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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 107/2019
[2020] NZSC Trans 11

BETWEEN **PORT OTAGO LIMITED**
Applicant

AND **ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**
First Respondent

OTAGO REGIONAL COUNCIL
Second Respondent

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
Third Respondent

MARLBOROUGH DISTRICT COUNCIL
Fourth Respondent

Hearing: 18 March 2020

Coram: Winkelmann CJ
O'Regan J
Ellen France J

Appearances: L A Andersen QC for the Applicant

D A Allan and M C Wright for the First Respondent
A J Logan for the Second Respondent
P D Anderson and W D Jennings for the Third Respondent
J W Maassen and B D Mead for the Fourth Respondent

ORAL LEAVE HEARING

MR ANDERSON:
Yes, may it please the Court, I appear for Port Otago Limited.

WINKELMANN CJ:
Tēnā koe Mr Anderson.

MR MAASSEN:
May it please the Court, counsel's name is Maassen, and I appear with Ms Mead, for the Marlborough District Council.

WINKELMANN CJ:
Tēnā kōrua.

MR ALLAN:
May it please the Court, counsel's name is Allan, initials D A, and I appear with Ms Wright, initials M C, on behalf of EDS.

WINKELMANN CJ:
Tēnā kōrua.

MR LOGAN:
May it please the Court, counsel's name is Logan, and I appear for the second respondent, the Otago Regional Council.

WINKELMANN CJ:

Tēnā koe Mr Logan.

MR ANDERSEN:

May it please the Court, counsel's name is Anderson, and I appear with Mr Jennings for Royal Forest and Bird Protection Society.

WINKELMANN CJ:

Tēnā kōrua. Now, Mr Anderson, we're thinking, we've allowed an hour for applicants to divide between themselves and an hour for respondents to divide between themselves. We thought we'd take the morning tea break therefore, logically, after the first hour, after the applicants.

MR ANDERSON:

Thank you, Your Honour. May it please the Court, first thing, a correction to the submissions for the appellant. There's paragraph 5.4(a) on page 7. "It will result in prohibited activities in absolute," it should be prohibition, it's just a mistake there.

WINKELMANN CJ:

Sorry, what was that?

MR ANDERSON:

Page 7, paragraph 5.4(a). It's just a typo, so "probation" should be "prohibition".

WINKELMANN CJ:

You're allowing one area of your work to slip into another Mr Anderson.

MR ANDERSON:

Indeed. This Court will have received the memorandum. Basically what was done was that there was discussion between the two, between the appellant and the Marlborough Council, because slightly different questions had been suggested, and so we put our heads together and came up with a formula

which we hope is acceptable to the Court, but at least it provides a joint approach from the two of us rather than a different approach.

Now this appeal raises important issues for the Court and generally because one of the things that flows from it is that if there is an absolute obligation to avoid adverse effects then that necessarily means that activities that have those effects would be prohibited, either explicitly or implicitly, I mean, either they would become prohibited activities, when the rules came out, or it would be impossible to obtain consent because they were contrary to the policy. So either way it's important that this issue be resolved at the policy level so that the port in particular but also other infrastructure in the same position know exactly where they are.

O'REGAN J:
There seems to be some controversy about that.

MR ANDERSON:
Well, there is, but –

O'REGAN J:
The respondent's say well it could be a non-complying activity, which would allow a resource consent to be obtained despite the non-compliance.

MR ANDERSON:
Well they say that but when you think about it a non-complying activity would enable a resource consent to be applied for but as soon as you apply for it, and the effect of the activity has the adverse effects, it would necessarily be declined I would suggest and so the fact that you can apply for it doesn't mean that it can be granted. And so really we're in the same position, whether it is a non-complying activity or a prohibited activity. If the activity has the adverse effects of values, and it is absolute that you can't have those effects, then it doesn't matter how you describe it, the result is that you're not going to be able to do it and I am going to be interested to hear how it could be suggested, and I know the respondents have suggested that in some way

the decision isn't as absolute as it suggests and in fact the High Court is wrong in saying that avoid means avoid in all circumstances, but if you give it that interpretation, that it must be avoided, it's difficult, in my submission, to see how anything else can happen. If you've got to avoid the effects then any activity that has that effects can't be permitted, whether we call it a prohibited activity or whether we're looking at a resource consent and then policy.

O'REGAN J:
Well a consent for a non-complying activity allows non-compliance doesn't it?

MR ANDERSON:
But one of the factors that is assessed is the policy, so that its non-compliance with the rules and so that it is, it's not permitted under the rules, but still, in assessing whether consent is to be granted, one of the things that is looked at under the Act is the policy so it would be difficult to see how you could have a non-complying consent granted for something that is contrary to policy and you would expect that it would be argued, if it was thought that that could happen then to be consistent you would expect that it would have to be argued at the rule stage that the activities were prohibited but it would seem to me, with respect, that as soon as it is contrary to such an explicit and direct policy, you're not going to get consent, however it is set out in the plan, ultimately in the rules.

O'REGAN J:
So you'd accept that Justice Gendall was wrong to say that it would automatically be a prohibited activity but you say it doesn't really make any practical difference, is that what you –

MR ANDERSON:
No, no, it's going to have the effect of a prohibited activity.

O'REGAN J:
And even if it's only a non-complying activity you'd even get consent…

MR ANDERSON:

You couldn't imagine it being permitted or discretionary so the choices are non-complying or prohibited and if it was non-complying then unless you could demonstrate that there were no adverse effects you couldn't get it but of course, and this is really the question, that there are necessarily adverse effects, in terms of the Port's operations because of its use of adaptive management. I hope it's helpful to have a look at the plan that was attached to the submissions because it illustrates the problems. You've got Port Chalmers and then Port Dunedin is further down the harbour and you've got the channel. Now the channel runs through the Aramoana Salt Flats, or the Aramoana Mud Flats, which interestingly enough at one time it was proposed to be an aluminium smelter, which caused much controversy. It seems unreal now but that's what was going to happen. But the issue of the markers for the channels, and they will have to be relocated because of the consent that's been given for the channel to be widened, the question there is whether they can be put in the protected area, because it will be a protected area. That may fall within the area of de minimis but we just don't know exactly what that means. If avoid means avoid any effect then does de minimis come into it is the question. But of much more significance are the disposal grounds. The one closest, the Shelly Beach one, isn't of any significance for this appeal. The Aramoana one has significance for the protected surf break, and you can see the surf break beside it. The Heyward's one has significance not just for the surf break but also the Karitane area and A zero, which is right out to sea, does have significance in terms of the Karitane Beach, and the reason that they have significance is because while it may only be a matter of low probability that silt in particular could come ashore from the disposal grounds, if that was to happen it would cause serious issues, not just in terms of, well, in terms of the fisheries and the vegetation further along the coast. So that is why there is adaptive management to both monitor how the disposal takes place at Heywards, and it's particular, it's mapped in a grid and particular items can be disclosed in particular ways to minimise the risk.

WINKELMANN CJ:

Can you tell me what it means “disposal”?

MR ANDERSON:

Yes. What happens is that the sand from the channel is picked up on a suction dredge. It is taken out and it is dumped at sea. So there is sand, some silt and some sand. The three inshore ones are used for maintenance dredging. The one at A0 is used for what they call, what is called capital dredging, in other words when a channel is deepened and widened, and also for some maintenance dredging because it’s impossible sometimes to distinguish between them. So what you’ve got is you’ve got the sand and silt is taken from the harbour and put in the disposal grounds. There’s different rules for different grounds but the point so far as Heywards is concerned is that it is managed to ensure that any risk from the silt in particular is avoided, and that’s the adaptive management, because there is various monitoring and determination as to where it goes. And the point about this is that you only have adaptive management if there is a risk of adverse effects, because you don’t need adaptive management if there aren't going to be any adverse effects. So this is, as soon as you bring into try adaptive management you know that there is, at the very least, a risk of these protected values being effected, and that is the reason that in the approach that the High Court took, they said that adaptive management could not be used because adaptive management necessarily acknowledges that there is an adverse effect. A potential adverse effect, of course, is an effect under the Resource Management Act. So that’s the issue that flows from there.

The Port’s position is that when you look at policy 9 of the Coastal Policy Statement, because if we didn’t have policy 9 then there would be, the rules would be absolute, but because the policy statement acknowledges the importance of the ports, and in my respectful submission the clause has been somewhat read down by looking at the first word “recognise”. Because while “recognise” isn’t as strong as some other words that are used, the clause needs to be looked at as a whole. And when we look at subclause (b), because what happens is that it starts off by saying it recognises,

"The sustainable national transport system requires an efficient national network of safe ports," including by, and then, "Considering where, how and when to provide in regional policy statements," so that's quite, that's a directive. They've got to decide where to provide in the policy statements and in plans, "For the efficient and safe operation of these ports," so that is actually a positive direction that has to be put in the plan the efficient and safe operation of ports, "the development of their capacity for shipping and their connections with other transport modes. And so this is quite different to the, with an existing port it is quite different to the situation that would occur if a new port was being set up, because the *Environmental Defence Society v New Zealand King Salmon Company* [2014] NZSC 38, [2014] 1 NZLR 593 type issues would come in and, "Is this a suitable place?" and those sorts of issues. But here we have an existing port, and the submission advanced on behalf of Port Otago is that the requirement that they've got to provide for the efficient and safe operation of the ports is a mandatory requirement and because it is a mandatory requirement then that invites a conflict with the avoidance provisions that were in a situation where the efficient and safe operation of the ports means that the adverse effects can't be avoided. So we have a conflict situation that needs to be resolved on its merits, and in my submission the question of whether that is correct or not is an important question, and it is important in my submission that it be dealt with by this Court because one of the things that we've seen since *King Salmon* is that we've seen various attempts have been made by Courts to interpret it, and in my respectful submission this is a situation that requires an authoritative determination as to exactly what it means, and particularly what it means in relation to the policy 9 and the ports and the inter-relationship between the two of them.

ELLEN FRANCE J:

So why is this not just a question about the application of *King Salmon?*

MR ANDERSON:

Well, in a sense it is. So you can look at it in different ways. But the Courts have tried to interpret and apply *King Salmon.* But what happens is that we

have, and this case typifies it, where the Environment Court has applied to *King Salmon* in a way which has given precedence to the safety of the ports and felt that it could do so, particularly relying clause 9, and the High Court says no, it can't, because the avoidance policies take precedence over the port policy. So in terms of the interpretation that's really a key issue. I'm not suggesting it is the only one, and my learned friend will address the issues as to what the limits of *King Salmon* are, so I don't propose to go into that in particular, he will deal with that. But certainly the point and the submission that I'm making is particularly in relation to how policy 9 relating to ports inter-relates to it.

