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

SC 25/2021
[2021] NZSC Trans 21

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

AND **NEW ZEALAND TRANSPORT AGENCY**
Respondent

AUCKLAND COUNCIL
NGĀTI MARU RUNANGA TRUST
TE ĀKITAI WAIOHUA WAKA TAUA INCORPORATED
NGĀTI TAMAOHO TRUST
NGĀI TA KI TĀMAKI TRUST
NGĀTI WHĀTUA ORĀKEI WHAI MAIA LIMITED
Interested Parties

Hearing: 16-18 November 2021

Coram: Winkelmann CJ
William Young J
Glazebrook J
Ellen France J
Williams J

Appearances: P D Anderson, S R Gepp, M C Wright (via VMR) for the Appellant
V E Casey QC, V S Evitt (via VMR), J E W Parker

(via VMR) for the Respondent
G C Lanning, C J Ryan (via VMR) for Interested Party Auckland Council
P F Majurey (via VMR), K Ketu for Interested Party Ngāti Maru Runanga Trust, Te Ākitai Waiohua Waka Taua Incorporated, Ngāti Tamaoho Trust and Ngāi Ta Ki Tāmaki Trust
R B Enbright for Interested Party Ngāti Whātua Ōrākei Whai Maia Limited

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CIVIL APPEAL

Māori

WINKELMANN CJ:
Mōrena.

MS GEPP:
May it please the Court. Ms Gepp, initials S R, for the Royal Forest and Bird Society, the appellant, and with me Mr Anderson, initials P D, and remotely Ms Wright, initials M C.

WINKELMANN CJ:
Tēnā koutou.

MR ENRIGHT:
E ngā Kaiwhakawā, tēnā koutou. Ko Enright, tōku ingoa. Kei kōnei ahau mō Ngāti Whātua Ōrākei Whai Maia. May it please the Court. Enright, appearing for Ngāti Whātua Ōrākei Whai Maia.

WINKELMANN CJ:
Tēnā koe Mr Enright.

MS CASEY QC:

E ngā Kaiwhakawā, tēnā koutou. Casey appearing with Ms Evitt and Mr Parker remotely for the respondent Waka Kotahi, the New Zealand Transport Agency.

WINKELMANN CJ:

Tēnā koutou. So Mr Parker is remotely?

MS CASEY QC:

Mr Parker and Ms Evitt are remote.

MR LANNING:

E ngā e Te Kōti, ko Lanning tōku ingoa. Kei konei māua ko Ryan mo te Kaunihera o Tāmaki Makaurau. May it please the Court. Counsel's name is Lanning appearing with Mr Ryan for the Auckland Council.

WINKELMANN CJ:

Tēnā korua. So are you both remote there Mr Lanning?

MR LANNING:

Yes, your Honour, we are.

WINKELMANN CJ:

Thank you.

MR MAJUREY:

Tēnā koutou. Can I just check the audio is working now?

WINKELMANN CJ:

Yes we can hear you Mr Majurey.

MR MAJUREY:

Tēnā koutou e ngā kaihautū o te whare. Majurey, remotely in Tāmaki, and Ketu hopefully is there.

WINKELMANN CJ:
He is, and he's on his feet Mr Majurey.

MR MAJUREY:
Thank you.

WINKELMANN CJ:
Tēnā korua. I think that's everybody is it? Yes, right. Ms Gepp.

MS GEPP:
Thank you Ma'am. Just in terms of housekeeping, we understand we have two days, and the parties have conferred and divided the time between us with that in mind. I propose to address you for most of today and then Mr Enright will appear. Ms Casey will commence her presentation today and then take the morning tomorrow and a small part of the afternoon, followed by my friends for Auckland Council, and my friends for the mana whenua parties, and then a brief reply. So we should be able to fit it all into the two days Ma'am.

I have filed a very short outline really just a signposting the structure of my submissions and the key references that I would like to take the Court to. I circulated that yesterday electronically. Does the Court have that?

WINKELMANN CJ:
We do.

MS GEPP:
Thank you. I propose to address you starting with a brief introduction to the proposed East West Link and the environmental issues that are the reason why we're here and then my submissions will proceed by addressing you on the scheme and the purpose of the Act, the place of the New Zealand Coastal Policy Statement in that scheme and its correct interpretation, the place of the Auckland Unitary Plan and its correct interpretation and then the application of those instruments in the consenting context, first in relation to section 104D of

the Act and then in the consenting and the notice of requirement context in sections 104 and 171 of the Act.

I note at the outset that what is not at issue, the positive environmental effects of this proposal or the mitigation and offsetting package. It's accepted that factual findings have been made about those matters and that is not in dispute before you. What is in dispute is the lens through which those consenting decisions are made and the relevance of the adverse and positive effects in that scheme. I will then address on the Board and the High Court's decisions following which I will address the alleged errors and briefly relief.

The proposed East West Link is a new four-lane arterial transport corridor that would connect between Onehunga and Penrose. The aspects of the proposal that are key to the issues before you are shown in the schematic that was produced by the parties for the purpose of the High Court and is attached to – is the last page of my written submissions if I could ask the Court to turn to that schematic.

The main areas of contention relate to the boxes in red, so in the centre of the image there is a box which says: "Reclamation and disturbance from boardwalk in Māngere and Titiroa area." This is the –

WINKELMANN CJ:
I thought you said it was in red, this is a sort of purply colour. Yes have you got the document reference for it?

MS GEPP:
The version – okay, I can just speak to it if you don't have a version with the –

ELLEN FRANCE J:
Where does it appear in the case on appeal?

MS GEPP:
It's not in the case on appeal, it's attached to the written submissions.

ELLEN FRANCE J:

No, no, but does it not appear anywhere else?

MS GEPP:

No it doesn't, it was just produced for the purpose of the High Court.

WINKELMANN CJ:

So when you said it says something, I can't see it saying anything so where does it…

GLAZEBROOK J:

And I can't see anything in red if that's what –

MS GEPP:

Yes, no, it seems that you don't have, for some reason the boxes have come off the version that you have, I'm not sure why that is Ma'am.

WILLIAMS J:

The box is at the bottom of the plan.

MS GEPP:

My version has boxes with words and yours doesn't. The version you've held up is the not version that I have. I can speak to it and I can provide a copy at morning tea.

GLAZEBROOK J:

Why don't we get the registrar to do a copy now?

WINKELMANN CJ:

It's not in the electronic one that you filed either, that's why it hasn't printed off.

MS GEPP:

There was a replacement version filed, Ma'am, the next day.

WINKELMANN CJ:
We'll just take a five minute adjournment, because I think to be able to see what you're referring us to.

COURT ADJOURNS: 10.15 AM

COURT RESUMES: 10.19 AM

MS GEPP:
My apologies. You should now have an image in front of you which has the boxes. So the – starting from the left-hand side there is an area shown with the label, the Board of Enquiry did not grant consent to the subtitle dredging so that area is not an issue. Then in the middle of the image the box says: "Reclamation and Disturbance from Boardwalk in Māngere Inlet and Titiroa area," and the numbers below in bold SEA-M2-23a and SEA-M2-21w2 are the references to the significant ecological areas that apply in that location.

Then further to the right the label says: "Structures in Ann's Creek Estuary and again lists those significant ecological area references and then on the far right Viaduct within Ann's Creek East and the reference to the SEA Terrestrial 5309.

The East West Link affects parts of the coastal environment that are identified as significant ecological areas as shown in that schematic. Māngere Inlet has very high values for wading birds and shore birds including threatened and at risk species and the evidence was that the proposed East West Link would have adverse effects on those birds and their habitat including through reclamation structures and ongoing disturbance by people.

At Ann's Creek East there is an area of native vegetation, a mosaic of lava shrubland, freshwater wetland and saline ecosystems that the expert

witnesses agreed was unique and irreplaceable and there would be significant adverse effects on those ecosystems.

There is no real dispute about the extent of those effects. There was evidence from Waka Kotahi and Auckland Council and a large area of agreement as recorded in the joint witness statement.

The case for Forest and Bird in that context relates to the section 104D and 104 and 171 decisions by the Board as upheld by the Court. In summary in relation to the section 104D decision, the High Court erred in upholding the Board's decision that the proposed East West Link is not contrary to the objectives and policies of the Auckland Unitary Plan on a correct interpretation of the Unitary Plan, the proposal is contrary.

And in relation to sections 104 and 171 the Court erred in three ways. First, in finding that the Board was required to give genuine attention and thought to the matters in 104 and 171 but they must not necessarily be accepted and that it was therefore available to the Board to grant the resource consents and recommend confirmation of the notices of requirement in circumstances where directive bottom line policies were not met.

Secondly, in not upholding an error –

GLAZEBROOK J:
You might just have to slow down slightly. It's just so we can get it down properly rather than, and understand the submissions.

WINKELMANN CJ:
It's in your submissions though.

MS GEPP:
Yes, Ma'am, it's just by way of introduction and it is covered in the introduction to my written submissions. The second aspect of the sections 104 and 171 errors was in not upholding an error in circumstances where the High Court

accepted that the Board erred in interpreting some of the chapter 9 biodiversity policies and failed to have regard to other provisions which were mandatory relevant considerations.

And thirdly, in not upholding or addressing alleged errors relating to the Board's failure to have regard to the New Zealand Coastal Policy Statement objectives and the Auckland Unitary Plan Regional Policy Statement provisions when those were also mandatory relevant considerations for the Board under sections 104 and 171.

Those errors were material to the Board's decision as the interpretation and application of those provisions was directly relevant to whether the consents could be granted and the notice of requirements recommended for confirmation.

Turning to point 2 of my outline B "Scheme and purpose of the Act." Under the Resource Management Act sustainable management includes protection. Protection from adverse effects of development. To achieve section 5(2)(a)-(c) is consistent with the Act's purpose. Section 5(2)(c) refers to avoiding, remedying or mitigating. It provides for choice and how to implement the purpose of the Act. It contemplates that avoidance may be one of those choices.

Section 6(c) underscores protection as a core element of sustainable management. The requirement in section 6(c) is for all persons exercising functions and powers under the Act to provide, as a matter of national importance, for the protection of significant indigenous vegetation, and significant habitat of indigenous fauna. Significant is a threshold in that provision, and the meaning of it is determined in the coastal environment by the New Zealand Coastal Policy Statement, and also by criteria and plans that sit under the Coastal Policy Statement.

The definition of "effects" in the Resource Management Act is broad, and it includes cumulative effects. In my submission cumulative effects are, in large

part, why we plan. Why we have plans under the Resource Management Act. Bottomline policies are particularly important in constraining decision-making where case-by-case decision would have the potential to erode protection of the matters of national importance that the policies relate to. Importantly that erosion is generally not going to happen because of “bad projects”. Many projects will have a range of positive effects, including on the natural environment, as would be the case with the East West Link. But a series of good developments can still result in loss of finite resources, and that is where the avoid policies link to the requirement to protect matters of national importance.

Section 8 is a key part of Part 2 of the Act. It requires that Treaty principles are taken into account in managing the use, development and protection, again protection, of natural and physical resources. Tikanga determines the context for Treaty principles and here there was more than one tikanga advanced before the Board, and Forest and Bird does not seek to intervene or address you on the details of those matters. But what it does say is that the concept of policy bottom lines that provide for protection, is consistent with taking Treaty principles into account. Further, bottom lines can be cultural as well as environmental, so section 8 could also be the source of bottom line policies. The relevant Treaty principles that are engaged could be protection, could also be other Treaty principles such as partnership or tino rangatiratanga. But the key point is that as a concept policy bottom lines are not inconsistent with the obligation to take Treaty principles into account. They are entirely consistent with that aspect of the Act’s scheme and purpose.

Moving through the Act. The regional council’s functions are set out at section 30 of the Act and section 30(1)(ga) in particular requires the maintenance of indigenous biodiversity as a mandatory function and duty of regional councils.

The Act then moves through the provisions for the relevant planning instruments. At section 56 it specifies the purpose of the New Zealand Coastal Policy Statement, and I'll just turn to the appellant’s bundle of

authorities. You have some excerpts from the Act at tab 1 of the appellant's bundle of authorities, and on page 5 of the bundle the purpose of the New Zealand Coastal Policy Statement is set out, and it is to state objectives and policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand. There follows the process for preparation and approval of the New Zealand Coastal Policy Statement, and that will be familiar to you from previous decisions, including the *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 decision, and to a certain extent the *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 decision.

Then at sections 59 to 62 the Act sets out the requirements for regional policy statements and again that purpose links to achieving the purpose of the Act. That is the purpose of a regional policy statement. Then from section 63 the Act deals with regional plans and that starts on page 9 of the appellant's bundle. The purpose of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of the Act.

Then there is a separate purpose for regional coastal plans which apply within the coastal marine area. The purpose of coastal plans is to assist a regional council in conjunction with the Ministry of Conservation to achieve the purpose of the Act in relation to the coastal marine area of the region. So again there is the direct link between the purpose of the Act and the role and function of a plan.

WINKELMANN CJ:
What section are you at there, sorry?

MS GEPP:
Section 63. Regional plans are not obligatory under the Act but regional coastal plans are. There must at all times be a regional coastal plan and that is specified in section 64 as is the process for its preparation and change.

Turning to section 67, which is at page 15 of the appellant's bundle, this provision specifies the contents of regional plans and it must state the objectives for the region, the policies to implement the objectives and the rules if any to implement the policies. Importantly in the context of this appeal section 67(3) provides that a regional plan must give effect to any national policy statement and the New Zealand Coastal Policy Statement and also at (c) a regional policy statement so that is the policy cascade as this court has referred to it. With each instrument lower in the hierarchy giving effect to the ones above it in the hierarchy.

The Act moves from providing for planning to providing for consenting for activities that require resource consent and again there is a direct line between consenting and the objectives and policies of plans and policy statements and the purpose of the Act. And that starts at the point of preparation of an assessment of environmental effects which must contain an assessment against any relevant objectives and policies and must contain an assessment against any relevant objectives and policies and must contain an assessment against the matters in Part 2. So an applicant for consent is required to turn its mind to those matters from the moment that it prepares its application.

The operative decision-making provisions then are sections 104, 104D in the case of non-complying activities and 171 in the case of notices of requirement, and again those directly reference and link to the purpose of the Act. Section 104 is expressed as being subject to Part 2 and requires that regard is had to any relevant provisions of a police instrument whether it be national or regional.

Similarly section 171, section 171 is expressed in similar terms and then section 104D which is on page 27 of the appellant's bundle of authorities is the particular restrictions for non-complying activities. This is sometimes referred to as the gateway test and it provides that where an activity is expressed as non-complying a consent authority may only grant resource consent for it, if it's satisfied either that the adverse effects of the activity on

the environment will be minor or that the application is for an activity that will not be contrary to the objectives and policies of any operative or proposed plan.

I'll now return to the wording of those provisions in detail when considering the particular decisions, but that is an overview of where they sit in the scheme of the Act.

I turn now to the New Zealand Coastal Policy Statement. The New Zealand Coastal Policy Statement is in the appellant's bundle of authorities at tab 13, page 568. The appellant's key propositions are that the New Zealand Coastal Policy Statement contains directive polices that require protection of areas or features from the adverse effects of development and that those policies are consistent with and implement the scheme and purpose of the Act.

WINKELMANN CJ:
Sorry where did you say it was?

MS GEPP:
Tab 13, page 568 of the appellant's list of authorities. Tab 68.

WINKELMANN CJ:
We'll need the joint authority numbers when you refer to things.

MS GEPP:
It's tab 68 and the page number is the same 568. Do you have that there Ma'am? Thank you. The appellant's key propositions are that the coastal policy statement contains directive policies that require protection of areas or features from adverse effects and that that is consistent with an implement to the scheme and purpose of the Act. The second key proposition is that correctly interpreted the New Zealand Coastal Policy Statement does not provide for infrastructure that would adversely affect areas or features contrary to the directive requirements of Policy 11.

The first point of difference with the respondent is that the appellant says the New Zealand Coastal Policy Statement is an instrument capable of interpretation. What the respondent calls an absolutist approach with an artificial focus on trying to interpret the multiplicity of verbs is in the appellant's submission an orthodox approach to the interpretation of a statutory instrument by looking at the text in light of the purpose.

In terms of the content of the New Zealand Coastal Policy Statement starting with objective 1, it is to safeguard the integrity form functioning and resilience of the coastal environment and sustain its ecosystems including marine and intertidal areas, estuaries, dunes and lands by maintaining particular values and features including at the second bullet point "protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna.

objective 3 is to take account of the principles of the Treaty of Waitangi recognising the role of Treaty of Waitangi, recognising the role of tangata whenua's kaitiaki and providing for tangata whenua involvement in management of the coastal environment in particular specified ways.

objective 6 is also of particular importance in this case. It's to enable people and communities to provide for their social, economic and cultural wellbeing and their health and safety through subdivision use and development, recognising particular matters. The first of those is that the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms and within appropriate limits. The appellant submits that that concept of use within limits is entirely consistent with the interpretation it advances.

Moving down to the fifth bullet point, it is the protection of habitats of living marine resources, or recognition that the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities. That bullet point –

WINKELMANN CJ:
Sorry, where are you at?

MS GEPP:
objective 6, fifth bullet point. That bullet point speaks to the relationship between people and ecosystems and that it is not a question of development providing for people and protection relating to ecosystems. By protecting ecosystems we also enable people's social, economic and cultural wellbeing.

The second to last bullet point recognises that the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected, and that places the role of Resource Management Act protections in the broader scheme of how New Zealand manages its coastal resources.

Turning to the policies, I will start with Policy 2. That is the Treaty of Waitangi, tangata whenua and Māori heritage policy and it requires that particular things are taken into account and recognised in taking into account the principles of Te Tiriti o Waitangi.

Policy 4 is concerned with integration, and in particular I refer to Policy 4(c)(v). Integration is required where it requires particular consideration of situations where significant adverse cumulative effects are occurring, or can be anticipated.

Next, Policy 6. Policy 6 is to recognise a number of matters in relation to the coastal environment. The first of those is that the provision of infrastructure, alongside the supply and transport of energy, the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural wellbeing of people and communities. This is the primary reference to infrastructure in the New Zealand Coastal Policy Statement, although obviously there are other policies that refer without expressly referring to infrastructure, and one of those, or some of those, are

recognised in Policy 6(2) over the page which says: “Additionally, in relation to the coastal marine area,” subpara (c), “recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places.” Clearly, that policy has the potential to apply to infrastructure. I submit that it’s important that it is not about providing for activities with a functional need wherever they occur. It is still required to be in appropriate places.

Policy 7 is concerned with strategic planning and providing for where activities may be inappropriate or may be inappropriate without consideration of effects through a resource consent application. Policy 7 thereby contemplates that the fact that an activity may be authorised through a resource consent is not determinative. It may or may not be appropriate, having regard to that consideration of effects, and Policy 7(1) finishes with the words: “… and provide protection from inappropriate subdivision use, and development in these areas through objectives, policies and rules.”

Policy 7(2) is again a reference, it’s a direction to regional councils to: “Identify in regional policy statements and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects.” Where practicable it directs councils to: “… set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.”

I'll just note, without dwelling on it, Policy 8, which was at issue in the *King Salmon* decision, and just note the wording of it, which is about: “Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities.” I note that that wording is very similar to the way in which infrastructure is provided for in Policy 6.

Then turning to Policy 10, this policy is in the frame in the current appeal because of the reclamation aspects of the activity, and it provides that reclamation must be avoided unless particular standards are met. But in addition where reclamation is considered to be a suitable use of the coastal marine area, have regard to certain matters in considering its form and design.

I note that Policy 10(3) refers to when considering proposed reclamations, having regard to the extent to which reclamation would provide for the efficient operation of infrastructure.

Next comes Policy 11, which is the direction to protect indigenous biological diversity in the coastal environment, and then has a number of sub directions in Policy (a) and (b). The requirement of (a) is to avoid adverse effects on those species, tax avoidance and ecosystems that are listed in (i) to (vi), and (b) is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on species, ecosystems and taxa listed in (i) to (vi) of (b). I note the distinction between avoiding adverse effects on those matters in (a) and avoiding significant adverse effects on the matters in (b), and submit that it can be assumed that that distinction was made deliberately.

Just before I finish with the Coastal Policy Statement, I note over the page Policy 13 and Policy 15, which were the two policies primarily at issue in the *King Salmon* decision. Those policies are similar in form to Policy 11 but Policy 11 is more absolute. It is to protect indigenous biological diversity in the coastal environment whereas Policies 13 and 15 are to protect or preserve from inappropriate subdivision use and development. Policy 11 does not have that rider.

In my submission when those provisions are considered and reconciled in the manner directed by the Supreme Court in *King Salmon*, no provision enabling infrastructure, or providing for reclamation, is more directive than the requirement to avoid adverse effects on matters listed in Policy 11. Those provisions can be reconciled, they do not conflict, they require that

infrastructure is provided for but not to the extent that it would have adverse effects that Policy 11 precludes.

The respondent submits that if avoid really means avoid, this would always trump any positive direction no matter how firmly expressed. That is not the case. The writers of the New Zealand Coastal Policy Statement could have chosen to direct that provision must be made for infrastructure even where it would have adverse effects, but they did not do that. They chose to prioritise protection of specific areas and features in the coastal environment over provision for infrastructure and also over mineral extraction and aquiculture. And that choice was entirely consistent with the purpose of the Act.

My friend from Auckland Council suggests that the Auckland context justifies a different interpretation. In my submission it does not. National policy is intended to constrain local policy, the extent of discretion to cater to local context is limited. But also, and perhaps more fundamentally in Auckland biodiversity maintenance is not a less pressing priority than provision of infrastructure.

The respondent and the Council point to the extent of identified significant ecological areas to support their proposition that the coastal policy statement cannot require protection of these areas by avoiding adverse effects. I submit that it demonstrates the opposite.

WINKELMANN CJ:
Can you just clarify, do you say that some of the indigenous biological diversity that's affected by this sits in Policy 11(a), that's the category?

MS GEPP:
Yes. And it's probably – I can take you to the relevant aspects of the evidence on that, but it's probably best analysed through the lens of the policies of the Auckland Unitary Plan that give effect to Policy 11(a) because those provisions – that while there are some minor in my submission, inconsequential differences between the two, that is where the Board stepped

through those provisions and identified the requirement to avoid effects on those values.

But certainly, even from the, the brief introduction I gave, the harbour is habitat for a number of threatened and at risk species and that would trigger the first aspect of Policy 11(a) and the vegetation in Ann's Creek East similarly would trigger Policy 11(a) and (b).

The point I was addressing you on was that what does the extent of significant ecological areas in Auckland's coastal areas demonstrate, does it mean that the policy should be read down because the effect would be too great in Auckland, in my submission it demonstrates the opposite. It demonstrates the extent to which Auckland's biodiversity is already depleted. Most shore birds and wading birds in this area are threat species that are at risk or threatened. It follows that the areas that these species rely on are ecologically significant because they support species that are rare. If these species were all thriving and not threatened or at risk their habitats would not be identified as significant ecological areas for the most part.

The Auckland Unitary Plan makes clear that development continues to threaten maintenance of Auckland's biodiversity and that makes protection of these areas a very high priority indeed.

WILLIAMS J:
Do you really need a prohibition to get to where you need to get to? It's always going to be a big call given the provisions in RMA dealing directly with prohibited uses or prohibited activities.

MS GEPP:
So the prohibited activities are only ever going to be able to be applied where you know that in all situations an activity is going to have adverse effects that you cannot allow in accordance with sustainable management.

WILLIAM YOUNG J:

But why can't you prohibit any activities that have adverse effects? Why can't the prohibition be directed to activities with particular effects?

MS GEPP:

Because the rule would have to be framed in a way that activity status turned on the effects of the activity and that would require an assessment before you could know whether you were a prohibited activity or not.

WILLIAM YOUNG J:

Do you say it's too indeterminate?

MS GEPP:

It reserves a discretion and makes it, yes, essentially too indeterminate.

WILLIAM YOUNG J:

It doesn't reserve a discretion because it would be a question of fact whether the effects were adverse.

MS GEPP:

Somebody has to make the decision though and…

WILLIAM YOUNG J:

And the courts are there for that.

MS GEPP:

Well, normally at the stage that it's being applied an applicant is determining whether they can apply for an activity or not and the rules need to specify clearly whether an activity is prohibited or non-complying. If that requires an assessment of effects, then there's uncertainty about whether it is.

WILLIAM YOUNG J:

I understand the issue. Is there authority on this that an activity can't be prohibited by reference to the effects that it has?

MS GEPP:

There's authority that there needs to be certainty between those categories, yes. I can't tell you, I'll have to get that reference for you.

WILLIAMS J:

It's kind of dyed into the Act anyway, isn't it? That idea is woven into the Act because it's seen as such a big imposition.

MS GEPP:

It seems that you – you wouldn't need policies if you could deal with everything through activity status. You could simply say all of these things are prohibited and we don't need any policies to decide how to manage them.

WILLIAM YOUNG J:

You may not want to say they're all prohibited.

MS GEPP:

I'm sorry, Sir?

WILLIAM YOUNG J:

You may not want to say they're all prohibited.

MS GEPP:

No, no, you may not. But if you want to be able to distinguish based on a more careful assessment of what the effects of the activities are, you'd provide for that assessment through policies.

WILLIAMS J:

That's right, so at least when the Act was first drafted, I don't know what sort of state it's in now, it was supposed to be effects based rather than prescriptive and the idea of an activity being impossible was kind of the antithesis of what was being thought of in 1991 and prohibited uses were therefore the exception, very much the exception because it was an effects-based piece of legislation.

MS GEPP:

Yes.

WILLIAMS J:

To free it up from the old Town and Country Planning Act.

MS GEPP:

Yes, exactly.

WILLIAMS J:

Madness.

MS GEPP:

Exactly, and so the focus is firmly on effects and if you can, as Simon Upton said when he was speaking to the Act, if you can undertake your development in a way that has effects that don't transgress these biophysical bottom lines, go for it, but if you can't, these bottom lines apply to protect the things that provide for the natural environment and for people.

WILLIAMS J:

I just wonder whether you in the end get pretty close to where you need to be by reading 9 and 11 – is it 9 and 11 –

MS GEPP:

6 and 11?

WILLIAMS J:

– 6 and 11, together, as requiring the proponent of a CMA piece of infrastructure to have an utterly gold-plated case.

MS GEPP:

When you say a "gold-plated case" does that mean a proposal that…

WILLIAMS J:

Well, per 6(1) – sorry, it's earlier, isn't it? The reclamation, for example.

MS GEPP:

The reclamation one? 8?

WILLIAMS J:

Yes. For example –

MS GEPP:

Sorry, 10.

WILLIAMS J:

Yes. Don't go building hills on the foreshore unless – and then those four requirements there in (1) – you have no practicable alternative method of doing what you need to do and the benefit is massive, bearing in mind the vulnerability or indeed preciousness of whatever it is you're intending to build your hill on per Policy 11 so that the standard increases, given the sensitivity of the environment. That's pretty stock RMA analysis isn't it?

MS GEPP:

Yes.

WILLIAMS J:

So why does that not get you somewhere where you need to be?

MS GEPP:

So if I understand you Sir, the, or I would submit that the requirement is to meet all of the matters in Policy 10, and to meet the matters in Policy 11, they are cumulative, and if you can meet all of those your activity, your reclamation in this case, can proceed.

WILLIAMS J:

Yes, that's right. So unless the effect is minor, can't do it, that's what you're saying –

MS GEPP:

That's right.

WILLIAM YOUNG J:

But you say avoid any adverse effects under 11(a) wouldn't you? Even minor effects are a showstopper aren't they?

MS GEPP:

No, I wouldn't say that minor effects were a showstopper, because it comes back to what you are required to do to protect and this court has said that it's not going to be necessary to prevent minor or transitory effects in order to protect. So that can be read into the, the definition of "avoid" essentially would then be to prevent the occurrence of effects that are not so immaterial that they fail to protect.

WILLIAM YOUNG J:

Any material, it's to avoid, it is to prohibit, it would prohibit reclamation if that involves non-material adverse effects?

MS GEPP:

If you were in Policy 11 territory, yes. If you're not then you would simply apply this Policy 10 limitations, yes.

WINKELMANN CJ:

And your point would be that this is very narrow. Policy 11(a) protects a narrow band of things and that's the highest order, if it's like, you know, species genus filum, that's the highest order of things that are protected, and that's, and they couldn't put it more plainly.

MS GEPP:

Yes.

WINKELMANN CJ:

And (b) is a lesser order.

MS GEPP:

Yes.

WINKELMANN CJ:

But still high, and then there are the matters at, lower down which are at 13 et cetera.

MS GEPP:

Well those matters protect different elements of the natural environment. The natural character of the environment, and the natural features and landscapes of the environment, but Policy 11 is the provision that is squarely concerned with ecological features.

WINKELMANN CJ:

And you might expect that, since we're talking about things that are listed by the International Union for Conservation of Nature and Natural Resources as threatened for instance.

MS GEPP:

That's right, and if we recognise, as the objectives do, that protection under the Resource Management Act is a key element of how New Zealand protects its coastal resources, this policy must have meaning in that context.

WILLIAMS J:

So my question is whether you really need to say that 11 is always your trump unless your effects are minor, because it's a steep hill to climb just generally in the way these things tend to operate, the coastal marine area is a big area, we've got a big coastline, when you could simply read 10 as if the practicable alternative methods should be read as, and there is no choice. In other words you could override 11 only where there's no practicable, bearing in mind the sensitivity of the environment, choice. But sometimes you just might have to.

MS GEPP:

I wouldn't accept that reading. I wouldn't agree with that reading. I think that Policy 11 must always be read alongside, not be overridden by Policy 10.

WILLIAMS J:

Yes. You see my point is that if you read 10(1)(c) as a sharp caveat, bearing in mind the sensitivity of the environment, then that would place a significant burden on a proponent to be able to indicate that there was no alternative to destroying the environment of a roosting bird, or whatever. Wouldn't that, in practical terms, get you where you needed to get to?

MS GEPP:

It turns on whether you're considering whether there are practicable alternatives for the activity that is before you as a consent authority, or whether you should be allowing the activity at all. Sometimes it maybe that there are no practicable alternative locations for a road, but that road still shouldn't go through.

WILLIAMS J:

Well that gets you to the benefit of the point doesn't it? It's got to be a significant regional or national benefit?

MS GEPP:

Well I don't think it does. I submit that it doesn't. That the biophysical bottom lines must apply to give effect to the purpose of the Act. Otherwise the Act is really just about the environment always making way for people and their needs and that's not the way that the Act's framed.

WILLIAMS J:

It takes the black and white out of it, and it throws the balance in your favour without you having to play cutthroat with your interpretation. You might lose.

MS GEPP:

Lose on the interpretation of Policy 11 and Policy 10?

WILLIAMS J:

Correct.

MS GEPP:

But that's in your –

WINKELMANN CJ:

We're not asking you to gamble.

MS GEPP:

But I would not like to –

GLAZEBROOK J:

Well you'd say probably that *King Salmon* is very much in your favour in terms of an environmental bottom line, but overrides – in terms of the interpretation of the coastal policy statement itself, that effectively overrides and also consistently with the Act.

MS GEPP:

Yes, yes.

WINKELMANN CJ:

And you'd also say I suppose that this is taking intergenerational approach to the environment in what seems a pressing need at the moment based on cars, may not be a pressing need in 50 years' time. So if you've put rare species in play because of the needs of the car, at the moment, you maybe depriving future generations and the biosphere of endangered species.

MS GEPP:

Yes Ma'am.

GLAZEBROOK J:

And I'd guess you say also it is narrow in terms of 11(a), in terms of that absolute, absolute bottom line?

MS GEPP:

Yes.

WILLIAM YOUNG J:
How much of the area around – coastal environment around Auckland would be subject to 11(a)?

MS GEPP:
Sorry Sir I didn't hear that.

WILLIAM YOUNG J:
How much of the coastal environment around Auckland would be subject to 11(a)?

MS GEPP:
I don't know, so the Council has said that 85% of the coast is either 11(a) or (b) but I don't know the proportionate of that which is (a) specifically and that maybe – we can probably do that analysis and work out how much it is, but as I was saying earlier, the application of – the interpretation of this instrument cannot turn on the proportion that meets the policy.

WILLIAM YOUNG J:
No, I'm just sort of responding to the suggestion that it's a narrow limitation but if its effect 50% of the coastline around Auckland, it would have a practical effect of precluding reclamation.

MS GEPP:
Well what's important to – sorry to interrupt Sir. What's important to recognise is that this doesn't say avoid any activity in those locations. There are a wide range of activities that occur within or adjacent to –

WILLIAM YOUNG J:
I'm talking about reclamation. It would be effectively avoid reclamation to those areas. It would be to avoid reclamation in the areas of the coastline that are affected by (a)?

MS GEPP:

Yes, so you'd still need to consider whether you – I accept that it's probably a fairly bright line in the context of reclamation, but you would still need to consider whether your activity was having an adverse effect on the things that are listed here.

WILLIAM YOUNG J:

Wouldn't reclamation almost always have some adverse effect?

MS GEPP:

As I say I think it's a fairly bright line and it would generally be having an adverse effect if it was in one of these areas. But if you've got a very, you know, very expensive area that species rely in and a very limited way, then – well query whether that would meet the – be identified as a significant ecological area in the first place, but if it was, it may be the reclamation could proceed without adversely affecting it. In this case the context – the really important context for assessing the magnitude of effects on shore bird habitat was the historic loss of 190 hectares of the Inlet that had already occurred. So the loss was cumulative and that is the intergenerational concept I think as well that, that we spoke of which is not just looking at the effects of a particular activity right now, but what have we done in the past and where do we want to be in the future.

WINKELMANN CJ:

How many hectares?

MS GEPP:

190. I was going to take you to some key aspects of the *King Salmon* decision. I know the Court is very familiar with it but I also think that it's been squarely put at issue in this case about what did the Court say, what was the ratio of that decision, what did it say about the requirement to avoid adverse effects. So I have that in the authorities, tab 15. I'll align my index with my friend's at morning tea.

So starting at paragraph 24 of that decision. Here the Court is making four points about the definition of "sustainable management" and I would like to focus on paragraph (d) of those four points where the Court says that "the use of the word 'protection' in the phrase 'use, development and protection of natural and physical resources' and the use of the word 'avoiding' in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management."

Turning to paragraph 28, here the Court is considering section 6 and in the last section notes that section 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

Then moving over to paragraph 80 of the decision. In this paragraph the Court is considering the direction that planning instruments must give effect to the New Zealand Coastal Policy Statement and the Court is addressing how interpretation of these instruments is to occur. It said that the implementation of the directive "will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction."

Then at 85, the Court is talking about the place of the New Zealand Coastal Policy Statement in the scheme of the Act and about half way through that paragraph says that the Coastal Policy Statement gives substance to Part 2's provisions in relation to the coastal environment.

At paragraph 90 again the Court says: “The New Zealand Coastal Policy Statement was intended to give substance to the principles in Part 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the Coastal Policy Statement translates the general principles to more specific or focused objectives and policies. The Coastal Policy Statement is a carefully expressed document whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices,” and that is the particular choice that I have referred you to in policy 11 is to require avoidance of particular adverse effects.

At the bottom of that paragraph: “The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchal scheme of the RMA.”

Then in the following paragraph: “… the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice.” But the requirement to give effect to the NZCPS is intended to constrain decision-makers. This relates to the relationship between the NZCPS and lower order instruments.

The Court then turns to the meaning of the term “avoid”, at paragraph 92. It notes it occurs in a number of relevant contexts. At 93: “… given the juxtaposition of ‘mitigate’ and ‘remedy’, the most obvious meaning is ‘not allow’ or ‘prevent the occurrence of’… must be considered against the background that: (a) the word ‘effect’ is defined broadly… (b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development ‘in appropriate places and forms and within appropriate limits’; and… 13(1)(a)… and 15(a) and (b)” which were the protective provisions at issue in that case, “… are means for achieving particular goals… preserving the natural character of the coastal environment and protecting it from ‘inappropriate’ subdivision, use and development… and

protecting the natural features… from ‘inappropriate subdivision, use and development.”

Again at 96 the Court talks about the use of the word “avoid”, and it says that it has its ordinary meaning of “not allow” or “prevent the occurrence of” and that in the sequence avoid, remedy or mitigate, it must bear that meaning, and that it has the same meaning in both section 5 and in policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words “avoid, remedy and mitigate” and that that interpretation is consistent with objective 2 of the NZCPS. In my submission that same analysis can be applied to Policy 11 and its relationship to objective 1 of the NZCPS.

Turning to paragraph 113 the Court was considering a decision on Auckland urban limits by President Cooke delivering the judgment of the Court. This case weas concerned with whether there could be policies that essentially had the effect of a rule that they would have the effect of precluding an activity if it couldn't meet the policies, and the Court in that decision held that such policies were acceptable, and the excerpt is just above paragraph 116. The Court said that: “Regional policy statements may contain rules in the ordinary sense of that, sorry, may not, “… contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens.” But the discussion that follows at paragraph 116, the Supreme Court confirmed that: “Although a policy in a New Zealand coastal policy statement cannot be a ‘rule’ within that special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule.” It gives the example of Policy 29.

Then over at paragraph 129, well it’s from paragraphs 127 to 129, the Court has returned here to the theme of how to interpret and reconcile policies that may be considered to pull in different directions. The Court observes that the various objectives and policies are expressed in deliberately different ways. Some give more flexibility or are less prescriptive. They identify matters that councils should take account of, or take into account, or have particular regard to or consider, recognise, promote or encourage or use expressions such as

"as far as practicable" and that such policies, the Court said, leave councils with considerable flexibility and scope for choice. "By contrast other policies are expressed in mor specific and directive terms, such as policies 13, 15, 23… and 29. These differences matter."

The Court directly addressed at paragraph 128 the submission that policies 13 and 15 should not be applied in accordance with their terms but simply as very important considerations, and that was based on the submission that the alternative approach of applying them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. The Court rejected that argument, and then said at paragraph 129 that when dealing with a plan change application, the approach is to identify the policies that are relevant, pay careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. "Avoid" is a stronger direction than "take account of". There may be instances where policies pull in different directions but this is likely to occur infrequently and apparent conflict will dissolve if close attention is paid to the way in which the policies are expressed.

If there is still a difference or a conflict, the area of conflict should be kept as narrow as possible and the necessary analysis should be undertaken on the basis of the NZCPS, informed by section 5. Section 5 should not be treated as the primary operative decision-making provision.

And the Court is still addressing the way in which policies are reconciled at 131 when it says that the danger of the "overall judgement" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than make a thoroughgoing attempt to find a way to reconcile them, and it reconciled policy 8, aquaculture, with policies 13 and 15 for protection of outstanding natural character and landscapes by saying that "policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding

qualities of the area. So interpreted, the policies do not conflict." In my submission the same approach can be taken with the interpretation of the relevant provisions in this case.

Lastly, at paragraph 132, the Court accepts or observes that the RMA contemplates that plans may prohibit activities, and if that is so, there is no obvious reason why a planning document which is higher in the hierarchy should not contain policies which contemplate the prohibition of particular activities in certain localities. In my submission that doesn't need to be read as meaning "prohibited activity". The concept is about prohibition of effects that would flow if those activities are allowed to occur in a way that would not meet the directive policy requirements.

Lastly, I just note that at paragraphs 145 to 149 the Court returns to the concept of the meaning of "avoid" and makes clear that the requirement to avoid in order to achieve protection is consistent with the scheme and the purpose of the Act.

Subsequent to the *King Salmon* decision the Court has recently heard and determined the *Trans-Tasman Resources* decision. That case was determined under the EEZ Act but required a consideration of the Coastal Policy Statement as the regime applying within the territorial sea. Now I don't wish to make too much of that decision given it was under different legislation but I just observe, because my friends have referred to it, that the Court did accept that the New Zealand Coastal Policy Statement contains environmental bottom lines and that its bottom lines are not defeasible, the majority held, by other factors in section 59 of the EEZ Act. The respondent in this case says that the Supreme Court in *TTR* saw environmental bottom lines as something that could in the context of the Resource Management Act be outweighed by other considerations, but in my submission that's not appropriate inference to draw from the *TTR* decision and in fact the appropriate inference is the opposite. The point as I read the judgment was to attempt to align the regimes and make them consistent as much as possible within the – within and outside the 12 nautical mile limit.

So if an environmental bottom line from the coastal policy statement applies beyond the 12 nautical mile limit it is implicit that that is also how the coastal policy statement applies within the 12 nautical mile limit.

Lastly, in relation to the New Zealand Coastal Policy Statement and its interpretation, I note the decision in *Royal Forest and Bird Protection Society of New Zealand Incident v Bay of Plenty Regional Council* [2017] NZHC 3080 which was a High Court decision had to grapple with this issue of how to reconcile provision for the policies and coastal policy statement relating to infrastructure with the biodiversity policies and it reached in essence the same – it applied the *King Salmon* approach to interpretation and reached essentially the same view that infrastructure must be provided for but not where it would adversely affect the matters listed in Policy 11(a).

The decisions in this case were – the operative provisions related to the Auckland Unitary Plan so having set that framework for the coastal policy statement I now turn to the Auckland Unitary Plan. Would that be an appropriate place to break Ma'am?

WINKELMANN CJ:
I think it probably is a very appropriate place to break.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.48 AM

MS GEPP:
You have the Auckland Unitary Plan at tab 64 of the joint bundle of authorities. Starting with Chapter A this is the introduction to the plan and applies across the – the Auckland Unitary Plan is a combined regional policy statement, regional plan, regional coastal plan and district plan and Chapter A applies across all of the combined instruments. Chapter A which is the first page in your – in the – behind that tab, starts with the purposes of the

Auckland Unitary Plan and after setting out the purpose of the Act and the functions of the Council at the bottom of this page it says: “The plan therefore has three key roles, the first is that it describes how the people in communities of the Auckland region will manage Auckland’s natural and physical resources while enabling growth and development and protecting the things people in communities value. Second, is that it provides the regulatory framework to help make Auckland a quality place to live, attractive to people in businesses and a place where environmental standards are respected and upheld, and the third, is that it’s the principal statutory planning document for Auckland.

Turning over, still in Chapter A the – at bundle page 603, half way down the page the chapter describes how the plan uses six main types of plan provisions. It uses general rules, overlays, Auckland-wide provisions, zones, precincts and standards. Standards are things that apply to permitted, control or restricted discretionary activities which if you don’t meet them send you up to the next level of activity status.

Then down the bottom of page 604, there is a discussion of activity statuses and it describes how permitted controlled and restricted discretionary activity status is used, and then over the page at 606, discretionary activity and non-complying activity and while most of this is really just a paraphrasing of the language of the Act, at the description of non-complying activities adds a little bit more about how non-complying activity status is used in the Auckland Unitary Plan and it says that activities are classed as non-complying where greater scrutiny is required for some reason. This may include where they are not anticipated to occur, or where they are likely to have significant adverse effects on the existing environment. Where the existing environment is regarded as delicate or vulnerable or otherwise where they’re considered less likely to be appropriate. So that is the context in which non-complying activity status is used in this plan.

Lastly, prohibited activity status it simply says that activities are classed as prohibited where they’re expected to cause significant adverse effects on the environment which cannot be avoided, remedied, or mitigated by conditions of

consent or otherwise where it may be appropriate to adopt a precautionary approach.

Turning over the page to page 608, this is the regional policy statement provisions for indigenous biodiversity. So in the regional policy statement there are two objectives and five policies for significant biodiversity and significant ecological areas and of most relevance presently is Policy 5 which is to avoid adverse effects on areas listed in schedule 3, significant ecological areas terrestrial, and schedule 4 significant ecological areas marine. So there is that, that link back to the requirement to avoid adverse effects.

Then the next relevant section of the plan is Chapter D9 which is the significant ecological areas overlay provisions. That starts at page 623. Starting with the introduction it recognises the uniqueness of Auckland's indigenous biodiversity and its diverse range of ecosystems. It recognises that development has resulted in the loss of habitats and a reduction of biodiversity and that urban expansion and development and changes in coastal and rural land uses and ongoing degradation from pest species continue to threaten the maintenance of indigenous biodiversity.

Then it has a response: "In order to protect and better provide for the management of areas that contribute significantly to Auckland's biodiversity it is important to spatially identify them as significant ecological areas in accordance with B7.2 indigenous biodiversity. That's a reference back to the regional policy statement and it says that: "Significant ecological areas have been identified for terrestrial areas in parts of the coastal marine area."

There follows a description of what the different scheduled significant areas mean and then at half way down or two-thirds of the way down page 624, the objectives and these are of most relevance are (1) and (3) areas of significant indigenous biodiversity value and terrestrial freshwater and coastal marine areas are protected from the adverse effects of subdivision use and development and that the relationship of mana whenua and their customs and

traditions with indigenous vegetation and fauna is recognised and provided for.

The next section of this chapter contains the policies relating to indigenous biodiversity and it directs that to manage the effects of activities on the indigenous biodiversity values of areas identified as significant ecological areas by – and then the distinction between (a) and (b) is important, so (a) is to avoid adverse effects on indigenous biodiversity in the coastal environment to the extent stated in policies D9.3(9) and (10), and then (b) is to avoid other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values and then remedying, mitigating, offsetting.

So the point I draw from this is that for some effects avoidance where practicable is directed and otherwise remedying, mitigating and offsetting, but for some effects in the coastal environment there is a cross-reference that sends the reader to subpolicies (9) and (10).

So turning to (9) and (10), that is to avoid – so that starts on page 628 – subpolicy (9) is to "avoid activities in the coastal environment where they will result in any of the following: (a) non-transitory or more than minor adverse effects on" and then there is a list of attributes or features that is largely the same as the list in policy 11(a) with some local specificity, for example, the reference to Māui dolphin and Bryde's whale is not found in the Coastal Policy Statement because these are species that are specific to this region and other neighbouring regions, and then (b), (9)(b) is to also avoid "any regular or sustained disturbance of migratory bird roosting, nesting and feeding areas that is likely to noticeably reduce the level of use of an area for these purposes," and (c), the deposition of material at levels which would adversely affect the natural ecological function.

Then subpolicy (10) is akin to policy 11(b) of the New Zealand Coastal Policy Statement and it's to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on the matters or features listed in (a) to (g).

There are a number of other policies in this chapter that reference, provide greater specificity about how to manage particular effects and, importantly, all of those policies contain some form of cross-reference to policies (9) and (10) or in some way make clear the relationship between themselves and policies (9) and (10).

So starting with policy (6) which is on page 627. The gist of the policy is to avoid as far as practicable removal of vegetation and loss of biodiversity in significant ecological areas, but the policy is tagged at the start "while also applying policies D9.3(9) and (10) in the coastal environment". So there's the cross-reference there back to the more directive approach required in policies (9) and (10).

Also subpolicy (8): "Manage the adverse effects from the use, maintenance, upgrade and development of infrastructure in accordance with the policies above, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas." This is an important policy but it's important to read its words carefully. It is not enabling adverse –

WINKELMANN CJ:
Can I just – what policy it is?

MS GEPP:
Subpolicy (8), page 628.

WINKELMANN CJ:
Carry on.

MS GEPP:
So the primary part of the first clause of this policy is to manage the adverse effects of infrastructure in accordance with the policies above. So no different framework for the management of the effects, recognising it's not always practicable to locate and design infrastructure to avoid significant ecological

areas, so locationally infrastructure may occur within these areas. It's effects are to be managed in accordance with the effects management policies.

ELLEN FRANCE J:
What does that mean in a practical sense?

MS GEPP:
It means that while in a general, while other aspects or other forms of activity may not be provided for in significant ecological areas at all, for example, dwellings, infrastructure generally is going to be conceptually provided for, but subject to it being able to manage its effects in accordance with the effects management policies.

GLAZEBROOK J:
And you say that includes avoidance, presumably?

MS GEPP:
Yes.

WILLIAMS J:
And where are those policies? Not 9 and 10 obviously?

MS GEPP:
Nine and 10 are referenced through, you have to go a bit backwards and forwards, but the very first policy (1)(a) avoid adverse effects on indigenous biodiversity in the coastal environment to the extent stated in policies D9.3(9) and (10).

WILLIAM YOUNG J:
But is there any fleshing out of the management of effects?

MS GEPP:
The fleshing out occurs in (9) and (10). So there's no –

WILLIAMS J:
Well one way of reading that is that it's completely contradictory because you can't.

MS GEPP:
I don't, I don't, you can. You may not –

WILLIAMS J:
But you see if your effects were going to be minor you wouldn't be in breach.

MS GEPP:
But these are policies so it's not necessarily about whether you're in breach, these also are going to guide what activities are provided for in the rules. So these policies don't only apply in the consenting context, they also guide the rules, because the rules have to implement the policies.

WILLIAMS J:
Yes, but it does seem, that subpolicy (8) does seem to be predicated on the idea that you're going to have some interfering infrastructure in vulnerable and/or significant areas, which by definition, unless it's a poll, is going to have more than minor effects. I mean the thing is when you've got ports already, that does seem to me to be a sensible sub policy because they're already there. So in real life the coastline has already been varied and so we have to kind of cope with that reality.

MS GEPP:
Yes.

WILLIAMS J:
So I wonder whether subpolicy (8) is such a pristine protector as you suggest it is.

MS GEPP:

If the intention was to say that infrastructure could have adverse effects on these areas, the policies would need to say so. These policies were the subject of an appeal to the High Court and changes were made to a number of the policies to try and align the wording of them with the New Zealand Coastal Policy Statement, and this was one of the policies that was added to, to try and create that alignment. So I'll take you to that decision.

WILLIAMS J:

That's Justice Whata's decision?

MS GEPP:

Yes. I'll take you to that decision, but just before I do that, I just also draw your attention to the cross-references in policies (12), (13) and (14), which equally distinguish between effects management and locating activities. So the activity may not be prevented all together, but its effects still need to comply with the policy framework.

GLAZEBROOK J:

And what page are they on? I just can't immediately find them.

MS GEPP:

They're on 629 to 630.

WILLIAM YOUNG J:

What about (13), at the bottom of 629?

MS GEPP:

Yes.

WILLIAM YOUNG J:

Do you say that's not a carve-out for a structure necessary to benefit the regional and national community including structures for significant

infrastructure where there is no reasonable or practicable alternative location on land or elsewhere?

MS GEPP:

Sorry Sir if you could speak into your microphone, it's just very hard to hear you.

WILLIAM YOUNG J:

You don't see 13 at the bottom of page 629, top of page 630, as a carve-out for structures necessary to benefit the community including structures for significant infrastructure?

MS GEPP:

No I don't see it as a carve-out.

WILLIAM YOUNG J:

What's its function?

MS GEPP:

Its function is to say that you could have rules and zoning that provided for these activities to be considered. So thinking back to Policy 7 of the New Zealand Coastal Policy Statement which was about strategic planning, some activities will be inappropriate and some activities will be inappropriate without an assessment of their effects and these policies are echoing that division and saying you might not need to preclude them altogether through the rules, and the zoning, you may be able to provide for them to be considered and an assessment of their effects undertaken, but you still need to achieve the directive effects management provisions.

GLAZEBROOK J:

Read just by itself and without the benefit of the coastal policy statement why would this not be a carve-out and you'd say it can't be because I guess because it must be read in accordance with the coastal policy statement, but just read by itself why is it not a carve-out?

MS GEPP:

So the same result can – I submit that the same interpretation can be reached just on the text of these or by reading them in light of the coastal policy statement but just on their text, the fact that they all reference back to those effects management policies is saying that, for example, if you take policy 13 that is to avoid structures in SEA-Marine 1 except where a structure is necessary for any of the following purposes. So you've got to be within one of those categories to have the structure at all. And then –

GLAZEBROOK J:

All right, so it benefits the regional and national community and significant infrastructure where there's no reasonable alternative?

MS GEPP:

Yes.

GLAZEBROOK J:

I'm in that category.

MS GEPP:

And then in – but that applies in addition to policies 9.3(9) and (10), so you need to apply those effects management policies in addition. This policy doesn't sit alongside and get balanced in an overall judgment alongside the requirement to avoid.

GLAZEBROOK J:

No, no I understand that submission, but if policies (unclear 12:08:03) 9.3 or 9.10 necessarily say you can't have a structure in a significant ecological area if it has adverse effects I can't quite see what the point of (d) is?

MS GEPP:

The distinction – the critical distinction is between activities and effects. (d) is about the forms of activities that may be appropriate in these areas.

GLAZEBROOK J:

All right I understand. Sorry, maybe finish the – so you say that this says you can have activities, it doesn't say they can have adverse effects?

MS GEPP:

Yes.

WILLIAM YOUNG J:

But if they're not going to have adverse effects there's not going to be a problem anyway, is there?

MS GEPP:

No that's right, but they still need a policy framework otherwise as an activity they might not be provided for at all. There are certain activities that aren't provided for in significant ecological areas at all and others that are. So you need that the policy framework is directing the types of activities that may be appropriate.

WILLIAM YOUNG J:

So just while I think of it, you're going to come back at some stage to identify authority that says that activities can't be prohibited by reference to their effects. Did you hear that? I'm sorry, I don't know what's wrong.

MS GEPP:

Yes I did, yes.

WILLIAM YOUNG J:

So you'll be able to come back?

MS GEPP:

Yes.

WILLIAMS J:

I can see conceptually how that reasoning works, except the reference to significant infrastructure means that in reality it doesn't, does it? Because you can't possibly have significant infrastructure located in a significant ecological area while still having only minor effects. Can you think of a situation like that?

MS GEPP:

Underground pipes? I can think of plenty of examples of things that don't have –

WILLIAMS J:

So underground pipes through the CMA?

MS GEPP:

Yes.

WILLIAMS J:

But then you have to dig up the CMA to do it.

MS GEPP:

And you have a transitory effect on an area that's used by wading birds and you pick it up and the adverse effect is not…

WILLIAMS J:

Let's think of something more significant than some pipes.

MS GEPP:

Re-alignment of a sea wall that doesn't contribute to the cumulative loss of habitat in a way that is an adverse effect on habitat.

WILLIAMS J:

Yes, so I'm thinking about significant infrastructure.

WINKELMANN CJ:

I don't know what the points – perhaps you just – what's the point of this?

ELLEN FRANCE J:

Well, because the policy refers to "significant".

WILLIAMS J:

Sorry?

ELLEN FRANCE J:

I'm saying you're asking about "significant" because the policy refers to "significant".

WILLIAMS J:

Thank you, yes. For myself, I'm just trying to tease out the practicalities here. I do see your conceptual point but pipes and sea walls wouldn't generally be seen as significant infrastructure. Motorways, ports –

WINKELMANN CJ:

Where's the word "significant" in relation to the infrastructure?

WILLIAMS J:

At (d), (13)(d).

WINKELMANN CJ:

(b). (d). That's the areas that are significant.

WILLIAMS J:

Motorways. Ports. Sewage treatment plants, to think back a few years now, not far from here, and so on. Those are significant infrastructure. They're always going to have more than minor effects in breach of (9) and (10), aren't they?

WINKELMANN CJ:

Structures for significant infrastructure.

MS GEPP:

They may do, and I don't resile from the – or I don't shrink from the concept that these policies are going to have implications for what can and can't occur. The interpretation that there are biophysical bottom lines does have implications for what can occur.

WILLIAMS J:

Quite.

MS GEPP:

So the alternative is should it, shouldn't, should a line have been struck through this policy rather than a cross-reference to D9.3(9) and (10)? Possibly it should've, but the reconciliation and the attempt to ensure consistency with the Coastal Policy Statement was achieved by referencing, or sought to be achieved by referencing those effects policies.

WINKELMANN CJ:

Ms Gepp, when I look at that, what strikes me as significant is it says "structures for significant infrastructure", it doesn't say "significant infrastructure", which tends to make it sound more like the pipes you were talking about.

MS GEPP:

Yes, well, it is certainly about structures and the broader provision for infrastructure is subpolicy (8) back on the previous page which says manage adverse effects in accordance with the policies above.

All right, it might be a good point to move to the High Court decision.

GLAZEBROOK J:

I suppose just coming back to your – the overall point is that in any event this can't be inconsistent with the New Zealand Coastal Policy Statement. That would be your submission effectively?

MS GEPP:

Yes, well, we were dealing just with the text and if you're looking at the text in light of the purpose of this instrument which is to implement those provisions higher up, then an interpretation that is lawful should be preferred in my submission. An interpretation that makes this document inconsistent with the Coastal Policy Statement because it provides for effects that the Coastal Policy Statement says cannot occur should not be preferred.

GLAZEBROOK J:

What if the interpretation has something that's unlawful then?

MS GEPP:

What if the interpretation means that it's unlawful?

GLAZEBROOK J:

Mmm. It doesn't mean you can do it, does it?

MS GEPP:

No, no.

GLAZEBROOK J:

So it comes to the same thing is really the…

MS GEPP:

It becomes more complex when you're dealing with section 104D which constrains your consideration to the plan itself, but in my submission you still need to look at the plan. If you have a question of interpretation you still need to look at the plan in light of the higher order instruments to understand what it's directing you to do.

GLAZEBROOK J:

All right.

MS GEPP:

I think I'll continue on through the Unitary Plan and then come to his Honour, Justice Whata's, decision at the end of that, because it's probably useful to have a full view of the plan provisions first. So the next chapter in the bundle at 632 is the infrastructure chapter. The introduction recognises that: "Infrastructure is critical to the social, economic, and cultural well-being of people and communities and the quality of the environment… as well as benefits infrastructure can have a range of adverse effects."

The objectives start right at the bottom of page 634, and the first is that: "The benefits of infrastructure are recognised." Then over the page at subobjective (3): "Safe, efficient and secure infrastructure is enable, to service the needs of existing and authorised proposed subdivision, use and development." And (4) "Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled."

objective (9) there is a general objective around effects management that "the adverse effects of infrastructure are avoided, remedied or mitigated." Then the policies start just underneath at E26.2.2.

WILLIAM YOUNG J:

What is "[rp/dp]?

MS GEPP:

So each of these provisions is tagged to identify whether they were regional plan, district plan, regional coastal et cetera.

WILLIAM YOUNG J:

I see, thank you.

MS GEPP:

So if it said "rcp" that would be regional coastal plan. So the first is to: "Recognise the social, economic, cultural and environmental benefits that infrastructure provides," by doing a range of things.

The second is to: “Provide for the development, operation, maintenance, repair, upgrade and removal of infrastructure… by recognising…” a range of matters.

The third is to: “Avoid where practicable, or otherwise remedy or mitigate adverse effects on infrastructure,” so this one is about other activities that could impact on infrastructure.

The fourth, fifth and sixth is where consideration is given to the adverse effects of infrastructure and the fourth is to: “Require the development, operation… of infrastructure to avoid, remedy or mitigate adverse effects…” on a broad range of matters.

Five is to consider particular matters when assessing the effects of infrastructure.

Six is to consider other specific matters: “… where new infrastructure or major upgrades to infrastructure are proposed within areas that have been scheduled in the Plan in relation to natural heritage, Mana Whenua, natural resources…” et cetera. So this would apply to significant ecological areas which are scheduled in relation to natural resources, and there’s a range of considerations there. Subparagraph (h) of that list: “Whether adverse effects on the identified values of the area or feature must be avoided pursuant to any national policy statement, national environmental standard, or regional policy statement.” And in my submission this is a critical provision.

WILLIAMS J:
Sorry, I've fallen behind, can you give me the number again?

MS GEPP:
Sorry Sir. So you’re on page 637, subpolicy (6)(h).

WILLIAMS J:
Thank you.

MS GEPP:

In my submission this is a critical subpolicy that links the management of infrastructure back to the directive provisions of the New Zealand Coastal Policy Statement. I'm going to move to Chapter F now, unless there are any questions on Chapter E?

WILLIAM YOUNG J:

Sorry, just pause there. I mean I suppose it's just the way these things are drafted, but it does suggest this is (4) that –

GLAZEBROOK J:

Policy 4 or…?

WILLIAM YOUNG J:

That's E26.2.2(4), page 636, that infrastructure can be permitted if it avoids remedies or mitigates adverse effects including on values for which a site has been scheduled or incorporated in an overlay. So it brings in the additional concepts of remedying or mitigating.

