

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

SUBMISSIONS BY APPELLANT

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I SUMMARY OF ARGUMENT

1.1 Port Otago submits that the Court of Appeal decision is incorrect in holding that policy 9 (“the port policy”) of New Zealand Coastal Policy Statement 2010 (“NZCPS”) is subordinate to and therefore not in conflict with (or does not need to be reconciled with) policies 11, 13, 15 and 16 of the NZCPS (“the avoid policies”):

- (a) The application of *King Salmon*¹ in this case has led to an incorrect assessment of policies;
- (b) The port policy conflicts with the avoid policies for the reasons set out by Miller J in the Court of Appeal.
- (c) Changes in the legislation after *King Salmon* was decided means that the port policy conflicts with the avoid policies after 30 October 2021 even if it was subservient before that date.

1.2 The application of the *King Salmon* decision in a manner that effectively treats policies as rules is a potential threat to the continued safe and efficient operation of Port Otago’s ports, notwithstanding the significant variation that the Court of Appeal made to the High Court decision.

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

II NARRATIVE OF THE FACTS OF THE CASE RELEVANT TO THE APPEAL

- 2.1 Port Otago Ltd (“Port Otago”) is a port company operating ports at Port Chalmers and Dunedin.
- 2.2 Otago Regional Council (“ORC”) is the regional authority having control of the coastal marine area in and adjacent to Otago Harbour.
- 2.3 The issue in this case arises as a result of the ORC proposed regional policy statement which necessarily incorporates the avoid policies and the port policy as required by NZCPS.
- 2.4 A port is fundamental infrastructure and the ability of Port Otago to operate its ports safely and efficiently is of significant functional and economic importance both nationally and to the Otago community:
- (a) A port must be able to operate safely;
 - (b) A port that does not operate efficiently and meet the requirements of large ship owners will not attract cargo.
- 2.5 The location of Port Otago’s ports means that its operations are adjacent not only to areas of national significance but also to surf breaks of national importance.
- 2.6 The RMA definition of “effect” includes all temporary effects, or future effects and any potential effect of low probability which has a high potential impact² which is significant when dealing with the effects of the port activities because of the uncertainties inherent in the coastal marine area.

² Section 3 RMA 1991

- 2.7 Reading the avoid policies and the port policy together requires ports to operate safely and efficiently whilst avoiding the effects protected by the avoid policies. It is only where that cannot happen that there is conflict that needs to be resolved.
- 2.8 Existing ports have no choice as to location and the requirement in the port policy to provide “in regional policy statements and plans for the efficient and safe operation of these ports, the development of the capacity for shipping and the connections with other transport modes” will only achieve its stated purpose if there is the ability to have the needs of an existing port to operate safely and efficiently evaluated against the locational requirements of the avoid policies in the area adversely affected by Port Otago’s activities.
- 2.9 The Environment Court formulated a policy for ports (applying the port policy) which did not absolutely prohibit adverse effects on the values protected by the avoid policies (“the protected values”) but specified a resource consent process as the means of resolving such issues (meaning there could not be a rule prohibiting such activities):
- (a) It held the following part of Policy 4.3.7 is not contentious³:

Policy 4.3.7 Recognising port activities at Port Chalmers and Dunedin

Recognise the functional needs of port activities at Port Chalmers and Dunedin and manage their effects by:

- (a) **ensuring that other activities in the coastal environment do not adversely affect port activities;**
- (b) **providing for the efficient and safe operation of these ports and effective connections with other transport modes;**

³ ConA pages 100 and 101 at [4] and [5]

- (c) providing for the development of those ports' capacity for national and international shipping in and adjacent to existing port activities;**

(b) It held clauses similar to the following should be added to Policy 4.3.7⁴:

- (d) if any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities then apply Policy 4.3.4 which relates to naturally and regionally significant infrastructure and prevails (in certain circumstances) over objective 3.2;**
- (e) if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in Policy 4.3.4(1)(a)(i) to (iii) then, through a resource consent process, require consideration of those effects and whether they are caused by safety considerations which are paramount or by transport efficiency considerations and avoiding, remedying or mitigating the effects (through adaptive management or otherwise) accordingly;**
- (f) in respect of naturally significant surf breaks to avoid, remedy or mitigate the adverse effects of port activities.**

2.10 It is accepted that the phrase “avoiding, remedying or mitigating the effects” in subclause (e) was too wide does not take proper account of the avoid policies and that subclause (f) does not take proper account of the policy protecting surf breaks.