WINKELMANN CJ:

I mean, is your point that *King Salmon* is a decision which has a great deal of impact and it is helpful to have it further explicated in a way.

MR ANDERSON:

Absolutely. And, I mean, the issues are that there's been this constant tension between the Environment Court and the High Court in terms of it. And you see it in this case, where even the respondents are saying the High Court got it wrong but in different reasons, and this I think is really illustrating the whole problem that is following from *King Salmon*. That's not to say that *King Salmon* needs to be re-looked at in that sense, but it would be really helpful in my submission for it to be explained by the top Court so that the assistance that the other Courts need is available, and that's both generally and in particular in relation to obviously ports have a real interest in knowing authoritatively exactly what the position is in relation to risks to their continued operation.

O'REGAN J:

So is your case that the reason that you can't just apply the linguistic analysis that *King Salmon* talks about, is because ports are existing infrastructure whereas the salmon farms in *King Salmon* were going to be new. Is that the distinction you're drawing?

MR ANDERSON:

That's the first distinction, and the second distinction is that because, yes, that's right, you can't sort of look at it directly and say, is this appropriate for this use, but once you say this is where it is, then the question is, if you accept that as your starting point, how does policy 9 inter-relate with the other policies, and in my submission that with an existing port, once you know it's there, and that these, the safety and efficiency of the port may require some – and we're not talking about major breaches because the adaptive management is designed really to avoid breaches. The whole point about it is that the potential means that there is a breach of it because of the very wide definition of "effects". And this is really at the heart of the problem, is that when you define "effects" as being potential effects, and they you say, well, adaptive management is designed to overcome these potential effects and to avoid it, the very thing which would avoid the effects may, in fact, be precluded by the rules unless the – by the policies, unless policy 9 is given some teeth to enable that to happen. This doesn't mean that the one policy would override the other. What it would mean is that you have the two policies, which have to be looked at, and the individual situation has to be considered in relation to, and generally the answer would be adaptive management so that the Court, or the consent, whoever determines the consent, can be satisfied that the avoidance policies would not be breached, or would not be breached any more than absolutely necessary through the means that we use, but recognising that there are adverse effects because of their potentiality.

O'REGAN J:

But if the port company was trying to set up a new port, if there wasn't a port at Port Chalmers and they were trying to set up a new one, would you accept that *King Salmon* just applies?

MR ANDERSON:

Absolutely. Yes, absolutely. You wouldn't be able to set up a new port in a situation which would necessarily involve – yes, I think it has to because the

rules have got to be different with regard to a new port. Unless there's any other matters that was what I was intending to cover.

WINKELMANN CJ:
Thank you Mr Anderson.

MR MAASSEN:
Thank you Your Honours. This case is about the correct method of analysis in this case under section 61 and 62, and the Council's view is that this case Is not just about ports but raises some very serious questions about available forms of analysis by the Environment Court where there are real environmental tensions, and I'm going to do a deep but brief dive into *King Salmon*, and in particular obviously the majority judgment, and the engine room of my analysis is paragraphs 128 to 131 of Justice Arnold's decision for the majority, which in my submission –

WINKELMANN CJ:
What were those paragraphs?

MR MAASSEN:
Paragraphs 128 to 131. Because if I was to summarise those paragraphs His Honour was saying that a textual reconciliation of the New Zealand Coastal Policy Statement was a necessary and often determinative method to reliably give effect to the New Zealand Coastal Policy Statement, which of course is a requirement for making plans under part 5 including a regional policy statement. However, and this is important, the Supreme Court also acknowledged that the reconciliation method was not sufficient or determinative in all cases to provide confidence that the whole of the New Zealand Coastal Policy Statement was implemented. What the Supreme Court certainly did is say that the textual analysis was the correct starting point.

Now where the textual analysis is not sufficient or determinative then the Court accepted that a weighting approach was appropriate relative to context

and in my submission that weighting approach would consider amongst other things the consequence of pursuing one policy at the expense of the other and addressing available alternatives and uncertainties. A type of environmental cost benefit analysis where the text is an important but not overwhelming factor and in that regard I rely on the last sentence of paragraph 141 of *King Salmon* and in particular the word "context" in that sentence.

One exception to the solely textual method identified by the Supreme Court is where policies pull in different directions and that's the words used in the fifth sentence of paragraph 129 of *King Salmon*. And that appears to apply when there is a gap in directional strength of policies and conflict but it is not a big gap and the reason I make that submission is because the previous sentence sets up a contrast to two sets of directions where there is a significant gap in their strength.

Importantly, Justice Arnold did not say this tension only arose where policies were equally directive, and the importance of paragraph 129 is also this –

WINKELMANN CJ:
Is that 129?

MR MAASEN:
Yes. "A jurist would not anticipate rules pulling in different directions. But for a suite of policies seeking to achieve a single goal of sustainable management that in itself intrinsically contains trade-offs, that phenomenon is entirely foreseeable when policies are considered for application to a particular circumstance or locality.

The other exception and I don't ask you to refer to it but it is in paragraph 88 is where the New Zealand Coastal Policy Statement doesn't cover the field and my submission is that these exceptions are porous categories. In *King Salmon* the Court found that it was in a position to achieve the answer by a textual reconciliation and that is clear from paragraph 131 where the

analysis is largely a textual analysis but with respect to the Court my submission that that analysis was informed by the environmental context to satisfy the Supreme Court that there were no strong countervailing environmental considerations that would change the conclusion, and the reason I say that is because the Supreme Court was in a unique position in *King Salmon* because under part 7 subpart 4 of the Resource Management Act uniquely for aquaculture you can have a concurrent application for plan change and resource consent. So in *King Salmon* the Supreme Court had clear findings on the effects of salmon farms in outstanding landscapes. Now that situation is not common. No everyone, very seldom are decision makers making plans in that privileged position of seeing the consequences of the plan facilitating a particular activity.

The main point I want to make to you today is that the Supreme Court in *King Salmon* was not well placed to describe and analyse those exceptions where textual analysis does not lead to reliable conclusions about how the effect the New Zealand Coastal Policy Statement could be achieved as a whole. Nor was the Supreme Court well placed to predict the incidence of these exceptions as it attempted to do tentatively at paragraph 129. In that sense the discussion on the exception category and its scope was obiter and made with limited information. Now we have a situation –

ELLEN FRANCE J:
Sorry, just going back, did you say the exceptions were porous?

MR MAASSEN:
Correct, yes.

ELLEN FRANCE J:
And just what do you mean by porous in that context?

MR MAASSEN:
Well I'm not sure it's the right word but what I mean is they are relatively ill defined in *King Salmon* and that is because it wasn't the type of case that they

were dealing with and the point I want to make is that now we have a situation where senior Courts are saying that relying on *King Salmon* that the only way to give effect to the New Zealand Coastal Policy Statement is a textual reconciliation and that method of reconciliation involves allowing one policy to overwhelm another based purely on a perception of the strength of directions and because it is arguable that the avoidance policies are always the strongest in the statement and therefore direct complete avoidance applies you can see why that's an attractive argument for the conservation interests. It's a simple these areas are completely off limits because they are the strongest direction and they always apply.

In my submission this approach has two problems with it. First it doesn't recognise the exceptions the Supreme Court allowed for where evaluation is an appropriate form of analysis and nor arguably is the High Court approach in this case truly the type of reconciliation or synthesis that the Supreme Court had in mind where it leaves some policies seriously disabled despite the environmental values that that policy addresses being legitimate and important dimensions of sustainable management. This situation in my submission –

WINKELMANN CJ:
Can you just repeat what the two problems are?

MR MAASSEN:
The two problems are, first of all, the because it's only a textual approach that the High Court is applying its not considering the exceptions that the Supreme Court considered and secondly the idea is that one policy will overwhelm another by the direction strength and I'm not certain that that is the type of reconciliation that the Supreme Court had in mind as the way of implementing the New Zealand Coastal Policy Statement as a whole. The reason it was in that case is because of that crucial qualifier in policy 8 relating to aquaculture which is the word “appropriate”.

So Parliament was trying to encourage aquaculture in new areas in appropriate locations and the Supreme Court was able to say when you look at the strength of the direction of the avoidance policy relating to outstanding landscapes that can't be an appropriate location and so in that sense the reconciliation is truly a reconciliation but my challenge is to saying one policy overwhelms the other because I can find a verb direction that is stronger, in my submission, that is not a reconciliation that necessarily comes out of the analysis in *King Salmon.*

So we get to this very illogical proposition. If you start from the proposition that section 61 authorises an evaluative method, and I will say why that is, then you get to this illogical situation. The method of evaluation is available under section 61 as a machinery to resolve serious and real environmental trade-offs but it is never up to the task of achieving the outcome of giving effect to the national policy statement, that's the illogicality. If you accept that section 61 provides a machinery for resolving these environmental tensions when they are serious. Again I'm not downplaying the text but I'm just saying its not overwhelming. If you accept that that machinery exists then you simply can't say that machinery can never achieve the requirement that the New Zealand policy statement has given effect to because these two provisions, sections 61 and 62, need to look to each other following the principle noscitur a sociis. You have to read these two provisions consistently.

WINKELMANN CJ:
So you're saying the application of *King Salmon* in this case means that effectively section 61 is rendered otiose?

MR MAASSEN:
Yes, it's saying that section 61 despite demonstrating clearly an evaluative method will never be able to apply to achieve giving effect to the New Zealand Coastal Policy statement. Again I reiterate, the starting point is the text and sometimes it is sufficient and determinative but there are exceptions.

O'REGAN J:

But this is asking us to rewrite *King Salmon* isn't it?

MR MAASSEN:

No, because I think that *King Salmon* was dealing with a particular circumstance and the judgment is written with –

O'REGAN J:

It was expressed in pretty general terms.

MR MAASSEN:

It was.

O'REGAN J:

And it was deliberately guiding lower Courts, wasn't it, it was expressed as correcting a misguided approach.

MR MAASSEN:

It was and my submission is that the misguided approach in that case was an overall judgment approach which is simply saying all of these are relevant considerations and we weigh them and I'm suggesting that the Environment Court in this case did not undertake that analysis, it started with the text, identified a substantive conflict which was insurmountable and then it weighed those matters applying section 32 and came to an outcome which was whether conflict was as narrow as possible as Justice Arnold suggested which is avoid if you can, try all means to avoid these places but if you can't then you should be able to apply for a resource consent and those matters evaluated as to their scale and significance in light of the entire policy context.