MS GEPP:

Yes and some of those, some of those overlay policies would provide for remedying or mitigating. So that would make sense in a – if that is applied in a general way.

WILLIAM YOUNG J:

So you say it effectively means to avoid value – avoid adverse effects on values for which a site has been scheduled or incorporated in an overlay where avoidance is required?

MS GEPP:

Yes, so the options in the policy are avoid, remedy or mitigate. So it's providing for all of those and then the –

WILLIAM YOUNG J:

But you say – the mitigation and – remedy and mitigation options aren't available in relation to –

MS GEPP:

Aren't always available. Yes.

GLAZEBROOK J:

But Policy 4 isn't related to the adverse effects on the environment. It has adverse effects on other things.

WILLIAM YOUNG J:

Yes it is. (e). (e).

GLAZEBROOK J:

It's not a generic thing on the environment.

WILLIAM YOUNG J:

No, no values for which a site has been scheduled or incorporated.

GLAZEBROOK J:

Well I might be on the wrong policy, so where are you?

WILLIAM YOUNG J:

Page 636, (4)(e).

WINKELMANN CJ:

And your response is –

GLAZEBROOK J:

I don't understand what it's related to.

WILLIAM YOUNG J:

These are – the areas we're concerned are subject to overlays, aren't they?

MS GEPP:

Yes they are, yes.

WILLIAM YOUNG J:

And it's the values and the overlays that are your concern in relation to adverse effects?

MS GEPP:

Yes, so there are a number of overlays some of which relate to human – you know for example historic heritage or character, areas of housing and that sort of thing, as well as environmental overlays. There are also overlays relating to developments such as the trans-protection of a transmission line. The – this is a general policy that is – appears if you look at (a) to (d) to relate more to amenity and human health matters. I accept that the way in which (e) is framed is very broad in general.

WILLIAM YOUNG J:

(d) refers to the environment?

MS GEPP:

(d)?

GLAZEBROOK J:

It's discharges though which is different. Sorry I just wouldn't have read (e) as being as broad as you're suggesting that's all, for the reasons I think that you're indicating that when read in context it looks more like human – adverse effects on human people?

MS GEPP:

Certainly, when you look at that in the context of subpolicy (6) which has the specific reference to natural resources schedules. That I think that that's the more relevant – I mean there's – I'm not saying that (4) is not relevant but certainly that it is expressed in such a general way that when put alongside a

directive requirement to avoid adverse effects or indeed the requirement of (h) to avoid effects that must be avoided pursuant to a national policy statement.

WINKELMANN CJ:
You'd say it's constrained by (6) effectively?

MS GEPP:
Yes.

WILLIAM YOUNG J:
And then with (6) at the bottom of page 636, you say that the relevance of functionality or operational need to be located in or traverse a proposed location, is still subject to effects constraints?

MS GEPP:
Yes, so these are cumulative requirements or requirements that must all be had regard to. Its functional need must be have regard to but it's – but where the effects must be avoided is also in play.

WILLIAM YOUNG J:
Although having a look over the page at (d) it does suggest that contemplates that where there aren't practicable alternative routes, the – it's at the top of page 637, (d) of (6).

MS GEPP:
Yes that, sorry it contemplates what Sir?

WILLIAM YOUNG J:
That some adverse effects maybe acceptable where there aren't alternative practicable alternative locations, routes or designs?

MS GEPP:
Yes and there are a number of overlays where the direction is only to avoid significant adverse effects or to avoid remedy or mitigate. So it's always going to be relevant in there and indeed there's a duty under the Act to always avoid

remedy or mitigate adverse effects. But the fact that there are provisions of these – of this plan that recognise or direct a requirement to minimise your impact cannot in my submission be read as saying: "Minimising is appropriate," rather than avoiding when there's a directive requirement to avoid elsewhere.

WINKELMANN CJ:
And you place – I mean this is, in drafting terms, appears to deliberately elevate those provisions which require avoiding adverse effects –

MS GEPP:
Yes.

WINKELMANN CJ:
– by singling them out that way.

MS GEPP:
Unless there's any further questions on Chapter E, I will turn to Chapter F which is on page 751. This is the chapter for the General Coastal Marine Zone. So this is a broad zone which comprises a number of subzones and obviously there are overlays within the zone as well, such as the SEA overlay and other overlays.

There is a general list of – the purpose of the general coastal marine zone is given about half way down page 751 and it has a range of broadly expressed purposes. So one is to enable the construction, operation and maintenance and upgrading of infrastructure within the coastal marine area (that cannot be practicably located on land) where it has a functional or operational need. Another, the fifth bullet point, is protecting significant ecological values. So there's obviously going to be circumstances in which it's not – where choices have to be made in how these objectives or purposes are achieved and, indeed, the last bullet point is to manage conflicts between activities within the coastal marine area.

The next part of the plan recognises that some parts of the general coastal marine zone have particular significant use or values that are mapped in overlays or precincts, and it lists the overlays, including D9, significant ecological areas overlays. And then there's a further discussion two-thirds of the way down page 752 about significant ecological areas overlay. It's probably of limited relevance to the issues before you but it's recognising that the identification of these areas is incomplete and that the Council still needs to do further work on identifying significant ecological areas, particularly in the subtidal areas of the region, so we are concerned with the intertidal zone, so this is of limited relevance but just recognising that that mapping is incomplete. And the reference down at the bottom of that paragraph is that the New Zealand Coastal Policy Statement will also be relevant in that regard, particularly policy 11.

Then F2.2 is the other provisions of the general coastal marine zone relating to drainage, reclamation and declamation.

The objectives are over the page at 753, page 753. The first is that the adverse environmental effects of reclamation, drainage or declamation on the coastal marine area are avoided, remedied, or mitigated. So quite a general phrase. And then at (2), the natural character, ecological values and natural coastal processes of the coastal marine area are not adversely affected by inappropriate reclamation, drainage or declamation. So again, much as in the Coastal Policy Statement, consideration of the appropriateness of reclamation and whether it will adverse effect those matters goes to whether it is appropriate.

Then the policies, first of all there is policy F2.2.3(1) half way down the page. This policy looks very much like the policy in the New Zealand Coastal Policy Statement, "avoid unless", and then lists the attributes that reclamation must have to be allowed at all, and then the next policy is "where reclamation or drainage is proposed that affects an overlay, mage effects in accordance with the overlay policies". So this sends the reader directly back to consider the overlay policies in terms of how the effects of reclamation are managed.

WINKELMANN CJ:

Sorry, which one does?

MS GEPP:

(2). I'll shortly move to Justice Whata's decision but just to point out, I don't need to take you there, but just to point out that you also have in the bundle should you wish to refer to it schedules 3 and 4 which list the criteria for identifying significant ecological areas and in the case of schedule 4 which is the marine schedule also have descriptions of the values and attributes of each numbered ecological area. So, for example, there is an entry for Ann's Creek which describes the ecological values of Ann's Creek.

WINKELMANN CJ:

Can I just take you back to F2.2.3(2)?

MS GEPP:

Yes.

WINKELMANN CJ:

Is that your answer to Justice Williams' point then that the document itself makes this policy subject to the overlay policy in relation to the special status areas?

MS GEPP:

Yes. It's absolutely linking you back and saying that that is – reclamation must be managed in accordance with those overlay policies. If they say "avoid", the requirement is to avoid.

WILLIAMS J:

That, of course, depends on whether the conceptual difference that I've accepted is there is actually a practical difference in the end, whether F2.2.3(1) refers to pipe and sea walls or something more.

MS GEPP:

Well, I do want to distinguish between – so part of this proposal involved reclamation. Other parts of it involved activities totally unrelated to reclamation. For example, the viaduct. So when you're dealing with the parts that don't relate to reclamation, that's – you're in the territory of infrastructure and structures policies rather than the reclamation policies. So I would –

WILLIAMS J:

Yes, but reclamation is fundamental to this proposal, isn't it?

MS GEPP:

It's part of the proposal, yes.

WILLIAMS J:

Well, the roads going in through the CMA. Pretty fundamental.

MS GEPP:

Yes. That part of it is, yes. There's other parts that aren't, that don't involve reclamation, but that part is, yes.

WILLIAMS J:

I understand that but, yes, this doesn't go ahead, at least not on this alignment, without reclamation.

MS GEPP:

Yes, that's right, and that is really the issue is it appropriate to push into the environment, into the ecology, rather than – if you're going to proceed with it, yes?

WILLIAMS J:

Yes, yes.

MS GEPP:

So you have his Honour, Justice Whata's decision, at tab 46. Now this was a decision on a consent order. The appeal was by Forest and Bird of the – if I

just take a step back. The Auckland Unitary Plan was recommended by an Independent Hearings Panel recommended to Auckland Council and adopted by Auckland Council. Unlike the normal process for planning that occurs under schedule 1 of the Resource Management Act there were no merits appeals except where Auckland Council did not accept the recommendations of the Independent Hearings Panel. So appeals were largely limited to errors of law. Forest and Bird appealed the provisions relating to significant ecological areas on the basis that they did not give effect to the New Zealand Coastal Policy Statement and that that was an error of law. Parties to that appeal included Auckland Council and Waka Kotahi, among others. The decision – the scope of the appeal was limited to Chapters D9, E15 and F2, so –

WILLIAM YOUNG J:
What's the tab?

MS GEPP:
It's tab 46.

WILLIAMS J:
You reeled off some numbers there. D9 and then there's one in middle before you got –

MS GEPP:
Yes, so the scope of the appeal was limited to Chapters D9, E15 and F2. I haven't taken you to E15. It is the chapter that relates to biodiversity not in scheduled significant ecological areas.

WILLIAMS J:
Biodiversity outside the overlays?

MS GEPP:
Yes, and also outside the coastal environment, so it's across the whole region E15.

WILLIAMS J:
So basically regional biodiversity?

MS GEPP:
Yes. The reason for the appeal – if I turn to paragraph 11 of his Honour Whata J's decision, the third error of law is described. The reason for the appeal was that the chapters could not be reconciled in a manner that gave effect to the coastal policy statement and at 12 his Honour records the submission by Forest and Bird that the coastal policy statement's particular effects management approach must be given effect to and that this was not achieved by the Auckland Unitary Plan as there was no clear direction to avoid adverse effects on marine significant ecological areas.

Down the bottom of page 333 at paragraph 17, his Honour records that the parties have reached agreement to amend Chapters D9, E15 and F2 of the Unitary Plan, and sought that the Court exercise its powers to make the amendments.

WILLIAMS J:
Could they not go back to the Board?

MS GEPP:
No.

WILLIAMS J:
Really.

MS GEPP:
There needed to be – no sorry that's not correct. They could have gone back to the Board but the – because the parties had agreed on the amendments that were required the Court determined that it could exercise its form of relief of approving the provisions that the parties had agreed.

WILLIAMS J:
Was this in the context of an appeal that had been filed?

MS GEPP:
Yes. So once an error of law was accepted, the High Court could grant relief and it did – the Court did expressly consider whether it should refer it back to the Board but determined it wasn't necessary to do so in these circumstances.

WINKELMANN CJ:
And paragraph 20. Is that the one that sets out why they're doing it?

MS GEPP:
So 20 sets out what the, the deficiencies, I suppose, what the deficiencies in the policies were and what the amendments did. The amendments expressly required avoidance of adverse effects and SEAs and expressly clarified the requirements of Policy 11 apply in relation to other provisions in the chapter, namely, D9.3(6) and existing provisions D9.3(9), (11) and (12). So those are those cross-reference policies that we discussed the meaning of. The cross-references perhaps are not as clear as the parties thought they were when they were proposing them to the Court for approval, but that was the intention of those changes was to clarify that Policy 11 applies.

At paragraph 23, this is talking about Policy F2.2.3(1) that's the policy that says manage the effects of reclamation in accordance with the overlay policies. As it was recommended by the Hearings Panel and approved by – and accepted by Auckland Council it only required avoidance of adverse effects in two circumstances. On site scheduled in D17 historic heritage overlay, and D21 sites and places of significance to mana whenua overlay. And rather than listing every single overlay and its various policies, in the reclamation chapter, Forest and Bird proposed instead that there be insertion of a general reference back to the specific effects management provisions set out in the overlay policies which includes D9. There's also an unrelated or less relevant change to policy F2.16.3.

WILLIAMS J:
So the Council wanted the – two specific places, two – sorry am I misunderstanding that?

MS GEPP:
So that if – it might be easiest to look over at the back of this decision there's actually a side-by-side of the provisions as they were and the provisions as they were then agreed to be changed.

WINKELMANN CJ:
But your point is that it used to refer – said avoid overlays and it named two particular overlays but not all overlays and your ground of appeal has been by referring to specific ones that seem to exclude the rest.

MS GEPP:
Yes.

WINKELMANN CJ:
And that should be – and it was agreed to remove the specific ones so that it referred clearly to all overlays?

MS GEPP:
Correct.

WILLIAMS J:
And the schematic at the end is unhelpfully vertical.

MS GEPP:
I'm going to blame Justice Whata for that one. That's his document, not mine. The policy referred to, I mean it's described in that, in the text of the judgment. It referred to two particular overlays and said avoid adverse effects on these.

GLAZEBROOK J:
Can you give me that paragraph number where it says that it ends sorry?

MS GEPP:

It's paragraph 23.

GLAZEBROOK J:

The trouble with working electronically is that I find I'm always on the wrong screen, and so I'm typing away thinking I'm making notes and I find I'm not, and I'm trying to highlight something and I find I'm typing – which is my fault, no doubt, but.

MS GEPP:

So just below at 24 note that: "There are 11 s 301 interested parties to this appeal. They were all consulted for feedback and have agreed to the proposed amendments." Some parties provided specific feedback, others didn't but signed off on the consent memorandum and then over the page at paragraph 36, the Court says: "In the present case, significantly, the parties agree that the IHP recommendations…" that's the Independent Hearings Panel recommendations, "… in relation to Chapters D9, E15 and F2 are deficient in terms of the NZCPS and the RPS. I agree also that there appears to be an error on the face of the recommendations. To elaborate, Policy 11 of the NZCPS states…" and then the Court gives Policy 11, and then the Court also gives Policy B7.2.2.5 of the Regional Policy Statement, which I took you to earlier, and yet the Court says that the only provisions of the AUP that give effect to these policies are found in Chapter E15. "The effect of this is that there is no specific protection for indigenous biodiversity in coastal marine SEAS."

Then at 40: "The absence, however, of any equivalent provisions in Chapters D9 and F2 means that compliant with Policy 11 is not achieved in relation to coastal marine SEAs."

Then the Court goes through the IHP decision and says this appears to be an error rather than not done for any proper reason, and at paragraph 47, which is at the bottom of page 338, it says: "With respect to the care taken by the IHP, I could find no explicit policies in Chapter D, the overlays section of the

Unitary Plan, to secure the outcome foreshadowed in the above passages. In particular, the overlays relating to SEAs found in Chapter D9, contain no explicit policy to secure protection of significant indigenous biodiversity as envisaged above or in terms of the NZCPS or to 'avoid' the adverse effects of subdivision use and development in SEAs. Accordingly, given that all the parties agree, a proper basis for allowing the appeal has been made out."

So the deficiency was there was no requirement to avoid the adverse effects of subdivision use and development, and the remedy was to insert those provisions and the cross-references.

It's important to note that the Court says this is a decision on the basis of a consent memorandum. I'm going to proceed on the basis that there is an error on the face of the record, rather than providing a fully reasoned judgment. However, as can be seen, there's certainly a reasonable amount of reasoning in there, given what the Court was being asked to do.

So certainly the intention of those provisions was to secure the bottom line protection requirements of the New Zealand Coastal Policy Statement both in terms of activities generally occurring in SEAs and specifically reclamation.

I'm going to turn now to what that means in terms of the application of this interpretation of these concepts in the consenting context, starting with section 104D. So in terms of my outline I'm at paragraph 2.d. The appellant's key proposition –

WINKELMANN CJ:
So Auckland City Council was one of the respondents who agreed, it's their Unitary Plan and they agreed that that was necessary to capture that?

MS GEPP:
Yes.

WINKELMANN CJ:
Right.

MS GEPP:
The appellant's key propositions in relation to section 104D are that a proposal that does not avoid adverse effects on specified ecological features or areas, is contrary to a policy that requires that such effects are avoided, and that a fair appraisal of the objectives and policies of a plan will interpret, reconcile and apply the policies according to their terms. Thirdly, a reclamation or infrastructure proposal more generally that does not avoid adverse effects as required by the Auckland Unitary Plan, is contrary to the Auckland Unitary Plan.

WINKELMANN CJ:
Are you in your submissions somewhere?

MS GEPP:
These are just the key propositions on section 104D that arise in my submissions. I wasn't reading from them.

WINKELMANN CJ:
So can you just go through them again for me?

MS GEPP:
Yes. A proposal that does not avoid adverse effects on specified ecological features or areas, is contrary to a policy that requires that such effects are avoided. Secondly, a fair appraisal of objectives and policies will interpret, reconcile and apply the policies according to their terms. Thirdly, a reclamation or infrastructure proposal that does not avoid adverse effects as required by the Unitary Plan, is contrary to the Unitary Plan.

In terms of the role of section 104D, section 104D brings the purpose of the Act as particularised through the planning instruments to bear on individual consent applications for non-complying activities. My friends'

submissions reference the specified departures concept of the Town and Country Planning Act. In my submission an analogy or reference back to that concept needs to be approached carefully, as the regimes are quite different. The main purpose of the Town and Country Planning Act was to control activities that took place in relation to land and other resources, whereas the Act, the Resource Management Act shifted the focus from the control of the activities to the control of the effects of activities. Specified departures from the district scheme under the Town and Country Planning Act could be provided where not contrary to the public interest, and where they would have little Town and Country Planning significance beyond the immediate vicinity of the land concerned, and the provisions of the scheme could remain without change or variation. That's quite different to the wording of section 104D. So even if it initially originated from the same concept, the actual encapsulation in the Act is very different.

Additionally in the case of non-complying activities in the Unitary Plan the plan tells the reader what this category is used for. It's not, as was the case for specified departures, for exceptional activities that are not generally contemplated by the plan. It's for activities where greater scrutiny is required because of the severity of effects of the activity or the vulnerability of the area that would be affected.

Turning to the text of section 104D, it's important to note, obviously, that section 104D is concerned with the objective and policies of the plan, not with the Regional Policy Statement or the Coastal Policy Statement. Those other instruments only come in at a later stage if the section 104D test is passed. Section 104D uses the term "contrary to the objectives and policies". In my submission, it means "opposite to". The case law uses the term "opposite to" but also uses "repugnant" or "antagonistic" and my submission is that those words, although they do mean "opposite to", they can also be taken to mean abhorrent or distasteful, and that's not a necessary interpretation of "contrary". It's sufficient that a proposal is opposite to the policy objectives and policies.

WINKELMANN CJ:
Or contrary.

MS GEPP:
Or contrary, as the Act says.

WINKELMANN CJ:
It's quite a good word on its own I think was your point.

MS GEPP:
Not all inconsistency amounts to being contrary, particularly in the case of policies that promote or enable something. A failure to fully achieve what the policy aims for is not contrary. But in the context of directive avoid policies, if a proposal does not prevent the occurrence of adverse effects it is contrary to the policy. If "avoid" means prevent the occurrence of adverse effects and a proposal doesn't do that, the proposal is contrary to the policy.

The assessment of whether an activity is contrary to the objectives and policies is made by considering all the relevant objectives and policies but that does not mean that an overall judgement of the policies in the round occurs. Rather a fair appraisal, to use the Court's words in *Dye v Auckland Regional Council* [2002] 1 NZLR 337, a fair appraisal of objectives and policies must be one that reconciles and applies the policies according to their terms. The question arises otherwise why undertake the detailed and prescriptive planning process to arrive at those words if the words do not matter when it comes to reconciling the provisions.

The appellant's –

WILLIAMS J:
On the other hand you've got a document this big, having gone through this complex and expensive a process – I'm not talking about the application, I'm talking about the AUP – you're not going to read it as if it was written by Parliamentary counsel. You're going to give it some wriggle room because

these are not, as I think some of the old cases used to say, finished pieces of chancery draftsmanship. Right?

MS GEPP:
Yes.

WILLIAMS J:
And that might mean that there's some wriggle room in between these policies, mightn't it?

MS GEPP:
Certainly there's –

WILLIAMS J:
Because it doesn't say "prohibit". It's not as clear and express as that. It doesn't say "no way, José".

MS GEPP:
It does say "no way, José".

WILLIAMS J:
Well, it says "avoid", "avoid", but of course, "avoid" is a softer word.

MS GEPP:
I don't accept that "avoid" is a softer word.

WILLIAMS J:
I thought you mightn't.

MS GEPP:
"Avoid" means prevent the occurrence of effects. It certainly –

WILLIAMS J:
Well, it means avoid the occurrence of the effect.

MS GEPP:

Well, yes, I'm relying on the Supreme Court's judgment about what "avoid" means which is that it means prevent the occurrence of adverse effects which is a very clear requirement and is very directive and doesn't leave a lot of wriggle room.

WILLIAMS J:

Well, in ordinary parlance "avoid" does leave wriggle room.

WINKELMANN CJ:

Is your point about section 104D that once you get – if you persuade us that the proposed – that the Unitary Plan does actually set out this clear hierarch and relationship, section 104D doesn't allow the decision-maker then to sort of throw it all into the balance into a whirligig and come up with a general vibe of the thing? They actually still have to respect that hierarchy?

MS GEPP:

That's absolutely right, and another way to put it is it must mean that the instrument must mean the same thing when you're writing it as when you're reading it.

WILLIAMS J:

It's harder than it sounds.

WILLIAM YOUNG J:

Doesn't your case come down really to the New Zealand Coastal Policy Statement requires the avoidance of effects in these areas and therefore the Auckland Unitary Plan has to be read in the same way and therefore section 104D wasn't satisfied? I mean that's your case in a nutshell, isn't it?

MS GEPP:

In a nutshell that's the case on section 104D, yes.

WILLIAM YOUNG J:

And the easiest way to approach it is probably to look at the New Zealand Coastal Policy Statement. If it means what you say it means then everything else follows. If it doesn't, well, the argument probably falls apart.

MS GEPP:

Yes.

WILLIAM YOUNG J:

And it's easy to deal with it there because there are only two or three clauses we have to look at as opposed to a mass.

MS GEPP:

And that's where I started because if the Coastal Policy Statement doesn't mean avoid adverse effects on these areas, then everything else that flows is more, has more wriggle room, but if it means "avoid" then everything that flows from it must also.

WINKELMANN CJ:

Although notionally it is open to a council to impose high standards on itself.

MS GEPP:

Correct, yes.

WILLIAM YOUNG J:

It might not be consistent then with the Coastal Policy Statement policies as to infrastructure.

MS GEPP:

It might not be.

WINKELMANN CJ:

Or it might be. It would depend on the case-by-case.

MS GEPP:

I can skip over a little bit here because that's, yes, in a nutshell that's the point I was carefully getting to.

GLAZEBROOK J:

Given that it says "objectives and policies", presumably there is – your submission is not that there's every single particular objective and policy must necessarily be – or every single provision in the plan must – that you do look at it in terms of slightly more overall but your submission is that the overall – when you look at it overall, you have some that must be avoided, some that must be mitigated, et cetera.

MS GEPP:

Yes, you still need to look across the range of relevant provisions, absolutely.

GLAZEBROOK J:

Yes.

MS GEPP:

And then maybe, and this is an important caveat, it would be open to the writers of the Coastal Policy Statement and thus the writers of the Unitary Plan to directively provide for an activity and it's possible – and I only raise this as an example and it's an issue for another day – but given we have a National Policy Statement on renewable electricity generation and on electricity transmission, it's possible that when you put that next to the Coastal Policy Statement you do get that directive requirement to provide for certain activities. But that's not the case here, in my submission.

Just before we break for lunch, I'll just also run through the consenting context in relation to section 104 and 171 because it's – some similar concepts apply. One concept is that a proper decision under those provisions requires a correct interpretation of all the relevant provisions, and it requires the decision-maker to have regard to in the sense that they bring into their analysis all the relevant provisions.

The direction in section 104 is to have regard to particular matters subject to Part 2 and similarly in section 171 it's to have regard, have particular regard to listed matters subject to Part 2. It's not just "have regard to" or "have particular regard to". Those words "subject to Part 2" are critical to what that decision-making direction and requirement requires.

So the words "subject to Part 2" affect the meaning of the requirement to have regard to and they bring that protection element of sustainable management from section 5 and 6 through the planning cascade into the decision under section 104 and require that be applied to an application. So "have regard to" or "have particular regard to" the policies subject to Part 2, means to apply the policies to a proposal according to their terms.

If that wasn't the case, again the detailed policy development processes are necessary because planning documents may as well just provide a list of relevant considerations and then say make whatever decision you like once you've had a look at those relevant considerations, but it doesn't. They make choices and they have priorities, and those priorities and choices must be relevant.

GLAZEBROOK J:
Doesn't *King Salmon* make that explicit somewhere?

MS GEPP:
Well, *King Salmon* was concerned just with planning, so it doesn't go so far as to say what –

GLAZEBROOK J:
I thought it did refer – I might be thinking of another –

WINKELMANN CJ:
Is it *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316?

MS GEPP:

Yes, so I was going to go to *Davidson* next. But perhaps that's a good place to break?

GLAZEBROOK J:

Okay, well, maybe I'm thinking of that.

WINKELMANN CJ:

Right.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.23 PM

MS GEPP:

Your Honours, just before I recommence, I note I'm running around half an hour behind where I would have liked to be at this point. Is there any possibility of the Court sitting for part of Thursday or should we assume that we need to strictly fit this within the two days?

WINKELMANN CJ:

Well, we'll have to just see how we go. I think we'll see how we go. We can sit a little bit late tonight, 15 minutes. I've got a meeting at 4.30 but we'll go 15 minutes late tonight and we might be able to start a little bit early tomorrow morning. So we'll see how we go.

MS GEPP:

Thank you, Ma'am, that's much appreciated.

WINKELMANN CJ:

We prefer to stick to the two days, the long and the short of it.

MS GEPP:

Thank you. Just before we broke for lunch we started to move to the *R J Davidson* decision. Now that is at tab 30. The Court of Appeal's relevant

findings are encapsulated in paragraphs 71 to 74. This was a decision about a mussel farm in the Marlborough Sounds. It had a range of adverse effects, including on King Shag which was a threatened species, and then which therefore engaged policy 11 of the Coastal Policy Statement.

The Court discussed the place of Part 2 in consenting and the role of the New Zealand Coastal Policy Statement in consenting decisions, and at 71 observed, with respect, in an orthodox way that where the Coastal Policy Statement is engaged, any resource consent application will necessarily be assessed having regard to its provisions, and that this follows from section 104, and that it would be inevitable that *King Salmon* would be applied in such cases. What the Court said is that the way in which that would occur would vary. If there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the Coastal Policy Statement, the consent authority could justifiably take the view that the policies in the Coastal Policy Statement had been confirmed as complying with the Act's requirements and separate recourse to Part 2 would not be required because that's already reflected in the Coastal Policy Statement and notionally by the regional coastal plan, so the decision-maker would get no assistance by resorting to Part 2 when it was already implemented through the Coastal Policy Statement and the plan.

On the other hand, the Court said that if a proposal were affected by different policies so that it was unclear from the Coastal Policy Statement whether consent should be granted or refused, the consent authority would be in a position of having to exercise a judgement and it could use Part 2 for such assistance as it might provide in those circumstances. In those circumstances, the Court said, *King Salmon* would not prevent that because in this example, in the Court's example, there is no notionally clear breach of a prescriptive policy in the Coastal Policy Statement and the application under consideration is a resource consent, not a plan change.

So then at 73 the Court talks about what it means to give consideration to the relevant plan provisions and says that it means that the relevant plan

provisions should be considered and brought to bear on the application in accordance with section 104(1)(b). A relevant provision is not properly had regard to, which is the statutory obligation, if it is simply considered for the purpose of putting it to one side, and that requires a fair appraisal of the objectives and policies read as a whole.

And lastly, paragraph 74, it may be that "a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with section 104(1) should be to implement those policies in evaluating a resource consent application."

Forest and Bird relies on that approach to say that in this case the requirement was to bring the relevant policies to bear. There was a clear breach of the New Zealand Coastal Policy Statement and the plan provisions that implemented it and the only outcome available in bringing those policies to bear was to decline the application.

The last case that I rely on is the *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 decision of the High Court, that's at tab 50 of the bundle, but I don't propose to take you through it. I will just speak to it. The key points from that decision is that it involved the need to consider how to apply the coastal policy statement provisions in a consenting context. It was a context involving infrastructure and biodiversity provisions. Sorry, infrastructure and landscape provisions in that case. And the key points were that the decision the High Court followed the *Davidson* decision and said that the requirement was to focus on the text and the purpose of legal instruments, pay careful attention to how they're expressed and that where policies pull in different directions the interpretation should be subject to close attention to their expression. That's applying the *King Salmon* approach to consent decisions.

What had happened in that case the Environment Court had applied an overall judgment of the policies, what was required was to carefully interpret the plan provisions, so the Environment Court's approach was a legal error.

The decision is also notable for its finding that there may be not only biological or ecological bottom lines but also cultural bottom lines and that those arose and applied in that case.

WILLIAMS J:
Can you give me an opportunity to note down the paragraphs.

MS GEPP:
Yes so in my outline I've got the paragraphs at – on the second page of my outline I've referred to the paragraphs. The bottom line reference is paragraph 94, the cultural bottom line reference is 94.

My outline also references – the next point in my outline is to reference some key paragraphs from the evidence. The evidence of Dr Bull, Dr Myers, and also the joint witness statement for ecology. The key evidence of Dr Bull and Dr Myers is largely reproduced in the Board's decision itself. So rather than take you to the evidence I'll take you through the Board's – relevant parts of the Board's decision, but you do have those references there if you wish to go back and look at the primary evidence.

The Board's decision is tab 90 of the common bundle, it's 316.03965 is the first page of the decision and I'd like to start at paragraph 365 which is on 316.04073.

In this part of the decision the Board is describing what is required of it in assessing section 104D. It starts at 361 but the Board is really describing the legal test at 365 and it says that: "A holistic approach to considering objectives and policies when considering the 104D test was established in the Court of Appeal decision in *Dye v Auckland Regional Council*." It also notes the *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 decision

which said that it's "not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy and be contrary to many others. But the proposal may be so strong in terms of that policy that it outweighs all the others if that is the intent of the plan as a whole. Conversely a proposal may be consistent with and achieve all bar one of the relevant objectives and policies. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal, it may be open to the consent authority to find the proposal is contrary to the objectives and policies under section 104D, but the usual position is that there are sets of objectives and policies either way and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed."

And in my submission those cases, while I take no issue with the concept in *Dye* of a fair appraisal of the objectives and policies, the way it's then been applied in cases such as *Akaroa* which tends to suggest more of an overall judgment of the plan provisions rather than carefully applying the provisions according to their terms, in my submission is not the correct approach.

Turning to the resource consents assessment which starts at paragraph 465 which is on page 316.04101, the Board records the uncontested evidence in relation to fauna –

WINKELMANN CJ:
Sorry what paragraph are you at?

MS GEPP:
465. First of all it describes the value, the ecological value of the Inlet as habitat for a number of threatened and at-risk species and the significance of the inlet for those species was confirmed by Dr Lovegrove who was the Council's expert ecological witness.

So those are the ecological values or the fauna, the bird values, described over the following paragraphs down to 470, and then at 471 the Board starts

to consider effects and says: “The Board accepts that there will be permanent loss of feeding and roosting areas for shore birds, including threatened and at-risk species. Such effects must be considered significant. On the basis of the evidence, however, the Board concludes that the proposed coastal works will not result in loss of habitat that is sufficiently rare that it would impact on the overall populations of those species, or the presence of those species within the Māngere Inlet or adjacent coastal areas. Therefore, provided that appropriate and adequate mitigation and offsets are implemented, the Board finds the effects of the proposed reclamations and coastal structures are acceptable when considered against the objectives and benefits of the works that necessitate those activities.” So the Board is applying a different magnitude of effects threshold.

WINKELMANN CJ:
What paragraph is that?

MS GEPP:
471. So having found effects are significant, the Board says nonetheless they are not going to be so significant that they would impact on populations or presence in the inlet and therefore as long as there is offsetting and mitigation, that’s an acceptable outcome having regard to the benefits.

WILLIAMS J:
Was it expected that these wrybill plovers would go back to the reclaimed areas?

MS GEPP:
Not to the reclaimed areas, no. No, it’s a permanent loss of that area, yes.

WILLIAMS J:
Non-replacement?

MS GEPP:

Yes. There is certainly a package of offsetting and mitigation measures put forward by the applicant and approved by the Board but not use of that particular area.

WILLIAMS J:

This is just they'd fly away?

ELLEN FRANCE J:

But going somewhere else?

MS GEPP:

Yes, so for some they will go somewhere else. For some there would be pest control in their breeding habitat in Canterbury to enhance the population through other enhancements.

WINKELMANN CJ:

In Canterbury?

MS GEPP:

In Canterbury.

WINKELMANN CJ:

Not in Auckland?

MS GEPP:

No, they don't, I don't think they breed in Auckland, the wrybill.

WINKELMANN CJ:

But the enhancements are in, out, off elsewhere?

MS GEPP:

Yes.

WINKELMANN CJ:

But are there mitigations to address the loss of habitat in the area?

MS GEPP:

I'll just get Dr Bull's evidence because she has a good summary of…

GLAZEBROOK J:

Where's that?

MS GEPP:

That's tab 30 of the bundle and –

GLAZEBROOK J:

Yes, yes.

MS GEPP:

It starts at 305.01738. So Dr Bull discusses, goes through the usual kind of structure of first of all describing the existing environment, what's there and how important it is, and then she moves to discussing all of the range of effects, so that starts on page 305.01750. She discusses construction effects, indirect effects on food supply and foraging, direct mortalities, operational effects, and then she has some ecological benefits described and then she has a summary of the effects in her table 4. So that's quite useful to look at, 305.01757.

WINKELMANN CJ:

305 what, sorry?

MS GEPP:

01757.

GLAZEBROOK J:

Can you just tell me the tab again because I lose the tab as soon as I click on it?

MS GEPP:

Sorry, it's tab 30.

WINKELMANN CJ:

Can you tell me the number again?

GLAZEBROOK J:

305.01757. I don't lose that for some reason, just the tab.

WINKELMANN CJ:

Just have to do the numbers a little bit more slowly.

MS GEPP:

Sorry, Ma'am. So is it easiest if I give you – so I should give you the tab number and then the page number, is that the best way to do it?

WINKELMANN CJ:

Yes, that's good, but slowly.

MS GEPP:

So if you've made it to 305.01757, about halfway down the page is table 4, and it flows over onto the next page.

WINKELMANN CJ:

And that's without mitigation?

MS GEPP:

That's correct, that's without mitigation. So she uses a matrix where she assesses the ecological value and the magnitude of effect and then comes up with a level of effect from that, and talks about whether it's a permanent or a temporary effect. And then she goes on to discuss mitigation over the page, 305.01759, it's paragraph 8.50: "The approach that the project ecology team has taken to mitigation and offsetting is an integrated solution." So they have looked at all the adverse effects and benefits and provided a bucket of mitigation and offsetting measures rather than a line-by-line approach.

So mitigation and offsetting measures are then discussed at 8.51. Establishing saltmarsh habitat, purchasing Ngarango Otainui Island to provide long-term protection of the pine trees as roosting habitat for royal spoonbills and shags, engagement with owners of industrial buildings currently used as high-tide roosts around Mangere Inlet to inform building owners of the value of the species using their rooftops and to discuss maintaining the roofs as roost sites, working with DOC to identify potential sites for some threatened or at-risk species and to develop an appropriate package of offset that will provide benefit to those species such as pest control, a post-graduate research scholarship in relation to benthic invertebrate assemblages, removing an area of kikuyu grass, those are the offsetting and mitigation measures that are proposed.

ELLEN FRANCE J:
And where in volume 3 of the Board's report, the conditions, do we then see that?

MS GEPP:
The conditions…

ELLEN FRANCE J:
Are those features reflected in the conditions?

MS GEPP:
I believe so, yes. They'll be in volume 2 of the report, which I think is at tab 91, but I'll just need to check that.

WINKELMANN CJ:
So there's high mortality caused by construction to some of these category A species?

MS GEPP:
Well, no, direct mortality is not expected to be a – let me just have a look. Mortality "very high", it does say that. I see there's a footnote on one of those

very highs though to say “if banded rails are found to be breeding”, there’s a footnote at number 10. But, yes, there are certainly – I don’t understand there to be a dispute that there was still moderate to high effects on these species that would still occur. I understand the respondent’s position to be that the package of benefits would address those effects.

WINKELMANN CJ:

So it’s not a like-for-like mitigation, you're not mitigating the effect on those birds in that area really?

MS GEPP:

It’s not lose a square metre, gain a square metre, no, of habitat.

WINKELMANN CJ:

So it’s not giving those same birds another habitat they can immediately transport themselves to?

MS GEPP:

No. For some of the species there is the finding that there are other areas in the broader inlet or the broader harbour that they will move to. But there is still a net loss of their habitat and that net loss is on top of the historic loss. So that’s described at same tab, so still Dr Bull’s evidence, page 305.01751. The first paragraph on that page is 8.7 and it says: “It is estimated that approximately 190 hectares of marine environment has been historically reclaimed in the Mangere Inlet.” “The area of proposed reclamation and permanent occupation of the CMA for the project within the Mangere Inlet is 25 hectares, which is 4.7% of the current intertidal habitat within the Mangere Inlet. The proposed reclamation and permanent occupation of the CMA is an additional 12.9% of the total already reclaimed.” And she assesses the magnitude of that effect in the following paragraph: “The magnitude of effect of cumulative reclamation and occupation of estuarine ecosystems is likely to be negligible but in order to be conservative I have assessed it as low,” so that’s her magnitude. But then at 8.9: “Given the very high value of shorebird assemblages,” “the overall level of effect of cumulative reclamation and

occupation of estuarine ecosystems within the Mangere Inlet and Manukau Harbour is considered to be moderate for shorebirds." So that's just shorebirds, there's other paragraphs that relate to wading birds and so on, but that's the finding about that cumulative habitat loss.

If I move on through the Board's decision. This area is described as the area where effects are assessed, and then the next section of the decision, the next subheading, is called "Adequacy of Ecological Mitigation and Offsetting" and that's at 04128. The significant adverse effects on the unique ecosystems at Ann's Creek East are only assessed in the Board's decision under the heading of "Adequacy of Ecological Mitigation and Offsets". So the Board doesn't consider first what those effects are and the avoidance requirement.

So at 583, which is on 316.04129 – sorry, 316.04129 – the Board records those findings about effects on avifauna that I've taken you to and stops at the negligible without moving on to the assessment that actually the effects are moderate.

WINKELMANN CJ:
Sorry, hang on, can you just re-state that? I didn't follow what you're saying.

MS GEPP:
Yes. So at 583 the Board quotes from Dr Bull's conclusions and says that save that the effects "are considered to be negligible at both the local and population level". And then those are the findings, having recorded that the effects are moderate, the Board then relies on those findings about the scale of effects at the population level to reach its findings about consistency with the policies, and that's probably, the Board comes back to that later in its decision when it's assessing the policies.

But at 584 the Board says: "In response to questions, Dr Bull confirmed that because the direct impact of the reclamation is permanent and cannot be

avoided, offsets are the primary means of addressing effects on shorebirds," and the measures to offset are described there.

The Board discusses the Ann's Creek East vegetation on the next page, starting at 591. At 592 the Board cites evidence from Ms Myers, who was Waka Kotahi's ecological expert witness, that: "Ann's Creek East contains sensitive and unique ecological values," and over the page, construction of the viaducts "will result in significant ecological effects" and those are listed. 589: "Dr Bishop generally accepted Ms Myers' assessment," that's Dr Bishop, being the Council's expert. Some discussion about the adequacy of the mitigation and offsetting –

WINKELMANN CJ:
What's the point of all this stuff you're taking us to? I'm just struggling to follow the point of what you're trying to say is.

MS GEPP:
For there to be an error, there needs to first of all be a finding that there are adverse effects that need to be avoided.

WILLIAM YOUNG J:
There is a finding, isn't there?

MS GEPP:
Well, that's what I'm taking you to.

WILLIAM YOUNG J:
I didn't understand there it was an issue.

MS GEPP:
Oh, it is an issue, and my friend's seeking to support the decision on other grounds. They say that the finding, that there wasn't inconsistency with the policies.

WILLIAM YOUNG J:

But is – sorry, may indicate my misunderstanding. I thought the Board did find that there were adverse effects but that essentially the relevant policies and objective did contemplate a no practically available alternative approach.

MS GEPP:

The Board found that there were – the Board did two things. In respect of the policies it found that they weren't inconsistent because, or they weren't contrary –

WILLIAM YOUNG J:

Well, if there's no practical available alternative then that was on the Board's approach a way through the issue?

MS GEPP:

Yes. The Board also found though that because the effects weren't at a population level they didn't need to be concerned with it being contrary to the policies. So there was a question about the factual findings as well as a question about the consistency with the overall policy framework. But I don't want to…

ELLEN FRANCE J:

Well, just point me to the paragraph where you say because they find, because the effects were not at a population level.

MS GEPP:

So one example of that is 605, which is just over the page at 04134.

ELLEN FRANCE J:

Yes. So what's the problem with their approach there?

MS GEPP:

So they accepted there would be a significant adverse effect but then said it wouldn't result in an effect on the overall populations and was therefore not

contrary, they later find when they turn to their policy assessment, not contrary to the policy.

WILLIAM YOUNG J:
But they accept that there are effects that are more than minimal, don't they?

MS GEPP:
Yes, but they apply a –

WINKELMANN CJ:
She's saying that.

WILLIAM YOUNG J:
This idea that they're worse than they, that the effects are worse than they found. But that doesn't really bear that much on the legal issue we're dealing with, does it?

MS GEPP:
Oh, no, I'm not disputing the magnitude of the effects. The Board said there would be significant adverse effects. The Board then said: "But they won't be at the population level." When they come to consider the policies they say – and perhaps it's best if I just go to that now – they say: "It is contestable whether the proposal will have non-transitory or more than minor adverse effects on threatened species," because they –

WILLIAM YOUNG J:
Where are you now?

MS GEPP:
645.

WILLIAM YOUNG J:
But it says: "Regarding clause 9.3(9)(a)(ii), the proposal will result in non-transitory and more than minor effects on areas of habitat utilised by some rare species." So isn't that the finding that you can hang your argument on?

MS GEPP:

Yes, I could hang it on that simple finding, then I would face the argument that there was only a single policy that was contravened, when if the Board had correctly interpreted –

WILLIAM YOUNG J:

If you're sort of – sorry.

WINKELMANN CJ:

Well, can she just finish, can I just hear the answer?

WILLIAM YOUNG J:

Sorry.

WINKELMANN CJ:

Can I just hear that answer?

MS GEPP:

Because if the Board had correctly interpreted the D9 policies, this proposal is contrary to all of those D9 policies that require avoidance, not just one policy, one sub-policy, which the Board later says while it's only contrary to one or two sub-policies and all the rest it's not contrary to, when in fact if you look at the wording of the policies, on the Board's own findings on the evidence it should have found the proposal to be contrary to all of the relevant ones.

WILLIAM YOUNG J:

I suppose I might be guilty of over-simplifying it by looking at it in terms of the New Zealand Coastal Policy Statement. For your argument on the New Zealand Coastal Policy Statement to succeed you only have to find one non-transitory not minimal adverse effect, don't you?

MS GEPP:

Yes, as long as you can bring the Coastal Policy Statement to bear on…

WILLIAM YOUNG J:
If your argument about that's right then all of this is, I won't say surplus, but it's just more of the same.

MS GEPP:
Yes.

WINKELMANN CJ:
So what you're saying here is that they are under-stating the extent to which precluded harms are not avoided?

MS GEPP:
Yes. Based on applying thresholds that are not in the policies, such as that there needs to be a population-level effect.

WILLIAM YOUNG J:
Is that a threshold or is it just an assessment as to what is significant or more than minimal or not intransitory?

MS GEPP:
Well, the Board had already found that the effect would be significant, so it had made a finding of fact that there would be a significant adverse effect based on the uncontested evidence. But it then went on to say: "But it won't be at the population-level effect," and it used that finding for its policy assessment.

WINKELMANN CJ:
Under A1 but not, but under A2 it says – oh, so is it actually using it across the board in saying it's being met in relation A2 but not A1?

MS GEPP:
So again it sort of, it goes, it makes the finding and then it minimises it by saying the habitats are important but the shorebirds will roost and feed

elsewhere. So each time it addresses a policy it incorporates an internal qualifier on the policy.

WILLIAMS J:
Isn't the best, maybe the way to put that is that by suggesting they'll move out in an accommodation-short city, that they're effectively negativing that policy about the protection of habitat –

MS GEPP:
Yes.

WILLIAMS J:
– by jumping to bird numbers and avoiding habitat itself?

MS GEPP:
Yes.

WINKELMANN CJ:
Right. And this qualification tends to suggest they're treating it as a bottom line, doesn't it?

MS GEPP:
Yes.

WINKELMANN CJ:
Or else they're actually – yes.

MS GEPP:
And equally, over the page…

WINKELMANN CJ:
Well, maybe more than that.

MS GEPP:

Paragraph 647. At the end of the paragraph they say it can be considered inconsistent with 9.3(9)(b): "It is however unclear whether it is contrary to that policy directive," and, as noted elsewhere: "the birds will likely opportunistically feed and roost elsewhere in the Inlet, the Tāmaki River," et cetera, so it's…

GLAZEBROOK J:

I'm sorry, I missed the paragraph number.

MS GEPP:

647, but it's over the page, the second part of that paragraph.

WINKELMANN CJ:

Starting with: "Thus, the proposal can be considered inconsistent…

MS GEPP:

Yes, inconsistent but not contrary.

WILLIAMS J:

There were some numbers cited, I think in the Board report, there was a figure of 25% of the harbour having been reclaimed, and then it said: "And this proposal adds 3%," but I couldn't work out whether it had got it to 25 or took it to 28.

MS GEPP:

No, I think that was – sorry – was that the paragraph that I referred you to earlier about the 190 hectares lost and the further…

WILLIAMS J:

Well, somewhere in here I seem to recall quite early on in the discussion, the set-up, if you like –

MS GEPP:

Yes.

WILLIAMS J:

– the Board records that the level of reclamation in the Manukau Harbour is significant.

MS GEPP:

Yes.

WILLIAMS J:

And it gave, the number I have in my head is 25% but I couldn't work out whether this proposal got it to 25% or whether this proposal was 3% more again. Am I misremembering this?

MS GEPP:

I can't put my finger on the paragraph now. It's the – I might have to come back to you on that one, Sir.

WILLIAMS J:

If that's so, then it would be surprising to think that an addition of 3% incursion, that's even assuming the whole harbour was habitat, an incursion of 3% wasn't more than minor.

MS GEPP:

Well, it was, the findings were that it was more than minor – sorry, the evidence was that it was more than minor.

WILLIAMS J:

Yes, but – quite. But then that's your point, I guess, that it seems to have been disregarded.

MS GEPP:

Yes. So just, I don't want to labour the point about the difference between the Board's assessment and the policies and the evidence, but just to, before I move on, paragraph 649 is that, it relates to policy D9.3(10), which is the policy about avoiding significant adverse effects. And the Board says, in the

third sentence: “The Board is satisfied that the proposal has avoided significant adverse effects on Ann’s Creek.” The Board has recorded only a few paragraphs earlier that the evidence is that there will be significant adverse effects on Ann’s Creek, and yet when it comes to its policy assessment it is satisfied that there will not be and therefore it’s not contrary to that policy.

WINKELMANN CJ:
And that’s Justice Powell accepted that was an error, didn’t he?

MS GEPP:
Yes, he accepted there was an error in relation to (unclear 15:01:37) 9.3(9)(1)(a) only, he didn’t address the rest of the pleaded errors.

Yes, so the Board found that it was not contrary to 9.3(10) because there wouldn't be significant adverse effects, contrary to the evidence and its own findings.

Over the page, or a couple of page, at 316.04147, this is the Board’s overall conclusion on section 104D, and the Board adopts the *Akaroa Civic Trust* approach of saying sometimes there’ll be a single provision that sways it, generally it’ll be an assessment across all the objectives and policies, this case involves the latter, “notwithstanding that there are indeed some inconsistencies between the proposal and relevant objectives and policies, particularly in areas of reclamation and biodiversity.” “In doing so, the Board has given measured weight to the word ‘avoid’, which is clearly not a direction to be ignored.” “On balance, the Board finds the proposal is not contrary to the objectives and policies of the AUP when considered as a whole.” And in my submission the Board has not applied the provisions according to their terms in reaching that assessment.

And I’m just going to have to back-track a little bit to where the Board considers that reclamation policy, F2.2.3.(2), the reclamation policy that talks

about managing effects in accordance with the overlay policies, that's on page 316.04140. At paragraph 629 the Board says –

WINKELMANN CJ:
Sorry, I'm going to ask you to repeat the number.

MS GEPP:
Yes. 316.04140, para 629: "Policy F2.2.3(2) requires consideration of the overlay policies." In my submission that's not quite what F2.2.3(2) says. It requires that effects are managed in accordance with the overlay policies, which is a different legal requirement. Over the page at 316.04142 at 642 the Board says: "Returning to Policy F2.2.3(2), the Board is required to consider the relevant provisions of Chapter D9," so they consider the overlay policies.

So when the Board's overall conclusion on 104D is seen in the context of the Board's finding about the relationship between the reclamation policies and the overlay policies, it is submitted that not only has the Board erred in its interpretation of individual policies, it has also erred in its reconciliation of the policies and then it's erred in its overall judgement, put-it-all-in-the-pot approach to section 104D.

WILLIAM YOUNG J:
So inconsistency with a single policy means it's contrary to the policies and objectives?

MS GEPP:
It depends what the policy says. If the policy –

WILLIAM YOUNG J:
Yes, if the policy says all adverse effects to be avoided and it doesn't, or says adverse effects to be avoided and it doesn't avoid adverse effects, you say that that means it's inconsistent?

MS GEPP:

Yes, because a proper reconciliation of those policies, including the enabling ones and the directive avoidance ones, would lead you to the view that the meaning of the objectives and policies, a fair appraisal of those objectives and policies as a whole, is that effects are to be avoided.

WILLIAM YOUNG J:

But it all really comes back to what the Coastal Policy Statement means, doesn't it?

MS GEPP:

Those are the Board's findings in relation to 104D.

WINKELMANN CJ:

Well, you actually have – don't you have errors of law which you say are freestanding of the NZCPS because you say that the Board, whatever test they applied, misdirected itself, applied, set it on a base, factual basis which was not open to it, unreasonable, because it was in contradiction with its own factual findings?

MS GEPP:

Yes. Well, I say that there are errors in the findings which it relied on when making its policy assessments. My friends say none of that can be material even if there are errors.

WINKELMANN CJ:

Well, how would we know?

MS GEPP:

Well, that would be my submission. If it's an error in relation to a policy that is clearly directly relevant to the matter before the Board then it must be a material error. But they say if you – well, they can say, they can put their argument but I understand it to be that because the Board was able to look across the provisions and there were so many provisions that supported the

proposal, that means that those errors in interpretation of the directive protection policies don't matter, if there are such errors. And I say that that cannot be right and that those policies need to first of all be correctly understood and applied.

WINKELMANN CJ:
So in the broad brush terms then you say that the Board was wrong in how it applied the avoid policies, then it was wrong in how it reconciled the enabling and the avoidance policies?

MS GEPP:
Yes.

WINKELMANN CJ:
And then it was wrong in its application of the *Akaroa* test?

MS GEPP:
Yes.

Turning to the next, the section 104 assessment, the Board says that it – at 680 the Board is considering the New Zealand Coastal Policy Statement. Now paragraph 680 is on page 316.04151. The Board in 680 says that it needs to be cognisant of the higher order documents, and that requires the Board to have specific regard to the NZCPS. Having had such regard, the Board is satisfied there's no specific incongruity between the Coastal Policy Statement and the Auckland Unitary Plan. Any key differences are anticipated and particularisations. "Therefore, the substantive discussion on coastal objectives and policies herein is made against the AUP provisions."

So then at 694, which is at the bottom of 316.04153, the Board says that as already addressed, in the Board's consideration of alternatives and under section 104D, the key planning elements engaged by the proposal are whether NZTA has adequately justified the proposed coastal route, whether potential adverse effects of that route can be adequately avoided, remedied or

mitigated. When considered against the provisions of the AUP and the NZCPS –

WINKELMANN CJ:
What paragraph are you at?

MS GEPP:
694, bottom of page 04153.

The key part of this paragraph, which is over the page at 04154, is: "Notwithstanding the directive wording of the key reclamation and biodiversity provisions, they must be assessed on balance against all relevant provisions, including those that support the proposal, and an overall balanced finding made."

On page 04157 –

WINKELMANN CJ:
So that's the critical thing, you'd say, "notwithstanding the directive wording", so that's the *Akaroa* approach?

MS GEPP:
Yes. Well, this is not in the – *Akaroa* is a 104D case, this is now in the context of section 104 and having regard, the "have regard subject to Part 2"…

WINKELMANN CJ:
Yes, okay.

MS GEPP:
Test under 104.

So I don't take any issue with the context that all the relevant provisions need to be considered and addressed, but what that must still involve is applying them according to their terms. And so the question is, well, is there really

anything here that authorities proposals or enables proposals that would have those adverse effects that the Plan and the Coastal Policy Statement say must be avoided, and the crux of my submission is that on a correct interpretation there isn't.

WINKELMANN CJ:
It is kind of a balancing in a way thing thought, isn't it? Because what they're saying is you can't just apply them, you have to balance them against other provisions, and you say that's the wrong approach, you just have to apply them.

MS GEPP:
If "balance" means read them down, it's the wrong approach. If it means look for a way to reconcile them in a way that makes them all work, I don't have any issue with that approach.

WINKELMANN CJ:
Yes.

WILLIAMS J:
And that's the question in the end, do the words allow the sort of reconciliation, whatever words were used by this Board, or are you right and the words just don't limit it?

MS GEPP:
That's right, that's the issue.

WILLIAMS J:
One policy's got to win.

MS GEPP:
Yes. Well, yes, except I wouldn't put it in the frame of one policy's got to win, I'd say all the policies lead you to the same outcome.

WILLIAMS J:
Well, no, the –

MS GEPP:
When we looked at those infrastructure provisions earlier, they still have that reference back to the Coastal Policy Statement, it's not one policy in D9.

So some key finds at 704, 705, 706, which is on 04157. The Board at 705: "The Board accepts the proposal is not consistent with particular clauses of 39.3(9) and (10) and E15(9) and (10) and may be contrary to some." "However, based on its findings in relation to the potential effects of the proposal, the overall assessment must take account of the scale of those effects and the extent to which they will be avoided, mitigated or offset, including protection and restoration of habitats. To that end, the Board has found that the reclamation is necessary for the road alignment and consequential mitigation of landscape, visual, severance and amenity effects." And carrying on at 706: "The Board also finds that the alignment across Ann's Creek East has, to the extent practicable, avoided the rare and threatened ecosystems. The adverse effects that have not been avoided will be adequately mitigated or offset. Furthermore, the Board is satisfied that the proposal will not result in a more than minor adverse effect on species populations or the presence of species within the Inlet or Ann's Creek East." So again, in my submission the Board is applying a range of considerations and thresholds that aren't found in the policies. If this were a proposal on land, looking at mitigation and offsetting would be absolutely required by the policies, but that's not a framework that this plan applies for significant ecological areas in the coastal environment.

WINKELMANN CJ:
In terms of F2.2.3 does the Board ever ask itself that question, address itself squarely to that question about whether it's the only reasonably practicable…

MS GEPP:

Yes, it does deal with policy F2.2.3(1). It deals with that on pages 04138 to 9. It says: "While some submissions considered NZTA had selected the wrong alignment, and that the Proposal should not extend into the CMA, it was common ground that the East West Link would provide significant regional benefit." "The areas surrounding Māngere Inlet are fully developed with industrial, commercial and residential land uses." "Therefore, it finds that there are no 'practicable alternative' ways of providing for the objectives of the Proposal in a manner that avoids the proposed reclamations and coastal occupation."

WILLIAM YOUNG J:

The guts of it is its para 626, isn't it?

MS GEPP:

Yes.

WILLIAM YOUNG J:

And it reaches that view largely on the basis of the material it addressed in relation to whether the Board's consideration of alternatives had been adequate.

MS GEPP:

Yes. The Board reaches this conclusion, that there is no practicable alternatives, because it's satisfied NZTA's scrutiny of alternative routes did not produce any other than the selected route.

WILLIAM YOUNG J:

Did anyone suggest an alternative route that…

MS GEPP:

I don't know.

WILLIAMS J:

This is something that – I must say that's why I was asking you these questions, really something has been gnawing away at me, because F2.2.3 sets a threshold, no practicable alternative, when the alternatives are assessed in the AEE they are assessed pursuant to the requirement provisions, 171(1)(b), I think, which is not about "no practicable alternative" but about whether alternatives have been looked at. The Board, when it deals with practicable alternatives, refers to its assessment in Chapter 15 which is its 171 assessment. Its 171 assessment does not seem to me to ever ask the question by reference to evidence as to whether this is the only practicable alternative, and there does not seem to me to be anything in the AEE that actually addresses that question. Now the evidence may have, because there's a lot of evidence and there's only some much you can read before you come to court, but because there's a big difference it seems to me between the standard in section 171(1)(b) and the standard in policy F2.2.3 which says you get you only get to do it if you don't have another practicable alternative. Are you able to help me about whether there was any evidence? Well, maybe you just want to think about that issue.

MS GEPP:

I will think about it and I will see if I can assist you on that, Sir. It's fair to say that Forest and Bird's involvement in the case was fairly and squarely focused on the ecological effects but my friend for Ngāti Whātua Ōrākei may be able to assist as well because they had a broader focus on, particularly on the reclamation.

WILLIAMS J:

Yes, all right.

MS GEPP:

I was at 706 talking about the effects on Ann's Creek, and then the Board considers the infrastructure provisions, starting at para 723 which is on page – just at the bottom of 04160. At the end of paragraph 723 the Board notes: "The provisions also require the consideration of identified values of an area

or feature pursuant to any national policy statement, national environmental standard or regional policy statement." Presumably, that's a reference to that paragraph (h) in the infrastructure chapter that refers you back to the national policy statements, but there's no assessment of whether that is met in this case.

At 725 the Board finds: "There is a clear and unavoidable tension across these provisions that requires the balanced assessment necessary for roading projects such as the East-West link. Not surprisingly, the enabling and providing provisions clearly support the proposal." "Policy E26.2.2(5)," the Board says, "is particularly germane." That's one about considering a range of matters. It's not 6, which is about when infrastructure is in a scheduled site, there's no, other than that reference, that slightly oblique reference in 723, there's no express reference to the policy, sub-policy 6, about –

WINKELMANN CJ:
So you're saying at 723 – just to go back, because you've passed over that quite quickly – are you saying they're identified that they might have to consider it but then they don't consider it, is that your point?

MS GEPP:
Yes. Yes, I mean a generous interpretation would be that they consider they've addressed that when they talked about the Coastal Policy Statement, et cetera, earlier, but there's no, nowhere do they say: "What is the effect of the infrastructure policies when you read all of the infrastructure policies?", they only focus on the enabling, saying that the enabling and providing provisions clearly support the proposal.

Then over the page at 04162 is the Board's –

WINKELMANN CJ:
And you would say that's a reading-down of the enabling provisions, because you'd say the enabling provisions themselves have those restrictions in them?

MS GEPP:

Yes, they are a package in themselves that recognises the positive and adverse effects of infrastructure and are certainly not a carte blanche provision for infrastructure.