⁴ ConA page 149 at [135]

- 2.11 It is submitted that an appropriate modification to subclauses (e) and (f) would be as follows (taking into account the comments of Miller J that it should not pre-judge the application):

(e) **if in turn (d) cannot be achieved because the operation or development of Port Otago may cause adverse effects on the values that contribute to the significant or outstanding character identified in Policy 4.3.4(1)(a)(i) to (iii) or to surf breaks identified as being nationally significant, Port Otago may apply for a resource consent for the operation or development which cannot be granted unless Port Otago establishes the adverse effects from the operation or development are the minimum necessary in order to achieve the efficient and safe operation of its ports**

- 2.12 The High Court decision⁵ that overturned the Environment Court decision had the effect of creating an absolute prohibition on Port Otago breaching the values protected by the avoid policies with Port Otago not permitted to avoid potential adverse effects on the protected values by the use of adaptive management.
- 2.13 The majority decision in the Court of Appeal upholding the High Court decision approved the High Court's determination that the avoid policies trumped the port policy meaning that Port Otago could only operate its ports if the activities did not have effects that breached the values protected by the avoid policies.
- 2.14 The potential problems for Port Otago arise from its location and the likelihood that some activity will be required in the future that is necessary for the safe and efficient operation of the ports that will have effects that breach the values protected by the avoid policies. An example is possibly being required to widen the shipping channel so

⁵ ConA page 59

that it further encroaches into the Aramoana salt marsh to accommodate large ships (especially cruise ships).

2.15 The modification by Court of Appeal⁶ of the High Court decision to allow adverse effects on the protected values that were less than minor or temporary is a significant benefit for Port Otago⁷:

- (a) Port Otago has a basis for arguing that activity with effects that may breach the protected values should not be prohibited; and
- (b) Adaptive management is currently used to monitor and avoid potential adverse effects and it was accepted to be a method of ensuring that adverse effects on the protected values are less than minor.

III STRUCTURE OF RMA

- 3.1 Part 5 of the RMA concerns and directs the hierarchy of RMA policy and planning documents.
- 3.2 These documents then determine the ultimate course and consenting requirements for a specific proposal to be assessed in accordance with the consenting processes in Part 6.
- 3.3 Part 5 begins first with some definitions of key terms, including of “rule” and “regional rule”.
- 3.4 The headings and structure of Part 5 set out the hierarchy of documents from top to bottom:

⁶ ConA page 10

⁷ This change was agreed by all parties, was not the subject of argument and were described as “immaterial” by the Court of Appeal at [88]: ConA page 42

- (a) Sub-part 1 of Part 5 provides for the highest level in the hierarchy, being national direction; whether through national policy statements (constraining force but not always specifically directive); or through national rules either in national environmental standards or national planning standards (clear and precise restrictions);
- (b) The next more specifically localised directions are provided for in sub-part 2, which now requires implementation of a Mana Whakahono a Rohe where requested by an iwi authority;
- (c) Sub-part 3 then addresses the next overlay, which comes through regional policy statements, which the current context for the current appeal; and then all of the above policy and national rules are then to finally be precisely implemented through regional rules in a regional plan (or a district plan for land use activities).

3.5 A similar structure is followed under each heading for these key planning documents, so that (generally speaking) the following matters are addressed:

- (a) The purpose of the document is prescribed. For example section 56 prescribes the purpose of an NZCPS, and section 59 states the purpose of a regional policy statement;
- (b) The method of preparation and change of the document is stated;
- (c) The contents of the relevant document is provided for;

- (d) For an NZCPS these matters are discretionary for the Minister as set out at section 58; and for a regional policy statement the matters are more prescriptive as set out at section 62;
- (e) For lower order documents, the matters to be considered in the process of preparing the plan documents are also prescribed and for a regional policy statement these matters are set out at section 61.

