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

SC 6/2022
[2022] NZSC Trans 11

BETWEEN **PORT OTAGO LIMITED**
Appellant

AND **ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**
First Respondent

OTAGO REGIONAL COUNCIL
Second Respondent

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

MARLBOROUGH DISTRICT COUNCIL
Fourth Respondent

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
NEW ZEALAND TRANSPORT AGENCY
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
Parties in 25/2021
(Submissions invited by the Court)

Hearing:	11-12 May 2022
Coram:	Winkelmann CJ Glazebrook J Ellen France J Williams J William Young J
Appearances:	L A Andersen QC and S Chadwick for the Appellant D A Allan, M C Wright and C S S Woodhouse for the First Respondent S J Anderson and T M Sefton for the Second Respondent (via AVL) M Smith, S T Shaw and M Downing for the Third Respondent J W Maassen and B D Mead for the Fourth Respondent V Casey QC and V S Evitt for Waka Kotahi P Majurey and K Ketu for the mana whenua parties in SC 25/2021 R Enright for Ngāti Whātua Orākei Whai Maia Limited in SC 25/2021

CIVIL APPEAL

MR ANDERSEN QC:

May it please the Court. I appear for the appellant Port Otago Limited with Ms Chadwick.

WINKELMANN CJ:

Tēnā korua.

MR ALLAN:

May it please the Court. I appear, Mr Allan, with Ms Woodhouse and Ms Wright, on behalf of the Environmental Defence Society Incorporated.

WINKELMANN CJ:

Tēnā koutou.

MR ANDERSON:

May it please the Court. Simon Anderson and Thea Sefton for the second respondent, Otago Regional Council.

WINKELMANN CJ:

Tēnā korua.

MR SMITH:

Tēnā o te Kōti, ko Smith tōku ingoa, e tu ana mātou, ko Ms Downing, ko Ms Shaw, mō the Royal Forest and Bird Protection Society Incorporated.

WINKELMANN CJ:

Tēnā koutou.

WILLIAMS J:

You need to develop a Māori name for that organisation Mr Smith.

MR MAASSEN:

May it please the Court. Counsel's name is Maassen with Ms Mead for the Marlborough District Council.

WINKELMANN CJ:

Tēnā korua.

MS CASEY QC:

E ngā Kaiwhakawā, tēnā koutou. Casey appearing with Ms Evitt for Waka Kotahi in the East West Link appeal.

WINKELMANN CJ:

Tēnā korua Ms Casey.

MR ENRIGHT:

E ngā Kaiwhakawā, tēnā koutou. Ko Enright tōku ingoa. I appear for Ngāti Whātua Orakei Whai Maia Limited.

WINKELMANN CJ:

Tēnā koe Mr Enright.

MR MAJUREY:

Tēnā koutou e ngā rangatira o te Kōti Manunui, Majurey and Ketu for the mana whenua parties.

WINKELMANN CJ:

Tēnā korua. Complete. Mr Andersen are you ready to address? I think the timetable that was prepared earlier continues to apply, does it, we just transpose the days?

MR ANDERSEN QC:

Yes, that's what I understood Ma'am. If it pleases the Court I want to first just talk about Port Otago and its ports in a very sensitive area and if the clerk could bring up the plan hopefully to show you what I'm talking about. So this, as you move, well that shows the mouth, which is really an important part, but of particular importance is the red hatched area, D18/F1, which is the Aramoana salt area, and the channel you'll see runs right alongside it, and in fact it goes under the channel in part, and apart from that you have the cockle beds, which you can just slightly see within the harbour, and incredibly it's difficult to know which areas will be given the maximum protection. We do know for sure that Aramoana will. There are fears that there will be other

areas – well when I "fears" it seems logical that there will be other areas that will also get a degree of protection, and you see the little square – there's three gradually increasing rectangles and those represent disposal grounds where the channel, when the channel is dredged, where the spoil is disposed of, and the first one and the second one are very close to surf breaks, important surf breaks. The surf break that is tucked in on the other side of the Aramoana Spit, the Aramoana Spit runs right out. The channel goes beside it. The surf break that is – the dumping ground that is there does have an influence on the surf break for Aramoana which is in fact created by the – if you go round to the heads and have a look where the channel comes out, the build-up on the south side of the channel is in fact what creates that surf break. It hits there and it breaks further over.

WINKELMANN CJ:
Do you mean the dumping helps the surf break?

MR ANDERSEN QC:
No, no, it's the channel itself. Where the channel is created, the south side of the channel just past the heads. So the waves come up from the south, they hit the channel and go over it and then they break, and it – the dumping ground there has a little bit of effect on it. There's been a lot of work done between the Port and the surf interest to maximise the benefits of that and…

But the surf break that is much more important is the one at Whakarewarewa which is in fact created by the Heyward Point dumping ground, the middle one.

Anyway, I'm just mentioning that to demonstrate the concerns that the Port has and why it is really concerned that it's operations could be put at risk by the avoidance policies being regarded as absolute bottom lines.

WILLIAMS J:
Are your submissions primarily focused on the salt marsh in practical terms?

MR ANDERSEN QC:

Yes, I do because that's guaranteed, but I was just saying that – yes, because the salt marsh will certainly be a protected area. The Regional Council have confirmed that in their submissions, and so that is an absolute situation, and that's the reason that I've focused on it because there's been suggestions that we're, Port's being a bit speculative but we know for certain that that area has potential issues so far as the Port is concerned.

WILLIAMS J:

Why is it not easy to avoid it?

MR ANDERSEN QC:

No.

WINKELMANN CJ:

Dump somewhere else. Can't you just dump somewhere else further out?

WILLIAMS J:

Well, it's not the dumping; it's the channel.

MR ANDERSEN QC:

No, no, sorry, the issue with the salt marsh is not to do with the dumping. It's to do with the channel running alongside it. So there's two issues that could affect the salt marsh and one of them relates to the ease of ships navigating round that – see that steep corner there? What happens is that they have to go very slowly to get around them, round that corner, and when the – before COVID, when the big cruise ships were coming in, they were having to go so slowly to get around there that there was perceived to be a real risk of the big ships being caught by the wind and so we would have a lot of sewers at the harbour as the ship got pushed over. So there were plans to widen the channel in order to enable the ships to go round it at a slightly faster speed so they wouldn't get caught, and the issue that follows from that is that they wouldn't – if "avoid" means avoid and the salt marsh can't be impinged

on and you can't widen the channel, so it would be an absolute prohibition on doing so, so –

WILLIAMS J:
Why can't you go south?

MR ANDERSEN QC:
No.

WILLIAMS J:
Or east?

MR ANDERSEN QC:
No. It seems not.

WILLIAMS J:
This is not – this is – the experts have made it clear and no one's fighting over the…

MR ANDERSEN QC:
Well, that's certainly my understanding, but you see, in fact, even the channel itself is within the salt marsh.

WILLIAMS J:
Yes, I see that.

MR ANDERSEN QC:
So that as soon – you know, that's – and just to illustrate my point as to why it is said that this doesn't accord with the RMA, its inference is there was some sort of catastrophe and a channel collapsed there, then what would happen is that the Port has got emergency powers, and it could fix it up immediately, but under section 330 I think it is of the RMA, it then has to get a resource consent, which it just couldn't do. So perhaps it fixes it and then gets resource consent. It wouldn't be able to get a resource consent because of the effect on the salt marsh. So this is what is being submitted, that in fact

the, treating this as an absolute bottom line in my respectful submission is not in accordance with the RMA itself.

WINKELMANN CJ:

You said there were two issues with the salt marsh, I'm not sure I got the second one?

MR ANDERSEN QC:

The second one is if the channel was collapsed.

GLAZEBROOK J:

Thank you.

MR ANDERSEN QC:

That would be the second one, because it would be, if the channel was to collapse somewhere around there it would have to be, it would be fixed and the Port would be directed, the Port is required under section 330 of the RMA to fix it up and then get a resource consent, and it would be an impossibility to get a resource consent if the avoidance provisions actually mean that you can't do it.

GLAZEBROOK J:

So it's widening and repairing, is that the…

MR ANDERSEN QC:

Well whatever that it would inevitably impact on the salt marsh. I mean if it collapses there you couldn't, realistically it would be difficult to imagine that you could fix it up without breaching the avoid policies. So if they are rules then you just can't do it. So it's an – yes they would fix it up, but then they would be in the position that they haven't got a resource consent and can't get one despite the fact that the Act says it has to, which is one of the problems that the Regional Council would face.

So what is submitted is that the approach taken by the majority in the Court of Appeal doesn't accord with that provision, and also with section 104D, but it's just looking at the Act itself. When you look at the 104D is the section that deals with non-complying uses, and what it says is that if permission is going to be given for a non-complying use, which is right at the bottom, it's under discretionary and above prohibited, but if permission is going to be given for that, then not only does it have to be considered an appropriate use, but it must go through one of the two gateways in section 104D, and what the Court of Appeal has done is it has effectively had a result that means there's no longer two gateways in 104D, and I say that because section 104D has firstly the adverse effects of the activity on the environment will be –

WINKELMANN CJ:

Could we have section 104 up.

MR ANDERSEN QC:

It's hyperlinked to my submissions. So if we look at section 104D, capital D, so either: "…the adverse effects activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor…" So essentially it's either minor or not contrary to objectives and policies. Now if we look at what the –

ELLEN FRANCE J:

Sorry, Mr Anderson, so are you saying there's no longer two gateways because (b) doesn't apply, is that what you're saying?

MR ANDERSEN QC:

No, I'm saying (b) is the only one that applies.

ELLEN FRANCE J:

But you wouldn't be able to use it, is that your…

MR ANDERSEN QC:

What I'm saying is that it's contrary to the scheme because this scheme envisages that contrary to policy is different to the effect being minor. Now the Court of Appeal says that a minor breach of policy is not a breach of policy. So therefore everything would fall under (2) because either the effect would not be contrary to policy, in which case it could get in under (2), or it would be contrary to policy, but would have minor effects, in which case it would get in under (2).

WINKELMANN CJ:

Are you saying that it closes off gateway (a)?

MR ANDERSEN QC:

Well what I'm saying is it makes gateway –

WINKELMANN CJ:

Which gateway are you saying it closes off?

MR ANDERSEN QC:

It's saying gateway – it's not that it closes it, but it makes it completely redundant, because anything that goes through –

WINKELMANN CJ:

Which gateway is made –

MR ANDERSEN QC:

Gateway (a), the first one. Sorry gateway, yes, gateway (a)"the… effects will be minor." Because every activity would satisfy (b) if it would satisfy (a), and just to explain it I sat here and looked at it and I had great difficulty –

GLAZEBROOK J:

I'm not sure that helps you, does it, in your argument?

MR ANDERSEN QC:

The what sorry?

GLAZEBROOK J:

I'm not sure it helps you in your argument because surely you'd like the idea of it's a minor effect it doesn't effect policy.

MR ANDERSEN QC:

Well I do but what I'm – and I agree, that's the issue, because, I mean the real problem with this is that I could say, yes, we just, forget about that, it fits nicely in terms of the Port's day-to-day operations, but the real point that I'm making is that to treat policies in that way is not in accordance with the scheme of the Act, and this is an illustration of why it's not in accordance with the scheme of the Act. Because (a), anything that satisfies (a) also satisfies (b), because either the activity is in accordance with policy, in which case it's fine with (b), or it has minor effects and contrary to police, in which case it still falls within (b). So the point that I'm making is not that this is a disadvantage for the Port, but the point that I'm making is that treating policies in this way, in my respectful submission, just doesn't let the Act work, and that's the reason that I've referred to these various provisions. What I'm suggesting, with respect, is that policies are different with rules and that they can't be looked at in isolation. The policies have to be considered in terms of the particular situation.

So if we have *Environmental Defence Society v New Zealand King Salmon Company* Ltd [2014] NZSC 38, [2014] 1 NZLR 593 itself, quite clearly that was a breach of policy and that's, it fell, you know, no matter how you interpret it, how you interpret the policy it was a breach of it, and there was no justification for being where it was. So that's fine but the issue is when you look at completely different situations, and the point that I make in respect of that, in relation to the *King Salmon* set of the circumstances, is what if that was the only place in the area, perhaps in New Zealand, where aquaculture was possible. Then if the avoid policy is to be read as absolutely excluding it, then that other policy has no value at all, and might as well not be there. So in terms of assessing the relativity of –

WINKELMANN CJ:

It would be better if –

GLAZEBROOK J:

The aquaculture policy?

MR ANDERSEN QC:

The aquaculture policy, yes, the aquaculture policy. If that was the only place. I mean I know –

GLAZEBROOK J:

I know, I know.

MR ANDERSEN QC:

But I'm taking an extreme example to demonstrate because it comes back to the issues affecting the Court. So if that was the only place then it would be my submission that that is a factor that would be taken into account in assessing the importance of that policy in that particular situation. So a policy which otherwise would say, no, no, it can't be there at all, it would have to be a thought about, well, if it's not here, and it's not going to be anywhere, is it important that we have that somewhere, which gets us back to the issue of the Port and exactly the same issue associated with the Port because it is an important policy that it operates safely and efficiently. Now quite clearly if it can operate safely and efficiently without relevantly impinging on Aramoana, then there's no question that's what it's got to do, absolutely, because for there to be any competition between the policies the Port would have to demonstrate that there is no alternative, both that it needs to do whatever it needs to do to be safe and efficient but also that it can't do it in any other way.

WINKELMANN CJ:

What about the fact – so that's not – the operation of the Port to allow cruise ships and how does that policy operate when you're trying to say – the Port needs to be able to operate but it's only restricted in its operation because –

the only restriction that's effective is that it can't get cruise ships in. Every other kind of ship can come in.

MR ANDERSEN QC:
Exactly.

WINKELMANN CJ:
How do you – but you might say that salt marsh is more important than allowing cruise ships in. They might just have to go to another port somewhere.

MR ANDERSEN QC:
Exactly, and I don't argue with that either, but what I'm saying is that the Port should not be precluded from raising the issue because the difficulty is that it doesn't even get a chance to say: "Hang on, this is more important," and, you know, the issues that would be important in determining that is what would be the effect on the salt marsh of maybe removing a bit or – obviously, there's a huge difference between moving a little bit and removing a whole lot, and just as the issue is how important is it in terms of the safe and efficient operation of the Port to have what it wants, and those are the very factors that would influence which policy in the particular circumstances, in my submission, would be the one that would triumph in that sense.

So you'd start off with a very strong directive, almost a rule, I'd agree almost a rule but not a rule, for saying: "No, no, you don't go there, but hang on, there are these other considerations," and when you look at the particular project and what is being sought, there needs, in my respectful submission, to be an opportunity to say while this is the general policies, in this particular situation the circumstances are such that this policy becomes so important that the general policy direction is contrary to the avoidance. Now I'm not –

GLAZEBROOK J:
Can I just check whether another way of saying this is that *King Salmon* didn't deal with a situation which you're describing where the policies genuinely

conflict and so what you're suggesting is a mechanism where they do genuinely conflict to work out which one applies in particular circumstances and that would, I would have thought, mean that you try as far as possible to make sure, and I think probably *King Salmon* says this, to have both policies impinged upon as little as they possibly could be in the particular circumstances?

MR ANDERSEN QC:

Absolutely. Absolutely, yes, that's right, and the point is that you can't tell in the abstract whether the policies are going to conflict or not is really the point. Until you actually have the particular circumstances and made your case in terms of where it is, you don't know. But yes, it does, and that was –

WINKELMANN CJ:

So you're effectively – your position is as is the position that's set out in Justice Miller's judgment?

MR ANDERSEN QC:

Yes, yes, it is, that's exactly right. That's the position you get to because what the Environment Court was trying to do was it's trying to say: "Well, when we look at these two policies one of the things that is fundamentally important to this particular area is that the Port can operate safely and efficiently," and so it put that in. Where it went wrong, and I acknowledged in the Court of Appeal that it went wrong, is by not dealing with it in terms of the minimum effect on the adverse policies. There's no argument that that's what the decision should have done and, you know, we're really just looking at the top bit of it rather than thinking it through, but that's exactly right, so that if in the circumstances – well, the conflict occurs if it is argued that it can't operate safely and efficiently without breaching the avoid policies.

The question then is how is that dealt with? There may be some areas where the – and local policy does come into it – there may be some areas where it is decided that a particular area is so important that it is more important than the Port, and if that was the situation then that can be a policy direction, it's a

perfectly legitimate one to put in, because it helps in those sorts of conflicts as to what's going to happen. But in a situation in Otago where the Port is fundamentally important, it becomes a question of when you look at these you do have to consider the importance of the Port, but it does have to be on the basis that the avoid policies are still recognised. While the general policies thrust may be to allow it, it doesn't give carte blanche to do anything and it has to be to the minimum extent possible to ensure that the avoid policies are kept to the extent necessary, and that's really what I'm suggesting is –

WINKELMANN CJ:
So in my understanding of Justice Miller's findings, and maybe 113, is that he was effectively saying that the Coastal Police Statement doesn't require or cannot require that next order local policy documents preclude that case by case analysis you're talking about.

MR ANDERSEN QC:
Yes.

WINKELMANN CJ:
But he also says I think in effect at 113, or that's what I'm understanding him to say, but nor can it give away through the policy that is adopted the general thrust of the New Zealand Coastal Policy Statement. So it can't go the other way.

MR ANDERSEN QC:
No, no.

WINKELMANN CJ:
I think that's what he's saying at 113.

MR ANDERSEN QC:
No, it's got to be taken – that's right, it's got to be taken absolutely into account. That's right.

But the problem that the Port has always faced is the suggestion, which is the Regional Council's position, that it can't, it is absolutely prohibited from doing anything which might cause any effect that is more than minor on the salt marsh, and what the Port's argument is that no, it isn't absolutely prohibited. It has the opportunity to argue that the policy favouring the Port in a particular circumstance could allow some incursion. Of course it doesn't. It's still got to make the case for being granted.