At, over the page, 04162 is the Board's conclusion under section 104(1)(b)(v) and (vi), which have regard to the relevant provisions of the policy documents. The Board references back to its overall conclusion on 104D and again states that finding that it's "contrary to a small number of policies or sub-clauses of policies" but those do not "individually or cumulative" provide "reason to conclude that the proposal is repugnant to the policy direction with respect to the resource consents sought", and that: "This same balance is found in the overall section 104(1)(b) assessment of the activities for which resource consent is sought. Halfway through that paragraph the Board "finds that the proposal achieves a level of consistency with the planning framework commensurate with the overall benefits of the proposal, including those afforded by offsets". And then at the end of that paragraph: "With respect to those elements of the proposal that are inconsistent or contrary to provisions, and without reading down the strong directive of avoidance policies, the Board finds that adverse effects have been avoided to the extent practicable in the context of the proposal objectives and route and residual effects, some of which are significant, will be mitigated or offset to the extent the proposal can be reasonably supported within the overall policy direction of the AUP, the Regional Plan and the New Zealand Coastal Policy Statement." And my submission while the Board says it is not "reading down the strong directive", that's exactly what it does in the words that follow.

Lastly, the Board – and I can be quite brief with this – the Board turns to its section 171 assessment, and this is on page 04297 at paragraph 1265, the Board records that its "earlier conclusions and findings on the relevant provisions relating to the applications for resource consent also apply to some extent here" in respect of the notice of requirement, and these include "coastal activities and Ann's Creek". So just recording that those same findings, to the

extent that the alleged errors that I've described, those findings also affect the 171 decision.

And then lastly, page 316.04304, at the bottom of the page, paragraph 1301, the Board says: "Having paid particular regard to the section 171(1)(a) matters, the Board finds that conflict with the policies set out in the relevant planning instruments is in most cases minimal. The Board has identified some areas of conflict and has balanced these against the benefits clearly flowing from the policies that support the proposal. Subject to the imposition of appropriate conditions to avoid, remedy, mitigate, the Board finds that the proposal achieves a level of consistency with the higher order planning instruments, and in particular the AUP, that reflects the overall benefits of the proposal," and goes on to consider some of those benefits.

So that's really the key aspects of the Board's decision I wanted to take you to. My outline, my two-page outline, has all of those paragraphs referenced if you wanted to refer back to them. And having done that assessment –

GLAZEBROOK J:
What do you say – does this look like the very analysis that *King Salmon* said that they shouldn't do or is your submission – does your submission reach that level?

MS GEPP:
Yes. I mean I have to acknowledge that *King Salmon* was a case about planning, not consenting.

GLAZEBROOK J:
Yes.

MS GEPP:
But *King Salmon* was also a case about the correct approach to interpreting planning instruments and the role of protective directive policies in decision-making under the Act, and to that extent I say that the *King Salmon*

findings are relevant and exactly directed at not having this type of overall judgment that balances positive and adverse effects to reach an overall outcome.

WILLIAMS J:
Unless the words allow it.

MS GEPP:
Unless the words allow.

WILLIAMS J:
Is there a – in *King Salmon* you do have the double whammy of "avoid" and "appropriate" or "inappropriate", and these are – although the Court says "avoid" means "don't do it".

MS GEPP:
Yes.

WILLIAMS J:
But there was also that rather more fuzzy word "appropriate".

MS GEPP:
Yes. In this case we have an even more stringent policy because in that case it was "protect from inappropriate development". Here we just have "protect".

WILLIAMS J:
Yes, but I wonder whether that might have affected the way that analysis worked because one thing *King Salmon* does say is "read the policies".

MS GEPP:
Yes, absolutely.

WILLIAMS J:
That's where you start?

MS GEPP:

That's hopefully been the theme of my submissions today, yes.

WILLIAMS J:

Yes. But read them carefully in context.

MS GEPP:

Yes.

WILLIAMS J:

And usually they say there won't be the conflict that perhaps you might – it might be suggested those who don't want to deep in this stuff and simply want to come up with the vibe at the end of it would prefer to see in order to be able to do that.

MS GEPP:

Yes.

WILLIAMS J:

The question here is whether we're in that situation.

MS GEPP:

That's right. The vibe approach allows for a much greater degree of discretion than the policy documents actually intend to provide, in my submission. Yes, the vibe, the thrust, the holistic approach, they're all sort of different ways of saying the same thing which can mask what's going on underneath.

GLAZEBROOK J:

You can't really possibly have a different approach at the consent level than you can at a plan change level, can you?

MS GEPP:

No, I don't think so. I think the scheme of the Act is to be consistent.

GLAZEBROOK J:

So you are suggesting that *King Salmon* directly applies, in fact, obviously, because if you…

WINKELMANN CJ:

By analogy.

GLAZEBROOK J:

Well, it's not even by analogy because the consent process is below all of that.

WILLIAM YOUNG J:

It all depends on what the policies –

GLAZEBROOK J:

No, no, of course it does.

MS GEPP:

The reasoning in *King Salmon* –

WINKELMANN CJ:

The reasoning though.

MS GEPP:

– particularly about the scheme of the Act, directly applies in my submission, directly applies.

GLAZEBROOK J:

No, of course it all depends on the policy but it can't be that at the consent level you can ignore the policies and do a vibe.

WINKELMANN CJ:

No.

GLAZEBROOK J:

Whereas up, further up, you can't do a vibe.

MS GEPP:

Yes.

WINKELMANN CJ:

That would be perverse.

MS GEPP:

Yes, and it would make the whole planning process a bit of a waste of time.

WILLIAMS J:

Well, yes and no, because what you state at the wholesale level and what you do at the retail level cannot necessarily be mirror images one of the other because consent applications, particularly for big projects, are many-splendoured things, and it's very hard for those writing for the wholesale market to be able to predict every kind of situation that's going to come up, particularly in the coastal marine area and particularly with infrastructure.

MS GEPP:

But then you would expect some form of allowance for those activities that were intended to have – you would still need to find that allowance that said: "Even though we've been very specific about these mapped areas and the values within them and the approach you need to take to effects, you can still find something in a general enabling policy that says you don't actually have to avoid those effects in this particular consenting.

WILLIAM YOUNG J:

That's absolutely the crux of the case, isn't it? Isn't it really as simple as that?

GLAZEBROOK J:

Yes.

MS GEPP:

Yes.

WILLIAMS J:

The question is really is there a thin sliver here, sliver here…

MS GEPP:

Yes.

WILLIAMS J:

Through which a project can crawl, in the CMA in particular, you know, in the coastal area, or not?

MS GEPP:

Yes.

WILLIAMS J:

And you say absolutely not?

MS GEPP:

Correct.

WINKELMANN CJ:

Well, you say there is. It's that it doesn't have the adverse effects that are precluded by (a) and (b), and that is realistic because –

MS GEPP:

Oh, yes, if the effects are not caused then it can proceed, yes.

WILLIAMS J:

Yes. And my rejoinder to that is yes, and then we all wake up to reality where big infrastructure projects, other than burying some pipes, don't stand a chance.

MS GEPP:

Yes, but – sorry, yes. But the reality we're living in is also one where our biodiversity is absolutely depleted and in crisis.

WILLIAMS J:

Absolutely.

MS GEPP:

So we've got to wake up one way or the other.

WINKELMANN CJ:

Yes. And you would say you'd expect – you might be searching for microdots or the vibe of the thing but there's certainly no clear language that suggests any intention to allow that outcome?

MS GEPP:

No. Particularly when you look at those reclamation policies that refer back to the overlay policies, and particularly with that sub-paragraph (h) that refers to "effects that must be avoided". Why use that language if you meant "effects that could be avoided or could be dealt with in some other way"?

WINKELMANN CJ:

And there is distinction in how different things are dealt with with different language, and it seems quite deliberate.

MS GEPP:

Yes. Just noticing the time, I think the only thing I have left to do was address you on the High Court decision. You probably don't need me to take you through it, because everything that we have that I've been addressing you on all leads up to that point. You know, the High Court took a slightly different approach, it accepted that there was, that the Board should have found that these effects were contrary to the policies, but then said: "However, E26 gives you this free ride –

WINKELMANN CJ:

Freeway through the system.

MS GEPP:

No, it's not a free ride, that's not a fair way to say it, but it's a way through. And so really the key is that paragraph 69, in which the High Court concluded that the effect of E26 is that infrastructure like the proposed East-West link cannot, by definition, be contrary to the objectives and policies of the Auckland Unitary Plan. That's a far-reaching finding that goes beyond this particular proposal but, even in the context of this particular proposal, my submission is it's not a fair reading of the Unitary Plan.

WINKELMANN CJ:

So it looks, I mean, read on its own terms it looks like it creates a freeway through the whole scheme for infrastructure, just that sentence, doesn't it?

MS GEPP:

That sentence does, yes.

WILLIAMS J:

I don't even think the Chief Justice *meant* that joke.

WINKELMANN CJ:

I did.

WILLIAMS J:

Oh, did you?

MS GEPP:

That's right, and that's the key, section 104D finding that the High Court relies very much on the infrastructure chapter. And then in terms of section 104 and 171, the issue is really just that the High Court just didn't engage with Forest and Bird's arguments about the misinterpretation of policies, the application of

standards that were not found in the policies, and findings that were not consistent with the Board's earlier findings of fact…

WINKELMANN CJ:
So you've taken us to E26, haven't you?

MS GEPP:
E26 is that whole chapter, whole infrastructure chapter.

WINKELMANN CJ:
Yes, and that's the one that's got (h) in it.

MS GEPP:
And the High Court doesn't grapple with –

WINKELMANN CJ:
(h).

MS GEPP:
– (h), the High Court copy and pastes, with respect, and includes the policy holus-bolus and then –

WINKELMANN CJ:
Well, we all do that when we're putting policies, we're not going to free-type them, are we?

MS GEPP:
No, no, no, dictation for sure. But then doesn't grapple with what that means.

And then in terms of the 104 and 171 decisions, the High Court found that the Board was required to simply have regard or particular regard to the Coastal Policy Statement and that meant to give genuine attention and thought to it but the matters in it need not necessarily be accepted, and I've submitted to you that that is not the correct approach. When the obligation is to have

regard subject to Part 2, the requirement is to do more than that, and it's in accordance with *Davidson*. It's to apply the policies according to their terms.

Unless the Court has any questions, I can leave it at that.

WINKELMANN CJ:
And the High Court Judge had found those errors in the factual findings of the Judge but he didn't then loop back round – did he loop back round to decide whether or not those were significant?

MS GEPP:
He said that they weren't material because the Board was able to rely on the – they weren't material to 104D because the Board was able to rely on the infrastructure policies.

WINKELMANN CJ:
Because of E26?

MS GEPP:
And then he didn't loop back to them in the context of 104 and 171 to consider whether those errors could have influenced the Board's findings under 104 and 171.

WINKELMANN CJ:
And in the paragraphs you took us to earlier, it's quite apparent that their assessment of the significance of the harm was relevant in their decision-making?

MS GEPP:
Yes, it was relevant under all of the provisions, 104D, 104, 171.

WINKELMANN CJ:
Have you finished earlier than you intended?

MS GEPP:

No. I was supposed to finish at three. But I can certainly finish now unless you have any further questions for me and then my friends can pick up after the adjournment.

WINKELMANN CJ:

All right, well, thank you.

MS GEPP:

Thank you.

WINKELMANN CJ:

It's Mr Enright now, I think.

MR ENRIGHT:

Thank you, your Honours. I understand there's no adjournment, we're straight into round 2.

WINKELMANN CJ:

That's right.

MR ENRIGHT:

May it please the Court, Ngāti Whātua Ōrākei's association with Onehunga and the Manukau dates back to the mid-18th century and the invasion and subsequent occupation of Tāmaki Makaurau by Te Taou and this history is identified in the Waitangi Tribunal report which is in the materials, the Manukau inquiry.

Ngāti Whātua Ōrākei is opposed to the East West Project principally because of the effects of reclamation on the Manakau and its biodiversity. Reclamation for roading has resulted in significant adverse effects for Ngāti Whātua Ōrākei in other parts of Auckland and Tāmaki Drive in terms of its effects on the kāinga and urupā at Okahu Bay, and that is as an obvious example.

Ngāti Whātua Ōrākei therefore appears in support of the appeal and I will address the following. First, a brief overview. Next a brief discussion of the whanaungatanga or whakapapa between Ngāti Whātua Ōrākei and the site.

GLAZEBROOK J:
You seem to be – can you perhaps – I don't know if you could just…

MR ENRIGHT:
You can't hear me or…

GLAZEBROOK J:
No, we can. I'm just slightly worried about whether it's coming through for the transcription that well.

WINKELMANN CJ:
Perhaps straighten the microphone up towards you, Mr Enright, yes.

MR ENRIGHT:
So overview, the whanaungatanga whakapapa, and really a focus for our submissions, we adopt what the appellant has said on 104D, and so our focus is on the 104/171 exercise, particularly failure to have regard to relevant objectives in the NZCPS and why that was material, and I'll briefly then reply to the opposing iwi authority submissions and address relief.

So just at the high level, environmental bottom lines are not new to resource management, town planning or mātauranga Māori. Rāhui have been used for centuries to manage biodiversity. Biodiversity values are cultural values, and this is reflected in section 6(e) RMA, which includes as a matter of national importance the relationship of Māori with their ancestral lands, waters and taonga. There are cultural bottom lines in Part 2 of the Act per Justice Palmer in the *Tauranga Environmental Protection Society* decision that my friend took you to, paras 93 to 94. Of course, that decision or, sorry, the earlier decision of the Privy Council in *McGuire v Hastings District Court* [2001] NZRMA 557 also talks about that continuous emphasis in Part 2 RMA in sections 5, 6(e),

7(a) and 8, and the emphasis given to Māori cultural interests under the Act, so that's the *McGuire* decision,.

The reasons that *King Salmon* was correctly decided in 2014 still apply now. An important benefit of *King Salmon* is certainty for policymakers when drafting policy provisions and their awareness that using phrasing such as "avoid" in policy frameworks is sufficient to protect values important to the community. It has not produced absolutism, instead the awareness of using deliberately framed language to create a hierarchy. It is to be preferred to "unfettered" or, in some cases, a shopping-list approach where competing verbs are employed in plan provisions and then left to be reconciled by decision-maker discretion on application to individual facts. Policy instruments should be able to identify areas of high values where infrastructure cannot establish if the "price", meaning the effects, are too high. *King Salmon* has not produced outlier judgments in terms of an absolute approach, whether in the High Court or Environment Court and has, instead, resulted in great certainty in plan drafting that seeks to reconcile competing policy imperative. And just sort of a practice point, certainly post the *King Salmon* decision the use of "avoid" in the manner my friend has described has certainly been adopted over the last seven or so years of plan review and plan drafting processes.

WINKELMANN CJ:
Is your point that this "avoid", which does flow to the facts I suppose, is a post-*King,* it's a consciously post-*King Salmon* piece of language?

MR ENRIGHT:
Yes. Well, the understanding –

WILLIAMS J:
That's a big call.

MR ENRIGHT:

The understanding of the meaning of "avoid" identified in *King Salmon* has been essentially adopted in plan review processes post 2014.

WILLIAMS J:

But "avoid" has always been used in that stronger and more negative way than "remedy" or "mitigate".

MR ENRIGHT:

That's a fair point, your Honour, and I'm sorry if I wasn't clear in the answer, but –

WILLIAMS J:

No, I probably over-reacted.

MR ENRIGHT:

Oh, well, that's very good of you to say that, Sir, but –

WINKELMANN CJ:

Well, certainly Justice Whata's decision suggests, the facts that are noted there, suggest that *King Salmon* was in the mix when the language was chosen.

MR ENRIGHT:

So the AUP is a classic example where it's post-*King Salmon*, and ironically we had Judge Kirkpatrick who was the Chair of course, who appeared in *King Salmon* in this Court, and it was certainly at the forefront of the minds. So my point is over that seven years the meaning of "avoid" has been carefully considered by plan review, plan drafting, and because *King Salmon* is very clear in its terms as to what its meaning is, that has followed through in the planning practice.

WILLIAMS J:

It didn't seem to work in *Akaroa*.

MR ENRIGHT:

I'm sorry?

WILLIAMS J:

Didn't seem to work in the *Akaroa* case.

MR ENRIGHT:

Well, I –

WILLIAMS J:

You see, the problem it seems to me is policy documents, they're not statutes, and there's always some fuzz around the edge of them because they're no, by and large, directive, they're about the mindset you bring to make individual retail decisions or setting rules.

MR ENRIGHT:

So it depends on values and effect that one is trying to manage, and so in the coastal environment post-2010 you have obviously a clear hierarchy. That approach of adopting bottom lines has also flowed through into freshwater management also. We have bottom lines in what's known at the NPSFM 2020, National Policy Statement for Freshwater Management, which has an inbuilt hierarchy around Te Mana o te Wai and certainly does employ on a calibrated basis references to "avoid". So I suppose again that's my point. *King Salmon* was instrumentally important in giving that clarity around if a drafter uses that language it will have the desired effect in the way my friend has described.

WILLIAMS J:

So was *Akaroa* just an outright rebellion? What was going on there?

MR ENRIGHT:

I would have to go to the facts on that. I can't give you it on the spot.

WINKELMANN CJ:

Well, perhaps don't worry about that now, I think, because –

WILLIAMS J:

The reason I raised it is that it seems to me looking at these cases that most often the problem you have is language in the policies that leave room for interpretation and interpolicy competition and, of course, that's what *King Salmon* says. I don't think we've quite emerged out into a world of utter clarity in this area at all because it's in the nature of these instruments that you're going to have fuzziness around the edges of them.

WINKELMANN CJ:

Or not.

MR ENRIGHT:

And the answer probably is yes and no because it depends on how clear one's drafting is. I accept that, as I think was said earlier, we're not looking at chancery draftsmanship. But nonetheless, as my friends describe, there was a very careful approach discussed by Justice Whata around how do we ensure all of the "avoid" policies relating to biodiversity category A. Category A biodiversity do require "avoid" even for infrastructure. So it has been carefully calibrated and the AUP is a good example of the proposition in my submission.

But I'll come back to *Akaroa* perhaps later if needed.

Just in terms of the – as identified by the "while" statement in section 5(2) RMA, bottom lines operate in tandem with enabling outcomes to achieve different metrics of wellbeing. There is no necessary dichotomy in section 5 between protection and the three forms of wellbeing: social, cultural and economic. So cultural wellbeing can be enhanced through the protection of biodiversity.

Moving from that to just briefly take you to the evidence for Ngāti Whātua Ōrākei, and here this is my submissions at paras 10 and 22 if you want a reference, Ngāti Whātua Ōrākei's ancestral and contemporary whakapapa to the Manukau and wider Tāmaki Makaurau can be briefly described but is important to their rationale for opposing reclamation proposed for the East West Link. Their relationship with their ancestral lands, waters and taongas was identified by evidence, and I would like to take you to Ngarimu Blair's evidence which is in volume 307 at tab 37, 307.2203.

WILLIAMS J:
Give me the tab number again, sorry?

MR ENRIGHT:
It is volume 307, tab 37. And just commencing at para 3, in summary he says: "Ngāti Whātua Ōrākei is an iwi with mana whenua status for the Onehunga and Māngere area and also respects the ahi kaa and mana whenua status of various Waiohua iwi," and he lists those, including Te Kawerau a Maki, Ngāti Te Ata, Te Ākitai, Ngāti Tamaoho, Ngāi Tai and Waikato-Tainui "to whom we are closely related". So, you know, from the outset his evidence acknowledged the obvious point that many iwi have a relationship with the Manukau, and he goes on to say that Ngāti Whātua Ōrākei has a deep and ongoing connection with named sites and that the East West Link as proposed does not adequately provide for the relationship of Ngāti Whātua Ōrākei with their named sites.

So at 6 he identifies the relationship which stretches back to the time of Te Taou/Ngāti Whātua invasion and occupation of Tāmaki in the mid-17th century. I think the Tribunal report says 18th century but – so it's probably an error. "The genealogical links to the earlier occupation groups created through marriage with Waiohua enabled Ngāti Whātua to connect the entire length of the Māori occupation of the Onehunga area," and he goes on to describe the establishment through conquest and occupation of ahi kaa. At 36 he identifies that "construction of a highway along the waterfront adjacent to and into the Mangere Inlet" and Harbour negatively affects their relationship

to their ancestral lands and then gives the example of Tamaki Drive, which may be a familiar example to the Court, which "severed our connection with Okahu Bay and the Waitemata in 1932" and continues this day to be "an immense barrier to enjoyment of the natural and cultural values of the Bay".

WINKELMANN CJ:
What paragraph are you at there?

MR ENRIGHT:
37. And identifies in the next paragraph, 38, that the adverse impacts from their perspective will be substantial ongoing. In addition, both Mr Blair and Dr Malcolm Patterson, whose evidence is in the bundle, refer to identified named ancestral sites and to identify their relationship.

So having that context, if you go to the Board decision –

WILLIAMS J:
Can you just – this is a background matter – when was Ngāti Whātua moved from Okahu Bay up onto the top of the hill? About this time, was it?

MR ENRIGHT:
I'd have to check that for you, but I suspect that's correct because of the severance issue. But I will come back to you because it's…

WILLIAMS J:
It's fine, I can check it.

MR ENRIGHT:
And if we go to the Board decision at para 752, and it's not the only – oh, we'll start at 750. The Board there accepted the submission of counsel that the evidence "confirmed the ahi kaa rohe and role of Ngāti Whātua Ōrākei and Te Kawerau ā Maki respectively" and that both those iwi concluded that on the basis of their world view that the effects are "significantly adverse".

Then in para 752, having set out that position, “an overall judgment must be made by the Board” a to whether the mitigation proposed is sufficient to mitigate the “adverse effects on cultural values” and says there that essentially the benefits of stormwater treatment and containment bund together with overall mitigation are “sufficient to mitigate the significant adverse effects” on the two iwi. Now this same paragraph is relied on by my friends for NZTA to deny that there was a factual finding of significant adverse effect. In my submission it’s a conflation problem because the mitigation related to the project and not Ngāti Whātua Ōrākei’s world view and beliefs about the project, from their perspective the mitigation does not address the significant effect. And of interest, the recent decision of Justice Palmer in the *Tauranga Environmental Protection* decision takes a slightly similar approach to how do we judge whether there is a significant effect on hapū or iwi, and essentially at paragraphs 62 and 65 of that decision confirms that: “Cultural effects on the traditions and beliefs are to be judged by reference to the iwi or hapū that holds those beliefs subject to probative evidence from mandated witnesses such at kaumātua and kuia,” and that is because the effect is on the particular iwi or hapū’s beliefs judged from their perspective. So we do maintain that there was a significant adverse effect, the mitigation side of the equation sat with the project not with Ngāti Whātua Ōrākei.

WILLIAMS J:
You wouldn't have any problem with the idea that Te Ākitai and Ngāi Tai Ki are themselves ahi kaa, for example, in the Manukau?

MR ENRIGHT:
So one of the points made later in my written submissions and also it’s a point of discussion as between myself and posing iwi. Some of it is not the right time to answer that question. There may be a future argument around who has the strongest relationship with the Manukau.

WILLIAMS J:
Well, I’m not talking about who has the strongest relationship.

MR ENRIGHT:

Yes.

WILLIAMS J:

It's just that Te Ākitai and Ngāi Tai have settlements around Manukau, don't they?

MR ENRIGHT:

Yes.

WILLIAMS J:

So that's incontrovertible.

MR ENRIGHT:

It is incontrovertible. But what –

WILLIAMS J:

Right, so, and the difficulty is that some iwi, it seems, have taken what might be called a practical approach to a bad situation and said: "This is terrible but if we engage with it it'll be better than it would otherwise be, so we're going to do that in exercise of our mana."

MR ENRIGHT:

That's essentially correct.

WILLIAMS J:

Yes, and you say no.

MR ENRIGHT:

For Ngāti Whātua Ōrākei we say "no", correct, yes, and that is all equally an exercise of rangatiratanga.

WILLIAMS J:

Absolutely.

MR ENRIGHT:

And so I know my friend's submissions for the opposing iwi, or supporting iwi I suppose I should call them, puts forward a proposition that we have competing tikanga applying here depending on which iwi we're talking about, or which hapū, and so it depends on your worldview and that is correct.

WILLIAMS J:

But I don't even know whether that's right. The real thing is that the same world-view applies, it's just that people have actuated those world-views in different ways, some more pragmatically, some more puristically, I suppose. Both of them perfectly legitimate responses to the situation they're in.

MR ENRIGHT:

Yes, indeed. I mean one could quibble about whether it's purism and pragmatism but I agree that some iwi have made the decision, as they're entitled, to support and some to oppose.

WILLIAMS J:

I don't mean to be critical by saying that Ngāti Whātua's purist. Far from it.

MR ENRIGHT:

Yes.

WILLIAMS J:

But the world-view that's coming, being brought to the problem, is the same from all of those iwis, just what they've decided to about the situation they're in is different.

MR ENRIGHT:

Yes. Whether the world-view is exactly the same depends on tikanga to some extent and so if your –

WINKELMANN CJ:

And what their interests in the area are, doesn't it? It depends on what're their interests in the area.

MR ENRIGHT:

Yes, that's right.

WINKELMANN CJ:

Each iwi will have different interests. Can I ask you just a question going to back to your previous submission? You cited Justice Palmer as saying whether or not their interests in mana whenua are adversely affected is best assessed from their point of view.

MR ENRIGHT:

Yes.

WINKELMANN CJ:

And we look at 751 and the Board says: "The Board notes that Dr Patterson came to the final conclusion that Ngāti Whātua Ōrākei could not support reclamation, having weighed up…" "He nonetheless confirmed that he had not had an opportunity to review relevant background documents and evidence associated with the proposal." So in that circumstance, isn't it inevitable that the Board is going to look more holistically when they make an assessment about the extent of the impact on the interests of mana whenua?

MR ENRIGHT:

Not necessarily. Ngāti Whātua Ōrākei was one of the few iwi who presented actual evidence to the Board as distinct from relying on a side agreement that came up during the hearing and whilst the Board may have placed less weight on his evidence in light of the point your Honour has just picked up, nonetheless the evidence was very strongly – as I've taken you through, particularly for Mr Blair, the reasons why Ngāti Whātua Ōrākei were in opposition were clearly identified, including their planner, Mr Andrew Brown,

who gave planning evidence. So I don't respectfully agree it was inevitable that the Board would come down on one side, not the other.

WINKELMANN CJ:

No, my point of view is they couldn't simply delegate effectively the factual view about the impact on mana whenua which I think is what you were saying that Justice Palmer had said that it was for mana whenua to say whether their interests are in adverse impacts

MR ENRIGHT:

Well, perhaps I could take you to the TEPS decision just because it isn't –

WINKELMANN CJ:

Yes, what's the name of the decision?

MR ENRIGHT:

Tauranga Environmental Protection Society. Sorry, I call it TEPS, and it's at tab 50, and, whilst it's discussed in more than one place, if we look at para 62 and following Justice Palmer references to the Court's finding that – or at para 61 – the Court accurately summarised Ngāti Hē's clear opposition to the proposal but refused to find the alignment would have adverse cultural effects: "The evidence of Ngāti Hē, as summarised above, is contradictory of those findings," and then goes on to describe that evidence. And then at 65: "The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to and must assess credibility and reliability of evidence." "But when the considered, consistent, and genuine view is that the proposal would have a significant and adverse impact on an area of cultural significance," "it is not open to the Court to decide it would not, Ngāti Hē's view is determinative". So that's the approach Justice Palmer adopted in the event. So it was subject to, it had to be probative evidence from mandated witnesses. But when it comes to judging whether there's an adverse effect on the tikanga of iwi or hapū, it's for the iwi or hapū to identify that.

WINKELMANN CJ:

I suppose if I was to make my point more precisely, which perhaps I should have from the outset, they seem to take into account that the overall proposal included mitigations that Dr Patterson had not taken into account.

MR ENRIGHT:

Abort, yes. Well, yes, but again – well, you've had my answer on that, I think.

I just wanted to finish the discussion with Justice Williams on the point about, you know, competing ahi kaa, and really one of the main points in reply to –

WILLIAMS J:

Well, just be careful about using that word "competing". Do you need to use that word "competing"?

MR ENRIGHT:

No, sorry, you're right. Well, "competing tikanga" I think is the way it's been described in written evidence, and when we're dealing with the essential Treaty principle of active protection of taonga, whilst there might be disagreement about whether, as to whether, how to actively protect the taonga, being the Manukau, obviously the Board took its own view on that and the various iwi authorities had differing views on that. But it is possible, one can't resort to relativism. Just because we don't agree on how to protect doesn't mean we cannot exercise active protection of…

WILLIAMS J:

No.

MR ENRIGHT:

So I'll move off that point and go to the issue of the receiving environment, and my friend for the appellant has covered this largely. So I just wanted to pick up the evidence of Dr Lovegrove who helpfully identified the habitat values for shorebirds, and that's at volume 306, tab 33 – I'll just grab my iPad – and at paragraph 7.4 of that brief, which is 306.02027, you'll see in

paragraph 7.4 and 7.5 Dr Lovegrove identified the Manukau Harbour as the most important single habitat for shorebirds in New Zealand, “in late summer supporting up to 140,000 birds or about half of the total wader population” and then refers to godwits and knots, et cetera, and then: “Within the Harbour,” because of course the Mangere Inlet is the area where the subject proposal is located, “Mangere Inlet has a significant role as an important feeding ground –

WINKELMANN CJ:
What paragraph are you at, sorry?

MR ENRIGHT:
7.4, 7.5, Dr Lovegrove, Council ecologist, and refers to the “departure and arrival points in the local movements of waders”. So just giving that slightly more context.

And it may assist also when we look at the values of the receiving environment, the AUP helpfully identifies some of those values also. And if I could take you to the AUP, which is tab 64 of the bundle, and at page 917 to 918, that’s schedule 4, SEAs, just gives a little bit more information, context around the Ann’s Creek values.

WINKELMANN CJ:
Page 917, is it?

MR ENRIGHT:
Page 917 hopefully, that’s schedule 4, SEAs, page 917, referring to Ann’s Creek, and it refers to the “mosaic of vegetation types”. About halfway down it states: “Ann’s Creek is the only site in the region where a suite of native herbs remain growing together on lava,” et cetera. “These include three threatened geraniums,” et cetera. And then below that refers to “Māngere Inlet, wading bird habitat” and gives just a very short description. So the AUP also identifies the relevant biodiversity values.

If you turn back to page 893 of that same AUP document, 893, 894, is the schedule 4 SEAs marine schedule, which sets out the relevant factors for identification of SEAs and, as you'll see there and you heard from my friend, as listed they include "recognised international or national significance", "threat status and rarity", "uniqueness", et cetera. So those are just some of the relevant criteria.

So the location chosen for the East West Link, which includes the biodiversity overlays, has high values for biodiversity than other parts of the coastal environment, and the Board accept that potential ecological effects of most significance are on the avifauna habitat of rare and threatened seabirds and the ecosystems of Ann's Creek or Kāretu, also known as Kāretu, and that is the Board at 582.

WILLIAMS J:
Did you say that Kāretu is the name of Ann's Creek, is it?

MR ENRIGHT:
Yes.

WILLIAMS J:
Right. And is that because kāretu grows there?

MR ENRIGHT:
I actually, well, don't know the answer to that. It's referred to in the evidence. But that's something I can come back to you on, your Honour.

WILLIAMS J:
No, it's fine.

MR ENRIGHT:
Para 582 refers to that.

At 1355 the Board noted that the high values of the receiving environment made this a “finely balanced” judgment for the Board, and
The non-compliance status of the East West Link is a key feature because it was common ground that the effects are more than minor, therefore the policy instruments are determinative as to whether the proposal may proceed under the section 104D threshold, and that is recorded in the Board decision at 130, 361 and 615, where the Board records effects are more than minor.

GLAZEBROOK J:
Sorry, can we…

WINKELMANN CJ:
Yes, can you take us to that part of the Board decision?

MR ENRIGHT:
Yes.

WINKELMANN CJ:
Were those both references to the Board’s decisions?

MR ENRIGHT:
So probably the best place to go is para 130 of the Board’s decision where it’s recorded, second sentence, that: “It was common ground that the East West Link cannot pass the adverse effects limb of the gateway test.” And at paragraph 361 –

WINKELMANN CJ:
Just pause for a moment.

MR ENRIGHT:
Yes. At 361, third sentence: “There is no way the application would satisfy the 104D(1)(a) test of having adverse effects that were minor,” and then goes on to refer to the policy limb, obviously, and 615 is another example in a similar vein.

GLAZEBROOK J:
I'm sorry, what was that last paragraph number you gave?

MR ENRIGHT:
Paragraph 615. All parties agree as to the High Court judgment that there are many relevant but only a few important policy provisions relevant to 104D and the balancing exercise in 104/171 relating to biodiversity reclamation, infrastructure and tangata whenua values. And if we go to 617 and 618 of the Board decision you'll see that the Board indicates that it places particular consideration – this is the third-to-last line, 617: "…particular consideration on the objectives and policies with the most specific relationship to the non-complying aspects of the relevant proposal and on those provisions which are more directive."

WINKELMANN CJ:
What paragraph are you at?

MR ENRIGHT:
Paragraph 617. So the intention here was, do we have to look at everything or can we focus on the material ones?

WINKELMANN CJ:
Right.

MR ENRIGHT:
And the Board identifies in 617 and 618 that it placed particular consideration on the material provisions.

GLAZEBROOK J:
And do you take exception to that?

MR ENRIGHT:
No.

GLAZEBROOK J:
No, that's all right. I was just double-checking.

WINKELMANN CJ:
So what is your point about it?

MR ENRIGHT:
It's simply the background point that we're in the right space here by focusing on the reclamation provisions, chapters E, D and F of the AUP, that is the appropriate approach in terms of the 104D threshold.

So moving to the NZCPS, and this is in my written submissions at paragraph 48 and following.

GLAZEBROOK J:
So where's the error the Board made?

MR ENRIGHT:
In those two – I'm not referring to an error in relation to that –

GLAZEBROOK J:
No, I understand that.

MR ENRIGHT:
Sorry. Oh, so the issue for the NZCPS, when we chunk it down to, if we move away from –

GLAZEBROOK J:
All right, so you're going on to that. That's fine.

MR ENRIGHT:
Yes, sorry.

WINKELMANN CJ:
We just lost where we're at with your submissions, I think, Mr Enright.

GLAZEBROOK J:

Yes.

MR ENRIGHT:

My written submissions, paragraph 48, and this is what I've described at the "NZCPS error", and the high-level point is that the Board –

WINKELMANN CJ:

Well, I mean, how long are going to take this? Because I see it's 4.13 and I'm wondering if we should – if this is your major point in your submissions, how long do you think you'll be with it? Because I'm wondering if we should do it in the morning.

MR ENRIGHT:

It might be helpful, your Honour, because I would need at least another 15 minutes or so.

WINKELMANN CJ:

Okay. Well, I mean, we said we'd adjourn at 4.15 and 4.14, so I think…

MR ENRIGHT:

Yes, sorry, I didn't realise the time.

WINKELMANN CJ:

No, that's all right. So we'll adjourn now.

COURT ADJOURNS: 4.14 PM

COURT RESUMES ON WEDNESDAY 17 NOVEMBER 2021 AT 10.04 AM

WINKELMANN CJ:
As a preliminary matter, I circulated that minute to counsel, so I just wanted to provide counsel with an opportunity, if they wished, to clarify if anyone has an objection based on that matter or wished to take more time?

MR ENRIGHT:
No, your Honour.

WINKELMANN CJ:
And anyone joining us remotely? Does anyone wish to say anything? Right, I will take it we are good to go then.

MR ENRIGHT:
I did provide a one and a half page summary for this morning's argument. Hopefully the Court has received that.

WINKELMANN CJ:
Is it somewhere on our desk? Here we are. I've found it all, yes.

MR ENRIGHT:
Good, thank you. And hopefully that will ensure efficiency this morning. So the error that Ngāti Whātua Ōrākei wishes to put forward relates to failure to have regard or particular regard to NZCPS under section 104/171 –

WINKELMANN CJ:
Can you just repeat that statement?

MR ENRIGHT:
Sorry, your Honour.

WINKELMANN CJ:
I just couldn't quite hear you.

MR ENRIGHT:

I'm sorry, the error that Ngāti Whātua Ōrākei relies on, in addition to the matters covered by the appellant, is the failure to have regard or particular regard to the NZCPS and that arises under the 104/171 statutory framework. So, the issue only arises if the proposal gets through the 104D threshold. There are two limbs to the argument. The first is that the Board wrongly adopted a particularisation approach and the second is that there was a failure to consider the objectives in the NZCPS.

Looking at the first topic of particularisation, I've given the Court the relevant references in the board decision and that is in my handout and my friend has already been to some of the paragraphs so I will only go to a couple in the Board decision starting at paragraph 680 of the Board decision and that, if you want a number, is 316.04151.

GLAZEBROOK J:

Now I've lost you at paragraph number.

MR ENRIGHT:

Paragraph 680.

GLAZEBROOK J:

Paragraph 680, thank you.

MR ENRIGHT:

It may, perhaps in context, if you start at 678, paragraph 678 and you'll see there, turning, the Board refers to the NZCPS, the question of whether to focus on the provisions of the AUP which counsel for NZTA, Mr Mulligan, reinforced has been prepared in full recognition of *King Salmon*, or whether to loop back up received much attention and then goes on to say: "The RMA in principle the RMA anticipates in giving effect to the high order plans regional coastal plans will be refined to reflect specifics of the region."

WINKELMANN CJ:
I'm going to have to ask counsel to stop because I do think I need to follow this, and my computer is not allowing me access to, if you just pause for a moment.

WILLIAMS J:
Board decision.

WINKELMANN CJ:
To a Board decision, it just seems to be giving me an error message so I'm just going to see if I am going a back out and see if I can get it. There's an error on the page. I'll try closing out of it. I might have to restart it we might just have to adjourn for a moment. I think something may have happened to the document. Yes, the document is there but it's a blank page. I think we might just have to adjourn for a moment while we try and work this out.

COURT ADJOURNS: 10.08 AM

COURT RESUMES: 10.16 AM

WINKELMANN CJ:
My apologies. I think I'm sorted now.

MR ENRIGHT:
Thank you, your Honour, hopefully it's all good now.

WINKELMANN CJ:
Yes, it's good, I'm there.

MR ENRIGHT:
So actually I should have said paragraph 677 gives the heading, so it shows you that's where the Board's consideration of the NZCPS commences under the section 104 limb, and then if we turn over to 678 the Board refers to this idea of particularisation which essentially means we don't have to look up to higher instruments; we can focus on the AUP, and in paragraph 679 you'll see

it says in the last sentence: "As noted in chapter 12…the Board accepts the general assertion that referring in detail to the higher order planning instruments may be limited to instances of invalidity, incomplete coverage or uncertainty of meaning…" So what it does there is essentially fetters its consideration of the relevant provisions of the NZCPS and uses that phraseology that comes out of *King Salmon* which you may recall was actually intended to apply to Part 2 RMA rather than policy instruments, planning instruments. So it's a fettering approach, and in 680 the Board –

WINKELMANN CJ:
Can you just pause for a moment?

MR ENRIGHT:
Yes.

ELLEN FRANCE J:
I'm not quite sure why you say "fettering". I mean aren't you just saying they haven't looked at the Coastal Policy Statement?

MR ENRIGHT:
That might – perhaps "fettering" is the wrong phrasing but they've limited their consideration in a way not anticipated or contemplated by the statutory provisions which refer to have "regard" and "particular regard". So instead their approach is to only have regard to the extent of invalidity, incompleteness, et cetera.

WILLIAM YOUNG J:
But if the regional policy statements and objectives give effect to the NZCPS then you would think on the whole that there's not much point in going back to the NZCPS.

MR ENRIGHT:

Well, in theory that may be correct but in the context of a case such as this and where the NZCPS had particular importance, it was necessary to do more than the minimum.

WILLIAM YOUNG J:

Does it go beyond really the issue whether infrastructure can be placed on sensitive coastal land if there's no practical alternative which is effectively what the Board found and the Court found, and the alternative argument that, no, not only must there be no practical alternative but also it must meet the various effects clauses of the Coastal Policy Statement and, of course, the regional documents?

MR ENRIGHT:

Well, perhaps the way in which your Honour expressed it yesterday was helpful that, you know, query the extent to which the Court needs to look at the AUP provisions if it were satisfied the Board did not apply the key direct –

WILLIAM YOUNG J:

well, alternatively, if satisfied that the approach the Board took was one that was consistent with NZCPS then is the intense focus on the regional documents necessary?

MR ENRIGHT:

Only for the purpose of –

WILLIAM YOUNG J:

Because it's quite a broad question.

MR ENRIGHT:

It is. Naturally there should be a line but, of course, the 104D test is limited to the AUP which was explored yesterday with my friend.

WINKELMANN CJ:

So if you – the ground of appeal advanced yesterday by Ms Gepp – if you construe the AUP consistently with the New Zealand Coastal Policy Statement, then the only thing that's left over – this really doesn't add anything, does it, unless there's some gap in the AUP that the NZCPS add something additional?

MR ENRIGHT:

Well, it's a little like the decision I've referred to –

WINKELMANN CJ:

Can you just answer that, yes or no, because I'm just trying to see what extra it adds to your argument?

MR ENRIGHT:

Well, in effect one has to look at the language used in the CPS in addition to the AUP so if that answers your Honour's question. One does have to look and it's a mandatory requirement –

WINKELMANN CJ:

No, no, it doesn't actually, I don't think. My question was, the argument we had yesterday was that you really need to construe the AUP consistently with the New Zealand Coastal Policy Statement and once you do that, in the areas that the AUP covers and there's no argument of invalidity conflict between the NZCPS and the AUP, whereas common ground, in the areas the AUP covers does this argument add anything?

MR ENRIGHT:

No. That's the primary issue. But it is still a secondary – it is still an issue of law, you know, if the Board failed to have regard to relevant provisions but I accept, as styled by the appellant yesterday, the primary issue around the CPS.

WILLIAMS J:

Well, you've got to read the AUP insofar as it relates to coastal matters consistently with the NZCPS.

MR ENRIGHT:

Yes.

WILLIAMS J:

So, in the event of ambiguity, look to the NZCPS to resolve it?

MR ENRIGHT:

Yes, and of course, it's the –

WILLIAMS J:

So it's not just looking for gaps, it's looking for help too.

MR ENRIGHT:

Yes. That's helpful, your Honour, thank –

WINKELMANN CJ:

Yes, but my point is that's what we should be doing at the first ground.

MR ENRIGHT:

On the first and primary ground, but it remains a second ground of an error and it was certainly argued in the High Court also, so I have made the point, just in my paragraph 4, my road map, that a consistency check may be adequate in some or most cases but whether that was adequate given centrality of the NZCPS provisions is at issue, and then –

WINKELMANN CJ:

So your ground of appeal really is that it's just another way, at that same point, that they didn't look at the NZCPS and, therefore, they really misapplied the AUP or is it just a free-standing one?

MR ENRIGHT:
It's a free-standing because –

WINKELMANN CJ:
It's hard to see how it gets you anywhere though in that circumstance.

MR ENRIGHT:
Well, it only applies – it's only triggered if this Court was not satisfied around the section 104D error of law, then we then go into the merits assessment under section 104 and 171 and there are a range of mandatory considerations under those two statutory provisions and that's where it comes in.

So, my friend, Ms Gepp, took you to the NZCPS, I won't do that now, objectives and she referred in particular to objectives 1, 3 and 6, and I'd just make the point there that objective 3 of the CPS does refer to inter alia Treaty principles which, of course, brings in the issue of active protection, the duty of active protection of taonga through the protection of exercise rangatiratanga over taonga and then just, there is an argument, a counter-argument in, I think, it's the Council's submissions that says if there was an oversight in relation to not considering the objectives, then it doesn't particularly matter because the policies are meant to implement objectives.

Now, just for you reference, sections 56 and 58 RMA refer to the purpose of the CPS is to state objectives and policies to achieve the purpose of the Act. So there is a requirement to state both obs and pols.

GLAZEBROOK J:
What were those section numbers again?

MR ENRIGHT:
56 and 58, RMA. 58 just says the CPS: "May state objectives and policies about one or more of the following," and then list relevant coastal matters. So the counter-argument here is that the objective states the purpose of the policies and reading policies absent, the objectives does not enable a

purposive reading, so one has to look at both, and the other point is correct, that there's no duty on a decision-maker to refer to all, every single one, if you like, of all of the many provisions in the planning instrument, and there's case law on that, but here if they're material provisions a different approach applies in my submission. That's the error.

I just have a few brief reply points on the submission of other iwi authorities and –

WINKELMANN CJ:
I'm sorry, I'm finding this ground of appeal very hard to follow. Is your point that there is some different methodology required once you come to section 104 and 171 that adds something to the AUP?

MR ENRIGHT:
The point is that under 104 and 171 it is mandatory to have regard to, amongst others, the NZCPS, and the approach taken by the Board was either wrong because the so-called particularisation approach was inadequate. Alternatively there was a simple failure to consider the objectives. So there are two limbs. One is not reliant on the other. If you don't like my first you may find merit in the second argument.

GLAZEBROOK J:
Sorry, what was the first one?

MR ENRIGHT:
The first one was whether it's sufficient to just check invalidity, incomplete there's some certainty as between the two instruments in the context of this case.

WINKELMANN CJ:
Can you just slow down Mr Enright.

MR ENRIGHT:

Sorry.

WINKELMANN CJ:

Two errors. The first is, is it…

MR ENRIGHT:

First, whether the particularisation approach –

MR ENRIGHT:

Just don't use that expression.

MR ENRIGHT:

Sorry, it's a phrasing the Board used and I won't use it. Whether the Board was correct to limit its consideration of the higher order planning instruments to the issue of invalidity, incomplete coverage uncertainty of meaning, or whether in context of this case a broader consideration was required, an second, whether the Board failed to have regard/particular regard to the NZCPS objectives.

GLAZEBROOK J:

Are you going to explain how that error bit in this case?

MR ENRIGHT:

How it –because the issue is materiality, is that – well it bites in the sense that it has, my friend has stated, this case very much hinges on the NZCPS and its relationship with the AUP, so a failure to have regard to the relevant provisions of the NZCPS augments the error.

WILLIAMS J:

(inaudible 10:28:20) accept that it might be technically correct, or it might not, but you run the risk in these sorts of arguments that getting a judgment that directs tick box exercises, which are a waste of time, particularly when it's the

bane of the RMA process that you've got so many words that you have to read and tick, that you can often lose the whole, the forest.

MR ENRIGHT:
Yes.

WILLIAMS J:
So you've got to be able to point to why that made a difference.

MR ENRIGHT:
Yes, and that is a reasonable point, except that – so it's, it has to be filtered through what's material in terms of planning instruments –

WILLIAMS J:
Well it's only relevant if it's material.

MR ENRIGHT:
Yes, that's right.

WILLIAMS J:
So you've got to talk to us about materiality.

MR ENRIGHT:
Yes. But there is a decision of Justice Wylie in the bundle, which I've referred to in my written submissions, the Bay of Plenty decision, where it may assist if I take you just briefly to that because it's a helpful discussion. Tab 47 of the casebook.

WINKELMANN CJ:
I mean you could make an argument, I suppose, that it's a useful crosscheck because it's got a clearer skeletal shape than the AUP. You can get lost in the labyrinth of provisions, but it's still hard to see how that adds really much more than it assists you in interpreting the AUP.

MR ENRIGHT:

Yes, but one has to bear in mind the statutory provisions require as a mandatory consideration that you look at each, you know, planning instrument in its own right, not just the bottom rung, and really Justice Wylie's point is, you know, the story can be lost in the retelling, as he says, so there is nuance and flavour, and that's at tab 47, the *Forest and Bird v Bay of Plenty* decision. Also a case about infrastructure, page 365, I'll just check everyone has that.

WILLIAMS J:

I'm having tech issues now. Just a moment, I've lost the index, the cases, so I'll just see if I can find it again.

MR ENRIGHT:

While your Honour's finding it, the paragraph references start commencing at 82 of that decision through to 89.

WILLIAMS J:

Okay.

MR ENRIGHT:

So I should point out this case was a plan change case, not a resource consent or designation case, but in my submission that doesn't matter for the purposes of analogy. So at 82 it identifies the method adopted by the Environment Court, starting at the lowest rung of the planning instruments, and then the exercise in terms of how it referred to the higher order instruments, RPS, CPS. 83 states the Court was: "I do not consider the Court was entitled to take that approach." Paragraph 84, nothing in the majority decision *King Salmon* which allows the decision-maker to confine their attention to the lower order instrument, and then at paragraph 86 refers to *Appealing Wanaka Inc v Queenstown Lakes District Court* [2015] NZEnvC 139, which was a case where a relatively similar approach was adopted, and then at 88 makes the point there about there's a risk "the intent and effect of higher order plans can be diluted or lost" in the provisions of plans lower in the

hierarchy, and then puts the colloquial point about “the story can be lost in the re-telling” and that there are “dangers in the truncated approach”.

WINKELMANN CJ:
What paragraph are you at there?

MR ENRIGHT:
That was paragraph 88.

WILLIAMS J:
What’s supposed to happen with these documents is that they implement and narrow the focus nationally in a particular area and then regionally and then district-wide. So it should make it, the lower order documents are suppose to make it easier because they take broad and often rather difficult to apply ideas and make them real in the local context. So if that story is lost it’s the fault of the lower order document.

MR ENRIGHT:
Yes, that is fair. But nonetheless again there’s this tension because they are stated as mandatory considerations that we do have to look at each level of the instrument hierarchy, not just the bottom rung in ladder and why it’s material here, well, you’ve heard – again, it’s probably just reiterating the arguments you’ve heard from my friend for the appellant around how the CPS bites and assists, indeed insists with interpretation of the AUP.

WILLIAMS J:
Right. We’ve just got to be careful that we don’t create system that’s so complicated for ordinary planning committees having to deal with these things that they can’t work out what the hell they’re supposed to do.

MR ENRIGHT:
Yes, but also we don’t want planning committees not having regard to the NZCPS, even if it’s, you know, focusing on materiality approach. It certainly does assist a decision-maker to bear in mind the national statement of

priorities in the NZCPS, in my submission. I can move off that point now, unless there's any questions?

Just moving – in terms of briefly replying to the iwi, the iwi authority submissions, there is an issue of just terminology and the Board does, yes, does refer to the four iwi authorities as the supporting mana whenua, but also refers to 10 authorities in general as generically mana whenua. So it's not an attribution of status per se, and we have provided the *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whai Maia Ltd* [2020] NZHC 2768, [2021] NZRMA 179 decision, which simply cautions against the use of mana whenua without further enquiry being undertaken into the issues of ahi kā, tikanga, and strength of the relationship.

WINKELMANN CJ:
Is your point that the Board has not made a positive finding that Ngāti Whātua are not mana whenua?

MR ENRIGHT:
Yes. Thank you your Honour, that's exactly the point.

WINKELMANN CJ:
But does it recognise, it recognises it has interests?

MR ENRIGHT:
Yes, as with the other iwi authorities, and there's no contest that there were layers of relationship. But importantly the decision of Justice Whata in the *Ngāti Maru* decision was issued post the Board decision, therefore the particular lens used in that case around strength of relationship was not an available approach for the Board, and so that is why it's not an error being pursued here.

WILLIAMS J:
You're not suggesting that there are no parties on the other side that are not ahi kā, are you?

MR ENRIGHT:

No.

WILLIAMS J:

Okay. So does it matter?

MR ENRIGHT:

Your Honour asked me that question yesterday, and I just revisited Mr Ngarimu Blair's evidence, and just to be clear on that he essentially makes the point that Ngāti Whātua Ōrākei asserts their ahi kā and mana whenua status in their rohe, and acknowledges the mana whenua status of Waihoua iwi in their rohe. So there's no – and it's just –

WILLIAMS J:

And they're all Manukau rohe?

MR ENRIGHT:

That's right.

WILLIAMS J:

There's no doubt about that, is there?

MR ENRIGHT:

No. So the point I make in my paragraph 13 is simply the extent to which the rohe may overlap would be a question for another day. It's not –

WILLIAMS J:

Overlap each other?

MR ENRIGHT:

Yes or don't.

WILLIAMS J:

Oh of course. That's going to keep people busy for generations.

MR ENRIGHT:

Indeed. So we don't want to go to that extent. I do make the point, at my paragraph 10, that there were four questions of law that Ngāti Whātua Ōrākei abandoned. The High Court is not, for clarity, pursuing those here and obviously could not do so, but the reason we have referred to the duty that protection of taonga and Treaty principles more generally is that they come in via the NZCPS provisions, for example objective 3, and are still intrinsically relevant to context.

WINKELMANN CJ:

Can you just remind us what the abandoned grounds of appeal were?

MR ENRIGHT:

The appeal document is in the supplementary bundle, and I don't have the reference, but my friend might be able to assist me. 401.0112 is the supplementary bundle and that should be, I think, the notice of appeal in the High Court.

WINKELMANN CJ:

I think it's in someone's submissions, isn't it?

MR ENRIGHT:

It is, that's right.

WINKELMANN CJ:

All right, I thought you might be able to tell us off the top off your head, but if you're not, you don't need to go chasing after it.

MR ENRIGHT:

So we didn't want to create a sort of side argument about that. There's no question those appeal points were abandoned. The reason we've argued Treaty, essentially the Treaty act of protection is the reason stated, it comes up through NZCPS, has some intrinsic relevance. Naturally the Manukau is a recognised taonga in its own right, and that's a finding that the Board itself

made, more than once, but at paragraph 743 where it refers to the Manukau as being a taonga, both intrinsically and in terms of its functions for biodiversity and habitat. So the point here is if there were a referral back then the Board, it would be open to the Board to reconsider where that duty of active protection falls and whether it means reclamation proceeds or does not proceed, and so that would go to, probably go to materiality.

Two final points. The submissions, both mine and those of my learned friend for the iwi authorities, reference the *Ko Aotearoa Tēnei* reports. I simply make the point that they, the reports does pre-date *King Salmon,* so it's a helpful report but solely for background purposes and doesn't deal with the bottom lines approach emerging from *King Salmon*, and just finally my friends referred to the Tāmaki Collective Redress deed but we do note that essentially that says that the cross-claims for the Manukau are still to be resolved and there is a section 17 of the enabling Act, the statements of culturalisation in that deed are not binding on decision-makers. It has not addressed or resolved the issue of mana whenua or ahi kā status.

So those are the submissions and my paragraph 16 of my road map I've just given you two errata.

And I just, to close the case for Ngāti Whātua Ōrākei – it is a key part of the Board's findings that it recognised the dual status of the Manukau as a taonga, both intrinsically because of its mauri or life force and functionally in terms of its habitat for biodiversity. The cultural values joint witness statement in the bundle at tab 47 acknowledged the great significance of the role and contribution of Ngāti Te Ata and, in particular, Dame Nganeko Minhinnick to the Manukau inquiry and Ngāti Whātua Ōrākei reiterates that acknowledgement as a statement of common ground that the foreshore of the Manukau has been subjected to decades of mistreatment is not a sound reason to enable further reclamation, and active protection was a unifying principle as between the competing iwi authority perspectives even if its application was disputed. Ngāti Whātua Ōrākei says that you do not protect a

taonga by extensive reclamation. The Board should be required to reconsider the policy provisions on a referral back under sections 104 and 171 RMA.

Those are my submissions, thank you.

WINKELMANN CJ:
Now is it you next, Ms Casey?

MS CASEY QC:
Yes, thank you, Ma'am. May it please the Court, just by way of housekeeping to make sure that papers are where I'm expecting them to be, can I just check, the Court should have a hard copy of the Waka Kotahi submissions with A3 coloured annexes at the back, hopefully nicely tucked in. Perfect, thank you. Also the registrar yesterday, and today I hope, will have distributed a number of papers. One is the Waka Kotahi outline of oral submissions, so a brief three-page document.

WINKELMANN CJ:
We all have it.

MS CASEY QC:
And with that will have been a table, in table format, as a brief reply to the further errors of law that were raised in my learned friend's submissions in reply to Waka Kotahi's submission. We understand that these were errors that Royal Forest and Bird alleged Justice Powell didn't consider in the High Court, so they hadn't actually been addressed by Waka Kotahi in our main submissions. So with the leave of the Court we've presented a very brief outline of particularly the relevant references that we would want to take the Court to in response to those.

The third document that will have come in that pocket yesterday is just a table for the reference of the Court setting out the equivalent provisions between the NZ, relevant provisions of the NZCPS, the regional policy statement and the regional plan and district plan, so that's just for the information of the

Court, I'm not planning to take the Court there unless we need to go there in response to questions.

Then the final document hopefully came up this morning, which was prepared last night in response to questions from your Honour Justice Williams and your Honour Justice France yesterday addressing both the extent of the reclamation and the mitigation, the final mitigation package in relation to the avifauna, which I will come back to in more detail further on in my submissions. So with that, thank you.

The next matter of housekeeping was just to address the topic division between the three parties who are appearing in support of the Board's decision. Obviously Waka Kotahi will be taking a main lead in addressing the submissions relating to the effect of *King Salmon*, the meaning of the term "avoid", the application of the New Zealand Coastal Policy Statement under section 104 and 104D, and the various other areas raised by my learned friends in that context.

It's anticipated that my learned friend for Auckland Council will do most of the heavy lifting in terms of the submissions on the particular provisions of the AUP. I'll touch on some of those in our reply to the new grant of appeal and Forest and Bird reply, but most of that will be addressed by Mr Lanning, and my learned friend Mr Majurey will address the issues raised, we've just heard from Mr Enright on the mana whenua and the Treaty issues.

And the last small bit of housekeeping, your Honours, is to explain the difference between the two chronologies. Waka Kotahi filed an amended chronology because we couldn't reach agreement on the chronology to be put before the Court. The reason why we did that, your Honours, when you see the chronology and you don't need to go there, is we've taken out reference to government statements regarding funding or the likelihood of, the speed of this project proceeding. These occurred after the Board decision. Waka Kotahi's view is that they're not relevant to any error of law before the Court, and we wish to strongly refute any inference in the written submissions

from my learned friend for Royal Forest and Bird that this may be a theoretical appeal only and of no practical or real consequences. I think it's uncontested that the East-West link is an important project, it is identified as a priority project in Auckland's strategic spatial plan, it's recognised nationally and regionally to have significant benefits.

The notices of requirement and consents at issue in this case are valid for between 10 and 15 years from the date of the Board's decision and, your Honours, that's a slight twist on what would normally be the running date for a consent or a notice of requirement. Because this was under a Board process these appeals are not operating as a stay, so the expiry point starts at the point of the Board decision, which is part of the reason why the Act provides for prompt termination of appeals. So we're not suggesting that there's urgency with this appeal but it's something for the Court to be aware of.

WINKELMANN CJ:
How long is it from the Board decision?

MS CASEY QC:
Ten to 15 years before the –

WINKELMANN CJ:
So not urgency.

MS CASEY QC:
Not high urgency, not claiming it. But we are saying that the fact that there may be issues around present funding in this difficult time that New Zealand is facing does not mean that these are not real world projects, and for the information of the Court the project to date has cost approximately $85 million. The project in its total execution is anticipated to be between 1.2 and $1.8 billion. So these are serious projects and these consents are of very high value both to Waka Kotahi and to Auckland and nationally, and already represent a significant investment of taxpayer funds.

WILLIAMS J:

Can you tell me whether the expiry date is, whether that 15 years is to completion or to commencement?

MS CASEY QC:

I'm going to glance towards my junior on the screen in Auckland and if it's completion can you please nod, Ms Evitt? No, it's not completion, it's commencement. Thank you.

WILLIAMS J:

Thank you.

WINKELMANN CJ:

That 85 million, is that in evidence or is that just from you?

MS CASEY QC:

That's just from me in response to what we regard as not in evidence from –

WINKELMANN CJ:

I'm not sure we want to hear that then, thanks.

MS CASEY QC:

Ma'am, that was the point, is the materials that have been put in the chronology to suggest that this is –

WINKELMANN CJ:

Well, you've objected to them being there, so, right.

