmon they, you get a discharge from the feed into the water, "the prediction of effects of maximum feed discharge on the water quality suffered from," and this is a quote, "an astonishing gap in the prediction of effects on the environment." And it considered that that gap, that astonishing gap, was quote, "a fundamental failing in the assessment of effects on the environment that we would not expect to see in a project of this magnitude and importance."

Then at little Roman (iii) the Board went on later to note that a change from today's conditions to what is called a eutrophic state, which is a state of eutrophication where essentially the sea looks pretty dead, if I can put it in non-technical language. A change from today's conditions to a eutrophic state caused by salmon feed discharges would represent an ecological disaster with significant implications for all of these other aspects of use of the Sounds.

So having identified that the risk is significant, and that it didn't have information about the environmental effects, it then in little Roman (iv), "Determined that it could only consider granting consent for the requested feed discharge levels on the basis of a more robust monitoring regime contained in the conditions it proposed to impose." The resource consent conditions, not the plan change.

Indeed even in relation to those consent conditions, this is little Roman (v), "The Board considered it had insufficient information on which to set water quality standards," even in the consent conditions. Instead it imposed what you could think of as pre-conditions that require King Salmon to gather baseline information and for King Salmon to appoint a peer review panel to recommend water quality standards and ongoing monitoring. So that's what you get out of the contested effects section of the Board's report on water quality.

The next section is about the plan change. This is (b) in the submissions –

ELIAS CJ:

Sorry, the question of law arising out of (a) –

MR PALMER:

The question of law arises because of (a) and (b) Your Honour.

ELIAS CJ:

I see. I'm sorry. Yes.

MR PALMER:

And so (b) is what it says in relation to the plan change.

ELIAS CJ:

Yes.

MR PALMER:

It explains that where, and this is (b)(i), this is the quote, "Where we have approved the [plan change] request, we have done so aware of the conditions of consent." So it didn't have the information that would allow it to understand the effects on water quality. It proposed in the consent conditions a process for getting it and on that basis it was happy to go ahead with the plan change itself.

GLAZEBROOK J:

And is your argument that if there – well, your argument presumably on five is that you can't even get off to a baseline start with a plan change if you don't have the baseline information?

MR PALMER:

That's –

GLAZEBROOK J:

On little five.

MR PALMER:

That was correct.

GLAZEBROOK J:

Your argument on four would be if you were going to impose conditions it should be conditions imposed on the plan and then there would be consequent conditions in any consent that might be granted rather than these particular consents. Is that the submission?

MR PALMER:

That's right, Your Honour, and in particular note the effect of doing this in the consent conditions. Because effectively I think what's happened, or I would submit, the Board has jumbled up its consideration of these issues. Instead of abiding by the requirement in section 148, 149P, to do first the plan change and then the consent, it has, for reasons of time probably, jumbled up its determination of what the effects were and then tried to fix those in the resource consent conditions, and the problem is that if it had fixed them in the plan change then when King Salmon came to go through the monitoring regime, obtaining the information and then applied for a consent, then my clients would have the opportunity of examining what information had come up through that monitoring regime and would have the opportunity of making submissions on the consent application in the context of all the information being available. So the effects of this, of the defect in process –

WILLIAM YOUNG J:

But that's a complaint that in a sense goes to the merits when you would have preferred the situation you've just postulated, but I don't – I mean, it's probably my fault but I don't really understand the contention that a plan change can't proceed on the basis that some issues will have to be addressed by conditions.

MR PALMER:

Yes, and – well, that would be a novel point, Your Honour, in terms of law in relation to these matters.

WILLIAM YOUNG J:

But a plan, something – I mean, my knowledge of – my exposure to this goes back so far that I'm going to use the expression "conditional use".

MR PALMER:

Right.

WILLIAM YOUNG J:

But it's quite common for uses to be provided for in a plan but on the basis that aspects of them will be, have to be addressed by conditions.

MR PALMER:

Yes, and what you would have in such a plan would be a – you might grant a particular status to the activity, so you could say that salmon farming is discretionary subject to meeting certain standards, and then you would have to be satisfied that those standards would mean that the activity can legitimately take place in terms of Part 2 of the Resource Management Act. But, if you were, then the applicant would need to apply for consents which demonstrated those standards are met, and that –

WILLIAM YOUNG J:

But is it not possible to have monitoring consents? Consents that have the effect that a particular activity can't carry on unless it continues to meet certain standards or its impact on the environment is monitored and if it's detrimental it stops?

MR PALMER:

Yes, but here we couldn't even specify what those standards are. So you could consider this to be a very pragmatic judgement. Parliament has said that you can look at plan changes and consents in the same process. We say that it is still adhering to the need to do it sequentially and that is because there are different considerations relevant in a plan than in a consent. Once you have changed the plan then anyone can apply for consents to use that activity, to undertake that activity in relation to that area, and you don't know what consents, conditions, are going to be imposed in the future on such applications. So the step of changing a plan is a different step, under the Resource Management Act, and it's crucial to the whole scheme of the Act, it's a different step than the step of approving a consent – a resource consent. So perhaps going to this question of whether first, my friend says there is no question of law here and in my learned friend's submissions his only comment, in fact, on the statement of the issue that Sustain Our Sounds offered, was to suggest that the question is more appropriately framed as was the Board entitled to approve the plan change on the evidence before it and given its factual findings. Now we say that's not the appropriate question but we say that is not, even that, even that formulation of it is a question of law. The word entitled –

WILLIAM YOUNG J:
It's not the sort of question of law I personally would be very happy to grant leave on because it looks really like a question of fact.

MR PALMER:
But it's not.

WILLIAM YOUNG J:
I understand that, I understand that, but it's very much, there's a sort of question of fact in there that's struggling to get out.

GLAZEBROOK J:
But you set out, in your proposed question you set out the particular findings which you say mean that it's not possible to have done it this way and as I understand it6, you say as a matter of law if you are going to have conditions that, if there are conditions that would mean that that was the only way the activity could be allowed, then those conditions have to be as a matter of law in the plan and not in the consent conditions, because that's the way the hierarchy operates. Now you may be right or wrong in that –

MR PALMER:
And that is a matter of law.

GLAZEBROOK J:
– but that is a matter of law.

MR PALMER:
Yes.

GLAZEBROOK J:
So you say as a matter of law that should be the case and the previous question is, that as a matter of law, a precautionary principle, which is principle 3 of the Coastal Policy Statement –

MR PALMER:
Yes.

GLAZEBROOK J:

– and implication in the Resource Management Act would mean that if you don't have the information then you can't make the plan change.

MR PALMER:

And that is also a question of law. There is no question of fact that we are challenging. We agree with the Board's findings on the facts. They didn't have the information. We are saying that it was the application of the Resource Management Act to those facts that they got wrong. Perhaps I can put it this way. Sustain Our Sounds says that the Resource Management Act does not permit a Board of Inquiry to change the status of salmon farming from prohibited to discretionary when it could not be satisfied about the key environmental effect that led to its own establishment as a Board. It could not be satisfied about the key environmental effects that led to its own establishment.

WILLIAM YOUNG J:

But couldn't that statement not in a sense be turned on its head? What was the evidence that led to salmon farming being a prohibited activity?

MR PALMER:

This was a decision made by the Marlborough District Council in an earlier plan change.

WILLIAM YOUNG J:

Yes but could it have been satisfied on the evidence that there could never be appropriate salmon farming? I mean can you be completely satisfied about something like that?

MR PALMER:

Well I think you could say that they were satisfied for the time being.

WILLIAM YOUNG J:

Yes but –

MR PALMER:

And to make something a prohibited activity rather than just controlled or some other status is a signal of how the Marlborough District Council considered the environmental effects in an integrated approach to the Sounds.

WILLIAM YOUNG J:
But they couldn't have gone through anything like the process that the Board of Inquiry went through. I mean there must have been little or no evidence on that issue compared to the vast quantity of evidence the Board of Inquiry had.

MR PALMER:
In terms of salmon farming?

WILLIAM YOUNG J:
Yes.

MR PALMER:
Yes, that's probably right that there was no, there was no applicant. I don't know. I don't know what evidence was before the District Council.

GLAZEBROOK J:
Well it might be that the lack of evidence meant the precautionary principle clearly applied so you made it prohibited rather than – if you didn't know what conditions would apply, and you had no information, then you'd probably have to prohibit.

MR PALMER:
There were some zones of the sounds where it was not prohibited, where aquaculture is permitted. So it's not that the Council made a decision that there should be no aquaculture anywhere in the sounds.

GLAZEBROOK J:
Okay.

MR PALMER:
There are some zones where it was, was not prohibited.

GLAZEBROOK J:
But they were mussel mostly, were they, although there are salmon as well?