So the importance of these ecosystems is not lost in the policy bed it's all there in the mix but what the Judge was saying is we can't determine this at this stage and coming to your point about non-complying and complying, in my submission that's a red herring. The Environment Court was given the task of providing guidance in this conflict, that was its task under section 62

subsection (1)(a) and (d), it couldn't evade that job so it gave the guidance it did and in my submission for EDS to say, “Oh well, if it had done an avoidance policy it would have been fine in the mix later on,” is simply usurping the task of the Environment Court. The question is not that but whether the Environment Court made an error in analysis. It's for the Environment Court to decide the guidance subject to that qualification.

O’REGAN J:
Do you agree with Mr Anderson that if it's made a noncomplying activity you would never be able to get resource consent for something which didn't avoid the adverse effect?

MR MAASSEN:
Well the thing that – I wouldn't necessarily put it quite those terms, I think that's too strong. What you do face with a noncomplying category is a gateway test under section 104 that you have to pass before there is a jurisdiction to grant a consent but my more fundamental proposition is that the Environment Court in the policy statement is not getting to the level of categorisation of activities and it may well be in the regional coastal plan you get a debate about that. What the Judge was saying is it needed to be able to be applied for and so he was heading off the pass a situation where the regional council armed with this avoidance policy is the strongest effectively close the door to any meaningful consenting pathway. I don't want to get into the categorisation because I think that's too far down the level.

Now in terms of why section 61 is evaluative I want to mention this point. Section 61 has a cascade of subsections of differing levels of guidance. The highest level is subsection (1) which directs to act in accordance with certain matters and section 32 is mentioned not once but twice in that list and the interesting thing about section 32 is that it requires an analysis of the most appropriate objectives for the region and appropriate following *King Salmon* is a contextual analysis and furthermore if you look at sections 32 subsection (1) paragraph (b) and section 32, subsection (2), each of those require choosing policies, implementing policies to apply cost benefit disciplines.

And so from that my submission is that an evaluative method is part of section 61 and those provisions demonstrate that there is some form of evaluation available in appropriate circumstances and it makes no sense to have that machinery if the answer is always revealed by the text, what we call the reconciliation by text method.

So we now have a situation where the Environment Court's evaluation in these nationally important debates are being struck down because they do not employ solely the textual reconciliation method and in my submission that is disabling the Environment Court from performing its statutory task. I want to reiterate that the Council, with respect, entirely accepts the correctness of *King Salmon* on its facts and entirely accepts the analysis, if I'm correct, of Justice Arnold's decision in paragraphs 128 to 131 but there are serious exceptions and this Court needs to explore, with respect, those exceptions and how they would operate in terms of that machinery because it is quite unreal to say that a national policy statement had the vision to solve the sort of problems that my learned friend has described about the channel into Port Chalmers and how you manage that issue. That is simply an unreal proposition to say that is determinative whereas to say a minister wanting to promote aquaculture would promote it in appropriate locations and not intend it to be in special places is an entirely sensible idea to contemplate and so *King Salmon* has been enormously important, it's a magisterial decision of great import to the resource management community but in my submission it's simply being overread and taken too far with serious consequences.

WINKELMANN CJ:

So you're saying effectively so in circumstances if you apply it in a mechanical way in circumstances outside that applied in *King Salmon* particularly the exceptional circumstances that identified it would lead to unjust and unforeseen results.

MR MAASSEN:

Yes it would lead to what I would submit is insensible results which is exhibited well by this case which is the reason Marlborough District Council hooked onto it which is that the port in Otago would have to close because it could not provide a safe port in circumstances where that would be a completely disproportionate result and that is not to say the port will not have to explore every alternative to avoid and employ measures to mitigate effects if they are and hopefully not endanger the full functioning of those ecosystems but to say as Justice Gendall does, avoid means avoid and that was the argument for the conservation interests and council in this case, that avoid means avoid, and it operates like a rule and that's what Justice Gendall found, that is the insensible consequence that I say arises from a purely textual approach in the way it was performed.

WINKELMANN CJ:

Mr Allan?

MR ALLAN:

Thank you Ma'am. We brought along a little bundle, and I appreciate that's a little late, but I ascertain that you all have all the cases and everything in front of you anyway, so we simply had *King Salmon*, the *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, (2017) 20 ELRNS 564 High Court decision and the NZCPS in that bundle.

O'REGAN J:

We've got them on our screen but it's probably better to have them on paper.

MR ALLAN:

My apologies for the lateness of that. We were all involved in other cases in the last week or so and onto this yesterday.

Before I take you to my written submissions I might just address some of the points that have come out in this morning's discussion. We finished with being told that the consequence of the decision is Port Otago is going to have

to close. With respect EDS does not accept that, and I know this is a matter of fact and supposition and all the rest of it, rather than dealing with the law, but it does encapsulate, I think, some pretty important differences between the parties. EDS says there is a different regime –

O'REGAN J:
If that's so that suggests we might need to give leave doesn't it.

MR ALLAN:
No. EDS says there is a difference between the tests that apply when you're going through the planning instruments from the RMA through the National Policy Statement such as the Coastal Policy Statement, through a Regional Policy Statement, through a Regional Coastal Plan. It's only the Regional Coastal Plan in this case that will get to rules and as you move through there you need to give effect to those higher level instruments. So the Otago Regional Policy Statement had to give effect to the National, well, Coastal Policy Statement, which is the debate that we're having here, did it do that or not. Once you've got to that point we then have a coastal plan that comes into place –

WINKELMANN CJ:
Once you've got to what point?

MR ALLAN:
To the point of the Regional Policy Statement, with whatever policies are in there. There's then a Regional Coastal Plan, and that's the document that then creates the rule that set the planning framework. At that point you're still giving effect to the higher order instruments but the fact that you have an avoidance policy, as we've called it in the Coastal Policy Statement, followed through in the Otago Regional Policy Statement, is dealing with the avoidance of effects, it's not dealing with the avoidance of activities. So EDS's position in the Environment Court, and all the way through, has been you can have activities for which you may seek resource consent –

O'REGAN J:

But it doesn't matter what the EDS thinks though, does it, it's what the Environment Court is going to do.

MR ALLAN:

And the Environment Court was doing the same thing. It was saying you can have activities for which consent can be sought.

O'REGAN J:

Yes, but it's been overruled.

MR ALLAN:

No it's been overruled on the way it interpreted the CPS and hence the policies that it put in place in the Regional Policy Statement. So it had effectively policies that were reliant upon a reading of the NZCPS that we said, and the High Court said, was wrong in terms, particularly with reference to *King Salmon*. But we say, and my reading of the *King Salmon* decision is also that X says that doesn't necessarily mean you must have prohibited activity status, it doesn't determine the status. The next phase, of course, is when somebody comes along to seek a resource consent and at that point there's a different regime in the Act. You have regard to those instruments, you don't give effect to them. So it is at that point where there's a weighing up of a whole lot of different factors.

So from our perspective we don't think the dire consequences you've been told about are what will flow from this. It will be something much more subtle and more nuanced and of course the fact that we have a port in Otago, in Port Chalmers, is a relevant factor. That is part of the environment into which any new activity comes.

WINKELMANN CJ:

So at the level of making decisions on the Regional Coastal Plan the test is that the decisionmaker must have regard to…

MR ALLAN:

That point is to give effect to the higher order instruments still.

WINKELMANN CJ:

Okay.

MR ALLAN:

So the rules reflect that, but higher order policies are about avoiding effects, not about avoiding activities.

O'REGAN J:

Yes, but *King Salmon* said "avoid" means prevent completely.

MR ALLAN:

King Salmon addressed the issue of, that particular issue about activity status in a couple of paragraphs…

WINKELMANN CJ:

Can you just take us more slowly through this point?

MR ALLAN:

Yes.

WINKELMANN CJ:

Because your point is that it's more permissive the lower down you get, is that your point, as to why it's possible to get resource consent where it's…

MR ALLAN:

Particularly at the resource consent stage.

WINKELMANN CJ:

Can you just take us through that again because, I'm sorry, I'm just struggling to follow it?

MR ALLAN:

Okay, apologies. So at the Regional Policy Statement, where we are now, you give effect to the Coastal Policy Statement provisions. At the Regional Coastal Plan you give effect to the Regional Policy Statement and the higher order provisions. But once you, when you're doing that, you are giving effect to policies concerned with the avoidance of adverse effects in certain locations, not the avoidance of activities in those locations. It's at that point that the decision is made with respect to activity status. And if, for example, an activity could only occur in a way that would generate adverse effects of significance on these special environments, the Council may well impose prohibited activity, but that's not in fact what's happed in New Zealand. In terms of ports, for example, in these localities they have tended to provide either non-complying or discretionary, and I gather that in the *Bay of Plenty* case, which is the *Forest and Bird* case that went to the High Court and then came back to the Environment Court, the status of port activities there is discretionary.

WINKELMANN CJ:

So adaptive management could be taken into account at this point?

MR ALLAN:

That is out submission, yes. And –

O'REGAN J:

So why are we having this fight then? Because that's all the Council wants.

MR ALLAN:

Because it's important that it's from, it's extremely important to get the relationship between the Regional Policy Statements and the Coastal Policy Statement objectives and policies correct.

O'REGAN J:

Well, you're just saying it's not because you only have to have regard to them.

MR ALLAN:

No, no. Because when you're creating the rules you give effect at the Regional Plan stage, you give effect to the policies, the higher order documents broadly. When you're then assessing a resource consent application under those rules, which is a totally different process and happens later, at that point you have regard to a whole range of factors, one of which is the policy provisions of the higher order planning instruments and of course the –

O'REGAN J:

But if you're not trying to stop the port from having adaptive management policies why are you kicking up such a fuss about this?

MR ALLAN:

The matter of principle is hugely important in terms of setting up the structure for the lower instruments, and the discussion we're having here again, my reading of the submissions you've heard is that we are moving towards a revisiting of that principle and that interpretation method, if you like, set out in *King Salmon*, and that approach we think is appropriate, it is very clear, it gives guidance. If there's a fundamental issue in terms of current ports versus future ports, maybe the New Zealand Coastal Policy Statement would be altered and it would split those two. But effectively what you're being asked to do is to make that distinction now in terms of a policy that applies to ports generally.

O'REGAN J:

No, we're not, we're being asked to give leave to appeal.

MR ALLAN:

Yes, I accept that.