MS CASEY QC:

Thank you the –

WILLIAMS J:

Can you tell me, the other thing is the length of time for the build?

MS CASEY QC:
I'm sorry, I don't know that. I'd have to come back to you on that.

WILLIAMS J:
No idea?

MS CASEY QC:
Your Honour, the cost of the project is in the Board decision itself, so they have a reference to the 1.8 million.

WINKELMANN CJ:
Billion.

MS CASEY QC:
Billion, sorry. So before I move to discussing proposal, there are a number of points that my learned friend for Forest and Bird made yesterday that I do wish to strongly contest for Waka Kotahi, sorry, your Honour, get some water. Waka Kotahi strongly disagrees with the portrayal of the proposal, its effect and benefits and the factual foundations of the Board's decision that was presented to you Honours yesterday.

We absolutely disagree that there is no contest between Waka Kotahi and Royal Forest and Bird on the effects of the environment as they were presented to you. We note that despite acknowledging an opening that Royal Forest and Bird cannot and does not challenge the factual findings of the Board, or the evidence presented to the Board, with respect, my learned friend did not then convey accurately and the correct impression of what those findings were and did go on to challenge them as not consistent with the selected extracts of the evidence that she put before you.

WINKELMANN CJ:
It's one of the grounds of appeal that the Board has made an inconsistent finding with its own factual findings.

MS CASEY QC:

That's a very narrow ground, your Honour, and it certainly does not expand to the range of environmental impacts that my learned friend was discussing with you yesterday.

Importantly, your Honours, the critical issue is that this project is not about a struggle between the environment and the economy. This is not a process where a project which, for example, in response to one of your questions Chief Justice yesterday, this is not putting a rare species at risk of extinction for a motorway so cars can go faster. This is not a project where we've got economic benefit at the cost of the environment. In that respect, its factual basis is very different from *King Salmon* and from what the Court was considering in *Davidson*. We're not suggesting that the values in policy 11 or the other important policies in the NZCPS should be sacrificed so that, for the benefit of the economy. This is, as we say in our written submissions, a textbook example of a project that achieves across the full range of the objectives.

Nor in response to a question raised by your Honour, Justice Young, yesterday. This is not a case where Waka Kotahi argue, well, we'll put up with these harms to these biodiversity values because we've got other environmental benefits as well. We're not even in the space where we're asking, where we ask for consent for that balance or that conflict. The project is better than that and –

WILLIAMS J:-

I thought this offset aspect was a key aspect, it was certainly pitched that way. That's the point you're about to make, isn't it?

MS CASEY QC:

Yes. So when we come to the proposals, we'll talk about the positive environmental impacts that are separate from offset and mitigation. So, for example, your Honours will have been aware that this project will capture and treat the leachate that is coming out from three –

WINKELMANN CJ:

Yes, counsel took us through that yesterday.

MS CASEY QC:

Yes, exactly. So those are the positive benefits. Those are not being put aside – they're not in competition with the offset and mitigation and the effect on avifauna – I'm just going to say "birds" from now. It's not even that. We're not even saying: "Well, we'll put up with effect on the birds because we've got these other great environmental wins." This project is a gold-standard project where the Board recognised and found as an uncontested and in this forum uncontestable finding of fact based on 12 weeks of hearing, over 100 experts, that this project, the adverse effects of this project are at least balanced out by the direct mitigation and offset packages plus it's got other environmental and regional and national benefits. So it's as important –

WILLIAMS J:

Can you just repeat that sentence, please? You say the effects balance out?

MS CASEY QC:

At least balance out is the finding of the Board at –

WILLIAMS J:

Was it "the effects overall at least balance out"?

MS CASEY QC:

Sorry. The adverse effects of the project are at least balanced out.

WILLIAMS J:

What does that mean?

MS CASEY QC:

You're back to neutral, if not better, in terms of that. The mitigation and the offsets at least balance out or neutralise the adverse effects on the biodiversity.

WILLIAMS J:

So you can say directly that all effects are minor?

MS CASEY QC:

That's not –

WILLIAMS J:

That's what you're really saying. You need to be very careful.

MS CASEY QC:

No, and it is – and thank you for the question – it's quite tricky because as the other uncontested aspect of – all the experts agreed, and the Board agreed with them, that you needed to take an integrated ecosystems management response to the adverse effects, and reclamation is the classic example. You reclaim an ECA area and you have, by definition, had a more than minor adverse effect on that area because you've destroyed it. So it's not a minor effect. Can't be.

WILLIAMS J:

See, that's why I thought when you said you're not talking about offsets, that you're actually exactly talking about offsets.

MS CASEY QC:

I am now, yes. I was just saying we're not claiming leachate justifies hurting birds, but –

WILLIAMS J:

No.

WINKELMANN CJ:

Well, I don't think Ms Gepp said you were claiming that.

MS CASEY QC:

Thank you, your Honour, I just want to make it clear that this is a very different project from *King Salmon*.

WINKELMANN CJ:

She was simply saying that the mitigations were not like-for-like. It was a basket of things. So that's what we understood.

MS CASEY QC:

Thank you. But it's important to understand how good that basket was which is part of what I wish to present to the Court today.

So the mitigations and offset, for example, for reclamation which I'll come to with a handout are directed at exactly those birds species, are directed at the loss of habitat, include a significant amount of replacement habitat as well as other offsets. So when the Board finds that they at least balance out the adverse impacts they're not saying those impacts themselves were minor. They can't say that, and no one asked them to, but they're saying: "Because we have this bucket of offset and mitigation, we're satisfied that the adverse effects are adequately and satisfactorily addressed and that we've got no net loss to those values," if you like, which is different from only minor effects.

WILLIAMS J:

Which is why you conceded leg 1 of 104D?

MS CASEY QC:

Yes, absolutely, although –

WILLIAMS J:

But you're kind of – you were at the point of saying "no bird was harmed in the making of this movie" sort of, so that overall your argument really is that the effects at a species level, in particular the affected species, are minor or less.

MS CASEY QC:

Not an argument, your Honour. It's the finding of the Board, and that is really very important not to be overlooked in this appeal is that the project responded to the NZCPS and AUP policies and it developed and evolved over the hearing and came up with a package that in the end, in the end, the Board and the experts were happy with.

WINKELMANN CJ:

Right, but that's not really the legal issues we have to address on this appeal, is it, so – well, and perhaps it's helpful if you move on now to your points. I think we have that submission.

MS CASEY QC:

Thank you. The second aspect that I want to address from the material that you were referred to yesterday is related but it is, again, important. There was general description of the adverse effects on birds and the Ann's Creek vegetation and a lot of that, with respect to my learned friend, conflated aspects of the values that were affected and how they were affected, and again the facts and contents are important here.

So first of all, your Honours, it was of course only available for my learned friend for Royal Forest and Bird to take you to very small extracts of the evidence. But it's important to note that the evidence that you were taken to was evidence filed in pre-hearing statements. So that evidence was filed by Waka Kotahi before the project evolved through the hearing process and before the mitigation and offsets were further developed. The bucket was, more was put in the bucket, and the Board is crystal clear in its decision that its finding that the mitigation and offset at least balanced out the adverse effects, and its finding, that it was satisfied that the project could proceed was

based on the increased mitigation and the increased offsets and the evolution of the proposal. There were changes, significant changes, to the scope of the reclamation, to the placement of the boardwalk. So the evidence that you were taken to yesterday was effectively not the evidence that the Board decided on. And I do want to –

WINKELMANN CJ:
Can you be more particular about what evidence you're talking about?

MS CASEY QC:
My learned friend took you to, I think, the pre-hearing statements of Ms Bull, Dr Bull, and Ms Myers, and the point that I want to make in response, your Honour, is that if the Court is minded to be critical of the Board's assessment of adverse effects, it is very important to bear in mind that this was a 12-week hearing, that 109 experts gave oral evidence and were cross-examined extensively –

WINKELMANN CJ:
Are we being asked to be critical of their findings on adverse effects?

MS CASEY QC:
My reading of, well, what I heard yesterday from my learned friend, was that you were. You were asked to find that the Board hadn't properly considered adverse effects, that they had made mistakes of fact, that they had reached contradictory conclusions, you were taken to parts of the Board's decision which they've said this here –

GLAZEBROOK J:
I presume in response to this you're not just going to make a generic statement, you're going to take us to the evidence that you say is contrary. Because a general diatribe or a jury address is really not going to go very far.

MS CASEY QC:

No, your Honour, and that's the point that I'm actually wishing to make, is that the evidence in front of the Board is not before this Court, you have a selected evidence that was chosen by parties as they considered it relevant to the alleged errors of law.

GLAZEBROOK J:

Well, if there isn't other evidence what are we supposed to be doing, just saying: "Well, we trust them that they've looked at this other evidence and that makes it all right"? I'm sorry, I'm just having trouble with the submission.

MS CASEY QC:

No, and thank you, your Honour, because to me this is a really, a critical submission from Waka Kotahi.

GLAZEBROOK J:

Well, it might be critical, but there's point referring to stuff that's not before the Court to make it.

MS CASEY QC:

The point that I –

WILLIAM YOUNG J:

Do you want to refer to it? Do you want to be able to put the additional evidence?

MS CASEY QC:

Yes, your Honour, that's exactly where I'm going, is that if the Court considers that there is, the errors of fact that it regards as significant from the basis of my learned friend's submissions yesterday which haven't been raised on appeal, the evidence to counter the references she took you to is extensive.

WINKELMANN CJ:

Well, can I just say if we start chasing down that rabbit hole, I didn't understand it to be a ground of appeal, so, and, yes, so perhaps we should just have that clarified.

MS CASEY QC:

Thank you, your Honour, I'll ask Ms Gepp.

MS GEPP:

I'm sorry, Ma'am, I was just looking for a reference. Could you repeat the question?

WINKELMANN CJ:

So this case, are you saying that you took us to evidence yesterday from Dr Bull and Ms Myers and she says that you were asking us to find, to be critical of the Board's findings in relation to the extent of adverse effects, and therefore she says if you were relying on the evidence which occurred at a pre-hearing there was other evidence the Board heard. For my part I thought that you commenced your submissions yesterday by saying that you accepted the findings of the Board in relation to adverse effects.

MS GEPP:

Yes, Ma'am, and primarily I rely on the evidence that is set out verbatim in the Board's decision as being the evidence that the Board relied on. The issue is the difference between the evidence that the Board quotes and the way in which the Board then paraphrases that evidence or the findings that the Board reaches for the purpose of its policy assessments. So it's that different not to suggest that the Board relied on some other evidence, or something to that effect.

ELLEN FRANCE J:

Well, that does sound like challenge to the factual findings of the Board –

WINKELMANN CJ:

Yes. How does that fit into your appeal grounds?

MS GEPP:

I'll just grab it.

GLAZEBROOK J:

Do I understand that you're saying the material that they set out was clearly material they relied on which, I think is, must be right, and then one of your grounds is that the way they dealt with that was inconsistent in terms of the report itself?

MS GEPP:

Yes, so one of the grounds was that the Board had – the grounds relate to the High Court's decision.

GLAZEBROOK J:

Yes, of course.

MS GEPP:

And whether the High Court was correct to uphold the Board's decision. The previous grounds that were appealed to the High Court related to the legal interpretation of policies and the way in which the Board's factual findings were – the way in which the policies were applied to the Board's factual findings. My friends then have filed notice to support the decision on other grounds which says that even where the High Court said that the Board got its assessment wrong, they say the Board didn't get its assessment wrong. I filed submissions in reply to that notice to uphold the decision on other grounds. I didn't file general reply submissions, it was directly in reply to my friend's notice to uphold the decision on other grounds. So I think that's the aspect of my written submissions, that my friend perhaps takes issue with. But if there was a suggestion yesterday that I rely on or that I challenge factual findings any further than simply saying, here's what the Board found

here, here's what it found there, those two things do not compute, that I wasn't intending to go further than that.

WINKELMANN CJ:
And to that extent, you took us to say, Dr Ball and Ms Meyer and that's the evidence you say they are paraphrasing when they make their factual findings?

MS GEPP:
Yes, they directly quote that evidence when they make the factual findings, yes.

WINKELMANN CJ:
So, Ms Casey, that does seem very limited in scope, it's really almost a face of a record-type thing?

MS CASEY QC:
Thank you, your Honour, and thank you to my learned friend and my submission in reply would be, it's not a fair reading of the Board's decision, that they may highlight some expert evidence and quotes and then an assumption made that they had nothing further to shift between what they observe and the final conclusions that they reach, given the 12 weeks of hearing that took, came, stood in between.

WINKELMANN CJ:
Perhaps you can take us to the relevant parts when you come to those in your submissions to show us how –

MS CASEY QC:
On those narrow points, your Honour, I can.

WINKELMANN CJ:
Yes, just show us how there is a disjunct, you say there might be a disjunct that explains that point.

MS CASEY QC:

Thank you, I will when we get to that –

GLAZEBROOK J:

And then I guess the supporting on other grounds.

WINKELMANN CJ:

You're going to suggest you're supporting on other grounds, are you?

MS CASEY QC:

In due course. We read the support on other grounds to be very limited to just the –

WILLIAMS J:

Just a moment. People have just disappeared.

WINKELMANN CJ:

We've lost about three, I think.

MS CASEY QC:

No, no, they've come back.

WINKELMANN CJ:

Who are we missing now?

MS CASEY QC:

We're missing Mr Parker, but he's in my team so I'm happy to go ahead without him, if that's all right.

WINKELMANN CJ:

Harsh.

MS CASEY QC:

Harsh. I have Ms Evitt. Thank you. Yes. We regarded the support on other grounds, the exchanges about D9 and D10 very limited but we'll come to that

evidence there. But what I do want to talk about is the need for caution in the description and discussion of what the adverse effects are from each – in the project itself and what I'd like to do –

WINKELMANN CJ:
Are we now moving on to your submissions from the initial comments you had in response –

MS CASEY QC:
I'm now at paragraph 4 of my outline, if that's all right. So, if I may take you to the annexes to Waka Kotahi's submissions because I think this is –

WINKELMANN CJ:
These are your principal submissions, not your outline submissions?

MS CASEY QC:
Yes, these are the principal submissions, thank you. Three A3 sheets.

WINKELMANN CJ:
Is that all of your attachments?

MS CASEY QC:
To the primary submissions, there's a fourth attachment which is just text.

WINKELMANN CJ:
Are you taking us to these?

MS CASEY QC:
Yes please. First of all, your Honours, just confirming, because when I first encountered this project, I wasn't actually sure where it was in location in Auckland space.

WINKELMANN CJ:
I know where it is in Auckland space. I don't think it's true of the others. Go ahead and orientate us.

MS CASEY QC:

If I may. So if we start with annex C, which is the one that looks like this. So you'll see Highway 20 coming up on the left-hand side and, going off to the left-hand side of the page. So that's the Māngere Bridge that you would drive across as you come up from Auckland Airport to go to the city, and Māngere Inlet, of course, is there to the side, and that is the project area. The project shows you the East West Link between State Highway 20 and between State Highway 1, and has been broken up into sections to describe both the adverse environmental effects, and a lot of the significant issues that the project had to deal with. It's quite important for context to understand that the two particular issues that my learned friends for Royal Forest and Bird raised, were just part of a far more complex proposal. So you'll see under sector 1, the Neilson Street Interchange. There were issues regarding mitigating the severance between the land and the coastal marine area, which is a nationally important objective. Minimising the cultural and geological heritage aspects. Reinforcing outstanding natural features. Dealing with adverse effects on salt marsh mangroves and enhancement.

Then sector 2, your Honours, is the big section that's in orange. Now this is the only section where there's reclamation, and it's quite important to note that part of the reclamation is in an SEA-M2, so that's the sort of the bigger bit that sticks out.

WINKELMANN CJ:

That's the wading bird SEA is it?

MS CASEY QC:

Yes. Well, your Honour, the SEA-M2, there's actually two overlapping SEA-M2s there.

WINKELMANN CJ:

That's the designation for wading bird, M2?

MS CASEY QC:

No. M2 means, sorry, SEA-M little w, is a wading bird designation. SEA-M2 may or may not be "w" but the "2" refers to this is a more robust environment. This is not our most vulnerable environment. So the project in SEA-M2 has reclamation. The other major reclamation to the left is not even in an SEA. It's just in the coastal environment, or the coastal marine area.

WINKELMANN CJ:

So how do we tell which is in the SEA – how do –

MS CASEY QC:

It's the little blue hatches on the ocean.

WINKELMANN CJ:

Okay.

MS CASEY QC:

So you'll see that big light blue hatching as the SEA-M2, and the dark blue hatching are SEAs-M1, so those are our much more vulnerable areas, and you'll see that when the project leaves sector 2 and goes into sector 3, it moves into an SEA-M1 in the Ann's Creek estuary, and there's a little SEA-T, which is Ann's Creek itself, and that's the tiny blue dots. The language I was using before about the project responds to the and the policies are given effect in the project –

GLAZEBROOK J:

It would help me if you actually went back to the diagram we looked at yesterday so we can see exactly how to orientate the two together. So the diagram we looked at yesterday when the one with the – we didn't have the boxes.

WINKELMANN CJ:

Ms Gepp's diagram – this one?

GLAZEBROOK J:

Because otherwise we're looking at two different maps with absolutely no idea how they relate together.

MS CASEY QC:

Thank you, your Honour. So the reclamations you can see in yesterday's diagram are the same. They are in hatched, and one is sitting in the general coastal marine area and the other is sitting in the SEA-M2.

GLAZEBROOK J:

Well, that doesn't really help me when you're pointing like that, I'm sorry.

MS CASEY QC:

Well, your Honour, they…

GLAZEBROOK J:

Relating the two diagrams together?

MS CASEY QC:

I think what you're missing is the Māngere Bridge perhaps on my learned friend's diagram. So if you draw in the Māngere Bridge in the same space, so at the left, in my friend's diagram, then the Māngere Inlet maps exactly. It's exactly the same. But my picture is just a close-up of the top half of the Māngere Inlet and doesn't have the bottom half because that's not the project area.

WINKELMANN CJ:

Ms Gepp's seems to have all the information yours has, it's just smaller, is that right? And – I suppose it doesn't say…

MS CASEY QC:

It doesn't canvass the scope of the issues and the complexities.

WINKELMANN CJ:

Right, so that's how these relate? You've got that information at the bottom.

MS CASEY QC:

They're the same project obviously but this has got greater detail.

GLAZEBROOK J:

Well, you might have to go a bit slower through your diagram because I've no idea what you're talking about, I'm sorry.

MS CASEY QC:

Well, no, that's important. Your Honour, I think perhaps we could orientate better if I take you to annex B because this is –

GLAZEBROOK J:

I'm sorry, it's important that we understand it and at the moment, I'm sorry, I don't.

MS CASEY QC:

No, no, and I apologise for not explaining this well. I think it's the problem with counsel having lived with the project for so long.

GLAZEBROOK J:

Yes, I think that's right.

MS CASEY QC:

So annex B I think probably –

GLAZEBROOK J:

I did understand your friend's diagram. I'm just having trouble understanding why yours has greater detail when it actually seems to have to me less detail, but at least in terms of being labelled.

MS CASEY QC:

Detail of different things, I suppose. So can I take you to annex B because this may be the most helpful orientation. So again we're looking at the top of the Māngere Inlet which is the project area, and you should have two pictures that basically match in terms of, well, closely match, in terms of what they are

looking at but they are showing you something different. So figure 1 is showing the extent of the current reclamation. So changes in the northern shorelines between 1853 and 2010 and that shows you what the Board refer to as the ruler-straight current coastline of the North Māngere Inlet and you'll see the Māngere Bridge to the left. This important to show both the existing vegetation and the location of Anns Creek because Anns Creek has had a lot of focus and attention in this appeal. And then…

WINKELMANN CJ:

Can I ask when they did the reclamations between 1853 and 2010 did they somehow preserve Anns Creek through the reclaimed area or did it just reclaim it through itself because it seems to flow – or is it a notional creek?

MS CASEY QC:

No, Anns Creek is an important – it seems to have survived.

WINKELMANN CJ:

It seems to be flowing through reclaimed land on this or not, is it not?

MS CASEY QC:

No.

WINKELMANN CJ:

Because it's shown as being part of reclaimed land.

MS CASEY QC:

The Anns Creek – are you looking at top picture with the yellow?

WINKELMANN CJ:

The top picture.

MS CASEY QC:

Yes. It does come down but you'll see that the reclamation, the original coastline, yes, has been filled in but a lot of the value features of Anns Creek have managed to survive.

WINKELMANN CJ:
Persisted.

MS CASEY QC:
Resisted, yes.

WINKELMANN CJ:
Persisted, yes.

MS CASEY QC:
Persisted. So what you'll see in the bottom picture there is the reclamations that are proposed and you'll see immediately that they are much more extensive than is necessary just for the road. If you were just plonking a highway down there you wouldn't need these major reclamations.

WILLIAMS J:
But it wasn't clear to me from the pictures how much of the road proposal is to be reclaimed land.

MS CASEY QC:
It's not actually very precise. It definitely includes reclaimed land.

WILLIAMS J:
So the 18 hectares, is that what the number is, includes road as well as these islandy things?

MS CASEY QC:
As well as these much bigger headlands.

WILLIAMS J:
Do you know what the proportions are?

MS CASEY QC:
I couldn't give you that offhand. I will try and get that for you.

WILLIAMS J:

Is that – those areas there don't look like anything like 18 hectares, they look like less than half of that, which means a lot of it is road.

MS CASEY QC:

Your Honour actually just, if…

WILLIAMS J:

Anyway, that's just my guess looking at the pictures, to be fair.

MS CASEY QC:

I think I do have that information.

GLAZEBROOK J:

I'm assuming these are to scale?

MS CASEY QC:

Yes. So the Board confirms any, around 302, that the reclamations go considerably beyond what's needed for the road, and that is I think –

WILLIAMS J:

Oh, yes, that's part of the deal.

MS CASEY QC:

That's part of the deal, exactly.

WILLIAMS J:

Right. I just was trying to understand how much road…

MS CASEY QC:

Versus…

WILLIAMS J:

Is new reclamation.

MS CASEY QC:

I'll get that information for you if I can. So the reclaimed headlands, one of the primary objectives of them is to restore the natural character of the coast, which is obviously a matter of significance, importance, under the NZCPS. The headlands are also used for part of a control and treatment of the leachate from the three historical landfills that are still leaching into the contaminated water of the Mangere Inlet. You'll see the boardwalks are the little white lines along the reclaimed area, and one of the things to notice is that in the reclamation on the right the boardwalk stops being near the coast and lurches much closer to the road. And that was an evolution through the hearing, through expert conferencing, which I'm informed lasted for weeks between the colleges and the planners and the landscapers, to take people away from the roosting and feeding habitats of the birds. So these are how the project responded to the important NZCPS policies as it was evolved.

WINKELMANN CJ:

Can I ask – so you can see that they sit on this land. That land that goes out past is also reclaimed land? I mean, it looks like it's real land but it's an illusion, is it?

MS CASEY QC:

Are you looking at Ann's Creek estuary?

WINKELMANN CJ:

So I'm looking at annexure B, and it draws in pieces of land that aren't there in the previous photograph. I'm just trying to understand the extent of the reclamation.

MS CASEY QC:

And that's the point of this. So what you've got in annexure B, in the second, is the proposed reclamation and boardwalks is pointing to three things only.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Those are the sort of orange and white lines, are they?

WILLIAM YOUNG J:

That's the boardwalk.

GLAZEBROOK J:

No, that's the boardwalk.

MS CASEY QC:

No, that's the boardwalk. The land itself that's drawn in there is the new proposed reclamation.

WILLIAMS J:

They're all new.

GLAZEBROOK J:

So all of that, okay.

WINKELMANN CJ:

Yes, it doesn't look like it's drawn in, it looks like it's real but it's…

MS CASEY QC:

Oh, it's a landscape, it's a landscape – it's an artist presentation. So, yes, thank you. So if you –

WILLIAMS J:

Oh, not yet.

GLAZEBROOK J:

So that's what will come. Okay, I understand that.

WILLIAMS J:

It's got 15 years to get real.

MS CASEY QC:

So at the moment you've got the ruler-straight coastline, which has got a footpath and cycleway right next to the habitats of the roosting birds, and annex B is showing you the new reclaimed land, but it's just those three that are pointed to. So they, what's around Ann's Creek and Ann's Creek estuary is existing vegetation. And the point that I'm wanting to make and make very clearly for the Court to understand is at the point where the East-West link hits Ann's Creek estuary, which is an SEA-M1, the reclamation stops. There is no reclamation in an SEA-M1, there is no reclamation in Ann's Creek itself, the project goes up onto a viaduct on piers or piles to avoid reclamation in the M1 area.

WILLIAMS J:

So that red hatched line at the eastern end of sector 2, is that the boundary of SEA-M1?

MS CASEY QC:

Yes. In very schematic terms.

WILLIAMS J:

Although now it's got a four-lane highway over the top of it but –

MS CASEY QC:

Now it's got a four-lane highway over the top of it, and the experts spend a lot of time talking about shading, noise mitigation, light, everything. This is what a 12 week hearing looks like. These issues are addressed by the Board.

WINKELMANN CJ:

So there's no reclamation but from Ms Gepp's diagram, and from what you just said, there are structures which one assumes are pylons, to support the flyover?

MS CASEY QC:

Pylons, yes, and the Board refers to, in its decision and there's expert evidence which we've referred to in our written submissions, that the placement of those pylons, particularly in Ann's Creek, which is the rare vegetation, that's the territorial SEA-T, rare vegetation sequences, has been mapped to the nth degree to avoid, and to absolutely minimise its footprint through Ann's Creek rare vegetation. So this is not like *TTR* or *King Salmon* where there is uncertainty. Everything, according to my instructions, every blade of herb, grass in that creek has been mapped. The project has been designed so that it's got extra-long spans to reduce the number of pylons that go through there. The cycleway, which is another important part of the project, is being referred to as the skyway. It's a separate thing going off in the air, to stay off this property. So again there's a responding to the policies.

GLAZEBROOK J:

We were told yesterday that there was clearly loss, irreplaceable and irredeemable loss of vegetation. You don't dispute that?

MS CASEY QC:

I don't dispute it but I think the Board regards it, I don't want to say minor, but it's not regarded as, it's been reduced to the lowest level possible, and it's not compromising the system.

GLAZEBROOK J:

I understand what you're saying there, it's just I think the submission made, which I was just asking you to comment on, was that there was irreplaceable loss, and the Board, the only thing the Board was looking at was the effect on biodiversity in terms of the birds and not on the vegetation itself.

MS CASEY QC:

I can absolutely answer that, and I do so in the table that I've got in response to reply.

GLAZEBROOK J:
Well that's fine if you're coming to it, that's fine.

MS CASEY QC:
I do, and the Board, actually it's a nice sequencing because they start with a problem and then they work through with the experts and come to a conclusion that they're satisfied that it' okay. But no, absolutely an issue, and absolutely one recognised by the Board –

WINKELMANN CJ:
They're satisfied that there's isn't irreplaceable loss of rare vegetation?

MS CASEY QC:
Well, your Honour, of course there must be some. There are pylons in Ann's Creek, they are placed at the top end of the creek and to the most already degraded part, which is right next to the industrial activity that's happening around it, that is already quite weedy, if I might say so. They've taken some of that land for the pylons, they are doing weed control and restoration all the way around it.

WINKELMANN CJ:
We know you think that's a wonderful project, but just answering the question, there is some loss of rare vegetation, but it's minimised?

MS CASEY QC:
It's minimised and offset, and it's the same with the birds. There is a loss of habitat, of course there is, there's reclamation, but it's offset and mitigated, and that's what the Board concludes.

WILLIAMS J:
So do Drs Bull and Lovegrove, are they the avifauna people?

MS CASEY QC:
Yes, I think so. Away from the Board decision the experts merge.

WILLIAMS J:

Well I'm very pleased to know that you can forget their names. I don't feel so bad about forgetting them myself. Do they say that the noise intrusion and so forth of a four-lane flyover SEA-M1 is not going to cause the birds to leave?

MS CASEY QC:

I am reluctant to answer that directly because I want to check that actual detail.

WILLIAMS J:

Yes, it's quite important, obviously, so good to know.

MS CASEY QC:

Thank you. We will check that and come back to you on that.

WILLIAMS J:

Because as matters stand now from, I think my recollection, there is no carriageway along that coastline is there?

MS CASEY QC:

There's a footpath.

WILLIAMS J:

Yes, but I mean a carriageway. There are no cars going through there that aren't accessing the industrial sites there?

MS CASEY QC:

Well actually if you look at the photo at the bottom of annex 2, you'll see it's major freight.

WILLIAMS J:

No I'm – obviously there's –

MS CASEY QC:

There's carparks, there's trucks moving, there's, you will see in the project area description, this is New Zealand's busiest logistic and commercial –

WILLIAMS J:

Yes, I've read all that.

MS CASEY QC:

So it's not quiet there at the moment, no.

WILLIAMS J:

No, no I know, I used to live in Māngere Bridge, so I'm a bit aware of it, but what's the predicted traffic flow along this link?

MS CASEY QC:

Your Honour, I'm sorry, I don't –

WILLIAMS J:

That's quite important, because you're going to get to, what, 40,000 or 50,000 vehicles day?

MS CASEY QC:

It's certainly intended to lift huge traffic flows from the congested areas that it serves. So it's not going to be a quiet road, and it's anticipated to have an enduring solution, so it's not one that's anticipated to clog up –

WILLIAMS J:

Yes, if it doesn't have 40 or 50,000 vehicles across it a day, it's not doing its job.

MS CASEY QC:

It's not doing any good. But your Honour I guess I must come back to where I started earlier today, is the Board made findings on the adverse effects.

WINKELMANN CJ:
Yes, well you're taking us into the facts.

WILLIAMS J:
Yes, you're tempting us in.

MS CASEY QC:
I am. So I'll come back to you on those matters.

ELLEN FRANCE J:
Sorry, Ms Casey, just in terms of Justice Williams' question to you about the proportions of the reclamation, in the AEE report at 302.00612 there is a table which seems to me to set out the approximate areas, but anyway perhaps you could confirm if that's the correct breakdown.

WILLIAMS J:
It's probably shifted now because the AEE will be out of date.

ELLEN FRANCE J:
Yes, that's what I wasn't sure about.

WINKELMANN CJ:
After the morning adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:
Ms Casey.

MS CASEY QC:
Thank you, your Honours. I can update and answer some of those questions now and, in fact, a number of them are actually in the hand-up that came this morning, of course. But before I do, your Honours, I need to clarify when I

answered your Honour, Justice Williams' question about the adverse effects all being mitigated and offset, I was talking about ecological effects and we don't claim that the at least balances and the mitigation offsets we're talking about here, are the ecological effects. The project had many other impacts and effects and I don't want to be claiming a broader success than I have.

WINKELMANN CJ:
Can you just be clear what you mean by "ecological"?

MS CASEY QC:
The values that are engaged in the SEA-M2 with the reclamation, the SEA-M1 and the SEA-T in the Ann's Creek area.

WINKELMANN CJ:
So you're saying that they were, everything we're really talking about was offset or mitigated, is what you're saying?

MS CASEY QC:
Yes. And the other point to clarify is that when we're talking about offset, it actually addresses the same values. So when we talk about policy 11 values, the offset has to be addressing the same value and in this case, for the same birds and the same type of vegetation.

So, if I could take you to the reclamation or the hand-up that came this morning about reclamation facts and the bird mitigation measures in response to questions yesterday. So, I just note at the first paragraph that a lot of the evidence –

WINKELMANN CJ:
I'm just not clear what hand-up we're going to.

GLAZEBROOK J:
Is this this table here?

MS CASEY QC:

No, it's this one. So it's in big print and the centre focus big print, East West Link Reclamation Facts and RV4 in Mitigation (11:53:30 can you check this plse??) So this was prepared last night in response to questions from the Court yesterday. So, in terms of reclamation and declamation, just noting what I've already covered at paragraph 1, that conditions and the project itself evolved so the comment from your Honours just before the break that the reclamation statistics aren't perfectly up-to-date is correct, the final reclamation statistics aren't yet available. Your Honour, Justice France referred to the table and the assessment of environmental effects and that is broadly equivalent to what I'm describing here which is from the evidence of the expert Stephen Priestley. There is a slight difference in how they're approaching the calculations and there's a slight difference in time. The assessment of environmental impact effects was December, the primary evidence of Mr Stephen Priestley was in the following May. But broadly you will see 1.2 describes the, in issue describe reclamation area of, compared to the existing CMA surface area, and it has broken it down to the road embankment, your Honour Justice Williams, which is 5.6 hectares, whereas the wetland and re-creation of the coastline is a further 12.2, so approximately doubled.

WINKELMANN CJ:

Can you just go through those again, thanks?

MS CASEY QC:

Yes, certainly. So I'm in 1.2 of that, the handout…

WINKELMANN CJ:

Oh, 1.2 – oh, great, thanks, yes.

MS CASEY QC:

So the size of the reclamation compared with the inlet, of course not the full harbour, it's much smaller when you go to the full harbour, and it has the comparison of the road embankment versus the wetlands created by the

reclamation, and it's those wetlands of course that are the cutting-edge treatment for the leachate and the runoff and stormwater from the industrial zone. So they are approximately twice the size of what's required just for the road.

At 1.3, a note, the distinction that I was trying to reach for before, which is reclamation doesn't equal loss of habitat. It's a fair assumption that a reclamation in an SEA area does, but it's not a fair assumption that a reclamation in in the CMA represents loss of habitat, in fact the contrary, because it's not an SEA.

Then at 1.4 we talk about the historical reclamation and the relativities to the whole harbour, so it's a .1% increase, and then at 1.5 there is exactly the information that I was looking for in regards to where the project lifts up to the viaduct, and your Honour Justice Winkelman asked about, well, what's the loss of ground under the piles, and that's there, so it's .001% of the inlet area for the piles that go through the estuary, so I think that would count as minor disturbance of the bird habitat in the estuary.

WINKELMANN CJ:
The evidence we looked at yesterday, the mitigations they took into account included asking, because the birds are already short on roosting area, asking the factory owners not to disturb their nests?

MS CASEY QC:
Yes.

WINKELMANN CJ:
That's the kind of mitigations, some of the mitigations we're talking about?

MS CASEY QC:
We're just about, over the page I'll talk to the mitigations. But I think, your Honour, that's a really good example of what happens practically on the

ground. The experts go and look: “What supports the robustness of what’s happening here?”…

WINKELMANN CJ:
It doesn’t sound all that robust, does it?

MS CASEY QC:
We’ll come to the rest of them, your Honour. I think if merely a factory owner not to clean his roof was it then you would have cause for concern. But that's not quite what we’re looking at.

GLAZEBROOK J:
Can I just check what you mean by “the inlet area”, especially in relation to Ann’s Creek?

MS CASEY QC:
Yes, your Honour, and that’s actually nicest seen on annex B – oh, sorry, the Māngere Inlet or the…

GLAZEBROOK J:
Well, that’s what I’m asking you, what the inlet area is in your 1.5.

MS CASEY QC:
Oh, the inlet area is the whole Māngere Inlet.

GLAZEBROOK J:
That’s the whole thing, yes.

MS CASEY QC:
Yes.

WILLIAMS J:
Yes, so it’s the other side of Māngere Bridge.

MS CASEY QC:
It's the other…

GLAZEBROOK J:
No, that's right, that's just what I was asking, sorry, yes.

WINKELMANN CJ:
So when you say it's .001% of the inlet area, that's but it's not .001% of the Ann's Creek area, is it?

GLAZEBROOK J:
That's what I was asking.

MS CASEY QC:
No, because there's no reclamation in the Ann's Creek area.

WINKELMANN CJ:
No, but your – yes, okay, right.

MS CASEY QC:
That's why I was trying to sort of step through, because it's quite important to focus on which is which.

But, your Honour, in a more detailed discussion the Ann's Creek estuary, so the bit of habitat affected in the SEA-M1, is the Ann's Creek estuary, and that's that little bit there where it's on "viaduct".

GLAZEBROOK J:
But percentages of the whole inlet don't mean much in relation to that Ann's Creek estuary. So do you say there are 21 that go through Ann's Creek and it's this wall of the inlet area? Well, I imagine it is, because Ann's Creek's not…

MS CASEY QC:
But when you're looking at impact on the habitat of a bird it actually matters.

GLAZEBROOK J:
Well, it doesn't when you're looking – which I think is the point that was made by your friend – that doesn't, that is not an answer to the loss of vegetation in that particular area.

MS CASEY QC:
No, that –

GLAZEBROOK J:
So a percentage of what it is in relation to that particular area would be more meaningful than a percentage in relation to the whole inlet area, although I accept your point about the birds.

MS CASEY QC:
Yes, and we have a figure, it's 73 square metres, and that's across both the estuary, so habitat for birds, and Ann's Creek, which is vegetation.

GLAZEBROOK J:
What's the, 73 metres squared compared to what?

MS CASEY QC:
I'll get more data for you.

GLAZEBROOK J:
Yes, that would just be useful

MS CASEY QC:
Thank you.

GLAZEBROOK J:
And I think we have to be looking at the land itself, rather than the inlet, but I don't know the answer to that.

MS CASEY QC:
Neither do I.

GLAZEBROOK J:
Exactly.

MS CASEY QC:
Luckily I have people listening, so…

GLAZEBROOK J:
Not that I think, I mean not that all this is going to turn on these fine aspects of percentages or metres, it's just it's helpful to get some idea of what the –

MS CASEY QC:
Absolutely and that's, I think, the context of what this proposal is and in a way how it's responding to the AUP and the NZCPS, I think, this is relevant context to that.

At 1.6 we talk about the declamation in the project. And in consultation with mana whenua groups, NZTA will replace the existing culverts for the Ōtāhuhu Creek Bridge and put in a bridge over a declaimed and restored creek, and that's got declamation of .55 hectares. Then on the second page –

WILLIAMS J:
Can you just tell me where, I don't really know where that is – this is the south side of the inlet is it? It's not in this picture, or it is?

MS CASEY QC:
No, in schedule C the Ōtāhuhu Creek is –

WILLIAMS J:
Is it at sector 5, is it?

MS CASEY QC:
Yes, it's sector 5.

WILLIAMS J:
Okay, thank you.

MS CASEY QC:

So the east side. So turning on to the next page of that same handout, this is the, in response to the question to my learned friend yesterday of what were the final bucket of mitigation measures for the birds. This doesn't cover the mitigation measures for Ann's Creek East, so for the vegetation, that's broadly described in my written submissions with some references and if your Honours would like a more detailed discussion of the conditions, they are in volume 3 but I'm very happy to provide a similar hand-up, if that would be of use. Thank you.

So, I'll just give the references to volume 3 of the Board's decision which is based on an over-arching ecological management plan in accordance with that integrated approach, and at 2.3 it lists through the measures in the package that specifically address the impact on shore birds so, you see there's the purchase of the island which you can – actually, and there's a map at the back of that hand-up, I'm sorry to give you yet another map, which has the location of all these mitigations. That's probably the easiest and fastest way to see it. So, the red areas are foreshore reclamation for rehabilitation of the nature coastline and water treatment wetlands. The dotted line is the boardwalk and the green are where these mitigation and offsets are, broadly. So those are the ones described in B –

WINKELMANN CJ:

So when they purchased the island, what does that do for the habitats because isn't the island sitting there unoccupied anyway?

MS CASEY QC:

They look after it. And protect and enhance its use as –

WINKELMANN CJ:

So get rid of rats?

MS CASEY QC:

Get rid of rats, look after, basically just look after it, turn it into a useful habitat space rather than an abandoned island in the middle of the inlet. So, as it says at A, 2.3A, so –

WINKELMANN CJ:

Be nice if they doing that anyway, wouldn't it?

MS CASEY QC:

Yes, your Honour, but I don't think NZTA's allowed to spend its money on that without a project.

WINKELMANN CJ:

Conservation perhaps, anyway.

MS CASEY QC:

Well, DOC is an, as you'll see in A, DOC is swinging in and collaborating on the management to create replacement high tide roost habitat on the island, working towards achieving statutory protection i.e. wildlife sanctuary or refuge status for existing roosts, creating another wading bird roost in the inlet, collaborating with DOC on pest control along the braided rivers in the South Island. Now this is a really important and key part of modern offset and mitigation, well offset, as by protecting and enhancing the breeding grounds of these migratory birds, we enhance the robustness of the species. And obviously increase its population numbers. So it's a direct value offset.

WINKELMANN CJ:

Does that mean, wouldn't they be doing some of things anyway, now they've had them drawn to their attention. Won't DOC be doing some of them anyway?

MS CASEY QC:

I can't speak for DOC.

WILLIAMS J:

No, that would take money.

WINKELMANN CJ:

Sad. All right, okay. Anyway, that was an irrelevance, I'm sorry, I shouldn't distract you.

MS CASEY QC:

I think that the Board.

WILLIAMS J:

Well, this is, I mean, I'm not expressing any view on this particular approach in any way, but this sort of negotiated offsetting is RMA working. I'm not saying this is…

MS CASEY QC:

No.

WILLIAMS J:

Generally as a proposition offsetting like this in much more complex and non-linear ways is sophisticated in terms of environmental management.

MS CASEY QC:

Exactly right, your Honour, and the Board decision is that, what they're doing in ecology is replicated across every area of the RMA and the policies that it engages with and the numbers of stakeholders. And that returns to, I think, the basic proposition that the NZCPS is not a decision-making tick box or flow chart, it operates here, it operates in these sophisticated RMA design and how a project responds to them. So even if they're not rigid rules they have a real effect and are designed to do that.

GLAZEBROOK J:

I suppose the, well, what we come down to a degree is what Justice Williams was asking you at the beginning, does this mean that the effects are only

minor or that you have avoided them, in a way that you – well, it is a slight conceptual problem, can you avoid something by offsetting, and you would say, I think, yes, you can?

MS CASEY QC:
Yes, in that broad rubric, yes.

GLAZEBROOK J:
And you'd say it in a more sophisticated way than saying these effects are minor, you would say, well, "avoiding" includes actually providing something else that has exactly the same effect of – well, actually, I suppose that's right, it avoids the effects.

MS CASEY QC:
At that bigger level.

GLAZEBROOK J:
At the conceptual level.

MS CASEY QC:
At the conceptual level, yes, and I think I –

GLAZEBROOK J:
Well, maybe even at the micro level in fact, because if you just move it –

MS CASEY QC:
Well, for some, absolutely.

GLAZEBROOK J:
– move it next door and it has absolutely no effect then…

MS CASEY QC:
And we get to that when we get to the 11(a) values and the impact on species, we'd say no effect on species.

WINKELMANN CJ:

Well, can I just ask for your clarification, because reading your submissions I hadn't understood you to argue this appeal on the basis that the threshold had been met, the avoiding.

MS CASEY QC:

Then more – no, your Honour, and I'm not. And it's quite important as a point of principle to be clear both on my learned friend's position and the position of Waka Kotahi and the position of the Council going in to this, the issues, the legal issues that you're facing. So what we've put in the written submissions is exactly right, that the Board was satisfied that the ecological effects are at least balanced out, and we do stand by that very, very firmly. My learned friend for Royal Forest and Bird in her reply submissions has helped and yesterday was very clear that from Royal Forest and Bird's perspective offset and mitigation can't count. "Avoid" means avoid, and if it's more than minor on the ground to that habitat, to that species, to that piece of vegetation, you're out. That's the contest between the parties, and it is not Waka Kotahi's position that it sidesteps that concept with an argument that: "Oh, we effectively avoid anyway."

WILLIAMS J:

Well, the best argument for Royal Forest and Bird is that that's remedy, not avoid.

MS CASEY QC:

Well, and if avoid means an absolute prohibition on any adverse impact to a habitat or a protected value, then Royal Forest and Bird is right, this project –

WILLIAM YOUNG J:

And you lose the case.

MS CASEY QC:

What's that?

WILLIAM YOUNG J:

If that's right you lose the case, don't you?

MS CASEY QC:

Yes. If you're not allowed to reclaim in an SEA, we reclaim in a SEA.

WINKELMANN CJ:

Well, you see, this is, you've just made it less clear. Because I thought that you were arguing on the basis that you accepted that you hadn't avoided the effects, you weren't arguing about what "avoid" means. Do you accept – because, I mean, that is another issue, but that doesn't seem to have been the contest to date in the High Court or here, what "avoid" means because you seem – was what your argument is, that, you know, that there is this ability to balance et cetera.

MS CASEY QC:

I think there's two parts to the argument that my learned friend was engaging with yesterday and we're re-engaging it on the same basis. The first is that avoid in 11(a) and the other avoid policies in the NZCPS mean you can't actually harm anything. Any adverse effects, and my learned friend says above minor, I'll come back to that, (unclear 12:10:43) you, and she's very clear, and we appreciate the clarity of her position on this, that you cannot take into account mitigation and offset. So, the first question for the Court, in my respectful submission is, does "avoid" mean an absolute prohibition on adverse effects?

WINKELMANN CJ:

Well, you see TTR's discussed that, hasn't it really? It's noted there are so many dimensions to material harm.

MS CASEY QC:

TTR's discussed that in the context of a statutory bottom line which was a direction to prevent harm to the environment from discharges. My learned

friend is trying to persuade you that the word “avoid” in the NZCPS means that, and that’s our contest there.

WINKELMANN CJ:

Yes, but even TTR, even that threshold allows there, that you could make the point that actually, if it’s just for a brief period of time or there is something else put in place that actually there isn't any harm et cetera that it’s not –

MS CASEY QC:

That’s exactly, and I do refer to TTR in that context as well. That’s the second issue. Royal Forest and Bird say “avoid” means you’re not allowed to, for that habitat to experience any harm. And the second issue, they say, is you are, in assessing that, you are not allowed to follow the TTR approach, you are not allowed to take into account mitigation and offset. Waka Kotahi’s position is that both those are wrong. So coming back to you Honour, Justice Glazebrook’s question in a very long windy way, yes, we do satisfy that second one for the ecological effects. We do say we have avoided and mitigated them down to the level that the Board is satisfied –

GLAZEBROOK J:

Well, mitigate – if avoid means avoid, mitigation is not enough.

MS CASEY QC:

Sorry, offset and mitigation, yes.

GLAZEBROOK J:

Yes, I think mitigation is a different concept.

WINKELMANN CJ:

No, offset. And so is offset because that’s, you know, making some change somewhere else.

MS CASEY QC:

To the same value. We're offsetting the value. So, we do say on that second point, yes, we get there on the facts, but we still hold the first point that avoid does not mean you're not allowed to harm a blade of grass in the SEA-T.

WINKELMANN CJ:

So, on your second argument, sorry, or was it your first argument, you said you get there on the facts, because that wasn't really how it was conceptualised by the Board, was it?

MS CASEY QC:

Yes, no, it was, your Honour.

WINKELMANN CJ:

The legal, what they – yes, because the appellant says the Board's applied a different framework, it hasn't – it's applied the – okay, so there's a different issue. There's the first issue about what test the Board's applied and whether that's right.

MS CASEY QC:

Yes, and I think that's the same thing because my learned friend would say the Board had to apply a test that if you harm a piece of grass and in the SEAT-T, or destroy a habitat in a SEA-M1, both of which engage 11(a), then it's a veto.

WINKELMANN CJ:

She wouldn't say "blade of grass", Ms Hardy.

MS CASEY QC:

A herb, how do we describe that? It's the vegetation and it is, it's not grass –

GLAZEBROOK J:

The submission was that the vegetation's gone and there isn't any offset. Now, I think you're going to say, well, there was an offset.

MS CASEY QC:

There was absolutely an offset. And we do –

GLAZEBROOK J:

I think the submission was, that yes, something had been done about the species, but they didn't look at it –

MS CASEY QC:

And in terms of the facts, that's right.

GLAZEBROOK J:

That's how I understood the submission.

MS CASEY QC:

But in terms of the Board's approach, what Waka Kotahi would say, and does say, is that the Board engaged with all the relevant policies and reached a conclusion on the facts based on the expert evidence. That it was satisfied, and I do keep coming back to their language that the ecological effects were at least balanced out by mitigation offset.

GLAZEBROOK J:

I understood the other submission to be that you can't have a bucket approach. That you've got to look at it – and again, that comes back to the vegetation because that's what I'd understood the approach to be. You don't say, well, in the bucket everything was fine, if in fact in the instant case you do have a total and irreplaceable loss of vegetation in one area that just hasn't been offset or replaced, because the bucket means that it's fine, that was the other way I understood it.

MS CASEY QC:

Okay, thank you for explaining that. The response to that from Waka Kotahi would be, one, the bucket approach was the unanimous view of all the experts, in the joint witness statement they confirm it, and it was confirmed by the Board –

GLAZEBROOK J:
Well, that doesn't mean it's legally right.

MS CASEY QC:
No, but in terms of an expert assessment of the correct way to approach mitigation offset, that bears considerable weight, and the second, of course, your Honour, is we just, I will take you to the detailed evidence of the offsets and mitigation on Ann's Creek, so we say that's…

WINKELMANN CJ:
I think I've got myself – I'm sorry to be very dim, but could you please just state therefore the skeletal outline of your argument, you know, because this is very critical and there are fine points of detail, there are fine points of difference between you possibly on some matters.

MS CASEY QC:
So, your Honour, our understanding of Royal Forest and Bird's argument that we're responding to, I think is the most helpful outline, is that Royal Forest and Bird take the position that the avoid policies in the NZ Coastal Policy Statement are an absolute prohibition of harm to the protective values. Waka Kotahi says that's an incorrect interpretation of the New Zealand Coastal Policy Statement and that "avoid" is a strong policy direction entitled to great weight but not a rule that prohibits consent.

GLAZEBROOK J:
And why is that different from *King Salmon* in the plan where it said "avoid means avoid"?

MS CASEY QC:
Can I come back to that when I've finished outlining my structure of my argument, otherwise I think I'm going to get lost again, if that's all right?

WINKELMANN CJ:
Yes.

GLAZEBROOK J:

So it's entitled to "great weight"?

MS CASEY QC:

Entitled to great weight, and an assessment –

GLAZEBROOK J:

Great weight in what, the consenting process but not, but it's determinative in the plan process, is that the submission?

MS CASEY QC:

I'm not – I don't, I'm not talking about the plan process.

WINKELMANN CJ:

So Waka Kotahi…

MS CASEY QC:

Great weight under section 104 and 171.

WINKELMANN CJ:

So just to help you, it says that it's an incorrect interpretation of the: "The Royal Forest and Bird's is an incorrect interpretation of the New Zealand Coastal Policy Statement, which is a strong policy direction entitled to great weight and *not* a rule…

MS CASEY QC:

Not a rule that requires consent to be declined as a matter of law, which was my learned friend's submission yesterday.

WILLIAMS J:

I thought your pitch – I'm still on your point…

WINKELMANN CJ:

Just, can we just be clear that Ms Casey has finished what she is going to –

WILLIAMS J:

No, but that's the point I'm trying to get to.

WINKELMANN CJ:

I know, but can we wait until Ms Casey's had a chance to finish, just because it's complex and…

MS CASEY QC:

So the core argument, the core contest between Waka Kotahi and Royal Forest and Bird is is "avoid" in the Coastal Policy Statement an absolute prohibition such that consent cannot lawfully be granted or a very strong policy direction leaving a sliver for a consent to be possible, that's the core argument in the case.

WILLIAMS J:

But the – no, keep going.

WINKELMANN CJ:

Is there another part to it?

MS CASEY QC:

The second argument, which I think is, because we've been in the facts we've been focusing on this morning, is while Royal Forest and Bird have confirmed in their written reply submissions and my friend yesterday confirmed that their approach is also that when you assess whether you've met the avoid policy you cannot, as a matter of law, consider mitigation, remedy or offset, you look at the raw effect only – this reclamation takes off this habitat, this pier takes away this rare vegetation – and if that has occurred, regardless of the offset or mitigation, you fail the avoid test. I hope I'm expressing that…

WILLIAMS J:

Right.

MS CASEY QC:

I'm getting a nod, which, thank you very much, Ms Gepp. So, and Waka Kotahi says that is also an incorrect interpretation and contrary to the clear words of the RMA.

WILLIAMS J:

That's assuming you're right on – you lose on proposition one?

MS CASEY QC:

If we need to get to proposition two, or both. We – yes, they mix and match really.

WILLIAMS J:

So…

MS CASEY QC:

Does that address your question, your Honour, Chief Justice?

WINKELMANN CJ:

So yes, I think it does. Yes.

WILLIAMS J:

So your proposition too comes down to whether you can use environmental credits to meet the "avoid" test in the AUP and the NZCPS where orthodox approaches to avoidance are not possible, as long as the credit that you've provided is specific and targeted and not genericised.

GLAZEBROOK J:

No, I think you are arguing you can genericise it?

WILLIAMS J:

No, no.

MS CASEY QC:

No, no, actually I'm not.

GLAZEBROOK J:

You're not?

MS CASEY QC:

That would be compensation. That would be if we were saying, look, we're treating –

GLAZEBROOK J:

Sorry, I thought you were arguing the bucket approach because you said the experts are agreed that the bucket approach was right.

WILLIAMS J:

Yes, but they're specific buckets.

MS CASEY QC:

They are specific buckets. They are –

GLAZEBROOK J:

Some are specific? All right, that's fine.

MS CASEY QC:

We're not chucking in "treating leachate" into that bucket.

GLAZEBROOK J:

No, no, I did understand that. It's just that I think that –

WILLIAMS J:

But not down to the same 12 birds.

GLAZEBROOK J:

Yes.

MS CASEY QC:

No, but we are close to, because the roost, the breeding site that we're protecting in the South Island are the birds who are losing habitat in the Māngere Inlet. It's the same birds. Might not be the exact same bird but it's…

WINKELMANN CJ:

So you're helping them in one place but not in the other?

MS CASEY QC:

No, we are in the other as well, with all the alternative habitats around the inlet too.

WINKELMANN CJ:

So do you accept that there were factual findings that there would be harm?

MS CASEY QC:

No. The Board –

GLAZEBROOK J:

You sort of did earlier.

MS CASEY QC:

Well, no, we claim some habitats of –

WINKELMANN CJ:

You did earlier. I mean this is why I'm finding it very hard because I thought you had.

MS CASEY QC:

Well, this is the problem, your Honour, and with respect to my learned friend, this is the problem with that second proposition. If you are asking to separate out, is there harm in the raw, is there harm at mitigation offset, it's an artificial discussion. But yes, is there – there's harm to habitat.

WINKELMANN CJ:

Well, it's all very artificial but it actually is the thing you need to do because in terms of the policy and in terms of the AUP you need to determine if you've avoided adverse effects of activities on indigenous taxa, indigenous ecosystems. So that's the factual issue. Have you avoided it?

GLAZEBROOK J:

You say you don't – that while you agree, even though you're trying to say you don't, but while you agree that there was harm at this stage if you're looking at it in that artificial sense, you say you can't look at it in an artificial sense. Obviously you've got to compare point A with point B and that does entail that you're going to be looking at the harm that's caused in respect of that particular reclaimed area but you say that what you've got to do, unlike your friend, you've got to look at the new bit and say, well, overall is there harm?

MS CASEY QC:

Yes, that –

GLAZEBROOK J:

So you still have to do that comparison.

MS CASEY QC:

You do.

GLAZEBROOK J:

And still accept there's harm in the first place I would have thought.

MS CASEY QC:

Harm to the habitat, yes. Harm to the species, no. The Board found –

GLAZEBROOK J:

No, no, I understand that.

MS CASEY QC:

And this is quite important. The Board found in terms of 11(a) that while in theory loss of habitat can harm a species, and the Environment Court in *Davidson* confirmed that, look, if the habitat is rare, loss of habitat can amount to species harm. But the Board found as a matter of fact this habitat is not that rare. It's not, as your Honour, Justice Williams, suggested in passing, a housing shortage for these birds in Auckland. The birds are rare. The habitats aren't. And the Board found as a matter of fact that there is no threat to the species from the loss of habitat, there's no population threat. So in terms of that 11(a) –

WINKELMANN CJ:

Yes, and that's taking it at the level of species.

MS CASEY QC:

Which is that 11(a)(i), I think, value.

WINKELMANN CJ:

And you're saying indigenous taxa means at the level of species as opposed to – so you can go out and kill a few rare birds but if it doesn't harm at the level of species it's not a problem?

MS CASEY QC:

No, your Honour. In this project there's no killing of birds.

WINKELMANN CJ:

I know that but I mean if that argument –

MS CASEY QC:

Yes, no, no, and –

WINKELMANN CJ:

But if your argument is right it would carry through to that point, wouldn't it?

MS CASEY QC:

No, and no, your Honour, it's not, and that's – actually, this is – I was going to come back to say it but we're here now. When my friend objected to this population threshold, when you actually look at what the Board did, it didn't impose a threshold. It didn't say: "We're not, we don't think 11(a)(i) is relevant unless it's population effect." What it was doing was actually assessing the facts and saying the habitat destruction is not affecting the population level of these birds.

GLAZEBROOK J:

So it's not a TTR? There's no effect at population level? A few might go but we don't worry?

MS CASEY QC:

No.

GLAZEBROOK J:

It was – well, actually that's probably unfair of me to put it that way in TTR but that was –

MS CASEY QC:

Actually, I should say that's a no.

GLAZEBROOK J:

That was certainly the argument in TTR against the project, and of course we didn't know – there was nothing that explained what that population level meant.

MS CASEY QC:

Exactly.

GLAZEBROOK J:

But assuming it meant it was okay to kill off a few to – because it – you're not saying that? You're actually saying that these same birds could just to, in fact, enhanced habitat in some areas?

MS CASEY QC:

In some, and that's the important thing about being very clear when you're talking about what values are affected, where they sit in policy 11 and what the actual harm is because the only harm, the only long-term harm to birds from this project is the loss of the habitat from the reclamation and the disturbance of people walking up and down the boardwalk. So there's no killing birds long-term. Short-term, the construction issues, my learned friend took you to, was, and we appreciated that she took you to the footnote which said: "This could be a mortality issue if," so if you're interested in the conditions to the consent, the construction work is going to happen at the point in migratory cycle of those particular birds so they're not there. So, I can, hand on heart, say no birds were killed in this –

WILLIAMS J:

So, they're in Christchurch being protected?

MS CASEY QC:

A different bird, actually.

WILLIAMS J:

But on your theory, or on the theory of your expert, in fact, there'd be an increase, there would be a net increase in birds, is that right? Is that how they pitch their case?

MS CASEY QC:

Yes, that's – I think the Board says, at least balances, it's taking into account a lot of these mitigations could actually really enhance the population.

WILLIAMS J:
What did the expert say?

MS CASEY QC:
I'm reluctant to say because the depth of the expert evidence itself is, it's not at the top of my…

WINKELMANN CJ:
So, Ms Casey, your argument then does not turn on some sort of overall weighing up of the different policies in the Coastal Policy Statement or in the AUP, you take on 11A head on and accept that as a threshold?

MS CASEY QC:
No, I'm sorry, your Honour, that's probably the final nuance is –

WINKELMANN CJ:
So this is your third limb of your argument?

MS CASEY QC:
This is the over-arching limb. There isn't a threshold would be Waka Kotahi's position. And this is the third limb of my friend's argument as –

GLAZEBROOK J:
You're going to have to explain to me why there is a threshold at plan level but not at consent level. And you really are going to have explain that.

MS CASEY QC:
I'm very happy to do that. I took that from yesterday, it's going to be a point of persuasion.

WINKELMANN CJ:
So I'm now confused. Is this your first order argument or your –

MS CASEY QC:

Sorry, your Honour, I shouldn't have said over-arching. It can be a third separate point. My learned friend then takes what she says is an absolute prohibition in 11(a) and the other avoid policies, she says we exclude offset and mitigation and my learned friend for Forest and Bird position is, and that threshold must be directly applied to a consenting decision under Part 6, and Waka Kotahi's position is that the established law for 30 years, since the RMA came into place, or 29, wherever we are –

GLAZEBROOK J:

And which *King Salmon* says was wrong.