The problem that's happening with the avoidance policies is that it is making entities very reluctant to spend the money involved in terms of development for fear that they can get a huge number of policies in their favour and basically deal with most things but there may be one avoidance policy which is impinged on, and this concept that it is a bottom line and just one little policy can absolutely stimy a development, that it trumps it, means that effectively developments, like if the – the Port could not have done the development that it did.

The Forest and Bird talk about its deepening of the channel and so on, but it could not have done that under the majority of the Court of Appeal's interpretation. It couldn't have done it because it involved some incursion into the Aramoana salt marsh, quite apart from some other theoretical things, but we know that absolutely, so it couldn't have deepened the channel.

What could it have done? Well, if it was going to do it, it would have had to have made a case to the government and got empowering legislation, and, with respect, that's not a good environmental result. We just need to have a look at what happened in Kaikōura when the road collapsed and the government allowed it to be fixed. There wasn't any environmental controls really on what could happen. Stuff was all just thrown in the sea. I mean the Ports, I think generally the Port CEOs looked with envy at the powers that the person who was in charge of that project had.

So we've set up this balancing mechanism in the RMA and it would be quite wrong, in my submission, if the way in which it's interpreted means that it can't

be used for big projects, either because there's something there that would trump it or that people see the risk of failure is so great that they're not going to spend the money on making the application. I mean you just think about transferring the Port at Auckland to Whangārei. Is it reasonable that anyone would try to do that in a situation where, if the avoid policies in terms of whatever was there, was held to be an absolute barrier. You wouldn't start with an RMA application, and if it was going to be done presumably it would be authorised by statute, and if it was authorised by statute, the very protections and the balancing that the Act gets are suddenly gone.

WILLIAMS J:
You're only arguing for a narrow pass through which to sneak, aren't you? you're not, I mean on your analysis –

WINKELMANN CJ:
Without the pejorative sense of "sneak".

WILLIAMS J:
Yes, I don't mean "sneak" in a bad way, I was just looking, I couldn't think of a better word. Basically you have to be satisfied, or the decider has to be satisfied that there's no reasonable alternative in order to provide for the safety and efficiency of the operation of an existing port.

MR ANDERSEN QC:
That's right.

WILLIAMS J:
So, and you say, your way of dealing with that is to read an exception into the avoid policies except where it's necessary.

MR ANDERSEN QC:
Yes, perhaps if I can put it –

WILLIAMS J:

But what about Policy 9 itself?

MR ANDERSEN QC:

Yes, well the same applies. I mean what I'm really trying to say is that you can't look at a conflict between policies in isolation. So we can say what they mean, and "avoid" means "avoid", and others are empowering, but we can't look at them in isolation because if you look at them in isolation then the avoid policies are always going to win, because the point made by Transport New Zealand was that if you had equivalent in terms of an empowering policy, would be compulsory, and that's right, so you can't do that. But if you don't look at – you can look at it in isolation and say that's a very strong policy, that's what it is, but how it applies on the ground, in my respectful submission, depends on the particular circumstances.

WILLIAMS J:

Yes.

MR ANDERSEN QC:

So something that clearly would not be permitted in one area, might be permitted in another, and so there might be any circumstances in which an empowering policy could take on such importance that it could be seen to override the avoid policy. Not an easy thing to do, I agree.

WILLIAMS J:

Well the words of Policy 9 say port infrastructure is necessary.

MR ANDERSEN QC:

Yes.

WILLIAMS J:

I think that's as fair paraphrase. Is necessary infrastructure, and it's necessary therefore for that infrastructure to be able to be provided in a safe and efficient way. Right?

MR ANDERSEN QC:

Yes.

WILLIAMS J:

If the only way to do that safely and efficiently is to take a chunk out of the salt marsh, and there's no other alternative, then it seems to me the two policies are in conflict.

MR ANDERSEN QC:

Yes.

WILLIAMS J:

And you have to resolve them either by your interpretive technique, or by following the *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 approach, and reaching above to do the job. Reaching above the NZCPS.

MR ANDERSEN QC:

Yes.

WILLIAMS J:

To find your answer. If you've got yourself into that logjam, and you're only arguing for the logjam, aren't you?

MR ANDERSEN QC:

Well I am, that's exactly right, because the – when you look at it – what I'm saying is that the Act, this is subsidiary to the Act, the Act is for sustainable development, it's got to be looked at in a way that does not preclude it. So if there is a logjam there's got to be that decision made, and what I'm arguing against is the concept that something which might in many cases be regarded as the bottom line, can't be said to be the same in all circumstances, because you've got to look at the individual circumstances and say, looking at those circumstances how are these, how do these policies relate.

WINKELMANN CJ:

So to take it to the extreme you couldn't have, interpret it to prevent food being brought into New Zealand's major city? To take it to the extreme.

MR ANDERSEN QC:

Yes.

WINKELMANN CJ:

Or Dunedin.

WILLIAMS J:

Or in your case you could say, couldn't you, that Port Otago has been receiving passenger liners for 50 years, and therefore it's already a bona fide part of the operation of the Port, and closing it down would be to knobble the operation to whatever extent it might be said, not just the operation but the economy upon which the operation sits.

GLAZEBROOK J:

Assuming cruise liners provide any proper benefit to the economy of course.

MR ANDERSEN QC:

Well the point is that, you know, you often don't realise that significance of these. I remember when one of the ships couldn't get in and there was several thousand lunches that had been made that couldn't be disposed of, and there were a lot of –

WILLIAMS J:

A few taxis missed out too.

MR ANDERSEN QC:

Yes.

WILLIAMS J:

But it might be different if the Port suddenly decided for the first time that it was a great economic opportunity to open up the Port to passenger liners. You might have a much tougher road, then, mightn't you?

MR ANDERSEN QC:

Look, I'm not, I accept the road could be incredibly tough, but what I'm suggesting is –

WILLIAMS J:

Passage, maybe channel might be better –

MR ANDERSEN QC:

Channel, could be very tough, but the point is that it must be given the opportunity to argue it and to make its case. You see the bottom line stops at it. It doesn't even get off the ground if you treat it as a bottom line, whereas –

GLAZEBROOK J:

And you agree you might lose, the Port might lose out, depending upon how it works out that conflict in the particular case, but what you say is you have the ability to go in and argue it, is my understanding?

MR ANDERSEN QC:

Yes, that's right, that's right.

GLAZEBROOK J:

So it has to deal with a conflict of policy in the way that you describe it, a true conflict.

MR ANDERSEN QC:

Yes, yes.

GLAZEBROOK J:

Which wasn't dealt with in *King Salmon*, so it's new.

MR ANDERSEN QC:

No, no, that's right, the issue was –

GLAZEBROOK J:

It didn't arise.

MR ANDERSEN QC:

The issue was quite simple there and that's what happened, and issue that was quite simply and is quite straightforward in terms of the facts has created all sorts of issues in terms of interpreting it where the facts are much more complex and there is while, when you look at the policies in the book, you might say, well, one's clearly more important than the other. When you're actually looking at the situation and it's real effect of them, it takes on quite a different complexion.

WILLIAMS J:

But there wouldn't be anything wrong, for example, with provision eventually by rules which made the maintenance of the current operation, a safe and efficient operation – sorry, operation of the current port, a discretionary activity, but any expansion a non-complying one.

MR ANDERSEN QC:

Well no, no, no, that's what you would expect. That's what you would expect. But the difficulty is that if it's non-complying and the avoid policies are seen as absolute bottom lines, then it can't do anything.

WILLIAMS J:

Well, that's expansion though. The factual scenario you're giving us is the maintenance of the current operation of the Port. Now do you want expansion also to be discretionary rather than non-complying, and how do you justify that.

MR ANDERSEN QC:

Well, I think the answer is I don't, it doesn't all together matter which it is, so long as it's not prohibited, and so long as there is the ability to argue. You see the, when we're looking at the policy which is what the Environment Court did, it wasn't really being considered whether it was discretionary or non-complying, but what was, with respect, a very clever thing in terms of dealing with it was that the, Judge Jackson said it had to be dealt with by way of a resource consent, and what that meant was that it couldn't be prohibited.

WILLIAMS J:

I thought it was a resource consent by way of a discretionary activity?

MR ANDERSEN QC:

No, no, it was simply a resource consent.

WILLIAMS J:

Okay.

MR ANDERSEN QC:

No, and it couldn't reasonably be expected. I wouldn't have argued for it to be a discretionary activity. But no it was simply by resource consent. The reason for that was that it then couldn't be prohibited, and so if it could be prohibited there was the opportunity to make the application.

WINKELMANN CJ:

And that's what Justice Miller says is the wrong approach, is that right?

MR ANDERSEN QC:

No, no, Justice Miller, as I understood it in terms of the wrong approach, was talking about the fact that once you got consent you had – once you got over the threshold you had carte blanche, which quite plainly you didn't, and that's where the Environment Court went wrong, because it said it had to avoid remedy or mitigate effects, whereas it really has to be that it has the minimum adverse effect possible.

WINKELMANN CJ:
Yes.

MR ANDERSEN QC:
I've been pretty much all over the place in terms of my oral submissions but I will just talk a little bit, if I can, about the…

You've got this constant tension, of course, between the natural and the physical resources and the problem prior to *King Salmon* I accept is that the so-called overall judgment approach just didn't give the adequate protection, and *King Salmon* was – something like that was needed certainly, I would respectfully submit, to put a brake on it. But the question is what does that mean and where does the brake go?

What I suggest has happened now is that the pendulum in terms of the lower Courts' interpretation of it has gone too far the other way, and so what – and when we look at this case it's illustrative of it. It's illustrative, I suggest, of a general tendency because the Environment Court saw the need to provide for it, albeit too generously. The High Court, in what was, with respect, a very principled decision, because basically if you were going to treat the policies as rules that's what happened and the problem is that when you treat the policies as rules without allowing for minor effects then basically you couldn't even have put channel markers on the salt marsh.

So it went that way, and the Court of Appeal seems, in my respect, to have taken a somewhat pragmatic decision which allows the Port to operate properly, but I suspect it felt somewhat constrained by the *King Salmon* decision to go further in terms of the issue of policies because what I'm suggesting is that whilst the Court of Appeal suggested that there was a bit of a mismatch, the mismatch really only occurs if you treat policies as rules. If you don't treat them as rules that apply everywhere but look at the policies in an individual situation, then, in my submission, it does work, that basically you look at the individual circumstances and recognise that a policy which in

some circumstances will be so strong as to be directive, in other circumstances there may be other policies which become more important.

The discussion in the English case I hope you'll find helpful in terms of talking about individual circumstances and things which are very important here may not be so important there.

So instead of an overall judgment, it is perhaps better, in my respectful submission, considered in terms of a balancing of policies, so that when you've actually got – so you can have a policy direction that is contrary to an individual, very strongly-worded avoid policy, and that, of course, means that you do have the two arms of section 104D when you go back to 104D because when you're looking at the issue of "contrary to policy" you're talking about what is deemed to be the policy thrust, not one individual policy.

WINKELMANN CJ:
Can I ask you about the policy in question? I mean you seem to be accepting that it did stray, is that right?

MR ANDERSEN QC:
Sorry, I missed the last…

WINKELMANN CJ:
Do you accept that it did stray, the policy in question, that it wasn't right, you know, the…

MR ANDERSEN QC:
Yes, yes, it strayed in terms of what happened afterwards, yes, so that the remedy that it had, the words that it had to "avoid, remedy or mitigate adverse effects", is far too wide because that basically suggested that you've got a hump to get over but once you get over the hump you've got carte blanche, whereas plainly you don't because the policies are still important and they are important in framing conditions, they are important in identifying what happens, and quite clearly when you've got an avoid policy any breach of it

has to be the minimum possible to achieve because if you're going to go beyond that you can no longer justify breaching it, so it has to be, in my respectful submission, the absolute minimum.

WINKELMANN CJ:

What about (d) which is just a general rule: "If any of the policies under objective 3.2 cannot be implemented while providing for the safe and efficient operation of Port Otago activities" then Policy 4.3.4 prevails, so it's just a general rule without regard to the particular context?

MR ANDERSEN QC:

I didn't see that as adding anything to it, quite frankly. There was an issue in terms of that other policy but I couldn't see any circumstances in which that would be relevant.

ELLEN FRANCE J:

Just going back, Mr Andersen, how does your balancing approach differ from the overall judgment?

MR ANDERSEN QC:

It differs because the overall judgment looks outside policies because what I – as I understand it under the overall judgment you could say, well, this is something that can be justified on a completely different basis, whereas the policies are only one factor in terms of the consent, so simply because you've got the policy going a particular direction does not mean you can get the consent. So there has to be a separate assessment of the policies.

WINKELMANN CJ:

And the approach, your suggestion is – do you accept the *RJ Davidson* approach, would that – that provides you with a methodology so you don't just sort of look at it in a zoomed out way. You actually go through an exercise. Is that the approach you're suggesting, so you go through reconciling and when you can't you look at the overall values in Part 2?

MR ANDERSEN QC:

Yes, but what I'm suggesting is that the two things are separate so that you have to sort out your policy approach and then there are all the other matters that are relevant too. The policies are important and so a policy can't be offset in respect of something that isn't a policy. So the issue – when I talk about the balancing of policies, what I'm saying is that you've got a policy here and a policy here. Before you're even going to be able to consider anything else you've got to be satisfied that the policy thrust favours whatever it is that's being sought. Then the question of whether it's granted or not is –

GLAZEBROOK J:

Sorry, can you just repeat for a bit? So you do the balance…

WINKELMANN CJ:

What are you saying because…

GLAZEBROOK J:

Well, you start obviously in working out whether you can – and I think you agree with this – whether you can meet both policies and if you can you have to.

MR ANDERSEN QC:

Yes.

GLAZEBROOK J:

And then when you can't, I think you were saying what you do then.

MR ANDERSEN QC:

Well, if you can't then it's – sorry, I may not have entirely understood it. Let's take an example. Let's suppose –

WINKELMANN CJ:

Also can I just remind you that *RJ Davidson* says you look at each policy and you work out whether you can meet them in the circumstance and it's only

when they're in conflict that you then assist yourself on how to resolve that conflict in a particular case by reference to the value, to Part 2.

MR ANDERSEN QC:

Yes, whereas –

WINKELMANN CJ:

And you're not happy with that?

MR ANDERSEN QC:

Well, not entirely, and the reason for that is that it's – two reasons. One, it is preserving this concept of individual policies possibly having a veto power, whereas what I'm suggesting is that you've got to look at all of the policies. Yes, certainly, if they can all be reconciled that's fine; if not, there's got to be a decision in terms of where the policy direction is.

WINKELMANN CJ:

Why do you say it's preserving the idea of individual policies having a veto power because that's not my understanding, or is that something in *RJ Davidson* then?

MR ANDERSEN QC:

No, it's not there but that's what is being argued here and I think particularly, as I understand it, with the *Transport New Zealand* case it's being argued that irrespective of the genuine – and I might be wrong – but my understanding of the argument is that irrespective of the genuine policy direction overall, if there is one avoid policy, that is sufficient to prevent it proceeding.

WILLIAMS J:

What do you mean by the policy direction overall?

MR ANDERSEN QC:

Well, for instance, let's take the issue of if they were going to expand the – the situation that I can perhaps talk about with a little bit of knowledge hopefully –

if you were going to expand the channel then you have a whole variety of policies in respect of the various issues that flow through, and it may be that the policies generally can be reconciled but there may be, and in a very positive way, so that there's only – it's seen as a very positive development but there may be a very small amount of the salt marsh that is going to be affected, or even potentially affected because when we're talking about "effects" it may be potential effects, so there's only going to be a small amount. Now in that situation it would be my submission that it would be quite wrong if the avoid policy could be treated as being something quite separate and preventing the project if the overall thrust was despite the avoid policy, and taking that into account, it is important that the project proceed policy-wise.

GLAZEBROOK J:
Is the submission rather that you don't just jump to an overall as – well, I don't think *Davidson* does say that necessarily – but that you try and work out the reconciliation of the two policies in terms of the document as a whole? So first of all you have to make sure there is a conflict and you do absolutely everything you can to avoid that conflict.

MR ANDERSEN QC:
Absolutely.

GLAZEBROOK J:
If it's unavoidable, you then look at how the reconciliation could happen in terms of not only the two policies but the document as a whole. Is that the submission?

MR ANDERSEN QC:
No, no.

GLAZEBROOK J:
No?

MR ANDERSEN QC:

It is most of the way there, but, of course, there'll often be more than two policies but –

GLAZEBROOK J:

No, I understand that, but let's just assume there two – and those are the two that are irreconcilable.

MR ANDERSEN QC:

Yes, so if the two are irreconcilable then there has to be a decision, in my respectful submission, as to which policy takes precedence in this particular situation.

WINKELMANN CJ:

And the question is what is that guided by and what has been submitted I think by Mr Maassen is that it could be guided as *RJ Davidson* suggests because it can't just be a free-floating thing. It could be guided by Part 2 of the Resource Management Act.

GLAZEBROOK J:

Or the document as a whole I thought first, I thought was your first submission.

WINKELMANN CJ:

Or the document as a whole too.

MR ANDERSEN QC:

Well, that's true but I would have thought that once you've got the policy direction you then still have to consider the issues. You have to consider them. They are not in isolation. But if you throw them in together, I think the concern was that if you throw it all in together you don't want to get back into the situation where there is an overall judgment which defeats the environmental effects. So that was really my concern in terms of putting it in that way, and yes, quite clearly it all has to be considered and what is

proposed will affect the policy, but I would suggest there really does need to be a decision as to what is the guiding policy as opposed to whether the consent should be granted.