O'REGAN J:
I mean, we see to be clear that the High Court Judge was wrong, that the effect of the decision is that everything else is prohibited, you agree with that, everyone seems to agree with it.

MR ALLAN:
There's I think two paragraphs where he made that error, and I think it is an error. They are 52 and 55. So if we can go there. At 52 of the High Court decision the Court said, "Implementation of the Avoidance Polices in the NZCPS inevitably results in rules creating prohibited activities that cannot obtain a resource consent unless the NZCPS itself allows less than absolute compliance with the Avoidance Policies because of some conflict with another policy in the NZCPS."

My submission is that is an overstatement and it's contrary to what the Supreme Court said itself in *King Salmon*. Then the same comments appears in paragraph 55, or a similar comment, similar effect.

But if I take you to 132 in *King Salmon*, which is the paragraph immediately after, the group of paragraphs my friend was referring you too, and if I can just read that through to you, I'm not sure if you have it in front of you.

WINKELMANN CJ:
Is that 152?

MR ALLAN:
It's 132.

WINKELMANN CJ:
We can read it for ourselves I think. Right.

MR ALLAN:
So my submission on that relates to the second part of the paragraph where the Court is saying the RMA contemplates district plans, made prohibited

activities, so there is no obvious reason why a planning document which is high on the hierarchy shall not contain policies which contemplate the prohibition. It doesn't say they must, it says contemplate, and then they come back to that point in 144 and 145. This is in response to arguments put to them by the opponents of that position. And again I'll let you read through those. Paragraphs 144 and 145.

WINKELMANN CJ:
What do you make of that?

MR ALLAN:
What I make of that is that the Court is noting that there will be circumstances where you don't need to prohibit activities and that applies in terms of its reading at the policy stage, in other words the regional policy stage we're dealing with here. The second part of that, of course, and it's not stated there, is that when you get a resource consent stage you then have that wider discretion I talked about earlier. So it's recognising that there may be circumstances where something other than prohibited activity status will apply and we'd agree with that.

O'REGAN J:
Well it except it says that only if they're minor or transitory. That's not going to help Port Chalmers doing a dredging in this area and dumping the resulting sand and mud. That's not going to be minor or transitory. They're going to be doing it regularly.

MR ALLAN:
It's not a statement. Put it this way, it's not a statement of the out of the edge of that category where you might enable an activity to seek resource consent to be sought for an activity, it's an example of something that you wouldn't necessarily expect to be prohibited. So there may be a wider range of activities, given that they are different from effects, so a wide range of activities that you might enable things to occur, and from EDS's perspective it doesn't anticipate prohibited activities in the case of the port, for which you

would need resource consent. You then have a circumstance where the resource consent process following on later determines whether in fact you get a consent that might have more than those effects because of a whole range of other reasons that are valid under the Act. So all we're saying here, all I'm saying here is that these provisions –

O'REGAN J:
Well you're saying it but *King Salmon* doesn't say it.

MR ALLAN:
No I'm saying *King Salmon* doesn't say you must make something prohibited simply as a consequence of the avoidance policies.

O'REGAN J:
Well it's contemplating you might not do it if it was minor or transitory.

MR ALLAN:
Well and it's contemplated you might do it in that earlier paragraph, so it contemplates to you may prohibit activities, it doesn't say you need to.

O'REGAN J:
That's just it's logic of saying you're allowed to prohibit activities and low level plans you must be allow to prohibit them in upper level plans, it's not saying and therefore once they are prohibited in upper level plans you can do what you like in lower level plans.

MR ALLAN:
Right, but the key distinction there I would suggest is between prohibiting activities and rules, sorry, policies that avoid effects because the range of effects that are given category of activities can generate might include ones that are of concern but it might not and if you design your activity in a way that doesn't have those effects or you design it in such a way that you've offset them, for example, you may be in a circumstance where the Council are prepared to grant you a resource consent for an activity that might otherwise

be seen to be contrary to the policies simply because you've had regard to the policies and you've had regard to all the other matters that are relevant on your resource consent application.

WINKELMANN CJ:
We'll take the morning adjournment.

COURT ADJOURNS: 11.01 AM

COURT RESUMES: 11.18 AM

WINKELMANN CJ:
Mr Allan.

MR ALLAN:
Thank you, Ma'am. If I can just take you – I hope you've got it in front of you – to section 104 of the Resource Management Act, which is just to clarify that point we were discussing previously regarding the test that applies in the case of a resource consent application. So the provision begins, it commences, it's in respect of consideration of resource consent applications, it commences, "When considering an application for a resource consent and any submissions received the consent authority must, subject to Part 2, have regard to," and then it lists a series of factors. The first is, "any actual and potential effects on the environment of allowing the activity," and then we move down to (b), "relevant provisions of – a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement," which is of course what we're dealing with in this case, and, "a regional policy statement or proposed regional policy statement," which is the document that the Environment Court is grappling with the provisions of in this case, and then, "a plan," which means the district plan or proposed plan, and then (c), "any other matter the consent authority considers relevant and reasonably necessary to determine the application." Now there are some specific provisions that then follow about things you can and can't look at, but that is a general discretion in terms of the matters to be considered and, in this case,

to be had regard to, and you'll notice that, unlike those higher order planning instruments, you don't need to give effect to those provisions. So that's the basis for my submission that there is flexibility to a council once an activity is available for resource consent to be sought.

WINKELMANN CJ:

Isn't it hard to imagine a council not regarding themselves at this level as when they have regard to them they must have regard to directionism? So just "having regard to" doesn't direct or dilute the content of the higher level…

MR ALLAN:

Clearly what it does do in the case of the avoidance policies is require you to look very carefully at the effects on areas that are subject to them and to include that consideration and the policy directive in your overall weighting.

WINKELMANN CJ:

So is your submission that this dilutes effectively, that the higher order – are we calling them "higher order", the ones that are more…

MR ALLAN:

The policy instruments. So the district plan or the Regional Coastal Plan, moving up beyond that the Regional Policy Statement and above that the Coastal Policy Statement, they're all to be had regard to but they are no longer determining the outcome.

WINKELMANN CJ:

So they're operating less potently at this level?

MR ALLAN:

Yes, less directively, absolutely.

O'REGAN J:

But didn't the Court in *King Salmon* describe them as being effectively rules?

MR ALLAN:

I think in terms of the way they're phrased, yes, and in terms of what they do for the following planning instruments, so that the Coastal Policy Statement policies have in a sense a directive function when you move down to the Regional Policy Statement, so the Otago or the Auckland Regional Policy Statement implement them or give effect to them. So at that level, correct, but when you come down to the resource consent stage, this is the provision that tells you what you are to have regard to and that's where the discretion is created.

WINKELMANN CJ:

So is this submission purely based on the words "shall have regard to"?

MR ALLAN:

Oh, that's a distinction between the – it's an entirely different process, but the wording that operates here is "have regard to" as opposed to "give effect to" at the higher order instruments, as opposed to the resource consenting process. And the intention, I would say, is to give flexibility at a resource consenting phase, because it's recognised that you can't identify every possible outcome when you're creating planning instruments, that's why you have a resource consent phase to seek particular consents for particular activities.

O'REGAN J:

So you say the practical effect of the High Court decision on the port activities is very limited?

MR ALLAN:

No, I'm not saying that. I'm saying the practical effect of the High Court decision on the Regional Policy Statement is to give clear guidance as to what those policy statements should and, well, particularly should not do. Thereafter there's a separate process with reference to section 32 as to what the rules should be in the next document down, being the Regional Coastal Plan, and once all those rules are in place there's an entirely separate set of provisions in respect to how you would seek and possibly be granted a

resource consent, so the assessment for the resource consent is a broader enquiry in a way but within that clear planning framework and policy framework.

And I make the point in that context regard the new versus the old port that we've been having this morning, that where there's a new port and you're coming into an area that's subject to the avoidance policies, they are likely to probably be, I would guess, be decisive, in the sense that if you're in a area where those things are existing currently, it's pristine pretty much, it's a real ask to then make a decision subsequently to do something new there. Where you have an existing port the policy framework at the CPS level is the same, that's policy 9 and the avoidance policies, they still operate. But you are in a circumstance where part of the existing environment is the port, it's already a presence, it already has effects, it already mixes with other things in a particular way. So the outcome is likely to be a little different when you come to an existing port than – well, it's very different with an existing port and a new port proposal.

WINKELMANN CJ:
So this kind of tiered level of potency that you're conceptualising is not the result of a clear statutory framework, it's a mixture of the language used in the Coastal – how does it operate, where do we see it clearly? Because what you're postulating is that really, that the discretionary part, the ability to mitigate, only comes in at the consent phase.

MR ALLAN:
Not only there. Well put it this way, the ability to provide flexibility comes in at the rule stage where you make a decision as to planning status, is this going to be prohibited, is it going to be non-complying, might it be discretionary. At that point there's a call made on a range of factors one of which is the avoidance policies flowing down as to what you might give activity status. Another factor will be the fact that you have an existing port, you have operations with effects, you've got things you need to continue to operate.

The next phase is where the test changes because it then becomes to give effect to, so that's when you're seeking a resource consent and then becomes entirely fresh and at that stage it becomes have regard to as opposed to give effect to.

O'REGAN J:
What is the test at the previous stage when you're making –

MR ALLAN:
At the regional plan stage? It's give effect to the higher order policy instruments, so the Otago Regional Policy Statement and the –

O'REGAN J:
Well can you give effect to a rule prohibiting something by saying it's discretionary?

MR ALLAN:
Yes because the policies avoid effects but the rules deal not with effects they deal with activities, so you can provide for an activity.

O'REGAN J:
But if it's an activity that we know has that effect why doesn't it have effect –

MR ALLAN:
Well if it's an activity that you know has that effect you may chose under section 32 in your cost and benefits analysis to give prohibited activity status but in existing ports I'm not aware of that having occurred in New Zealand at all, it's more a case of you tell us your activity we'll access the effects of that if there are effects on these particular values and there are ways of avoiding that. You might put particular parts of activity in particular parts of your port. You might put in place measures to offset or to take other steps in terms of overcoming any effects that you do generate and that you do suggest in your application for resource consent might otherwise be problematic so it gives them flexibility at that stage to people to find ways around what would

otherwise be a problem or ultimately say to the Council we want you to make a judgement call on whether this activity should get granted resource consent or not.

O'REGAN J:

But my understanding is you're saying the *King Salmon* analysis, the textual analysis is equally applicable to rule 9 as it is to rule 8, I'm sorry, clause 9 as it is to clause 8 and if that's so I just don't see how this flexibility you're talking about is really open and obviously the High Court Judge didn't think that either.