MS CASEY QC:

King Salmon says very clearly was wrong in respect to Part 5.

GLAZEBROOK J:

Well, frankly, you really are going to have to try hard to explain –

WINKELMANN CJ:

Would you state your last – yes.

MS CASEY QC:

So the process from now, if I may –

WINKELMANN CJ:

Well, can you just finish your statement there?

ELLEN FRANCE J:

You were saying the established law for 30 years –

GLAZEBROOK J:

For over 30 years.

MS CASEY QC:

A decision-maker under Part 6, takes into account as directed by section 104, 171, all relevant policies including the New Zealand Coastal Policy Statement and reaches an one the ground assessment of whether those, whether the proposal responds sufficiently well to those policies and the Part 2 for consent to be granted. So, it's the overall assessment approach which contrary to my learned friend's submission yesterday, the Court of Appeal in *Davidson* actually affirmed applied to consenting, and I'll come back to that submission in more detail.

So that is the approach to consenting and the core difference, your Honours, is Part 5 and Part 6 are separate. The cascading regime in Part 5 is subject to the Parliamentary direction that lower order policy documents give effect to higher order policy documents. Part 6 is the separate consenting part, they interact directly at rules. So Part 5 is lowest order is the actual rule which says: "What status has this activity got?"

Then we go across to consenting. Parliament has done something different in Part 6. Instead of constraining the local authority policy-making, it has vested the local authority decision-maker with a far broader discretion with the direction to have regard to, and it's the difference between give effect to and have regard to is possibly, in my respectful submission, one of the clearest examples of statutory differentiation in the effect of a process.

WILLIAMS J:

Are you really saying that Auckland city only, or a decider, only needs to have regard to the rules in a district plan and is not bound by them?

MS CASEY QC:

No, the rules the status, those are regulators.

WILLIAMS J:

But that's what section 104 says, "have regard to the district plan".

MS CASEY QC:

To the policies, yes, the policies and plans.

WILLIAMS J:

The plan, which includes the rules.

MS CASEY QC:

Oh, yes, but a decision-maker can't overturn a status in a rule – sorry, a rule setting the status of an activity if prohibited is –

WILLIAMS J:

But a rule that says, you know, your building's only allowed to be three metres high is still a rule.

MS CASEY QC:

And it will depend on the –

WILLIAMS J:

Be non-complying at that point if you didn't comply and then you'd have to deal with it by reference to the difference rules and policies.

MS CASEY QC:

Yes, and I think we –

WILLIAMS J:

But they're binding, you don't just have regard to that.

WILLIAM YOUNG J:

I think you're at cross-purposes.

MS CASEY QC:

I think we are at cross-purposes, your Honour.

WILLIAMS J:

Oh, okay, sorry.

MS CASEY QC:

So the rules are, the rules at the bottom of Part 5 set the activity status and the conditions for consent, for restricted discretionary, my learned friend took you to those. Put those to one side. We then come to a 104 decision, and the application is made: "I have a non-complying activity, please consider this under 104," and 104 is crystal clear that the obligation on the decision-maker is to have regard to the range of factors, including the…

WINKELMANN CJ:

Are you at 104 or…

MS CASEY QC:

104.

WINKELMANN CJ:

What about 104D, same thing?

MS CASEY QC:

No, your Honour, 104D is a separate, the gateway.

WINKELMANN CJ:

Right.

MS CASEY QC:

But let's just start with 104, because that's responding to Justice Glazebrook's question of why doesn't a threshold in the – why doesn't the NZCPS have to be directly given effect to in a consent, why did *King Salmon* not go, what is it between, why is *King Salmon not* –

GLAZEBROOK J:

Why would you bother having the policies at all if you actually don't really have to have regard to them in any meaningful sense when they say: "This is actually what you have to do"?

MS CASEY QC:

Well, your Honour, that's the point where I would contest my learned friend's – yesterday said: "Well, it's the difference between – if you don't have to give effect to it as a rule then all you have is a shopping list and you can put it aside when you wish." That's not, with respect, how the RMA works, and this project and many others are examples of policies that are given effect to in consenting decisions in the sense as policies, that they are responded to, that the project incorporates their values, that the decision-maker is satisfied that the values protected in all those policies have been adequately addressed. It's the difference between a strong policy directive that must be given "considerable weight", or whatever words you like, and a rule that binds the decision-maker and a threshold that says: "You may not as a matter of law consent this."

GLAZEBROOK J:

But I just have a bit of difficulty in saying you're giving effect to a policy that says you must avoid something by not avoiding it –

MS CASEY QC:

You're not giving effect to it, you –

GLAZEBROOK J:

So you give weight to that and say: "Well, I should have avoided this but I think I won't," for whatever may be good or bad reasons?

MS CASEY QC:

Well, and that is the question. So, what, for good reason, and who, the question is –

GLAZEBROOK J:

But if it says "avoid" where do you get a good reason to say: "No, I don't have to"?

MS CASEY QC:

Because you're taking into account, for example, the equally strong –

GLAZEBROOK J:

But then you're doing exactly what *King Salmon* says you don't do, which that overall judgement approach.

MS CASEY QC:

That's correct. But *King Salmon's* very clear that it does that in Part 5, and it does that primarily in reliance on the "give effect to" wording of Part 5 and, with with respect, *King Salmon* in that context was clearly a major shift in understanding of the meaning of "give effect to" and the significance and importance of what the New Zealand Coastal Policy was trying to do. But "give effect to" is very different from "have regard to", and these decisions are made by expert decisionmakers on the ground in complex RMA situations where many, many, many policies, enabling and restricting policies, are in play, and where Waka Kotahi takes issue with the approach from Royal Forest and Bird is that "have regard to" cannot be an absolute rule that prohibits a consent. The narrow – the policies will constrain the window down to a very narrow window in some cases and when 11(a) is engaged or 16 or 13 or 15 are engaged, that's going to be a very narrow window. But Parliament vested the decision-maker of whether the consent is appropriate, the decision-making in the Board, not in the Executive from 2010, and it's the difference. Your Honour, Justice Williams, referred to "retail" versus "wholesale". The RMA is supposed to be an enabling, flexible, responsive regime, not a prescriptive regime. So these words "have regard to" in the scope of the discretion of the decision-maker have real value.

When I get to your written submissions, your Honours, I will also take you to the New Zealand Coastal Policy Statement Regulatory Impact Statement which makes it very clear that certainly at the time of the promulgation of the New Zealand Coastal Policy Statement it was anticipated that it would not directly affect consenting decisions because it would be a matter for the

decision-maker what weight it had in the circumstances then arising. So this is not a shopping-list debate.

WINKELMANN CJ:
So *R J Davidson*, when it said – is it not dealing with this provision, is it dealing with section 104D, when it said that once a decision-maker looked through, even though it only says "have regard to", a diligent decision-maker would actually give effect to?

MS CASEY QC:
The section in *Davidson* that my learned friend took you to is the obiter discussion from about paragraph 70 onwards. The Court there is postulating how might the NZCPS land in the context of an overall assessment, and *Davidson* affirmatively –

WINKELMANN CJ:
So it does say that effectively?

MS CASEY QC:
Sorry, your Honour.

WINKELMANN CJ:
It is, it's obiter, but that's what – the effect of what it is is what I said, is it?

MS CASEY QC:
They would say that in most situations if in an overall assessment approach which the Court has just five, 10 paragraphs before that affirmed as the appropriate law for a Part 6 decision because – sorry, your Honour, I'm stepping, going through –

WINKELMANN CJ:
Well, you were going to take us to it so that's all right.

MS CASEY QC:
Yes. It's probably best if I do it in the decision.

WINKELMANN CJ:
Yes.

MS CASEY QC:
I've actually got myself lost.

WILLIAMS J:
Yes. That's understandable.

WINKELMANN CJ:
Well, you said, your point was that *King Salmon* is distinguishable because it was Part 5 and the language is "give effect to" and this is just NZCPS's policy document. In the extreme complexity of resource management decision-making, consent decision-making, you can't have those operating as rules.

MS CASEY QC:
As such prohibitory rules. Yes, your Honour, thank you, that's a fair summary of that part.

WILLIAMS J:
So, I'm with you part of the way but once you get to rules in district plans you're stuck with those.

MS CASEY QC:
And, your Honour, I don't mean that, and –

WILLIAMS J:
Well, you see that 104 refers to rules, and when it says you must have regard to rules, you have regard to district plans, those district plans include rules and rules are binding. There's no choice.

MS CASEY QC:
Your Honour, I think that's – if you're looking at 104 itself, it says what has to have regard to.

WILLIAMS J:
Yes.

MS CASEY QC:
And (a), (ab) and (b), any relevant provision of the standards, et cetera, plan or the proposed plan, and I think your Honour's point is that if the plan includes a rule that is –

WILLIAMS J:
No, they all do. They're required to.

MS CASEY QC:
Yes, but the plan is much more than the rules.

WILLIAMS J:
Of course, yes. But where it says "have regard to the plan", that includes the rules.

MS CASEY QC:
And it's the same with the national environmental standards. They have rules.

WILLIAMS J:
Okay, so why are the rules not just a squishy "have regard to"?

MS CASEY QC:
Because the plan and the standards state that they're prescriptive.

WILLIAMS J:
But so what – but, you see, that's circular because so is the policy, or at least on Royal Forest and Bird's…

MS CASEY QC:
Absolutely, and I think it's a similar logic from Royal Forest and Bird. They say rules are prescriptive and we can read this policy as a prescriptive

rule, therefore in the context, if you – (b) is basically capturing everything in the RMA system.

WILLIAMS J:
(b)?

MS CASEY QC:
104(1)(b). So, as a matter of drafting, it makes sense that it wouldn't specify, and if there's a compulsory rule you must comply with it, it doesn't need to say that.

WILLIAMS J:
You see, I think the answer just having looked at section 76 which is the rules provision, the answer is that rules are regulations and the others aren't. So any S standards and rules are regulations, they're deemed, sorry, they're deemed to be regulations except where they're inconsistent with the regulations, therefore, they have binding force of law, one would say just from that the policies and objections are not regulations.

MS CASEY QC:
Yes, thank you, that was what I was reaching for. And it is absolute, the National Environmental Standards are regulations.

WILLIAMS J:
And you say that's what gives you the wiggle room?

MS CASEY QC:
Yes. When we're in policies, we're in policies and objectives wherein have regard to and the overriding force of regulations would match that.

WILLIAM YOUNG J:
The rules, you might have regard to rules that are not binding, it might be an application for consent for non-complying activity which is complying in other zones. And the rules that apply to that activity in those zones might provide

guidance as to the terms and conditions upon which a consent might be granted for out of zone.

MS CASEY QC:
Yes. Absolutely.

WILLIAMS J:
Yes, but that's –

WINKELMANN CJ:
One scenario.

WILLIAMS J:
That's by analogising because the rule that is binding is the rule in the zone.

MS CASEY QC:
Yes. So if you want to read 104 must comply with every regulation, and have regard to everything else, I think that would be a fair –

WINKELMANN CJ:
And those rules are required to give effect to the Coastal Plan?

MS CASEY QC:
Going down, yes. And that's Royal Forest and Bird's position, as if you read the Coastal Plan as an absolute prohibition, then any rule that allowed that activity, and I'll take you to one that does, is unlawful. And so we're in that contest point.

WILLIAMS J:
You say that's a Part 5 fight, not a Part 6 fight?

MS CASEY QC:
Yes.

WINKELMANN CJ:

Well, do you? Because if you accept that the rule has to give effect to the Coastal Policy Statement, then the rules applying through section 104 and 104D –

MS CASEY QC:

Yes, I mean you just – so, it's that dichotomy. Is the Coastal Policy Statement a prescriptive rule itself, which has to come down through, in which case Royal Forest and Bird win and this project can never go ahead and they're right, it could never have been lawfully contested, the whole Board of Inquiry process was a waste of time, because as soon as a reclamation hit an SEA, it breaches 11(a), end of story. And, your Honour, that may sound like –

WINKELMANN CJ:

Well, that's not right.

MS CASEY QC:

No, it's not right, your Honour.

WINKELMANN CJ:

Without an offset. So if you get rid of the whole habitat and the whole of the birds, how can you possibly say that it's okay because you just have to give great weight to that and in the context it's such a great project that it doesn't matter that the birds go?

MS CASEY QC:

Well, the question, your Honour, is who's the decision-maker, because –

GLAZEBROOK J:

Well, if the decision-maker can say: "I don't care. This is a wonderful project and I don't care if I've killed all of the wading birds"…

MS CASEY QC:

Then as a matter of policy application, you might be in an *Edwards v Bairstow* (12:43:32) situation.

WILLIAMS J:

You think?

MS CASEY QC:

I think. Possibly.

WINKELMANN CJ:

No, but the point is that I think you're just overstating the argument to make it seem ridiculous because –

MS CASEY QC:

With respect, your Honour, I'm not –

WINKELMANN CJ:

Well –

MS CASEY QC:

– because if – sorry, I don't mean to interrupt.

WINKELMANN CJ:

The point is that it's a very narrow band and there is an opportunity to avoid adverse effects, and so it's only when you can't avoid adverse effects that the thing can't go ahead on this narrow band, adverse effects on this narrow band of protected things.

MS CASEY QC:

But, your Honour, if you then add on Forest and Bird's next layer which is you can't consider mitigation and offset –

WINKELMANN CJ:

Well, that's another issue.

MS CASEY QC:

Well, that's what I was talking about. If Royal Forest and Bird are correct in their full three points, then this project was unconsentable from the point in time it had a reclamation and an ECA.

WINKELMANN CJ:

And I mean it's possible there are projects that are unconsentable in that sense, that that might be the intended effect of New Zealand Coastal Policy Statement.

MS CASEY QC:

And that's the point of contention in this case. But I wasn't meaning to be facetious when I said it was a waste of time for the Board if Forest and Bird's arguments are accepted because that would have been the result, and my learned friend yesterday was very clear. She said it could not in law be consented on their approach, so – and given – I'll take your Honour to the evidence references shortly on no practicable alternative – given that the Board found there was no practicable alternative for the East-West Link, that would mean that this project could not go ahead and the enormous expense of the Board hearing and the commitment of the experts was irrelevant, it should have been struck out at SEA reclamation. So it's not intended to be a facetious or ridiculous submission because, with respect to my learned friend, that is the consequence of her argument.

GLAZEBROOK J:

Well, that might just say that there was a misunderstanding of the law right at the beginning and if there'd been a proper understanding of the law then it shouldn't have, you shouldn't have embarked on the expense.

MS CASEY QC:

If the law was that way that's exactly right, your Honour, but the certain understanding of the Ministers and everybody involved in the project so far – but that's a separate thing if this is the question for you.

WINKELMANN CJ:

So where are we at with your argument then? So we were up to your argument about the effect of section 104 and that it's different, operates differently, because it's just "have regard to".

MS CASEY QC:

Yes. Would you like me to address that aspect now, or should I go back to sort of the high-level – I've jumped over…

WINKELMANN CJ:

So that's the three arguments, and that's really your –

GLAZEBROOK J:

I thought it was just two, but are there three?

WINKELMANN CJ:

There are three.

MS CASEY QC:

Yes, there are, there's "avoid" isn't a prohibition rule –

WINKELMANN CJ:

That's really your highest order of argument.

MS CASEY QC:

It is, absolutely. The Royal Forest and Bird's position is not only is a rule you can't take into account offset and mitigation, that's two, and then their argument is that the effect of *King Salmon* is that if those are the rules then they bind the consenting decision-maker under 104. So those are the three arguments.

GLAZEBROOK J:

Sorry, I thought that was part of one, but is that a separate…

MS CASEY QC:

I'm conceiving it in three because I've got three different sets of – but it's…

GLAZEBROOK J:

So actually you probably need to take me through one again, but I'd assumed that was the argument under one but – can I just…

MS CASEY QC:

Yes. So the issue with one –

WINKELMANN CJ:

Can I just read you back what you've said because then you can fix it up, it might help you.

MS CASEY QC:

Thank you.

WINKELMANN CJ:

"Royal Forest and Bird say the avoid policy in the NZCPS is an absolute prohibition of harm for protective values. Waka Kotahi says that's an incorrect interpretation of the New Zealand Coastal Policy, which is a strong policy direction entitled to great weight but not a rule that requires consent to be declined as a matters of course."

MS CASEY QC:

So you're right –

WINKELMANN CJ:

Yes.

MS CASEY QC:

– your Honour Justice Glazebrook, I had merged those two and I'm happy to address them on that basis.

WINKELMANN CJ:

That's good.

GLAZEBROOK J:

Oh, yes, I just, and I hadn't understood your submission on one if it wasn't a combine submission.

MS CASEY QC:

The nuance I think I was reaching for is that "avoid" isn't "prohibit", it's that simple on the language.

GLAZEBROOK J:

Well…

WILLIAMS J:

But they're two different arguments, aren't they?

MS CASEY QC:

Yes, that's…

GLAZEBROOK J:

Yes, but you do run against *King Salmon* if you're arguing "avoid" doesn't mean avoid.

MS CASEY QC:

And I do that in my written submissions directly, your Honour.

WINKELMANN CJ:

So that is a separate argument?

WILLIAMS J:

That's why I think you actually do have three propositions.

MS CASEY QC:

Three arguments, I think you're probably right, Sir, I apologise. So one is "avoid" doesn't mean prohibit, two is avoid, you have to be allowed to assess offset and mitigation, and three is it's –

WINKELMANN CJ:

And three is that actually it's not a rule anyway.

MS CASEY QC:

NZCPS is not a rule, it's a…

WINKELMANN CJ:

It's allowed to be put into the mix.

MR CORNEGÉ QC:

Yes. Very big part of the mix, as the Board acknowledged, refers to how much of the hearing was on this issue but, yes. Thank you.

GLAZEBROOK J:

So one is an interpretation of the Coastal Policy Statement itself…

MS CASEY QC:

Yes.

GLAZEBROOK J:

The other one is saying that even if it does mean, even if "avoid" does mean avoid, which *King Salmon* says, that only applies to Part 5, not Part 6, have I got that right?

MS CASEY QC:

It's a policy, not a rule – oh, sorry, no. The second is offset and mitigation must be able to be taken into account.

GLAZEBROOK J:

Oh, yes, and I've…

WILLIAMS J:

Can I just suggest the nuance in the first proposition?

MS CASEY QC:

Please.

WILLIAMS J:

And that is that "avoid" in this context doesn't mean prohibit.

MS CASEY QC:

Yes.

WILLIAMS J:

Because your focus is on the words of the AUP.

MS CASEY QC:

Yes, of course, yes.

WILLIAMS J:

And didn't you argue that that's what separated it from *King Salmon*, apart from the Part 5, Part 6, point, which is your proposition three?

MS CASEY QC:

And one, when I go to the NZCPS and the submissions on that, yes. I think the discussion in *King Salmon*, "avoid" means do not allow, was actually very fast and not subject to any discussion in the judgment, which made sense given what the judgment was primarily addressed with. But when you actually look at the NZCPS properly, the do not allow equivalent isn't there but also with respect to the Court in *King Salmon*, I don't think *King Salmon* itself said "absolutely prohibit". It said something in the nature of a bottom line. It expressly refused to express a view on the *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) decision which had been put before it which said avoid - it's short of prohibit. In the Supreme Court in *King Salmon* said: "We don't comment on that. We're not reaching a

view on that." So, with respect, I think *King Salmon* has been interpreted in the RMA world as perhaps a blanket rule which I don't consider, read fairly, the Court made a direct finding on. So that's a very short synopsis of what's in my written submissions on that point. So with that, your Honours –

WINKELMANN CJ:
So that's your overview? Well, we've gone through quite a lot of it there.

MS CASEY QC:
I think we've gone a long way through it. What I'd like to do, if I may, and just before we get to the break is just talk very briefly about the RMA because I think before we get to what the RMA and the NZCPS, because before we get into the detail of the interpretation arguments, I think it's important to have a clear outline. And this is where – I'd just like to delve very briefly into my written submissions because there's a few tables there that I hope are of assistance. So, I'd like to take you to page 2 of my written submissions at paragraph 2.4.

So, your Honours, this is the cascading table that you'll be familiar with in terms of *King Salmon* and the general RMA structure. It does go over the page, by the way, and on the right-hand side of the column it's got what each of these do and what they have to do. Now, my learned friend in her written submissions stated that the point of the AUP, a purpose of the AUP was to give effect to the New Zealand Coastal Policy Statement. My learned friend, Mr Lanning will go in that in more detail, but of course the AUP is much more than giving effect to the Coastal Policy Statement. What I really want to draw attention to is the distinction between the land and the coastal marine area, but more importantly, the lack of distinction of the coastal environment between those two regimes.

So, when we're talking about the coastal environment, we're not talking about the CMA, we are talking about the CMA plus the landward side of mean high water springs that is regarded as being part of the coastal environment, and I am that vague, your Honours, because there is no definition. The only

guidance that anybody has as to what land is included in the coastal environment is objective 1 of the New Zealand Coastal Policy Statement which is a broad description of the coastal environment includes, and that it includes land is obvious from the fact that outstanding natural features, outstanding natural character, a lot of the policies are landward-looking policies. I note the footnote there on that page, at footnote 3, refers to that description and notes from *King Salmon* that the full extent of the landward side of the coastal environment is unclear. Later on in my submissions I refer very briefly to a decision of the Environment Court where Judge Smith postulates it could include the entire Auckland isthmus.

GLAZEBROOK J:
What's the point you're making about that?

MS CASEY QC:
So when we're talking about, is this a rule, my learned friend yesterday said: "Look, if this project was on land we could take into account offsets and mitigation." Well, part of this project is on land. Ann's Creek is regarded as terrestrial, but it's still part of the coastal environment. So when we're looking at the rules, whether this is a prohibitory rule or a policy statement, the fact that its application to land is unclear is a pretty, in my respectful submission, strong indication that the Minister and Parliament did not intend a policy statement to be a binding rule that would affect property rights which is something I come to later. But I thought, because we were in a cascade, I would start with there.

So, your Honours will, of course, be familiar with section 5 of the Resource Management Act but I would like to take you back to sections 5 and 6 in tab 1 because an appeal of this nature it is easy to focus on the protective aspects of the RMA and, of course, section 5 talks about the protection of natural and physical resources in a way or at such a rate and it gives us our values that are also important. *King Salmon*, of course, confirmed that protection is important part of section 5, and that was *King Salmon's,* one of the main ground-breaking things that it did, but it also confirmed that it doesn't have

primacy under section 5, and the concept of protection of natural resources is, of course, not the same as protecting them from any harm at all. The (a), (b), (c) talks about sustaining and safeguarding and avoiding mitigating and remedy. So section 5 isn't a bottom line protection itself. We're different from TTR and 10(1)(b), if I may make that point.

So section 6 matters of national importance. These are not ranked and they don't have priority, and this is a theme that I'll come back to with the New Zealand Coastal Policy Statement as well. My learned friend yesterday made a submission, well, if the policy said you're allowed to do this despite adverse impacts to policy 11(a), or policy 11, that would be different and with respect, the scheme of the Act is the reverse. It doesn't say, section 6 doesn't say protection of national biodiversity – of biodiversity is a primary, is the primary consideration. We would not read section 6, which talks as a matter of national importance, it talks about, at (d), the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers. We would never read (c), protection of indigenous biodiversity as subject to (d). We would never say we'll protect indigenous biodiversity provided it doesn't interfere with public access to the coast. And with respect, this correct statutory interpretation of 6 is that we don't read that the other way either. Both of them are values that must be recognised –

GLAZEBROOK J:
You're not looking at 6, I mean, *King Salmon* is just saying that the 5 and 6 can include protection only as a value and a coastal policy statement or any other statement can say protection of the environment is paramount. And it's able to do that then you'll then look at the interpretation of the particular policy statement to see – and that would be consistent with 5 and 6 because you can pick one of those. I mean, you could pick amenity as paramount, I mean, it mightn't be rational possibly, if you did that, but you could.

MS CASEY QC:
Yes, absolutely, and –

GLAZEBROOK J:

So you're really then looking at what the Coastal Policy Statement actually does say, aren't you?

MS CASEY QC:

Yes, and I'm about to turn there next, but, your Honour, that's exactly the point that I wish to be making. And I think –

GLAZEBROOK J:

Well, it escaped me, I'm sorry, because –

MS CASEY QC:

Well, I'm starting at 6 and moving down. So, we're starting and saying, does the Act give primacy, no it doesn't. So as an interpretative tool, do we read primacy into the New Zealand Coastal Policy Statement? My respectful submission is, we don't because that's not what the Act says. And then I'm going to do exactly the same exercise in the New Zealand Coastal Policy Statement and make the same submission down into the AUP. There is not primacy here in the Coastal Policy Statement and that's the point that I wanted to go to next.

WINKELMANN CJ:

And when you do that you'll have to deal with a *King Salmon* point about the different language.

MS CASEY QC:

I will do Coastal Policy Statement and then move to *King Salmon*, if that suits the Court.

WINKELMANN CJ:

So shall we come back at two because you had a lot of questions.

MS CASEY QC:

If that suits the Court, your Honours, I'd be happy with that. I must say, with regard to the timing, obviously we had hoped to do a compressed two day hearing with me starting yesterday. I would hope to be finished by, before the end of the day so that my friend Mr Lanning can start submissions, but I don't see that I'll be able to get through this material and have Mr Lanning and Mr Majurey and a reply done this afternoon. So, if the Court is able to sit on the third day that we requested when the fixture was set down, that would be of great assistance to counsel.

WINKELMANN CJ:

We'll discuss it over lunch.

MS CASEY QC:

Thank you.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.06 PM

WINKELMANN CJ:

Ms Casey.

MS CASEY QC:

Thank you, your Honour. I have response to some of the questions from earlier. Noise and disruption for the birds from the operation of the road was indeed considered by Dr Bull. I can give you the reference and a brief summary.

WILLIAMS J:

That will do.

MS CASEY QC:

The background noise from the industrial area was so high that the main issue was identified as people. So, just walking –

GLAZEBROOK J:

Is what, sorry?

MS CASEY QC:

Was people walking. Which is –

GLAZEBROOK J:

Okay.

WILLIAMS J:

So the place is already, there's already a Deep Purple concert, so –

MS CASEY QC:

And the wading birds that hang out there seem to be okay with that.

WILLIAMS J:

Okay.

MS CASEY QC:

So that was the summary. It was in the technical report at 16. Your honour Justice Glazebrook asked questions about the piers in Ann's Creek. I can't give you –

WINKELMANN CJ:

Pylons, is it piers?

MS CASEY QC:

Piles or, I call them piers, they're holding up the viaduct anyway.

WINKELMANN CJ:

Pylons I think they're called. I don't know, maybe I'm wrong about that. Anyway, poles.

MS CASEY QC:

I always think of pylons –

GLAZEBROOK J:
Whatever, they're 73 metres square, yes.

MS CASEY QC:
Whatever they are. So, of course, there are 20-odd pylons across the estuary and Ann's Creek. I don't have area for you for that but I can say that the ones that are actually in Ann's Creek itself, so they are affecting the high value vegetation, there are only five there, and if it's of assistance, annex B has got a tiny scale for the picture which shows that that's about 200 metres, so you can get a sense of scale. I'm sorry, they haven't got – we have been able to get more confined figures than that.

Your Honour, Justice Williams, I haven't got yet information on predicted traffic volumes. Would you like us to get that for –

WILLIAMS J:
It's probably going to be in the AEE somewhere.

MS CASEY QC:
I think it would be. We just –

WILLIAMS J:
Don't worry.

MS CASEY QC:
Thank you. So, your Honours, before the break I was about to take you to the Coastal Policy Statement which is obviously relevant to many, many parts of the arguments before you, but I'll go reasonably quickly through but I just want to identify and highlight a relation of aspects to the policy statement. It's at tab 68 of the joint bundle of authorities and I will just like to start at the very beginning with the preamble and paragraph 2: "The coastal environment has characteristics, qualities and uses that mean there are particular challenges in promoting sustainable management." So, the policy statement itself recognises its dealing with challenging and, with respect, increasingly

dynamic challenges in a coastal environment with climate change which is one of the issues recognised in the statement and at page 7, sorry, going over from the preamble, the next is the application of the policy statement and you'll see the first dot point it recognises that regional policy statements, regional plans, must give effect to this. But the third dot point confirms that the NZCPS itself says that consenting authorities must have regard to it, so it does not contemplate that it's a rule binding on a consenting authority.

Then moving over to the objectives, the point that I'll be making throughout is these are not expressed as priorities. The coastal policy itself says that the numbering is not intended to take, indicate prioritisation, and they are wide-ranging and my learned friend took you to 1, 2, 3 and she didn't refer to 4, but obviously maintaining open spaces and public qualities is important. The second dot point at objective 4 is a useful illustration of the complexity of the issues we're looking at. So, maintaining and enhancing public walking access to and along the coastal marine area with charge and where there are exceptional reasons that mean this is not practicable providing alternative linking, and when we get to the policies, you'll see that this is expressed quite strongly. You're not allowed to restrict access unless it's necessary to protect indigenous fauna or flora. So, it's not – this public access already is balancing out with Policy 11 in a way that's not clearly articulated but is of relevance.

My learned friend took you to – I note objective 5, noting the importance of climate change and, with respect, when we consider whether to interpret the NZCPS as formulaic or rigid rules, we need to be conscious that it is going into a very dynamic and changing and increasingly challenging environment. objective 6, my learned friend took you to part of this but not the second dot point, the importance of – we're talking about enabling people in communities to provide for their social, economic, cultural well-being and their health and safety through use including recognising that some uses and developments which depend upon the use of natural and physical resources in the coastal environment, and that includes the use of space in the coastal environment, are important to the social, economic and cultural well-being. So in the

objectives level the importance of infrastructure, transmission grid, et cetera are acknowledged.

Over at Policy 1, just as location, your Honours, Policy 1 is the best definition we have of what the coastal environment is, so the scope. Policy 2, my learned friend, Mr Enright, was referring to this in the relevant objectives. This was engaged in many aspects of the proposal, as you will have heard, and one of the ones that's really significant is the Otahuhu Creek declamation that I was talking about earlier. This is a major re-engineering around State Highway 1 in Auckland which is going to involve closing State Highway 1 in Auckland for the works to be done and will recreate the portage link or a nod to the portage link of the link between the east and the west via water that will be accessible in the right tides for recreational users. So, if implemented, this is a very big deal. It will, this is recreating a connection of the historical portages of that time. So strong engagement and strong support with the Policy 2, even with the legitimately different world views and views of the affected iwi that your Honours have heard about.

WILLIAMS J:
I didn't pick that up. The entire portage?

MS CASEY QC:
Well, it's recreated the portage but it's recognising and recreating the water link. So it's going to go under State Highway 1 as an open water reclaimed Otahuhu Creek link.

WILLIAMS J:
Right, so, how –

WINKELMANN CJ:
Are you saying that's part of this project?

MS CASEY QC:
Yes, your Honour.

WILLIAMS J:
How much closer, sorry.

MS CASEY QC:
You're going to ask me a very specific question which I may not be able to answer.

WILLIAMS J:
Okay. Don't bother.

MS CASEY QC:
So it's in sector 5. It's going under State Highway 1. It's re-engineering State Highway 1 to bridge over –

WILLIAMS J:
Yes, I see that. How much is declaimed, do you know?

MS CASEY QC:
It's in that memo that I handed up on the declamation. I think it's five, point 5, sorry, your Honour.

WILLIAMS J:
Yes, you talked about a .5 of a hectare?

MS CASEY QC:
.55 of a hectare and form a new tidal channel similar to that of the original channel.

So, Policy 6 is obviously a core policy for the project. But there are other, because this is where we recognise the provision of infrastructure that are important activities. But this is also an important provision to look at when we move to how strong are the avoid policies and do they override the affirmative and enabling policies because essential Royal Forest and Bird's argument is that 11(a) overrides 6(1)(a), that's their clear argument, but your Honours

need to be, of course, aware that it will override every other enabling provision in Policy 6 and, indeed, in the Coastal Policy Statement itself, and that will include 6(1)(d), recognising "tangata whenua needs for papakāinga, marae and associated developments and making appropriate provisions for them" and all the other ones listed down. So an absolute rule on Royal Forest and Bird's interpretation will apply across the board, and that's a key part of Waka Kotahi's concern with such an approach.

Then at policy 6(2) there's directions to recognise the "potential contributions" from "use and development of the coastal marine area", so an affirmative recognition, maintaining and enhancing "open public space" and then, (c), recognising that there are "activities that have a functional need to be located in the coastal marine area and provide for those activities in appropriate places". Very strong direction from the NZ Coastal Policy Statement that it is intended to enable these.

Strategic planning we're going through, the next one of significance of course is the reclamation and declamation policy at Policy 10 and "avoid reclamation of land in the coastal area unless", and Waka Kotahi's position is this is a specific reclamation empowering provision where the Minister has set what she considers to be – she, as was – considers to be the critical reason, analysis, and what needs to justify being in the coastal marine area. Adopting my learned friend's argument from yesterday, this does not say "subject to Policy 11". Policy 11 does not say "subject to Policy 10". It is a critical part of the interpretation of the NZCPS and its application that it does not specify subservient relationships or ranking, and I'll come back to that shortly.

Then, your Honours, I want to just delve a little bit more deeply into Policy 11, just referring back to an argument that was made without reference to the words of the policy earlier, just to explain the point that I was making. So first of all Policy 1 is about indigenous biodiversity. Caution needs to be exercised, this is not the environmental protection provision in the New Zealand Coastal Policy Statement. Biological diversity is one aspect of

the environment, there are other aspects dealt with in the policy statement and of course there are other aspects that are not covered in the policy statement at all but are still important values for section 5 and 6 of the RMA.

Going into 11(a), the most vulnerable. So (i) is effects of activities on "indigenous taxa" that are listed or threatened and (ii) is similar, and that was the discussion we had this morning that the Board could have and it was open to the Board to consider that a loss of habitat might have impacted the species, but it reached a factual assessment that there weren't significant or adverse effects on the species because of habitat loss, so that's the conversation we have this morning relating to noise, where we ended up with the other potential activities. (iii) is engaged in Ann's Creek. This is an impact on an indigenous ecosystem vegetation type, and I need to re-emphasise, my reference to grass was not supposed to be disrespectful to the values, these are high-value places, no dispute about that. But (iv) is the habitat issue, and this was where we did have some concern with the way that this was expressed to you yesterday, your Honours. The impact on habitat in 11(a)(iv) is impact on habitat of species that are "at the limit of their natural range or are naturally rare". Now this, habitats we're impacting are not on creatures at their natural, limit of their natural range, these are threatened and at risk but not at the limit of their natural range. And "naturally rare", if you look down to footnote 6, is defined in the glossary of the NZCPS as rare before humans came to New Zealand. So Waka Kotahi's position is that 11(a)(iv) is not engaged. The habitat impact comes under 11(b)(v), it's a habitat "including areas and routes important to migratory species".

So that's why I was saying this morning it's important, the facts are important in when you're assessing the impact, because the values, whether they're an (a) or a (b) value obviously, and according to Royal Forest and Bird, has significant effect. So that was just to go back to that earlier discussion.

Other key policies engaged here which the project responds to very well – starting to sound like a puff piece – Policy 14, the restoration of natural character. Just in passing, your Honours, I want to note Policy 16, which is

not engaged but it's a very useful touchstone when we're assessing, in my submission, and should be taken into account when assessing Royal Forest and Bird's approach to "avoid" under the Coastal Policy Statement.

So Policy 16 is surf breaks of national significance, it's strongly directing. It directs protection of surf breaks by "ensuring that activities in the coastal environment do not adversely affect the surf breaks". That's actually stronger than "avoid" in my respectful submission, it's an absolute "ensure". Then secondly, at (b), "avoiding adverse effects of other activities on access to and use and enjoyment of the surf break".

Now that avoiding is an unmitigated "avoid" and the same a 11(a). So whatever interpretation this Court opts to endorse for "what does avoid mean" in 11(a), as a matter of statutory interpretation of this NZ Coastal Policy Statement it will apply. And this is not again a facetious or supposed to be – can't even think of the word I'm looking for there – your Honours may recall that this is actually at issue in the Port Otago case where the High Court interpreted Policy 16 as overriding and taking dominance over the safe and efficient operation of the port. This Court declined a leapfrog appeal but noting that it was a significant issue whether *King Salmon* was being correctly applied in the High Court and we are currently waiting for the Court of Appeal decision. So the interpretation of the NZCPS word "avoid", in my respectful submission Policy 16 is a useful touchstone, do we think the Minister actually intended the enjoyment of a surf break to take priority over Policy 6 and Policy 10, because Royal Forest and Bird's argument would take us there.

WILLIAMS J:
Although on your thesis "ensure" wouldn't get them there either.

MS CASEY QC:
Well, no, because it's a policy.

WILLIAMS J:

Because it's a policy. What I want to know is why Lyall Bay and Titahi Bay aren't in that list?

WINKELMANN CJ:

That's a joke.

WILLIAMS J:

That's something you might want to get some details about later.

MS CASEY QC:

No, your Honour, I can almost answer that. I've been involved in surf break limitation in the past –

WINKELMANN CJ:

You don't need to bother…

WILLIAMS J:

Oh…

MS CASEY QC:

It's an interesting story. So policy –

WINKELMANN CJ:

Can I just ask, you're saying that "ensure" is a stronger word than "avoid"?

MS CASEY QC:

Well, your Honour, I think it's a matter for interpretation.

WINKELMANN CJ:

Opinion might differ on that but…

MS CASEY QC:

And I'll come to that in a minute with the multiplicity of verbs in the NZCPS, there's endless potential for debate as to which is stronger.

So just skipping now through, Policy 17 was engaged in the project, Policy 18, public open space, particularly (c), the project responded to that very strongly, Policy 19 was engaged and responded to, and at sub (3) of 19 was what I was referring to before. So "impose a restriction on public walking access" only where "is necessary" to protect a threatened or indigenous species. So that illustrates the complexity of the potential interaction of Policy 11 and the other priorities under section 6 in the Coastal Policy Statement and perhaps why it is better, respectfully, for these to be balancing assessments to be made on a project-by-project, case-by-case basis, under the consenting framework, because they're not straightforward interactions and the appropriate response will vary case by case.

Policy 21 is enhancement of water quality, and I've already covered that particularly in written submissions, this project responds very strongly to. Policy 22, sedimentation, was engaged. Policy 23, discharge of contaminants, was engaged and addressed. But here, your Honours, I do want to refer to what in my respectful submission is the strongest direction in the NZCPS, and this is at sub (2), and this is where the NZCPS says "do not allow".

GLAZEBROOK J:
So…

MS CASEY QC:
Policy 23(2), "In managing the discharge of human sewage, do not allow," and then there's a list, and when we turn to *King Salmon* – and that's the point I was trying to make, touch on earlier. The Court in *King Salmon*, because it was considering, its core issue was what does "give effect" mean to, gave a one-line statement saying, well, "avoid" should have its ordinary meaning of "do not allow". It didn't attempt to and didn't need to engage in a discussion about whether "avoid" meant "avoid at all costs" or "absolute prohibition" and had it intended to engage in that issue it would have been a significant point for the Court in *King Salmon* to be aware of and refer to the fact that the

Coastal Policy Statement actually used the word “did not allow” in a different place and, respectfully, with a stronger meaning. So the key point in terms of going back to the –

GLAZEBROOK J:
So “do not allow” means “do not allow”. Well, wouldn’t your argument still apply to “do not allow” then?

MS CASEY QC:
Yes but be incredibly strong direction. You’d – hard to imagine a decision-maker that could have a bound of reasonableness to allow the discharge of human waste. We’re –

GLAZEBROOK J:
So I’m probably just having a bit of difficulty understanding what the wriggle room – sorry, you probably didn’t say it. Did you say “wriggle room” or a “window”?

MS CASEY QC:
I’d say the window of opportunity or the sliver.

WILLIAMS J:
You said “sliver”.

MS CASEY QC:
The sliver.

GLAZEBROOK J:
How does one assess that, because you’ve now just said “a reasonable decision-maker”. So a reasonable decision-maker, how do they say when they’re looking at this: “Well, I’m applying the policy”?

MS CASEY QC:
Well, Part 5 or Part 6 –

GLAZEBROOK J:

I'm just wondering what the process is you're suggesting that…

MS CASEY QC:

Well, do not allow the discharge of human sewerage, you would say that that would almost end up in every district plan as a rule that has a status of regulation and it's off the table under Part 6. It doesn't come up in Part 104 because it will be a prohibited activity.

WINKELMANN CJ:

Wouldn't you say the same for rare and endangered, do not – avoid harm to rare and endangered species?

MS CASEY QC:

The question, your Honour, is is that a proper interpretation of the NZCPS that it is a directive that it has to be prohibited, and obviously Waka Kotahi says no, it's not quite that strong –

WINKELMANN CJ:

What I'm saying is it's the same sort of – I mean in some ways you'd say avoid harming endangered and species is a stronger kind of a value than avoiding a discharge of raw sewage.

MS CASEY QC:

But, your Honour, that – well, no, I think the Minister said don't allow, whatever you do, don't allow.

WINKELMANN CJ:

No. You understand my point, if you just sit back from the words, I mean because you can see obviously why you would want to prevent the discharge of raw sewage but, you know, you also can see obviously why you wouldn't want to harm –

GLAZEBROOK J:

Hector's dolphins.

WINKELMANN CJ:

Yes, Hector's dolphins, for instance.

MS CASEY QC:

Your Honour, and I think this is why we talk about a "sliver" or "narrow window". For a decision-maker these – "avoid" is important and it has to be given real weight in Part 6 consenting. There's no issue with that, and the Policy 11(a) values are very high values.

GLAZEBROOK J:

What's the sliver and how do they know they're in the sliver?

MS CASEY QC:

Well, your Honour, if –

GLAZEBROOK J:

That's my question. So what do you say the decision-maker does at – well, *King Salmon* would suggest that the decision-maker, when making a plan change, can't, there's no sliver unless you say that isn't the case but you're taking us to *King Salmon*.

MS CASEY QC:

Yes, and I think it's the difference between a strong policy directive and interpreting "avoid" as being "avoid at all costs". Now if you interpret "avoid" as being "avoid at all costs" and a binding rule then there's no sliver. If you interpret "avoid" as being more nuanced than that, as a very strong policy directive –

GLAZEBROOK J:

What's it mean though? When do you say: "Oh, I don't care"?

MS CASEY QC:

I don't think you ever say –

GLAZEBROOK J:

Or when do you come within the sliver?

MS CASEY QC:

This project is an example. It engaged across the board with many enabling policies and offset and mitigate its ecological impacts so –

GLAZEBROOK J:

So it's an "all in the pot", going back to the "all in the pot"?

MS CASEY QC:

Yes, your Honour, it is. Section 104 requires "have regard".

GLAZEBROOK J:

So you're basically going back to the way in *King Salmon* that they said you don't do? Going back to 5 and 6?

MS CASEY QC:

In *King Salmon* they said you don't do that for under, in Part 5 where the –

GLAZEBROOK J:

But you do when you're consenting, is that the submission?

MS CASEY QC:

Yes, your Honour.

GLAZEBROOK J:

So when consenting –

WINKELMANN CJ:

You probably wouldn't just say that though, would you? You'd say it's all in the pot but you give – it would – this would be entitled to the absolutely strongest weight?

MS CASEY QC:

Absolutely, and the Board did that and in my written submissions, your Honours, I pick up the language from the Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 and the language from the minority decision of this Court in *TTR* to say this is what it looks like. There is the language of, you know, strongest. You have to respond directly to it, you have to give very good reasons for why in this case it's not the prevailing consideration, and in my respectful submission that's the correct and orthodox approach. It's not a shopping list and that's never been the contention.

So the dispute really is whether – this Court will recall the Court of Appeal's approach to other marine management regimes and the discussion of what the Board had to do and failed to do and, with respect, in terms of the minority's approach in *TTR* to the section 10(1)(a) purpose of the Exclusive and – Economic, Exclusive – anyway, the EEZ Act, was a similar approach and I don't, didn't take the majority judges in *TTR* as disagreeing with that approach to the sustainable management concepts in EEZ, and my respectful submission is that those are the orthodox approach to consent up against a sustainable management aspect. But – and I will come to…

WILLIAMS J:

The logical sliver is no practicable alternative.

MS CASEY QC:

On this with reclamation, absolutely, and it's not even logical, it's a requirement of the policies.

WILLIAMS J:

Quite, but if you're talking about "do not", for example, dumping sewage into the Manukau Harbour for a change, you would have the exceptions, if there are to be exceptions in a policy-based thing, would be a natural disaster in which there's just no choice.

MS CASEY QC:

Something like.

WILLIAMS J:

It's the only way you can deal with it.

MS CASEY QC:

Yes, and that would be giving effect to the policy and the strength of the directive in the policy.

WILLIAMS J:

And allowing for a terrible exception, or a necessary but terrible exception.

WILLIAM YOUNG J:

It might be something that's not allowed. It just happens, in the event of a…

WILLIAMS J:

Possibly, yes.

GLAZEBROOK J:

Yes, I wouldn't have thought you'd be allowing it in an event.

WILLIAMS J:

Well, you may need to provide piping, you know, temporary piping infrastructure.

WINKELMANN CJ:

And on your analysis we would create a human – the sewage thing, on your analysis it would cost a lot of money and we'd have to knock over houses to

avoid discharging it in the Manukau Harbour. We'd discharge it in the Manukau Harbour.

MS CASEY QC:
No, not at all, your Honour, that –

WINKELMANN CJ:
Because that's the reason – well, moving onto a different subject. I'm taking you to another which is what's, you know, no practical alternative.

MS CASEY QC:
No, but I – I'm pleased to have the opportunity to say "no" and that's what I started with in my submissions this morning. This is not environment versus people. This project is how the RMA is supposed to work. So let's just say how the RMA is supposed to work is that it responds to all the policies that are relevant. So it's not people versus environment. It is people and environment. It's the "while" in section 5.

GLAZEBROOK J:
Yes, but your argument must apply to a project that is people versus environment though in a stark sense.

MS CASEY QC:
It does but how it lands will depend on the project. So the primary argument, no, there isn't a rigid prohibition rule in the NZCPS absolutely applies. How will that land in a project where it is people versus the environment? *Davidson* is a classic example. The Board said no, the High Court said no, and the Court of Appeal said even on an overall assessment approach, no.

WILLIAMS J:
See, that's really the point. On a people versus the environment fight on this policy the environment will usually win.

MS CASEY QC:
It's so strong.

WILLIAMS J:
And you'd expect that.

MS CASEY QC:
And you'd expect that, and I think that's my point, your Honours, is there was a – just a throwaway example tossed out yesterday, I'm not sure who by, to say, well, you know, talking about intergenerational effects, it may not be worth promoting faster cars now for losing a threatened species. You don't need to have a rigid rule that "avoid" is a prohibition to easily conclude, well, if that was the case that shouldn't be consented. The polices do that work for themselves. So I note it's in a way the difference between Part 5 and Part 6 is there's less constraint on the decision-maker, Parliament intended it that way and we have to let the decision-maker exercise their expert judgment subject to the appeals on points of law that the regime allows for. Trying to dictate downwards through a policy as a rigid rule, with respect, is not how to best give effect to what the RMA is trying to achieve.

So, stepping back, your Honours, to coastal policy doesn't state priorities or subject to any of those policies. So it is a matter of interpretation. Royal Forest and Bird are having to argue that that is done through the use of the word "avoid" without the follow on, avoid remedy or mitigate. That is, with respect, heavy lifting for one word in a policy to do and, with respect, it also doesn't fit with the multiplicity of verbs used in the Coastal Policy Statement.

I'd just like to take you to another table in my written submissions, if I may, on page 24, so at paragraph 5.34, and this is part of the written argument about avoid doesn't mean absolutely prohibit which I've canvassed in quite a few pages leading up to here, but this is a summary table of all the positive and negative verbs used in the NZCPS and there are room for arguments, endless arguments about which take priority over which, but there are a wide range and, in my respectful submission, this is because it's drafted as a policy.

It wasn't drafted as an intended cascade of prioritised, ranked policies that take effect at the expense of the other. You'll see "avoid" is just those four, which is surf breaks, natural character, outstanding landscape and biodiversity does not occur, ensure does not occur in Policy 3, I think, is probably stronger. "Ensure no adverse" effect is in a few.

But the other part of this, your Honours, is when we get to Royal Forest and Bird's argument that avoid trumps the enabling policy, that is just a reflection of language. It is very hard to write an enabling policy that has the same mandatory directive sense as the negative policies. It is possible if you want to make something compulsory. So you could draft a policy, ensure that – well, even no, I don't know, the local authority must provide for infrastructure including in a coastal marine area. That would be compulsory, that might be as strong as avoid. But if it's enabling, just as a feature of language, it doesn't say so. It isn't as strong. And my learned friend's submission yesterday was, well, it could enable and say: "despite policy 11(a)," but the policy doesn't want to say that either because we don't want an override of policy 11(1)(a). We want them both to be relevant. So the interpretation argument which always ends up with avoid trumping every other policy, in my respectful submission, is a crucial flaw in Royal Forest and Bird' analysis.

It's also my respectful submission that it mistakes the direction in *King Salmon*, a very important direction in *King Salmon*, that decision-makers Part 5 or 6, it doesn't matter at this point, shouldn't leap to the assumption that policies in the Coastal Policy Statement conflict. Royal Forest and Bird's approach is actually the opposite to that. It assumes every policy conflicts and says that we must reconcile them by interpreting the strength of verbs. It does not, in fact, attempt to reconcile them as directed by the Court in *King Salmon*, it says one is subservient to another is subservient to another is subservient to another, and because "avoid" is strongest those always come out on top.

The other submission I'd like to make on that interpretation approach is it's also not sensible when you stand back and look at what are the values that

those four policies protect, and that's coming back to the surf break point. Is it a serious contention that the Minister proposed and intended the enjoyment of a surf break to override all those other enabling policies? And, as I've said in my written submissions, it also severely unbalances the New Zealand Coastal Policy Statement. Every single one of those policies is there because it's important, and if you take an approach that makes one subservient to the other you basically overrule that assessment. So –

WILLIAMS J:
I guess the counter-argument is that what it does do though is to create areas, well, not to create, to recognise areas of particular sensitivity and use harder words.

MS CASEY QC:
Yes, absolutely, and as a policy –

WILLIAMS J:
You can't dodge that either.

MS CASEY QC:
No, I don't want to dodge that, that's Waka Kotahi's position is that these strong words have real meaning, but they don't go so far as to be a prohibition, that's all.

WINKELMANN CJ:
Well they could though, as a matter of logic, do you think there is nothing in the planning world that can be set as aside as sacrosanct on your analysis?

MS CASEY QC:
And national environment standards set by the Minister as a regulation can prohibit activities and in my written submissions that's the core structure of the RMA is the Minister can do two things: one is issue policy, two is issue regulations, and the Act specifically provides that regulations can create prohibited status.

WINKELMANN CJ:

I know. But the problem with that is it's activities as opposed to effects.

MS CASEY QC:

No, your Honour, it isn't, because –

WINKELMANN CJ:

Well, that's what you just said it was, activities, prohibited activities.

MS CASEY QC:

Oh, I was just, I haven't got that part of my submissions in front of me so I didn't want to mis-quote the power. But the Minister under the Coastal Policy Statement is authorised under the RMA to set restricted coastal discretionary activities, no prohibited activities, so that is another indication that the Minister is not, the policy statement is not intended to allow the Minister to prohibit something and – I'm conscious of time, your Honours, but that's canvassed in considerable detail in my written submissions, that core structure of the RMA. And I know in *King Salmon* they –

GLAZEBROOK J:

Well, there is still that difference between activities and effects.

MS CASEY QC:

Yes, the RMAs moves reasonably freely between them. So the Coastal Policy Statement talks about reclamation, well, that's an activity, that's Policy 10. Policy 11 is about any activity that has this effect. So there is no magic difference between the two, policies can cover both.

WILLIAM YOUNG J:

Can I just ask you, is there any reason why an activity cannot be prohibited by reference to its effects?

MS CASEY QC:

The scope for rule setting with a local authority, I would imagine the only constraint is drafting.

GLAZEBROOK J:

Although that activity would have to have those effects.

WILLIAM YOUNG J:

Yes. What would be – yes.

MS CASEY QC:

Yes –

WILLIAM YOUNG J:

An activity which has this effect is prohibited.

GLAZEBROOK J:

Yes.

MS CASEY QC:

Actually, and you can see it already. So in my written submissions – sorry, I'm just going to, so I get the right wording. The cascade of activities – which is on page 4 at 2.8 – you can see kind of almost the reverse of this and –

WILLIAMS J:

Where are you at, sorry?

MS CASEY QC:

Page 4 of my written submissions. So this is the activities that you can apply – well, the range of activities includes those that you can get consented. So a controlled activity is allowed to proceed subject only to certain assessments that are set in the rules of the plan. So it might be an effects test and if you meet that test, that's as far as the consenting authority can go. So there are structures and logic in the RMA that would allow it. I'm certainly not aware of anything that would prevent it.

WINKELMANN CJ:
And why would this logic not apply in the plan change area?

MS CASEY QC:
Because we're in planning, we are in the give effect realm and I think it would be timely for me to move to that part of my submissions that address that directly. So just bear with me for a minute.

So, your Honours, in terms of just placing in space, I'm actually in my outline oral submissions in the middle of Royal Forest and Bird's logic, I've just addressed step 1 and step 2 and step 3. Step 4 is a summary, so now we're at step 5 which is your very question. So the start –

WILLIAMS J:
You're at your outline, you're talking about your outline?

MS CASEY QC:
Yes.

WINKELMANN CJ:
You're at 5 of your outline, paragraph 5?

MS CASEY QC:
Yes. Step 5.

ELLEN FRANCE J:
8.5.

MS CASEY QC:
8.5.

WINKELMANN CJ:
Because I was feeling depressed when you said you were at paragraph 5.

MS CASEY QC:

No, no, and much of what follows is dealt with in depth in written material, so it's not a proportion speed. So this is the proposition that consenting decisions must comply with the directive policy. Nothing overrides the absolute veto of the avoid directive. And so this is obviously, your Honours have heard me on the difference in wording between Part 5 and Part 6, and the difference status each has under the regime. The other thing to unpick a little bit here is why would it just be those four policies of the NZCPS. If there's an interpretive approach that policies reach through into section 104, and bind the decision-maker, then it would be all policies. And it would not just be the avoids, for we've seen for example the recognition, must recognise, so we are in a field where every – there's no logical reason why every directive, positive or negative, in a policy wouldn't bite in Part 6, under 104. So that's the first point.

The second point is that *King Salmon* didn't decide this point. The Court does not mention Part 6 at all and places, as I've said, a lot of focus on the give effect provision in Part 5.

Royal Forest and Bird, well, actually, and the other point of that is, I'd like to take the Court to the decision that was issued by the Supreme Court at the same time, which is your Honour Justice Glazebrook's judgment in *Sustain Our Sounds v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 40. Now that didn't make it into the joint bundle, I'm afraid, but it was the other hand-up that I'm hoping you got from the registrar with out material.

So, everybody is of course familiar, these two decisions came out at the same time. The *Sustain Our Sounds* was challenging not only the planning decision but also the consenting decisions primarily on the basis of the adoption of an adaptive management approach. But what is interesting with respect to the intention of the Court in the *King Salmon* decision is what is not in the *Sustain Our Sounds* judgment. There is no criticism of the Board's overall assessment approach to the consenting decisions even though the same Court had just issued, at the same time, a finding that the overall assessment

approach in a planning decision was unlawful. So, it's an inference but only an inference.

GLAZEBROOK J:
I think it's a wrong inference, frankly.

MS CASEY QC:
Well, your Honour, for the –

GLAZEBROOK J:
It wasn't in front of the Court as a criticism, so I don't think you can draw any inference whatsoever from it, myself.

MS CASEY QC:
But I think my point is that that, respectfully, must apply the other way. You can't draw an inference from the *King Salmon* decision that it intended –

WINKELMANN CJ:
Well, no, we've heard you on that. Can I ask you about the *King Salmon* decision? I'm just struggling to see that there is really this difference. Because wouldn't, if you're right that these things all have to be balanced, et cetera, and that they are not to be given a direct effect to, wouldn't that also apply, wouldn't it have to apply when the plan is being set, so you can have guidance given to people?

MS CASEY QC:
Well, no, the point of *King Salmon* was that the Act directs the planner to give effect to the Coastal Policy Statement, and it's policies – and, sorry, that's the point, it's a policy cascade. So this policy is given effect to in this policy, is given effect to in this policy.

WINKELMANN CJ:
Yes, I know that, but my point is that given effect to its policies on your terms is not – what must lie at the heart of your submission is that these policies all

contemplate that they may be balanced off one against each other. It must be true at the top level if it's true at the bottom level, and you've taken us through and shown us why you say that it's so.

MS CASEY QC:

So, your Honour, but the Coastal Policy Statement and the tiers down, as my learned friend said yesterday, do a lot of work under the regime. So one of the areas that they work is landing in the plans and the rules. So they guide a regional or a territorial authority as to how it will implement the objectives and policies, and those are policy decisions to be made and as the Court in *King Salmon* said, the Coastal Policy constrains that exercise of judgment by the policy-maker, it doesn't dictate. *King Salmon* was very to say it doesn't dictate, or rather that it is a constraint, and the window gets narrower and narrower. But where it doesn't land is that there has to be a prohibitory rule. A council may decide that is the only appropriate response to "do not allow human waster discharge" but if for some reason in the circumstances of the Council – I can't imagine what – a difference prioritisation was made, that would have to be addressed, but –

WINKELMANN CJ:

I'm still struggling to see why it's not true at the plan change level, why your argument doesn't actually entail that *King Salmon's* wrong.

MS CASEY QC:

It's a question of whether you regard these policies as directive rules…

WINKELMANN CJ:

That's my point, I suppose.

MS CASEY QC:

And my primary submission is that they're not. So if they're not regarded as directive rules then the problem disappears because Part 5 is a policy framework which requires them to be given effect to, Part 6 is a decision framework which requires them to be have regard to.

WINKELMANN CJ:

Yes, but if they're not directive rules then the plan could actually have, the plan could take a different form and balance off different things.

MS CASEY QC:

Absolutely, within the scope of what does it mean to give effect to, and that's – because every plan is, it lands on the ground for the decision, for the plan-maker, and more restrictive examples are there, but even in the AUP, which is common ground, there are different phasing and different words. So NZCPS talks about "functional" need for infrastructure in the coastal marine area, the AUP talks about "functional or operational" need, they're nuances, and it works as a policy. But I agree with your Honour, it absolutely doesn't work if the avoid is a prescriptive rule, it just doesn't, because you – and that logic thing of how can I have a rule going down to here, it suddenly isn't a rule over here. The logical problem is there if it's a prescriptive rule, I agree.

WINKELMANN CJ:

So your argument can work with *King Salmon* if *King Salmon* is not seen as saying that avoid is a total prohibition?

MS CASEY QC:

Correct. And that's, as I say, covered in quite a lot of detail in my written submission, so.

ELLEN FRANCE J:

Sorry, could I just ask two things? In terms *R J Davidson* one of the points made is that 104 is expressly expressed to be subject to Part 2.

MS CASEY QC:

Yes.

ELLEN FRANCE J:

Is that part of your argument in terms of the approach?

MS CASEY QC:

Yes, and in fact, basically your Honours, in terms of does *King Salmon* rule out the overall assessment approach in consenting, I endorse the approach in *Davidson* where, which I will take you to next, where they step through and say, no, that's the direct – because the High Court in that case has said it's got to apply to consenting, you have to give effect to the NZCPS and the Court of Appeal said, no, you don't. It's not that directive. So the reference to Part 2 in the beginning of 104 as well as the have regard is key.

ELLEN FRANCE J:

Well, if you're coming to it you might deal with it and I anticipate that you would probably describe it as the obiter part of the decision, but the Court of Appeal in *R J Davidson* does say you can't subvert the New Zealand Coastal Policy Statement, so don't you just get back, to some extent, at least, to quite what the New Zealand Coastal Policy Statement means in this context?