MR PALMER:

Mainly marine farm, mainly mussel farms, shellfish, but there's also some salmon farms as well.

GLAZEBROOK J:

So there's some there. Well, yes, because there was an issue of –

McGRATH J:

But there's nothing in the particular zone, is there? It's in zone 1.

MR PALMER:

I'm sorry, Your Honour?

McGRATH J:

There is a zone in which there is no aquaculture, is there not?

MR PALMER:

Yes, and that is where –

McGRATH J:

And that's what we're concerned –

MR PALMER:

That's what we're concerned about here.

McGRATH J:

For places within that zone, yes.

MR PALMER:

So we say that the RMA does not permit the Board to change the status of salmon farming in this way when it could not be satisfied about the key environmental effect that led to its own establishment. We say that is inconsistent with the Board's power to change the regional plan, which it does under section 66 of the Act, and perhaps it would be worth just focusing now on section 148P – 149P, I'm sorry – because 149P is the section which governs the consideration of these matters by the Board, a

Board of Inquiry, and we see at subsection (1), 149P(1) – does all the Court have copies of this? I do have hard copies if anyone –

GLAZEBROOK J:
I'm just getting one up.

ELIAS CJ:
Yes.

MR PALMER:
149P(1) says, "A Board of Inquiry considering a matter must (a) have regard to the Minister's reasons for making a direction in relation to the matter," and, of course, here we have a Minister making a direction that this is a matter of national importance in part and we would say in, to a substantial extent, because of the potential effect on water quality.

And then if we go down to subsection (6), we have the power granted to a Board of Inquiry in relation to a change of regional plan. 6(c), "Must apply sections 66 to 70B and 77A to 77D as if it was a regional council." Those are the usual decision-making sections for changing a regional plan that are applied by Council and they, because they sit in this nested hierarchy, in particular they are subject to Part 2 of the Act, the sustainable management principle in sections (5) to (7), and it has to be said that those sections do provide, place, some primacy on the question of water quality, and you can see that running through the Act as well. If we were in a substantive hearing, I'd take you to them.

So, and then in subsection (8) of 149P we have the sequencing section. "A Board of Inquiry considering a plan change request and its concurrent application... must, firstly, determine matters in relation to the plan change request; and secondly, determine matters in relation to the concurrent application." And if, if it is correct that in determining the plan change request you can have regard to factors irrelevant to the consent conditions then that is a significant issue of law which the High Court judgment frankly stands for and which, in the submission of Sustain Our Sounds, subverts the scheme of purpose of the RMA, and that would apply in relation to all aquaculture activities in the future.

There is a minimalist answer to this question of what the question is and why it's a question of law. The minimalist answer is the *Edwards v Bairstow* [1955] 3 All ER 48 (HL) approach. So if the Court were not to accept the arguments I've been making –

ELIAS CJ:
That's, of course, a terrifying prospect –

MR PALMER:
It is.

ELIAS CJ:
– for a second appeal Court.

MR PALMER:
Yes.

ELIAS CJ:
And rather does push you to the Court of Appeal at best.

MR PALMER:
I understand Your Honour and I'm not particularly placing a lot of weight on it but, because I think that the first argument is the best one.

ELIAS CJ:
Although your point on the *Edwards and Bairstow* point, is that, is quite a confined one.

MR PALMER:
It's a confined discrete issue –

ELIAS CJ:
Yes.

MR PALMER:
– and it must be a question of law, just to answer my friend's assertion that we're not dealing with questions of law, that is a question of law.

WILLIAM YOUNG J:

Sorry, a question of law that whether you can take into account, like your consent conditions when approving a plan change?

ELIAS CJ:

That you had insufficient information to make the plan change.

GLAZEBROOK J:

Insufficient information and if, as I understand the second argument is, if you were going to say that the only way that this activity is allowable, you should have at least the umbrella in the plan change itself and then the consent conditions relate to that umbrella. They maybe more detailed but you should have an umbrella so that you would have something that would say, well you can only have a salmon farm if the effect on water quality is Z, less than Z, and I'm not sure whether it's measured that way, so excuse the...

MR PALMER:

And here the plan change that was granted was the plan change that was requested which has in it –

GLAZEBROOK J:

Maximum –

MR PALMER:

– maximum feed discharges about which the Board expressed it's concern there was a fundamental failing about their effects. That was in the plan change.

McGRATH J:

Is your *Edwards v Bairstow* point arising in 2(c) of your questions or is it arising earlier?

MR PALMER:

Are you, Sir are you looking at the statement or –

McGRATH J:

Yes.

MR PALMER:

– question of law, yes.

ELIAS CJ:

Sorry, which paper is that?

McGRATH J:

This is the statement of questions of law in response to our minute.

ELIAS CJ:

Right.

GLAZEBROOK J:

It's a precautionary principle, as a shorthand, if you don't have any information you can't do it, but the second issue is if you did say it's only available in these circumstances you should have actually set the maximum in the plan itself rather than allowing maximum feed levels about which you had no idea the effect on water quality.

MR PALMER:

Yes, although that's not quite the *Edwards v Bairstow* issue.

GLAZEBROOK J:

No, no, I'm trying to get the, because I'm not, I probably share the Chief Justice's concern about the *Edwards v Bairstow* formulation of the question, it's too wide, so I'm trying to narrow it down to the points you say are points, specific points of law, because it seems to me that of course you can take account of particular conditions, if they would remove the environmental effects then one would have thought you could take account of that. Your argument though is that you should, if there are particular conditions that can remove it, they should be referred to in the plan change themselves so that any consents are conditional on meeting those conditions that would remove the environmental effects.

MR PALMER:

Especially when you're setting up a monitoring regime because you don't have the information.

GLAZEBROOK J:
Well that's another matter, yes.

WILLIAM YOUNG J:
Can I, just so I understand the argument –

McGRATH J:
I'd just like my question answered –

WILLIAM YOUNG J:
Yes, sorry, sure.

McGRATH J:
– before we go on another diversion.

MR PALMER:
I'm sorry Your Honour, what was the question?

McGRATH J:
My question was, is *Edwards v Bairstow* principle really coming under limb (c) of your question 2? I was trying to place it.

ELIAS CJ:
Well was it lawful given that –

MR PALMER:
That's right, it actually comes under the lawful, the lawful –

McGRATH J:
Earlier?

MR PALMER:
Yes so – but those (a)(b) and (c) are all reasons why –

McGRATH J:
Yes.

MR PALMER:

– there was no basis, it was not tenable, for the Board of Inquiry to make the decision it did. So perhaps I –

McGRATH J:

Which is the *Edwards v Bairstow* point?

MR PALMER:

Exactly.

McGRATH J:

You've answered it, thanks. It's, what you're saying is it arises throughout.

MR PALMER:

Yes. And the analogy is probably with the *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2011] NZSC 138 case, that this Court delivered in relation to *Edwards v Bairstow*, where the Court found that the Commerce Commission there, when it realised it had a flawed methodology, should have reappraised the situation, and formed by the complaints about the methodology, and should have concluded that it must not continue to use that methodology, that's what the court found there, and the same, the same point could be made here. Once the Board of Inquiry realised that it had a flawed model, it wasn't giving it the information it needed to make its decisions, it should have reappraised the situation and concluded it should not use it. So that's the *Edwards v Bairstow* point.

McGRATH J:

Thank you.

WILLIAM YOUNG J:

This – I mean, I can understand an argument that as a matter of good drafting practice the District Plan should, the plan should contain – be as prescriptive and as definite as possible, leaving discretion reserves on only a limited basis, so that the more open-textured the plan, the more that's left to the individual discretion of the consent authority, the worse. Okay? Now, but where I'm more doubtful is whether a failure to conform to best practice is an error of law. Now you're saying no reasonable Board of Inquiry could have come up with this plan based on the

evidence before it, which is an *Edwards v Bairstow* point. Is there a particular provision in the Act which you rely on as pointing to the unavailability of the approach adopted? Is there any section that says in approving your plan change you can't take into account likely consent conditions? I mean, is there anything concrete that you can point to as opposed to what in the end may just be an *Edwards v Bairstow* argument?

MR PALMER:

No, it's not a specific provision that says you can't do that. It's the scheme of the Act, which is why it's difficult to articulate.

ELIAS CJ:

And isn't it the whole balance that's required by the sustainable management criteria and so on, that you – if you're not in a position to know whether it's sustainable, you can't approve?