WINKELMANN CJ:

My difficulty, what I think you're saying is that it sounds like a slightly triumphalist approach. Is it like one policy wins out? But that's not what you're saying, is it?

MR ANDERSEN QC:

No, no, I don't. No, quite the opposite. What I'm saying is that you have to apply the policy to the circumstances, and I suppose that is in a sense what his Honour was saying, wasn't it? If it is that you apply the policy to the circumstances then yes, I agree with that totally, but if…

WINKELMANN CJ:

So what is said in *RJ Davidson* is that you faithfully apply the policy to the circumstances and that you do see, try to work out that to ensure there's no conflict if possible.

MR ANDERSEN QC:

Yes.

WINKELMANN CJ:

When there is, then it's not just – you're not suddenly in the land of the overall judgment.

MR ANDERSEN QC:

No.

WINKELMANN CJ:

You're still bound by the principles, by the policy document and also by the – you might find assistance in Part 2.

MR ANDERSEN QC:

Yes.

WINKELMANN CJ:

That sounds like what you're saying.

MR ANDERSEN QC:

It is, it is, and I was just a bit reluctant to put it in a way that might have thought I was supporting the overall – it does say, it does support what I'm saying, but the real essence also of what I'm saying which I don't want to be lost in that is that a policy can have different effects in different circumstances and that's really the key to what I'm saying is that a policy which would absolutely prohibit something in a particular set of circumstances may be quite different in a different set of circumstances because another policy which would be subservient in one set can in fact take real importance in another because of the circumstances surrounding it.

WINKELMANN CJ:

So you don't assess whether there's a conflict between the policies just on the language? You assess it on the facts of the particular case in front of you?

MR ANDERSEN QC:

It has to be assessed on the facts, yes, because as soon as there's a recognition that the avoid policies are not an absolute bar, then that gives the opportunity to be able to say, well, you know, we can rely on these other policies to say that in this situation what would normally be absolutely prohibited is fine, and it allows in some situations for adverse – for effects on – activities having adverse effects that would otherwise be prohibited may be able to be sufficiently mitigated in a policy sense because it's not a rule and it can be satisfied that that policy can in fact, looked at generally, perhaps be met by maybe re-establishment of a bird colony or something like that because although the actual colony itself, its destruction was to be avoided, something else put in place which would provide the same overall purpose might be seen, and I'm not saying would, might be seen in a particular

circumstance as increasing the – decreasing the significance of that policy such that a development that otherwise was very important could go ahead.

GLAZEBROOK J:

Can I just check, you're suggesting the wording at 2.11 of your submissions, as I understand, is that the – is that what you're suggesting?

MR ANDERSEN QC:

Yes. Well, there's –

GLAZEBROOK J:

Can I just put it to you that that assumes that the Port policy is going to override the other policies and then – which is not really what you've said orally and that you've accepted that in particular circumstances it might be that the prohibition actually overrides the Port? So it's really a wording issue in respect of this because I think what you're saying is, well, what you seem to have agreed with, is that in certain circumstances it might be that they say: "Sorry, cruise ships, that does not allow you to do whatever it was that you were doing with the salt marsh."

MR ANDERSEN QC:

Well, it certainly wasn't intended to be empowering and can I explain why? What was thought was, firstly, it can apply for resource consent and, secondly, it had to establish a minimum threshold before it could apply. That's what was intended.

GLAZEBROOK J:

Okay, I understand.

MR ANDERSEN QC:

Not that it would be granted, but that this is the minimum, that, you know, that we're not interested in any application from the Port unless it can establish that the…

GLAZEBROOK J:

And then whether it's granted or not is –

MR ANDERSEN QC:

Yes, the minimum necessary to achieve the efficient and safe operation. So the Port has to say for the efficient and safe operation this is the minimum that can be achieved, and only then can it say: "Please can we have it?" So no, it wasn't intended to be read as saying if it can establish that it gets it. No, it's just simply in the position that that's the threshold –

GLAZEBROOK J:

To apply?

MR ANDERSEN QC:

– and in my submission a high threshold. It meets that threshold, then it can say, yes, let's talk about whether we can – let's make our case, basically.

WILLIAM YOUNG J:

Mr Andersen, what happens if the Port wants to expand its operations? On your wording would it be an answer to that application, well, they can achieve an efficient and safe operation of its ports but on a low scale of activity?

MR ANDERSEN QC:

The answer is, well, it wasn't intended to be because it was the effects from the operation or development, so it was envisaged that if the –

WILLIAM YOUNG J:

But you're talking "the minimum necessary in order to achieve the efficient and safe operation of its ports".

MR ANDERSEN QC:

Yes.

WILLIAM YOUNG J:

Do you see that as leaving scope for argument that an expansion of the activities of the Ports beyond what they presently are might be necessary?

MR ANDERSEN QC:

Yes, yes, and essentially it's not – it wasn't envisaged that it would do it. I mean whenever it has expanded the argument that's been met is that it hasn't been necessary for it to have this extra land, have the extra things.

WILLIAM YOUNG J:

Well, at one level it's not necessary for it to expand. I mean it just means if it doesn't expand there would be other consequences, but…

MR ANDERSEN QC:

The difficulty that the Ports face is that they are very dependent upon overseas shipping. They really have no control over what they do in that sense and they either have to meet the requirements or they lose the trade. So that was the way in which it was put.

WILLIAM YOUNG J:

So the Port has to meet the market.

MR ANDERSEN QC:

Yes. If it…

WINKELMANN CJ:

There's a lot in that then, isn't there?

MR ANDERSEN QC:

Yes.

WINKELMANN CJ:

In those words.

WILLIAM YOUNG J:

But say it did want to, for instance, significantly increase its capability for cruise ships, would that be an increasing capability if that is necessary for its efficient and safe operation?

MR ANDERSEN QC:

Well, it would have to demonstrate that, wouldn't it? The answer would be yes or it wouldn't apply for it because essentially if the cruise ships get bigger, as happened for a while with the container ships, if the cruise ships get bigger, if it's going to maintain its cruise market, it's got to be able to cope with them, and what was intended here was that –

WILLIAM YOUNG J:

But, sorry, there are different sizes of cruise ships. They're not sort of a homogeneous category of vessel.

MR ANDERSEN QC:

Absolutely.

WILLIAM YOUNG J:

So you could have a port operation that services smallish cruise ships, and if the Port were to say: "Well, we want to actually deal with the much bigger ones as well," then this wording would lead to perhaps a slightly abstract debate as to whether it is necessary to accommodate larger cruise ships.

MR ANDERSEN QC:

Yes, I accept that, and essentially I think what was really thought was that it's really not likely to go into any new fields. It was just it's going to maintain. But yes, I accept that's right, that there could be something that it wanted to do and some new area which this would not allow, and so, you know – and that just hadn't been thought about. It was really just thought about in terms of it's development to meet its existing needs, not the possible development in a situation if there was something new, and this is the whole problem, that you don't know what's around the corner with the Ports, and, you know,

Port Chalmers has faced that. I mean it was virtually a derelict port in the ’60s and that created the noise problems that it’s got because the people that wanted a nice seaside place, when the Port got busy, suddenly found themselves living in an extremely noisy environment, and that just illustrates the lack of ability to be able to accurately foresee what’s going to happen, and I take your Honour’s point.

The issue that is intended to be there though is that there has to be some threshold so that an application can’t just be made simply because this would be nice to do, and you fix the threshold and that is in accordance with the Coastal Policy Statement because it sets out the broad brush and it’s for the community really to decide at what level is it going to consider that these other policies may come into play.

WILLIAMS J:
I would have thought that in addition to your minimum extent necessary for efficient safe operation standard you’d also need and must still remedy or mitigate, since you can’t avoid, to the maximum extent possible consistent with the activity proceeding.

MR ANDERSEN QC:
Yes, I wouldn’t – I agree. I –

WILLIAMS J:
So maybe Judge Jackson was right in the end, as long as there’s a necessity standard in there too.

MR ANDERSEN QC:
Yes, yes, that’s right. So that’s really the middle bit that was missing, but yes, I certainly agree with that and that’s what would be expected, and it wouldn’t hurt to put it in, I agree.

WINKELMANN CJ:

Is there a problem though that the policy could be said to cut across the Coastal Policy Statement in some circumstances. It's wording is too permissive.

MR ANDERSEN QC:

Well the question is if it is permissive, I mean there's no magic in the wording so the issue is that – and it wasn't intended to be permissive, it was intended to set a bar.

WINKELMANN CJ:

I know but it is, in itself, a policy direction, isn't it, it could be seen to be a policy direction and contrary, do you see, it's kind of setting up a whole new set of rules which seem to be permissive of harm and don't carry forward that value of avoiding to the extent possible. Well, avoiding, doesn't carry forward that really. This is just my thought, you know, whether it's actually the point that I think Justice Miller is making is 113 to 115 still apply. Just thinking that through Mr Anderson.

MR ANDERSEN QC:

Look I accept that and the issue is, of course, that this has to go back to the Environment Court to fix the final policy so that it is – no it goes back to the Council to fix the final policy. So that's what the Environment Court did. It suggested a policy that the Council were to put in place. So whatever is here isn't the final word. So basically what was intended was to provide something that provides a proper direction as to this sort of situation, how it's going to be dealt with. Firstly it avoids pointless applications and secondly, it makes it clear that in the right circumstances an application can be made. But I agree it should quite plainly make it clear that you're dealing with a very sensitive area, and if you go to damage it you've got to be expected to fix it up. That has essentially been the way in which the Regional Council rules have operated with the Port in respect of noise. That was the first point that actually put in place a noise mitigation programme to compensate people for the effects of noise and so on, and it's part of that whole concept that the

polluter pays, and the same, look, I entirely accept is appropriate here, and it's just a question of what wording it should be. But the important thing from the Port's point of view is that it can't be excluded from making an application if it needs to, and it would be helped if there was some indication of what would sort of be the minimum necessary for it to even be considered, which was what was aimed in terms of, working on what Judge Jackson had started with.

GLAZEBROOK J:
So we've asked you a lot of questions, and I see you've got 22 minutes left in terms of your time allocation.

MR ANDERSEN QC:
I think I've covered a lot of what I wanted.

GLAZEBROOK J:
I was just going to ask quickly whether something more generic in terms of saying if there are conflicts in policies, or the conflict should be worked through as far as possible, would be better than something specific in relation to the Port. I mean obviously it would be applicable to the Port, but in fact would set out how once you get to an irreconcilable conflict, how that could be worked through.

MR ANDERSEN QC:
Oh absolutely. Absolutely. I mean the real issue, if the decision recognises that the strength of policies depend on the individual circumstances, and not on the absolute words seen in the abstract, well then that, the rest can follow. But that's the real problem, is that if it is treated, a negative policy is treated as being a rule, then you don't get anywhere. Once it is seen as being a policy that is something that is to be applied in terms of the purposes of the Act, looking at it and interpreting it and interpreting the conflict with other policies, then the rest flows to some extent, and it can be nice to have the various add-ons but not particularly necessary really. This is, the problem has arisen because of the way in which something which quite plainly needed to be

avoided *King Salmon* has been interpreted as a more general sort of "no, you can't touch it irrespective of the circumstances".

WILLIAMS J:
So then the fight moves to the plan and then to the consent stage?

MR ANDERSEN QC:
Yes, although there may not necessarily – yes, but I'm not even sure that there would necessarily be a particular fight in the plan because it seems to me that if you are going to do something which relates to an area which is strongly protected by policy then the best you can reasonably expect is a non-complying use, so that what you have to show then – I mean, it's nice to get something else but what you have to show is that despite – if there's recognition that it's the policy thrust that is relevant for 104D rather than an individual policy, then it enables individual projects to be assessed on their merits because you can say, right, despite the – yes, there may be some avoid policy – the effects may breach some avoid policies, so looked at on their own we're not going to get through 104 because obviously the effects are more than minor, but if it can be said that the overall policy thrust favours it then that would allow the consent to be given. So the issue…

WILLIAMS J:
But if, as you suggest, the policy should be amended to have a necessity clause in it, shall we say, then that naturally cascades down into a plan that makes permitted use provision for the necessity circumstance. You wouldn't generally have a non-complying activity status if the plan says there are necessity circumstances in which the activity and its effects need to be provided for.

MR ANDERSEN QC:
Well, it could do but I think it would be too much to expect to have a –

WILLIAMS J:

Otherwise the plan and the policy statement are inconsistent. One says they are necessary and the other doesn't provide for them.

MR ANDERSEN QC:

No, I don't entirely accept that, with respect, because the plan –

WILLIAMS J:

You're talking against yourself.

MR ANDERSEN QC:

Yes, maybe, but the reason for that is that the rules in the plan will permit particular things and it may be the most you could expect in terms of something like the channel is a discretionary use.

WILLIAMS J:

That's what I was…

MR ANDERSEN QC:

And – or it might be permitted with regards to its existing channel. But any extension –

WILLIAMS J:

I meant permitted in the general sense rather than…

MR ANDERSEN QC:

The reality is that when you look at the way in which the, the theory of the plan, the difference between a discretionary use and a non-complying use is the gateway that the non-complying use has to go through. That's the big difference, and what really regulates that is policy in terms of big developments. So if you look at – if policies are going to have a veto effect then you're never going to get permission for a large use that is non-complying, but if the general policy – if policies are looked at as being the general thrust of the policy such that an overall policy basket which may

include some avoid policies can nevertheless support the scheme, then it can be granted as a non-complying use, and from a practical point of view I would expect the argument at the plan level to simply relate to the ease with which the Port could carry out its existing operations so long as it was satisfied that there was an ability to apply if necessary, even as a non-complying use, for something that was unexpected in the future, and my point being that – and it all depends upon the interpretation of policy, so it's –

WILLIAMS J:
I must say I would have thought that the Port would want activities that were necessary for safe, particularly safe, but also efficient operation to be provided for specifically.

MR ANDERSEN QC:
It would love it, it would love it, but is it achievable? That's the question. Yes, it would certainly love – but the problem is that it's fine as a concept but if you're not – I don't see how you could get a rule that would in some way permit an encroachment onto Aramoana, you know, if we look at the reality of it in terms of where the real problems arise because it would have to be, I would have thought, dealt with on a case-by-case basis.

GLAZEBROOK J:
That's your point, isn't it, that you can't really have a generic rule because individual circumstances will come to different conclusions, even where there's a conflict. So if there's a conflict it might be the avoid policy overrides the other policies just if you're interpreting in context and in the context of the objectives of the plan and possibly Part 2, and in other circumstances that won't be the case.

MR ANDERSEN QC:
Yes, exactly, and it would invite an argument as to what was required by the – difficult to have a rule talk about the safe and efficient operation because that would just be inviting arguments as to what that involved in a particular –

WILLIAMS J:

Think you're going to get that anyway.

MR ANDERSEN QC:

Well, that's right. We do, I agree, and I mean from the Port's point of view it really – it's trying to be realistic about what it can expect and by both allowing it to operate safely and efficiently but also recognising the fact that it's in a very sensitive environment, and, you know, you'll see that the Regional Council are very conscious of the environment that it's in and almost to the extent, as I understand their submissions, of saying, well, if it's the environment or the Port then it's the environment, which there's – you know, and that's the battle to some extent that is being waged here, and the Port's got it up front but there'll be various other entities right throughout the country that face that same sort of issue if they are dealing with particular challenges in terms of their environment.

One thing that I haven't mentioned is that, and it just follows on from what I'm saying, but one of the issues that I ask you to bear in mind is that whilst there's been a lot of interpretation of policies in the particular Courts, there doesn't really seem to have been consideration of what is meant by "policy" and the word itself is also one of those words that needs to be interpreted in context because of the Legislation Act. I just really make that point and it is talked about both in the Act itself and in the Coastal Policy Statement right at the beginning.

One matter that I do want to just mention as being – there is some discussion, both in the Court of Appeal and in some of the submissions, about the difference between policies and rules and effects and values, and whilst, of course, they are quite different, it really has no practical significance in terms of this argument because if the activities do not have adverse effects that adversely affect the protected values then nobody's concerned, so – and there's really two opposite arguments that have been raised. One is that values are different to effects. Yes, they are, but from a practical sense the

Port knows that some of its activities will have adverse effects on protected values.

The other argument that's raised is, well, let's wait and see what happens, you know, this is getting a bit too premature. But the problem is that the policies are right at the top of the tree and the rules and so on are going to follow from the policies and if it isn't sorted out now then who knows how long it's going to be before there's another look at policies, and what's going to go on in the meantime? So that's why it is really important from the Port's point of view to get the issue of what is a policy and how it works clearly identified at the time that the policy statement is there.

EDS have claimed, and this is at paragraph 14, Mr Clerk, that no evidence support Otago's concerns and to some extent what has happened there is that there has been a little bit of an overstating of what happened because there's various issues that happen. I just want to make it clear what Port Otago's concerns were. Right at the beginning their concerns were that they might not be able to do anything which impacted on the protected values and the two matters of real significance in relation to that were the putting of the beacons for the channel on Aramoana, if even a minor thing was prohibited, and the other one was adaptive management because adaptive management is a tool that is used by Port Otago in terms of its dredging and disposal operations to ensure that there aren't adverse effects. The problem is that you can model what's going to happen at sea and it is modelled but how do you know that everything is going to behave exactly as modelled, and that is where adaptive management comes in because what is happening is that the Port is only operating under certain conditions and if the turbidity is different to what is predicted they stop the work and find out why. That's the basis of the consents that it got for the dumping grounds and some other matters, and the High Court decision excluded adaptive management and did not allow that to happen. The concessions made in the Court of Appeal judgment were fundamentally important to the Port because it's no longer a matter of concern about its day-to-day operations which are able to be covered because the effects are only minor in terms of its day-to-day

operations at most. You'll be aware that there are, of course, no existing use rights in the coastal marine area.