MS CASEY QC:

Yes, you do –

WINKELMANN CJ:

Do you think you could take us to *R J Davidson* because I think it's quite critical to your argument?

MS CASEY QC:

I will, but if I – I'm happy to answer that question because it's the same conceptual issue that I've just been talking to Her Honour the Chief Justice, *R J Davidson* doesn't say avoid is a veto. It doesn't say the NZ Coastal Policy Statement are directive rules, and it's open to discussion, it makes perfect sense read in that way, because it's endorsed an overall assessment approach but said, you know, sometimes you can look at the policies in the Coastal Policy Statement and the answer's going to be clear. And, with respect, that's not the case here. It was the case in *R J Davidson*, you know, it was a classic people, well, private economic enterprise versus the environment and the Court had no problem saying, look, that's the right

outcome. But you can't read *Davidson* as saying it's a prohibition rule that has to be applied. It does in fact stands for the opposite.

Your Honours, just before I leave *Save Our Sounds*, I need to just deviate because we're in that decision. One of the issues, actually, no I won't. It's too complicated. I'll come back to that.

WINKELMANN CJ:
We'll go to *R J Davidson*.

MS CASEY QC:
So, this is at tab 30 of the joint bundle. And Justice Cooper delivering a judgment of the Court starting at paragraph 4. Directly, he says he's directly addressing this question: "What's the extent that the reasoning in *King Salmon* should be applied to the case applications for resource consent?" Then, your Honours, if you skip over to paragraph 15 and 16, you will see the Court referring to the decision of the High Court below, and there's a reference and a quote there: "We accept –

WINKELMANN CJ:
Sorry, what paragraph are you at?

MS CASEY QC:
Paragraph 15 of *Davidson*, and the High Court there, I think Justice Cull, said: "We accept we only have to have regard to but we think - we note the majority of the Supreme Court was clearly of the view that its reasoning would apply to applications for resource consent." Footnote is omitted and the Court of Appeal in *Davidson* at 16 says that's a key aspect that they need to return to and then at, just moving through to 23, in a more detailed discussion of the High Court judgement: "The Judge considered that the Supreme Court had rejected the 'over judgment' approach in relation to the 'implementation of the NZCPS in particular'" "The judge then held that the reasoning in *King Salmon* applied to 104(1)…She considered that *King Salmon* applied equally to 104(1) as it does to a plan change."

Then over the page at 27, the Court refers to the submissions for the appellant as a: “comprehensive argument based on the text and purpose of s 104(1), its legislative history and the wider scheme of the Act. He submitted that the approach taken in *King Salmon* to plan changes should not apply in the case of applications for resource consents.”

The Court then sets out those submissions and arguments in considerable detail right through to, through paragraph 38 and then refers in 39, addressed various other arguments why the Supreme Court decision should be confined to cases involving plan changes. Then at paragraph 42 the Court starts referring to the submissions for the respondent about how the approach should be applied to plan changes – to consenting decisions. Then at 46 the Court begins its analysis, and at 47 say: “For the reasons addressed by Mr Gardner-Hopkins…we are satisfied that the position of the words ‘subject to Part 2’…required to clearly show that the consent authority must have regard to…Part 2.”

The discussion continues and get over to, in my submission, the reasonably critical findings at 49, or rather at 50. So it talks about, the Court talks about the Supreme Court saying section 5 is not intended to be an “operative provision”, “these statements of law are binding on the Court”, and then at 51: “In the case of applications for resource consent however, cannot be assumed,” various other factors, and the planning documents “may not furnish a clear answer as to whether consent may be granted”.

The discussion continues through 52 to 53: “The real question is whether the ability to consider Part 2 in the context of resource consents is subject to any limitations of a kind contemplated by *King Salmon* in the case of changes to a regional coast plan. The answer to that question must begin with an analysis of what was decided in *King Salmon.”* The Court goes through quite a detailed analysis and refers specifically in 59 to the “overall judgment” approach and its place, given the “statutory obligation” to give effect to Coastal Policy Statement.

They continue at 60: “There were other relevant aspect to the statutory context that underpinned the Supreme Court’s approach.” They talk about in that paragraph, they consider it was fundamental to the “contextual rejection of the overall judgment approach”. So the Court is directly considering not just reference to the plan Part 2 but the judgment approach itself.

Then over at 65 – and this is the really key parts – “The Court referred to additional factors,” the Supreme Court here, “additional factors that supported the rejection of the overall judgment approach in relation to the implementation of the NZCPS,” and at 66: “We see these various passages…as part of the Court’s rejection of the overall judgment approach in the context of plan provisions implementing the NZCPS. Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the Court intended to prohibit consideration of Part 2 by the consent authority in the context of resource consent.”

And at 67: “First the Court made no reference to section 104 of the Act nor to the words ‘subject to Part 2’. If what it said was intended to be of general application across the board, affecting not only pan provisions under Part 4,” now 5, “but also resource consents under Part 6, we think it inevitable that the Court would have said so. We say this especially…” and then: “The overall judgment approach has so frequently been applied in the context of resource applications. If the Supreme Court’s intention had been to reject that approach it would be very surprising that it did not say so. We think the point is obvious,” and from the earlier, and at 68: “We do not consider that what the Supreme Court said…indicates it intended its reasoning to be generally applicable,” across the board.

Then over again at 69, referring to contrary arguments, at that last sentence there: “This is a long way from establishing that the Court intended to proscribe an overall judgment approach in the case of resource consent applications generally,” and then: “Thirdly, resource consents fall to be addressed under 104(1)…statutory language…The Act’s general provisions dealing with resource consents do not respond to the same or similar

reasoning as to that which led the Supreme Court to reject the overall judgment approach in *King Salmon."*

So, your Honours, with respect, the analysis of the Court of Appeal here which I've just zoomed over is robust and thoughtful. My learned friend for Royal Forest and Bird did not address any reason to disagree with this approach and, with respect to my learned friend, it is clear that the obiter tentative discussion of the weighting that would be given to the NZCPS in a resourcing consent –

WINKELMANN CJ:
But then is 71…

MS CASEY QC:
71.

WINKELMANN CJ:
Which seems pretty relevant.

MS CASEY QC:
But, your Honour, it does not override the Court's acceptance of the long-established and orthodox overall assessment approach to resource consent.

WINKELMANN CJ:
What does it mean there? Well, what do you say it means? "Where the New Zealand Coastal Policy Statement is engaged, any resource consent application will necessarily be assessed having regard to its provisions…We think it inevitable that *King Salmon* would be applied in those cases."

MS CASEY QC:
Yes, your Honour, and that's the approach to *King Salmon* in terms of reconciling the policies, in terms of giving strong weight, in terms of thinking about these matters as something in the nature of bottom line. It cannot be

taken to say that *King Salmon* rejected the overall assessment approach because the Court of Appeal has –

GLAZEBROOK J:
Well, it did certainly in terms of plan changes and explicitly, so –

MS CASEY QC:
Absolutely. No, no –

GLAZEBROOK J:
So I just have real difficulty in this submission. I just – well…

WINKELMANN CJ:
Because it also then goes on to say there at 71, and then in such a case "recourse to Part 2 would not be required."

MS CASEY QC:
But that's, your Honour, that's in the context of an over – it's just endorsed the overall assessment approach and is saying: "This is how we would see it playing out when these strong policies are engaged."

WINKELMANN CJ:
But isn't it saying that when these strong policies are engaged you're not really in such an overall assessment situation? You're really in a situation where the strong policy considerations are guiding the decision? Isn't that exactly what it's saying anyway?

MS CASEY QC:
Yes, your Honour, they are guiding the decision, and that's only – the only point of contention here between Waka Kotahi and Royal Forest and Bird is Royal Forest and Bird say it's an absolute prohibition that means consent cannot be granted. *Davidson* and Waka Kotahi say it's a strong policy guidance. The overall assessment approach is maintained by the Court of Appeal, and that was the issue before it.

GLAZEBROOK J:

Well, if – I can understand your submission if "avoid" doesn't mean "avoid". But if "avoid" means "avoid" and *King Salmon* says the overall judgment approach doesn't apply, I have a bit of difficulty in saying how you could then say but when you get to the consenting which is done by much lower officials effectively in an individual decision-making circumstance and they're not bound by the same things that they would be, that the higher level, and I'm talking, I mean because you can have numerous levels, decision-makers would be.

So "avoid" means "avoid" for plan-makers but doesn't mean it for the people making individual decisions, and it becomes – I can understand your submission that says "avoid" doesn't mean "avoid" anyway because that's a –

MS CASEY QC:

Well, not – I would say "avoid" doesn't mean "avoid at all costs". Of course –

GLAZEBROOK J:

No, no, I absolutely understand that.

MS CASEY QC:

Yes, so we don't need to go back to that.

GLAZEBROOK J:

It's the next bit of it that I have a bit of difficulty with, like if you're wrong on that, and I'm not saying you are.

MS CASEY QC:

Well, that's the thing. If the NZ Coastal Policy Statement sets an absolute rule that any activity that infringes 11(a) is prohibited, if it does all those things, I can fully understand the logical problem and I – it is there. But if it's just a strong policy directive, then the problem doesn't arise.

GLAZEBROOK J:

Well, it probably doesn't arise at either level at that stage though, does it, i.e., at the plan change level or at the consenting level?

MS CASEY QC:

I suppose you could look at it and "give effect" means you're going to have – you can't step outside the boundary set by the policy.

GLAZEBROOK J:

And if the policy means "avoid but not at all costs" –

MS CASEY QC:

You can.

GLAZEBROOK J:

– then you can – well, no, you're not stepping outside it effectively. You're within it.

MS CASEY QC:

Exactly. It's where is the boundary, and that's where the debate about the AUP comes down to is Waka Kotahi and the Auckland Council say you can absolutely read that plan to be within the boundaries of the Coastal Policy Statement and allow the sliver to authorise this. But if you can't, if it is an absolute prohibition, then the AUP is unlawful. Read that way.

WINKELMANN CJ:

So why I was taxing you with that particular paragraph is that I find it, well, I suppose the way I read it to reconcile it to what goes before and I wanted to hear what you had to say about it. It seems to me that they are saying that where the NZCPS is engaged, it really, although you maybe have an overall assessment, really the NZCPS is going to decide if it's got clear directives.

MS CASEY QC:

Yes, and in terms of a policy guidance, I think that's exactly what they're saying. They're saying the policy guidance from the NZCPS in some cases may be so strong that even on an overall assessment you really don't have a lot of wriggle room.

WILLIAMS J:

Well, I thought – it does seem to me to be reasonably clear that at 71 and 72, taking the, what you've taken us to at that point, the Court then says, if on this application the NZCPS has a clear directive, you don't need to go to Part 2 because Part 2 is given effect by the choices made in the NZCPS, you don't need to look further. If, however, it's not clear, then go to Part 2 to figure out what your answer should be. I mean, well, that's not rocket science. But I don't think it gets to your point at all.

MS CASEY QC:

No, then I'm not expressing myself very well.

WILLIAMS J:

Because, well, Royal Forest and Bird says it is completely covered and clearly by the NZCPS and you say it's not, but that's because you say avoid doesn't mean avoid. So, *R J Davidson* –

GLAZEBROOK J:

You also say factually it is, yes.

WILLIAMS J:

Yes, so *R J Davidson* is a bit of a distraction from your call point which is Forest and Bird have misread the document.

MS CASEY QC:

That's absolutely the call point, the *R J Davidson* is to do with, does the rejection of the overall assessment approach in *King Salmon* apply directly across to 104. My respectful submission, it doesn't.

GLAZEBROOK J:

So that's your point 3, because we had – that's your point 3, we're probably mixing them again which is slightly –

MS CASEY QC:

Yes. From earlier –

WINKELMANN CJ:

And what I'm saying is I don't think, that only really works in some ways it is the same as your first argument. It only really works if there is that possible interpretation of the New Zealand Coastal Policy Statement –

WILLIAMS J:

That's right, if there's wriggle room in the words.

MS CASEY QC:

Yes, if there's wriggle room in the –

WINKELMANN CJ:

So it's where we started out. Were 1 and 3 the same?

WILLIAMS J:

Yes, so yes. Read the document.

MS CASEY QC:

Exactly, your Honour. But it was important to say to the Court, in my respectful submission, to make a submission that the overall assessment approach under 104 is still good law according to *Davidson*. Now, this Court has been asked to take a different approach and that's obviously –

GLAZEBROOK J:

Well, it's a different sort of overall assessment than had been applied in the past. And you, I mean, I think it has to be accepted because all in the pot is not what your submission is at or –

MS CASEY QC:

Absolutely, and *King Salmon* was important for the, for endorsing the importance and significance throughout the whole regime of environmental protection and endorsing the importance of New Zealand Coastal Policy Statement. The one area where we disagree with my learned friend is that it's an absolute prohibition, we say no, it's not, it can't be. And that's that point.

So, that's 8.5 and if the separate provision which I do want to address is step 6, Royal Forest and Bird's very clear position that the avoid directives in 11(a), 16 and 13 and 15(a), so the avoids, the unmitigated avoids bite before any consideration of mitigation or offset or compensation and I've used that, I've just given the phrase from my learned friend's reply submissions "in contrast to the more lenient (b) provisions".

So, your Honours, first of all I've got to start with section 104. 104 directs all the effects of the activity to be taken into account in a consenting decision. And effects include positive and negative. Section 104(1)(ab) directs the decision-maker to take into account or have regard to, not to this from memory: "Any measure proposed or agreed by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may arise from the activity." 104 mandates this be done. Now, 104(ab) came in after the Board's decision and I've dealt with that in a footnote in my submissions to show that it was reflecting the existing law at the time and I've got a case reference there and a reference to the AUP as well, but in the context of what we're talking about now which is the statutory interpretation argument, it would be unlawful for a decision-maker to disregard the offset and mitigation in assessing whether an activity complied with the New Zealand Coastal Policy Statement, be that 11(a) or 11(b). It would also be contrary to section 104D(1)(b), so the second gateway.

WINKELMANN CJ:

Are you sure that's – where's the provision? That seems an unusual outcome.

MS CASEY QC:

The 104D provision?

WINKELMANN CJ:

So – the new amendment?

GLAZEBROOK J:

Can I just have a – can I get it?

MS CASEY QC:

Sorry, I'm going fast.

GLAZEBROOK J:

I was sort of just getting but – I was writing down what you were saying without looking at it and it would certainly help me to –

WINKELMANN CJ:

It's 104(1)(ab)

MS CASEY QC:

(ab).

WINKELMANN CJ:

So you're saying that this – that the section – you're saying that you could never have an absolute prohibition anymore because the section means that you always must be able to consider whether the harm is mitigated?

MS CASEY QC:

Yes, your Honour, and –

WINKELMANN CJ:

So even if it was expressed as a prohibition you would say this means even so –

MS CASEY QC:

Yes.

WINKELMANN CJ:

– the possibility of mitigation…

MS CASEY QC:

Because – and that comes back to the structure of the RMA, your Honour. If the Minister had meant a prohibition and put it into a national environmental standard as a prohibition, that's a regulation. It gets applied by the decision-maker. But –

WINKELMANN CJ:

But wouldn't they just have to have regard to it and if there's already a prohibition in place they wouldn't have regard to it? It's just like you don't – you have to have regard to a national environmental standard but if that standard doesn't apply you don't put it into effect. Wouldn't you take that interpretation of the section?

MS CASEY QC:

I think we're returning to a discussion we had earlier with Justice Williams. The regulations apply as regulations. So the prohibitions that are set as regulations in the rules or in the environmental standard apply as regulations and go down that path. The terms of the policies, if you interpret the New Zealand Coastal Policy Statement as saying you cannot look at mitigation and offset in assessing the activity, my respectful submission is –

GLAZEBROOK J:

There's a slight difference between mitigation and offset though, isn't there, because offset, arguably, says there isn't an effect which is what you're arguing here and which you are saying the Board found because there's sort of a one-to-one – well, you know, the birds move down the road, put it that way. The same birds move down the road to something that was even a bit better than they had before is what you're arguing, is that right?

MS CASEY QC:

Yes, but –

GLAZEBROOK J:

Just to put it in very sort of simplistic terms.

MS CASEY QC:

Very, very loose terms. Now I don't want to go back to that. But in terms of statutory interpretation and interpretation of the New Zealand Coastal Policy Statement, and interpretation of 11(a), the standalone "avoid" as meaning you cannot consider offsets or mitigation would, in my respectful submission, contravene 104 because the decision-maker has to.

WINKELMANN CJ:

Might there be a problem in your argument though because it's not offsets or mitigations? It's offset or compensation and I don't think you'd take your argument so far as compensation, would you?

MS CASEY QC:

Just because it's not relevant to this particular application but the – as an interpretation exercise, it's hard to reconcile an interpretation of a policy statement which would direct that a decision-maker couldn't consider the things that are mandated by Parliament under 104.

WINKELMANN CJ:

So you'd allow, to take our example, rare and indigenous species to be harmed at the population level if there was compensation for it, according to this, according to you? You could possibly on your own interpretation, a decision-maker could do that.

MS CASEY QC:

You could possibly but that's the point of allowing – of Parliament vesting a decision-maker with the decision.

GLAZEBROOK J:

It would be odd to do that, wouldn't it?

MS CASEY QC:

It would be extremely odd to do it, your Honour.

GLAZEBROOK J:

No, no, but I mean it would be odd for Parliament to vest a decision-maker the power to actually disregard clear directives in a hierarchy of documents and –

MS CASEY QC:

I'm – my language has probably not been sufficient for the occasion. It's not disregard, it's not diminish, it's not put to one side. It's the only difference is did the policy make it a directive rule, and the issue I'm trying to address at the moment is my learned friend's interpretation is not only did it make it a directive rule but the policy prohibits consideration of offsets, and just on basic, an interpretation approach, the Minister can't override Parliaments direction that offsetting compensation is taken into account. Now, I don't think it's feasible to say that the decision-maker, in taking that into account would allow a threatened or at risk species to be exterminated, that's a different argument, but it's again, is the Minister able, through his policy, to override 104(ab) and my respectful submission –

GLAZEBROOK J:

But that's the whole point about the policy –because the Minister can do a whole pile of stuff –

MS CASEY QC:

But he can't override Parliament, your Honour.

GLAZEBROOK J:

Well –

MS CASEY QC:

He can direct and be very strong directives and guidance –

GLAZEBROOK J:

I'm sure Parliament didn't think it was actually stopping somebody saying, you can't get rid of the Hector dolphins by putting (ab) to 104.

WILLIAMS J:

It would have to be pretty good compensation.

GLAZEBROOK J:

Yes.

MS CASEY QC:

Your Honour, that –

WINKELMANN CJ:

Anyway, so this is only, it's not your own critical argument anyway, is it?

MS CASEY QC:

No, your Honour.

WINKELMANN CJ:

It's just an additional argument.

MS CASEY QC:

No, your Honour, but – it is, and I think, I keep coming back to the same distinction between –

WILLIAMS J:

Well, it just shows that the consent stage is a different task. And where, and I think it's clear that where Parliament does say you can disregard certain effects, because it does do that, in the RMA, it says so.

MS CASEY QC:

It says so. And as a matter of interpreting the Coastal Policy Statement, in its application to a consent the terms of 104, in my respectful submission, are relevant, as is 104D, so subsection (a) refers to, the first gateway refers to adverse effects, the second gateway refers to the activity, whether the activity is contrary to the policies of and objectives of the relevant instruments and, with respect, that is a broader scope and it would make sense that both the positive and negative and the offset and mitigations are to be taken into account in that assessment. And with respect to your Honour, Justice Winkelmann and the discussion in *TTR* about material harm under 10B, my respectful submission is this is the same issue. I think the phrase that was used, it would have no environmental utility to prohibit or not allow an activity where effects were transitory, offset, mitigated, your Honour, with respect in *TTR*, was saying we have to look at the substance of what the full activity is otherwise we're in a unreal or a unreal world example and, your Honour Justice Glazebrook in the *Sustain Our Sounds* decision at paragraph 145, even in the context of a plan change you refer to the possibility that an activity that is to be avoided might be allowed if conditions, if there were, as in an obvious condition that would address the initial harm and your Honour expressed the view that it would be irrational in terms of the RMA not to allow consideration of that condition even in a planning context. So, I would respectfully adopt –

GLAZEBROOK J:

That means that you would be avoiding the harm. I suppose it's just terminology.

MS CASEY QC:

It is, and that's the issue that I'm addressing in the statutory interpretation approach, is you have to look at the whole activity, that's what the RMA is about.

GLAZEBROOK J:

I have to say, having had another flick through this, I think it was actually suggesting that the approach that was in *King Salmon* in relation to plans actually did filter down to the actual consenting just as an implication from the whole way this is done. Although the issue was whether you could look at conditions that would actually take away the harm which – and that might encompass offsetting as well which I don't think, I don't think we were looking at offsetting here, we were looking at actually conditions that supposedly got rid of the harm altogether.

MS CASEY QC:

In that case you were looking at adaptive management, Ma'am.

GLAZEBROOK J:

Yes. It was all tied up with some more complicated matters at that stage.

WINKELMANN CJ:

Where are we at in your argument, Ms Casey?

MS CASEY QC:

I just want to tie off whether the policy prohibits a decision-maker considering offsets and mitigation. One, for the reasons that I've just discussed, the second is that you obviously have to look at the activity in the round otherwise you're being very artificial, it's just covered. And also, your Honours, it's actually practically, with respect to my friend, absurd because if you put a four-lane highway down without any consideration of its offset and mitigation, it would contravene an awful lot more than policy 11(1)(a). Of course the consenting authority must assess the whole activity as against the policies. It would be – yes, I would imagine that almost every provision of the AUP that was engaged would have a problem with it if you weren't considering that.

So, your Honour, my respectful submission, RFB's logic falls over at a number of points but most critically, of course, if the "avoid" directive is not absolute and that is the core issue.

So if there is any leeway in the New Zealand Coastal Policy Statement and in the AUP for a decision-maker to grant a consent, RFB's logic doesn't stand. Waka Kotahi's position is that it's a strongly rooted directive rather than an absolute rule and the policies in that basis can work together as they were intended to and as they did, respectfully, in *Davidson*.

Your Honours, I do need to note and address an exception that Royal Forest and Bird have included in a footnote to their reply submissions and which I say in my summary is an unexplained exception. So this is referred to in my outline of my arguments heard only – at page 2, footnote 8, of my argument. Outline of my argument, sorry. So I say noting the unexplained "exception" in reply submissions at footnote 25 for the National Grid. With respect, the National Policy Statement on Electricity Transmission contains no "override" to the avoid policies in the NZCPS and, indeed, is expressed in no stronger terms than the enabling provisions in the New Zealand Coastal Policy Statement, objective 6 and policies 6, 7 and 10. And with respect, your Honours, the ecological impact of the footprint of a transmission tower is not significantly different from the impact of a pylon or a pole holding up the viaduct.

Now, your Honour, in my respectful submission, if Royal Forest and Bird consider that some enabling policies can be read as overriding the avoid directive, there does not seem to be a principled or reason basis for enabling policies that are within the NZCPS to do so, and I've also noted in my outline that – my footnote 1 of my outline – that the NPS on Urban Development also strongly supports the current infrastructure proposal and other infrastructure proposals. So there does not seem to be a principle basis to say this infrastructure is okay under policy 11(a) even though it doesn't override it but you can't interpret the NZCPS for any other type of infrastructure.

Your Honours, the next thing that I deal with in my written outline is the submissions on – and these are the core of my written submissions – so say regardless of how the NZCPS or AUP policies interact, avoid is not an

absolute prohibition, and from that I mean it doesn't mean "avoid at all costs", and, your Honours, I've covered that in quite some detail in my written submissions. I'm not sure if it would be a good use of time to revisit those policies, those arguments, here.

WINKELMANN CJ:
Which arguments? They're in your written submissions?

MS CASEY QC:
So I start – if you're just in my outline, your Honours, I talk about *King Salmon* doesn't support the blanket interpretation of this is an absolute rule, and I go through the decision in some depth there.

WINKELMANN CJ:
And we've been going through your steps, haven't you? And this is all in your written submissions?

MS CASEY QC:
Yes. I've touched on all of this. So I don't think I need to take you back. It is covered in quite some depth there, except for one thing that I do need to take you to and this is going back to does the NZCPS directly bite in a consenting context. I'm sorry, I should have taken you to this earlier. So if I could take you to page 28 of my written submissions and it's just paragraph 6.6 and this is the Regulatory Impact Statement to the New Zealand Coastal Policy, and I've just – this follows from a discussion from *Davidson* and, so the regulatory impact statement is discussing what is the cost benefit analysis basically for this Coastal Policy Statement. And it says: "The essential caveat concerning this analysis is that the NZCPS does not directly regulate activities under the RMA but guides the management and regulation of those activities by local authorities. The impact of the CPS, therefore, depends on how local authorities give effect to it, particularly in policy statements and plans," so that's language: "plan provisions will vary according to the nature and scale of the coastal management issues for different regions. The impact on decision-making on resource consents and other relevant approvals will also

vary from case to case depending on the weight the decision-makers give to the NZCPS relative to other matters that they might have regard to." And that's just to say that it was the understanding and intention of the role of the NZCPS itself at the time it was promulgated.

My written submissions then just go through what does the weight of a policy like that require from the Board and that's where I refer to the *TTR* decision.

So, your Honours, I'm happy to take the rest of my written submissions as read on what are the key points for Waka Kotahi in this appeal because I think I've discussed most of the points with you in passing.

Which gets us to the discussion of your Honours, still in my actual full written submissions, I then address at paragraph 6.13 my learned friend Mr Enright's challenge to Justice Powell's finding about the truncated assessment of the NZCPS and your Honours, the primary response of Waka Kotahi here is that Justice Powell undertook a very detailed analysis of the Board's decision and considered that that error just didn't happen and we respectfully adopt that analysis and that approach and my learned friend didn't actually direct any criticism to Justice Powell's point. He concludes around paragraph 86, and this is all footnoted: "By any measure the Board took full account of the objectives and policies of the NZCPS."

Then that gets me to, over the page at 107, which is the section 104D gateway. Your Honours, again, my written submissions are reasonably fulsome on this. Basically I say, take the Court back to the beginning of the gateway provision when the RMA was first enacted and the gateway provision was in very similar terms and the definition of non-complying activities, I'm at the bottom of my page 31: "The definition of non-complying activities in the Act, at the time the gateway test was enacted was," over the page: "means an activity which contravenes a plan –

GLAZEBROOK J:
Can I just check where you are again?

MS CASEY QC:

I'm in paragraph 7.4 of my written submissions.

GLAZEBROOK J:

Thank you.

MS CASEY QC:

"The definition of non-complying activity was means an activity which contravenes a plan but is not a prohibited activity." So, your Honour, respectfully, the one thing you can't read into 104, the second gateway in 104D is if it contravenes a provision of a plan or a policy, it fails the gateway. The gateway was designed for exactly those activities. So, as I've said, the Randerson Review, which brings in our RMA talks about this as being analogous to the specified departure regime. At 7.7 I set out, we went to some trouble to find a leading text under the old regime, so we could give you the appropriate approach under the old regime, but then over the page it at 7.8 I refer to the Randerson Review saying that's all well and good but we actually want under out gateway test, to make consents for non-complying activities more readily available. So it's not supposed to be a tight gateway, it's supposed to be quite a broad gateway, and the concept of "contrary" can't mean it contravenes and, as *New Zealand Rail v Marlborough District Court* [1994] NZRMA 70 says, "opposed in nature", "different or opposite", "repugnant to", or "antagonistic", which is the sense of 104D, and –

WILLIAMS J:

That consistency point is really what does carry on directly from the old specified departure, which is "this isn't going to threaten the integrity of the plan".

MS CASEY QC:

Yes. And it's designed for unique proposals like this.

WILLIAMS J:

Yes, something they didn't think of.

MS CASEY QC:

Something they didn't think of, and the Randerson Review which, in the footnotes and the more extensive references, talk about the need for flexibility and responsibility to stop the new process, the new regime, become rigid and rule-bound, it wanted to expand the ability to have non-complying activities consented, and appropriate case.

WILLIAMS J:

Yes. Now it's rule, policy and objective-bound.

MS CASEY QC:

Yes, different issue.

So, your Honour, respectfully, *Dye*, which I refer to there, have been the standard leading authorities from the Court of Appeal for now nearly 20 years and in my respectful submission are still good law and, with respect to Forest and Bird, as I understand their argument, they don't really challenge that approach but they say, ah, but you must interpret. If you interpret "avoid" as being "prohibit" and you're contrary to a prohibit, then you can't get through the 104D gateway, 104D(b) gateway. The logic there is sound, to that extent, except for this: it's not an interpretation of 104D(b), it makes 104D(b) totally redundant. The only way an activity that infringes on their basis can get through the gateway is under (a), if it's got minor effects. So (b) becomes otiose, is also –

WINKELMANN CJ:

In this particular situation.

MS CASEY QC:

Not in every situation.

WINKELMANN CJ:

Not in every situation, just in this particular situation?

MS CASEY QC:

No, no, in every situation. If the avoids are rule-prohibiting…

WINKELMANN CJ:

Only in avoid situation.

MS CASEY QC:

Oh, yes, absolutely, and I understand their argument is to be limited to the avoid situation. But if the argument is intended to be broader and that any contravention of a plan provision means you can't get through the 104D gateway, then we are in contest because *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA) and *Dye* and *New Zealand Rail* are absolutely contrary to that approach. Both of those cases talk about if we can find a pathway or a narrow window or a sliver, you can come through, which reflects the gatekeeping nature rather than the substance of 104D and, in any event your Honours, if Royal Forest and Bird's assessment is correct you don't need 104D anyway because, as my learned friend said, you can't lawfully consent this under 104, so the gateway itself is redundant.

So, your Honour, then I'll move to the alleged errors, population versus habitat. My submissions there take you in some detail to the Board, the point is that the alleged error just didn't occur, the Board considered not only population level, it also considered at location level and at various scales of the inlet and the wider harbour, so it just didn't, the alleged error isn't borne out on the Board's decision, and I've just stepped through those.

Your Honours, I should now, having promised to do so earlier and made a number of references to it, the more specific challenges that Royal Forest and Bird put in its reply submissions, which we understand to be reflecting the errors that Royal Forest and Bird said were not addressed by Justice Powell. So that's where I'd like to briefly go to the table of Waka Kotahi's response to Royal Forest and Bird's reply submissions.

This is reference heavy, and that's the reason why we thought it would be appropriate to give this to you in written form, and I will step through quite fast. So the RFB references are to the reply submissions and there's an alleged error in relation to the impact on species and the response is that the partial quote in the submissions doesn't accurately convey the Board's assessment but, more importantly, what my learned friend says is the imposition of an unlawful threshold is just a weighting imbalance discussion by the Board. It's assessing the evidence and going: "We assess this evidence and we think this effect is this." They don't, on the face of the – or either in form or substance, put, impose an artificial threshold. The Board clearly understands what the policy requires is my respectful submission, and I note the Board was entitled and indeed required to consider alternative habitats in the consideration of species effect under the policy D9.3(12) and then I've just set out extensive references to the Board's conclusions on the impact on species by loss of habitat.

Then in the second address is the criticisms of the Board's approach to loss of habitat per se. Again the partial quote, with respect, doesn't convey the Board's assessment and this was just an assessment of fact and weighting, and for the reasons that I've already canvassed in relation to the Coastal Policy Statement, D9.3(a) is not engaged. The impact of habitat is not so sufficient that it's affecting the species, so we're down into D, (9), (10), which is the avoid, mitigate, remedy, more lenient policy, my learned friend would say, and I've just given some of the more specific conclusions on habitat then but the conclusions above on species apply also.

Then we get into the allegation that D9.3(9)(b), that there is regular and sustained disturbance of roosting, nesting and feeding areas. Now I've set out the full of D9.3(b) in the table so that I don't need to take you to it. So regular and sustained disturbance of these areas such that it is likely to noticeably reduce the level of use of areas for these purposes. And I note Royal Forest and Bird say that the Board made findings to this effect. With respect, the reference they've given is not to findings to that effect. As I say, it was a reference to an expert who said there is potential for disturbance by

people and activities beyond the current shoreline. It's not a finding of disturbance at a level that would engage 9.3(9)(b) and I've actually referred to that evidence already, and the Board is making – it's not imposing a threshold. It doesn't put in a qualifier. It's making an assessment of fact or weight, and I note here – this is that point I took your Honours to earlier – disturbance due to public access actually has got some conflicting policies in both the AUP and the NZCPS because of the priority given to public access. So it was never going to be a straight application of 9.3(9)(b) anyway.

Your Honours, then I turn to the alleged errors in relation to Ann's Creek and here I note that Royal Forest and Bird are referring to expert evidence before the mitigation and offset. That was evolved and developed through the hearing and that was that conference, workshopping and conferences of experts that I've talked about and the Board pays a lot of attention to, and in response to my promise earlier I think to Justice Glazebrook I've set out the whole process through the Board's decision of progressing, noting that the strength and conditions, confirming that the concerns were adequately addressed and concluding that the adverse effects were mitigated or offset, and then I refer to also a more detailed discussion of expert views and conclusions and the key conclusions there.

5 is the argument that mitigation and offset can't be taken into account and I've canvassed that fully.

WINKELMANN CJ:
We'll just have to note there that that section 104(1)(ab) was not in force at the time. That's just your sort of analogy type point.

MS CASEY QC:
Yes, your Honour, and I address that in my written submissions as well that 104(ab) reflects the current state of the law prior to the amendment, but also there's a provision in the AUP to the same effect. But my point was in any event a broad statutory interpretation point there.

I address very briefly the *Edwards v Bairstow* error in concluding that – the conclusion on Ann's Creek with just a reference back to the evidence that the Board actually referred to. A reference, an allegation that the Board failed to consider D9.3(11), that D9.3(11) is just a more general catch of matters that had already been considered. I note that that those protective values had already been discussed and I'll give you a reference back to the authorities to say that the Board doesn't need to refer to every provision it takes into account.

And the last one that I want to address is the Royal Forest and Bird claim that the Board was wrong to say reclamation policy F2.2.3(2) is not trumped by D(9) and D(10), and the reliance here on the consent order, my learned friend took you to that in some detail.

Your Honour, with respect, my learned friend took you to paragraph 20 of Justice Whata's decision and said: "Well, this is what those consent orders were supposed to do." Paragraph 20 is a statement of Royal Forest and Bird's concerns and what it wanted those consent orders to do. My learned friend then said: "Well, maybe the cross-reference, which is only – I should say, sorry, what was inserted into F2.2.3(2), as I've said in the response, was: "Where reclamation or drainage is proposed that affects an overlay, manage effects in accordance with the overlay policies."

And my learned friend yesterday said: "Well, maybe that wasn't as clear as the parties wanted it to be." With respect, your Honours, an agreement on such a nuanced matter as this is actually more likely to reflect the nuances that the parties agreed to, and it isn't appropriate to read those words as saying "subject to D9.3(9) and (10), particularly as there are other provisions in the agreement which are much more specific with their reference to D(9) and (10), and particularly, as my learned friend pointed out, Auckland Council was party to this, Waka Kotahi was party to this. It is not a fair inference that Waka Kotahi and the Auckland Council, contrary to their proposals, would be agreeing words that would make it unlawful to consent either this or major infrastructure, or any major infrastructure in the Auckland isthmus that

engaged with the coastal environment. So, with respect, I don't think it's a fair interpretation of the consent order that the parties agreed or the Court ordered that F2.2.3(2) is trumped by D9.3(9) and (10). Then, your Honours, in the –

WINKELMANN CJ:
Subject to what "avoid" means, of course, because if "avoid" has a more capacious meaning, as you submit it does, then it wouldn't make the, wouldn't necessarily make everything unlawful, would it, unconsentable?

MS CASEY QC:
Yes. And the reference to "manage" in the proviso is actually quite important because "manage" is usually taken to mean the broad management of effect through avoiding, remedy, mitigating, but it does beg the question of what does "avoid" mean? So I note that the proposed interpretation would conflict with the RPS objectives…

GLAZEBROOK J:
Sorry?

MS CASEY QC:
So I'm halfway down my response here, so…

GLAZEBROOK J:
Oh, sorry, okay.

MS CASEY QC:
Yes, so I'm still there. And I refer you specifically to the objectives in B3.5 and B7.7 and I would like to take you to those, because an interpretation that conflicts with clear policies and objectives is, respectfully, unlikely to be correct. So, B3.5 wasn't put in Royal Forest and Bird's excerpt, so it's actually at tab 65 of the joint bundle, and there should be in the index, you should be able to just link into B3, I'm hoping.

WILLIAMS J:

So my system has managed to close down my, you know, the lovely tidy little contents page that I can just hyperlink to, and I'm too afraid to close things down and start again. So can you just – I've got the non-content page version…

MS CASEY QC:

So could you go to tab 65?

WILLIAMS J:

I don't have tab numbers though. But can you give me a name I can work with?

MS CASEY QC:

Yes. The name that you should – should be "Auckland Unitary Plan (additional excerpts)".

WINKELMANN CJ:

Is this the document *Ngā pūnaha hanganga kawekawe*…? Is it that?

MS CASEY QC:

No.

ELLEN FRANCE J:

"Infrastructure, transport and energy".

MS CASEY QC:

Yes, yes, it is.

WINKELMANN CJ:

It is "Infrastructure: Transport and Energy".

WILLIAMS J:

What is it? B3, is it?

MS CASEY QC:
B3.5.

WILLIAMS J:
Yes, "Infrastructure transport and" – yes.

MS CASEY QC:
So if I can take you down to B3.5, and my learned friend, Mr Lanning, will take you to more details of the actual policies, but this is the – 3.5 gives an example of the AUP strongly –

GLAZEBROOK J:
You might, just for the record, the transcript, it won't…

MS CASEY QC:
Technology. So B3.5 talks about the reasons for the adoptions of the policies and you've seen some of these policies and my learned friend, Mr Lanning, will take you to more, but this is for the AUP saying: "Infrastructure is an essential foundation for almost all other activities." "Critical to enable people and communities to undertake the activities that provide for their economic and social well-being." So if you want to get a strong word to counter "avoid" I think we're getting close.

The second paragraph though is an explicit recognition in the AUP that "infrastructure can have adverse effects on the environment, including on sites and areas specifically identified for their high values as well as on neighbouring activities." So the AUP is contemplating that infrastructure may happen in a site of high significant value. So an interpretation of F2.2.3 that contradicts that, in my respectful submission, would not be sound.

WINKELMANN CJ:
So your best statement of that is "conflicts or incompatibilities between adjoining land uses need to be avoided as far as practicable" – sorry, no. "Managing the reciprocal effects…on more sensitive areas and uses" –

MS CASEY QC:

No. That's to do with incompatibilities.

WINKELMANN CJ:

Yes.

MS CASEY QC:

But –

WILLIAMS J:

You have to get over the "must" line.

WINKELMANN CJ:

It's the line above it.

WILLIAMS J:

That you have to get your proposal over the "must" line. That's what you say would be the sliver.

MS CASEY QC:

Yes, your Honour, and I've realised I didn't take you to the references on "no practicable alternative".

WILLIAMS J:

I was going to remind you.

MS CASEY QC:

Thank you. Yes, absolutely. So it's the "managing the reciprocal effects of infrastructure on more sensitive areas and uses" is the point I wanted to emphasise is that the – yes.

WINKELMANN CJ:

Yes. That's the sentence I meant to refer to.

MS CASEY QC:

And then it goes on, the next paragraph: "Infrastructure must keep pace with the activities and development it serves." The road network, the location of many – raises particular issues. So the policy is doing the best it can in enabling words to say "this is really important". So there's that policy which, in my respectful submission, needs to be taken into account in the interpretation of F2.2.2(3)(ii), and the other one is in B7.7 which I won't take you to but that contemplates a more nuanced approach to – actually, no, I should take you to that, sorry, your Honours. It's an important point.

So this is in tab 64. Justice Williams, that's the other Auckland Unitary Plan, so "Auckland Unitary Plan excerpts", should be –

WILLIAMS J:

So what I've got is AUP B3, B6, B8, C, E1, E15, E18, IHP.

MS CASEY QC:

No. It's the earlier – the whole – Royal Forest and Bird put in the asset of excerpts which is at tab 64. So that's where we need to go back to.

WINKELMANN CJ:

What's the document you're taking us to?

GLAZEBROOK J:

Tab 64, the Unitary Plan, but it –

MS CASEY QC:

Tab 64, and this one has got page numbers. So could I ask you to go to page 615. 615, your Honours, just because we were going to be in here, is the map of the coastal waters that have been degraded because I refer to that earlier and you'll see the Māngere Inlet where this proposal lives is as far to the right as you can get on the Māngere Harbour and is in dark blue, being the most degraded. But then I want to take you to page 617. Again, explanation of principal reasons for adoption, and this is the indigenous biodiversity

discussion, and it talks about the importance of threatened ecosystems and systems requiring effective management. Sorry, I am about three paragraphs down. The concept is effective management.

GLAZEBROOK J:
Sorry, I think I've lost you.

MS CASEY QC:
So we're in paragraph B7.7. Page 617. So the policy here talks about requiring effective management. It doesn't say, avoid any adverse effects on these systems because they are so vital we cannot allow any adverse effects. It says, we need effective management. It talks about the overlays.

WINKELMANN CJ:
To protect them.

MS CASEY QC:
To protect them, yes, but protecting the systems is not the same as avoiding any harm to a part of the system. If the harm is such that there is, it's a broader scope than no adverse impact at all, and that, I think your Honours, becomes clearer when we go to 618.

WINKELMANN CJ:
What can be said against you is this is just general words. These are just general words, aren't they, they're not dealing with a specific situation, and then you have specific protections.

MS CASEY QC:
Well, your Honour, they are no less general, being the New Zealand Coastal Policy Statement, in fact, more so because this is the AUP trying to land those policies into the Auckland environment where infrastructure is very important, and other values are very important, and the key thing, your Honour, that I need to take you to, as relevant to the interpretation of F2.2.3, how many twos are in there, is the next page. So page 618. "The objectives and policies…"

F2 itself, "… seek to promote the protection of significant vegetation and fauna and the maintenance of indigenous biodiversity by…" and then the fifth dot point down: "Establishing a management approach which seeks to avoid adverse effects on or degradation of significant indigenous biodiversity and requires that, where adverse effects do arise from activities, they are remedied, mitigated or offset."

And, with respect, that is exactly consistent with an approaoch under Chapters E and F that allow a sliver or a narrow window for appropriate projects.

WINKELMANN CJ:
So what paragraph is that last one?

MS CASEY QC:
That was the paragraph at the top of page 618, and it was the fifth dot point and, your Honour, the final thing that I wish to take you to in this document is that this interpretation of D9 and 10 being trumped, sorry, trumping F2, would actually be contrary and defeat the rule that the Auckland Unitary Plan proposed. So can I take you to, please, on this document, page 791, which is the rules. We're in Chapter F now, which is the "Coastal – General Coastal Marine Zone", and 791 should start with F2.19. So these are the rules, these are the actual rules. This is where the plan lands and says, this activity is prohibited or not, and (1) talks about saying what we're doing. (1)(a) refers to the overlay, so the plan makers know the context that they're in, and then your Honours if you go over the page on 792, "Activity Table – Drainage, reclamation and declamation."

Now can we look please at this SEA-M1 zone and the outstanding natural character column. SEA-M1 is the more vulnerable of the SEAs, and it says: "Reclamation or drainage not otherwise provided for" is prohibited. (A3): "Minor reclamation for the purpose of maintaining, repairing or upgrading a lawful reclamation," is discretionary. And: "Reclamation or drainage for any of the following," is, and it starts what's very familiar with the policies all the way

through, “where it is required for the safe and efficient operation or construction of infrastructure: or where it is necessary to provide for safe public access to,” and it’s non-complying.

WINKELMANN CJ:
What does “NC” stand for?

MS CASEY QC:
Non-complying. So “Pr” is prohibited. “P” is permitted. Discretionary and restricted discretionary are obvious. So your Honours if F2.2.3 was meant to be read as subject to D9 and D10, this rule would be wrong.

GLAZEBROOK J:
Why?

MS CASEY QC:
Because it would need to say either with no, and have no more than minor effects, and it doesn’t, and it clearly doesn’t contemplate –

GLAZEBROOK J:
Where would it need to say that?

MS CASEY QC:
In (A4).

WILLIAMS J:
Why would it need to say “have no more than minor effect”?

MS CASEY QC:
Well if the argument is that D9 and D10, D9.9 and D9.10 directly apply so that only infrastructure with no more than minor effects is, can be lawfully consented, it should appear in this rule.

WILLIAM YOUNG J:

Your point is the drafting of this rule presupposes your interpretation of the Coastal Policy Statement.

MS CASEY QC:

And part –

GLAZEBROOK J:

I can't quite see why that's the case though because they're looking at activities, some of which may have no effect at all, or some of which could have an offsetting effect. I can't see why it would be contrary to the rule and why you'd need something specific in it, that's all.

MS CASEY QC:

Well the argument that Royal Forest and Bird are making to you in this context of you have to interpret F2 as being specifically subject to D9.3(10) so that any infrastructure that doesn't avoid more than minor effects in the CMA has to be prohibited. I'm saying it's an incorrect interpretation of the AUP because this rule says to the contrary. It does, it says –

GLAZEBROOK J:

I can't see that it says to the contrary, so can you just explain why it says to the contrary?

MS CASEY QC:

Because (A3) deals with minor reclamations, so the rule drafter knows when they're talking about minor reclamations. (A4) doesn't have the qualification of "minor".

WILLIAMS J:

But that's inherent in the non-complying activity status.

MS CASEY QC:

Yes your Honour.

WILLIAMS J:

But you see so that's why that's probably not inconsistent because as section 104D says, in order to get through the gateway you've got to be either consistent or minor.

MS CASEY QC:

Yes.

GLAZEBROOK J:

But a minor reclamation can be different from an adverse effect though, can't it? What are they talking about in terms of minor? You could reclaim the whole of the inlet, and if it has a minor effect, I don't think so. I think they're talking about just filling in a small amount of – well I don't know. Do you say "minor" means minor effect or a small reclamation?

MS CASEY QC:

I meant a small reclamation.

GLAZEBROOK J:

Well that's what I would have thought, which could have a huge effect.

MS CASEY QC:

It could, and that's why it's discretionary, not permitted. But –

WILLIAM YOUNG J:

Can I put it another – if the New Zealand Coastal Policy Statement should be construed, as Forest and Bird say, you would expect (A4) to be prohibited unless effects are minor?

MS CASEY QC:

Yes your Honour, so my point in terms of Royal Forest and Bird's argument that you can read that restriction in because of these other policies, F2.2.3, they're saying no you can't because F2.2.2.3 sits alongside this, which doesn't say that, and as your Honour expressed earlier, and I've put in my outline, a

major reclamation in an SEA-M1, which is what we're dealing with on this column, could never have more than minor effects, because it's a reclamation.

WINKELMANN CJ:
This is all subject, of course, to it all being interpreted consistently with the NZCPS and what that means.

MS CASEY QC:
And my learned friend would say that if this rule permits a major, allows a consent to be possibly lawfully consented, which it says it does in an SEA-M1, which it says it does, my learned friend would say this rule also is unlawful. I accept that.

WILLIAMS J:
Well, there are two gateways through what Royal Forest and Bird's interpretation does, and only does, is lop off the inconsistency path because the non-complying activity, by definition, must have minor effects.

MS CASEY QC:
But, and by definition a reclamation in an SEA-M1, can't.

WILLIAMS J:
Yes, well…

MS CASEY QC:
So it is a contradiction. An infrastructure reclamation of the kind contemplated in (A4) –

WILLIAMS J:
Well you see the problem is that the policies are about effects, so the two paths in, in this context of D(9) and (10), are referring to the same matter, which is effects. 104D says the effects cannot be any more than minor, and D(9) and (10) say the effects cannot be any more than minor too.

WINKELMANN CJ:

As well.

WILLIAMS J:

Too and as well. So in the end it's the same pathway through.

MS CASEY QC:

Yes your Honour. The point I was trying to make with the reference to this rule is not, is to say if there's an argument about what does the AUP policy mean, have a look at this rule, and this rule is dealing with major reclamation in an SEA-M1. So in vulnerable area, and allowing that it may be able to be lawfully consented, and we know, as a matter of definition, it can't have more than just minor effects, because it's a major reclamation in a SEA-M1.

WINKELMANN CJ:

Ms Casey, it's 4.06. How much longer are you going to be, because you're nearly finished aren't you?

MS CASEY QC:

Sorry, I am very nearly finished. In fact what I want to do, with the accommodation of the Court, is run through briefly the submissions on the no practicable alternative route.

WINKELMANN CJ:

I'm feeling that we're all a bit tired, and we should adjourn, and perhaps maybe we should start at 9.30. We've had a lot of information fed to us, you've had to face a lot of questions today.

MS CASEY QC:

I'm conscious I've got so many different topics that are interweaving. I'm in the Court's hands. I would probably be 10 to 15 minutes, but I'm very happy to return tomorrow.

WINKELMANN CJ:

We'll start at 9.45 tomorrow, and we should be finished by lunch, one assumes.

MS CASEY QC:

I would estimate so. Auckland Council was anticipating an hour and my friend Mr Majurey, I think, was thinking half an hour to 45 minutes, and then reply.

WINKELMANN CJ:

Was that someone wanting to say something on the screen? No?

WILLIAMS J:

Well it maybe that given the discussion that we've had about policies and so forth, that Mr Lanning is going to take us through some of that in the AUP, that may mean either you've covered ground and therefore will need less time from him, or it may mean that we're going to deep-dive, in which case it may be a little more than an hour.

MS CASEY QC:

We had briefly discussed that I would do some of the work on the F2 policy, but I think he will put it in a broader context as well. But I'd certainly finish my section on the AUP.

WINKELMANN CJ:

We'll adjourn now and we'll come back at 9.45 am.

COURT ADJOURNS: 4.09 PM

COURT RESUMES ON THURSDAY 18 NOVEMBER 2021 AT 9.50 AM

MS CASEY QC:

May it please the Court. Regrettably, I'm starting the session again with the correction of a couple of errors from the last session.

WINKELMANN CJ:

Well, it's not surprising given how many questions you had to field on the hoof, so…

MS CASEY QC:

I appreciate the indulgence, Ma'am. So the two questions that I answered incorrectly related to questions from your Honour, Justice Glazebrook. The first was in connection with the mitigation bucket and, your Honour, we had an exchange about what was in that bucket. It's the integrated ecosystem approach to mitigation and offset, and you asked me a question and I said yes, it's just the values at issue in this proceeding.

GLAZEBROOK J:

The, sorry?

MS CASEY QC:

Just the values at issue in this proceeding. Just the birds and the vegetation. What I, of course, overlooked were all the other ecological issues that are not at issue in this proceeding. So in the bucket we would also have consideration of mitigation and offsets relating to the lizards, relating to freshwater issues and relating to coastal issues. So fish, molluscs, eels and the like. It is a standard integrated ecosystem approach and I overlooked that it included other aspects.

WILLIAMS J:

But you're not saying, are you, I took you not to be saying, that if you save the lizards you can ruin the homes of the birds?

MS CASEY QC:

No.

WILLIAMS J:

That was your key point, was it?

MS CASEY QC:

That was the key point.

GLAZEBROOK J:

And that was the point of the question, not a –

MS CASEY QC:

Yes, but I realised I'd given an inaccurate answer on the facts, so – and the second is the vexed question of the number of piers in Ann's Creek East which has been worked on –

WILLIAMS J:

Did you do a pier review?

MS CASEY QC:

It's been worked on overnight, thank you.

WINKELMANN CJ:

Are they piers? They can't be piers. Just must be pylons or poles.

MS CASEY QC:

Pylons. So the pylons have been peer reviewed overnight, your Honour. So the hand-up that we gave you yesterday on the reclamation referred to 21 pylons in Ann's Creek CMA. So that was the coastal marine area. But when I responded to a question from the Court yesterday I extended that answer: "Well, that's all the pylons in Ann's Creek total," but the hand-up wasn't covering the terrestrial – so the Ann's Creek East vegetation area. So there are additional pylons in the Ann's Creek vegetation area. Yesterday I advised that that number was five. I understand that that's a number that

was in an earlier design and when the viaduct, the route of the viaduct was changed to be at the northern and less pristine side of the Ann's Creek East area, the number of pylons has considerably increased and it is now at 16.

But I do have a better answer, I think, for the core of your Honour's question which is what proportion of Ann's Creek East vegetation area is affected and that is discussed in the brief of evidence of Dr Myers, and I'll just give you the document reference and then a brief summary. So that's at 304.01644 and the discussion starts at paragraph 8.11, and in summary, your Honours, Dr Myer talks about how the structures avoid the southern and central sections of the creek with the more pristine lava flows and intact areas of natural lava shrublands and she talks about the exclusion plan delineating the highest value areas to guide the location of the piers even in what she refers to as the more modified part containing weed species, native planting, areas of fill, but it's still got the exclusion plan, and she says even with that, with the pylons and the shading, the adverse effect of the viaducts will affect approximately 18, 1-8%, of the vegetation communities in that area.

I just want to put a note of caution, your Honour. You will then see in her brief that Dr Myers talks about the impact of the construction area and she talks that will result in a loss, temporary loss of about 16% of the vegetation communities. This is again where we've got to be very clear with the facts of the case. This is discussed in detail in the Board decision. That construction area was already consented by the Environment Court for the owner, the TG Group, to completely destroy and convert into a truck parking lot. So –

WILLIAMS J:
When was that?

MS CASEY QC:
I don't have the date of, it was a pre-existing consent before this project was considered by the Board.

WILLIAMS J:
But was it a live consent?

MS CASEY QC:
Yes.

WILLIAMS J:
So it was within the two years?

MS CASEY QC:
I assume – yes if that's the period of live, the Board discusses it in a lot of detail so the NZTA proposal was actually a better response to that area because while it would be used as a construction area NZTA through its designation then committed to rehabilitate the area and manage it for 10 years and there's a, the Board canvases this interesting debate whether it was appropriate and lawful for the NZTA to use its designation powers under the notice of requirement to – for a mitigation purpose as opposed to a purpose of just immediate use of the road and the debate was NZTA wanting to use a longer period of designation to ensure that the mitigation took place in that the rehabilitation was effective and the Board decided that 10 years was fine and they didn't need to give the full period that NZTA had asked for. And my point of going into that in detail is partly to alert your Honour if you go and see that brief and you'll see that there's a reference to a total of 35%, that's, you have to divide the two off. But it's also –

GLAZEBROOK J:
The 18% and 16%, is the 16% cumulative on the 18%, is that the –

MS CASEY QC:
Yes.

GLAZEBROOK J:
But it's temporary so you would argue that would be, come within a void?

MS CASEY QC:

Well it's more than temporary, it's better than a status quo because a status quo, that 16% was going to be turned into a truck parking lot.

WILLIAMS J:

Well better than a potential status quo?

MS CASEY QC:

Yes. So –

GLAZEBROOK J:

Well whatever the answer is –

MS CASEY QC:

They are different aspects.

GLAZEBROOK J:

But so the 18% is, and that is total loss presumably?

MS CASEY QC:

No, no, no not at all, that's that shading of rain, that's the total area that is impacted by the structure, so the viaduct's that provide a, provide, that sounds a positive, give a rain shade and a sunshade over areas which can, of course, affect plants so that's total area. It's certainly not loss.

WINKELMANN CJ:

Well isn't harm, is it harm, it's not loss, why is it 18%, what's at 18%, can you say what the 18% is then?

MS CASEY QC:

Of the total area of the Ann's Creek east.

GLAZEBROOK J:

So it's partly pylons where it would be totally lost obviously?

MS CASEY QC:

Yes.

GLAZEBROOK J:

So the, however many pylons?

MS CASEY QC:

Sixteen?

GLAZEBROOK J:

Yes I think I've got that down somewhere, oh, no I didn't, oh, yes I have, and of the 18% how much is the actual total loss, you don't know?

MS CASEY QC:

I don't know.

GLAZEBROOK J:

I don't think it's actually in the leaflet –

MS CASEY QC:

But I understand it's interesting to try and lock that down, I'm sorry I don't know that and I actually don't think the final design has been put in place yet.

GLAZEBROOK J:

I think you were going to say what the offset was because I understand with the 16 in the truck part but you were going to say what the offset was in relation to the 18% in terms of vegetation?

MS CASEY QC:

That's been, that's covering in our written submissions, we'll summarise the offset in mitigation for Ann's Creek as summarised in our written submissions with references at paragraphs 3.31 and 3.32.

GLAZEBROOK J:

I think that I was really just asking you to deal with the criticism of the appellant in respect of that being in relation to birds but not in relation to the vegetation?

MS CASEY QC:

Oh, I see. No the, so the main, what is covered is and this is the sort of the complexity of a project like this is there is minimisation, mitigation and offset involved which is directly to the values in Ann's Creek so I referred before to the exclusion plans which even in the modified area are going to ensure that the piers are not put on high value areas, they're going to placed in the right place and I made a reference before to every rock and piece of lava shrubland having been mapped to the nth degree to ensure that. So when we talk about loss from the piers we're not plonking the piers just down.

GLAZEBROOK J:

I understand.

MS CASEY QC:

So there's – the other – I don't – we talked yesterday about whether the Court would like a full list of the mitigations relating to Ann's Creek. They're in –

GLAZEBROOK J:

My question was really just on that specific criticism that was made in respect of the offset not doing anything about vegetation. So –

MS CASEY QC:

So the references I've got in paragraph 3.3(2) are the high level ones. They include creation of replacement, raupo wetlands which is one of the affected values in the south-western corner of Ann's Creek reserve wetland. They include a salt marsh creation and enhancement along the coastal foreshore and in the Ann's Creek estuary.

GLAZEBROOK J:

So the answer to the question is if we look at those that will give us the…

MS CASEY QC:

Yes.

GLAZEBROOK J:

Okay, that's all then.

MS CASEY QC:

And also there's a much more extensive list in the conditions in volume 3. So yes, not just birds but definitely – and, your Honours, I suppose that's part of where I want to step back to and say a 12-week hearing with 109 experts workshopping and giving evidence and being cross-examined, and a Board of this standing and status facing a task like this, the criticisms of my learned friend to say, well, they just didn't do that or they just didn't consider that when Royal Forest and Bird weren't actually at the hearing as, with respect, needs to be taken with a lot of caution – I'm sorry, there's…

WINKELMANN CJ:

No, you're not doing anything, Ms Casey. I'm just wondering what's happening to the sound system. Someone on screen has not got their mic muted. Someone may have just inadvertently unmuted themselves on screen. Can you just check that? Thank you, carry on.

MS CASEY QC:

And the second point that I want to make with that is, for example, the point we've just discussed about the construction zone in Ann's Creek East, these are just illustrations of the complexity of a project of this scale and in my respectful submission it's important to bear in mind the real significance of the decisions and the expert views that are made on the ground responding to the situation and the specifics of the project. So when the Court is considering is it appropriate to view this regime as one where we should have a top-down absolute direction from the Minister set in general terms in 2010 being the

deciding factor in a project or whether we should allow an expert board working with panels of committed experts who are making an on the ground analysis of the actual facts to make the assessment. That seems to be the regime debate that we're having in this case and my respectful submission is that the latter is what the RMA is supposed to do and it is, of course, a much better system for delivering the outcomes that the RMA was intended to deliver.

So the aspect that I wanted to address this morning is, Justice Williams, your question on did the Board separately consider and make it a separate decision on whether there was no practicable alternative. Your Honours, I understand exactly the question is section 171 requires the Board to be satisfied that Waka Kotahi gave appropriate consideration to alternative routes but policy F2 and the rules relating to reclamation require the Board to be satisfied that there is no practicable alternative.

WILLIAMS J:
Sorry, who has to be satisfied under 171 do you say?

MS CASEY QC:
The Board has to be satisfied that Waka Kotahi undertook the right process.

WILLIAMS J:
Right, yes. So in both cases it's the Board?