MR PALMER:

Perhaps I could direct the Court to section 66, because this is the empowering section for a Regional Council changing a Regional Plan. It says, "The Regional Council shall prepare and change any regional plan in accordance with its functions under section 30, the provisions of Part 2, its duty under section 32," so the provisions of Part 2 being invoked there takes you straight back to the Part 2 purpose and principles, and when you apply the purpose and principles to this situation where you do not know the key environmental effect, we say the application of sections 5 to 7 by the Regional Council under section 33, or here the Board of Inquiry, section 66, must mean that on their own findings that it is not available to them to make – to change the plan.

McGRATH J:

Well, that point is really an administrative law point that the powers are being exercised for a purpose that's contrary to the purposes for which they're given.

MR PALMER:

Yes.

WILLIAM YOUNG J:

Well, I just sort of still haven't got my head around it.

ELIAS CJ:

Well, is the substantive point, anyway, so we're not really embarked on that. You don't need to get your head around it.

MR PALMER:

Well, you might.

WILLIAM YOUNG J:

Can I just say there is a problem because if you take too broad approach every decision by a consent authority or other decision maker under the Act can be challenged on a point of law because someone says it doesn't – it's not an outcome that's consistent with the principles of the Act because we think something else would be more sustainable.

MR PALMER:

And I do understand that point, Your Honour, and it is a point that resource management lawyers make in order to convince every High Court appeal that it is all a matter of weight and don't go there, and, with respect, the purpose and principles of the Resource Management Act must have something to do with a decision made under the Act.

WILLIAM YOUNG J:

Well, I think even I agree with that.

MR PALMER:

And this is frankly an extreme example of a situation where on its own findings of a fundamental failing in the evidence a decision maker has not acted consistently with the purpose and principles of the Resource Management Act on its own findings. So I do understand why at first glance it can seem to be all about facts, but there is no fact we're challenging. It is really a question of law and it is a question of law at a reasonably high level because it goes directly to what the purpose of this Act is.

And reading sections 5 to 7, about the importance of sustainable management and, in particular, 5(2)(b), "Safeguarding the life-supporting capacity of water". You can see where the argument goes.

ELIAS CJ:

Mr Palmer, I had hoped that this hearing was going to be a little shorter.

MR PALMER:

Yes.

ELIAS CJ:

But I think, as it won't be, and I'm not being critical because it's very engrossing, I will take the adjournment.

COURT ADJOURNS: 11.36 AM
COURT RESUMES: 11.52 AM

MR PALMER:

I am conscious it is going a little longer than I was expecting it to but I do take heart from the suggestion it might be engrossing. Perhaps I can move on to a couple of final points and that is why this question, which I hope I have now established is a question of law, is of general or public importance and why the exceptional circumstances apply.

My friend in his submissions makes the suggestion that is the question of law which must be of general or public importance, not the proposal generally, and I do think there is some difficulty with that proposition. The context that is affected by a question of law, in my submission, cannot be ignored in assessing the importance of a matter, which is a word used in the Supreme Court Act. The importance of a subject matter –

ELIAS CJ:

A matter? Have we got – sorry it's just it's such a striking term given the Australian legal arguments about when a matter arises, I've never thought of that. Which section are you talking about?

MR PALMER:

I'm looking at section 13(2)(a) of the Supreme Court Act.

ELIAS CJ:

I see, yes. You're not suggesting any particular technical –

MR PALMER:
No, in fact I'm almost suggesting the opposite.

ELIAS CJ:
All right, good, thank you.

MR PALMER:
I think – my friend is suggesting that it has to be the legal issue which is of general or public importance and I'm saying you need to see the legal issue in the context of the effects that it has on people.

ELIAS CJ:
Yes.

McGRATH J:
So do we assess this question by how much space it's got on the front page of the *Dominion*?

MR PALMER:
No. I think that would be a bad guide to anything Your Honour. But I was addressing the Court on another matter –

ELIAS CJ:
But however, in connection with an appeal on point of law only, can you really maintain that position, because it's the point of law that has to be the matter –

MR PALMER:
There has to be a point of law and the matter must be of general or public importance.

ELIAS CJ:
All right.

MR PALMER:
And to take another recent example, which I had the privilege to address Your Honours on recently, the question of whether in an excise context something is

involved in the production of something else is not in itself a matter of general or public importance. The interpretation of those words is not of importance. It is of importance because of the effect of the interpretation of those words. The effect on the excise regime generally. So it is not particular words that must be, that must be of general or public importance in my submission. Now here we do have what Sustain Our Sounds says is a matter of general or public importance whether you characterise it in a very narrow way of, for example, does section 149P, is that breached by what the Board of Inquiry has done, or in the more general sense, which I have been advocating, which is that the decision is inconsistent with the scheme and the purpose of the Resource Management Act.

ELIAS CJ:
Well are they different because 149P imports the scheme –

MR PALMER:
Yes, it leads –

ELIAS CJ:
Yes.

MR PALMER:
– it leads to, but in terms of framing the issue one could take a very narrow approach to it, which is what not I'm favouring. But the boarder formulation, which is the formulation in the question of law that I've offered to the Court, must, even on its face, be a matter of general or public importance because it goes directly to the interpretation of the purpose and principles of the Resource Management Act and is relevant to the way in which that Act is construed as a general matter. I believe I'm right in saying that there is no Supreme Court authority directly on that important matter considering in depth the purpose of the Resource Management Act and how those sections are to be construed in the way, for example, that there is in relation to the Bill of Rights Act. And that, I would say on behalf of Sustain Our Sounds, is a matter of general or public importance. It is important in its own right but it is even more important when you take into account the effects here.

So two things. Firstly, the precedent effect, because the interpretation of the Act in relation to the principles and purpose, and the scheme of the Act in terms of the relationship between plans and consents, is a matter of general importance. We say

the criteria is satisfied. But in addition the way in which that manifests here is in relation to a Board of Inquiry's determination on a matter of national importance and the submissions of Sustain Our Sounds go through the ways in – the factors that were relevant to the Minister determining that it was a matter of national importance, and perhaps I can just direct you to it, rather than taking you to it. Paragraph 4.3 of our submissions details the way in which, for example, the Marlborough Sounds is a place of national significance. The fact that the proposal would involve the discharge of a significant number of tonnes of, 40,000 tonnes of fish feed into the coastal water of the Marlborough Sounds.

ELIAS CJ:
We have read this Mr Palmer.

MR PALMER:
Yes. So those factors also, we would say, I would say, on behalf of Sustain Our Sounds indicates that you have a matter of general or public importance. Perhaps I could add in parentheses that it seems clear from the Board's report that Board's of Inquiry which seem to be assuming an increasing significance in decisions under Resource Management Act could do with an authoritative statement of the requirement that they adhere to the law.

So then there's a question, the final question, is why this is a matter of exceptional, or whether this is a matter of exceptional circumstances being pertaining to the situation, and I think in some ways, from the position of Sustain Our Sounds, a hearing in either the Court of Appeal or the Supreme Court would give us what we really want, which is the opportunity to argue this case, but frankly stepping back from this, my submission is that this is the sort of case that you would expect the Supreme Court to be dealing with because it goes to that fundamental construction of the principles and purpose of the RMA and because it goes to that fundamental aspect of the scheme of the RMA to do with the relationship between plans and consents.

So I will just leave that there for the Court to consider in relation to whatever threshold test the Court develops in relation to the first part of our discussion this morning.

Unless there's anything else I can assist the Court with?

ELIAS CJ:

No, thank you, Mr Palmer. Mr Kirkpatrick?

MR KIRKPATRICK:

Thank you, Your Honour. May it please the Court, if you have to hand the memorandum of the Environmental Defence Society of 20 September in response to the Court's minute, and then the two memoranda in response to that, King Salmon's of 27 September and the Crown of 27 September. EDS took the opportunity to modify the first question it posed by adding particulars in sections 1.1 and 1.2 in order to clarify what was otherwise the generality of question A. In my submission, this properly identifies two issues of statutory interpretation. 1.1 focuses on the text of the most relevant policies, being 8, 13 and 15, and then those must be considered in light of section 67(3)(b), which is give effect to in terms of the NZCPS, but also what will be relevant will be section 66, which is not mentioned there but which my friend just referred to in terms of the empowering provision where it says in accordance with Part 2.

Then question 1.2 is a question –

ELIAS CJ:

Can I just ask, that formulation, would you – I just wonder whether it's putting things round the wrong way. Isn't the issue whether the approval was in conformity with the law?

MR KIRKPATRICK:

Yes, Your Honour. Yes, in – and on that basis –

ELIAS CJ:

So that's your second sentence, I suppose, but –

MR KIRKPATRICK:

Well –

ELIAS CJ:

– it's just that your first sentence looks pretty diffuse.

MR KIRKPATRICK:

I accept that, Your Honour.

ELIAS CJ:

And also really probably not contentious.