So it's fine in terms of the day-to-day operations, and so the concern is what happens if, for instance, they want to expand or they want to do something different, and so it's very much at the policy level for them and thinking about, okay, if this is going to happen are we prohibited from even considering it under the RMA or do we have a chance of getting resource consent?

So I've pretty much covered what I wanted to, I think, if there's…

WINKELMANN CJ:
Thank you, Mr Andersen.

MR ANDERSEN QC:
Thank you.

WINKELMANN CJ:
Mr Maassen.

MR MAASSEN:
May it please the Court. It's always interesting following Mr Andersen because I'm acting for the Council really supporting their position because I'm – the Council is very concerned about the administration of the Act and how *King Salmon* is applied, and sometimes my friend, even acting for the Port, makes concessions I wouldn't, but largely supporting the position he's adopted.

The way I would like to approach the oral argument is in three tranches or sections. The first is to discuss the different approaches of the parties to the function, application and effect of the avoidance policies and that's a very abstract jurisprudential discussion, and that distils the fourth respondent's submissions from pages 1 to 16. The second section is some specific submissions about the New Zealand Coastal Policy Statement as it relates to

ports, which is at pages 26 to 27, and finally, as section 3, some discussion about the choice of approach to intervention in these cases, and the impact that has in terms of the senior courts role in regional planning. So there is real legal significance about how you approach intervention in these cases.

WINKELMANN CJ:
What do you mean "intervention"?

MR MAASSEN:
Well the legal basis for saying there is an error of law. What are you saying has gone wrong, and what's the basis for your intervention.

WINKELMANN CJ:
You mean appellate intervention?

MR MAASSEN:
Yes. So essentially there are two different theories emerging from the submissions.

WINKELMANN CJ:
So we're on one now are we?

MR MAASSEN:
Yes, section 1. The first is the definitive theory, which essentially says that "avoid" means "avoid", and I know that's somewhat simplistic because there is acknowledgement exceptions but essentially the argument is that that this is a definitive bottom line that must be followed, and that is why EDS challenged the Environment Court's decision because, it challenged the finding at paragraph 122 of the Environment Court's decision, that in certain circumstances the avoidance policies could yield to Policy 9 and that, they say, is an incorrect application of *King Salmon* and the implementation obligation. So that's the definitive theory that the avoidance policies always trump other policies. They uniquely reach down into the discretions in section

61 and 104 to definitively define the result, and my learned friend Ms Casey describes that as the absolutist approach, and I prefer the definitive theory.

The second theory, which is the one I've tried to advance in my submissions, is what I call the constraining theory, and that recognises that avoidance policies are very strongly worded and intended to powerfully shape outcomes at the regional scale. So absolutely accept they're strongly directed policies aimed to shape outcomes. But it is important to read these as policies and that they are direct and are nuanced for two reasons. The first is that if you are trying to convey a constraining meaning of a directive nature, you do tend to use strong language, and the Court of Appeal at paragraph 79 and 87 of its decision noted and placed significance on the fact that the avoidance policies did not have the formulation avoid, remedy or mitigate. However, wording of this type would have sent completely the wrong message because it would look like there was a buffet of options, each of which is equally valid. On the other hand if you use avoid strongly you are conveying the need for only few exceptions and for them to be demonstrably justified through careful reasoning, and in my submission that captures the point in a nutshell. These passages of the Court of Appeal's decision apply an interpretive regulatory lens to the determination of the function and effect and application of policy, and it ignores the context and purpose of policy and its intended use.

WINKELMANN CJ:
What paragraphs was that in the Court of Appeal's majority decision?

MR MAASSEN:
It's paragraphs 79 and 87. The second reason it is direct and unnuanced is because there is very limited information available to a Minister in making a statement at the national scale. You don't know where the resources are, they are still to be assessed, inventorised and itemised through the process of regional planning and hence you simply don't have reliable information to set absolutely bottom line limits. The machinery that follows that provides the mechanism by which those exceptions are created. So when interpreting

language in my submission we as lawyers inevitably read policy the way we read regulation, without understanding the terrain that we're in, in terms of what these documents are, and in my submission –

WINKELMANN CJ:
It's 11.31. that was an overview of the second reason was it? Do you want to pick that up after morning tea?

MR MAASSEN:
Certainly.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:
Mr Maassen.

MR MAASSEN:
Yes, thank you, your Honour. So I'm now going to just briefly summarise the hallmarks of what I call the constraining theory which is that policies are different in effect, function or application to rules in that they are not determinative but constraining. They are an input into a discretion, a rule is not and a rule has explicit confined exceptions. A policy is an input to a discretion where exceptions are developed in the context of the matters relevant to those discretions.

The second feature is that the statutory discretions where policy is applied which provide by their nature a scope for choice cannot be constrained in a way to effectively fetter a statutory discretion.

WINKELMANN CJ:
Now are you in your submissions somewhere?

MR MAASSEN:
This is just a summary of the general concept.

And while not rules, the force of policy is intended to shape outcomes and ensure regional consistency and therefore to have legal force. Therefore the provisions of the NZCPS must be correctly interpreted. The provisions must be discriminated amongst each other for their respective constraining force and weighted appropriately. So the constraining theory fully accepts the legal force of policy and the need for them to be appropriately reconciled.

The fourth feature is that implicit in the existence of choice is that policy is an input into decision-making, not determinative.

WILLIAMS J:
What do you make of Policy 29 then?

MR MAASSEN:
There are some minor exceptions about implementation. If I could just bring up 29. The Court noted that some policies sort of operate like rules and are provided for in the statutory scheme and they are around implementation. So Policy 29 is an example of that.

WILLIAMS J:
It's a straight direction.

MR MAASSEN:
It's a straight direction.

WILLIAMS J:
It reads like a rule.

MR MAASSEN:
It does read like a rule, I agree with that, and you'll find in the National Policy Statement for Freshwater Management a direction for councils to immediately introduce a policy. So those have that character and the point I think the Supreme Court was making is you can't generally say: "It's a policy, therefore it never operates like a rule," because there are some that have that real character in this framework, and I fully accept that. I'm just simply submitting that in this context the avoidance policies are more directive but they don't have this character which is essentially an implementation direction. So no, I fully accept that there are exceptions to that general proposition.

WILLIAMS J:
Is it possible to say that because – is it section 55 or 57 that specifically provides for such directions by policy? I can't remember which one it is but one of those two – that that's where it's in those circumstances that policies are rules but not otherwise?

MR MAASSEN:

Yes, I think the reverse applies, that those are exceptions that prove the rule that they don't operate like rules, I guess is what you're saying, and I definitely think you can draw that inference, that they are specifically provided to have a different effect than the normal class of objectives and policies, and so I have put them in a separate class in terms of my submissions.

So in these two competing theories each party or each group claims to be following faithfully *King Salmon* and that is because there is some language that supports the constraining theory and there is some language that supports the definitive theory, and my argument has been that where it's been in support of the definitive theory it's because the Court is addressing the specific situation of the policies and circumstances before it in that case. So there was a clear yielding of Policy 8 to the avoidance policies and it was very clear that something had gone wrong here through the reasoning to give precedence and that mechanism was the overall judgment approach. But in my submission there are other parts of the decision that clearly support the view that the constraining theory is correct, and I just wonder if I could briefly take you to the key passages that I think in that judgment support the constraining theory?

So if you could bring up *King Salmon* which is in the fourth respondent's bundle as item 4 and turn to paragraph 142. So the first point is the top sentence in the second page is highlighted and it's the acknowledgement that there is a distinction between objectives and policies and an enactment, and in that context I think his Honour is referring to both regulation and statute. So that's the first explicit acknowledgement that there is a difference.

GLAZEBROOK J:

Sorry, whereabouts are you?

MR MAASSEN:

The top of the second page that reads: "The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies

and, to that extent at least, does differ from an enactment." So it's about half way down 142.

The next passages that I want to refer to are 91, and this is where the Court recognises considerable choice for councils in how they formulate new objectives and policies to implement the NZCPS, and the point they make is that the policies are variable in their strength and therefore different in the degree of choice or flexibility that is allowed, and the constraining theory absolutely accepts that position.

So the statement: "Of course, scope is not infinite," is a deliberate statement because that's exactly what the overall judgment theory posits, that the choice is infinite, and so the Court is squarely there, recognising what I call scope for choice constrained by the directive strength of policy.

If I turn to 127, the highlighted passage is at the end of 127, the Court is really saying these differences again in directive strength directly impinge on the degree of flexibility and scope for choice in the discretion.

Finally, 152, the sentence, the fourth sentence: "As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice." There's no suggestion that these are not policies but in a sense determinative, and so in my submission that's consistent with the theory and the next point is that the Court recognised that there could be exceptions, and I refer to paragraphs 126 and 129, and one of those, of course, is where there is a tension or conflict between provisions. So at 126 the Court agreed with Mr Kirkpatrick that all these policies were not inevitably in conflict, they had to be reconciled in some way, and the constrained theory absolutely says you have to go through a reasoning process of identifying this precedence. But then at 129 the Court acknowledges that there will be circumstances which they predict to be infrequent, where those conflicts can arise, and the key sentence that I want to draw to your attention is the one that starts: "But we consider that this is likely to occur infrequently, given the way that he various policies are

expressed and the conclusions that can be drawn from those differences in wording." The words that I want to emphasis is "and the conclusions that can be drawn from those differences in wording".

And the question is, really, EDS has put, is can you reliably conclude from the subtle differences in wording between the avoidance policies and Policy 9, that this avoidance policies were absolutely in any circumstances to prevail, and in my submission, you can't draw that conclusion from reading the whole of the NZCPS as a whole. So that is not a reliable conclusion. However, as the Court demonstrated very powerfully in *King Salmon*, you can draw the reliable conclusion that allowing for an enabling aquaculture in appropriate places would yield to the avoidance policies because they are inappropriate, and so I don't think it necessarily follows that you have to have this competition to see whether both policies that are in play have the absolute same constrained strength. It's about what reliable conclusions can you draw in the event of a conflict in the circumstances that you're presented.

Finally, at paragraph 129 again, his Honour talks about weight. He says moreover those expressed in more directive terms will carry greater weight. That's not the language of definitive determination and 141 also frames the argument in terms of weight. The last sentence is: "The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts," and I emphasise those words, "but rather how much additional weight." And in my submission the word "in relevant contexts" somewhat mollifies the language where when his Honour is talking about reconciling, it's a purely textual reconciliation, as opposed to an eye to also the context in which you sit.

So in my submission *King Salmon* does provide support for the constraining theory and the reason I raise that is because when the first application for leave was made his Honour Justice O'Regan said, I was trying to overturn *King Salmon* and in my submission I said, no the decision is just trying to be correctly applied in a different context, and in different circumstances, and it's

definitely not that agenda as I understand it. I think it can be reconciled with the theory I'm advancing.

I wanted to then show that the Supreme Court's approach in *King Salmon* has a family resemblance to some of the UK authorities, and I appreciate it's a different statutory context but those authorities do sympathetically correspond to some of these statements by the Supreme Court in *King Salmon*. So if I could bring up the *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] UKFC 37, [2017] 1 WLR 1865 decision, which is in the authorities bundle, I think it's item 16. This is, I'm at page 1877. This is a decision of Lord Carnwath in the Supreme Court, and at page 877.

WILLIAMS J:
Of the bundle or the report?

MR MAASSEN:
Of the report.

GLAZEBROOK J:
Can I just say, which authorities are these?

MR MAASSEN:
These are the authorities that were added to the drop box by Mr Anderson, and it's simply in a folder called authorities, and they were supplied with a memorandum explaining that we had done some comparative law assessment that had picked up these cases.

WILLIAMS J:
Yes, that's the third one in the drive.

GLAZEBROOK J:
I'm just trying to locate them. Thank you. Located.

MR MAASSEN:

So what I have up on the screen is a quote directly from that judgment which is quoting Lord Justice Reed in the *Tesco Stores Ltd v Dundee City Council* decision, and if you get a chance to read that, that is entirely, in my submission, consistent with *King Salmon* and the idea that policy is intended to constrain decision-making and to incorporate some degree of consistency in decision-making by the parties that are responsible to apply the policy, but it goes on to say that these input into discretionary powers where some degree, some measure of flexibility is to be retained, and in my submission that is entirely consistent with his Honour Justice Arnold's decision in *King Salmon*.

Finally I just want to refer you to two, three passages actually, from the *City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320, [2021] 1 WLR 5761 decision, which is a decision of the English Court of Appeal, and the first point I want to make is that that decision recognises the existence of exceptions that emerge from policy, and if I could ask you to go to page 5779 to explain this case. So the statutory setting for this policy is identified at paragraph 57 of the decision. So this is a particular or special regard provision to policies that are created under that regime. Then on page 5781 is the policy that is in question and it's in capitalisation at roughly A to B, and if you read that policy you'll see that it is extraordinarily directive around protection of heritage, and if you go to 5788 the Court makes the point that, at paragraph 78, that cases will vary and, for example, addresses situations where that variation may be important, and importantly I draw your attention to the last sentence which is not that the benefits of, say, a work would sustain heritage in the location and therefore outweigh those benefits, which is something Justice Arnold dealt with in his exceptions discussion, you know, it could actually improve natural character, his Honour there is saying, actually, benefits of a different kind which have no implications for the heritage asset must be, may be weighty enough to outbalance the harm, and so there is this way in which policy can yield to other policy or other circumstances depending on the facts of the case.

Finally, if you could go to page 5772, there is at paragraph 28 a general statement of principles that in my opinion the Court should reflect on as having some relevance to getting the balance right in terms of the basis for your intervention.

Now in the English experience, intervention only occurs in a *Wednesbury* sense and I'm not advancing that as the position, only position in which you could intervene in respect of determinations of this character because my submission is the Supreme Court was right in *King Salmon* that the implementation obligation itself has boundaries that are different and tighter than *Wednesbury* but I am making the submission that when the Court says: "We will not be drawn into an unduly legalistic approach," the reason is that if the approach is one purely that is interpretive and not contextual to the circumstances of the case that is exactly the cul-de-sac in which you will be driven, and the Courts have been repeatedly resisting that in England.

So in my submission it's not on all fours but there is useful indications there about why you should support the constraining theory as I have formulated it.

Then I want to talk about why, in my submission, this constraining theory is valid based on an interpretation of the New Zealand Coastal Policy Statement as a whole, and so what I would like to do is to pull up the New Zealand Coastal Policy Statement which is in the case 301.151 and look briefly at Policies 11 and 15.

Now these avoidance policies all start with "to protect" or "to preserve" something. That's their fundamental goal and then they have a sequenced analysis of avoidance, full avoidance for very special natural resources and then avoid significant effects on the second tier of resources, if that makes sense. That's deliberate because it's trying to be more directive in terms of the policy regime.

But if you turn to Objective 6, this objective makes an important point in the first bullet point because this is the enabling objective. It says: "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 the idea of "appropriate limits", in my submission, is because the maker of the statement is anticipating that the limits will be set down this system, down in the regional plans or ultimately in decision-making, and so to say that the avoidance policies are bottom lines when this objective is identifying the possibility of setting appropriate limits, in my submission is not a fair reading, so you cannot read it as absolute avoidance, and to support that – and I emphasise the word "appropriate" because it comes up a lot in this statement.

If you look at Policy 1, the policy acknowledges as the first policy right off the bat, Policy 1(1), that the extent and characteristics of the coastal environment vary from region to region and locality to locality; and the issues that may arise have different effects in different localities. So that's an acknowledgement that the maker has not got all the information to make a full evaluation of how these policies are intended to land in lower order instruments.

Finally, Policy 7 which is the crucial strategic policy statement which the Supreme Court emphasised heavily in *King Salmon*, the Regional Council is to consider how and where to provide and what activities and forms of subdivide, use and development are inappropriate and may be inappropriate without consideration of the effects through a resource consent application. Where you are dealing with a predictive situation here, which is what will the Ports needs be, and you cannot define those or set those and balance those appropriately, what his Honour, Judge Jackson, said is this is one of those circumstances that is appropriate to have determined in a resource consent but we can't just simply shunt it down there; we have to set a policy framework that is more specific to guide the exercise of those discretions, and in my submission that was grappling with the issues at a regional scale which was the Court's job, and, secondly, in subparagraph (2) of that policy, again it's requiring regional policy statements to identify the resources and values and specify acceptable limits to change, and so this is the work, in my submission, of the more particular regional instrument. So in my submission none of these

provisions are made subject to the avoidance policies and so in my submission there is scope for choice and strategic planning.

The second context I wanted to put for the constraining theory is the importance of scale at which an assessment is made in the formulation of policy, and the constraining theory fully accepts the NZCPS is a comprehensive and more detailed picture of sustainable management priorities compared with Part 2 but it is not acknowledged to be fit for purpose at the regional scale. In my submission the machinery and the requirement for regional plans and the evaluative tools that are contained within that machinery point to the fact that the NZCPS is neither sufficient or complete in terms of reconciling or resolving these issues, and in my submission the mechanism in section 61 in particular points to the fact that Parliament did not regard the NZCPS as the final word in terms of resolving these issues.

The other point that I made in my submissions was referring the Court to the Ministerial Record of Reasoning and that is –

WINKELMANN CJ:
Just a moment. So you're saying the mechanism in section 61 of the RMA points out that Parliament didn't regard – can you just repeat that submission?

MR MAASSEN:
The provisions of section 61 which describe how you go about making a regional plan or regional policy statement say in accordance with the NZCPS Part 2 and section 32, and that's the mechanism and that is intended to operate to produce…

GLAZEBROOK J:
Can we perhaps get it up please.