MR ALLAN:

No, the High Court Judge reconciled the policy 9 and the avoidance policies in a way that said, in this case because of the interpretation of policy 9 and what it does and doesn't do I'm finding that the avoidance policies need to be given effect to in your regional policy statement provisions and the provisions that the Environment Court had proposed did not do so because it didn't do what the avoidance policies required them to do.

WINKELMANN CJ:

But the High Court Judge's reasoning assumed that this flexibility didn't operate.

MR ALLAN:

Well it did but I don't think that makes a difference to the outcome because notwithstanding the fact that he thought there was no flexibility the High Court Judge still went with the view that policy 9 needs to be read in the context of the avoidance policies and the avoidance policies need to flow through into the provisions.

O'REGAN J:

But that didn't seem to make any allowance at all for the fact the port was an existing port, he was just saying too bad, you're just in exactly the same position as *King Salmon* who wanted a new salmon farm.

MR ALLAN:

And in terms of the analysis of the provisions that's appropriate with respect to the reading of those two provisions. So policy 8 and I don't need to take you I think in the detail of our analysis as to why, sorry policy 9, that the port policy our analysis before the High Court and before the Environment Court was that that deals with certain aspects but it does not override if you like the avoidance policies. So you still need to have the avoidance policies flowing through and your port policy needs to reflect that and that's the reconciliation that he did.

O'REGAN J:

So the Regional Coastal Policy Statement has to reflect the New Zealand Coastal Policy Statement by having an outright prohibition on any adverse effect.

MR ALLAN:

Has to have a policy to that effect, yes.

O'REGAN J:

Then how does that get into the actual plan?

MR ALLAN:

There's then a separate plan process and that is notified subject to submissions, and that leads to policy provisions –

O'REGAN J:

But hang on, how does it lead to it? Does the plan have to give effect to the policy?

MR ALLAN:

The plan has to give effect to the policy statement, but that doesn't meant that you need to have prohibited activity status.

O'REGAN J:

That's what the High Court Judge said it did mean, didn't he?

MR ALLAN:

That's what he, yes, and for the reasons I think, we explained in our written submission we don't agree to that outcome. We don't think it leads to that, and clearly it hasn't in New Zealand, it's quite different.

O'REGAN J:

So what you're saying is, Coastal Policy Statement says "adverse effects completely prohibited". Regional Policy Statement has to say the same. The plan has to give effect to that. But at the resource consent stage it's all up for grabs?

MR ALLAN:

Well, at the resource consent stage you have, the Council has discretion, but it needs to have regard to that weight of policy, and that will influence, to some extent, its decision. The extent to which it influences will depend on the facts of the case.

WINKELMANN CJ:

I find it hard to understand why it should be so, so the prohibition should operate completely until it gets to this lower level.

MR ALLAN:

That's just the way the phrasing of the Act works. So it flows –

WINKELMANN CJ:

So that's simply – so it's section 131, is there any other section you'd refer us to in that regard?

MR ALLAN:

Sorry section…

WINKELMANN CJ:

You referred us to section 131.

MR ALLAN:

Sorry 104 in the Act.

WINKELMANN CJ:

Sorry 104.

MR ALLAN:

So that's the resource consent provision.

WINKELMANN CJ:

Yes.

MR ALLAN:

The section 62(3) is the one we're dealing with in this case, which is the one that says you must give effect to.

O'REGAN J:

But what's the next tier down when you're turning the policy statement into a plan. What section applies then?

MR ALLAN:

It might be 67.

WINKELMANN CJ:

It would be quite helpful if you gave us the tier of, the tiered…

MR ALLAN:

Section 74(1)(a) says, "A territorial authority must prepare and change its district plan in accordance with," a number of matters, including, "A national policy statement, a New Zealand coastal policy statement, and a national planning standard," if any.

O'REGAN J:

But that doesn't deal with the regional policy statement.

MR ALLAN:

No, and I'm going to have to move back to find that one. That'll be somewhere between the two. 67, sorry. So 67(3), "A regional plan must give effect to (a) any national policy statement; and (b) any New Zealand coastal policy statement; and… (c) any regional policy statement."

O'REGAN J:

So you say you can give effect to a plan that prohibits something while making it discretionary.

MR ALLAN:

It's prohibiting in effect, and you – the plan provisions tend to deal with activities, so they are a different thing. An activity may or may not generate an effect. If it's always going to generate an effect, you might make it prohibited. If it might not, and you want to give somebody the opportunity to seek a consent for it and have it tested, you would make it a non-complying discretionary whatever activity status it's thought in terms of the broader range of matters is appropriate. But certainly, as I said, I'm not familiar with a port, that provisions that are prohibited. I don't have exhaustive knowledge. But that's not where they got to in *Bay of Plenty*, after the High Court decision in *Forest and Bird*, and it's not what we have in Auckland, and it's clearly not what's currently there in other places I'm aware of.

WINKELMANN CJ:

So you say this hierarchy response is apparent in these sections?

MR ALLAN:

Yes, that's the tests that you apply, and that's the test that the Supreme Court was looking at in terms of, or the requirement to give effect to in *King Salmon* and it explained how you give effect to in terms of that decision and identify the contextual approach as the way to do that.

I'm conscious of time. I will zip through a couple of little things and then pass to my friends.

My friend, Mr Maassen raised some issues regarding exceptions and he referred you to paragraph 88 of *King Salmon*. In paragraph 127 of that case the Court set out the contextual analysis that is to be undertaken and explained what it is and then in 130 it made it clear that only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible, the necessary analysis should be undertaken on the basis of the NZCPS albeit informed by section 5 RMA. As we have said, section 5 shall be treated as the primary operative decision making provision. So our submission here is that these exceptions come into play if the contextual analysis doesn't give you the answer.

O'REGAN J:
Textual rather than contextual.

MR ALLAN:
Sorry, yes, quite right. Textual analysis doesn't give you the answer.

WINKELMANN CJ:
Sorry the exceptions come into play.

MR ALLAN:
The exceptions come into play if it's not apparent from that textual analysis what the relationship between the provisions are if they can't be reconciled.

Now the other matters that were raised in paragraph 88 of *King Salmon* –

WINKELMANN CJ:
What happens when the textual analysis produces a perverse outcome in the context?

MR ALLAN:
Well that's –

WINKELMANN CJ:
Which is what's said against you.

MR ALLAN:
Yes, well and the Court in *King Salmon* said these avoidance policies are matters that are in the nature of a bottom line. So they are matters that have that degree of importance as a nation through that document we've recognised that and the hierarchy of instruments, if we read it strictly as *King Salmon* suggests we should in terms of the wording that's been used, that produces an outcome. If the outcome is problematic the answer may well be to change the NZCPS and this is a six year old decision now, it hasn't been changed in terms of that issue. So if the interpretation gives us an outcome that is perceived to be perverse then that may need us to change the instrument rather than changing the way in which we analyse the document that's been written, we would say, to have particular weightings applied to particular issues.

And just a note from paragraph 118 of a Supreme Court decision. The Court looked at the ministerial ability to make decisions that do impose national bottom lines and confirmed that they can be done.

O'REGAN J:
So what do you say about paragraph 88?

MR ALLAN:
Sorry, I will take you back to there. So that's running through a serious of issues that might be problematic. The first is low party they say challenge the

validity of the NZCPS or any part of it and I'm not aware of anybody doing that here. Secondly, there may be instances where the NZCPS does not cover the field and a decision maker will have to consider whether Part 2 provides assistance in dealing with the matter. My submission is that if the field in this case involves ports then clearly the NZCPS does cover it because it has a specific provision dealing with ports, other provisions dealing with infrastructure generally and then the avoidance policies and it's the reconciliation of those that's at the core of the issue. I haven't heard anybody submitting that it doesn't cover that field and, third, if there is uncertainty as to the meaning of particular policies reference to Part 2 may well be justified. And that's where we go through the textual analysis and at the end of that if there is still uncertainty that's the issue dealt with in paragraph 130.

I suppose there is one final issue I should just address briefly before sitting down and let my friends get on with it. My reading is that the parties here, I think all, agree that to the extent the High Court said that the avoidance policies necessarily lead to prohibited activity status, we don't think that was correct, and I've explained to you why I think *King Salmon* at least doesn't support that position, and I think goes further than that. It may be possible for you to give some clarity on that point to the extent it's needed and a decision that doesn't grant leave, because we're all I think of the same mind in terms of that issue. I appreciate that my friend, Mr Maassen, in particular, has raised much wider issues. I would characterise those as essentially challenging *King Salmon* and I would oppose that. But I think the issue regarding whether the avoidance policies lead to prohibited activity status is one that might usefully be clarified given, I think, we're all ad idem on that.

O'REGAN J:
It's not normal for the Court, as a leave panel of the Court being less than the whole Court, to make definitive findings of that kind.

MR ALLAN:

In that case, Sir, I think our position is that it is *King Salmon* that's the case that has precedence in terms of these issues and a mis-statement in the High Court will not override that analysis that I put to you. Thank you.

WINKELMANN CJ:

Is it Mr Logan next? Right.

MR LOGAN:

May it please the Court, the case presented on behalf of Port Otago and Marlborough District Court is in essence an invitation to this Court to revisit the decision of *King Salmon*. I know that a lot of words have been said today and in written submissions which suggest otherwise, but on examination the appeal would require this Court to reconsider that decision and in my submission that is not in the public interest at this time and is not an arguable proposition for either Port Otago or Marlborough District Court to advance.

So in my submission the starting point is really to consider what the Act, alongside *King Salmon,* have established, and it seems to me there are a number of propositions which emerge which really mean that the case which these parties are advancing is not seriously arguable.

The starting point is the role of the New Zealand Coastal Policy Statement. That is a national document prepared through a process of public consultation and through section 32 evaluation. Its object is to achieve the purpose of the Act in the coastal environment, it sets national directions and priorities, it's at the top of the hierarchy of planning instruments which relate to the coastal environment. The next in that hierarchy is the Regional Policy Statement for each region in the country. The statutory direction in section 62(3) is that the Regional Policy Statement must give effect to the New Zealand Coastal Policy Statement. The decision in *King Salmon* explains that the New Zealand Coastal Policy Statement must be given to, as it stands, for better or worse, it's not for regional councils or the Environment Court to depart from the injunctions of the Coastal Policy Statement. It is correct, as my learned friend

Mr Maassen highlighted, that there are matters set out in section 61(1) to which the Regional Council or on appeal the Environment Court must take into account in the preparation of the Regional Policy Statement. The relationship between section 61 and 62 was effectively explored by this Court in *King Salmon.* There is a difference in that *King Salmon* was concerned with a change to a regional coastal plan whereas we're concerned in this hearing with a regional policy statement but the statutory provisions are identical. It's the same range of matters which must be considered and section 62(3) the statutory obligation to give effect to the New Zealand Coastal Policy Statement has its equivalence for regional plans in section 67(3) to which my friend Mr Allan just took you.