MR KIRKPATRICK:

Well, no, I think it is contentious in terms of the revised questions that have been put forward, which is the veto point. But certainly, Your Honour, the second question, which is compliance with section 67(3)(b), that is the – in my submission, that is the fundamental issue of statutory interpretation, but it does require then a consideration of what the NZCPS states so that it can be given effect. But yes, Your Honour, whether the Papatua plan change did or did not comply with section 67(3)(b) is at the heart of the first question.

1.2 raises a counter-argument, to be found in both the Board's decision and in the High Court decision, which is that give effect to is not as directive as EDS will submit it is but is subject to the broad – the overarching judgement, the balance judgement, the assessment in the round. Now that goes all the way back to the New Zealand Rail decision, *New Zealand Rail Ltd v Marlborough District Council* [1004] NZRMA 70 (HC), which was a decision on an application for resource consent, not a plan change, and so a principle issue for EDS is whether or not that approach, which is an approach, in my submission, undertaken under section 104 of the Act in relation to consents, is appropriate or lawful when one is looking at section 67(3)(b) in terms of giving effect to a national policy statement.

Now both respondents have suggested alternative wording which in my submission isolates elements of the argument rather than identifying the question of law. They raise the issues about prohibition or veto and in my submission that's part of what will have to be considered but it is not the primary question, and in my submission it – the restated questions put forward by my friends on behalf of their clients go too far essentially down a track of argument rather than identifying the question of law.

ELIAS CJ:

Sorry, I'm just trying to find the piece of paper that that's on. I haven't got it very well organised.

MR KIRKPATRICK:

Page 1 of King Salmon's memorandum of the 27th of September, paragraph 2, 2(a), and the Crown's memorandum, paragraph 2.

ELIAS CJ:

Thank you.

MR KIRKPATRICK:

I don't doubt that the matters raised by King Salmon in 2(a) will be the subject of argument if the matter is to be heard before this Court, but in my submission they are within the scope of the primary question.

ELIAS CJ:

This is addressed at the "give effect to" point.

MR KIRKPATRICK:

Yes, yes, it is, that's right.

ELIAS CJ:

So if one were to avoid the loaded language –

MR KIRKPATRICK:

Yes.

ELIAS CJ:

– is the question whether "give effect to" means "comply with"?

MR KIRKPATRICK:

Yes, and whether there are statements within the New Zealand Coastal Policy Statement that can be complied with or alternatively whether they all pull in different directions so that overall compliance may not be possible, which is then the second element which is the broad, overarching judgement. And that's why, in my submission, it is appropriate to break the general and admittedly diffuse question into parts like that.

McGRATH J:

You use the term "this includes" which rather suggests –

MR KIRKPATRICK:

Yes, and I –

McGRATH J:

– that you might be having a few things up your sleeve, not yet known about possibly.

MR KIRKPATRICK:

Absolutely not, Your Honour. I noted that as I was preparing to address you and I've put the word "particulars" against the word "includes".

McGRATH J:

You did, yes.

MR KIRKPATRICK:

And I'd be quite happy to amend the words "this includes" to be, simply to say "particulars".

McGRATH J:

Thank you.

MR KIRKPATRICK:

Now the only other thing is my friend, on behalf of the Crown, has suggested that our question may relate to each policy in the NZCPS. EDS does not seek to bring each policy before you. The document will have to be considered as a whole but the focus is on policies 8, 13 and 15, because that is where the issue arises in both the Board of Inquiry decision and the High Court decision. There are other relevant aspects of the NZCPS but those are at the heart of it.

Now then in relation to the second and distinct question that EDS wishes to raise on page 3 of its memorandum of the 20th, and that's the *Brown v Dunedin City Council* [2003] NZRMA 420 (HC) matter, the question of consideration of alternatives, the counsel for the Crown has not advanced anything in relation to that. Counsel for King Salmon have at the top of page 2 of their memorandum set out a slightly revised version.

GLAZEBROOK J:

Can I just indicate that I actually did work my way through the Board of Inquiry report, and managed to keep awake, but having said they weren't going to discuss alternative sites, they then went through the evidence in great detail of the alternative sites that had been suggested and the reasons why, and came to conclusions on those, so is the point of law while important really moot in the sense that they did consider everything that had been put forward and then came to quite specific conclusions as a matter of fact, that those alternatives were not viable alternatives?

MR KIRKPATRICK:

Yes –

GLAZEBROOK J:

There was a huge, obviously quite a lot of – no evidence put forward on alternative sites but there had been a lot on cross-examination as I understand?

MR KIRKPATRICK:

Well in fact I believe that King Salmon's material in support of its application or applications for the plan changes did go through some degree of alternatives and I'm conscious of the mootness point Your Honour. When one looks at policies 13 and 15 one sees that choices are contained within the text of the policies depending on the character, the natural character or the landscape character of the sites that are involved. And while it is, it would be correct to say that the Board did pursue a range of alternatives, there is still the problem that the manner in which the *Brown v Dunedin City Council* decision is referred to as it stands, and notwithstanding what the Court went on to decide, is a stopper to what EDS will be submitting ought to be done in terms of policies 13 and 15 of the New Zealand Coastal Policy Statement. So while I've said that question B is a separate and distinct question, it relates at least to that extent and I expect that –

GLAZEBROOK J:

Well you have limited it I suppose to say outstanding coastal landscape so –

MR KIRKPATRICK:

I'm obliged to my friend who counsel for King Salmon in fact have tightened the wording of question B further in that regard and so EDS would be happy with the King Salmon suggested wording.

McGRATH J:
Of question B?

MR KIRKPATRICK:
Of question B, yes Sir. Not – we stand by what we put forward in terms of question A with its subparts but we're happy to accept that, as Her Honour has pointed out, better definition is provided by the King Salmon formulation.

I'm conscious of the terms on which I was invited to speak Your Honour. Unless I can assist further you have the submissions in relation to leave generally and all I would then be doing would be treading into the merits issues, I suspect, if I were to go further. So unless I can assist?

ELIAS CJ:
No thank you Mr Kirkpatrick.

MR KIRKPATRICK:
Thank you very much Your Honour.

MR BUTLER:
Your Honours if I can just have a moment just to get my papers sorted?

ELIAS CJ:
Yes of course. Do we have anything like a text of where people have got to on these various – I suppose it's been sufficiently indicated, that we can work off Mr Butler's as to question B.

MR KIRKPATRICK:
Yes Your Honour.

ELIAS CJ:
Yes, all right, thank you.

MR BUTLER:
Thank you Your Honours. I had hoped that we might be able to avoid getting into some of the detail around what might be regarded as some of the merits of the case.

ELIAS CJ:

Well I think it isn't necessary to go into the merits. If there was anything you need as a matter of burning urgency to correct, do so, but we won't be getting into the merits in this determination.

MR BUTLER:

Indeed. Perhaps then if I just outline to Your Honours where I'm going to go to or how I might be helpful to you in terms of deciding whether to grant leave or not. Obviously I'm going to split my short submissions into SOS and EDS. In relation to SOS I would like to talk a little bit just to the question I think that came, or the issue that was raised by Your Honour Justice William Young in relation to what the content of a plan typically might be. What you would expect to see in a plan and what you might see in a resource consent. The short point for us being that in fact when you look at the plan, which I will take you to, you will see that there is a huge amount of detail that is actually provided for in the plan arising out of the evidence that was heard by the Board of Inquiry, and I think it's very important that we don't talk abstractly about what this plan is, that's in issue, but we actually have a look and a feel for what the plan actually is and compare it, for example, to what the current plan is in relation to the CMZ 2, and I'd like to draw your attention there just to give the Court some comfort as to how it is that the Board of Inquiry went about its exercise here and to show that what the Board did here is exactly what you'd expect the Board to do, which is it brought its experience to bear in light of all of the evidence that was put before it, and it exercised its expert judgement to achieve the purposes in Part 2, which it repeats on numerous occasions, as Your Honour, Justice Glazebrook, will know through having done the same exercise as I have done many times, to say that what we are ultimately here to do is to give effect to the purpose identified in section 5 and to give appropriate weight to the matters listed in section 6 and in the relevant planning documents. So I just think it's important that one has a feel because sometimes when one talks abstractly about these issues, a case can take a particular tenor or a lustre, but when one actually sees what the documents are things become clearer.

ELIAS CJ:

So what's the point – the point that you are taking us to this is to indicate that there is a significant amount in the plan.

MR BUTLER:

Correct.

ELIAS CJ:

That's all, yes.

MR BUTLER:

And it goes to the *Edwards v Bairstow* –

ELIAS CJ:

And on water –

GLAZEBROOK J:

And on water quality?