WINKELMANN CJ:
If this submission at all important, Mr Maassen, it's just that you went quite fast past it and I didn't have time, my slow brain.

MR MAASSEN:

I'm sorry, section 61, if you bring it up, there is two provisions in play here. There is 61 and 62 and 61, in my submission – so 62 has the implementation obligation and 61, in my submission, describes the methodology for decision-making, and subsection (1) requires you to prepare and change a regional policy statement in accordance with your functions, the provisions of Part 2, an evaluation report in section 32, the obligation to have particular regard to that report in section 32, and a national policy statement. Now in my submission the implementation obligation in section 62(3) is doing a different job. It is setting –

GLAZEBROOK J:

Can we please bring that up.

MR MAASSEN:

So that provision is telling, explaining what has to be – sorry, just track up to the start of 62. The marginal note says "Contents of regional policy statements." So this is not a provision which is describing the methodology for assessment, and section 62(3) contains the obligation to give effect to the New Zealand Coastal Policy Statement, and I accept the proposition in *King Salmon* with respect, that it is intended to have constraining effect, but it's location in this provision, as opposed to section 61, is deliberate, and in my submission it is intended to both constrain and deliver an outcome. But you have, you can't see section 61 as the methodology as being implicitly or by its nature in conflict with 62. So undertaking the process in 61 doesn't always produce an outcome if you have different objectives and policies to the NZCPS to non-implementation. The implementation obligation sets a boundary –

GLAZEBROOK J:

I think you're going to have to go over that again because I don't quite understand –

WINKELMANN CJ:

Perhaps you should begin by telling us where you land with this statutory interpretation argument, and then go backwards from that.

MR MAASSEN:

So if I could just answer that question by just quickly taking you to section 32 because it explains how I land.

WINKELMANN CJ:

Okay.

MR MAASSEN:

So section 32, which is mentioned twice in section 61, describes your task of setting new objectives and new policies. So the point is the statute is anticipating in the regional plan not a facsimile of the New Zealand Coastal Policy Statement.

WINKELMANN CJ:

Whose task was this?

MR MAASSEN:

Section 32(1)(a) and (b), and point is that you are going to get new objectives and policies in a new plan. Now if a facsimile, if what was intended was a facsimile of the New Zealand Coastal Policy Statement, that wouldn't make any sense, and so there is an evaluative exercise, and section 32 is mentioned twice in section 61(1). So my proposition is that you, the methodology for arriving, for going through your reasoning process, is set in section 61, but you're obtaining guidance from section 62(3), which is a constraining force on your choices. So it's trying to reconcile 61 with 62 because they sit in different places, they do different things.

ELLEN FRANCE J:

So what does that mean in a case like this one?

MR MAASSEN:

Well what it means is that you simply don't parrot an avoidance policy like Policy 11 or Policy 13, and follow it slavishly. What is anticipated is an evaluation under section 32 and a new set of objectives and policies, and the question is, have you complied with the implementation obligation, and if that is, the test of that is, have you literally followed the words of the policy, then the answer is no. But then if the answer is no there's something, there's a scope for choice here through the process in section 32 and section 61, then the question is, what is the ambit of that choice.

WINKELMANN CJ:

So is your point as you go down the hierarchy you're actually, it is, you're not required to parrot the words of the Coastal Policy Statement as you set out but rather you're allowed to, by applying them to your particular local circumstances, make choices and have those choices reflected in your policy?

MR MAASSEN:

Correct, and evaluated, and I'm sorry I couldn't say that –

GLAZEBROOK J:

Although how do you comply with 62(3) if you're making choices that actually are totally against the Coastal Policy Statement, because you're going further than Port Otago because Port Otago says the choices are only at the stage where you can't reconcile and then you work out how you reconcile in particular circumstances, and I think they would say as well, or accept, that it's relatively difficult to do so in the abstract, at the regional plan level.

MR MAASSEN:

Yes, so I slightly depart from Mr Anderson on that –

GLAZEBROOK J:

Well rather largely depart I would have thought but.

MR MAASSEN:

Well, no, I guess what I mean –

GLAZEBROOK J:

But maybe you can just explain how you reconcile it with 62(3)?

MR MAASSEN:

Yes, so if I just explain where the difference lies. So as it relates to Policy 9 and the avoidance policies, the position is as expressed by your Honour this morning which is there is a conflict. There's a very real conflict based on a proper reading of both. But, for example, Policy 6 talks about infrastructure, and it is in no way, if we just pull up the New Zealand Coastal Policy Statement, Policy 6, that is in no way as strong as the Policy 9.

So, for example, Policy 6(b), and my submission is that not all infrastructure, public infrastructure is the same, and some public infrastructure may actually be more important than a port, and very important to provide for people. Now the words here are less strong than Policy 9, but if the circumstances of the case were sufficiently strong, the submission is that the avoidance policies could yield, so that it is a combination of both wording and circumstances, and that's the evaluative exercise that, in my submission, section 61(1) requires in part through section 32. So to answer your question, how do I reconcile that with the implementation obligation, my submission is that the implementation obligation requires you to recognise and accept the differences in the wording and the fact that in ordinary circumstances the avoidance policies would prevail, and then demonstrate by a fully reasoned process why other incommensurate values in the particular circumstances of the case could overwhelm that, recognising that that would be an extremely difficult task, and all I'm saying is, I'm not comfortable with the proposition that this is a purely textual assessment because there will always be potential circumstances where this can overwhelm.

So that comes to the essential question which is, when does this Court intervene, and in my submission that comes down to the question of

appropriateness. Now I've been criticised by the Otago Regional Council for saying there is a circle of legitimacy but there is a boundary, as unworkable, and my proposition for that is appropriateness is defined in both section 32 and all of the New Zealand Coastal Policy Statement as a measure of the outcome, and in my submission it isn't a *Wednesbury* test, it's an appropriateness test and it can be judged just as the, and I'm slightly going off tangent here because in judicial review you have the innominate test which is "something has gone wrong here", and the *Wednesbury* test is no rationale authority. Well, neither of those are particularly definitive either, but my submission is that there is a boundary created by the implementation obligation but it shouldn't be judged by the language or the outcome in a particular case; it should be viewed at the regional scale, and in terms of that –

WINKELMANN CJ:

Well, can I just ask you? So when you see the part from 112 to 115 I think where Justice Miller says, well, look, it's gone wrong here, because the Court has proceeded to fix quite firm rules in a situation – permissive rules – in a situation when it had factual uncertainty which kind of ties up with, in a different context, but ties up with your analysis, doesn't it, which is as you get more factually detailed the decision-maker has more room to make choices because they have the facts to make those choices? But they wouldn't, it would be beyond your circle of permitted choices to make those calls when you don't have the facts and that's what the Judge is saying, I think.

MR MAASSEN:

Absolutely, and so what I submit you can draw from section 32 and all of this elaborate procedure of the hierarchy is that Parliament intends a very reasoned approach, constrained by the direction of higher order policy but a very reasoned approach, and that requires consideration of the facts as well as the direction above, and my submission is that that leads you to a situation where you can, the senior Courts can supervise this implementation obligation as it effectively did in *King Salmon* and, with respect, correctly, in my submission. It doesn't get down the rabbit hole of textual arguments about

whether something trumped this or whether this legally should be this because, in my submission, where this is heading is people are going to say, well, was that significant? Did they meet this policy because this policy is stronger? Was it significant? and then there's this very legalistic – and, in my submission, it's better to say that the senior Courts are intervening where the implementation obligation has not been achieved and the outcome is inappropriate in light of the constraining forces of the New Zealand Coastal Policy Statement, and that avoids the legalism that is the other alternative to the definitive theory, and so my submissions really urge the Court to think about what is the basis for your intervention and when are you going to intervene because the discussion which was had about the content of policy on an interim decision is effectively the Court reaching into and making regional policy wording that really hasn't been through the section 32 and 32A analysis which considers those things.

WINKELMANN CJ:
Have you got some example of that occurring?

MR MAASSEN:
Of the intervention by the Court?

WINKELMANN CJ:
Yes.

MR MAASSEN:
Well, I think *King Salmon* is the classic example but in section 293 the Environment Court has the explicit statutory power on appeals from plans to satisfy itself that –

WINKELMANN CJ:
I was rather thinking about the decisions that were made in relation to the – no, it's just as part of – was that through the Coastal – was that through the review, Auckland plan review?

MR MAASSEN:

Justice Wylie's decision in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] RZRMA 1 in Tauranga about the infrastructure was essentially a statement there was a sea-change by *King Salmon*, "avoid" means avoid, and therefore any provision of infrastructure in the Tauranga Harbour has to yield to those avoidance policies. Now I'm not over the content of what the resources were in question but the logic wasn't about what are the circumstances and how does this interrelate and was it appropriate. It was simply saying the Supreme Court has said "avoid" means avoid and therefore everything must yield to that direction, and my submission is that that is simply bad law. So that's a very clear example and that is one of the reasons why, for example, the Council I represent are very concerned that *King Salmon* has been taken beyond its natural limits to effectively a legalistic approach to the policy. So the point I make also in my submissions is the Environment Court has this function, and so –

GLAZEBROOK J:

Sorry, perhaps just explain, I think you started explaining the 293 and didn't finish so can you…

MR MAASSEN:

Yes, so 293 is a statutory recognition of the obligation, I think it's 293, I'm pretty certain, if you could bring that up. So it's an explicit wording about the Court not allowing a departure from a national policy statement in certain circumstances, and it defines "departure". So in my submission there is quite a good mechanism in the Act for the specialist court to assess the question. The question is, how is the Court intended to approach that responsibility, and in my submission –

GLAZEBROOK J:

Can I just – sorry. You might just have to say what responsibility you're suggesting.

MR MAASSEN:

Okay, so –

GLAZEBROOK J:

So just back up.

MR MAASSEN:

Back up a bit.

WINKELMANN CJ:

Is it possible to go to the top of that section?

WILLIAMS J:

This was the provision that the decision below was made under, was it not?

MR MAASSEN:

No, this is a power that the Environment Court has to observe that there are outcomes that potentially depart from a national policy statement and subsection (3) says that if the Environment Court finds that a proposed policy statement departs from, and then it lists a list of statements and plans, then the Court can, going over to subsection (4) direct a process by which the plan provisions are modified. So the limit is if the Court finds the departure is only of minor significance and does not affect the general intent and purpose of the proposed policy statement or plan, and then it defines "departure" as not giving effect to a New Zealand Coastal Policy Statement. My point about that is that the 293 process enables the Court to go back to the public and say, we find that it doesn't implement it and we now need to work, and they go through a consultative process and my concern with the Supreme Court, or the senior courts intervening through the implementation obligation, is that effectively they are saying, this is how the policy should read without any communication or consultation through a 293 process. So my submission is that the senior courts should only use the implementation obligation as the ground for intervention and my submission is that you don't look at individual cases so much as what the outcome is at a whole of region level, and that is

emphasised by his Honour Justice Arnold that what is intended by the policy statement is a whole of region assessment and of course the Supreme Court was exactly in that position in *King Salmon* because the issue there wasn't the content of regional policy statements or plans, the finding was these were fine and gave affect to the New Zealand Coastal Policy Statement.

What the plan change did was unravel that so that small areas that had been protected as outstanding were then going to be unravelled simply through the overall judgment approach, and in my submission that factor, and the fact that in that case the result, in other words the resource consent, was heard at the same time as the plan change, which is a unique feature of aquaculture under Part 7A that the two can run in convoy, meant the Court in *King Salmon* was in this uniquely privileged position to both know the consequences of the plan change and know that it had a very good regional policy statement in place, intended to protect those areas. Judge Jackson here was in a fundamentally different position. He was asked by Mr Anderson to make a prediction about the possible needs of the Port and then based on some predictions on what that would result in, in terms of health and safety, how that should be provided for for the life of the plan, and that is an entirely conceptual and predictive exercise, which in my submission fundamental effects how you should view your approach to intervention.

WINKELMANN CJ:
So can I just ask you to zoom out a little bit then and say, if you were to say, basically you're saying to us I think that if the Courts intervened through the judicial review too readily, we will be disrupting a process that is already in the Act which is working through a specialist court quite well, and the disruption will have what effect? It will be, it will do what?

MR MAASSEN:
The disruption from senior court intervention you mean?

WINKELMANN CJ:
Yes, if we are too readily, we'll be proceeding...

MR MAASSEN:

Well effectively your reasoning will lead to an outcome in terms of the content of regional plans. So if your proposition is, yes it's avoiding and "avoid" means "avoid", then the way that will translate to the Environment Court is the Port, there are no appropriate circumstances where a port can yield. So how you define your intervention in the outcome fundamentally trickles down and I mean *King Salmon* was enormously impactful in the resource management community and rightly so in terms of waking us to the importance of policy. But equally if it goes too far it will have the same ripple effect because the Court's judgment is read closely, and so my submission is, is it effectively has you deciding that the evaluation that section 61 and section 32 requires, can be done by you because the verb "avoid" is significant strong that no further evaluation is required, and in my submission that's unlawful.

GLAZEBROOK J:

But does it, does it, because effectively what *King Salmon* says is that "avoid" means "avoid" and that if there's something that conflicts with that, then the avoid policy overrides that, but accepts that there could be circumstances where they're not reconcilable.

MR MAASSEN:

Yes I –

GLAZEBROOK J:

And in those circumstances accepts that, I'm not sure whether it's a constraining effect or something else, but something has to be done in order to reconcile that, and what Port Otago is saying is that takes into account, as you're saying as well I think, the circumstances and the wording, not just the wording.

MR MAASSEN:

Correct.

GLAZEBROOK J:

So it's not done on a legalistic basis because these are policies, and I mean I would say that although *King Salmon* say in ordinary parlance they could be a rule, or in ordinary parlance a rule has exceptions, even if it's in an ordinary sense of it being a rule.

MR MAASSEN:

It does but it states those exceptions definitively and what you see about the language of the NZCPS is it doesn't really attempt to do that.

GLAZEBROOK J:

Well no because it's a policy statement, it's not a – an objective and policy statement, it's not actually supposed to be defining rules. However, just looking at 293, they're certainly saying you can't depart from it. So you still have to go back to the policy statement and work out whether you are departing from it, don't you, in particular circumstances.

MR MAASSEN:

Yes, and I think what people need assistance on is what does the obligation to implement to give effect to, how much choice and in what circumstance – what's the approach.

GLAZEBROOK J:

Well I think probably – oh well. Okay. Well actually, that you have to give effect to it, which means that you still go back to working out what is consistent or what is a departure from the New Zealand Coastal Policy Statement don't you?

MR MAASSEN:

Yes, and that's where I slightly depart, with respect, from your Honour because that leads you back to a textual assessment, and I'm saying –

GLAZEBROOK J:

Well not necessarily because, well it shouldn't lead you to a textual assessment because it should lead you to the process of saying, have you got an irreconcilable conflict, and if you have, how should that be worked through.

MR MAASSEN:

Yes.

GLAZEBROOK J:

Which then comes down to circumstances.

MR MAASSEN:

Yes, and that fits with my theory. So the Council is very anxious to preserve what it sees as the essence of *King Salmon*, which I'm not inviting you to depart from, which is it's very important that these avoidance policies do operate at a regional level to fundamentally shape and exceptions will be small and fully justified. What it's resisting is the idea that the mantra, "no, "avoid" means "avoid"", and that is, in my submission, exactly how the Court of Appeal framed it and I describe – I argued that that was a mischaracterisation of the decision but the Court helpfully exemplified the argument that has now got currency and I've said to you in my submissions I cannot argue that some reasonable people can infer that from *King Salmon* because I've had senior Courts take that view, and so that's why it's important, in my submission, for the issue to be corrected. So…

WILLIAMS J:

In this case Judge Jackson and the Court made their directions under section 293 to correct the plan and then there was an appeal on a point of law. Your argument is don't dress up good environmental management as a question of law, right?

MR MAASSEN:

Correct. That is exactly what the –

WILLIAMS J:

Yes, I get that. So you say that the further down the system you go the – I'm not sure if you mean the greater the choice, but the greater the multiple of choices that are to be made. So when the CPS, when the go to apply CPS in a regional policy statement the decisions you make are about where, when and how, and whether, you say, right?

MR MAASSEN:

Mhm.

WILLIAMS J:

And whether. But all of those, and particularly the "whether", probably primarily the "whether", is constrained by the strength of the policy language. So "and avoid" constrains you pretty tightly, you'd agree with that?

MR MAASSEN:

Absolutely. Absolutely, and I would also say, as my learned friend has said to you, that the circumstances doesn't cut one way. In other words, in favour of development and those factors that I've described as incommensurate values that are not – so biodiversity values. If the resource, the natural value, is very, very delicate, very, very sensitive, and to a point where you would lose a national taonga, then it may be that the Port could never expand beyond a certain point.

WILLIAMS J:

You'd like to think so.

MR MAASSEN:

You'd like to think so, but –

WILLIAMS J:

Yes, that's the aim of the system.

MR MAASSEN:

I'm not sure that a salt marsh is in that category and I don't know how much of a bite it's going to take out of the process. All of that's for another day. But in my submission what his Honour was doing was saying you should avoid as far as possible but once you get to that there has to be an evaluation of the circumstances. In my submission that is a reasonable approach to reconciling those policies. I felt the Judge –

GLAZEBROOK J:

But you accept, just to be clear, so I'm just clear, you accept that first of all you have to make sure there is an irreconcilable conflict between them?