In the Supreme Court decision in *King Salmon* and in particular around paragraphs 85/86 the relationship between in effect section 61 and 62 was explored by the Court and it's plain from the judgment as expressed in those paragraphs that the Court considered that the statutory duty to implement the New Zealand Coastal Policy Statement overrode the range of considerations which were in section 61(1). That is important in the *King Salmon* case because amongst the matters set out in section 61 was consideration of Part 2 of the Act and the Supreme Court held in *King Salmon* that the Board of Inquiries resort to Part 2 of the Act, it was not permissible when the field was covered by the relevant policies particularly the avoidance policies in the New Zealand Coastal Policy Statement.

Part 2 in section 61 stands on the same footing as section 32, the evaluation provision upon which my friend Mr Maassen quite heavily relies.

WINKELMANN CJ:

Sorry, can you just restate that? Can you just repeat that statement? You're giving a lot of very dense, very useful material and we're trying to take it in.

MR LOGAN:

Part 2 sits alongside in section 61 the evaluation which is required by section 32 of the Act, they stand on the same footing and applying the same logic as in *King Salmon* the section 62 imperative to give effect to the New Zealand Coastal Policy Statement must prevail over any consideration or evaluation under section 32 or, to put it another way, section 32 can come into play but only to the extent that it gives consideration to options or alternatives which give effect to the New Zealand Coastal Policy Statement. It's not an opportunity to range outside the directions of the New Zealand Coastal Policy Statement because that would be equivalent to ranging outside the New Zealand Coastal Policy Statement and embarking on a Part 2 examination of the merits of a particular range of planning provisions or particular range of consent matters.

WINKELMANN CJ:

What section is that you were talking – did you say section 32?

MR LOGAN:

Yes, Ma'am. Section 61 lists matters which must be taken into account in the preparation of a policy statement. That includes the evaluation under section 32.

WINKELMANN CJ:

Right.

MR LOGAN:

So the strongest direction in the Act is the Supreme Court, found in *King Salmon,* was to give effect to the New Zealand Coastal Policy Statement, and that in turn lead to the question of what does the New Zealand Coastal Policy Statement require. The Supreme Court set out in that decision the principles of interpretation to be applied to the New Zealand Coastal Policy Statement, it did so at some length. In my respectful submission those principles were applied correctly by Justice Gendall in addressing the relationship between policy 9 for ports and the avoidance polices.

The avoidance policies are expressed in compelling directive language. Policy 9 is not as forceful. It's not as prescriptive. They can sit together alongside one another. They're not in conflict, and in particular it's policy 9, subpolicy (b), which is applicable in determining the relationship between providing for ports and their environmental effects. The where, the how and the when element of 9(b) is critical, and the avoidance policies set the limits in determining the where, how and when. So those policies work together.

The Supreme Court likewise held that "avoid" is a strong word, effectively meaning "not allow". The Environment Court had teased out "avoid" to include "avoid, remedy or mitigate". "Avoid" means do not allow the prescribed adverse effects, "remedy or mitigate" is a response to adverse effects. You can't remedy an effect that hasn't occurred. If you mitigate an effect you're reducing its impact but you're not avoiding it.

So, contrary to the submission which my learned friend Mr Maassen advanced this morning, it isn't the case of policies pulling in different directions and therefore some sort of exception. My learned friend also took the Court to paragraph 141 and the concluding sentence in *King Salmon*, and with respect to my friend it doesn't have the significance which he suggested. It reads, "The contested issue is not whether policies 13 and 15 have greater weight than other policies in relevant contexts but rather how much additional weight." The Court left it hanging at that point but it's clear in my submission from the balance of the decision, which is encapsulated in the second to last paragraph 153 that the avoidance policies had decisive weight so that it was impossible to approve a plan change where there was a factual finding that the proposed plan change would have significant adverse effects on an area of outstanding natural character and landscape. So in my submission the decision reached by Justice Gendall in the High Court was the only one open.

WINKELMANN CJ:

So you say you support Mr Allan's analysis of the hierarchy and how it, there is more, there is a more permissive approach allowed at the last two steps,

the setting of rules and in the Resource Management decisions, consent decisions.

MR LOGAN:

Well I listened carefully to my friend and I'm not sure that I entirely would agree with the way in which he approached. I would express myself somewhat differently.

WINKELMANN CJ:

Right, well can you show us how you'd express yourself?

MR LOGAN:

The Act sets out a cascade of planning instruments, and it's described in detail in *King Salmon* but in summary it's said, the New Zealand Coastal Policy sits at the top. It must be given effect to in the Regional Policy Statement and in turn the Regional Policy Statement, which is assumed to mirror the directives of the New Zealand Coastal Policy Statement, must be given effect to in the Regional Coastal Plan. So the objectives, policies and rules in the Regional Coastal Plan should align with those in the New Zealand Coastal Policy Statement and in turn in the Regional Policy Statement. There should be a clear line of sight from top to bottom.

Where it comes to rules things are a little bit more complicated because while the direction in the New Zealand Coastal Policy Statement will be to avoid certain adverse effects on certain resources, because of their intrinsic value, that doesn't necessarily translate into prohibited activity status. I say that because in some cases it will be clear that certain activities will have that adverse effect, and you can safely prohibit them. In other cases activities may or may not have a proscribed adverse effect, whether that adverse effect would occur, is a factual enquiry which is capable of being undertaken through a resource consent process. It may be that the activity on examination will not have any one of the adverse effects which is prohibited by the avoidance polices in the NZCPS. It maybe that it can therefore be consented or conditions can be imposed so that the activity is conducted in a way in which

those adverse effects do not occur. Adaptive management might be a tool which is used to prevent those effects occurring if a consent is granted. Adaptive management conditions could be imposed on a resource consent to avoid effects, not simply remedy or mitigate them. It depends on what the objective of the adaptive management condition is, and how it's structured, and what thresholds it has.

O'REGAN J:
Let's just cut to the chase. Let's assume operating the port will have an adverse effect on one of the features that's referred to in the prohibitions in the CPS and you say should be in the RCP. Can a resource consent be given to the port to do something which will have that adverse effect?

MR LOGAN:
In the face of an avoidance policy it would be extremely difficult to properly grant a resource consent.

O'REGAN J:
So Mr Anderson is right then. A port may have to cease operations, that's what he's saying, because it can't avoid them.

MR LOGAN:
Well, that is a rather –

O'REGAN J:
It seems rather odd to me that the owner of the port is here saying that that should happen.

MR LOGAN:
Well, the owner of the port here is in its regulatory capacity and it has certain statutory duties to perform, and one of them is to apply the NZCPS, not to manoeuvre the NZCPS because of its ownership of the port, and that's why it's here, so that there's integrity in the planning process.

WINKELMANN CJ:

So you'd accept it is extremely unlikely that – unlikely, extremely unlikely…

O'REGAN J:

So Justice Gendall was right in practical terms then, wasn't he? He just was wrong in the legal niceties of it. What he was basically saying is if you can't avoid one of these effects then you can't do it.

MR LOGAN:

If you put it in those terms and disregarding the legal niceties I would agree that flying in the face of an avoidance policy is not a decision which a consent authority should be making, in my submission, not an Environment Court. But there are whole lot of assumptions built in to both the question and the answer –

WINKELMANN CJ:

Yes.

MR LOGAN:

– and there's no factual findings to justify some sort of conclusion that if this decision of Justice Gendall stands the port will close, although there's some rhetorical flourishes to that effect the have been advance this morning.

WINKELMANN CJ:

Well, I don't know, there wasn't that much rhetoric. Right.

MR LOGAN:

Maybe I was imagining it. But yes, there are challenges at an operational level, I'm not going to deny that. But what I do say is that the Act and the NZCPS have together created a system of management for the coastal environment which has to be applied. So the New Zealand Coastal Policy Statement makes no distinction between new ports or existing ports. There's nothing to that effect in policy 9, the same regime applies to both. How that bites at a consent application level is, as my friend Mr Allan suggested, a

matter of fact, not of policy. It is very much coloured by the context that there is a well-established port that's been operating for over 150 years, it's had environmental effects, and the values which the Coastal Policy Statement seeks to protect co-exist with the existing port operation or, in the case of the surf breaks, have some sort of symbiotic relationship where port activities actually have created and maintained them. So it is very simplistic to say that Justice Gendall's decision is a knockout blow for the port. I do –

WINKELMANN CJ:

Well, I mean, you're tending to say that it's a knockout blow for them getting consent to do these activities, it would be prohibited though. I think you are tending to say that, because you said it would be extremely unlikely they'd get consents.

MR LOGAN:

Well, it would be unlikely to get consent in the face of an avoidance policy if the avoidance policy was triggered by the inability to carry out the activity without having the adverse effect. So in terms of existing operations it's very unlikely conceptually for there to be any change.

ELLEN FRANCE J:

I'm not sure why that follows.

MR LOGAN:

Well, because the existing values which the avoidance policies would seek to protect exist in the current environment, which has been shaped by over 150 years of port activities: ships coming and going, wharves being built and removed, reclamations, dredging, disposal of dredging spoils and so on.

WINKELMANN CJ:

A lot of things are progressive and cumulative so if there's all this dredging that goes on, on an ongoing basis, and the waters around it change, why couldn't it be that dredging suddenly is stopped by the application of this coastal plan down through the hierarchy.

MR LOGAN:

I'm struggling with the answer because I'm struggling to visualise the kind of scenario where that would arise.

WINKELMANN CJ:

Well the effect of currents et cetera change, we know that we said it moves around a little in the coastal areas, so a storm might change the lie of the land for instance.

MR LOGAN:

Possibly but a storm may also remove the resources which the avoidance policies protect. It's very difficult to work from the bottom up because we don't have a proper evidential foundation in the Courts below, and what the Act and the New Zealand Coastal Policy Statement require is a top down approach to policy making.

O'REGAN J:

So you would say *King Salmon* has made the law clear. This case was just an application of it. There's no reason for us to give leave and that to the extent Justice Gendall was wrong about the prohibited activity point, it's not of great practical significance because the activities probably wouldn't be allowed anyway.