MR BUTLER:

And on water quality, and I would like to then take you to aspects of the resource consent conditions which address that particular issue as well. So these are all matters or appendices –

ELIAS CJ:

But why do we need to go to those, because we're concerned only with the sequencing and the plan?

MR BUTLER:

Correct, correct.

ELIAS CJ:

Yes.

MR BUTLER:

So, but in terms of understanding how sequencing actually works on the grounds or on the water, I suppose, if I can allow myself a dreadful pun, it's important to see the two relevant planning documents, one of which is the plan.

ELIAS CJ:

Well, it may well be when we get into the merits but why is it necessary for these purposes?

MR BUTLER:

Because if what one is looking at is an *Edwards v Bairstow* type situation as advanced by my learned friend, Dr Palmer, it's important I think to actually identify what it is that the question of law is alleged to gather around, to coalesce around, to have an understanding as to whether in fact his point of law that he's tried to advance is in any way arguable.

ELIAS CJ:

All right.

MR BUTLER:

All right. So I just think that's quite important that Your Honours have a feel for that, and then I would like to properly contextualise what it is that you've heard from my learned friend in relation to the water quality issues that were identified by the Board, because I think that's, from our perspective, terribly important. If I can just again summarise where I'm going to go to with that so you have a bit of a feel for the pathway. Yes, it's correct to say, as my learned friend says, that the Board of Inquiry expressed some disquiet from its perspective as to some of the modelling that was done in respect of water quality.

The first point, however, which I will take – and I will take you to the relevant extracts of the Board of Inquiry if that's necessary, is that in terms of the initial discharge of feed the Board was not unhappy with the modelling. So that's very important. So in terms of setting the baseline and knowing what the initial discharge of feed is going to be, the Board was happy with that and said the modelling was conservative. So in terms of the concern that the Board of Inquiry expressed, it was on the going forward situation from the initial discharge of feed, and that's very important. Why is that important? Because it was in respect of the going forward situation beyond the initial discharges that the Board of Inquiry said, "Well, that's where we've got a bit of gap in the evidence. The gap in the evidence through the modelling is at a quantitative level but we feel that we can manage that through (a) qualitative measures. We're comfortable about qualitative measures and assessment criteria that we can adopt, and then what we will do is we will put in place monitoring mechanisms in the resource consent," and they are very detailed which is why I want to take you to them

so you'll see why it would be inappropriate to place those into a plan. They are very detailed monitoring requirements which, if not complied with, are a stop to any further discharge of feed into the water column, and, in addition to that, the resource consent conditions allow for periodic review by the Marlborough District Council at any stage in respect of any concerns it might have as to, for example, effects on the water column. So that's what I – that's why I just wanted to make sure that Your Honours have a full picture and a full understanding –

ELIAS CJ:
But is this a fuller picture than you've provided in your submissions?

MR BUTLER:
No. What I do in my submissions, Your Honour, that's a fair point, in my submissions what I do do is I provide that fuller picture with quite extensive references to the relevant material both in the Board of Inquiry decision and also obviously in the plan, the resource consent and in the High Court. What I wanted to get across, however, was that my sense from some of the exchanges that the Court had with my learned friend and Dr Palmer was that some of the points that I might have been making there might have been hidden, so to speak, because they were located in the footnotes.

ELIAS CJ:
All right.

MR BUTLER:
Because I haven't produced great extracts in my submissions.

GLAZEBROOK J:
You might want to deal with the two year issue in respect of a number of those sites in terms of gathering information.

MR BUTLER:
Yes.

GLAZEBROOK J:
Which you haven't mentioned.

MR BUTLER:

No that's right and I think what I can do in regards to that, they're all matters that are addressed very specifically in the resource consent conditions starting from –

GLAZEBROOK J:

Yes I must say for myself I'd be very interested in that in the substantive hearing.

MR BUTLER:

Yes, agreed.

GLAZEBROOK J:

I'm not particularly interested in it in the leave hearing in the sense that they're obviously very, very important in the substantive hearing.

MR BUTLER:

Absolutely and I suppose from my perspective, without wanting to spend a huge amount of time delving into them, they are also important. However, if what I'm confronted with is an *Edwards v Bairstow* argument, because the effect of that is to say that no reasonable, in a sense no reasonable decision maker of the sort of the Board of Inquiry, almost like a *Wednesbury* type of situation, could have come, could have addressed the issue in the way in which it did and come up with the answers in the way in which it did. So difficult for me to counteract that at a leave hearing without an ability to at least demonstrate to the Court the extent to which the Board of Inquiry, this expert Board with a very experienced retired High Court Judge and a very experienced Environment Court Commissioner, well understanding their duties under part 2, I don't think those people would require any tutoring from the Court necessarily as to the obligations to abide by the law, I pick up the phrase from my learned friend Dr Palmer. How it was that they went through very carefully, I think it Your Honour Justice Glazebrook, having read it, will agree it's a very thorough and very careful report, and worked his way very carefully through the issues, always in terms of part 2 and the purpose under section 5. And so that for example in relation to this fundamental failing which is the phrase plucked, contextually my submission, from the Board of Inquiry decision by my learned friend Dr Palmer, what one's got to do is get a feeling for well what, what is the nature of the fundamental failing and how did the Board of Inquiry, very mindful of its part 2 obligations, go about dealing with that issue and the answer is in a combination of the plan change that is approved, very extensive plan change, and very detailed for a plan, and also by the conditions

of the consent. In other words, taking you to some of those documents can allay your fears this will not be the right case in my submission –

ELIAS CJ:
But those fears are not going to be addressed in this hearing. I'm a little concerned – well perhaps Mr Palmer's opened this up sufficiently –

MR BUTLER:
I think he has.

ELIAS CJ:
– for us to let you run a little bit but please keep it confined Mr Butler.

MR BUTLER:
Yes, I totally understand the message, I didn't want to run –

ELIAS CJ:
We've had a long prefatory start to it so perhaps just take us to it and perhaps you could do it by reference to the submissions that you've made?

MR BUTLER:
Yes, well I was thinking that that might be a useful way of doing it Ma'am, thank you.

ELIAS CJ:
Yes.

MR BUTLER:
That's exactly what I was going to do. But if I could, just before i come to those submissions, there's one document, I don't have a photocopy of it, but I just wanted to give you a bit of a feel, and particularly in light of what His Honour Justice William Young had to say in terms of what the normal content of a plan might look like so in terms of CMZ 2, so the area in which marine farming can take place, I can have copies made up afterwards if need be, so that's it, that page there with a little diagram and the very top of the following page. When you actually look at the plan change that's approved in this particular case what you'll see is we've got four pages worth of detail in relation to how the plan should occur so in terms of what the norm is, or best practice, I just think in terms of the volume of the material that is

actually placed in this plan change, it's a very significant amount of detail that's in there.

So I can take you first then to the submissions that we filed in relation to the SOS appeal, or application for leave to appeal dated 6 September and if i could turn to the background, so page 3 of those. Do Your Honour's have those before you?

ELIAS CJ:
Sorry, what do you want us to look at?

MR BUTLER:
Yes, so page 3 of the –

ELIAS CJ:
Your submissions, yes.

MR BUTLER:
– my submissions dated 6 September on the SOS appeal. And so what I do at the very top, just in response to Your Honour, Justice Glazebrook's comment about the two year issue is in paragraph 7(a), just note that no discharges of feed and therefore no nitrogen may occur until one or two years of comprehensive baseline monitoring of the relevant coastal space has been undertaken. So in other words there has to be that first –

ELIAS CJ:
Did you say 7(a)?

MR BUTLER:
Yes.

GLAZEBROOK J:
He means 5(a).

ELIAS CJ:
Thank you.

WILLIAM YOUNG J:

I think it's 7(a), isn't it?

MR BUTLER:

I think it is 7(a). Are you looking at the EDS?

GLAZEBROOK J:

But you see – well, I don't know, on the submissions I've got it says 5(a) so…

MR BUTLER:

That could be the EDS submissions.

ELIAS CJ:

It is the EDS one, sorry.

MR BUTLER:

Sorry, we filed two.

GLAZEBROOK J:

Well, it says, "Respondent's submissions in opposition for application for leave," but…

MR BUTLER:

Yep.

McGRATH J:

There are two parties, two submissions for two applicants?

ELIAS CJ:

7A.

MR BUTLER:

We filed two sets of submissions, one to SOS and one to EDS.

ELIAS CJ:

Yes, thank you.

GLAZEBROOK J:

But you see isn't that what's complained about in terms of a precautionary principle as a matter of law? So yes, it's not going to have an effect on the environment but isn't the issue whether that can, a plan change can be made in that, and I'm not suggesting necessarily that that issue would be decided in favour of the would-be appellant, but that is the issue, isn't it?