- 3.6 Each of these documents are created following the plan development procedures in Schedule 1 of the RMA which require comprehensive consultation processes, submissions, hearings, decision and appeal.
- 3.7 In region wide planning contexts, it is important for a policy statement and plan to provide appropriately for that region for all key regional issues and address all possible or potential activities and their associated effects.
- 3.8 The actual activities that may be undertaken under that plan and/or effects that may arise from any activity, are considered more in the abstract at the policy and plan development stage, with appropriate enabling and constraining policies for that region identified and drafted by the local authority with full community input.
- 3.9 There is some scope for a private party to amend a planning document independently by initiating a private plan change – which was the specific context for *King Salmon*. In a private plan change context, consideration of objectives and policies are more directed toward the key activity that is in issue. Most commonly a plan change will involve a rezoning to allow for a new supermarket; or in *King Salmon*, a new marine farm.

3.10 Policies

3.10.1 There is no definition of “policy” in RMA and the Court of Appeal’s attempt to define policy in *Auckland Regional Council v North Shore City Council*⁸ was a “course of action” that would not always be followed. It said the following⁹:

It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy.

3.10.2 A lawyer could have a policy of a work life balance. If that cannot be achieved at a particular time because of deadlines, the policy is not diminished or tarnished by such failures.

3.10.3 Policy considerations are reflected in the rules for permitted activities, controlled activities, restricted discretionary activities, discretionary activities and prohibited activities.

3.10.4 The current NZCPS was developed in 2010.

3.10.5 In preparing a Coastal Plan rule, the NZCPS forms part of the policies to be considered because the council must prepare and change any regional plan in accordance with the NZCPS¹⁰. That requires giving effect not just to the policies but also to the objectives.

3.10.6 Policies can veto an applicant in obtaining consent for non-complying activities as a resource consent can only be granted for a non-complying activity that is contrary to policy if the consent authority is

⁸ *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18

⁹ Page 23

¹⁰ Section 66(1) RMA 1991

satisfied that “the adverse effects of the activity on the environment will be minor”¹¹.

3.11 Rules

3.11.1 Section 67(1)(c) RMA provides that the rules are “to implement the policies” which is a general statement that does not apply to every individual policy.

3.11.2 Section 68(1) RMA has two prerequisites for rules which must:

- (a) Be for the purpose of carrying out the functions of the Act; and
- (b) Be for the purpose of achieving the objectives and policies of the plan.

3.11.3 It is possible to have a rule that is contrary to a specific policy so long as it is achieving the objectives and policies of the plan, looked at as a whole i.e. sustainable management.

IV THE COURT OF APPEAL DECISION

4.1 The majority of the Court of Appeal confirmed the *King Salmon* approach that NZCPS avoid policies created bottom lines¹². It saw policies 7 and 9 as being part of a directive hierarchy in the NZCPS and “The avoid policies contain relatively clear environmental bottom lines; policy 7 and 9 contain lower level degrees of direction as to development and other activities in the coastal environment”¹³. It held the port policy operates within bounds set by the more directive avoid policies.

¹¹ s 104D(i) RMA

¹² At [79] ConA page 38

¹³ At [82] ConA page 40

- 4.2 The majority decision of the Court of Appeal has the potential to restrict Port Otago's activities because its ability to operate safely and efficiently is limited to the situation where its activities do not have effects that impinge on the values protected by the avoid policies in a manner that is more than minor or transitory.
- 4.3 As policies govern future as well as present activities, consideration of effects must include possible future issues that may arise. If the avoid policies have the potential to prevent the port operating safely and efficiently in the future then that is of such concern that it is necessary to identify the potential now including whether it is possible to change the policies without legislative intervention.
- 4.4 It is no consolation to Port Otago that the avoid policies do not directly require activities to be avoided because the policies only create difficulties for Port Otago when its activities have effects that detract from the values protected by the avoid policies, effectively requiring such activities to be avoided. The judgment at [85]¹⁴ notes that the question of adverse effects "from a proposed port activity is a fact-specific enquiry and requires detailed evaluation of both activity and environment". The difficulty is that the Court did not accept that the application of the policies is fact-specific meaning that while Port Otago does not know if any future activities will have effects that breach the avoidance policies, the Court of Appeal decision means that if that situation arises then it cannot get consent.
- 4.5 An example of a situation which could not obtain consent applying the Court of Appeal judgment is the extension of the shipping channel into the Aramoana salt marsh. It is clear the salt marsh is protected by the avoid policies and this means:

¹⁴ ConA page 41

- (a) Applying the Court of Appeal decision, no excavation of the salt marsh would be permitted meaning there will either be a rule prohibiting such disturbance or the activity will be a non-complying activity;
 - (i) A resource consent could not be applied for if a rule prohibits such a disturbance;
 - (ii) A resource consent could not be obtained for a disturbance of the salt marsh if the activity was non-complying because the activity cannot get through either gateway of section 104D RMA because it would be more than minor and contrary to the relevant avoid policies.
 - (b) Either option would prevent Port Otago from any excursion into the salt marsh in any circumstances whether it be a necessary widening of the channel or some other incursion necessary for the safe and efficient operation of shipping.
- 4.6 The dissenting judgment of Miller J is supported: He held that for an existing port, the port policy required the Regional Council to consider “how and when to provide in its plans for the port’s efficient and safe operation, the development of its capacity for shipping, and its connection with other transport modes”¹⁵ with those requirements being “imperative” which distinguishes them from the aquaculture policy at issue in *King Salmon*.
- 4.7 Miller J considered that the Environment Court did not succeed in attempting to set a mechanism for resolving future conflicts making it clear that the way he considered the avoid policies and port policies should be interpreted would be dependent upon the merits of the

¹⁵ At [111] ConA page 49

particular proposal meaning the port would not be precluded from making an application so the merits could be tested¹⁶.

V WHAT DOES KING SALMON MEAN

5.1 The interpretation of *King Salmon* has resulted in differences of opinion in the courts. The extent to which it constrains decision making is important.

5.2 The following was not decided by *King Salmon*:

- (a) It did not decide that a policy is a rule or has the characteristics of a rule¹⁷;
- (b) It did not decide one negative policy can have a right of veto when an evaluation of all policies gives an overall result that a particular activity accords with the relevant policies;
- (c) It did not say that the hierarchy of a particular group of policies would remain constant irrespective of the effects of the activity or the location of the activity;
- (d) The rejection of the overall judgment approach was not a rejection of a specific evaluation of the policies as they related to the specific activity with no prohibition on considering matters specifically relating to that activity that are relevant to the evaluation of the policies.

¹⁶ At [113] ConA page 50

¹⁷ The example given of a policy that can have the effect of a rule at [116] is policy 29 NZCPS which is not a policy that restricts any activities.

- 5.3 The incorrect treating of the avoid policies having the characteristics of a rule occurred in the High Court decision in this case with the consequential determination that activities with minor or transitory effects on the protected values were not permitted and that adaptive management was not available to manage actual and potential adverse effects.
- 5.4 *King Salmon* held that “avoid” has the ordinary meaning of “not allow” or “preventing the occurrence of”¹⁸. However, the word is nuanced and an interpretation of “avoid” meaning “avoid if at all possible” in different circumstances is not precluded by the *King Salmon* decision. The majority explicitly avoided agreeing or disagreeing on the approach taken by the Environment Court in *Wairoa River Canal Partnership v Auckland Regional Council*¹⁹ when it held that “avoid” is “a step short of prohibit” which could be recognition that there are circumstances when activities may be permitted that have effects that breach the protected values.
- 5.5 Two illustrations are given of situations where it is possible (but not certain) that an activity may be able to obtain a consent despite the avoid policies because the avoid policies in those circumstances would not necessarily act as a veto:
- (a) If the *King Salmon* application had been made with the additional important fact that the chosen site was the only site in New Zealand that was suitable for aquiculture. In that situation the relative importance of policy 8 would be elevated in comparison to the avoid policies because the activity specific evaluation would include the fact that the policy supporting aquiculture would be meaningless if it could be considered at the only site at which aquiculture is possible.

¹⁸ [24(b)], [62], [92]-[96]

¹⁹ At [95-96] referring to *Wairoa River Canal Partnership v Auckland Regional Council* [2010] NZEnvC 309, (2010) 16 ELRNZ 152

- (b) If Port Otago applied to excavate the shipping channel by encroaching onto the Aramoana saltmarsh and it could establish both that it was necessary to carry out such work for the safe operation of the ports and there was no alternative then a relevant factor in the policy evaluation would be that the port policy would have no value if the avoid policies did not allow an evaluation of the policies in the light of those circumstances. Relevant factors in the evaluations would include the effect on the port (and the consequent economic health of Otago) if the channel could not be widened and the amount of excavation (a one hundred metre excavation is a more serious breach of the avoid policies than a one metre excavation).