MR MAASSEN:

Correct. So I'm saying that, for example, on the infrastructure argument, you simply couldn't choose to go through an area where an avoidance policy applied. You would have to demonstrate that avoidance was not reasonably practicable and that would have to be demonstrated to a satisfactory degree, recognising the constraining force of the avoidance policies, and they will continue to operate. So there will still be these policies in the regional policy statement about the importance of these values. They will still sit there as informing discretions. It's not as if the only work is being done by the policy that is now being formulated. That is certainly a specific and important policy but these other policies will sit there and continue to operate, and so in my submission it isn't necessary for you to go down to the wording, (a), because I don't in my respectful submission say it's your job, but also because the lens is too narrow. You have to understand what the discretions will encompass or consider down the path which –

WINKELMANN CJ:

Can I ask you this? It seems to me as a matter of logic though, just sort of true logic, that the more zoomed out you are from knowing all the details and having pinned down the variability of what's going to happen on the ground, the more a document will cleave to the language of the New Zealand Coastal Policy Statement because that's most likely to achieve its outcomes. So when

you're talking about a regional policy statement which is dealing with large areas, et cetera, then you are likely to see more of the echoing of the language but when you get down further…

MR MAASSEN:

I agree with that. Yes, I accept that, your Honour. I actually accept that. I think that is true, with respect, but his Honour here really got confronted with a choice. The port obviously recognised it needed to confront this and it was a regional issue, that's the job of the regional policy statement, and so he's got quite specific, and I think one of the problems with planning is that people don't confront the issues, they don't explicitly recognise them, so they do parrot higher order instruments, which is actually not the point of engaging with and debating these issues and getting more directive statements because you hope, following *Davidson*, the further you go down the chain the more directive, the more helpful, is the policy in terms of informing your discretion.

WINKELMANN CJ:

So what do you say to what Justice Miller said about what Judge Jackson did here, which was to say he proceeded where there was too much factual uncertainty to give – I think is what he said.

WILLIAMS J:

Justice Gendall?

ELLEN FRANCE J:

Justice Gendall or…

WINKELMANN CJ:

Was it Justice Gendall? Yes. He proceeded –

MR MAASSEN:

No, I think Judge Jackson made a – had to balance the uncertainty with the task of recognising both competing policies and his choice was, well, I must

give precedence to the avoidance policy at least to the extent that you have to avoid it as far as practicable and beyond –

WINKELMANN CJ:

Yes, well, I'm talking about 113 where he's talking about what the Environment Court did and he said –

ELLEN FRANCE J:

Justice Miller.

WINKELMANN CJ:

Justice Miller, yes. "It might be permissible to establish a policy of the kind proposed by the Environment Court so long as Port Otago is merely continuing its existing operations, *if* the effects of those operations on areas of outstanding natural character were known to be limited," and he said: "(The Court did not in fact make such findings, but presumably it might do so.) The Court could to that extent prejudge the outcome of investigation and reconciliation," but he said in relation to future policies: "Under the Court's policy Port Otago would also be permitted to do that, subject to an obligation to remedy or mitigate the effects."

MR MAASSEN:

Yes, I don't accept that conclusion because –

WINKELMANN CJ:

Yes, so that's – and why not?

MR MAASSEN:

Because first of all I resist the idea that we can make a line at the expansion because we all –

GLAZEBROOK J:

Sorry, I just missed the – what was that?

MR MAASSEN:

We can draw a line about expansion, somehow expansion's different, because we all think we know what we mean by "expansion" but I suspect that the future might have a different outcome. So as I understand his Honour, Judge Jackson, he was saying you could have safety requirements for particular ships because they were slightly larger and the Port couldn't decide what they were. Now is that an expansion where the ships have been dictated by the carriers to be larger and therefore bigger safety requirements or is that just a continuation of the passenger activity? So in my submission I'm nervous about the term "expansion" at this point because we simply don't know whether it has sufficient pedigree to justify a point of demarcation in this context.

WINKELMANN CJ:

What he's saying though is that you don't know enough facts and the Judge is being too permissive in the policy he's setting, but Mr Andersen says, well, he's not really being permissive; he's saying you can apply at this threshold. So…

MR MAASSEN:

My submission is –

GLAZEBROOK J:

Sorry, have we got that up, what you're referring to?

WINKELMANN CJ:

So on my… It's paragraph 115 where he comes to the nub of it, yes.

MR MAASSEN:

Yes, I recall the paragraph. My submission is that his –

WINKELMANN CJ:

And he says: “Under the Court’s policy Port Otago would also be permitted to do that,” and Mr Andersen’s response to that was, well, no, it wouldn’t be permitted to do that, it would be permitted to ask to do that.

MR MAASSEN:

Correct, and so in my submission what Judge Jackson was fundamentally trying to do was to create an opportunity for an application to be fairly evaluated provided they met the threshold of demonstrating they’d done everything reasonable to avoid, and that’s not, in my submission, going too far because the question about whether that’s any particular application is appropriate will be decided against the entire policy bedrock and the circumstances of the case which is exactly what a resource consent will do.

So his Honour is choosing a method, and so the point he’s making is we cannot be in the position of making an intelligent assessment if that threshold is met without a resource consent because that is the method or process which the Act has designed for the full evaluation of such an application.

So I don’t agree with his Honour that he’s gone too far by creating the opportunity, given the specialist Court being correct that a resource consent is simply an opportunity against which section 104 and all its provisions will operate, and so I disagree with that. I got some progress with his Honour, Justice Miller, in the argument but I disagree with that conclusion, so…

I haven’t had a chance, and time is running out, but this point about the basis for intervention is something I want to stress to the Court as extraordinarily appropriate and I do advance the argument of appropriateness because it finds its place in section 32 and it is all within the New Zealand Coastal Policy Statement and so when you ask yourself the question “was the implementation”, that should be part of the measure and I would encourage a regional perspective because the question Justice Miller posed is, well, if you avoid 98% of what is characterised is covered by the avoidance policies, and you allow 2% to give effect to Policy 9, have you implemented the plan

change, and at the scale at which the policy statement is framed my submission is that's got to be "yes", and you only get to know if you adopt the definitive theory and that is the legalistic approach. But in my submission there is a place, and I think it's important for the senior Courts to preserve the capacity to intervene for failure to implement the – failure of the implementation obligation. I think that is a very important supervisory function. This is just simply a case where the conclusions of the Environment Court Judge were, in my submission, appropriate.

WINKELMANN CJ:

It could be a failure of method as the basis for the intervention, couldn't it? So if you start and find someone's taking the overall impression type of approach as opposed to the working assiduously through methodologically with the facts of the case, identifying if there is indeed a conflict, seeing how that conflict can be reconciled, looking at Part 2.

MR MAASSEN:

Yes, but I think when you're a regional planner…

WINKELMANN CJ:

Sorry, this is a regional planning, right.

MR MAASSEN:

Yes, when you're doing a regional policy statement or a regional plan you are taking a regional perspective and saying: "Have I done the job that I should be?" and at the current state of law the answer is: "No, unless you avoid all the time."

WINKELMANN CJ:

Yes.

MR MAASSEN:

And my submission is that you should mostly avoid and it's very important to avoid as far as possible, but there might be, in limited cases, exceptions that

can overplay that, and I simply don't think it's correct to simply say those exceptions can be defined by the Court, but the Court has to be clear that the flexibility is very limited and that is a significant burden to overcome.

WILLIAMS J:

So your basic point is that you can't read "avoid" as "prohibited" because that's dispositive wherever the avoid policy applies before the facts are known?

MR MAASSEN:

Correct. But I also say that the product – that the NZCPS itself is a product of an evaluation which I describe in my submissions as the Minister's reasoning, and the Minister has – nowhere did she evaluate the consequences of avoidance for the Ports of New Zealand. She expected that to be done at the regional level, and in my submission the converse of "avoid" means avoid in all circumstances is the judicial review of the Minister's section 32 analysis because she has not considered the consequences of her decisions down to that level. So you get into a double bind that the Minister hasn't done her job. I've provided you with the section 32 analysis, it's not great, and if that's the job that is sufficient for a Minister to close a port, in my submission that's an avenue of judicial review.

WINKELMANN CJ:

So can I just clarify? Your points are it can't be that "avoid" means avoid all the time. It can't also be that the exceptions must be defined by the Court.

MR MAASSEN:

Correct.

WINKELMANN CJ:

So there should be capacity for those exceptions to be worked through at a regional level, but equally – regional and local level – but equally the Court should make clear that exceptions to the avoid standard are rare and should be carefully scrutinised as to necessity and as to permitted scope?

MR MAASSEN:

Yes, and "necessity" means – I think it is necessity, with respect. It's the need based on – yes, what I had in mind for infrastructure was things about public health and safety or those sorts of categories of things which would overwhelm it. Not just a nice-to-have but as a society we will confront irreconcilable choices.

WINKELMANN CJ:

So necessity measured by reference to alternatives, so it's not necessary if you can do your channel somewhere else but it also might not be necessary if it's just a nice-to-have as opposed to a vital infrastructural service?

MR MAASSEN:

Correct, and so where that lands, I mean it does need to be evaluated. So, for example, I have no idea what the Waka Kotahi case is – but that's its situation – but I am envisaging quite limited circumstances, but ports –

WILLIAMS J:

But the setting of the necessity standard is a question of law. What gets through that gate, the width of the gate, ie, necessity or no reasonable, least reasonably practicable alternative, is a question of interpretation and therefore a question of law. What gets through that gate is a question of resource management, good resource management practice, one presumes.

MR MAASSEN:

Correct, and…

GLAZEBROOK J:

Well, it's really necessity and no practicable alternative, isn't it, rather than "or", because there can be no practicable alternative to something nice-to-have but not necessary?

MR MAASSEN:

Correct.

WINKELMANN CJ:

No, I there are two – there are different…

GLAZEBROOK J:

But I think you have to have both is what you're arguing?

MR MAASSEN:

Yes, I think that's right.

WINKELMANN CJ:

Well, what would you say? Scrutinised as to necessity and what? What's the other one?

MR MAASSEN:

Absence of practical alternative.

GLAZEBROOK J:

So you have to have this for the sort of reasons that you're talking about but also there can't be another way of providing it that doesn't impinge on the avoid policy. Is that…

MR MAASSEN:

That's correct, and –

GLAZEBROOK J:

Sorry, I probably got around the wrong way. What you say is if there is another way of doing it then you can't impinge on the avoid policy but if there's no practical alternative and it's necessary then you can depending upon –

MR MAASSEN:

Yes, and the circumstances justify that.

GLAZEBROOK J:

Absolutely.

MR MAASSEN:

And so what I have in mind is, for example, say, Rongotai Airport, sits in a coastal environment, may well be next to some sensitive environment, needs an extension to meet safety standards for RESA. Does "avoid" mean avoid? We've got a facility that generations have spent vast sums of money and it's critical to their functioning and do you move the airport because you can't achieve avoid? Well, it's a similar situation to this. It's really – I mean I think we see it when we – we recognise when we see it. These are true exceptions.

WINKELMANN CJ:

You might not. You might require it to be moved if it's going to kill Māui's dolphins off, for instance.

MR MAASSEN:

Indeed. Absolutely.

WINKELMANN CJ:

So it is very – yes. Anyway, it's luncheon adjournment. Mr Maassen, have you finished?

MR MAASSEN:

Yes, I have.

WINKELMANN CJ:

Isn't that propitious? Right. Just I should say we're going to hear parties as to costs at the end I think during the reply period.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Now Mr Allan, you're next, are you?

MR ALLAN:

Thank you, Ma'am, I am. I and my colleagues are here representing EDS, Environmental Defence Society, a society that was involved in the *King Salmon* case, of course, and I thought I would begin just by covering in a couple of minutes the reason why EDS is here and why it considers these matters are so important.

New Zealand has a unique flora and fauna but over past centuries, and not many of them, much of that's been lost or destroyed. That includes much of the coast environment, much of the forestry around the coast, many of the resources within the coast, and those effects have really been cumulative and developed as a consequence of a lot of little changes, and EDS' concern has been that that cumulative effect will continue and that the consequence will be a gradual further degradation of our coastal environments, and more generally, of course.

So its understanding is that the RMA, in terms of particularly section 5, section 6, matters of national importance in section 6, the purpose in section 5, and then the structure that's created within it, including the necessary provision of a New Zealand Coastal Policy Statement, are measures that assist to address those issues and that was the intent in part of the Act, encouraging development, giving flexibility there, but also addressing the ecological effects of the development that occurs, and its reading of the NZCPS has always been that those avoid policies are there to provide environmental bottom lines, so hence the reason for bringing the proceedings back in 2014 or thereabouts, hence the reason for still being here today because its position is that the correct way to give effect to the NZCPS in the lower order planning instruments of which, in the case of Otago, the regional policy statement is the first, and that will be followed by a regional coastal plan and, of course, the district plan for the land-based side, the correct way to do that is expressed very elegantly in the *King Salmon* decision and, in particular, in those paragraphs in 126 to 133 which really set out the way that we will address and endeavour to reconcile the policies within that instrument where there is the potential for them to be in conflict.

That does involve careful reading of the words but EDS' position is the words in the NZCPS are differentiated and for a reason and that where we're seeking to avoid things, or avoid adverse effects, that means avoid adverse effects. Where we're seeking to avoid significant adverse effects that meaning again flows through. Where we're recognising or using other verbs, there's a rationale for that.

So EDS' position in simple terms is that both the High Court and the Court of Appeal in essence correctly applied the analysis that's set out in those paragraphs of *King Salmon*, that Policy 9 Ports is structured very similarly to Policy 8 Aquaculture – they're both recognised policies, they both list things that one might do to give effect to that recognition – and that the avoid policies, if I can use that terminology, that we're all tending to jump to, in terms of Policies 11, 13, 15 and 16, apply in a similar way in this case as 11 and 13, I think it was, 15, did in *King Salmon*.

So at part of my submission I will take you to the provisions, or the part of our legal submissions, the written submission, where we address that interpretation because our reading of it is that the policies are very similar, that the approach can be very similar and the outcome in this case can be very similar.

The point I want to start by making though in response to my friend, Mr Andersen's, case, is that we really need to distinguish between the plan-making process where section 62(3) of the RMA tells us the regional policy statement must give effect to the Coastal Policy Statement from the consenting process where section 104 of the RMA tells us regard must be had to those provisions and to that document, and there's been discussion this morning about the need for flexibility, the need for an ability to deal with unusual circumstances. EDS' position is that essentially those more closer examinations happen through the consenting process, that we have a policy framework where Parliament has said that the regional policy statement should give effect to the Coastal Policy Statement, we then have a regional

plan that is to give effect to that regional policy statement and the Coastal Policy Statement, but then we have a separate consenting process which applies with a different test, and in simple terms the "give effect to" provision relates to the content of the instrument. So the regional policy statement is to give effect to the Coastal Policy Statement. That influences what is in the regional policy statement. The "have regard to" provision is really about a process and it's saying to the person who is making the decision: "These are matters you need to have regard to."

I appreciate that the East West case that's before you at the moment is one that deals essentially with that consenting aspect, and I'm not going to get into it because I've not been familiar with the arguments that have been run, but essentially that case is about what does "have regard to" mean in terms of my understanding. This case is what "does give effect to" mean, and when you're giving effect to the provisions in the CPS –

GLAZEBROOK J:
So you're suggesting actually contrary to the submissions in the other case that "have regard to" – well, at the consenting process you can actually depart from the regional policy statement and New Zealand policy statement?

MR ALLAN:
I'm not going to dare venture into wherever that case is going, Ma'am. All I'm saying is the test – the wording is different, my understanding historically has always been. They are different tests. One of them is about content and one of them is about process. Where you get to in terms of what "have regard to" means –

GLAZEBROOK J:
Well, what does "process" mean?

MR ALLAN:
What does the…

GLAZEBROOK J:

What do you mean by “process”?

MR ALLAN:

I’m just referring there to the – “have regard to” is about the consenting process, so where the decision-maker in the consenting process has regard to a number of listed matters and forms a view.

GLAZEBROOK J:

And can totally depart from the New Zealand Coastal Policy Statement, is that the submission? That’s certainly the submission of the Transport Agency in the other case.

MR ALLAN:

I think it is a different test. Whether they can depart from it in the given circumstances I suspect what you’re going to address. I’m sure there will be cases where there are very minor or de minimis effects where absolutely you could. The mix of elements produces an outcome and the outcome might be the grant of consent. Where the…

GLAZEBROOK J:

I still don’t quite understand what you mean by “process” though.

MR ALLAN:

The evaluation of those matters to which the decision-maker needs to have regard under section 104. That lists the matters. The decision-maker having regard to that then needs to make a decision under –

WINKELMANN CJ:

Could we just get section 104 up on the screen, please?

WILLIAM YOUNG J:

By “process” do you mean on a resource consent application?

MR ALLAN:

Yes, indeed, yes. It's the consenting process, Ma'am. If I didn't make that clear, I apologise. Can we have 104 of the RMA which will be… 104.

WINKELMANN CJ:

It's obviously not in that document.

MR ALLAN:

What am I looking at at the moment? I'm not sure.

WINKELMANN CJ:

Nicely done.

MR ALLAN:

Yes. So section 104, which is the resource consenting section, which we're not dealing with in our case, says: 'When considering an application for a resource consent and any submissions received the consent authority must, subject to Part 2 and section 77M, have regard to any actual and potential effects on the environment," et cetera and then under (b): "any relevant provisions of," under (iv): "a New Zealand coastal policy statement". So there is a number of matters that are listed, effects in (a), measures taken to ensure positive effects in (ab) and then provisions of a listed series of documents. That is a different test from the one that we're dealing with in our case.

WILLIAMS J:

Should it really matter in theory anyway? Sorry, you can't see my mouth moving, can you?

MR ALLAN:

I can hear it's coming from over there.

WILLIAMS J:

Because whatever you grant it subject, whatever you decide is subject to Part 2, so Part 2 controls, and everything cascading down from Part 2 is

supposed to be an increasingly localised embodiment of the balancing act contained in Part 2. So if you're having regard to those documents they are simply the practical embodiment of the requirements of Part 2 and sustainable management anyway.