MR BUTLER:
So that is the issue as –

GLAZEBROOK J:
I – ie, you can't on a precautionary principle without having that information.

MR BUTLER:
That's certainly how the issue has been –

GLAZEBROOK J:
So that's the issue –

MR BUTLER:
– advanced by my learned friends and –

GLAZEBROOK J:
– and the question of law that's advanced.

MR BUTLER:
Correct, and so that my –

GLAZEBROOK J:
So it doesn't help that issue to say, "Well, that means there won't be an effect on the environment for two years."

MR BUTLER:
Agreed, so –

GLAZEBROOK J:
Or one year, depending upon which area.

MR BUTLER:

Or one year, depending on which way it goes. The only point I wanted to make in regards to that is that what my learned friend has to do I think in order to convince Your Honours to grant leave either before this Court or the Court of Appeal is to convince that there is an arguable question of question of law which he can advance, and his proposition, it seems to me as I understand it, is to say wherever you've got a situation where you can't be 100% sure as to what the effects might be on the environment because –

GLAZEBROOK J:

No, I think the proposition is when you have no information whatsoever so that you have to spend one or two years gathering it, you cannot as a matter of law under the precautionary principle both in the Coastal Policy Statement policy 3, I think it is, and in terms of the sustainable management provisions in Part 2, change a plan to allow something even as a discretionary activity when you don't even have that baseline information. As I understand it, there's also a natural justice point in the sense that the people who want to make submissions on that are not going to be able to make submissions on the basis of the information that then the consents will be granted and the levels will be set. That's the argument. I – whether it's right or not is –

MR BUTLER:

I think that's an argument and I suppose what I'm trying to say to Your Honour is in short is I just don't see how they can be arguable. The first point can't be arguable because, as the Board of Inquiry made very clear throughout the process, and if you read the preface, everybody had an opportunity to be able to submit on –

GLAZEBROOK J:

But not –

MR BUTLER:

– on conditions.

GLAZEBROOK J:

– not on the basis of the water quality information that is going to be gathered post the hearing. At the hearing there was no water quality or baseline information. That – and it's not, it's just a, whether that is a question of law. It's not even really whether it's – if it's totally unarguable, but it's difficult to see how it's unarguable

because they certainly were not able to make any submissions on information that had not yet been gathered.

MR BUTLER:

And they could make, they could and did make submissions that in the absence of that type of evidence a precautionary approach would say, "Don't approve the plan allowing for any discharge beyond, say, the initial maximum feed." That would have been one possibility. My point simply in reply on behalf of King Salmon is that making that call, so long as the Board of Inquiry properly instructed itself as to the precautionary principle, which it did, so long as it correctly identified, which it did, that adaptive management techniques are available to it to give effect to the precautionary principle, then the Board of Inquiry has properly instructed itself as to where its legal duties are, it then makes an assessment on the facts as to whether or not a, it's satisfied they've got enough information in terms of the initial maximum discharges –

GLAZEBROOK J:

Well that's your submission and it may well be successful at a hearing but the submission, as I understand it, of Mr Palmer is much more fundamental where it says that you just cannot do that. Instructing yourself an adaptive management is not sufficient to meet the precautionary principle that is required as a matter of law.

MR BUTLER:

And he's not –

GLAZEBROOK J:

Now he might be wrong.

MR BUTLER:

And –

GLAZEBROOK J:

And you would submit that he is.

MR BUTLER:

I say he certainly is, absolutely, because in a sense what it does is it subverts the precautionary approach again. I'm trying to resist getting involved in the merits of the

issues but I am conscious of the fact that the question has to be arguable and it has to be argued in the sense as to what the direction is that will come from this Court, which is on questions of law. So as I said it seems to me he's on very thin ice if he is arguing that a Board that has properly instructed itself that it must have regard to part 2, that it must apply precautionary principle, and that knows through its experience that there are a range of techniques that are available to it which it has adopted here, to plug the gap, so to speak, in relation to information or uncertainties, uses those techniques –

ELIAS CJ:
But whether it has is the question for the hearing and the argument against you is that from its own – from what it did, it didn't properly apply the principles of the legislation. We really should not be going any further into that I think Mr Butler. You really need to meet whether this is a question of law.

MR BUTLER:
Yes.

ELIAS CJ:
And then whether it's one that we should give leave to.

MR BUTLER:
Yes.

ELIAS CJ:
That's all.

MR BUTLER:
That's correct and again, I feel I've said it so I won't say it again, you know what my position is in relation to that. I really do think that when one stands back in the context of this particular case what has been advanced by my learned friend is just a dressed up, we would like you to undertake a new weighing or balancing approach that is different from that which was undertaken by the Board of Inquiry and which was given the tick, for want of another phrase, by His Honour Justice Dobson in the High Court. It's not a question of law. There is no prohibition in the Act on approving a plan change or approving a resource consent application simply because you don't have all the information that you might like to have. There are other techniques then

you can do it. In terms of the way in which the scheme of the Act works, it's tried law. That's what happens every day of the week. I think my submission if either this Court of the Court of Appeal were to be a forum for addressing these issues I think you'd be sorely disappointed when you came to consider what the material is to give you a base to consider these issues that have been dressed up, with respect, by my learned friend. He will not give you that opportunity.

I don't think I can assist you any more in terms of the SOS question of law. I'll move then to the question raised by my learned friend Mr Kirkpatrick in respect of EDS. If I can start with the *Brown v Dunedin City Council* case. You'll have read my submissions in relation to that. We say fundamental a direct response to why leave shouldn't be granted is the question is moot. The Board of Inquiry spent something like 13 pages considering in detail the evidence that was put before it in respect of alternatives. It reached findings in respect of each of those and came to the clear conclusion that those alternatives simply were not adequate in the circumstances. So for that reason alone in terms of mootness the issue simply isn't one that's suitable for an appeal either to this Court or to the Court of Appeal. Mootness determines.

GLAZEBROOK J:
Do you want to say something about that specific link to policies 13 and 15? I must say for myself I couldn't see the link helped because if there weren't any alternatives that were viable then linked or not it doesn't help. I suppose the only thing might be that if there aren't alternatives – well, I'm not sure of the link, to be honest.

MR BUTLER:
Mmm.

GLAZEBROOK J:
Does the link help?

MR BUTLER:
In terms of –

GLAZEBROOK J:
Because you have – you've suggested a tightening of that question.

MR BUTLER:

Yes, I just suggested it because I just think it kept it a more focused question. That was my suggestion. That was simply why I was doing it.

GLAZEBROOK J:

So it's moot no matter what, is your submission?

MR BUTLER:

Yes, it's – absolutely, it's moot no matter what because the Board of Inquiry considered it in great detail, the existence of alternatives. And I'm not sure how many of Your Honours have had an opportunity to read the decision but if you look at it, it is 13 pages. I can give you the relevant references to that if that would be helpful. They are set out in my submissions in relation to EDS.

So that's what I'd wanted to say in relation to *Brown*, particularly say in relation to *Brown v Dunedin City Council* just in terms of mootness.

Then going, working upwards, in terms of my submissions in here, I'm at page 7 of my submissions in relation to EDS dated 6 September, if that's helpful to Your Honours just to know where I'm at. The reason I'll – so my point in terms of the paragraphs (a), (b), (c) and (d) is that we don't have an arguable point of law here in any event.

GLAZEBROOK J:

Is that in relation to *Brown*?

MR BUTLER:

And that's exactly right. So –

ELIAS CJ:

So that's not the mootness point? That's your second point?

MR BUTLER:

No, so that's my second point exactly.

ELIAS CJ:

Yes.

MR BUTLER:

So I thought I'd just work upwards –

ELIAS CJ:

Yes.

MR BUTLER:

– from mootness to say really there's just nothing here for you to look at because the Board –

ELIAS CJ:

But that's really a submission that *Brown* is right.

MR BUTLER:

Correct, correct.

ELIAS CJ:

But can you say it's unarguable?

MR BUTLER:

Yes, we can, we do, because my learned friend isn't able to refer and hasn't referred notably, Your Honours, to any particular provision of the Act which would require it, and again, if you look at the passage from the judgment of Justice Chisholm in *Brown* itself which I've extracted, little (c), the logic of what His Honour says there –

GLAZEBROOK J:

Frankly to me the logic –

MR BUTLER:

– is compelling.

GLAZEBROOK J:

– logic is not apparent but as the issue's moot it's probably not worth…

MR BUTLER:

Yep. Thank you. I just wanted to make the point that we certainly weren't saying that there was an arguable point of law in relation to *Brown* because we don't believe, we don't believe that there is.

Good, so if I then move up to the question (a) –

ELIAS CJ:
Of course, if a question for a decision maker is whether development in the coastal environment is – it's whether it's an unnecessary development, is that still in the Act?