MR LOGAN:

Well it is of some practical significance because a Coastal Policy Statement is going to be, a coastal plan is going to be more subtle than that by having a range of activity statuses, not just simply linked to prohibited activity status where there is some outside possibility of a prohibited adverse effect in terms of the avoidance policies.

O'REGAN J:

But it's not necessary for us to clarify this because I think Mr Allan's point is *King Salmon* makes it, it's clear when you read *King Salmon* that Justice Gendall must have been wrong about that. Do you agree with that?

MR LOGAN:

It's not crystal clear, but it is difficult to reconcile with some passages in *King Salmon*, I accept that.

O'REGAN J:

What would you envisage an Environment Court Judge would do faced with that comment in the High Court judgment that the outcome is a prohibited activity. Would an Environment Court Judge say, well, that's what the High Court said but the Supreme Court said something different and I'm going to follow the Supreme Court.

MR LOGAN:

I couldn't discount the possibility that an Environment Court Judge might consider it a binding matter. Having been through the hearing and read the judgment closely I would say it was an obiter comment which wasn't necessary for His Honour to deal with the outcome in the Environment Court which trespassed beyond in my submission and in His Honour's view the directions in the New Zealand Coastal Policy Statement but that would by no means be clear to some other reader.

WINKELMANN CJ:

Are those your submissions Mr Logan?

MR LOGAN:

I'm just checking my notes but yes Ma'am I think I've covered everything.

WINKELMANN CJ:

Take your time if you need to take the time to check your notes. You're happy you've covered them?

MR LOGAN:

Yes I'm happy to leave it there. I think one way or another I've covered the points that I wish to make.

WINKELMANN CJ:

Thank you Mr Logan. Mr Anderson?

MR ANDERSON:

I guess I'm just going to respond, I'm not going to go through my own submissions, I just want to respond to the matters that have been raised through the course of this morning.

I first want to start by setting out – there seem to be two kind of important issues that arise. The first is about the concept of the challenge to *King Salmon* and the second is this business about prohibited activities and adaptive management. So I want to deal with the first one, and my submission on that point is that the appellants in this case are seeking to – they're not seeking to re-examine *King Salmon*, they're seeking to turn it over and bring back a different approach. And in order to understanding why I make that submission I think I'd like to go to the Supreme Court decision in *King Salmon*, and then I want to start at, well, what is an overall broad judgment that the Supreme Court was considering in that, and they refer to what the Board said in paragraph 34, and the Board said, "It is well accepted that applying section 5 involves an overall broad judgment on whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting consideration in terms of their relative significance or proportion in the final outcome." So that's the overall broad judgment and that had been the approach the had been applied in resource management for many years. And *King Salmon* was so important because it effectively, well, it overturned that and brought in an entirely new regime, and I think that's been referred to as the environmental bottom lines approach or Mr Maassen refers to that as the contextual approach, and that's where you look at the words and the words –

WINKELMANN CJ:

It's textual, not contextual, textual.

MR ANDERSON:

Yes. Did I say “contextual”? So I meant “textual”. It’s a textual approach where the words matter and the words are what is applied. So we can see that in, if we go to *King Salmon* itself, 1 to 7, it talks about the way in which words are framed in various policy documents, and in 127 there is, it refers to, “They identify matters that councils should take account of or take into account, have particular regard to, consider, recognise,” and I’ll return to that in a minute, “promote or encourage and use word like ‘as far as practicable’, et cetera.” So in *King Salmon* it referred to the different ways in which policies can be framed. And I note there that there’s a reference to “recognise” in the footnote, it’s footnoted down to policy 9. So when it made those comments the Supreme Court was cognisant of policy 9 in the Port’s policy.

And so what the real, the bottom line textual approach, is really set out in 129, “When dealing with a plan change application,” and I don’t need to read it out, but what is important is, “Those expressed in more directive terms will carry greater weight than those express in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decisionmaker has no option but to implement it,” and so that's where the bottom lines come from. The bottom lines in the environmental bottom line approach come from the application of an avoid policy which flows through to these bottom lines, and there are qualifiers on that.

The key qualifiers were set out in paragraph – I’m going to say 88 but, well, 90 in fact – the key ones that were referred to there, and I refer to the bottom bit of paragraph 90, “For these reasons it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies of the NZCPS more generally absent any allegation of invalidity, incomplete coverage or uncertainty of meaning.” So there we have the two approaches in stark contrast. The overall broad judgment approach, we look at the competing considerations and take account of their value and make an overall judgement, or we go to the words and we interpret the words, and my submission is there’s no ground in between them. There isn’t a middle ground that allows a re-examination of *King Salmon.* If you go back to *King Salmon*,

if you view *King Salmon* and decide that it doesn't hold then you go back to the overall broad judgment, and in my submission that's, I took notes of what my friend said this morning , and at one point Mr Anderson referred to a conflict situation that needs to be resolved on its merits, and Mr Maassen similarly referred to the textual as being important but not the end point.

So in my submission they are advocating a return to the overall broad judgment approach. There isn't a middle ground. So in that sense my submission is that an approach that seeks to turn over *King Salmon* is not a good idea and is not appropriate, and one of the reasons I say that is that we've had five, six years since *King Salmon*, and that has involved a seachange in the way in which we do plans. Plans get developed, there's an almost slavish looking up the line to what the higher documents say, and so now we have these plans coming through which actually implement that, you'll see these words that are in policy 11, replicated in policy statements and plans around the country, and that's a direct reflection of what *King Salmon* did to the resource management system. The words matter and that's reflected in our plans and I think it would be, it wouldn't be appropriate to then suddenly as we're halfway through implementing what *King Salmon* means, because these planning processes take a long time, to then turn around and say well actually we want to go back to our broad judgment approach because there are some situations where you might get some perverse outcomes.

So insofar as this application for leave seeks to re-litigate, re-visit, re-whatever you want to call it, *King Salmon*, in my submission is it should be declined because it's not an appropriate thing to do in terms of where we're going to go if we want – in terms of the whole resource management system if we're going to go back to the overall broad judgment. So that's my submission on that point.

O'REGAN J:

Do you accept there's some difference in between an existing facility like the port and the fact that it was a new development in *King Salmon*?

MR ANDERSON:

I don't accept that it's different. I think that what the Act and the NZCPS direct you to are effects and so the reality is that a new port will have significantly different effects than some activities associated with an existing port, and what you're looking at is the effect. So you will have an application to do something, and if it's a new port then you'll look at the effects of that, but when you've got an existing port the application won't be the for the existing port, it will be for some associated activity with it. It will be for cleaning – for maintenance, dredging or good dredging for channel, and so in that sense you look at the effects of that, and you look at the way those effects work. So whether it's a new port or an old port is neither here nor there. What's important is the effects you're talking about, and in the context of an existing port those effects are likely to be less and therefore less likely to contravene these avoid policies, whereas a new port is more likely, particularly if it's located in a place where these important values are.

The one thing I would like to briefly talk about is the cascade down, the planning hierarchy. So you've got, you know, section 5 and Part 2 at the top, and that goes into, I'm going to get my computer now. I had a battery problem but hopefully I've charged it up now.

WINKELMANN CJ:

Are you running out of battery?

MR ANDERSON:

Hopefully I can refer you to the correct words. So we go to –

WINKELMANN CJ:

What are we looking at now?

MR ANDERSON:

The RMA. So we've got the Coastal Policy Statement and so section 56, what is the purpose of the Coastal Policy Statement. "The purpose of the cps

is to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand."

Then we go down to what we have here which is a Regional Policy Statement and we talk – and that's section 59 and that says, "The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources…"

So we have – and a regional policy statement has to give effect to the New Zealand Coastal Policy Statement, so in that sense they work down in that way. Then we go the next level down is regional plans. The purpose of regional plans. Section 63. "The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act." So we have a purpose and the regional plans have to give effect to a Coastal Policy Statement and the Regional Policy Statement. So then you have the rules that might achieve that. Then the final step is resource consents which are different and they're dealt with under section 104. I think that is a different framework, as Mr Allan pointed out, around section 104 and how that interacts with plans because you have a, 104 has a broad range of matters to, I think the word is have regard to, when you decide whether or not to grant a resource consent, and one of those is the plans, and that leads to obvious tension which is if you have this hierarchy of plans that go all the way down from coastal policy statement, regional policy statement, plans, then you have these broad matters to be considered in section 104 which include actual and potential effects on the environment and then it's got, any relevant provisions of the relevant planning documents. So – and that has been an issue and the Court of Appeal dealt with that in *RJ Davidson Family Trust* where they actually talked about the interaction between section 184 and how it worked between a consent and a plan, and what the Court said in that case was effectively that in most cases you won't need to go back to Part 2, but you're not precluded from doing so. We'll find – so the Court of Appeal said, the High Court made quite a strong finding about resource consent decisions had

to give effect to, and the Court of Appeal didn't go quite as far as the High Court. So they said, "Having regard to the foregoing discussion we agree with Justice Cull's conclusion that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications. Providing the plans have been properly prepared in accordance with Part 2. We do not consider, however, that *King Salmon* prevents recourse to Part 2 in the case of applications for resource consent. It's implications in this context are rather that genuine consideration application of relevant plan considerations may leave little room for Part 2 to influence the outcome."

This was so in the present case. That's a brief run through about the planning hierarchy and how it works specifically with relation to resource consents so the, the perverse outcome where you have something which has a relatively minor effect on one of those important resources which are identified in the Coastal Policy Statement, significant biodiversity, outstanding natural character, outstanding landscapes. In the context of what *RJ Davidson* tells you about resource consents, if you had that perverse outcome that might be a situation where it's appropriate to have recourse to Part 2. If you had a minor effect, if you had an effect that breached one of the avoidance policies, but it would close down the Port, that might be the situation that RJ Davidson Trust was talking about where you could recourse back to Part 2 and say well maybe we don't have to strictly apply because that's the flexibility that the Act incorporated into resource consents.

O'REGAN J:
But that wouldn't be the case if it were a prohibited activity presumably?

MR ANDERSON:
It was predictively that you couldn't grant – you couldn't make the application in the first place, so I want to get onto that. That was going to be my next point, this issue around prohibited activities.