MS CASEY QC:
In both cases it's the Board but I understood your question yesterday and the key question you were asking was whether the Board understood and itself made the right assessment under policy and rules in Chapter F that there was in fact no practicable alternative. So not whether Waka Kotahi had done enough work but the Board itself had to have a view, and I said I would take you through the references in the Board decision.

So that decision, if we could go to the Board decision which is at 316.03965 and I'd like to start at paragraph 233 which is – I must acknowledge that the Board's discussion is in this and in many topics, as you'd expect given the scale and speed of their processes, the Board's discussion is a bit diffuse on this, so I'm going to have to take you through a number of paragraphs to show the logic and to show how they got to where they got to.

So at paragraph 233 of the Board's decision, this is their overview section, and the Board is talking about "the proposal is a complex one. Application of the relevant provisions of the RMA is no easy task." "Weighing and balancing…is challenging." And then in the middle of that paragraph it says: "Had NZTA been able to design and East West Link route or corridor that avoided severance of Onehunga from the Manukau foreshore, and in particular avoided reclamations, the Board's task would have been easier. However, given the nature of the area to be served by the Proposal…and in particular, given the need to find a transport solution that is both effective and enduring, the wish just expressed is probably forlorn," and that's where the Board introduces the two key concepts to the "no practicable alternative" assessment. One is that this link needs to be in this location. It needs to be running between 20 and 1 and it needs to be in the Onehunga industrial area because that's its purpose is to serve that freight and high congestion space, so that –

WILLIAMS J:
Yes, I'm not talking about the need for the link itself or even the need for it to be there. It's the alignment.

MS CASEY QC:
Yes, but the alignment of the – where it has to be is the first step of the alignment and then does it have to be exactly where it is?

WILLIAMS J:
Sure, sure, yes.

MS CASEY QC:

And the second concept that the Board is touching on here which is critical to its assessment is the enduring solution, and this is a reflection of what NZTA needed to achieve for this route to be effective was it needed to achieve a traffic solution that wouldn't clog up in five to 10 years, and that is a core part of the operation requirements of this route and that is the basis of the Board's decision as you'll see going through.

So then the next, chapter 9, just on the next page, starts at 236 which is the strategic need for the proposal, and your Honours will be familiar with this discussion which is extensive for the reasons why the proposal is required and why it needs to be in that area and talks a lot as we go through about –

WILLIAMS J:

Will it help if I can say, since it was my question, for myself, that's not the issue?

MS CASEY QC:

Thank you, all right, then I think –

WILLIAMS J:

Unless my – my colleagues may think otherwise but…

MS CASEY QC:

Well, so I will just step very quickly through that because I'd like to land on paragraph 248, to the second half of paragraph 248, that the Board accepts, and there being no challenge to the expert's evidence about the overall methodology for the selection of the route. So that's an important acknowledgement by the Board that there is uncontested evidence about the methodology that was adopted to choose the route, and at 249 again talks about the results that need to be achieved and in the middle of that focuses on the enduring benefits of the proposal, and then just going through more generally talks about the benefit to a number of people at 255, and the life

benefit that it will create, at 255 talks about the unique challenges and opportunities of the location and why it's so congested.

At 260 there is – this is a slight deviation but it is a telling part of the Board's analysis. It refers to some evidence which it finds compelling. Just talking about the freight and logistic problems that Auckland faces and this area faces and there is this really interesting and I think informative discussion about why we have to have a road and it's not a railway issue, it's not a public transport issue, it's not a cycling issue, and the witness refers to freight and logistics which I think some of it people like me don't really take on. He refers to the fact that logistics distribute through the Auckland region a million litres of milk each day and that there are 200,000 freight vehicles in Auckland, and then in the paragraphs that follow discussed the challenges: "Well, do we really need a road and do we need it here," and talks about how other options aren't practicable. But then the discussion, if I can take you through from there to paragraph 620 which is where the Board starts the direct discussion of policy F2 and the reclamations. So the Board starts, if your Honours are there, the Board starts with setting out the requirements including at (b) that there are no practicable alternative ways. At 621 they say: "Later in the report we're going to be talking about section 171 so –

WINKELMANN CJ:
Sorry what paragraph were you at before 621?

MS CASEY QC:
Paragraph 620 sets out the requirements and then in 621 they say: "Later in chapter 15 we'll undertake our assessment of section 171," so they're clearly acknowledging they know they're in different tasks and 622 they start the discussion and the second sentence there: "Essential component of NZTA's reasons for accepting a foreshore alignment with the associated reclamations was that it would provide the most enduring transport benefit."

Then at 623 the Board acknowledges its role: "It is critical for the Board to be satisfied that East West alignment is indeed the option that provides the most

enduring transport benefits to the extent that these benefits are necessary and that there are no practical alternatives to achieve that outcome." So the Board is acknowledging and setting out its understanding of its task very clearly. It then refers to submissions from Mr Burns which it disagrees with and goes back to the uncontested evidence of the expert of Mr Murray which contributed to the balancing of all factors in choosing the proposed alignment, the factors that are relevant must be relevant to whether there is a practicable alternative. In my respectful submission that is obviously correct, a route that is, doesn't deliver the objectives which justify the business case for the proposal is not a practicable alternative, NZTA would not spend between 1.2 and $1.8 billion on a route that didn't provide an enduring benefit.

WILLIAMS J:
But it might not have to you see.

MS CASEY QC:
Well it wouldn't do it because it wouldn't…

WILLIAMS J:
Well it might not have to because if it doesn't have that alignment it won't have to reclaim and it will have to purchase properties but it won't have to deal with all of these roosting sites and so on, shifting its pylons et cetera, et cetera.

MS CASEY QC:
But that's not, it's not a question of cost in this context.

WILLIAMS J:
You just said it was?

MS CASEY QC:
No it's a question of what NZTA needs to achieve, one core thing with this project which is an enduring transport benefit.

WILLIAMS J:

And it's hard to argue against that but my point is this. Throughout your submissions you've said this window, given the strength of the words in the policy, this window is narrow?

MS CASEY QC:

Yes.

WILLIAMS J:

Now that's important because you've said "trust me, this is a narrow window and we get through it"?

MS CASEY QC:

Yes.

WILLIAMS J:

Right, a narrow window is a practicable alternative test.

MS CASEY QC:

Yes.

WILLIAMS J:

Right, which means for 48 days, 49 days in a high powered panel that needed to be the focus of this process because that's the window, right?

MS CASEY QC:

The border also needed –

WILLIAMS J:

See the problem with it, you see, you say look trust us it's 100 experts, 109 experts, 48 days –

MS CASEY QC:

Forty nine days.

WILLIAMS J:

Forty nine days sorry, for the High Court Judge running the panel how could they have got it wrong, see the problem is really and often the problem with projects like this is that it's so big to pick up on Justice Wiley's point, you lose the forest for the trees. Now your argument is the forest is no practicable alternative, that's the big picture and for myself I happen to agree with that, but I may be the only that does, but in any event that means that if this process has to focus on one thing it is is there no practicable alternative because that's the window right and as you said that assessment is diffuse in the documents?

MS CASEY QC:

Sorry and I perhaps was not fair to the Board. We are now in the paragraphs where –

WILLIAMS J:

Yes I know I've read them.

MS CASEY QC:

And why I said it was diffuse was that you needed to understand the Board's consideration or I needed to explain the Board's consideration of the centrality of the point of an enduring transport solution.

WILLIAMS J:

Yes.

MS CASEY QC:

Because that is the reason that they focus, that they say there is no practicable alternative because there is no alternative that provides an enduring solution.

WILLIAMS J:
See the, well quite, but then you've got to get yourself to the point of concluding and so does the Board that enduring solution is your non-negotiable?

MS CASEY QC:
Yes.

WILLIAMS J:
And see that becomes a question of how enduring and whether given the narrowness of the window compromises might have been appropriate because one of the alignments, for example, is half of the foreshore and then cutting in and heading to Ann's Creek, right, and that would have avoided the SEA-M, the SEA-M1 area because there would have been no reclamation in that area, say?

MS CASEY QC:
There is no reclamation in the SEA-M1.

WILLIAMS J:
Sorry no –

MS CASEY QC:
No viaduct.

WILLIAMS J:
There would have been no viaduct and so forth. You see now I'm not seeing that analysis being done given that that is the forest and that's troubling. Because it seems to me that analysis of the alternatives, if you look at the AEE, it goes through the 16 alternatives then reduces them to six, then to two, a number of which do not involve this sort of invasion and one of which involves somewhat less invasion is not, it seems to me, discussed by the Board in any particularly focused way, why alignment, I can't remember the number of it, the one that is the most invasive option as opposed to one which

is less invasive and why compromising enduring say from the foreseeable future down to 20 years or 25 years is an option that should not be taken because your whole case hinges on the idea that avoidance is narrow but trust us we fit it?

MS CASEY QC:
Now if I may address that in a number of sections. The case for Waka Kotahi before this court is not in response to a challenge on an appeal that the Board was wrong to find that there was no practicable alternative, if I may.

WILLIAMS J:
That's fair.

MS CASEY QC:
My learned friend Mr Enright in his submissions yesterday conceded that the Board had made that decision and didn't challenge it, my learned friend for Royal Forest and Bird did not raise that as an issue of loyalty, referred to it in passing in her submissions on day one.

WILLIAMS J:
But you did say this morning you were going to address it?

MS CASEY QC:
And I'm going to show you where the Board addresses it but your Honour if you were, if this was something that was, this court wanted to pick up and examine closely I'm going to take you to the key sections of the Board but I'm not in a position to take you to the analysis that went into this because as you say –

WILLIAMS J:
Well can I help you by saying this is, just having read through the documents, this is what troubled me.

MS CASEY QC:

Your Honour I underst –

WILLIAMS J:

In that the sections that you've just identified, 628, 620, 5, 6 and so on what the Board does is say "we deal with the detail of this in section 16" chapter 16 or is it 15?

MS CASEY QC:

15 in relation to 171 because the factors overlap.

WILLIAMS J:

Quite, of course, except the test in 171 is different and specifically, specifically the Board says under that analysis that its job is not to assess the merits of the other options, it is simply to be satisfied procedurally that other options have been considered?

MS CASEY QC:

And if I may the point of these discussions I'm taking you to of the Board is to show the Board recognised that under F2 it had a different task and that it had to be satisfied and, your Honour, I think in terms of an appeal in law that's as far as I can go is that the Board correctly understood its task. The facts that are discussed in the paragraphs in the 200s and in chapter 15, the uncontested evidence of that expert which I am not in a position to take your Honour to, I don't even think it's in the record before the Court, because this wasn't an issue on appeal.

WILLIAMS J:

No.

MS CASEY QC:

And I'm not really saying: "Just trust us. The Board is expert." I am saying those things partly because they're true, partly because we're in appeal on point of law, and this wasn't an appeal point, but also the reality of a Board

decision like this, you are correct, your Honour, that they had to be satisfied that was a crucial window that you had to pass through, but there are other constraining factors on this narrow window as well that the Board had to address. So when we get to the mitigation and offset for the adverse effects they say we have to be also okay that the direct adverse effects are not outrageous. I'm paraphrasing. But they had to do a really detailed assessment of that window as well. So there were a whole lot of constraints on the window, not just this. So – and there are some that we don't even touch on in these appeals which is why we've got a decision of such huge length, and a Board of Inquiry process like this, as your Honour knows, operates at enormous speed. So the level of analysis in a written decision like this, when we focus in on really important issues, may still not be the sort of analysis that you'd expect from a court sitting like this with some months to write a decision and I do accept that. But my respectful submission is that this Board absolutely understood its task, that even if you have to go through the whole of Chapter 15 and the beginning parts to understand the importance of the enduring solution to understand why the 16 came down to two, and I'll get to the point where they conclude between the two that only one is good enough. It is there in sufficient depth, in my respectful submission, to show that they knew what they were doing, they took it seriously, they understood that it was a key – there was a key corner that the window had to pass through but there are other parts of that window that constrain it further that they also needed to address.

WINKELMANN CJ:

Are those the last paragraph references you were taking us to?

MS CASEY QC:

No, your Honour. This is just the start to say that they're acknowledging their task, and then – so at 625 this was the point where they're saying: "No, we are satisfied that to be a practicable alternative it has to deliver the enduring benefit that NZTA says justifies the project," which I think is, your Honour, where I perhaps expressed myself poorly before was the project to do its job

had to be enduring and NZTA, that was a critical feature. So when you're talking about practicability, an alternative route has to deliver on that.

And then at 626 is the Board's conclusion that it is satisfied that there is no "practicable alternative" and it is satisfied that NZTA's scrutiny did not produce any enduring transport solution other than the selected route. So it's drawing and relying heavily on NZTA's analysis but also on the expert evidence of Dr Murray in reaching that conclusion.

Then it comes back to it again –

WILLIAMS J:
Can you tell me, because I haven't read Dr Murray's evidence, and if you can't that's fine, I'll read it. You can't, no?

MS CASEY QC:
Your Honour, I can't. I can check if it's in the record and – actually, the Court is referring to his reply evidence and cross-examination evidence as well – sorry, the Board is.

WILLIAMS J:
I'm just interested in whether Dr Murray walks through the "no practicable alternative" evidence in that evidence because that may well be important.

MS CASEY QC:
I can come back to you on that, your Honour. I'm looking at Ms Evitt who's large on screen, but I'll come back to you on that.

So then the discussion returns at 699, and 699 and 700 are important because in 699, particularly at the bottom of that paragraph, you can see that the Board's talking about the section 171 task, and in 700, so it says – but lifting the facts from the section 171 task, so it says: "The "Board is satisfied that the choice was made," so NZTA's choice was made, "after an extensive, replicable assessment of alternatives to achieve the Proposal objectives, and

in consideration of all the potential effects and how those could be most appropriately mitigated. The Board finds that the justification for the coastal route has been adequate," and then the key factual conclusion which applies to both: "Alternative routes will not, on the …"Alternative routes will not, on the basis of the evidence, achieve the same level of benefit as the proposed route when considered against the Proposal objectives."

While they agree there's not a functional need for the road to be located in the CMA, "on the basis of the Board's finding in relation to the route selection, there is an operational need for it to be located," and then the Board refers explicitly to the requirement in Policy F2 where it cannot be practicably located. So it clearly knows the question it's answering, and then the next point I'll take you to is just the final summary at 1369. So at 1369, under the heading "Route selection", again the Board is very clear that it's considering two separate questions here. It says: "As stated…the Board is satisfied that the proposed route for the HE WILL is the product of adequate consideration of alternative routes," so that's the 171 question, "that the route will provide enduring transport benefits, and is reasonably necessary for achieving NZTA's objectives," and "the Board is further satisfied that the route is the result of there being 'no practicable alternatives' for the purposes of relevant policies."

So, your Honour, I haven't taken you into the evidential analysis.

WILLIAMS J:
Yes, there's no doubt the Board recites the appropriate mantras, but the question in my mind is whether the analysis underpinning that either in the consent application itself or in the way in which the evidence is assessed reflects the underpinnings for that mantra.

MS CASEY QC:
So your Honour is asking Waka Kotahi to basically respond to an *Edwards v Bairstow* "no reasonable board could have reached that view" because that would be the only basis on which that issue comes to this Court.

WILLIAMS J:

Well, it's not that, yes, that that's a high standard. It's not really that. It's more whether it is appropriate to look behind the mantra to see whether the question has been adequately asked by reference, asked and answered, by reference to evidence.

MS CASEY QC:

Answered…

WINKELMANN CJ:

And your point is?

WILLIAMS J:

It would have been a lot easier if the consent application had said: "We've gone through the options. This is the only reasonably practicable option and these are the reasons." It doesn't quite do that, you say. It does say the most and this is – it does undoubtedly say: "This is the best option," and they may well be right about that but that's not the test.

MS CASEY QC:

No, your Honour, and with respect to respond to your question we would do what we would – we would need to take the Court through the…

WILLIAMS J:

Sure.

MS CASEY QC:

And Waka Kotahi would need to unpick all the evidence through the hearing on this issue.

WINKELMANN CJ:

And you haven't come prepared to do that because it's not one of the points of appeal.

MS CASEY QC:

I just haven't, your Honour, I'm sorry.

WILLIAMS J:

That's fine.

MS CASEY QC:

And with respect I would also say that on appeal on error of law we would have to be looking at the *Edwards v Bairstow* test, threshold, and –

GLAZEBROOK J:

Yes, I think that's fair.

MS CASEY QC:

But I do understand your Honour's genuine concern on the issue and I'm sorry not to have been able to provide more reassurance than I have.

WINKELMANN CJ:

Right, was that the end of your…

MS CASEY QC:

No, your Honour, there were a few more points that I had wanted –

WILLIAMS J:

Sorry, can I just follow up one small point of detail before that? What is the MCA?

MS CASEY QC:

The MCA?

WILLIAMS J:

Yes. This is the calculator that got to this result. It was called the MCA. I couldn't work out what that was.

MS CASEY QC:

Yes, sorry, I'm just…

WILLIAMS J:

There's a hand going up on the screen.

MS CASEY QC:

Yes. No, no, I can answer this one. Thank you to my learned friend. I was thinking it's not coastal marine area backwards. Multi-criteria analysis. So that is – in policy speak we're more used to a cost benefit analysis. So a multi-criteria analysis is a far more sophisticated and more tailored planning and options evolution tool. I'm looking towards Ms Evitt to see if she's nodding or shaking her head. She's not. I'm going to have to come back to you on that. So that was my understanding, your Honour, but clearly – close enough. It's a tool. It's an analytical tool.

WINKELMANN CJ:

You can come back later on this. So what's the next point? I'm just conscious of the time.

MS CASEY QC:

Yes, your Honour. So there were a few other points that I did want to address briefly before I get to Waka Kotahi's submissions on relief.

WINKELMANN CJ:

Because, I mean, when do you anticipate being finished because you thought you'd be another 15 minutes this morning?

MS CASEY QC:

Well and when I came in this morning I thought I'd be between 15 minutes and half an hour but…

WINKELMANN CJ:

Because we have people who have to catch planes today so we've just got to move on.

MS CASEY QC:

Yes your Honour I will, I will.

WINKELMANN CJ:

I'm not wanting to rush you but I do feel we do need to – it can't just go on.

MS CASEY QC:

No I understand that your Honour. Look I would say less than 10 minutes from now if that's acceptable.

WINKELMANN CJ:

Okay, go ahead.

MS CASEY QC:

So there were a few other points from yesterday that I want to touch on and there were a few matters that I didn't get to in terms of Whaka Kotahi's core submissions. The first question very briefly was the discussion on activities, the distinction between activities and effects and just wanted to step back to some of the more fundamental principles of the RMA as that effects and activities, the consideration is integrated and when we talk about the controlling activities under the RMA they're only controlled because of their effects and so plans classify activities on the basis of their likely effects and that's actually just the central reality of what a plan does. So, for example, an activity might be classified as controlled because it's anticipated that its likely effect is X, AUP then sets standards if it's like, if its effects take it over those standards it flips into another category and a more intensive consenting process is required to consider those effects. So it's not, with respect, appropriate to try and split out activities and effects because the RMA treats them as an integrated whole and that's what rules and plans address.

The other aspect that I wanted to touch back on was the, in response to a question of if it's not a mandatory rule how does a lower order policy document or planning instrument give effect to a higher order one if they're not firm rules and, with respect, Whaka Kotahi's position here is that a lower order instrument gives effect to policies by reflecting them in the lower order policies. So if the NZCPS places a high value on a surf break then the lower policies must similarly place that high value on a surf break, same with SEAs and the ONLs et cetera and, in my respectful submission, it's not helpful to use terms like "apply the policies" or "implement the policies" in a policy planning context because these suggest that the policy must be converted into something operational in a plan which if that's what's required. So a central government wants to dictate the content of a rule it does that through setting standards and setting activity status, the RMA provides for that in the standards and even in the NZCPS by allowing the Minister to set a restricted coastal discretionary activity status. So that's how the RMA allows the central government or a higher order decision-maker to actually impose a rule.

WINKELMANN CJ:

Sorry can you just repeat how a central government, how do you say it, a Minister imposes a rule?

MS CASEY QC:

Imposed a rule, for example, on the National Environmental Standards can set activity categories as prohibited and the NZCPS policy 29 allows the Minister to set a restricted activity status for activities.

GLAZEBROOK J:

So the Minister can't say in a policy "you must have a rule that says you can't do this if it has these effects"?

MS CASEY QC:

That's correct.

GLAZEBROOK J:
Is that the submission?

MS CASEY QC:
Yes, if a Minister –

GLAZEBROOK J:
Well I just can't see why that's – why would you have a policy then if you can't say you must, this is the policy that we want this not to happen?

MS CASEY QC:
If the Minister wants to do.

GLAZEBROOK J:
As an effect?

MS CASEY QC:
Sorry, if the Minister –

GLAZEBROOK J:
And they couldn't say, they couldn't translate that into an activity because it could be any number of activities that have that effect in that area?

MS CASEY QC:
If the Minister wants to impose the rule the Minister must use the National Environmental Standards which are regulations which go through a regulatory drafting process subject to rules, review by the Regulation Review Committee subject to the LAC Guidelines and those regulations, those standards can absolutely prohibit effects, no doubt about that and that's how the Act deals with it, it says "if you're going to prohibit something you go through regulatory controls. If you're going to set a policy you set a policy" and that's –

GLAZEBROOK J:
What's the point in having a policy if you can't dictate what happens on the policies as they go down in the consenting process?

MS CASEY QC:

Well your Honour if we step back to sort of what's a policy for, a policy provides guidance. That is a policy and in admin law we'd be in a different argument. Here if policies dictated outcomes we would say you're fettering the discretion of the decision-maker. It is important that a policy – and a policy is implemented in the lower order policies but they're still policies.

GLAZEBROOK J:

Well if it's only guidance why was there a consent order in that case we were taken to?

MS CASEY QC:

I'm sorry your Honour?

GLAZEBROOK J:

Well we were taken to a case where there was a consent order?

MS CASEY QC:

About a policy?

GLAZEBROOK J:

Yes.

MS CASEY QC:

Yes and a lower order policy must reflect the higher order policy but it's still a policy. I think that's my point, it's still a policy.

GLAZEBROOK J:

Okay well I understand the submission but…

MS CASEY QC:

Thank you.

GLAZEBROOK J:

I think there's probably an hour of debate to carry on with it.

MS CASEY QC:

The next point I wanted to address was in a discussion yesterday there was an issue about, well if section 104 just requires a decision made to have regard to the policies which include – the plans which include the rules then the decision-maker could just take into account and disregard, for example, that inactivity was prohibited. The answer to that sits in the RMA itself, section 87A sets out the rules on what, on activity status and subsection (6) in particular says that a prohibited activity can't be applied for and this is how.

WINKELMANN CJ:

Section 87?

MS CASEY QC:

87A subsection (6). This is how the RMA operates in the 104 and Part 6 context. A decision-maker has regard to policies and plans but, of course, is bound by the regulations and the Act itself. So if there's a part of a plan that is of regulatory affect it applies and that's, with respect, the structure of how the RMA operates in that zone.

GLAZEBROOK J:

So you actually are directly challenging *King Salmon* frankly on that?

MS CASEY QC:

No, your Honour, I'm not, *King Salmon* is a Part 5 decision and the planning –

GLAZEBROOK J:

I'm sorry I thought you were saying more generally if the Minister wanted to impose a rule that had to go down the lower order documents that –

MS CASEY QC:

Oh, yes, your Honour I am and that's in the written submissions, absolutely.

GLAZEBROOK J:

Well so you are challenging the Part 5 *King Salmon* analysis?

MS CASEY QC:

No, with respect your Honour, I'm, the way that I read *King Salmon* is what it was deciding was is it open under a Part 5 plan making decision for a decision-maker to take an overall assessment approach in setting a plan and *King Salmon* –

GLAZEBROOK J:

Well it also said that a void means a void, in the context of a plan. Now I understand your argument that a void doesn't mean a void in the particular policy so I'm leaving that aside.

MS CASEY QC:

Yes. So –

GLAZEBROOK J:

But you're saying actually that's ultra vire as in *King Salmon* is wrong on that?

MS CASEY QC:

My – in the way I've expressed this in my written submissions with respect to the *King Salmon* court is it actually very carefully did not say that what had occurred in that case. It said something in the nature of a bottom line, it refused and declined to provide, to comment on –

GLAZEBROOK J:

No but that's a question of, so if it. That is a question of interpretation of the policy, I understand that argument. But *King Salmon* definitely said that if it were a bottom line then it had to be applied in the lower level policies and you're saying no that's not right because it wasn't a regulation?

MS CASEY QC:

I'm sorry your Honour, there's two aspects to that. The first is *King Salmon* says the policy has to be applied, a lower order policy, no contest. In Part 5 of course a policy has to be reflected, applied, implemented, that the lower order policies must give effect to that higher order policy. If the highest weight

possible has been given to protecting surf breaks the lower policies must do that and that, I think, is the core of *King Salmon* and there is no challenge to that.

GLAZEBROOK J:
But if the higher level policy says not only must it be the greatest weight but it actually says you have to protect it at all costs –

MS CASEY QC:
You have to prohibit.

GLAZEBROOK J:
– you're saying you can't do that?

MS CASEY QC:
Correct your Honour, I am and that's –

GLAZEBROOK J:
Well you're saying that has to be done by regulation?

MS CASEY QC:
Yes your Honour and that's set out in detail in my written submissions and I won't canvas it here conscious of –

GLAZEBROOK J:
So you are challenging *King Salmon* on that point?

MS CASEY QC:
Your Honour my first point –

WILLIAMS J:
It depends on what you mean by what *King Salmon* said?

MS CASEY QC:

Yes, and I don't think *King Salmon* went that far. *King Salmon* did not say that that was the result. It gets close but my respectful submission, and my written submissions, it didn't consider the implications of that last step and that's obviously for this Court, but that's –

WILLIAMS J:

In any event, you invite us to restrict *King Salmon* to Part 5 –

MS CASEY QC:

Yes.

WILLIAMS J:

– given the potential problems if it applies to Part 6?

MS CASEY QC:

Thank you, yes, and all the analysis in *Davidson* and the other aspects that I've covered off in written submissions.

Your Honour, Justice Glazebrook, I do also want to come back to a point you made, an observation you made yesterday about the desirability of constraining lower order decision-makers because they would be at the bottom tier of decision-making, and I think there was an expression that we might just get a council staff member making a consenting decision that had a terrible adverse effect on the environment.

And, your Honour, I just wanted to circle back and talk a bit more again about the regime, that it's not structured in that way. There are other aspect parts of the regime which are carefully structured to make sure that decisions which have significant adverse effects are made at the appropriate level. The current Board process, and the Ministers referring to a Board of Inquiry, is one. The restricted activity status under the NZCPS is another which allowed the Minister to say any decision that's going to affect this value or have significant effects in this area has to come to me as the Minister. That's what

the Act allows. It's since been amended and it allows the Minister to appoint an expert panel.

So the regime itself is structured to avoid the need to worry about some low-level council consent decision that could have catastrophic effects. It's dealt with elsewhere. We don't have to do it by constraining decision-makers through the policy.

Finally, your Honours, the one annex that I didn't go to in my written submissions was annex A and if I could I'd just like to spend a couple of minutes talking about annex A and the implications of the *Davidson* decision in this context. So that's – I'm sorry, I've actually left my coloured one back in the office – but it's the graphic showing the highlighted selections of the relevant provisions to this proposal with a comparison to the *King Salmon* policy context. So, your Honours, it's an inevitable feature with the limited focus of appeals that get to this level that it can give the impression that the New Zealand Coastal Policy Statement is the top of the chain and that it is the only – and the critical –

GLAZEBROOK J:
Can you just wait…

WINKELMANN CJ:
It's the third one. Counter-intuitively annex A is the third in the bundle.

MS CASEY QC:
So the NZCPS is not the whole story. It was the whole story in *King Salmon* and you can see that with the comparison. But for complex multi-faceted projects it isn't. So here we're seeing the East West Link policy context, and this is really only selected highlights, engages across four national policy statements. What's not even here is the – sorry, the national environmental standards, and, as you know, even within the NZCPS it engages with 11 policies, 149 policies in the AUP plus legacy policies.

So why does Waka Kotahi take the position that the overall assessment approach is the only right approach to section 104 and section 171? Because anything else, your Honours, is impossible and would not give effect to the objectives of the RMA. Each project engages its own unique combination of policies and objectives and, as here, the NZCPS and Policy 11 is very far from being the whole story, and that's the difference between Part 5 and Part 6. You can do this, you can have a statutory directive to give effect to a higher policy document in the planning context because a planning policy decision is a direct cascade. It covers the same topics. So my policy must address the same policies as the NZCPS, therefore I follow. But when we're in a project –

GLAZEBROOK J:
Well, I would have thought it was actually the other way round because the policy documents are actually going to be much wider and you couldn't have a policy document that just said: "I'm going to reflect one bit of this without taking account of all the other policy documents," could you?

MS CASEY QC:
But we –

GLAZEBROOK J:
You couldn't have a plan that said: "Well, I'm only looking at this. I'm actually going to see how it fits together."

MS CASEY QC:
Absolutely, and they are complex enough in themselves. I'm not saying it's a simple process but when you get to a project, it's not just engaging, it's not a coastal policy, it's not just the coastal policy, it's a whole lot of other things as well, and how it engages and responds to every aspect of those is unique to it.

WILLIAMS J:
Doesn't it really mean that the further down the cascade you get, the more choices are made? That's the whole point in, when you get to regions and

districts, you make choices about which bits of the CPS are going to be important in this particular environment.

MS CASEY QC:
And how they're going to be –

WILLIAMS J:
And how, and then you make the ultimate choices when you're dealing with consents.

MS CASEY QC:
And part – well you finish in Part 5 when you've got your plan, jump to Part 6 and go, now I have to consider it all a fair appraisal of all the relevant plans and policies, and that's why that section 104D box is highlighted, to demonstrate the scope of the 104D process that the Board had to go through, because all the relevant plans and objectives and policies were, needed to be considered. Then, of course, they all come into the mix again with the fair appraisal overall assessment under D and, with respect, there is no line that you can draw up to the NZCPS and say, that's the be all and end all that's dictating the result and, your Honour, I wish to come back to –

WINKELMANN CJ:
Well can I just ask you one question about that point, because in *R J Davidson* they acknowledge that and – sorry. *King Salmon* and *R J Davidson*, I think, so *King Salmon* really grapples with this, and you say in a Part 5 basis but not Part 6 basis, but it does say that there will be conflict between policies and you just have to work through and reconcile them, and one assumes that that is effectively what a consent-maker would do in any case, whether you had *King Salmon* or not, you'd be working across these policy areas and reconciling them and often finding that actually they don't conflict as *King Salmon* contemplates. But then when they do, at least in a Part 5 context, *King Salmon* says you have to work out which one trumps.

MS CASEY QC:

Well, your Honour, I don't think it does, and I think that's the important thing. *King Salmon*, with respect, said people are assuming that they conflict, and we have to work out a hierarchy. *King Salmon* says, no, actually you can reconcile them and as you'll see –

WINKELMANN CJ:

It does contemplate sometimes you won't be able to, doesn't it?

MS CASEY QC:

It does, and that's where *Davidson* is quite important in the consenting context because it discusses that. But if you look at what *King Salmon* was looking at, actually it was very straightforward, and where the Court got to was it had Policy 8 enable appropriate aquaculture, Policy 13, don't allow inappropriate development, and went, well, what's appropriate in one won't include what's inappropriate in the other, so it was a relatively straightforward assessment, and that's my point about planning decisions can make that general –

WINKELMANN CJ:

I was just going to say, it just sounds like the analysis that *King Salmon* contemplates quite a lot like the analysis you contemplate, because it's a careful working through.

MS CASEY QC:

Absolutely. What I don't support is Royal Forest and Bird's working through which says, "avoid" is strongly directive and trumps every other verb and you do a formulaic assessment of the strength of the verb, and the "avoid" will always trump. That's the point of contention here, not –

GLAZEBROOK J:

But that's an interpretation point. I think I keep coming back to – well. I suppose what I keep coming back to is I understand the interpretation point that you're putting forward. I don't understand that you either need to challenge *King Salmon* in the respects that you're doing, but you need to say

that five and six are different because your best point, with respect, is the reconciliation point in respect of the various policies, and within the Coastal Policy Statement.

MS CASEY QC:

Thank you, and I think that is – I agree that's absolutely our first point, but should we not succeed on that then we do take the other points.

GLAZEBROOK J:

I understand. It's just that they keep getting mixed up in your submissions, I think, and I can understand why that's happening as well.

MS CASEY QC:

Thank you. I apologise if it's a lack of clarity.

GLAZEBROOK J:

No, no, because they are interlinked, so that's certainly not a criticism, it was just a comment.

WINKELMANN CJ:

Ms Casey, I interrupted you, you were going to come back to a point that we'd discussed you said you wanted to address?

MS CASEY QC:

Yes, which flowed on from exactly what we've just talked about, which is your Honour asked me, and we were in *Davidson*, and if I could take you there, it's tab 30, and I've taken you through the discussion of the overall assessment approach and you said quite bluntly a couple of times and I don't think I gave you an adequate response to what is Waka Kotahi's answer to paragraph 71 of *Davidson* and I just want to take one minute to, with the indulgence of the Court, to come back and give a better answer if I may. So do your Honours have *Davidson* at paragraph 71?

GLAZEBROOK J:

Perhaps just give me a second. Yes.

MS CASEY QC:

Thank you. So we've just had the discussion about the overall assessment approach and my respectful submission is that *Davidson* confirms that that applies to Part 6, and then they talk about where the NZCPS is engaged and my first comment here is that at 71 itself the Court of Appeal is obviously obiter but also being tentative and suggestive, saying: "We think that it's inevitable that *King Salmon* would be applied in such cases. The way that would occur would vary." Suppose there was an activity which would be demonstrably in breach? The consent authority could justifiably take the approach and goes through. So these are – and one thing the Court is not saying is you have to apply *King Salmon* as a rule – not *King Salmon* – NZCPS as a rule. They are suggesting this would be the likely outcome in a clear case. They say at the bottom of that paragraph, absolutely you can't subvert a clear policy just by saying: "Oh, look, we're going to do an overall balancing approach under section 5." I think *King Salmon* put that to bed in every direction. You can't just put – you're not properly considering it if you put it aside; you're not properly considering it if you're subverting it. You have to properly consider the weighty factors, and that, we submit, is what the Court means when it says if you don't give adequate consideration or proper consideration required then you risk being overturned on appeal, and that's 71.

But also when you go to 72 the Court immediately acknowledges, if on the other hand, if a proposal were affected by different policies so that it is unclear, so if NZCPS doesn't clearly guide you to the right result, then you have to exercise a judgement and that's where we say this project and complex projects like this will always sit. The decision-maker has to exercise a judgement and it's important that the Court allow them to exercise the judgement.

Then over at 73, similarly where other plans and district plans come into play which is obviously – and here we've got other policy statements and environmental standards and other legislation coming into play – and here critically at the end of 72 the Court refers to "consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan." This is the fair appraisal approach that they've talked about earlier. So here the Court, in my respectful submission, is exactly endorsing their earlier finding that the overall judgement approach is the correct approach under section 104 because it's saying: "This is how you've always done it. You know your job. Go away and do it."

WILLIAMS J:
Can you just tell me what paragraph that is?

MS CASEY QC:
That's paragraph 73, about two-thirds down. Then they go back and 74, it may be, of course, that it's obvious and the answer presents itself. But even in 74 they refer – they say it may be as a "result of a genuine process that has regard to those policies in accordance with section 104(1) should be to implement the policies in evaluating a resource consent application," and this is: "It could not justify an outcome contrary to the thrust of the policies," et cetera. So the Court there is still talking about an evaluation task undertaken by the consent authority, and that's the only issue in this case. Was it open to the consent authority to make this evaluation? And in my respectful submission *Davidson* fully supports that it was and also fully supports a Part 6 consenting framework post-*King Salmon* which is these policies have to be given absolute proper consideration and, if they're not, the decision-maker is subject to appeal on point of law, but it is still for the decision-maker to make the judgement.

And with respect, your Honours, that is how the regime is designed to work and it's not necessary to reframe the regime to convert strongly worded policies into absolute rules or to remove the discretion of the decision-maker to make an appropriate assessment in complex cases. With respect, your

Honours, it's a bit like minimum mandatory sentences, do we impose the rule from the top in general terms or do we allow the decision-maker on the ground who is fully informed of all the factors to make the decision guided and in accordance with acknowledged and important principles.

GLAZEBROOK J:
I just don't see where your point of law comes in in that because it would have to be *Edwards v Bairstow*. So in fact you have a very strongly worded policy that says this is an amazing value we want to and yet, and in *King Salmon* says that you can't override the two but you say a decision-maker at the bottom and yet it doesn't matter whether it's a Board or what it is can actually override that effectively unless it's so totally unreasonable that it's an error of law, it's just a, you know, there's no narrow window there, there's no indication of how you figure out what that narrow window is?

MS CASEY QC:
Well that's what the policy, I mean that's the different between policies that provide real guidance and policies that are treated as shopping lists and nobody is suggesting a policy treated as a shopping list so, with respect, if –

GLAZEBROOK J:
They're not a shopping list, we just don't understand where you'd actually get to, I've given great weight to this and I've decided I'm going to get rid of the Hector dolphins.

MS CASEY QC:
Well that, they are –

GLAZEBROOK J:
I mean that's probably –

MS CASEY QC:
But that is your example.

GLAZEBROOK J:

Well it's, because I think probably that would be unreasonable in any sense but…

MS CASEY QC:

Exactly and I think that's the point, your Honour, is that's the frustration and the glory of administrative law and the supervisory jurisdictions of the Court as there is –

GLAZEBROOK J:

It's really the supervisory jurisdiction –

MS CASEY QC:

No it's not sorry it's an appeal on –

GLAZEBROOK J:

– of the whole policy framework rather than the Board.

MS CASEY QC:

Yes so it's how much discretion do we leave?

GLAZEBROOK J:

And supervisory isn't quite the right word but you know what I mean.

MS CASEY QC:

So your Honours I just wanted to, one minute to relief and then I will have finished my submissions unless there's any questions. So we're now talking, should your Honours uphold any of the errors and there are, there's a range of issues in this. The first is that we support Justice Powell's position that if your Honours find that there was an error of law in the 104D assessment in how the Board approached Policy D9 and the 104D assessment Whaka Kotahi respectfully agrees with Justice Powell that it, those weren't material in light of the task of the Board under 104D which was to assess whether it was overall contrary to the general thrust of the objectives and policies, so minute, we

don't accept any errors occurred but if your Honours find that there did they weren't, they wouldn't have made a difference and they were not material given the scope and breadth of that task. Similarly if your Honours are inclined to my friend Mr Enright's error of a truncated assessment of the New Zealand Coastal Policy Statement, our key point here is that no substantive difference was identified between the NZCPS and the AUP provisions so there is no material error even if the form of the consideration did not meet requirements of substance was still there.

But, of course, the main issue is Royal Forest and Bird's view of the Coastal Policy Statement and their perspective clearly expressed to the Court on day one that properly applied the New Zealand Coastal Policy Statement and the AUP properly interpreted meant that this project could never be consented because it has adverse effects in the SEA and one of Ann's Creek East. We disagree about whether the reclamations would have resulted in a strike out. It's a start position from my learned friends, they are asking the Court to rule affirmatively for all projects engaging with the NZCPS avoid policies, that avoid is always trump and absolute, that no mitigation or offset can be considered and that it applies directly to veto a consent under section 104 or a designation under 171 and, with respect, despite the regulatory impact statement for the NZCPS expressly disavowing that intention. In the context of this decision the factual findings are clear. The Board considered that the offsets and mitigations at least balance out the adverse effects, and very clear that the project overall not only promotes but achieves sustainable management.

While Forest and Bird do not challenge those findings, they give us a clear clean case that as a matter of law they're not good enough. My learned friend correctly states that if the approach to the Act is correct, the project could never be lawfully consented given its impact on an SEA-M1. However, given they also ask for a referral back, and this is where I'm unclear as to what utility that would have, given their position. Given the Board's finding that no other practicable route for the East West Link can be found, the outcome must be that the nationally significant project, the priority in Auckland's spatial plan

would not be able to proceed, and Waka Kotahi questions the merits or value of a referral back.

WINKELMANN CJ:
Wouldn't Waka Kotahi, however, want to reserve the ability to have – I mean is Waka Kotahi really saying that there should be no reference back, because there were other plans that didn't have the damage to SEA-M1

MS CASEY QC:
Well those would be different consents your Honour. So what we've got is these consents. If these consents are overturned –

WINKELMANN CJ:
So they're so fundamentally different you'd need a different process?

MS CASEY QC:
Well if you uphold the position that this, and I suppose, with respect, what I'm asking the Court to do is be clear here. If you are upholding Royal Forest and Bird's position that this project could never be lawfully consented, then that would be the consequence.

WILLIAMS J:
Yes, you'd have to start again.

MS CASEY QC:
You would have to start with a different project. This one couldn't – anything in the - Royal Forest and Bird is asking you to say is any reclamation here, anything in the SEA-M1 could never be lawfully consented, and for the benefit of the taxpayer could we have that clearly decided.

WINKELMANN CJ:
And what about if it's simply that the wrong legal conception of what was required was applied?

MS CASEY QC:

If the Court comes back with a different answer to what my learned friend is asking for, then absolutely. But if it's going to be an absolute there is no lawful way, no lawful basis that a consent could ever be made, then we would question the utility of a referral back.

WINKELMANN CJ:

Because it would require a different project.

MS CASEY QC:

And I suppose it would be helpful for the Court then to be very clear as to which aspects make it, which aspects engage the veto, but I don't know if that's…

WILLIAMS J:

Well, isn't it the case that the SEA-M1s are all in sector 5, 4, I can't remember the numbers anymore, so that part of that alignment and reclamation would not be in breach of the 11(a).

MS CASEY QC:

I should be clear, my learned friend for Royal Forest and Bird considers that the reclamations are in breach of 11(a). We dispute that but that's – and I should, I do, in terms of the alternative routes, this is something that I know my client would want to say, is that it cannot put this, its view is that it cannot put this road on the land side because that would be effectively to put a four-lane highway through the industry that it's trying to serve. So destroying the very thing this route is trying to serve. So if options were easily available I think, and that's why I took you to that Board, the plaintiff hope, the forlorn hope that the Board had at the beginning. If other options were feasibly available, they would have been pursued, which is recognised by the Board, NZTA, everybody involved that this threading a needle through the difficult environment was always going to be a challenge, and if something –

WINKELMANN CJ:

That last point you just mentioned about putting a four-lane highway through the industry it's trying to support, that's covered in the Board report is it?

MS CASEY QC:

Yes your Honour in the sense of it was recognised that NZTA's decision, that it had to go onto the coastal environment, rather than take out a swathe of the Onehunga industrial estate.

WINKELMANN CJ:

I'm just trying to remember, it's narrated in the Board report.

WILLIAMS J:

That's not what the options analysis said at all.

MS CASEY QC:

Your Honour, sorry, I know I'm –

WINKELMANN CJ:

I don't want to hold you up on that. I'm sorry, I want to let you sit down.

GLAZEBROOK J:

I think that might have been a slight bit of rhetoric there, so we'll take it as – we go back to what your other analysis was in respect of that.

MS CASEY QC:

Thank you. So the basic point is the Board accepted and agreed that there was no practicable alternative route for the East West Link, and if your Honours consider that this East West Link as consented could never be lawfully consented no matter what was changed, then it would be beneficial in terms of public administration to have that rule clearly stated. But, of course, if there's a lesser error that you think the Board could remedy or NZTA could remedy –

GLAZEBROOK J:

Well, in *TTR* I took the view that there was no utility in sending it back. The other members of the Court disagreed and it's difficult to make that assessment. I thought it was quite clear in *TTR* but the other members of the Court didn't think it was quite as clear. So, and it is a relatively bit pool.

MS CASEY QC:

The point that I'm reaching for, I think *TTR* the issue was the facts could be different, the evidence could be different and –

GLAZEBROOK J:

All right, so –

MS CASEY QC:

But if on the facts as established by this Board –

WINKELMANN CJ:

I think we've got it.

MS CASEY QC:

Yes, your Honours.

WINKELMANN CJ:

I think it's quite straightforward you've said.

MS CASEY QC:

Your Honours, if there are no further questions, those are the submissions for Waka Kotahi.

WINKELMANN CJ:

Thank you. So it's Mr Majurey now is it?

MS CASEY QC:

Mr Lanning, I think.

WINKELMANN CJ:
Good morning, Mr Lanning.

MR LANNING:
Good morning. May it please the Court, I've provided a summary of my oral submissions so I'm hoping you've got that, and I plan to use that to hopefully move through what I want to say in an efficient way. We've hyperlinked the summary so hopefully you'll be able to just click on the relevant parts of the Unitary Plan. There are some parts of the Unitary Plan which I will go to which are not hyperlinked.

Before I start at paragraph 1, I just wanted to record the Council's role in this process and why the Council has remained involved. The Council was a submitter on the proposal. It supported the proposal in principle and "in principle" meant that we sought some quite significant additions to the mitigation of effects that were proposed initially as part of the project and ecological effects associated with the significant ecological areas was a central part of those concerns and I want to come back to that because some of the disquiet, I guess, that is being expressed about the role of the policies at the decision-making process I'd like to comment on that at the end, but importantly these effects that are at issue today were central to the Council's submission and its position throughout this process. The Council's involvement obviously involved provision of evidence, involvement in the extensive expert conferencing, ongoing discussions with the Waka Kotahi experts and other experts, cross-examination of the experts and things like that. So it was a very active involvement we had in the hearing and, in my submission, that involvement was a key driver to the additional ecological mitigation that was ultimately included in the conditions that the Board approved, and importantly those conditions are part of the proposal which the Board is assessing under sections 104D, 104 and 171. So that ecological package is part of the proposal which is being assessed against policies that you've been or we've been talking about.

So the other point I wanted to make before I start reading through my summary is that I'm relying on the legal submissions by my friends, Ms Casey QC, or Waka Kotahi, in particular in relation to the interpretation and application of the New Zealand Coastal Policy Statement.

So I will start at paragraph 1 of my summary. Public infrastructure is necessary to provide for the wellbeing of the people in communities of Auckland and beyond, projects like the East West Link are proposed solely for that reason. They are complex, they raise a broad range of resource management issues of values and require difficult decisions to be made and I think East West Link are perhaps a high watermark in terms of difficult decisions on infrastructure. The Unitary Plan assists that process by identifying the issues and values and signalling which require particular attention and in this case obviously the indigenous biodiversity values which are represented by the SEAs are deserving of particular attention. But, in my submission, that does not automatically preclude projects like the East West Link that might not be able to fully address all of those effects on-site.

Royal Forest and Bird's position is that if the adverse effects listed in the Unitary Plans avoid policies are not avoided in infrastructure such as the East West Link simply cannot be consented and any other interpretation would mean that the Unitary Plan was not giving effect to the New Zealand Coastal Policy Statement and therefore would be unlawful. Therefore the assessment of affects is simply in Royal Forest and Bird's case. Are these adverse effects avoided or not. Positive effects in the extent to which the adverse effects might be otherwise addressed is simply not relevant if you adopt the Forest and Bird position and in our respectful submission that is not a correct position.

So the first and there are kind of three points I wish to raise. The first, is the contextual one and my friend or Forest and Bird seem to dismiss context as being important in this case, I do not agree with that. In broad terms we're dealing with Aotearoa New Zealand's largest urban area and it's surrounded by two harbours. With that we have the ongoing urban intensification and

expansion and within that we need infrastructure to provide for those urban activities. And here, your Honours, I'd like to take you to appendix A of my legal submissions which is a series of maps, well it actually begins with a table with some numbers on it and the first thing I would like to do is make a correction to the table which also relates to paragraph 33.6 of my legal submissions which refers to 85% of Auckland's coastline abutting a significant ecological area.

After some of the questions on day one of this hearing I asked the staff at Auckland Council who generated these numbers to see if they could distinguish between the SEA-1 and the SEA-M1 and M2 areas. As a result of that they discovered that the numbers on this table were incorrect and I can provide a separate document with all the details. But ultimately instead of what they found using a more sophisticated software based technique is that rather than 85% it's 71.5% of the urban area abutting a significant ecological area of marine. As is, your Honour, and they've also provided more detailed numbers about the breakup between M1s and M2s and the rest of it. They can provide that to the Court if it's useful. It's not really essential to what I say is important in this case but if the Court would like that then I'm happy to provide it.

WILLIAMS J:
Is the – just for the purpose of getting the detail right the 2,300, 528 figure is correct and so it's just a matter of working back from that to get to 71%?

MR LANNING:
Yes that's correct your Honour.

WILLIAMS J:
Okay thanks.

GLAZEBROOK J:
I'd quite like the more detailed analysis.

WINKELMANN CJ:

Yes, it would be helpful to have a more detailed analysis, thank you, Mr Lanning.

MR LANNING:

Certainly, your Honour. What I would like the Court to refer to though is the first of two maps following that table. The first one is obviously a plan of Auckland and showing the significant ecological areas and showing the zoning and I just wanted to explain a little about what some of those colours and things meant. It just helps, I think, understanding the context that we're dealing with in Auckland. So first of all the East West Link and in particular I guess the Ann's Creek area is shown as a green dot with a black dot right in the middle to the right of Onehunga. So that's just to locate your Honours.

GLAZEBROOK J:

Sorry, which map are you on now?

MR LANNING:

I'm on the one that reads "Auckland Urban Area – Significant Ecological Area – Marine".

GLAZEBROOK J:

Okay, I just need to find your black dot.

MR LANNING:

You'll see the word "Onehunga" in the middle. To the right of that label is a green dot.

GLAZEBROOK J:

Green dot, yes.

MR LANNING:

Green, with a black dot in the middle, and that's pretty much the Ann's Creek area. And broadly, to provide some scale to this, the distance between Whangaparaoa –

WILLIAMS J:

Sorry, Mr Lanning, my printout, I got a printout of it but I did it on my –

GLAZEBROOK J:

It's attached to his, the back of his submissions.

WILLIAMS J:

Yes, I've got that, but it's in black and white, so when you talk about green dots it's hard for me to tell and my computer which I went to as an alternative has just freaked out and given me all blank pages on your submissions. So can you just bear with me a second?

MR LANNING:

Certainly, Sir.

WILLIAMS J:

Good, keep going.

MR LANNING:

And just to provide a little bit of scale for the Court, roughly the distance between Whangaparaoa which is labelled in the north down to Papakura in the south is around about 60 kilometres and it's around about 30 kilometres from Henderson in the west shown on the plan through to Howick in the east. So that's a large area. In terms of the colours that are shown there, the light yellow and sort of orangey colours, they're residential zones. Purple colours are generally sort of commercial business/industrial type activities. Bright yellow, so for instance found up north near Whangaparaoa and down south near Papakura, those bright yellow areas as future urban areas. So those are areas where it's indicated that if we're going to expand we

should be expanding into those areas, and then the brown is rural and the green is open space reserves and things like that.

So the point I want to make here, your Honours, is that the urban area is busy, it's complicated, and it's surrounded by the significant ecological areas which – marine – which are shown with the crosses, either sort of light blue or a dark blue. And so that is the context that the Unitary Plan is addressing.

And I guess the other point that we wanted to try and convey through these plans is the potential impact of Forest and Bird's argument that avoiding effects in accordance with these SEA policies which are obviously affecting these ECA areas has potential implications for larger areas across the Auckland region.

I now want to return to paragraph 5 of my summary. So this context generates a complex web of resource management issues that the Unitary Plan addresses through a range of regional policy statements and plan provisions which must be considered together, and I want to focus on some of those groups of provisions, and so (a) and (b) here is summary and I want to come back and go through some of these provisions in a little bit more detail.

So the first sets of provisions are first of all the B3 which is the RPS and the E26 provisions giving its infrastructure. They're associated with the B8 and F2 provisions which deal with coastal issues. In my submission they're recognising the essential importance of infrastructure to the sustainable management of the urban environment.

GLAZEBROOK J:
Do you want us to go to those?

MR LANNING:
I will come back to those your Honour. This is just a bit of a summary.

GLAZEBROOK J:
That's fine.

MR LANNING:
So in my submission they're acknowledging the central importance of infrastructure to the sustainable management of the urban environment, and importantly that the practical issues facing the provision of infrastructure including the need for it to integrate spatially and (inaudible 11:20:40) and that is (inaudible 11:20:42) my friend Ms Casey QC alluded to near the end there in some of that discussion with Justice Williams about some of the practicalities of providing this infrastructure in such a congested environment. And they all, these provisions also recognise the potential, and it's all about potential, the potential for infrastructure and the related reclamations within these SEA areas. Then the second set of, or third set of provisions, are the ones dealing with SEAs, the D7 and D9 set, and they're identifying and protecting important ecological values, and they do that through the scheduling of particular areas, in this case SEAs, and combined with relatively stringent policies. As I mentioned earlier, relatively large areas of the marine area adjacent to Auckland's current and future urban area, have been scheduled as these areas.

So now I want to come back and look at some of those provisions in a little bit more detail. Your Honour Chief Justice, in terms of timing, when would you like the break to occur?

WINKELMANN CJ:
11.30 Mr Lanning.

MR LANNING:
Thank you your Honour. So now turning to the Unitary Plan, and may it please the Court, I'd like to return to Chapter A1. So this is in the Unitary Plan extracts documents. Unfortunately the Unitary Plan, as you now have discovered, have become separated between two parts of the bundle. So Chapter A, it's on page 1 of the Unitary Plan extracts document.

GLAZEBROOK J:
That's tab 64, is that right?

MR LANNING:
Yes your Honour. I've got too many bits of paper in front of me.

GLAZEBROOK J:
I know the feeling.

MR LANNING:
And a small desk unfortunately. So the points I want to make here are firstly that this chapter is recording the statutory purpose of the Unitary Plan, and my friend Ms Gepp said in her submission that one of the purposes of the Unitary Plan is to give effect to the New Zealand Coastal Policy Statement. While that might seem like a minor point, in my submission, it's a significant point because the starting analysis of the Unitary Plan is that it's giving effect to, it's purpose is to achieve the purpose of the Resource Management Act, and that is captured on that page 1 where it refers to the statutory purposes of the Unitary Plan. It's about achieving the sustainable management purpose of the Resource Management Act. It must, of course, give effect to the New Zealand Coastal Policy Statement, just as it must give effect to all other national policy statements. But in my submission it's important that the New Zealand Coastal Policy Statement is given effect to in a way which suits what's on the ground. It suits, it's got to fit with the issues which a particular area is facing. It's contextual. And that contextual issue I guess is also captured similarly in this Chapter A1 right at the bottom of the first page an dover the next page where the planner refers to the various roles it's trying to achieve, and including managing Auckland's natural and physical resources while enabling growth, and protecting those things that people in communities of Auckland value.

Just within that statement alone are a lot of complex, potentially conflicting, and sometimes incommensurate values, but that is the nature of resource management planning. Now the Unitary Plan does this by grouping certain

types of issues together and then addressing obviously at the RPS level and then down through the planning, the plan of provisions. So there's that integration both down that way and it tries to integrate them across those various packages of provisions as well. But importantly and I think your Honour Justice Williams alluded to this earlier on in the hearing, how those policies are brought together in any particular proposal depends on the proposal and it's something which cannot be predicted at this planning stage and the East West Link if I could say has got a high watermark in terms of bringing a multitude of Unitary Plan policies together.

Now I probably don't need to take your Honours to this, the requirement that all of the policies are brought together and that the RPS is left as a whole is recorded in B1.5 of the plan which is again at tab 65, B1 and B1.5 and again this is important because this was the way that the Regional Policy Statement was developed, this was in the mind of the hearings panel that wrote the plan saying that B1.5, the Regional Policy Statement must be read as a whole, if an issue relates to more than one section then the relevant objectives and policies in each section must be read together.

GLAZEBROOK J:
Sorry is this in the excerpts or is this in the, this is in the other section isn't it?

MR LANNING:
Yes it is, tab 65 your Honour.

GLAZEBROOK J:
Yes all right, okay that's fine, got that now. Thank you.

WINKELMANN CJ:
Sorry Mr Lanning where were you reading through –

GLAZEBROOK J:
It's tab 65 so you have to go out.

WINKELMANN CJ:
I've got it, I was just wondering where you were reading from in B1?

MR LANNING:
So that's B1.5.

WINKELMANN CJ:
1.5 thank you.

MR LANNING:
So I now want to look a bit more closely at some of these sets of provisions which are at issue in this hearing and the first ones relate to the infrastructure provisions.

GLAZEBROOK J:
And are they in tab 64 or?

MR LANNING:
I'm about to find out your Honour. So the first one is B3 which is tab 65 so that's under tab 65. And you've been taken to the sections before so they won't be completely new, I hope. I just want to sort of move through them and highlight what I would say are particularly important aspects of these provisions.

GLAZEBROOK J:
Actually mine, sorry you'll have to just bear with me for two seconds, thank you. Right.

MR LANNING:
So first of all B3.1 which is a statement of the issues and in my submission what that statement of issues is recognising is the relationship between infrastructure, the wellbeing of people in communities, the quality of the environments and economic activity. So it's bringing those various aspects together saying this is the issue that we're dealing with. Through the

objectives and the policies, both in the Regional Policy Statement and in the planning provisions I would say there's three themes which merge. The first theme is recognition and acknowledgement of the benefits and the need to provide for the infrastructure. The second theme is that infrastructure has adverse effects which need to be dealt with in various ways and the third theme is around the practicalities of providing infrastructure and I've mentioned those earlier, and so you see those themes both in objectives at 3.2 in terms of objective (2) benefits, (3) the adverse effects, and then over the page, (4) and (5), dealing with those practical issues of structure.

I'll just note at this point that the benefits mentioned at subclause (2) of objective 1, that lists a number of types of benefits, including (e) which is "protecting the quality of the natural environment", and in my submission East West Link delivered on all of those aspects of benefits, so in not just providing economic benefit. There are a number of other benefits.

Moving on from the objectives through to the policies at 3.2.2, again same things, the need to provide for infrastructure, managing the adverse effects and then some more practical issues, and I just want to highlight there Policy (6) which is at the bottom of the page which is enabling infrastructure "in areas with natural and physical resources that have been scheduled," so these SEA areas, and then near the end of that, "while ensuring that the adverse effects on the values of such areas are avoided where practicable or otherwise remedied or mitigated."

So the point there, in my submission, is that at the very highest level of the Unitary Plan, at the RPS level, recognising the potential for infrastructure to have to locate in these areas. I will note here, however, this. Obviously (6), of course, is dealing with all of the different overlays, not just the significant ecological areas.

WINKELMANN CJ:
Sorry, what number were you at there?

MR LANNING:
So this is B3.2.2(6), and that's half past, your Honour.

WINKELMANN CJ:
We'll take the morning adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:
Mr Lanning.

MR LANNING:
Thank you, your Honour. So just before the break I finished with the Unitary Plan, the RPS provisions in the Unitary Plan dealing with infrastructure at Part B3. Those RPS provisions are given effect to in the Unitary Plan on E26. I just want to briefly go to E26. This is again at the tab 64 documents and it's at page 35 of those documents. I think it's got 632 at the top of the page. Page 35 of the PDF. I will be coming back to these provisions as well.

I wanted to take your Honours to the policies which are at E26.2.2, and again, I'm like a broken record, but again these themes of recognising the need for infrastructure, providing for it but also acknowledging the adverse effects is repeated in these policies, and I'll be coming back to policy 6 which there's been some discussion earlier in the hearing on, and that's where these E26, these infrastructure provisions, are brought directly in contact, if you like, with the SEA provisions which I'll be talking about later as well, and that was in particularly, you might recall, subparagraph (h) of that policy (6) which talks about the adverse effects being avoided or the policies that require avoidance and how they might apply in this policy context. I'll be coming back to policy (6). So that's the infrastructure set of provisions in the plan.

The next ones are the ones dealing with the coastal issues. That begins with –

WINKELMANN CJ:
I don't know that it's necessary just to show us the policies because we've seen them already, so probably you can proceed directly to making your points.