MR BUTLER:
No, no, in fact –

ELIAS CJ:
It's not, so –

MR BUTLER:
– that's been explicitly removed because unnecessary was regarded as too tight, yes.

ELIAS CJ:
Because of this, that was too tight?

MR BUTLER:
Too tight.

ELIAS CJ:
So is there nothing like that? I don't mean necessity but is there no –

MR BUTLER:
Appropriate.

ELIAS CJ:
Appropriate? All right, how do you assess whether a development is appropriate without, and it's a contextual thing, not a mandatory –

MR BUTLER:

Yes.

ELIAS CJ:

– requirement, how do you assess that without considering alternatives? And indeed, as you'd know, very commonly in resource management cases all those alternatives are looked at. For example, if you're going to quarry in a particular site you look at whether that material could be obtained somewhere else with less effect. So I'm just trying to understand how absolute this proposition is.

MR BUTLER:

So at the plan stage the law's been clear that at the plan stage, particularly in relation to a private plan, which of course is a different beast from say an annual – I'm saying the periodic review that might be undertaken by the relevant, say for a regional plan or for the relevant authority, if I can just use a generic phrase, is quite different and again that's something that His Honour Justice Chisholm in the *Brown* case notes that there are two quite different things. A private plan change is a different beast. It can happen, that there can be material that can come out, so to speak, and if it's there it can be considered. What we're talking about here is whether there's a requirement to put alternatives, and to have considered all possible alternatives –

ELIAS CJ:

But contextually it maybe necessary to consider all alternatives in order to decide whether a development is appropriate, that's the proposition I'm putting to you, so it does seem to me that all of this is very widely expressed.

MR BUTLER:

Obviously –

ELIAS CJ:

It would have to be something that was unreasonable not to consider.

MR BUTLER:

No, no, because again looking at the context Your Honour, with respect, in the context of a private plan change, it is quite a different exercise from that which is undertaken obviously –

GLAZEBROOK J:

Well I would put to you that if it was perfectly legitimate for King Salmon to have put everything it wanted to put into a zone where it was already okay in the Marlborough Sounds, without spoiling a landscape of natural beauty, then nobody in their right mind would say, well, it's fine to go and spoil the landscape of natural beauty because we can't look at the alternatives, that King Salmon can go expand its existing farms, buy a few mussel farms, the sort of alternatives that were actually put and considered by the Board.

MR BUTLER:
Hmm.

GLAZEBROOK J:
So to say, and I'm sure that's why the Board actually did consider them, because if in fact it would've been perfectly legitimate and easy and had exactly the same effect for King Salmon to buy a few mussel farms and expand its existing operation then there is no way you'd be spoiling landscapes of natural beauty would you? I.e. not being able to meet policy 13 and 15 which the Board said it couldn't do? I mean you couldn't close your eyes to the fact that it could be everything that, every economic benefit, and every benefit from the salmon farms that could be achieved, could be achieved somewhere other than a place of natural beauty?

MR BUTLER:
So in terms of saying one wouldn't close ones eyes to it, I think that goes back to the point which –

GLAZEBROOK J:
No, you would have to consider it otherwise it would be a totally unreasonable position. So *Brown* can't be as absolute. Now of course it's moot in this case –

MR BUTLER:
It's moot in this case I was going to say.

GLAZEBROOK J:
– because there is absolutely no way that –

ELIAS CJ:
Well that's your second point and perhaps that will be sufficient.

MR BUTLER:

Sufficient to get –

ELIAS CJ:

But for myself I would have thought that *Brown* was arguable.

MR BUTLER:

Okay. I understand the point that Your Honour has made in that regard. So if we come then back to the principal point that my learned friend Mr Kirkpatrick had focused his attention on which is in relation to the question of law concerning the NZCPS and the interpretation there, you'll see from my submissions again what my submission is, is driven off a proposition that really again is there an arguable question of law, which is, which has been advanced by my learned friend in this regard, and what I've tried to do through my formulation of the question was to actually draw out, rather than hide, I don't meant that in any pejorative sense, but draw out rather than hide the questions, the sub-questions which arise out of his way of formulating the question, and I was also a little bit worried, if I can put it that way, when I saw the words "these include", I just thought well let's just see exactly what issues might arise.

ELIAS CJ:

Well "these include" come out so don't worry about them.

MR BUTLER:

Yes, exactly, so I just wanted to explain why it was that I'd gone about formulating the question the way in which I've tried to do. So if we have a look at the way in which I'm trying to formulate the relevant questions, it seems to me he's going to have three hurdles to overcome. First he's going to have to demonstrate whether policies 13 and 15 do provide for a complete prohibition on activities that have adverse effects on areas of outstanding natural character, or outstanding natural features, or landscapes in the coastal environment. So that's an interpretation of those policies, just on their own, as to whether those polices actually have a prohibition. Even if those policies on their own appear to suggest some sort of prohibition, can activities which might be inconsistent, I think, was the phrase that he used, with those policies, nonetheless be enabled in a plan if to undertake those activities, to allow those activities in principle would meet other policies and/or objectives in that same NZCPS, and it seemed to me that in relation to that question,

that issue, both the Board of Inquiry and the High Court were very clear in stating and articulating what appears to New Zealand King Salmon to be a trite proposition, which is it is in the nature of these policy statements that from time to time you will have certain policies that will pull in opposite directions or in other directions.

His Honour, Justice Dobson, in the High Court, I think I'm right in recollecting it was at paragraph 109 or 110, said that the proposition that separate policies, different policies, would pull in different directions and could potentially pull into opposite directions in the context of a particular case is not novel. I say it's trite and if that premise is accepted then the weight to be accorded to those competing policies in the particular context of an actual case, an actual decision to be made, is the decision to be made by that decision maker.

ELIAS CJ:
Unless it's unreasonable.

MR BUTLER:
Unless it's unreasonable, exactly. Unless it's unreasonable. And those issues of unreasonableness are ones that can be addressed and could have been addressed obviously before the Board of Inquiry in the usual way but then obviously with a check by the High Court on an appeal, on a question of law, we'd say that this – the conclusion reached is an unreasonable one but that's not the nature of the challenge that's been brought here. The challenge that's been brought here is that there's a misdirection. What the proposition is that's been advanced by my learned friends for EDS is that policies 13 and 15 are a veto on any activity that is inconsistent with those policies. Now we say that cannot be right in the context of a scheme of an Act which is clear that all of these competing policies and competing objectives can, do compete, and the correct resolution or – yes, the resolution of those competing factors takes place in the crucible of the hearing itself.

The Board correctly directed itself as to the existence and presence of the coastal policies, correctly directed itself that there are other policies that it had to acknowledge, policies 8, for example, around aquaculture, policy 6(2) of the NZCPS –

ELIAS CJ:

Well, aren't you really addressing us on the merits? I understand that you're trying to say that it's not arguable but I'm losing track of the difference between the two here. It does seem to be that you're advancing a full frontal substantive argument.

MR BUTLER:

No, well, I'd have a lot more to say if leave were granted. I'm just simply trying to demonstrate –

ELIAS CJ:

You'd have a lot more time too.

MR BUTLER:

Indeed, quite, and I am conscious we're nearly at lunchtime and we'll all be getting peckish, Your Honour, but my point – I just – I think I would not be doing my duty to the Court if I just simply said blasé, "Well, they've come up with some questions of law here," and then we come along for the hearing and you're saying, "Well, but, Mr Butler, we see when we examine the facts and we look at the policies there's just nothing here." It's trite that policies compete. This Court and other Courts are constantly saying a policy is simply a guidance. That's the word that is used by the authors of the NZCPS. It's just guidance which gets applied –

GLAZEBROOK J:

Well, it's mandatory though. I mean, I think that's the problem. It might be guidance but it's mandatory to give effect to it, whatever that might mean.

MR BUTLER:

The whole of the policy. It doesn't –

GLAZEBROOK J:

Well, no, I understand those arguments but then it's a matter of interpreting the policy and what might be overriding and what might not, but…

MR BUTLER:

Yes, and I totally understand that perspective.

ELIAS CJ:

If the would-be appellants have it wrong and – well, that is a matter for the substantive hearing. You would have to accept that if they have – if the Board failed to give effect within the meaning of the Act then that's an error of law.

MR BUTLER:

Yes, correct, and my only point – the only point I'm trying to make, being familiar with reading on a regular basis the leave decisions of this Court, it is often the case the Court wants to know is have we got an arguable question of law here that is worthy of drawing on our resources or the Court of Appeal's resources for determination. What I'm trying to persuade you through my written submissions and here today is that you do not have an arguable question of law. It is trite that there are competing policies. They pull in different directions. The forum in which they get resolved is the Board of Inquiry in any particular case, or the relevant decision maker in any particular case, and they apply the relevant weight. If they had ignored them, then that would be an error of law clearly.