5.6 The following propositions are in accord with *King Salmon*:

- (a) In any consideration of policies there is likely to be a predominant overall policy direction representing the sum of the relevant policies that either supports, opposes or is neutral to a proposed activity;
- (b) The relevance of a particular policy is site specific, depends on the proposed activity on any identified natural values and the appropriateness of the location for that activity;
- (c) Where there is more than one policy pointing in different directions then an evaluative assessment is required of all those policies before determining whether the policies support, oppose or are neutral in considering the proposed activity;
- (d) A policy which is so strongly expressed as to effectively operate as a rule or veto in one situation might not be in accord

with the overall policy direction in the circumstances of a different application;

- (e) Policies that are contrary to the overall policy direction do not have a veto affect but are relevant in considering all other matters including conditions of any consent.

5.7 The propositions have the following effect:

- (a) The evaluation of the policies is not an “overall judgment” of the activity but an evaluation of the policies alone in circumstances of the proposed activity;
- (b) It cannot be said that a policy acts as a bottom line or a veto to trump a policy that supports an activity without considering the circumstances of the particular activity.
- (c) Matters that could affect the way a particular policy is evaluated in a particular situation could include considerations of alternatives as to how an enabling policy could be effected or the extent to which the values protected by an avoid policy would be adversely affected.

VI THE PORT POLICY AND THE AVOID POLICIES

6.1 Policy 9 (“the port policy”) provides²⁰:

Ports

Recognise that a sustainable national transport system requires an efficient national network of safe ports, servicing national and international shipping, with

²⁰ ConA page 165

efficient connections with other transport modes, including by:

- (a) ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports, or the connections with other transport modes; and
- (b) considering where, how and when to provide in regional policy statements and in plans for the efficient and safe operation of these ports, the development of their capacity for shipping, and their connections with other transport modes.

6.2 The Court of Appeal interpreted the *King Salmon* as determining that the avoid policies created bottom lines, and did not consider that the port policy was sufficiently textually or contextually different to policy 8 so as to enable a different outcome from *King Salmon* or that the operative word in the port policy is the word “requires”.

6.3 The Court of Appeal judgment means that Port Otago cannot rely on the port policy if the efficient and safe operation of the ports requires an activity that breaches the avoid policies and no consideration is given to the circumstances or characteristics of the activity that has effects that breach the protected values.

6.4 This interpretation of the port policy does not take full account of its support by Objective 6 NZCPS²¹, Objective 6 NZCPS recognises the importance of economic wellbeing in communities and notes potential conflict that will provide exceptions to protection of values of the coastal environment by including:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend on the use of natural and physical resources in the coastal

²¹ ConA page 160

environment are important to the social, economic and cultural wellbeing of communities;

- **functionally some uses and developments can only be located on the coast or in the coastal marine area.**

6.5 If the Court of Appeal is correct then Port Otago is unable to obtain consent for any activity that has a minor effect on the protected values even if such activity is essential for the safe and efficient operation of the ports. The reading down of the port policy in that way makes it meaningless and is not in accord with either the wording of the policy or objective 6.

6.6 The dissenting judgment of Miller J is to be preferred to that of the majority:

- (a) There is a specific requirement for an efficient national network of safe ports;
- (b) The “where” in the port policy is not relevant as the ports are existing;
- (c) Because the port is already in existence, the how and when in policy 9(b) are mandatory considerations requiring the ORC “to provide in regional policy statements ... for the efficient and safe operation of these ports, the development of their capacity for shipping and their connections with other transport modes”;
- (d) There is a conflict between the requirements of the port policy and the avoid policies if Port Otago’s ports cannot both operate safely and effectively and comply with the avoid policies and the conflict only arises when Port Otago’s activities breach the protected value;

- (e) The conflict is not reconciled by making the port policy subject to the avoid policies as that does not ensure the ports will be able to continue to operate safely and efficiently which is directly contrary to the requirement relied on by Miller J of “an efficient national network of safe ports”.