MR ALLAN:
That is correct, that's the assumption.

WILLIAMS J:
So "have regard to" doesn't really tell you much about the power of the documents you're applying.

MR ALLAN:
No, you need to read them and understand how they then apply to the particular case before you on a resource consent application.

WILLIAMS J:
No, I mean more than that. I mean that in the end the controlling provisions are Part 2 and each good document below that is the increasingly localised embodiment of the requirements, and so when you're required to have regard to the regional policy statement, that's simply a much more tangible form of the requirements of Part 2 anyway, at least it should be.

MR ALLAN:
Indeed, and because it's gone through the process that's specified in the Act, it will be a honed version of it and much more precise in terms of what it's doing.

WILLIAMS J:
Yes.

MR ALLAN:
And the NZCPS we say has gone through that process and has that level of precision…

WILLIAMS J:
Right.

MR ALLAN:
And gives clear guidance on the plan-making side to give effect to it, and it becomes one of a number of relevant instruments on the consenting side, and the extent of its relevance of course will depend upon the nature of the activity for which you're seeking consent and its location.

WILLIAMS J:
Yes, but my point is that “have regard to” is a little beguiling because of the provenance of the document, having regard to it as the embodiment locally of Part 2 which, whichever way you look at it, is the controlling set of provisions, then having regard to it means a lot more than just take a look at it and read it.

MR ALLAN:
And in the case of all these documents there is a degree of precision that they bring to it in terms – the Part 2 ideally is reflected in the documents that are listed there.

WILLIAMS J:
Well, it has to be, that’s what the statute says.

MR ALLAN:
Yes, and there are cases or there are circumstances where if it doesn’t give effect to Part 2 or the flow down the documents is incorrect, then the deciding body can say, can identify that, and can address it appropriately. In general, consent applications do not get there because it is generally accepted that the documents you're dealing with, and typically you start at the other end with the plan, the district plan or the regional plan are documents that ought to and typically do reflect Part 2 and the intervening national policy documents.

GLAZEBROOK J:

What I'm having a slight bit of difficulty with, if "avoid" means "avoid" all the way down, the effect of your argument seems to be "avoid" means "avoid" except in individual cases and then it doesn't mean "avoid" and that doesn't seem to me very much in line with what I would have expected you to be arguing.

MR ALLAN:

All I'm saying is that there is a difference in the wording and we are dealing with the plan-making side where you have to give effect. So that's a bit more direct.

GLAZEBROOK J:

Well, if you say "avoid" means "avoid" and it should mean "avoid", it seems an odd submission for you to say, but nevertheless it doesn't really mean "avoid" in individual cases, rather than saying there might be an exception to the avoid where there are irreconcilable differences, which is effectively what Justice Miller was saying, I think.

MR ALLAN:

Yes. And let's move back then to the plan-making process where were are having to give effect.

WINKELMANN CJ:

Well, can I just ask about that? Isn't there a logical extension, what you concede in relation to the particular applications for consent that even a policy might have to permit a departure from the avoid standard, because otherwise it will foreclose the necessary consideration at the lower level when we come to the consent? So this is what's really Mr Anderson's argument and Mr Maassen's, which is that the policies haven't kept on using this black and white language effectively, puts people in a position which they are fighting a rear-guard action, dissuaded from ever attempting it, is causing confusion in the law, et cetera.

MR ALLAN:

I think again it depends on where that avoid policy ends up in terms of rules because – and I make the initial statement that you don't need to have a prohibited activity or a non-complying activity where an avoid policy applies, because under section 32 which is the, what's the most appropriate method of giving effect to this, it may be that the Council and/or the Environment Court decide that a restricted discretionary activity status for example is adequate because you can identify the effects that are of concern. You can then do an assessment if in fact the effect of concern is one of the ones addressed in the avoid policy, in other words the proposal generates that effect, then the Council has the ability to decline consent. But if it doesn't generate one of those effects, it still has the ability to grant consent. So the distinction needs to be drawn, in my submission, between avoiding effects and avoiding activities, and the NZCPS provisions that we're dealing with deal with avoiding effects. Now an activity of a particular nature may or may not have an effect on a specified resource –

GLAZEBROOK J:

Yes, but if it doesn't generate that effect then it's not against the policy, is it?

MR ALLAN:

Correct. But –

GLAZEBROOK J:

Well, because it doesn't mean that you can ignore the policy, it just means that if it doesn't generate the effect it's not within the policy.

MR ALLAN:

I agree.

GLAZEBROOK J:

But that is right anyway.

WINKELMANN CJ:
That doesn't help us.

MR ALLAN:
But that's why it's – there's a range of options available to a council in terms of activity status that enable them to make a decision based on all those factors when a resource consent application comes in.

So the issues that my friend Mr Andersen raised in terms of section 104D, which is the one that applies to non-complying resource uconsents, and it sets out two thresholds, if you like, one of which must be passed for the matter to go on to be considered, doesn't necessarily arise at the consenting stage if the Council's decided to use a discretionary activity status, for example.

WILLIAMS J:
So you'd be more generous than Mr Andersen with his client in terms of the status of the activity because you would say that it can – if an effects-based regime is not so much concerned with status of activity, it's only concerned primarily with effects?

MR ALLAN:
I think that's fair. I mean I'm not in the position where he is with a specific client with knowledge as to what they might want to do.

WILLIAMS J:
Sure.

MR ALLAN:
But as a generality, the range of activities that one can put in place, and the example – and you may not want to go there but tab 4 of our authorities bundle is the *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 3217 case, and that was a decision relating to the provisions that would apply in an area that was an outstanding natural landscape but where there was also farming going on. So it was in a sense an analogous position. There's an

existing activity but there's a recognition of the outstanding nature of the landscape that's left, and in that case there are some permitted activities. There are mostly restricted discretionary activities which means that the potential effects are identified and consents can then be – or applications can then be assessed against that. If you have that available…

WINKELMANN CJ:
We have it up on the screen.

MR ALLAN:
It is. It's in front of me. I keep looking at the wrong screen, sorry. Let's move to paragraph 47 which I think is useful because it shows the objectives that were in the plan relating to outstanding natural features and the relationship between those outstanding natural features and the existing rural production activities that occurred within that context. It was largely the Hauraki Gulf islands.

So there's objectives there. Number 1: "Auckland's outstanding natural features and outstanding natural landscapes are protected," strong word, "from inappropriate subdivision, use, and development," and, of course, that's consistent with the wording flowing through sections 5, 6 and on through.

Then Objective 4 deals with the other side of that equation which is the recognition of the existing rural production activities.

Then we move to the policies: "Protect the physical and visual integrity of outstanding natural landscapes by," and there's a number of matters that are here listed. Avoiding certain things, maintaining other things. If we scroll down the page you'll see – and this essentially is the level of detail that I think you were discussing my friends earlier in terms of what happens as we move down the plan hierarchy and get to the nitty-gritty, if you like, in the district plans and the regional plans, and Policy (1) has protect the physical and visual integrity by certain measures. Policy (2): "Protect the physical and visual integrity of outstanding natural landscapes while taking into account the

following matters," and this starts to get to the changes that have been wrought by humans. Then (5): "Enable use and development that maintains or enhances the values or appreciation of an outstanding natural landscape or outstanding natural feature," and then (6): "Provide for appropriate rural production activities and related production structures," and, finally, encourage the restoration.

So there is a mix of policies and provisions that are intended to give effect to. Some protect higher order instruments and particularly section 6 of the Act, and also recognise the activities that are occurring.

So that is the level of detail that one finds in a plan. At this stage we're dealing only with the regional policy statement and the essential issue that EDS had with the Environment Court decision was that it went beyond avoid. It went to avoid, remedy or mitigate, and in that way we say didn't give effect to the higher order provisions.

WINKELMANN CJ:
And Mr Anderson and Mr Maassen would say, well, that was an appropriate resolution at the plan level in respect to a particular activity where there was conflict between the two objectives in the policy and…

MR ALLAN:
Well, I think we would say there's a distinction be drawn between a conflict between activities, and in this case potential port activities and the resources that the avoid policies are trying to protect and a conflict between the wording of policies in the NZCPS, and it's the second of those, whether there's a conflict between the wording, that *King Salmon* addressed and that we say is consistent, the same outcome, if you like, is produced by the wording when we examine it in terms of that *King Salmon* analysis in this case.

WILLIAMS J:
If you pick up some of the relatively director wording in *Man O'War,* you've got the obligation to protect landscape and provide for rural activities in and on

that landscape, so be nice to everybody. But, you know, you can read that as being internally in conflict or you can read it as developing a natural point of balance between the two with the policies contemplating the need for compromise one for the other from both side. Could that not be the same approach between Policy 9 and Policy 13?

MR ALLAN:
I think the first thing is that these are policies where we have part of the landscape is already farmed –

WILLIAMS J:
That's right.

MR ALLAN:
– so there's a commonality between them, and I guess you could say in that…

WILLIAMS J:
Yes, same here.

MR ALLAN:
Port Otago, some of the landscape here has already got port activities in it. My submission would be that whether an activity has an adverse effect upon that is assessed in the context of that landscape.

WILLIAMS J:
That reality.

MR ALLAN:
That reality, absolutely.

WILLIAMS J:
Yes. So you've got – what did it used to be called, the, I don't know, something like "the factual bottom line", do you recall that, I don't know what the phrase is, where you establish a kind of –

MR ALLAN:

Oh, “permitted baseline”, is that the – yes.

WILLIAMS J:

“Permitted baseline”, that’s the phrase, that sort of thing.

MR ALLAN:

I suppose in a sense it’s related, yes, in that there is a landscape that’s already farmed, more farming activities will not have an adverse effect upon that landscape, subject to their scale and colour and form being appropriate.

WILLIAMS J:

So when you assess the level of conflict you take into account the existing level of erosion of natural character, the existing level of industrial activity or whatever it might be.

MR ALLAN:

Absolutely, yes. And when the Council does its identification of areas that will be subject to the avoid policies in Otago harbour, they will do that again in the context of an existing port operation, existing elements to it.

WILLIAMS J:

Exactly.

MR ALLAN:

And that may, may not affect it.

GLAZEBROOK J:

Well, they may or may not, might they? Because I think it’s even conceded by the Court that they may say: “Well, this is an area of natural, of particular significance, even if there are existing activities in it.”

MR ALLAN:

Oh, absolutely, yes. But I think – and that’s appropriate. But the question then becomes when I’m proposing something for the Port to change things,

that assessment of effects and whether there is an adverse effect on that resource, is carried out in the current context where clearly it's not pristine, there are some very important elements there, but it is a harbour that's used and it is a harbour with a port in it. So that may well affect the analysis that's done in terms of effects in Otago as opposed to, say, one of the fiords on the West Coast of the island.

GLAZEBROOK J:
I'm not entirely sure where that fits with your absolute, absolutist argument.

MR ALLAN:
I'm not sure that we have a –

GLAZEBROOK J:
Again, it wasn't something I would have expected from you as a submission. But that doesn't mean to say you can't make that submission, it's just surprising to me.

MR ALLAN:
We don't have an absolutist position. And again I come back to that what EDS is doing is saying: "How did the Supreme Court analyse and endeavour to reconcile the policies in *King Salmon*, and if we do the same thing in terms of Policy 9 as opposed to Policy 8, where does that get us?" and the answer is we end up with a Otago regional policy statement provision dealing with ports that needs to recognise that the avoid policies may apply and I mean it can be separately written but the avoid policies will flow down into other provisions in the regional policy statement. What the Environment Court endeavoured to do was to say if you conflict with the avoid policies then here's a way around it and here's the – you can avoid, remedy or mitigate in certain circumstances, and that, we said, went too far because that's not consistent with the NZCPS. You can certainly – and I don't have a particular problem with it specifying there'll be an opportunity for resource consent to be made. How that's then addressed in those policy provisions then are similar to the sort of process

we've looked at now in terms of the *Man O'War* case. The Regional Council will need to address that in its coastal plan.

WINKELMANN CJ:

Can I just ask you to wind back on what you've just said? You don't have a problem with them saying you can have a chance to apply for a resource consent. Would you accept that the resource consent might be given in circumstances where it's not possible to avoid the harm that the policy sets?

MR ALLAN:

Correct. There will be occasions where an application is made that simply doesn't avoid the harm and what the test is then, I think, as I said earlier, I think is what you're addressing in the East West Link case, and how does that work. But there may well be circumstances where consent is declined and EDS' position is because of those issues in terms of cumulative effects, because of those issues in terms of what it thinks is the desirable environmental bottom line and the approach that *King Salmon* took, it thinks that's not an unheard of or an inappropriate outcome. We are in a position where certain activities should not happen because of the effects they have on the environment and –

WILLIAMS J:

One of the risks you run though is that on the next cycle of the NZCPS the hard line on avoid causes the pendulum to swing back the other way because avoid is too hard in many cases, and that's not going to be in EDS' interests, is it?

MR ALLAN:

Here's the thing, it's eight years since *King Salmon* and my expectation, not having taken part in that hearing, when I saw it was I can see the councils, I can see the government, changing the provisions of the NZCPS. I can see consequences of this. The reality is that the government of the day undertook an analysis and sought one and received one from experts, that said, and it decided you don't need to change the CPS.

WINKELMANN CJ:

But isn't the – the risk isn't that the government will change the CPS. The risk is that when the councils come to make their assignments of land, et cetera, they will be very careful not to assign land having important values in the areas around, you know, in the Manukau Harbour, in Otago Harbour.

MR ALLAN:

Those are all concerns, well, elements that I thought might arise too eight years ago. The reality is that councils recognise they have obligations under the Act. They recognise importance of those and they recognise the direction that the CPS gives them, and they are, and to my observation, largely complying with that when – and some of them are better at doing the processing than others but the outcome hasn't been affected by a judgment as to what should happen in terms of activity applications.

WINKELMANN CJ:

So is there very much between you and Mr Maassen then because the difference between you and Mr Maassen seems to be that he says that just for rule of law considerations and access to law considerations you should allow some expression of the resolution of these conflicts to appear in your low order policy, particularly planning documents, so that people get a good steer on what's likely to happen, and you're saying no, really, basically all the way down to consent you should maintain that very clear line and the –

MR ALLAN:

What we're –

WINKELMANN CJ:

– and that since this occurs at consent level.

MR ALLAN:

What I'm saying is that in the regional policy statement which needs to give effect to the higher order instrument, the Coastal Policy Statement, it should do so and if the policy says avoid effects on certain things then the regional

policy statement should also say as a policy avoid effects on those same things. Now…

WINKELMANN CJ:

So that is a clarity of – that's kind of a conformity really of expression.

MR ALLAN:

It doesn't have to be exactly the same words but it clearly needs to be – it needs to give effect to that policy imperative from the higher order instrument.

WINKELMANN CJ:

Yes, and Mr Maassen would say, well, look once you get to the level that you've got sufficient detail, you're in the region or in the locality, then you can have a lower order policy document or a lower order planning document which actually does that early work of starting to synthesize those conflicts which you know are going to arise which is what he says is going on here.

MR ALLAN:

To some extent it might be able to do that but what it cannot do, in our submission, is effectively not give effect to the policy, the avoid policies, and to come back to the example that the Environment Court did by saying "avoid, remedy, or mitigate" in very simple terms it had diluted the effect. It said you need to avoid some of the time but some of the time you don't need to, and that's not the way that the NZCPS was expressed.

GLAZEBROOK J:

I think everybody, well, at least certainly Port Otago, agrees with that. But where I'm having difficulty is how, once you have absolutely avoid right through, at a consent level you can say that doesn't mean avoid, and if you can say that, what the test is at that stage because there must be some sort of test, because you have something that says avoid, avoid, avoid, avoid, means effectively you can't do the activity if it has that adverse effect, but then you have an exception at the consent level to say "except in these 15 cases". I

would have thought that was actually possibly a worse outcome than suggested by Port Otago, for the environment.

MR ALLAN:

My submission is that the Act is structured so that you have a coherent consistent policy structure moving down but you have a separate consenting exercise, and –

GLAZEBROOK J:

So you have a coherent policy structure that you bother to go through all of those, but you can totally ignore it at the consenting stage?

MR ALLAN:

No, no, absolutely can't totally ignore it.

GLAZEBROOK J:

What do you do at the consenting stage? What's the submission?

WINKELMANN CJ:

Can I ask you this? You heard Mr Maassen came to when he was talking about I think consenting, the consenting level, and he's saying that really you need policy and plan documents that drive this kind of outcome and he says it cannot be that there's avoid all the time when you get to consent. It can't be that the exceptions have to be defined by the Courts, but equally the Court should make it clear that exceptions are to be rare and carefully scrutinised as to necessity and absence of practical alternative and as to permitted scope.

MR ALLAN:

I'm not sure that that's giving effect to the higher order policy instrument which is using very clear language in terms of protecting and preserving some resources. Now I have to make the point, it's not all resources in the coastal environment. It's, as the CPS itself said, it's scarce resources and rare. So for most of the coastal environment you're not encountering the same issues that you are in terms of the avoid, the top part of those avoid policies,

and our submission is to give effect the policy there needs to be a coherent policy framework running down.

WINKELMANN CJ:
But at a consent level you're not giving consent, effect to. You're having regard to it?

MR ALLAN:
That's the way the Act is structured, yes.

WINKELMANN CJ:
But would you accept that that could fall within the "have regard to"? On your formulation that might be an acceptable way of proceeding at…

MR ALLAN:
Well…

WINKELMANN CJ:
Subject, of course, to the nature – its facts on the ground.

MR ALLAN:
Correct.