So there is general acceptance that I think that Justice Gendall – I mean, I would say he framed that paragraph in his decision about prohibited activities and adaptive management poorly rather than it being wrong. So what we've got in – what he's done he's conflated activities with effects and that I think is the problem in that bit of the decision. So if you look at section 12 of the Act, section 12 of the Act talks about various activities which are, so section 12 talks about restrictions on use of the coastal environment, and that there refers to a range of activities. You can't reclaim or drain any foreshore or seabed, erect, reconstruct, place, alter, extend or remove, so there we have this reference to "activities" in the actual Act itself. And then there is, and I was going to say there's no reference to "effect" but there are some qualifiers around "effects" before you engage section 12. But what the High Court said is that – rather than attempting to, probably incorrectly, saying it I'll say what he actually said in that paragraph. So in 55 Justice Gendall says, "In their decision the Supreme Court confirms that avoidant policies will inevitably result in prohibitive activities." So there the policies talk about effects because where they're talking about policy 11, and policy 11 of the NZCPS talks about effects, the one that is most often used is where you have – so you have avoid adverse effects on threatened species effectively is what (a)(i) is about. So you have this Act that talks about activities and then we're talking about effects. And so avoidance policies will inevitably result in probative activities.

When you're doing a plan you look at the effects of the activity and you see whether that avoids the policies and breaches those policies. So if you had – and I looked at what the Bay of Plenty plan, which is the most recent plan, did – and so if things are going to have a minor effect you can make them permitted, so things like navigation aids and bearing, like, washed-up whales, those are permitted activities because you know at the planning stage that the effects of those are minor and therefore you can permit them.

On the other end of the spectrum there's things that you know are going to breach the avoid policies in that plan: mining in significant size was a prohibited activity because you know when you make your assessment at the planning level that it's going to breach the policy. But then you have these

other effects which cover the complete range. So, you know, disturbance of the sea floor, that can be all sorts of things, and the consent process itself determines the effects and whether you've breached the policy. So in that sense that's why in my submission that's where the conflation of the two things together is problematic because the consent process itself determines whether you've breached the policies and you can't do that in relation to activities which are broad in their nature and you don't know what they are.

O'REGAN J:
But if you look at – he relied on paragraph 132 of *King Salmon…*

MR ANDERSON:
Yes, I just think, I think that's an error.

O'REGAN J:
And they also talk about prohibition of particular activities being – they say if plans can do that then so should policy documents.

MR ANDERSON:
I think the key word in 132 is the word "may", and I'll just go to 132 to make sure I'm correct on that point. But where I think – "The RMA contemplates that district plans may," and that in my submission is the critical word, they don't have to but they may, and they may where you know that that activity will breach an avoid policy. But if you don't know at the plan stage if an activity, for example building a structure in an SNA or a significant site, will breach the avoid policies then you don't prohibit it, you make it discretionary or non-compliant depending on where you are.

O'REGAN J:
Well, except that they're referring there to policies 13 and 15 and they say there's no reason why they shouldn't be policies contemplating the prohibition of particular activities in certain localities.

MR ANDERSON:

And that's right, and so those relate to outstanding nature character and outstanding landscapes. And so you can imagine a policy – if you knew something, for example, a large building in one of those sites, you knew that was going to breach those avoid policies by having an effect, then you could prohibit it. But there might be activity in those places where you can't be certain at the planning stage whether the effects of it will be, for example, a building, full stop, that may or may not have the effects that contravene those policies. So that where you make, you don't prohibit it, you make a discretionary non-complying and you let the consent process determine whether it breaches those policies, and that leads you to your decision.

And the final point I think is around adaptive management and why that is still available in relation to the avoid policies because the normal interpretation of adaptive management would be, you know, you do an activity, you monitor it and you identify the effects and you take remedial action and the step of taking remedial action you don't devoid by taking remedial action so, you know, there's a first glance that well adaptive management you don't avoid effects by doing adaptive management but I think there are certain circumstances where you can avoid effects using adaptive management and that's about the level of the triggers you set. So if you –

WINKELMANN CJ:

So is the Judge wrong on that then?

MR ANDERSON:

Prohibited adaptive management, yes, I believe he was in the same way it's the same error about prohibited activities. It's a looseness of the – it's just poorly framed, I don't think he actually meant – no I won't say that actually. But it's the same issue that the adaptive management. You could set your triggers at a level below avoid, for example, *King Salmon* says minor or transitory effects may not be an adverse effect, so you could set your trigger levels at the minor or transitory level and then when you've hit that level in your adaptive management you could then pull the activity back so you didn't

breach – the effect that required avoiding never occurred and so that's an example where adaptive management could be used to avoid effects, but those issues in my submission don't warranting granting of leave. The *King Salmon* decision stands in the face of those statements in 55.

WINKELMANN CJ:
All right, are those your submissions?

MR ANDERSON:
Those are my submissions.

WINKELMANN CJ:
Mr Anderson, thank you. Now are you both replying, Mr Maassen or Mr Anderson?

MR ANDERSON:
No Your Honour I'm happy for my learned friend to reply. Of course I'm happy to answer any questions the Court may have.

WINKELMANN CJ:
Mr Maassen?

MR MAASSEN:
I will be brief. First of all I commend to you paragraph 135 of the Environment Court decision which is an indicative policy suite intended to provide the parties – it's an interim decision intended to provide the parties with conceptually an idea of how the findings of the Court may be implemented in the regional policy statement and I reiterate the point that it is quite an intricate policy framework with obviously a strong preference for avoidance in the absence unless there of course an absence of alternatives and a prioritisation of safety considerations and on the safety point His Honour looked back to section 5 which emphases human safety as a dimension of sustainable management and in my submission the authority that he obtained from that was the judgment of *King Salmon* which said where it doesn't cover

the field or there is a tension then you could look back to section 5 and so he was quite properly entitled in trying to understand how these two, these policies could be reconciled in that circumstance to have regard back to section 5 and there is caselaw that quotes the Latin principle that safety is one of the fundamental concerns of a law. So all of that was the lens in which the Court did it and my submission is that this is not at all remotely like the overall judgment approach that the *King Salmon* decision rightly rejected as an appropriate implementation of the statutory task in plan making, this is a consideration of text, a recognition that the avoidance policies have a slightly stronger direction but the policies in relation to the port are also resolute but that when you looked at the context like safety considerations and disablement of the port you had to stand back and say this is a conflict, this is in substance a conflict in the particular circumstances and I do rely on the *King Salmon* decision at paragraph 141 the last sentence. I don't resile from that submission that I made where His Honour Justice Arnold put it is not just a question of one having greater weight but how much additional weight in the relevant context and so my submission is that sometimes context can generate an exception to the textual principle and this is a paradigmatic example of that. It will be not common but it will arise with significant existing infrastructure with locational determinants.

WINKELMANN CJ:

But would it be not common. Couldn't it arise in every existing new situation?

MR MAASSEN:

In every new situation where you have a choice in a real sense between locating the activity or not then I accept that the calculus is closer to *King Salmon* than the one I'm advancing in a situation where you have an existing activity but I don't say that absolutely because there could be, for example, nationally significant infrastructure supported by other policies in the National Coastal Policy Statement where you're choices about location and alignment are simply not that great and in those circumstances if you're designing policy to accommodate that you may well say that a complete avoidance approach is disproportionate. It’s a pulling in different directions

but what you do have to have, in my submission, reading fairly the paragraphs I quoted in the morning is relatively similarly strong policies that in the context lead to an environmental trade off that in substance is a significant conflict. That's the sort of exception that I'm postulating and it is a far cry from *King Salmon* and I'm not suggesting that you would resolve the conflict by simply saying, well the policies are just relevant considerations, no you would recognise the difference in the word, you would consider the matters in section 32 and you were to preference avoidance if possible but, if not, the human benefits that might derive may allow or justify some effects of a certain scale. I simply reject the idea that avoidance means avoidance in every situation which is the position I think Mr Logan has fairly advanced as the position that the Regional Council did adopt and has always adopted as to the meaning of give effect to and it was interesting because Mr Allan talked about applying the New Zealand Coastal Policy Statement and that is a significant terminology because it is more appropriate to a rule than it is to a policy statement and if you start applying these policies as rules that you create inflexibility and that has two consequences other than the insensible results.

It potentially deprives the instrument of its value because the idea of establishing policies is that you want them to apply generally but there will be exceptions and if you start saying policies are rules then people are going to abandon policies because they simply are not up to the task of being that very useful constraining force but not determinative force and the policies are used in the administrative state of modern democracies is a fact and if we start to say the Supreme Court has made a category error it is said policies are rules then we're attributing to the Court a category error but also depriving society of an effective tool which has sufficient flexibility in it to achieve its purpose and so what happens is that my friends in the High Court quote Justice Arnold where he says that sometimes policies can operate like rules. He says that at paragraph 116.

Well the first point is that the reference he then makes is to policy 29 which of course clearly is a rule because it's a mechanical provision. He doesn't say that about the avoidance policies. And the second point is in *King Salmon* we

can expect that aquaculture will not be located where the avoidance policies apply. So to the extent that it relates to aquaculture the avoidance policies will operate like rules because they will always exclude that activity. It is quite another to say these avoidance policies are always rules and they are to be applied based on some formula for precedence so that they always prevail. In my submission that is not what *King Salmon* says and equally when you refer to bottom lines Justice Arnold in paragraph 132 said the avoidance policies were in the nature of bottom lines and what he was meaning is that these are aiming – the plan is aiming for protection as the principal objective and I don't have any debate with that proposition they are trying to but to then say that these are ecological bottom lines, in other words, avoidance is what you have to achieve to sustain that ecological ecosystem is simply – has no foundation in fact whatsoever. You may well be able to damage an ecosystem in one place and sustain it nevertheless in a diminished scale. So when you come back to the broader objectives of the policy statement which are to safeguard the life supporting capacity of the ecosystems you may well be able to demonstrate that, yes, there are effects but that fundamentally the life supporting capacity of that ecosystem is not compromised.

O'REGAN J:
Why is this helping us decide whether to give leave or not?

WINKELMANN CJ:
I think it's not actually. The earlier points we understand but now we're just heading into argument as if we were hearing the appeal.

MR MAASSEN:
Yes, I see. All right, I think the only point I would make finally is that to some extent the argument got into whether there is any evidence that the Regional Policy Statement, sorry, the Port will be disabled and my only point that I want to make about that is that the Environment Court considered there was sufficient evidence before it of the need to establish policy guidance in response to that risk and that's an evidential question it's not a legal issue that I think occupies the senior Courts. The Court reached that proposition and so

in my submission we should accept that finding for what it is as a sufficient basis for them to formulate guidance. If the Court pleases.

WINKELMANN CJ:

Thank you Mr Maassen. I thank all counsel for your submissions, we will take some time to consider this application for leave and we will let you have our judgment in due course.