MR LANNING:
Certainly, your Honour. So in terms of the coastal issues, the RPS coastal provisions is at B8. So again this is at tab 65 under B8. The first point I want to note here is again in the issues statement which is recording that Auckland's coastal environment is a fundamental part of the region's identity and it has high natural social and cultural values and economic uses. So again it's a contested or a particularly difficult area to manage.

In terms of the policies, the RPS policies, your Honour, they're at B8.3.2 and the most importantly ones that are addressed in terms of the East West Link are the use and development policies. The first policy there is recognising that the potential to use these areas is particularly important in terms of social, economic and cultural wellbeing. (2) and (3) are important and there's a distinction between them which is important. (2) is effectively saying that urban development within these environments should be focused on where values have already been compromised and we should be avoided using areas that are less compromised or of higher value.

But then (3) deals again specifically with infrastructure and it has a different approach, and its approach is to provide for the use of the coastal marine area for particular activities and then it has a series of subclauses that have "ors" between them so they're not "ands", including some of these things like functional needs, things like that, which we were talking about. So there's again a different policy approach for infrastructure. Then over the page –

WINKELMANN CJ:

But how do you say it's a different policy approach?

MR LANNING:

So (2) is dealing with general urban activities and saying that they should be really focused on areas that are already compromised, if you like. (3) is different. It's saying provide for certain uses (inaudible 11:54:16).

WINKELMANN CJ:

So it's less restrictive, is your submission?

MR LANNING:

It could be interpreted to be actually enabling.

WILLIAMS J:

That's right, it's not restrictive at all.

MR LANNING:

And certainly less restrictive. It just talks about avoiding or mitigating. (3) is talking about enabling.

WILLIAMS J:

Are you going to tell us about the difference between functional and operational need?

MR LANNING:

I was hopefully not, Sir, because I struggle with that function myself.

WILLIAMS J:

Good, so do I. I don't understand it.

MR LANNING:

Then the only other policy I wanted to draw the Court's attention to was Policy (9) over the page which deals with reclamation and again I'm not going to spend any time on this but this is the policy foundation in the RPS for the

requirement that reclamations must meet certain criteria before they can be considered. So those RPS policies are given effect to in the F2 provisions, which your Honours will be more than familiar with, so I just wanted to have a very brief look at F2. So this is in the excerpt documents as well so this is back in that same tab 64 and it's at page 154 of that and it's got 751 on the top of the page. Your Honours have that?

WINKELMANN CJ:
Yes.

MR LANNING:
So again you've seen these before so I just wanted to briefly move through them again. Well before we actually move on to policies, on that same page where the policies are at F2 to 3 there's a background discussion and that background discussion, again this is the approach taken to these rules, policies and rules, was that reclamation and drainage from the coastal marine area may sometimes be necessary to enable activities that have functional operational need and then it goes on: "However, reclamation and drainage can have significant and often irreversible adverse effects on these areas that we're talking about." So again this acknowledgement that we need the infrastructure that has adverse effects that we need to manage.

Now looking at the policies again I'm not sure if I need to press your Honours on anything specific other than Policy 3. So Policy 3 says: "To provide for the reclamation of works that are necessary to carry out certain activities," and I wanted to draw your Honours' attention to subclause (b).

WINKELMANN CJ:
When you say Policy 3 do you mean Policy 2.3, no what are we?

MR LANNING:
Sorry your Honour.

WILLIAMS J:
2.2.3(3).

MR LANNING:

Yes F2.2.3 subclause (3) and I would like to just draw your attention to one of the purposes for which reclamation is provided is at (e) which is: "To enable the construction and/or efficient operation of the infrastructure, including but not limited to ports, airports, roads," et cetera. And in my submission those policies are the reason why we have the rule which my friend's Ms Casey, through your questions to her yesterday, where reclamation in these most important SEA-M1 areas are not prohibited in noncomplying activities whereas most other reclamations are prohibited.

And while we're on those rules there you might recall, your Honours, there was some discussion about what "minor reclamation" might mean because in the rules they provide for minor reclamation. Minor reclamation has a definition in the Unitary Plan. Unfortunately the definitions are not included in what you have in front of you so I'll just read it out to give you an essence of what a minor reclamation is. "A reclamation created adjoining an existing reclamation as part of maintenance, repair or upgrading a reclamation's seawall." Then there is actually a standard in the rules which says: "The new seawall must not extend more than 1.5 metres beyond the seawall limit of the existing structure." So they are small and they are really for the maintenance of existing reclamations.

So the next set of provisions which have obviously taken up a lot of this hearing relate to the SEAs and the ecological studies and I say that and I'm quite happy to take you through these now. So the RPS provisions which inform the SEA policies and rules are in B7 of the RPS and really there are three aspects to those provisions which run through all of these provisions. The first one is the identification and evaluation of areas of indigenous vegetation habitat.

WINKELMANN CJ:

Sorry, where are you at, Mr Lanning? I'm sorry, I was typing something. I missed what you're taking us to.

MR LANNING:

Sorry, your Honour, and I was also trying to truncate what I was going to say to save some time. So maybe it's easier if I just take you to B7. So this is in the excerpts document, tab 64, at page 11. This is Chapter B7, so again this is part of the Regional Policy Statement, and rather than reading through all of these provisions, your Honour, in my submission they can be boiled down into – there are three aspects to these provisions which means they are managing effects on these ecological values.

The first was the identification and evaluation of areas habitat and vegetation against certain criteria. Where they met, those criteria, they were mapped and scheduled as significant ecological areas, and then there are policies which apply to those areas. So that was kind of the methodology used to protect these areas, and you'll see that in the RPS at Chapter B7.

And then, of course, I'd like to take the Court back to D9 that you've spent a lot of time looking at. So D9 is the significant ecological area overlay provisions. Again, this is in the excerpts document at page 26.

So the key points I wanted to make here are that there are two aspects to the management regime. The first is the scheduling and the second is the policies. In terms of the scheduling, the Court is now familiar, there are terrestrial and there are marine significant ecological areas, and at paragraphs 4.24 and 4.25 of my legal submissions I kind of explain, well, I do explain, how that scheduling was developed and how they map, if you like, against the New Zealand Coastal Policy Statement policies. By way of –

WILLIAMS J:

Can you give me that reference in your submissions again, please?

MR LANNING:

So it's paragraphs 4.24 to 4.25. By way of a summary, the SEA-M1 areas generally correspond to the New Zealand Coastal Policy Statement 11(a) matters, so the more significant ecological matters. The M2 scheduling

generally corresponds to the 11(b) matters. They don't map exactly but in general terms that's the way the – that's how the scheduling maps, if you like, against Policy 11 in the New Zealand Coastal Policy Statement, and, as the Court will be more than familiar now, Policy (9) in the E26 set generally corresponds to the 11(a) New Zealand Coastal Policy Statement matters and Policy (10) in the Unitary Plan maps to the 11(b) matters. So the Unitary Plan has been developed very closely aligned with the New Zealand Coastal Policy Statement 11(a) and (b).

WINKELMANN CJ:
Policy 9 where? Which chapter?

MR LANNING:
D9, yes, sorry, your Honour. I know you've had a lot of numbers thrown at you.

WINKELMANN CJ:
So can you just say, can you repeat which ones in D9 map as you say?

MR LANNING:
Certainly, your Honour. Yes, so we're at the D9.3 policies. Policy (9), which is the avoid-full-stop policy, if you like, that corresponds generally to the 11(a) matters. Policy (10) which is the avoid significant effects, generally maps against Policy 11(b) of the New Zealand Coastal Policy Statement.

And the reason I say that's important is that picking up on the explanation that Ms Casey made yesterday in terms of where the reclamations and structures were and avoiding the SEA-M1 areas, again, where these places are is important in terms of which policies apply.

So I now want to return to my summary at paragraph 6. So these policies (9) and (10) are very clearly, they're very directive, they're clear avoid policies reflecting the particularly important ecological values identified by the significant ecological areas. However, in my submission, they sit in a set of

policies that do not necessarily exclude infrastructure. So while we're still in this D(9) set of provisions, and in particular the policies, so again (9) and (10), very clear, very directive but they do sit within a set of policies which includes, for instance, Policy 8 which your Honours have considered previously, which acknowledges the fact that it might not always be practicable to avoid these significant ecological areas, that's Policy 8 so that's –

WINKELMANN CJ:
Is that, can I just ask about that because when I look at that the obvious reading is that, is not as you've just put it because it says: "In accordance with our policies above," and then it moves on to (9) and (10) which are below which seem to me to suggest if you were intending (9) and (10) to be subject to (8) wouldn't you, be a better indication of that?

MR LANNING:
In my submission, your Honour, all of these policies apply. They have been very carefully worded, (13) is the other one which also recognises a potential for structures in that case to be located in these areas. They're very carefully worded policies that do not preclude or displace the role of policies (9) and (10) nor do they provide (9) and – or create (9) and (10) as vetoes over all of the other policies and if that was the intent, in my submission, then that wording would have been possible. Because we are not saying that policies (9) and (10) do not apply where there's infrastructure, they clearly do. But what these policies are doing is indicating the reality that there might be cases where we have to locate infrastructure in these areas, that's what these policies are doing.

So what that might mean, your Honour, for instance, is that when you're looking at the avoid requirement in Policy (9) it might be that if strict avoidance of all effects on-site is not possible, then a proposal is going to have to respond to the values protected by those policies in a different way, and we would say that that's what occurred with the East West Link.

So while we are here, your Honour, and this is paragraph 7 of my summary, again it wasn't just the D9 policies engaged by this proposal, there were a range of other ones and what Policy (6) in the E26 set does and we can go back to that if that's helpful.

WILLIAMS J:
You mean E26.2.2(6) or?

MR LANNING:
Correct your Honour yes. Sorry this is E26 again, tab 64, page 35 of that document is where E26 starts. So Policy E26.2.2(6) is what I'm referring to and it's actually hyperlinked in the summary so hopefully that will take you directly there, that's helpful.

GLAZEBROOK J:
It would be if we could find the summary in electronic form but some of us can't.

WINKELMANN CJ:
What page is it on of the thing?

MR LANNING:
E26 starts at –

WINKELMANN CJ:
No the particular one you're taking us to.

MR LANNING:
Sorry yes, it starts at 636. So I say at paragraph 7 of my summary that this policy specifically anticipates new infrastructure proposed in the SEAs, that is the point of this policy. So it's dealing with the case before us. And what the policy does is it lists a number of matters that must be considered when we are in this scenario. The first one, again, is that the benefits derived from the

infrastructures (a) economic, et cetera, benefits derived from infrastructure and importantly the adverse effects of not providing the infrastructure.

Then right at the end of the list is (h) and one of the matters to consider at (h) is whether adverse effects on the identified valleys of the area or feature, so in this case a significant ecological area, must be avoided in accordance with a national policy statement et cetera which is clearly the case here. So those were the NZCPS Policy 11 objectives.

What I say is that this is reinforcing, and I say this at paragraph 7(b) of my summary, this is reinforcing the importance of the avoid policies. It requires the matter to be considered but it does not amount to a veto where the effects are not entirely avoided on the strict terms of that policy. Now I'd say that the policy, this clause (h), in fact all of this Policy (6) would be written quite differently if that was the intent. If it was intended to be more than just a consideration it would have been quite easy to write it in a way that meant that.

So your Honours I'm about to move off the Unitary Plan, you might be relieved by that, but if there's questions on that, I'm happy to answer that before I move onto the other points.

WINKELMANN CJ:
Is there anything in the plan that you can show us as an example, or have we already been taken to that by Ms Casey, I think we might have already been taken to that of where you might avoid, the language you might use if you intended to be a bottom line. If you don't have that to hand Mr Lanning I don't want to hold you up, just I thought you were the plan expert so you might know that off the top of your head?

MR LANNING:
Not off the top of my head sorry your Honour.

WINKELMANN CJ:
Well that's okay.

MR LANNING:
The next point that I wanted to raise was our view of the New Zealand Coastal Policy Statement and I say there on the heading, paragraph 8 of my summary. The New Zealand Coastal Policy Statement should not be interpreted such that public infrastructure that cannot avoid effects in terms of Policy (7) must in effect be prohibited and there are three points why I say that. The first, is the Coastal Policy Statement is a statement of policy applying to all of Aotearoa New Zealand's coastal environment. That obviously the Unitary Plan is a lower-order statutory document that must give effect to. But again, it must give effect to it in a context of the area that the plan is dealing with. And in that context a high level of caution should be applied before ascribing a literary effect to the Coastal Policy Statement, especially in the Auckland context.

Following on from some of the discussion this morning, your Honours, I thought it might be useful just to take you to, and it is in the bundle, as an example of where the Minister has prohibited an activity is in the freshwater context. So this is in the, so I want to take your Honours to the New Zealand –

WILLIAMS J:
Is this in the authorities is it?

MR LANNING:
It is your Honour and I'm just, for some reason I've lost. So this is the Resource Management (National Environmental Standards for Freshwater) Regulations. If I had a junior next to me, which I'm not allowed, they'd be able to show me. So it will be subordinate legislation. We're looking at tab 70. So these were regulations that were, well, a national environmental standard that was made as part of the freshwater package that was released last year which included an amended national policy statement and this national

environmental standard and regulations as well. I just wanted to take your Honours to clause 53 of that National Environmental Standard, headed "Prohibited activities" and so this is a standard which has been causing a bit of consternation where earthworks within a natural wetland is prohibited, and subparagraph (2), other activities are prohibited in relation to wetlands.

WILLIAMS J:

Can you give me a reference that I can – you said clause 57.

MR LANNING:

53, your Honour. So it's page 39 of the NES, and "natural wetlands" unfortunately is not defined in the NES. You have to go back to the National Policy Statement on Freshwater which is at tab 66. I don't need to take you there. But it's a broadly defined term and it's the reason and the fact that it's a broadly defined term combined with a prohibited activity which has been causing the consternation and why the Ministry is now relooking at all of this. But that's an example of the Minister prohibiting an activity, it is linked to the National Policy Statement on Freshwater which is about stopping any further loss of these wetland areas. So it's a fair policy direction backed with a prohibited activity.

WINKELMANN CJ:

I just wanted to ask you one question about that. It seems to me that it's not necessary – the fact the Minister can regulate in a specific way does not necessarily preclude the notion that the policies are intended to also preclude certain types of activities because what the Minister may be doing here is simply saying: "These things are clearly, these activities are clearly prohibited, and therefore I can say that now," whereas he can't in a general policy statement encompass all activities. So it's more helpful to be particular?

MR LANNING:

In my submission, your Honour, it's analogous to when New Zealand Coastal Policy Statements and the types of policies that you've been looking at which talk about avoiding effects on certain values or certain areas, a general policy

like that could be effectively enacted, if you like, or enforced through a national environmental standard or regulations in much the same way as the Minister has done here.

GLAZEBROOK J:
Do you take your argument as far as Ms Casey to say that you can't prohibit through a policy statement?

MR LANNING:
Yes, I do, your Honour.

GLAZEBROOK J:
Well, how would this be? So you could say earthworks within a national wetland is a prohibited activity if its effects are adverse which is what – complete or partial drainage. Okay. So I mean I suppose I just have difficulty if you actually say in a policy statement that the policy is to avoid this at all costs, that that doesn't have to be translated down, because it may be, as the Chief Justice said, that you can't necessarily indicate what activities might do that. I mean here you think earthworks would which is sort of a fairly obvious thing that might do that.

MR LANNING:
Thank you, your Honour. I think certainly a policy like Policy 11(a) in the New Zealand Coastal Policy could in some circumstances justify a prohibited activity rule in a regional plan or a district plan. The point is that to establish that rule you'd need to go through the proper statutory process where, for instance, people who might be directly affected by that rule can have a say in that process.

WILLIAMS J:
They have a say in the policy process too.

MR LANNING:
Yes. That is –

WILLIAMS J:
It's the same kind of say.

MR LANNING:
Yes.

GLAZEBROOK J:
Well, it's probably irrelevant anyway, as I've said to Ms Casey, in the sense that your argument doesn't depend on that anyway, it depends upon the reconciliation of the various policy.

MR LANNING:
Yes.

So I can move on to paragraph 8(b) of my summary. Undoubtedly, the environmental values in Policy 11 are significant, in New Zealand Coastal Policy Statement 11, are significant and are deserving of high order policy recognition, and my submission, adverse effects on these values should be avoided – that's the policy – across all of New Zealand.

However, New Zealand Coastal Policy also recognises that in some contexts use of this environment, including for infrastructure, is necessary to provide for the wellbeing of people and communities. In some contexts, such as Auckland, this recognition is particularly important, in my submission.

So the third aspect of my summary is this. So what does that mean? I've heard the disquiet in terms of some of the discussion this morning, again in terms of if there are these avoid policies in the New Zealand Coastal Policy Statement does that mean decision-makers can effectively put them to one side.

The Council is not promoting a scheme whereby the avoid policies are balanced out, with reference to positive effects. So this is not a case of saying the ecological effects on the wading effects on the wading birds is justified

because of an increase in gross domestic product. The “avoid” policies are statements of policy, however, and do not necessarily predetermine the method or response to that policy. As the East West Link illustrates, the “avoid” policies drive a range of responses, and that included the assessment of alternatives, the project design, and you’ve heard some comments about how the project is actually designed to reduce and avoid these effects, and then finally, in terms of the mitigation methods, the package, the bucket or whatever we call it, of provisions which directly respond to this policy that says we should be avoiding these effects. These respond to the stringent demands of an “avoid” policy, and again we’re not saying this because it’s balancing out positive effects against adverse effects. We’re saying this slightly more discretionary approach is justified because of the importance of this infrastructure and, in particular the benefits of public infrastructure to people and communities.

And just on that, this issue of can these policies just be left on the shelf, if you like, at the final decision-making stage, because the statutory test is only to have regard to them when you get down to the section 104D, sorry, section 104 and 171 provisions, I just wanted to comment that these policies, these Policies (9) and (10) in D9 and these NZCPS policies were the reason why the Auckland Council ecologists could push so hard and increase the pot and provide what we say is a far better set of provisions responding to the effects that are recognised in these policies, and again the conditions that capture what is required if this project is to proceed is part of the project which is assessed by the Board when it’s looking at section 104D, 104 and 171.

That was all I wanted to say, your Honour.

WINKELMANN CJ:
Thank you, Mr Lanning. So we’re moving on to you, I think, Mr Majurey.

MR MAJUREY:
Yes, Ma’am. Just checking my audio.

WINKELMANN CJ:

Yes, we can hear you.

MR MAJUREY:

And I understand, Mr Registrar, that you have more paperwork but an oral from me.

WINKELMANN CJ:

We have the oral outline. Is that what we need? Just the oral outline?

MR MAJUREY:

Yes indeed.

WILLIAMS J:

Just a moment. Yes. Thank you.

MR MAJUREY:

Thank you Sir. It's an outline, but to assist the Court I've completed in full what I want to convey, just to avoid the Court having to make notes. So may it please the Court, and also just to say, given the number of times I've dropped out this morning, there's a chance I might drop out again. If that coincides with a hard question, that'll be completely coincidental. So starting at 1, this is a big case. The Supreme Court will determine whether *King Salmon* applies in resource consent decision-making and, if so, to what extent. Whether long-standing case law on the interpretation of "contrary to" for the gateway decisions is correct. The method for assessing divergent mana whenua positions in resource consent decision-making, and whether the Treaty principles operate as RMA "bottom lines".

The discussion on specified departures brought back memories of a tortured statutory construct (at least in practice). It is a reminder that the effect of this Court's decision will endure even if the RMA law reforms come to pass, including the transitional provisions that will see the many resource consent

applications in the system run their ultimate course through the courts over the years.

The notices of appeal/errors of law before the High Court do not reference the Treaty principles and the reference there I've given coming from the discussion the other day, from our principal submissions, set out those errors of law that were withdrawn by Ngāti Whātua Ōrākei.

I'm at 4. Ngāti Whātua Ōrākei say the Treaty principles are “intrinsically relevant” and “where several interpretations are available, the version that better reflects the relevant Treaty principles should be preferred”.

While it was understood Ngāti Whātua Ōrākei was not contesting the mana whenua status of the other iwi parties, it now seems to be a case of a bob each way. I have referred to the oral there and I'll come down to that a bit later in the submission. But I want to address both those points, but first with some geography and a reference to the ancient interests.

So in terms of the extent of the project it is important to remind ourselves that while a large focus of this case has been on the Manukau Harbour, the project’s scope literally is from east to west and west to east, through to State Highway 20 – sorry, State Highway 1 by Mutukaroa/Hamlins Hill and go around Penrose. I've referred there to a number of litigant taonga. Te Manukanuka o Hoturoa. Te Tō Waka and the Kāretu portages and several Tūpuna Maunga.

If I can take you over the page, members of the Court, you’ve had a number of maps, this is yet another one courtesy of Google which actually took me to a Waka Kotahi document. The legend didn’t translate in my cut and paste so I just wanted to highlight a number of these features. So clearly you’re familiar with the Manukau. If I go from west to east, south of the Māngere Inlet, you’ll see the reference there to Tūpuna Maunga Māngere/Te Pane o Mataaoho. If we go north then, or north-east, you’ll see Rarotonga, Mt Smart, that’s another Tūpuna Maunga. The bit to the north-east of that you see

Mutukaroa/Hamlins Hill, which you'll be familiar with driving along State Highway 1, the Sylvia Park turnoff. You see the red triangle inverted 55 metres, and below that Mutukaroa. Then below that you see the two sets of dotted lines, and those are the portages that I've mentioned. The northern one Karetu and Te To Waka, the southern one. So those are the features I've just wanted to highlight. They've been in different maps, but these are significant and of great moment and weight to mana whenua.

WILLIAMS J:
Can you tell me, this is just a matter of detail, the alignment of the portage, Te To Waka, is that the same as the alignment of portage road?

MR MAJUREY:
I think so but I couldn't swear that on the *Bible* Sir.

WILLIAMS J:
Okay.

MR MAJUREY:
There may be others on your screen you can, I'm not seeing any indication. If I can go back then to seven of my oral. The moana and whenua here are some of the earliest places of contact for our Polynesian tūpuna.

Manukau was, for example, navigated by the Tainui Waka after journeying around Tikapa Moana/Hauraki Gulf, through the Tāmaki River, over the portage to the Manukau and ultimately travelling to its resting place at Kawhia.

The Manukau and portages were highly strategic areas – maritime highways if you will - also serving as a route to the Waikato River and Waikato-Tainui people, the very close whanaunga of the Waiohua and Marutūāhu tribes (being Tainui waka peoples).

So too are these places important to Ngāti Whātua and Waikato-Tainui.

These are the longest-standing human-related interests in these places.

Over the page to 12, the modern recognition of these ancient interests include Treaty settlement instruments. I'm happy to take you to these references in terms of the text, but just to confirm going down the list there is acknowledgements in Part 10 of the Tāmaki Collective Deed, and that's in our full submission, and that's where all of the 13 iwi hapū of the Tāmaki Collective, the Mana Whenua Tāmaki Collective, confirm the high customary spiritual historical interest that they all had with the Manukau. Then there is references to the acknowledgements and ownership arrangements for the Tūpuna Maunga, Rarotonga, Te Pane o Mataoho and all the iwi parties in this case have those acknowledgements and the recognition of their customary interests in those Tūpuna Maunga.

Over to page 3 now in subparagraph (c), this is not in the bundle, it is the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, which was the settlement legislation for the deed, and in the preamble it sets out there in (a) it relates to certain maunga, motu, and land of Tāmaki Makaurau; and (b) in respect of which all the iwi and hapū have interests; (c) in respect of which all the iwi and hapū will share. The maunga and motu are taonga in relation to which the iwi and hapū have always maintained a unique relationship; and honoured their intergenerational role as kaitiaki.

WILLIAMS J:
Are these propositions seriously in contention, Ngāti Whātua doesn't say Ngāti Maru and Te Ākitai have no right to speak in this, Ngāti and so on have no right to speak on this issue do they, I didn't take them to be saying that, you just have different views?

MR MAJUREY:
Yes, there is a reference in the oral that we received from a learned friend that they question that Sir so I just wanted to be really clear about this in terms –

WILLIAMS J:
Well that's why I asked him the question that I did and he said: "No that's not an issue."

MR MAJUREY:

I note at 13 and I'll take this as read, one of the deed references to Ngāti Tamaoho in terms of their close association with the (inaudible 12:33:14).

Turning to 14, the appellant parties have discussed the Treaty principles, especially active protection.

In this case, unlike *TTR* and *TEPS*, there are multiple iwi traditions, world views and positions.

Ngāti Whātua Ōrākei say a "decision that avoids reclamation is at least consistent with active protection of a vulnerable Taonga".

We say the assumption that the active protection principle can only produce a prohibition outcome if this case is misplaced, as can be seen for example in the Mana Whenua Cultural Values Report and I want to take the Court through some of these extracts. So the reference is tab 17 of the case on appeal. I'll just pause to make sure the Court has that before you.

WILLIAMS J:

Sorry I'm having trouble opening mine on the hyperlink.

WINKELMANN CJ:

Tab 18 is it did you say Mr Majurey.

MR MAJUREY:

It's 17. The front page title says Cultural Values Report for the East West Link February 2017.

WILLIAMS J:

Just carry on.

WINKELMANN CJ:

Carry on Mr Majurey.

MR MAJUREY:

Thank you, Ma'am. In my para 17 I've set out the reference, a number of bullet points, and I'll quickly go through about two-thirds of these references and then the couple of sections at the end that I want to pause on. If I work through the bullet points, para 2.2, a list of the tribes that engaged in the project and that includes all the iwi parties in this case. 2.3 confirms that these tribes are the key mana whenua partners in the project. 2.4 and 12.2 list those iwi that provided Māori values assessments. So that's all the iwi parties in this case apart from Ngāti Whātua Ōrākei.

3.1 sets out the purpose of the CVR. For Justice "Williams I will just quickly confirm that. So 3.1: "The purpose of this Report is to outline the aspirations of Mana Whenua to enhance the mauri of the Māngere Inlet and record how this is to be achieved; outline the cultural values of Mana Whenua and how these have been recognised and provided for throughout the development of the project; record the effective engagement undertaken with Mana Whenua for the project; and summarise the issues, information and recommendations contained in MVAs received to date, and arising out of engagement with Mana Whenua."

9.2 lists relevant Iwi Management Plans from a number of iwi parties. 12.6 confirms iwi engagement was exemplary.

Part 4 discusses mana whenua cultural values. Part 5 discusses mana whenua history and association with the project area. Part 6 discusses particular sites and areas of significance. Clause 7.2 discusses the Treaty principle, and now I come to those sections I would like to spend a bit of time with.

So starting at 13.4. this is the section headed "Sedimentation effects". 13.4 there is an acknowledgement of the risk of the project increasing sediment discharges and how that could affect ecosystems and habitat.

13.5, in order to mitigate this it talks of mana whenua making recommendations in terms of sediment control, and at 13.7 it says: “As discussed earlier in the report, the construction methodology also provides for the removal of materials from the closed landfills along the Māngere Inlet (for construction of the road) and the establishment of a contamination containment bund at Onehunga. These measures will also work to reduce sediment entering the inlet.”

The next topic is “effects of increased stormwater discharge”, and 13.8 makes the point that “in the past, large volumes of untreated stormwater have been discharged into the inlet carrying a significant amount of pollutants,” and the pollution there has affected the ecological environment in and around the inlet. It also notes: “The mauri of the Inlet has been reduced through the mixing and cross-contamination of different water sources.”

13.10 it notes that during the engagement, mana whenua identified a number of measures in terms of dealing with stormwater systems and it says: “These measures will seek to ensure that the mauri of the water is not further degraded.”

13.12: “The Project design provides for the collection and treatment of stormwater from all new and some existing road areas in the Project area. This equates to a total road surface area of 46 hectares. This will improve the quality of water being discharged into nearby coastal marine areas, including the Māngere Inlet and the Tāmaki estuary.”

And at 13.3: “Another feature of the Project is the foreshore stormwater treatment areas that cater for existing runoff from over 600 hectares of land in the Onehunga and Penrose area. These areas currently drain directly into the Inlet without treatment, including discharge from the contaminated industrial land areas. This is expected to enhance the mauri of this water body and help to restore the mana of the wider area. It is expected that Auckland Council will take long-term responsibilities for these treatment facilities.

Then if I move to Part 14, this talks of enhancing cultural values through the ongoing project design. In there, it's in 14.1 confirmed that "mana whenua have recognised significant opportunities for the project to positively enhance cultural values. In addition to enhancing the mauri of the Māngere Inlet, mana whenua have played an important role in incorporating cultural values and concepts into the project design."

Those are detailed at 14.5 where it said: "As a result, a number of cultural values and concepts have been included in the project design. Examples include: (a) Te Hōpua ā Rangi – Mana Whenua artworks are to be included in the design; (b) Ann's Creek – design and interpretive signage is to be included within the Ann's Creek area to acknowledge the value of this environment to Mana Whenua; (c) Kāretu Portage alongside Mutukāroa – signage and interpretive information is to be included in the portage area; and (d) Ōtāhuhu Portage – the importance of the portage is recognised in the design of the bridge and the passage beneath the bridge is to be enhanced."

At 14.6: "Implementation of the project design is planned through conditions setting a process of ongoing consultation and engagement with Mana Whenua. This will include design reviews and input to design development and approval of design outcomes as they relate to cultural values and will ensure that contractors and the project team work effectively in partnership with Mana Whenua."

And the conclusions wrap up those matters, and again confirm that these various initiatives and measures address the mauri, and also deal with some of the existing and non-project related adverse environmental effects that occur in and around the Māngere Inlet in Manukau.

I am back at 18 in my oral. "There appeared to be some questioning implying the Mana Whenua parties were effectively forced to make the best of a bad position." And I've got a rather colourful (inaudible 12:41:42).

"The CVR is an illustration of why that is not so. For the Mana Whenua parties, the co-design of the project by Waka Kotahi and Mana Whenua was the manifestation of active protection, and partnership. Ngāti Whātua Ōrākei say 'Treaty jurisprudence also recognises environmental bottom lines, in particular the active duty to protect taonga, particularly vulnerable taonga, from harm'. This is not the position of the Mana Whenua parties as seen above." And there I'm referencing the bottom lines, not the protection of taonga.

Also relevant is the following evidence of Karen Wilson of Te Ākitai Waihua, which as instructed, where she said: "Te Ākitai has a particular world view when it comes to making decisions about things that may have an impact on our taonga. We do not have environmental bottom lines as such. To us, this is a Pākehā construct and, in our view, the wrong way to look at things from a Māori perspective. We have tikanga. Implicit in that is our role as kaitiaki and, implicit in that is, the concept of manaakitanga. In essence, there must be a balance between all things. If a balance is struck that aligns with our tikanga and our role as kaitiaki…" and that actually isn't too far from the Ngāti Whātua Ōrākei position.

If I can take the Court to the Board's decision, and paragraph 457, and I'll just pause there to make sure that you have that there.

WINKELMANN CJ:
Yes.

MR MAJUREY:
Thank you. just while I'm there, there was an exchange, I think on day 1, in terms of the position of Ngāti Whātua Ōrākei and the important evidence provided by Dr Patterson. If we turn to paragraph 751, the Board records there the reference to Dr Patterson and consideration of effects, and as I think (inaudible 12:44:30) the question, the important statement at the end where the Board records in the final sentence he, and that's Dr Patterson, "He nonetheless confirmed that he had not had an opportunity to review

relevant background documents and evidence associated with the proposal, except the archaeology evidence of Ms Eaves for Auckland Council."

WILLIAMS J:
Your case isn't Ngāti Maru and Waiohua Te Ākitai and so on are right, and Ngāti Whātua are wrong, is it?

MR MAJUREY:
No.

WILLIAMS J:
You just want to outline your case?

MR MAJUREY:
To the extent that, and again it comes back to the nuances of my friends' submissions, to the extent that there's some hint or indication of primacy and therefore the sole right to articulate.

WILLIAMS J:
We're not interested in that.

MR MAJUREY:
Exactly.

GLAZEBROOK J:
So that's probably put wrongly. In this case it's not relevant.

WILLIAMS J:
Yes, not in this case. We might be interested in it a little later. We're not sure.

MR MAJUREY:
Well, there might be a decision from Justice Palmer that makes its way.

My next section may be otiose. It was referring there to mana whenua but I do acknowledge the exchange I had with Justice Williams. It seemed from

one of the paragraphs in the oral it was a bob each way. So I've just set out there the very clear position as acknowledged and confirmed by Mr Blair, for example, where he acknowledged other tribes having mana whenua as well.

WILLIAMS J:
I think we understand there's a contest over this going on right now and that the parties are sensitive about it and don't want to be seen to be giving an inch in the context of this appeal. We just take that as read.

MR MAJUREY:
Yes, thank you, Sir. So really the main thrust of my submissions has been about the place in operation of the Treaty principles in the context of this case.

Those are my submissions. As much as I'd like to have a go at *King Salmon*, you've heard enough.

WINKELMANN CJ:
Thanks, Mr Majurey.

WILLIAMS J:
It is worth noting though that the tūpuna you talked about were quite good at swallowing kiore mate. It was core kai.

MR MAJUREY:
Koinā. Thank you, Ma'am.

WINKELMANN CJ:
Thanks, Mr Majurey. Well, that leaves us with the reply. So, Ms Gepp, are you – it does leave us with a reply doesn't it? Yes, we're at that point. Are you in a position to…

MS GEPP:

Well, I'm certainly in a position to reply, Ma'am. I anticipate taking around half an hour which would take you 15 minutes beyond the luncheon adjournment.

WINKELMANN CJ:

We'll just start.

GLAZEBROOK J:

I'm not able to do that.

WINKELMANN CJ:

So no, we're not going to carry on. We'll adjourn at one but we may as well get started is what I'm thinking, and come back after lunch.

MS GEPP:

Thank you.

WILLIAMS J:

You were afraid that we were going to keep you to 1 o'clock and you'd have to stop?

MS GEPP:

Yes, I was afraid you had flights to get on and I'd have to squeeze it into 15 minutes. I have circulated an outline of my reply submissions which the registrar may have provided.

WINKELMANN CJ:

So I don't know that we've got a hard copy. We've got it electronically, haven't we? Is that right?

MS GEPP:

Yes, it will have only come in electronically. Before I start on my outline, I just wanted to clarify one matter which is that, and apologies if I have inadvertently misstated the position on this, Forest and Bird's position is not that there was no offset for the Ann's Creek East vegetation impacts. The issue was

whether, as it is with all the other aspects of this case, whether that was an appropriate response to the significant adverse effects that were held to occur in that location, not whether the offset was provided or was sufficient.

Just for a summary of the reference that there are significant adverse effects, a useful place to reference that is the hearing summary of Shona Myers which is in the bundle, tab 66, page 309.02885, and in that summary Dr Myers talks about all the methods that have been used to minimise the impact on Ann's Creek East vegetation, and then says: "Despite these measures vegetation alteration and removal in Māngere Inlet and Ann's Creek East will have significant ecological effects on rare and threatened biodiversity and ecosystems. As a result mitigation and offset measures are required." So the residual effects are significant, therefore the package of measures is proposed to address them. So that's the factual context in which the case for Forest and Bird is put.

WINKELMANN CJ:
So what tab was that at?

MS GEPP:
That's at tab 66. So each of the witnesses prepared a short summary for when they actually gave evidence at the hearing so this is not pre-hearing this is when Ms Myers appears at the hearing.

WINKELMANN CJ:
And she says mitigate –

ELLEN FRANCE J:
Sorry I was just going to say you said – you're not saying there was no offset but it was, and I just missed how you described your position?

MS GEPP:
Sorry Ma'am, that whether it was appropriate for the Court to, for the Board rather, to consider offsetting in the context of a policy requirement to avoid.

And I'll come back to that legal question in my reply but I just wanted to clarify the case. Just one other clarification in response to your Honour Justice Williams, functional need and operational need are defined in Chapter J of the AUP so you don't have Chapter J but if you did want to know what the definitions say they are both of those terms are defined.

WILLIAMS J:
Are they complicated?

MS GEPP:
Would you like me to read them out?

WILLIAMS J:
No.

MS GEPP:
There's a slight difference but I'd have to look at them to tell you what they say.

WILLIAMS J:
That's fine.

MS GEPP:
So picking up in my outline of reply the primary issue here what avoid adverse effects means and the appellant's position is that it means prevent the occurrence of material adverse effects that is more than minor and non-transitory adverse effects and it bases this on the, primarily on the Court's decision in *King Salmon* which related to avoid in section 5 and policies 13 and 15. The Court in *King Salmon* was unequivocal on the meaning of "avoid", it defined it five separate times with reasons including a specific section of its judgment under the heading "meaning of avoid". And the juxtaposition of avoid with remedy and mitigate was a key aspect of the Court's reasoning as to the meaning of avoid so that the suggestion that the Court was somehow tentative on that point or didn't go all the way as to say it

means prevent the occurrence of adverse effects in that context is not supported by the decision, in my respectful submission.

The same interpretation must apply to the Coastal Policy Statement Policy 11 and the Auckland Unitary Plan policies that were written to implement the Coastal Policy Statement. My friend for the respondent places weight on the Court in *King Salmon* declining to comment on the meaning of avoid in the *Wairoa River Canal Partnership* decision. That's because it was used in that case in a single policy in the then proposed Auckland Regional Policy Statement. That policy in the Auckland Regional Policy Statement were not before the Court in *King Salmon* so it wasn't appropriate for it to reach a finding on how avoid had been interpreted in that case. That is all that can be drawn from the Court's comment that it does not express a view on the correctness of the interpretation in that case.

An issue that has developed over the course of this hearing is the relevance of concepts of mitigation and offsetting to avoiding adverse effects. The appellant's submission is that effects that must be avoided are the residual effects that are left once steps have been taken to locate and design in a way that minimises the footprint of an activity and it takes account of the consent conditions. So mitigation can contribute to reducing effects, the question is what effects are left and how they must be managed. So it's not the appellant's case that you need to look at an absolutely unmitigated, undersigned, unaligned proposal and assess its effects. Obviously the effects to be assessed are what is left after the appellant, sorry the applicant has done what it can to minimise effects.

WINKELMANN CJ:
So that would include remedial steps that are possible to take to remedy so that any effects are just transitory or –

MS GEPP:
If they're truly transitory I would say that's the case, but I wouldn't extend transitory to say at the end of a 10 year period there is going to be no net loss

because we will have planted some vegetation to offset the vegetation that's been lost. But if it's transitory in the sense that the effects are not going to, I think it depends on the form of effects that is being considered, so if it's ecological effects, the question is, is it transitory from the perspective of the economy that's impacted.

WINKELMANN CJ:
Can I just ask you, because when you took us to Dr Myers you said she actually said there's the adverse effects that are left, there would be conditions imposed to manage, didn't she?

MS GEPP:
She says: "Despite these measures vegetation and alteration will have significant adverse effects. As a result mitigation and offset measures are required." And then she says: "Overall in my opinion the amount of mitigation required to offset the ecological effects is finely balanced." So she's sort of conflating mitigation and offsetting, which was understandable because that was the way that the bucket was put forward by the applicant.

WINKELMANN CJ:
But couldn't the Board then come along and say, well we've looked at all the offsets and conditions and we're satisfied that they do take it down to that threshold.

MS GEPP:
Not in terms of offsetting in my submission because, and I'll move on to the next point in my outline, offsetting doesn't reduce or avoid adverse effects. It provides a positive effect to counterbalance the adverse effects that have not been avoided. And you have a High Court authority in the bundle that is authority for that proposition. It's a counterbalancing of effects not addressing effects at source.

ELLEN FRANCE J:
I'm a bit lost about what that means then in a practical sense.

MS GEPP:

So a good example is the Wrybill loss of habitat is offset by enhancing breeding habitat in Canterbury. So the effects is still there, the effect is the loss of habitat. The offset is the enhancement of the species through a breeding, protection of the breeding sites programme. So if the only consideration was a net consideration of what does this mean for the species, then the offsetting counterbalances the adverse effect, and that maybe, and I move to this, that maybe an absolutely valid policy response, but it's not a policy response that is specified in the provisions that applied to this application.

GLAZEBROOK J:

And why is that the argument is that you have to avoid the loss of habitat in the first place?

MS GEPP:

You have to avoid adverse effects that are more than minor and not transitory. So to start with there's a definition of "biodiversity offset" in the Unitary Plan, and it is compensation for significant residual adverse biological effects arising from subdivision use and development. So that's how the Unitary Plan defines a biodiversity offset, and in some situations it will be, and in some policies, it will be appropriate to apply an offsetting approach to managing effects. In other situations it won't, and those, it's valid to distinguish between when offsetting is allowed and when it's not, and there is another High Court decision which I have referenced there, and I have a copy of that for the Court. I've got a hard copy if that would assist. I've also sent an electronic copy to the registrar. This is a decision where it was specifically on that question, should a plan, or in this case a regional policy statement, should the Regional Policy Statement allow for offsetting, and the Court specifically considered when ecologically it is appropriate to offset, and when it is not, and put parameters around that.

WINKELMANN CJ:

We might go onto to discuss that after the lunch adjournment.

MS GEPP:

Thank you Ma'am. One of our members has got an appointment so we'll adjourn. Well, Mr Majurey you're…

MR MAJUREY:

I just wanted to address you Ma'am. I was seeing if I could seek an indulgence to be excused. I have to make some arrangements for tangihanga exemption travel for tomorrow. I need to go and get some –

WINKELMANN CJ:

Yes, you can be excused thanks Mr Majurey, and thank you for your attendance.

MR MAJUREY:

Thank you.

WINKELMANN CJ:

I take it no one had any questions for him? All right, we'll adjourn.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.03 PM

WINKELMANN CJ:

Now, Ms Gepp, I will indicate a time limit. We will be adjourned by 2.25.

MS GEPP:

I will very briefly take you to the decision which you should have a hard copy of, the *Oceana Gold v Otago Regional Council* [2020] NZHC 436 decision. This goes to the point I was just making before lunch about policies validly distinguishing between offsetting and other effects management responses, particularly avoidance.

There's rather a long passage from the Environment Court's decision which is quoted in the High Court's decision at paragraph 39. So if you're able to find

paragraph 39 of the High Court's decision and then turn over a page to paragraph 90 of the quoted Environment Court decision, that's where I'd like to pick up.

WINKELMANN CJ:
So we're at 39?

MS GEPP:
Paragraph 39 of the High Court's decision and over two pages, paragraph 90 of the Environment Court's decision that is quoted within that paragraph. Paragraph 90 starts: "The Societies say"…

GLAZEBROOK J:
Can you just help in terms of the sense in which you're using "offsetting" because I think you might be using it in a technical sense that we may not be totally au fait with.

MS GEPP:
So I'm using it in the sense that it's used in the Unitary Plan which is a very similar definition to what was used in this case. So the Unitary Plan definition which is set out in my reply outline is "compensation for significant residual adverse biological effects arising from subdivision, use and development". So the concept of compensatory effects rather than addressing, mitigating, making less, the specific effects that are being caused.

This case is simply to point out that there are valid policy reasons why you might not provide for offsetting in all cases. So the Court was referred to the International Business and Biodiversity Offsetting Programme principle of "limits to offsetting" and a specific guidance paper on that called *Limits to what can be offset*. At 91 of the Environment Court's decision it quotes that paper as identifying two scenarios where the risk is high that impacts will not be successfully offset, and underneath it says: "These factors indicate that on site conservation through avoidance, rather than an offset elsewhere, may be necessary to enable the persistence of affected biodiversity."

And then over the page at 92 the Environment Court is describing another paper that was put before it called *Biodiversity offsets – a suggested way forward* and says: "Perhaps the strongest concern about biodiversity offsets is that they could make it easier for developments to proceed that have a very significant impact on biodiversity that in many cases would be judged unacceptable, on the back of claims that the damage to biodiversity will be offset. There is also a concern that biodiversity offsets could be used as a form of 'green washing'." And it goes on to say: "Biodiversity offsets are inappropriate for certain ecosystems (or habitat) types because their rarity or the presence of particular species within them makes the clearance of these ecosystems inappropriate under any circumstances."

So it goes on to – I do want to make clear it's not challenging the offset that was put forward in this case. It is simply saying it is valid for policies to distinguish and say you can have offsetting in these circumstances, you can't have it in these other circumstances, and that is exactly what the D9 policies do. They specifically provide for offsetting in particular circumstances, and that's in policy D9.3(1), but in other circumstances the requirement is simply to avoid and the juxtaposition of those requirements to avoid versus to avoid where practicable, then remedy, then mitigate, then offset, is an important policy distinction.

Picking up at point (g) of my outline, the respondent's position appears to be that as long as you "protect" it's artificial to distinguish between how you do it (whether by avoiding or by an offset). So on that view the policies are irrelevant, it's only the objectives that need consideration. But in some situations the policy instruments make choices as to how to protect, and it is valid to make those choices and they should be respected in order to give meaning to the policies.

So the submission is that the project's consistency with the planning instruments is to be assessed based on its residual adverse effects that cannot be avoided, not the net outcome following offsetting.

WINKELMANN CJ:
So what paragraph of your outlines are you?

MS GEPP:
Outline paragraph (h). And I say that approach is not artificial. It's exactly what the policy contemplates by distinguishing between avoidance, remediation, mitigation and offsetting.

At (i) I'm addressing how that fits with the *TTR* guidance on assessing the materiality of adverse effects and I say that that guidance on assessing materiality in terms of scale, magnitude, sensitivity of the affected environment, that is relevant to a degree, but it's distinguishable to the extent that it encompasses remediation which is relevant to meeting section 10 of the EEZ Act but not to a policy that directs avoidance rather than remediation.

So the whole thrust of my –

GLAZEBROOK J:
The *TTR* was a bottom line case.

MS GEPP:
Yes, and the bottom line was "protect", and if all we had in this case was a verb saying "protect" with no policy direction as to how to achieve it, it would be open to the applicant for consent to take any approach they wish in order to demonstrate protection. But that's not what we have here, we have an objective of protecting and policies that say do it in this way and that deliberate policy choice to require avoidance is important.

The next point relates to interpretation of the New Zealand Coastal Policy Statement. There's been a suggestion that it contains policy, I'd call it policy with a little p, which is just guidance and not intended to be binding or in fact that's the whole thrust of the respondent's case. The NZCPS is subordinate legislation, it's specified to be that in the Act, it is appropriate to interpret it as such and properly interpreted there is primacy for protection of biodiversity by

avoiding adverse effects in specified circumstances. So when Policy 10 is placed next to Policy 11 there is primacy for reclamation that avoids adverse effects on biodiversity but Policy 10 doesn't say "enable reclamation where", it says "avoid reclamation unless". It's a gateway for reclamation, it's not a code for reclamation. If it was a code it would contain environmental parameters in its list of scenarios where reclamation must be avoided but it doesn't it relies on the other policies to do that work. Properly reconciled, reclamation must come within Policy 10 and meet Policy 11 and interpreted in this way both policies are met.

Turning to infrastructure and biodiversity so Policy 6 and Policy 11. If the Coastal Policy Statement enables infrastructure that would adversely affect biodiversity then both *TTR* and *King Salmon* were wrongly decided. Mineral extraction is provided for in the same subpolicy as infrastructure, that's Policy 6(1)(a), and aquaculture is enabled to a greater extent than infrastructure on the words of the Coastal Policy Statement. It has a specific direction in Policy 8 but I say, of course, that those cases were not wrongly decided, the policies can be reconciled but that does require that primacy is given to the biodiversity policy.

I just note very quickly my friend places some reliance on the surf breaks policy, it's limited and it's very limited in its application to the sites that are listed in the Coastal Policy Statement. It's not merely, surf breaks are not merely an enjoinment recreation aspect, they are expressly part of natural character which is an avoid policy in itself. The language of Policy 16 has been addressed by High Court in *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278 case. How it relates to provision for papakainga is really not an issue for this Court. We don't need to reconcile every single scenario in the New Zealand Coastal Policy Statement in determining the meaning of the provisions that are in issue before the Court.

My point 4 addresses the proposition that "if the AUP did not allow these effects, the rules would say that an activity with these effects is prohibited" and I say that that proposition is incorrect. It may be permissible to use effects as a standard to distinguish between prohibited and other statuses and

this point addresses, your Honour Justice Young's question and I undertook to come back to you with the case law on this. The case law that I identified distinguishes between permitted and consented activities so it's not the same as consented and prohibited. But I say that the same concept, that case law says "you need to be able to determine readily between permitted and consented without reference to any discretionary assessment because you need to know whether you can proceed or not and I say that that same concept of certainty to determine compliance must arise for prohibited activities because no consent may be sought for a prohibited activity.

WILLIAMS J:
By consented do you mean consentable?

MS GEPP:
Consentable, thank you. Distinguishing activity status based on effects would result in significant uncertainty, but the Act doesn't contemplate a major investigation into the effects of an activity potentially with competing assessments as part of determining whether consent may even be sought. It just doesn't work in that way. Further, some coastal policy statement policies are incapable of being implemented through distinctions in activity status.

WILLIAMS J:
It's pretty common though to identify an activity and then say, unless it's effects are.

MS GEPP:
I disagree that that is common. There are, certainly I had a look through the Unitary Plan provisions and I couldn't see any that distinguish in that way.

WILLIAMS J:
Usually they'd be, it's a controlled if you comply, and if you don't comply with sunlight requirements and so on, your basic planning things, then it's discretionary.

MS GEPP:

Yes, absolutely, you can have standards, that if you don't meet those standards.

WILLIAMS J:

Yes.

MS GEPP:

But if the standard is, will it have an adverse effect on a threatened bird, you first of all need to know what threatened birds you're dealing with, what the extent of the effect is, and that is the level of discretionary effects assessment that I say the Act doesn't usually, there maybe an example out there that I'm not aware of, but it doesn't usually distinguish between activity statuses based on an effects assessment. Standards are normal but not effects assessments. So if I can just distinguish between, for example, a setback, you must be two metres back from your neighbour's boundary.

WILLIAMS J:

Yes, I understand the point about standards, you are dead right about that, but there are lots of rules that say, if the effects are, noise ones for example, that aren't dBA related, but just unreasonable noise. Anyway let's not go there because you've only got until 2.25.

MS GEPP:

Yes I have. I make the last point that there are practical issues in distinguishing activity statuses based on effects because the rules would require extensive cross-references to all the policies that were relevant to determining whether the effect was, whether the activity was non-complying or prohibited. But more importantly I say, even if it is legally permissible to do that, to distinguish in that way, that's not what the Unitary Plan does in its rules. The first example of that is that we would expect that aquaculture and outstanding landscapes would be prohibited where it has adverse effects on the landscape. That would be a direct implication of the *King Salmon* decision, but it's not. Aquaculture is non-complying in outstanding

landscapes. The requirement to avoid effects on a landscape is achieved through the policies, not the rule. So I've got the reference in the footnote there. That's Rule A115.

It can't be inferred from the activity status of reclamation and structures in SEAs, as in the fact that the rule doesn't say they're prohibited where they would have adverse effects on the SEA, it can't be inferred from that, that the adverse effects do not have to be avoided. As with aquaculture, the requirement to avoid effects is achieved through the policies, not the rule.

The Unitary Plan uses a range of activity statuses for coastal activities, often discretionary, in the general coastal marine zone, and non-complying within SEAs, but not exclusively, for example, disposal of waste from sewage sludge and disposal of fish processing waste are discretionary activities in SEAs. It cannot be inferred from their discretionary status that these activities are not required to avoid adverse effects on SEAs. Again, it's the policies, not the rules by themselves, that determine whether consent maybe granted. So all of these rules, none of them have a standard saying "unless you have particular effects". They rely on the policies to achieve that outcome.

Activities are classed as prohibited in the Unitary Plan context where they are expected to cause significant adverse effects, that's what Chapter A tells us, not where national direction requires avoidance of adverse effects. So there's a higher standard set for prohibited activities in the Unitary Plan than might be necessary in order to implement a national policy direction. So again I say it's relying on the policies to do the lifting of achieving the avoidance requirement. It's not relying on the rules.

Section 104D needs to be read alongside section 87A(5). My friend referred you to section 87A earlier. It's the provision that describes what each of the activity statuses means, and when an activity maybe granted for one of those statuses. It contemplates a wide range of constraints on granting non-complying activities. If it only meant rules, I submit, it would say so, and I've set out subsection (5) there. If an activity is described as non-complying a

resource consent is required for it, and the consent authority may decline the consent, or grant the consent with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met, and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan. In that sentence or in that provision the word “conditions” which is defined in relation to plans and resource consents, includes terms, standards, restrictions, and prohibitions. It’s much broader than just rules.

The next point responds to the concept of or to the question of what the direction in sections 104 and 171 to “have regard to” means. It’s very important that it is read as “have regard to subject to Part 2” those are the words of the section and my friend spent very little time on those words “subject to Part 2” and focused on the words “have regard to”. Part 2 is particularised through the planning documents. That is also the answer to the respondent’s reliance on section 104(1)(ab). Now this is the provision that says that the consent authority must have regard to any positive compensation that's put forward by the applicant. That obligation to have regard to positive actions is subject to Part 2. Parliament specified that everything in section 104 is to be assessed subject to part gave the Minister the duty to particularise what Part 2 means in the coastal environment, and gave regional councils the duty to particularise Part 2 in relation to the coastal marine area of their region.

There was a discussion yesterday about the fact that does that mean you only have regard to the rules and your Honour Justice Williams said, well no because the rules are regulation but I submit that that distinction is illusory because the Coastal Policy Statement is itself secondary legislation. It was until the end of October termed a termed a disallowable instrument, its language is now changed to secondary legislation with the passage of the Secondary Legislation Act.

WILLIAMS J:

But why would they choose a different term, why didn’t they just say it was regulation?

MS GEPP:
It's not regulation but it is secondary legislation.

WILLIAMS J:
I know but what's the difference, that's the question, is there a difference in that and, if so, what is it?

MS GEPP:
Well regulations are also secondary legislations so they're both forms of secondary legislation.

WILLIAMS J:
Yes I get that but.

MS GEPP:
So is there a difference the regulations have a direct effect, rules and policies have no less status than rules but they have effect through the provisions that apply them but they're both forms of legislation to be interpreted and applied as such.

Just addressing the concept of planning being wholesale and consenting being retail it's absolutely accepted that plans cannot anticipate everything that may arise in a specific resource consent application, but the unitary plan is very specific in some ways. It described the ecological values that must be protected in marine ECAs in schedule 4 to the specificity of listing individual plan species. Why would it do that if it wasn't intended to have a constraint on consenting. Seeing those provisions as merely matters to have regard to is contrary to *R J Davidson*: My friend addressed you on that this morning. The appeal point in *R J Davidson* related to whether records depart to is permissible when making a decision on a consent application following *King Salmon*, and the respondent relied on his references to overall judgement in *Davidson* as authorising a non *King Salmon* balancing approach, when the Court is using "overall judgment" as shorthand for whether reference to Part 2 is permissible, but the Court goes on to make

clear Part 2 is expected to be implemented through the planning documents while acknowledging that will not always happen. The Coastal Policy Statement contains "restrictions" which if clearly relevant will determine a consent application and the same applies to "competently prepared" plans. Those statements are all made in *Davidson*. No basis to distinguish *Davidson* it's not just an economy versus the environment case, it was an aquaculture, Policy 8, and biodiversity, Policy 11, case.

WINKELMANN CJ:
I've negotiated another five minutes for you Ms Gepp.

MS GEPP:
Another five minutes.

WINKELMANN CJ:
But there'll be no more than another five minutes after now.

MS GEPP:
Thank you Ma'am, this next point is probably the key, the key point so if don't get through anything beyond this one that's, I'll just have to live with that.

WILLIAMS J:
We'll read it.

MS GEPP:
Thank you. This is the concept of the sliver or the narrow window or the "you just need to respond to the provisions" approach to consenting. The issue with this is that it's very hard to put parameters around what gets through the window or the sliver and what doesn't. So the respondent says the sliver is this proposal, as you might expect the respondent to say. So you get through if you mitigate and you offset and you meet enabling policies. The issue with that is that any competently prepared application for resource consent should achieve those requirements. The team putting together the application is

really not doing their job if they don't ensure that the application does all of those things.

Secondly, every region has its regionally significant or priority or exceptional projects and forms of development. So Marlborough it was aquaculture; in Auckland, roads, urban development. The exception to the – or the sliver, quickly becomes the rule. The proposition has been discussed about whether the sliver is where there is "no practicable alternative" and I say that there are a number of issues with that approach. Firstly, it's the same as reading the "avoid" policy as if it said "avoid where practicable". There are 16 references to "practicable" in the Coastal Policy Statement but none in Policy 11. Policy 23 is "do not allow the discharge of treated human sewage unless there has been adequate consideration of alternative methods, sites and routes". That kind of language, unless there's been an alternative assessment, that's not used in Policy 11. Policy 11 would have said "avoid where practicable" is that were its intended meaning.

Fundamentally, all locationally constrained activities, which includes mining, quarrying, ports, some infrastructure, potentially some urban development, cannot practicably avoid effects on the environment they locate in, so they would not have to meet the "avoid" policies. They would pass through the policy window.

"Practicable alternatives" are assessed by reference to the applicant's options assessment, how the activity can proceed, not whether it must occur at all. Here it was satisfied by evidence that assessed alternatives on a multi-criteria analysis.

If "practicable alternative" is the sliver or policy window then I submit it requires a hard look. There is evidence of alternatives assessment by Linzey and Murray but you don't have those before you. And my friend from Ngāti Whātua Ōrākei has requested that I clarify that it was accepted by Ngāti Whātua Ōrākei that a factual finding was made by the Board as to "no

practicable alternatives" but that doesn't mean that the finding was accepted as being legally correct.

Just a couple more points in the couple of minutes remaining still on the concept of the sliver or policy window. Not all directive policy is about protecting the environment. Some is about protecting existing development, for example, Policy 8(c) protects ports, Policy 9(a) protects existing aquaculture. If these are merely matters to be given significant weight then protection of those existing developments is similarly weakened, similarly to the environmental policies, and a key issue is that the sliver approach results in uncertainty. *King Salmon* specifically addressed the uncertainty between different aquaculture consent decisions at paragraph 137 and listed that as one of the issues not to take the overall judgment approach.

The proposition that the whole Board hearing would have been a waste if Forest and Bird is correct speaks to this issue. What Forest and Bird is proposing is an approach that would provide clarity from the point of preparation of an assessment of environmental effects for a proposal. The respondent's approach would encourage applicants to "give it a try", with no certainty in advance about the essential parameters that an activity must meet.

A decision enabling an activity contrary to directive policies could only be challenged if the decision was so unreasonable that no decision-maker could have come to it because weight given to a provision is not otherwise an error of law. So even approval of "very bad projects" could not be challenged except on that unreasonableness basis, but no project is likely to be framed in a way that makes it unreasonable. Your Honour, Justice Glazebrook, referred to the Hector's dolphin extinction example and I'm sure there'd be no issue with people saying that that would be an unreasonable outcome. But what if it's a snail? What if it's a piece of vegetation? Here we have an internationally unique ecosystem. Where do we know what would be unreasonable in an ecological sense and what would not be?

And lastly, the value of planning is significantly reduced and incentives for public participation and planning are significantly reduced. Parties or the public may as well not focus on getting the plan right and just appear at the consent hearing, if there is one. That is contrary to the direction of resource management reform over the last decade which has been to reduce opportunities for engagement in consent processes and encourage participation in planning.

I will leave it there, thank you, Ma'am.

WINKELMANN CJ:
Thank you. Now I had rather assumed that Mr Enright had no submissions in reply and I take it you don't, Mr Enright?

MR ENRIGHT:
No, thank you, your Honour. I had assumed that only the appellant can. Given the time constraints I'm comfortable with that, thank you.

WINKELMANN CJ:
All right, thank you. Ms Gepp.

MS GEPP:
Thank you, Ma'am.

WINKELMANN CJ:
Thank you all counsel for your very careful submissions. They've certainly thoroughly traversed the issues and we will take some time to consider our decision.

COURT ADJOURNS: 2.30 PM