

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANU NUI O AOTEAROA

No. SC 6/2022

BETWEEN **PORT OTAGO LTD**

Appellant

AND **ENVIRONMENTAL DEFENCE**
SOCIETY INCORPORATED

First Respondent

AND **OTAGO REGIONAL COUNCIL**

Second Respondent

AND **ROYAL FOREST AND BIRD**
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED

Third Respondent

AND **MARLBOROUGH DISTRICT**
COUNCIL

Fourth Respondent

SYNOPSIS OF ORAL ARGUMENT ON
BEHALF OF PORT OTAGO LTD

I certify that this submission is suitable for publication and does not contain any information that is suppressed.

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1. Port Otago's ports are in a very sensitive area
 - a. Its activities will conflict with avoidance policies
 - b. Concern is whether port operations at risk by the avoidance policies being regarded as absolute bottom lines
2. CA says mismatch following *King Salmon* because NZCPS enacted at a time when overall judgement approach – CA interpreting *King Salmon* as effectively treating policies as rules.
3. Two examples CA majority approach leading to result contrary to s5 RMA resulting from future protected status Aramoana salt marsh (refer ORC submissions paragraphs 84, 85, 88 & 184)
 - a. Expansion of channel -either prohibited or non-complying
 - b. Collapse of channel- s330 – Port Otago Lifeline utility under Schedule 1 Civil Defence Emergency Management Act 2002 – needs resource consent after doing work
4. CA approach does not accord with s104D RMA which is effectively reduced from 2 options to one as effects that are minor will not be breach of a policy and there becomes no point in having 2 gateways;
 - (a) the adverse effects of the activity on the environment . will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of..The only relevant gateway becomes (b)
5. Tension between Natural and Physical resources
 - a. Constant battle between enabling and restricting policies - RMA sustainable development
 - b. Prior to *King Salmon* the “Overall Judgment” approach did not adequately protect environment because no balancing of relevant policies.
 - c. *King Salmon* was a necessary wakeup call
 - d. The Court of Appeal's judgment gives the restricting policies too much weight – effective veto by one avoidance policy

- e. Only Millar J recognised that the obligation to provide in the plan for the efficient and safe operation of the ports together with their development must mean something.
6. The wording of policies important to determine strength but “What is a policy”. S10 Legislation Act 2019 requires the meaning of “policy” (not just the contents of policy) to be “ascertained from its text and in the light of its purpose and its context”
7. Policies:
 - a. relate to future intention;
 - b. need to be flexible;
 - c. importance depends on the particular situation.
8. S 56 RMA provides purpose of policies to achieve purpose of the act – repeated in NZCPS which S5 RMA specifies as sustainable
9. RMA polices are future intention of the result of sustainable development i.e., what is intended to be achieved. The compromises inherent in sustainable development mean that even very strong individual policies such as the avoidance policies can be contrary to the policy direction for a certain project.
10. While “avoid” means “avoid” and an empowering policy, in the abstract, cannot be stronger than an avoidance policy (it would make the action it supports compulsory), the submission is that policies cannot be compared by simply comparing their words as the correct consideration is to consider the words of the polices in the context of a particular situation – a beacon can be put on Aramoana because the breach of the avoidance policies is miniscule and the beacon is required for safe and efficient navigation of the shipping channel.
11. Policies pull in opposite directions, but this cannot happen if CA decision is upheld and there is one or more avoidance policy in the mix - EC port policy flawed but providing guidance
 - a. If CA correct and one avoidance policy has a trumping effect, then policies pulling in the opposite direction have no value and there can be no balancing of policies to obtain an overall policy direction;

- b. Development will be stifled:
 - i. Large infrastructure projects will not be possible under RMA – e.g., shifting Auckland Port to Whangarei;
 - ii. Much development in coastal marine area will only be able to occur if authorised by legislation ego Port Otago’s next generation consents
 - c. No solution to say the answer lies elsewhere – interpretation of RMA in accordance with its purpose results in sustainable development
12. Proper RMA interpretation of “policy”:
- a. The policy direction is not reached through “overall judgment” but by a “balancing exercise” applying polices to specific situations meaning it is possible for an empowering policy to overcome an avoidance policy where the purpose of RMA requires it - *City and Country Bramhill Ltd v Secretary of State* at 74-80:
 - b. If overall policies support a project, then one avoidance policy does not veto the event provided the strength of the avoidance policy is factored into the overall policy direction – in *King Salmon* this may have occurred if the location was the only possible location for aquaculture (it would be the only way to give effect to the policy):
 - c. S104D(b) relates to the overall policy direction, not one policy that forms part of the balancing exercise, and if the proposal is contrary to that policy, then it does not get through the (b) gateway and can only get consent if the adverse effects are minor.
13. There is no practical difference in considering the result of prohibiting activities and prohibiting effects.
14. EDS claim no evidence to support Port Otago’s concerns at 8.5 incorrect. Did not make such claims. The reference in EC was to activities with effects that would not have been permitted by HC decision but permitted by CA inclusion of minor effects. POL065/D23