ELIAS CJ:

But that is going to be the question if leave is granted, have they ignored them, as a matter of substance.

GLAZEBROOK J:

Or misinterpreted them.

WILLIAM YOUNG J:

Well, they haven't ignored them.

ELIAS CJ:

Well, they've said –

MR BUTLER:

Well, it's nobody's argument, just to be clear, nobody's arguing that they ignored them because it's replete, the Board of Inquiry decision is replete with references.

ELIAS CJ:

Did they give effect to it – to – yes.

GLAZEBROOK J:

To the proper interpretation of those policy…

ELIAS CJ:

Yes. In this sort of legislation, approaches are absolutely key, Mr Butler, and if there has been an error in approach or if the weighting is unreasonable then there's error of law. That's what's being argued.

MR BUTLER:

No, my understanding of the EDS argument, and I don't want to waste your time much further, is they are not arguing reasonableness. They're just saying playing misinterpretation –

ELIAS CJ:

Yes.

MR BUTLER:

– of the relevant NZCPS.

ELIAS CJ:

Yes.

MR BUTLER:

There was just one point I'd wanted to raise in light of this morning's exchange around the forum, this Court or the Court of Appeal, if you were minded to agree with any of the prospective appellants that they have a question of law of public and general importance, and it was simply this. I had indicated that on a factorial approach, a factorial approach would be appropriate in terms of exceptional circumstances, one of the factors from King Salmon's perspective is its desire to have this process come to an end quickly. It's spends in excess of $10 million through this process. Your Honours will probably know they have to pay for the Board of Inquiry of the private plan change applicant. It really would like to see an end to the process. So again, if we go back –

ELIAS CJ:

Well, we might not be quicker here.

MR BUTLER:

So I've just simply raised it. That way Your Honour will be conscious of the legislative steer in that regard and that just simply goes to the relevance of capacity in terms of hearing time and fixture time. This hearing, I don't know if the leave was granted on all issues how many days we would be talking about but I suspect we'd be talking more than one. In the High Court it was three and a bit days of hearing. There's quite a lot of documentation which I suspect if leave were granted counsel both – counsel for all sides would have to take you to. So I'm just conscious of that capacity issue. This has been going for King Salmon since 2007. These proceedings are more – are newer but you will be familiar from the Board of Inquiry decision that King Salmon has been pursuing this issue since 2007.

GLAZEBROOK J:
How many days would you estimate?

MR BUTLER:
I should have thought a minimum of two. I haven't had a chance to talk with my learned friends, and we could go into three. I see my learned friend, Dr Palmer, says two to three, and two from my learned friend, Mr Kirkpatrick, and two plus from Mr McCarthy. So I think that is a relevant consideration to have regard to, and that's – and as I said, it's not necessarily setting a precedent for any other ones that might be in the pipeline. I gather there might be one further appeal of this type before this Court for consideration.

Thank you, Your Honours, for your time, much appreciated.

ELIAS CJ:
Thank you, Mr Butler. Yes, Mr McCarthy.

MR McCARTHY:
Thank you, Ma'am. There's really just one point that I wish to address and that was the drafting of EDS's question A, and rather than take the Court's time up with particular minutiae in the drafting, there are really just two issues I would ask the Court to make sure are clear in the drafting, because essentially that's the difference between us and EDS, assuming the Court gives leave.

The first is it would be very helpful to have a clear statement of an issue around the meaning of give effect to the NZCPS or give effect to individual policies, which seems to be one of the key points in contention.

GLAZEBROOK J:
What isn't clear from the particulars on that?

MR McCARTHY:
It's more just the drafting of the question, Ma'am. The…

GLAZEBROOK J:
Well, can it – where's your –

MR McCARTHY:
Yes, the…

GLAZEBROOK J:
Sorry, we're just having terrible trouble with paper here. I did have yours open earlier and now I've lost it again.

MR McCARTHY:
Well, it may be easier to start with EDS's proposal. That's their memorandum of the 20th of September. Perhaps I should say the other key issue that I'd submit it would be useful to have clearly stated in whatever question is how to resolve any conflicts between policies within the NZCPS and the issue in relation to EDS's drafting is in their paragraph 1.2. Both those points are conflated into the one question.

GLAZEBROOK J:
Your formulation doesn't actually split them out. I'm just wondering whether perhaps it might be useful for you to discuss this with Mr Kirkpatrick and come up with an agreed possible formulation, because I wouldn't have thought that that was an issue that Mr Kirkpatrick would have difficulty splitting out, but – not wishing to speak for him, but…

MR McCARTHY:
I'd certainly be happy to do that, Ma'am.

GLAZEBROOK J:

I don't know whether that makes some sense. It's…

ELIAS CJ:

Well, we're probably going to have to go after lunch, are we?

GLAZEBROOK J:

Well, I just would have thought they could put in something agreed.

MR McCARTHY:

If it helps, I have nothing more to say.

ELIAS CJ:

All right.

GLAZEBROOK J:

Well, no, no, it's because it just seemed to me that you were agreeing that it should be "give effect to" but that you wanted it split into two different questions. I wouldn't have thought that was an issue and I would have thought you could have just come up with an agreed statement that dealt with your concerns, but – does that…

MR McCARTHY:

Well, hopefully we could, Ma'am.

ELIAS CJ:

Well, perhaps if you're able to put in this afternoon, because Mr Palmer's indicated that we won't need to sit after lunch, if you were able to put in this afternoon a modification that you're able to agree on – if you're not, that's fine – that would be helpful to us.

MR McCARTHY:

Yes, thank you, Ma'am, I'll attempt that.

ELIAS CJ:

Thank you. Thank you, Mr McCarthy. Yes, Mr Palmer. I'm now going to hold you to that.

MR PALMER:

Yes, Ma'am. The simple point on behalf of Sustain Our Sounds is that this Court –

ELIAS CJ:

I'm sorry, I didn't ask you, Mr Kirkpatrick. I'll give you an opportunity in a minute. Yes.

MR PALMER:

– that this Court does not often have the opportunity to interpret the Resource Management Act and in particular to construe its core purpose and principles and how they should be applied. This is that opportunity and nothing that my learned friend, Dr Butler, has said suggests that this Court should not take that opportunity. His arguments go to the substantive merits of the arguments which the Court would need to consider. And that's all, Your Honour.

ELIAS CJ:

Thank you, Mr Palmer.

MR KIRKPATRICK:

May it please the Court, in relation to the mootness of question B, I would ask that the Court read the whole of paragraph 16 of *Brown v Dunedin City Council* because towards the end of that paragraph His Honour stated, "It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by section 293 of the Act," which is a power for the Court, the Environment Court, to go through a further process in relation to matters, "so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point." My submission is that *Brown* itself highlights a possibility that there may be exceptions to it so that the premise that there are no exceptions to *Brown* is in my submission not supported on the decision itself. And I'm not sure without getting –

ELIAS CJ:

Sorry, how does that – I thought you were going to say something about mootness. That doesn't relate to mootness, does it?

MR KIRKPATRICK:

I'm sorry. In relation to the mootness, I do rely on, I still rely on the point which I obviously didn't make terribly well the first time, which is that when one looks at the text of policies 13 and 15 of the New Zealand Coastal Policy Statement you will see that options are identified within them and so that notwithstanding that the Board of Inquiry did investigate various alternatives, it still came back to Papatua as an area of high natural character and outstanding natural landscape without then going to look whether in the options within policies 13 and 15 it might have found somewhere else, or King Salmon might have found somewhere else, so that to that extent, may it please the Court, in my submission *Brown* should not have been put forward as a stopper on the alternatives and doesn't make that alternative issue moot notwithstanding the consideration which the Board of Inquiry gave to it.

And the question of law issue in relation to question A, may it please the Court, again, if one looks at policies 8, 13 and 15 together, policy 8 is broadly an enabling policy for activities in the coastal marine area. It says it enables them in appropriate places. Policies 13 and 15 then say to avoid adverse effects on areas of outstanding natural character or outstanding natural landscapes. In my submission, there is a live issue of interpretation in relation to those policies and that the question, the broad question of whether or not policy documents may pull against themselves through various matters is not actually addressed in the Board of Inquiry decision or the High Court decision by any textual analysis of the directly relevant policies, and that is what EDS wishes to bring before this Court or the Court of Appeal, depending on the leave decision. May it please the Court.

ELIAS CJ:

Yes, thank you. We'll reserve our decision in this matter. Thank you, counsel, for your assistance.

COURT ADJOURNS: 1.01 PM