VII CHANGE IN NZ SALMON INTERPRETATION OF CBS REQUIRED BY SUBSEQUENT LEGISLATIVE CHANGES

- 7.1 The NZCPS was promulgated in 2010 at a time when the Environment Court was required to apply its policies in accordance with the cases that followed from the 1993 High Court decision in *New Zealand Rail Ltd v Marlborough District Council*²² that required an overall judgment to be made and, in particular, the preservation of national character was held to be subordinate to section 5’s overall purpose in promoting sustainable management²³.
- 7.2 There have been two significant changes to the rules relating to interpretation of the NZCPS from those existing when *King Salmon* was decided:
 - (a) The amendment to s 56 RMA expands the purpose of the NZCPS from 19 April 2017²⁴;
 - (b) The repeal of the Interpretation Act 1999 on 29 October 2021 and its replacement by the Legislation Act 2019.

²² [1994] NZRMA 70

²³ *King Salmon* [39-42]

²⁴ Legislation Amendment Act 2017 (No 15 s 46)

7.3 Amendment to section 56 RMA

- (a) Section 56 RMA was amended on 19 April 2017 by adding “objectives and” to the purpose of a NZCPS to read:

The purpose of a New Zealand Coastal Policy Statement is to state [objectives and] policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand.

- (b) When the Supreme Court considered *King Salmon* only the policies of NZCPS were specified as achieving the purpose of the Act and the NZCPS objectives had no legal status;
- (c) The purpose in the NZCPS of “to state policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand” must now be amended to include objectives because of the 2017 amendment to section 56 RMA²⁵;
- (d) The inclusion of objectives means interpretation of policies must take into account they are intended to achieve the objectives;
- (e) The objectives make it clear that the avoid policies are not intended to be absolute bottom lines;
- (f) The significance of the 2017 amendment in interpreting the port policy is that it makes clear that the Court of Appeal is incorrect in its bottom line interpretation of the relationship between the port policy and the avoid policies as the port policy’s relationship with the avoid policies is not one of subservience:

²⁵ Section 56 was amended by 2017 No. 15 s 46 to inset the words “objectives and” so the RMA provides “the purpose of a New Zealand Coastal Policy Statement is to state objectives and policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand

Objective 6 NZCPS specifically states that development in appropriate places and forms within appropriate limits is not precluded by the “protection of the values of the coastal environment”.

7.4 Enactment of the Legislation Act 2019

- (a) The change to the rules in relation to interpretation of the NZCPS applies from 29 October 2021 i.e. after argument was presented to the Court of Appeal in this case²⁶.
- (b) The significance is that section 5(1) of the Interpretation Act 1999 previously provided:
 - (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.**
- (c) The new requirement in section 10 of the Legislation Act 2019 is:
 - (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.**
 - (2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.**
- (d) The significance of the new additional requirement of considering “context” is that interpretation of the NZCPS after 1 November 2021 must look beyond the words themselves and

²⁶ The Interpretation Act 1999 was repealed on 28 October 2021 see: section 6 Legislation (Repeals and Amendments) Act 2019 and Legislation (Repeals and Amendments) Act Commencement Order 2021/251. This change applies to the NZCPS as section 52(4) RMA specifically states that a national policy statement is secondary legislation under the Legislation Act 2019 and that section applies to Coastal Policy Statements by virtue of section 57(3)(a).

consider what was intended at the time that the NZCPS was passed;

- (e) The context of the NZCPS is that it was intended to be interpreted in accordance with the “overall judgment” approach applied by the courts in 2010 confirming that the context of the avoid policies is that they were not intended to be an environmental bottom line in any circumstances and should be interpreted as if each has equal standing meaning there is a conflict if Port Otago’s activities have effects that breach the protected values.

7.5 For both these reasons, the port policy and the avoid policies will conflict if Port Otago cannot operate its ports safely and efficiently without an activity that has effects that breach the avoid values

I certify that the submissions are suitable for publication and do not contain any information that is suppressed.

Dated 29th day of March 2022

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L A Andersen QC
Counsel for Appellant

APPELLANT'S AUTHORITIES

1. *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18
2. *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593
3. *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70
4. *Wairua River Canal Partnership v Auckland Regional Council* [2010] 16 RENZ 152