WINKELMANN CJ:
So it might be the most incredibly protected environment and you would not grant consent in those circumstances and you'd require the Port to move somewhere else if it was –

MR ALLAN:
And it might be an activity that has very little impact in a fringe part of an area and there may be a different outcome. Again, this is the issue that you have in front of you on the other case, but – it is a judgement that the Act has set up that there be a separate consenting process later, and I guess if I – to divert quickly back, in I think 1953 in the Town and Country Planning Act there was a process for making plans but there wasn't really a process for consenting.

It was the 1957, I think, Act that then produced that consenting process and then followed through ’73 and onto the RMA. So over time Parliament has refined the way that we address these issues.

ELLEN FRANCE J:

I must admit I can’t – I don’t understand how on your approach at the consenting stage, unless something has only minor effects, you can get to the point of saying despite a conflict with avoid you would grant the consent. I don’t understand the approach that you're apply there to get to that result.

MR ALLAN:

I think I would tend to agree with you, that if you have a significant effect on an area and it’s subject to the avoid policies, it’s unlikely you're going to get consent.

WINKELMANN CJ:

But “have regard to” as opposed to “give effect to” means there is wriggle room, no?

MR ALLAN:

On its face. I’d always thought it did. I’m going to find out when you issue a decision on the other case.

WINKELMANN CJ:

Well, just trying to understand what your submission is.

MR ALLAN:

My submission is simply that we are “give effect to” and…

WINKELMANN CJ:

And you're not dealing with “have regard to”?

MR ALLAN:

Yes. We are not in that element, in that part of the Act, that follows later, at the consenting stage.

WINKELMANN CJ:

We’re fixing you with it because it helps to understand the scheme, to make sense of what you're saying.

MR ALLAN:

Right.

WILLIAMS J:

If you're right that you're automatically – not if you're right, “here’s the proposition”. If the policies as they are are inconsistent with the Port, shall we say renewal or expansion or whatever it might be, then you're not going to get in under the second head of 104D, the only way you’ll get in is if your effects are minor. So…

MR ALLAN:

Correct.

WILLIAMS J:

And usually these plans, as you say, are effects-based – sorry, these policy statements are effects based, and that’s the clincher. Because if the policy statements are all effects-based, then if you can’t pass through the policy gateway because you’ve got too many bad effects, you're not going to get through the 104D(a) gateway either.

MR ALLAN:

That’s correct if you're a non-complying activity.

WILLIAMS J:

Sure.

MR ALLAN:

But if the council decides you're a discretionary activity because –

WILLIAMS J:

But you can’t be on your analysis if you're an avoid.

MR ALLAN:
No, it could be.

WILLIAMS J:
Oh, that's right, yes, sorry.

MR ALLAN:
It could be an RDA or it could be full discretionary. So at that point – and that may be a factor that lends itself to discretionary status, and I have to say there's fewer and fewer non-complying activities and a lot more discretionary than we ever had, and partly that's statutory because that keeps changing, partly it's directive from central government, but partly it's policy, I think, inside councils.

Just to clarify that point, my friend Ms Wright has passed me up the *RJ Davidson*, which is tab 7 on our bundle of authorities, and particularly go to, if you could, page 304 of the judgment, which is paragraph 71, which sets out the Port's analysis there in the context of the consenting process as to what happens. That statement in 71 and 72, which I suspect you've had put to you in the other case in some depth, is one that EDS is comfortable with.

GLAZEBROOK J:
So what are you exactly referring to in that paragraph?

MR ALLAN:
Sorry, the…

GLAZEBROOK J:
The whole paragraph?

MR ALLAN:
Yes, the whole paragraph. Those two paragraphs address what's likely to occur where the NZCPS is engaged in a resource consent application, and that was something that EDS was comfortable with.

WILLIAMS J:

I get the impression from the review that you talked about that all that's happened is that the battles have shifted up to the policy stage, the real battles, instead of the consenting stage. Because everyone knows that the effect of *King Salmon* read the way you suggested is that the war is going to be won at that level, not at the consenting level.

MR ALLAN:

Yes, there's a lot of awareness about the word "avoid", I have to say, and I've been in a lot of consent, sorry, plan-making processes, where there's been a lot of discussion about verbs and more discussion than there had historically been, because of the importance of those verbs, and I think everybody accepts the logic in that. There are obviously parties who are unhappy practically with the result of *King Salmon* for them, but as a series of professions the planning grouping, if you like, have adapted to *King Salmon* and worked with it for eight years now, and that for example informed all the debate through the Auckland Unitary Plan process because the decision came out very early in that process.

WILLIAMS J:

But it's, I'm not going to say disingenuous because I don't think that's right, but it's shall I say a little clever, and I don't mean that impolitely, to say: "It's okay, wait till the consenting stage."

MR ALLAN:

I would say it reflects the Act's structure, because –

WILLIAMS J:

Oh, okay, so you're not saying: "It's okay, Port of Otago, wait for the consenting stage," you're just saying the battle's, the war's not finally won at this stage?

MR ALLAN:

Oh, no, I'm absolutely happy, EDS is happy to continue discussions about what the RPS should say and what the regional coastal plan policies and objectives should say, it thinks that's a really worthwhile area for discussion between the parties. It's issue was that it thought the Court's wording went beyond what the CPS said because it went beyond "avoid these certain effects on these certain resources" and started to work back from that. So there are ways to then enable people to seek consents, ultimately, and to modify their activities in such a way that they might fit within the policy structure that's created. But, as I said earlier, there will be occasions where consent can't be granted because it's just problematic in terms of the whole policy framework.

WILLIAMS J:

What do you say then to the, I've called it the "narrow sliver", through which Mr Andersen will shimmy in order to save his port from destruction?

WINKELMANN CJ:

A great mental image.

MR ALLAN:

Well, first of all I'd say his port is not facing destruction.

WILLIAMS J:

But are you comfortable with the idea of a narrow set of exceptions built into the process or do you think that's fundamentally inconsistent with *King Salmon*?

MR ALLAN:

It depends on what they are…

WILLIAMS J:

Ah.

MR ALLAN:

And…

WINKELMANN CJ:

Well, that's what I just put to you, which was Mr Maassen's narrow set of exceptions, which of course was he accepts the specific, the circumstance, so, you know, the importance of what's going on is relevant, and so is the importance to the environment. But he said the exceptions should be rare and carefully scrutinised as to necessity and the absence of practical alternatives and as to permitted scope.

MR ALLAN:

Okay, and my answer probably wasn't expressly as it should be. So if the sliver is about consenting rather than prohibition, that's fine. If it's about focusing attention on particular effects, that's fine. But if it's about, if it says something other than you, if it says you can remedy or mitigate these effects, I think there's an issue in terms of the policy framework and the giving effect to the CPS.

WILLIAMS J:

So you're opposed to a necessity exception?

MR ALLAN:

Yes, well, I'm glad we came to that, straight to that. The necessity and the, I think the other wording was…

WILLIAMS J:

"No practical alternative".

MR ALLAN:

"Impractical to do anything". Those are the sorts of things that might well have been put into Policy 9 of the NZCPS –

WILLIAMS J:

Ah, okay, but not.

MR ALLAN:

– or might well be put into it in the future, but they're not there now. And the issue of necessity is something that is already present in the CPS, I have that noted down here somewhere.

WINKELMANN CJ:

So this is at the consent level we're talking about, or at the policy level?

MR ALLAN:

I'm talking about the policy level.

WINKELMANN CJ:

Okay, right.

WILLIAMS J:

So there's no room for it at the consent level, you would say, unless it's in the policy?

WINKELMANN CJ:

No, that's not what he said.

GLAZEBROOK J:

Well, I think he says there is room at the consent level, which is quite puzzling.

MR ALLAN:

No, that's a different enquiry under section 104.

WILLIAMS J:

Oh, now you're taking me back to "have regard to".

WINKELMANN CJ:

So we're talking about policy, talking about policy.

MR ALLAN:

I'm talking about the CPS, the Coastal Policy Statement.

WILLIAMS J:

I get that.

MR ALLAN:

So in terms of Policy 9, it doesn't refer to, on my reading of it, to necessity as being a way to get around the avoid policies, and nor does it refer to there being another alternative. So it perhaps might be helpful if we can get Policy 9 up on the screen.

GLAZEBROOK J:

I don't think that's the argument. The argument was that you have to try and avoid as much as you possibly can there being a conflict between those two policies. If there comes a conflict between those two policies in very rare cases that can't be worked through, then the test is necessity or, necessity and no other practical alternative. Mr Andersen would have had a slightly, it would have had the same effect but slightly different wording.

MR ALLAN:

Okay. And…

GLAZEBROOK J:

But again concentrating on policies that just can't fit together, so the *King Salmon*, which *King Salmon* did not deal with, conflicting policies.

MR ALLAN:

So if we could get Policy 8 and 9 on the page together that would be excellent. So Policy 8 is the policy that was looked at in *King Salmon*. Policy 9 is the policy that's looked at in this case. They both begin with the

word “recognise”. So the aquaculture: “Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:” and a list of things. So that’s recognising the benefit that this activity can bring and then dealing with the way that you do that.

Ports policy: “Recognise that a sustainable national transport system requires an efficient national network of safe ports,” so that’s talking about a network of safe ports, “servicing national and international shipping, with efficient connections with other transport modes, including,” again, “by:” and then there’s a list of matters.

So in terms of the chapeau, our reading of it, and it may well be that you have a different one, but we’re addressing it as best we can in the context of what *King Salmon* gave us guidance to do, is that those are similarly weighty chapeau. They both ask the policy-makers to recognise certain things and then set out a list of things.

WILLIAM YOUNG J:
“Requires” is the key word against you though, isn’t it?

MR ALLAN:
Well, except that the – our argument is, and it’s set out in, I think, Part 6 of our submissions in a bit more detail, is that the recognition is the key verb. We require an efficient national network of safe ports, sure, but it doesn’t say ensure that there is an official – that ports are safe and whatever. It’s expressed in wording that’s very similar to Policy 8 and the –

WINKELMANN CJ:
Couldn’t you say that’s because this is an activity-based recognition whereas the others are effects based and that’s why it’s a different kind of language?

MR ALLAN:
I’m not sure that there is a difference there, Ma’am, so –

WINKELMANN CJ:

Well, the problem is that these things are being dealt with at such an extraordinary high level, you couldn't have an avoid – how could you have an avoid policy where it's looking at effects that sufficiently at the policy level allows reconciliation of these different objectives for aquaculture, ports, reclamation and de-reclamation?

MR ALLAN:

Sorry, I'm not…

WINKELMANN CJ:

So I'm simply making the point which Mr Maassen's made which is that this is a policy and it's hard for it to express itself to reconcile all the different objectives it's recording.

MR ALLAN:

Well, I suppose to flip that around, in a sense, is it possible for this policy, Policy 9, to be written in a way that gave it the sorts of exceptions to Policies 11, 13, 15, 16, that the Port company would like, and I think the answer is yes, you could do that, and again by specifying that those policies would not necessarily be – you need not avoid effects if it is necessary for the safe operation of the Port to do so. It –

WILLIAMS J:

One of the issues I think with drawing out the verbs is that the other language gets left behind, not just the "requires". But the aquaculture policy recognises that it's quite a good idea to have aquaculture because of its contribution to the well-being of the community, et cetera, et cetera. Policy 9 is much sharper because it says: "I'm going to recognise that a sustainable national transport system requires certain things." It's not arguing about whether the sustainable national transport system is mandatory or just a good idea because it's obviously assumed that no country can run without it, and you can really only understand that chapeau as saying: "We'll do all we can to

support a safe and efficient national network of safe ports because we're a trading island nation." Aquaculture's a million miles from that.

MR ALLAN:

And if I can take that point and move on with it, under Policy 9. So the items that it's listed here are: "Ensuring that development in the coastal environment does not adversely affect the efficient and safe operation of these ports or their connections with other transport modes." So that's protecting the Ports, if you like, from other development in its context, and there's a similar one in Policy 8. And then: "Considering where, how and when to provide in regional policy statements and in their plans for the efficient and safe operation of these ports, the development of their capacity for shipping and their connections with other transport modes." And our analysis is that the where, how and when is affected by the avoid policies, in other words –

WILLIAMS J:

Yes, well, there can be no argument about that.

WINKELMANN CJ:

Can I just take you back to the question –

WILLIAMS J:

Can I just finish my point?

WINKELMANN CJ:

Oh, sorry, I was just going to – okay, carry on.

WILLIAMS J:

There's no "whether" in (b), just "where, how and when", right?

MR ALLAN:

Sure.

WILLIAMS J:

So, and of course it's a reference to existing port operations. The impression in (b) is that ports are a non-negotiable. Now I find it hard to understand why that's any less powerful coming from its perspective than "avoid" is coming from its perspective.

MR ALLAN:

Right. And we would say it's because courts are a non-negotiable provided they're not having effects on those very special, very rare resources that the avoid policies identify, and that goes back to section 6 of the Act.

WILLIAMS J:

Yes, that gives primacy to the avoid over the other. What if the relationship is in the other direction? You avoid, but only to the extent that it's not inconsistent with the safe and efficient operation of our necessary port system.

MR ALLAN:

If that's the interpretation then that's –

WILLIAMS J:

Well, that's the suggestion I'm putting to you.

MR ALLAN:

Yes, I suppose – my reading of it is not as sharp as yours is in terms of the level of commitment, if you like, to the Ports relative to the other resources, to the resources to be, on which effects are to be avoided.

WILLIAMS J:

I guess my point is to accept that "avoid" is very strong but Policy 9, taken in context, is pretty strong too, that's the problem we face, whereas Policy 8 not quite so much.

MR ALLAN:

Well, I think, and as I understand it, that's really a discussion about the relative importance of those activities and essentially saying that we require a sustainable national transport system, being read to a level that if it doesn't equate to avoid policies becomes close.

WINKELMANN CJ:

Can I take you back to my earlier question which I haven't had a chance to engage you about?

MR ALLAN:

Yes, certainly.

WINKELMANN CJ:

You said in response to my question about how you could draft that policy to meet Policy 9 and I think you said: "Oh, and it could have had added in that it's not necessary to avoid, et cetera, et cetera." But that's misunderstanding the nature of policy because it would be way too much, because you should be operating your ports to avoid all these things.

MR ALLAN:

Oh, certainly.

WINKELMANN CJ:

And that's the difficulty I'm pointing out, that when you're offering a level of policy it's hard to encompass, to give clear directions without already giving away too much, and that's your point when you get down to the planning documents, isn't it?

MR ALLAN:

Yes, yes. And I'm not about to try and re-draft the Ministry's policy for them. But is something I, if it were intended to – it could be clearer, if you like, if that was the intent, that these be policies that have a different relationship between them than it does currently.

WILLIAM YOUNG J:

So is there any evidence as to the practicality of maintaining or expanding major New Zealand ports in ways that don't trench on the avoid directions in Policy 11 of the New Zealand Coastal Policy Statement?

MR ALLAN:

Well, I think there are consents that have been granted to Port Otago Limited that my friend acting for the Regional Council can discuss in more detail. I'm not sure there is a lot, because not all ports are in a position where they encounter these issues. So Auckland Port –

WILLIAM YOUNG J:

Well, they're only going to encounter them, I guess, if they want to do something, probably something that changes the scale of their existing operations.

MR ALLAN:

And if they are in a location where some of those items exist.

WILLIAM YOUNG J:

Yes, I agree. That's what I want to know. If you're, say, a port, say the Wellington port, would expansion, development, infringe Policy 11 or potentially –

MR ALLAN:

I'm afraid I don't know enough about the Council.

WILLIAM YOUNG J:

Or Lyttelton or Auckland.

MR ALLAN:

Auckland, no, is my understanding. Whangārei potentially because of the qualities of the environment on the head on the northern side of the harbour entrance.

ELLEN FRANCE J:

Is that –

MR ALLAN:

But it's very much driven by whether you have those resources in the location or not.

WILLIAM YOUNG J:

Yes, it's just a matter – I mean just in looking at Policy 9, it would be of interest to me to know whether it is possible to maintain an efficient national network of safe ports without at times breaching the Policy 11 avoidance requirements.

MR ALLAN:

And I can't answer that. I guess the observation would be that clearly Port Otago is able to operate currently and the other ports are able to operate currently, and whatever the Regional Council does when it's allocating its notations on the maps that show where these areas may or may not be, it will be in the context of an existing port.

GLAZEBROOK J:

But that does mean it's – which is not actually the argument of Port Otago. Does that mean that the Regional Council is constrained and says: "There's a port here so I can't actually make that a – I can't actually note that as being of particular significance"?

MR ALLAN:

I don't think it's that – it's not that brutal.

GLAZEBROOK J:

Because that would be odd, especially in light of your argument about cumulative effects have already to a degree ruined the coastline. So if you accept –

MR ALLAN:
No, there are – clearly, where the Port actually is I suspect there won't be any of these special resources, but again my friends can answer that.

The issue appears to be in relation to where the channel is and from the plan that was shown earlier – I don't know if you can go back to that plan.

UNIDENTIFIED SPEAKER:
What plan is this, sorry?

MR ALLAN:
That was the aerial photograph that my friend had on the first day, so I think beginning of the day. Last document in the bundle.

WILLIAM YOUNG J:
There's quite good aerial maps on Google which actually give a rather better picture of what's involved, I think.

MR ALLAN:
There are. Not high fidelity, is it?

WILLIAMS J:
You don't have these lovely coloured squares though.

WILLIAM YOUNG J:
Well, I found a bit easier to follow.

MR ALLAN:
So as I understand it the dotted corridor represents the channel. The issue in terms of the sea grass is on the area to the left of that and the Council will need to make a call as to where it identifies that and notates it in terms of the valuable resources that the Act and the CPS wants it to protect. So whether they overlap or not at this stage I don't think is known. How close they come is not known, but clearly there is a potential if there was a proposal to widen

the channel for there to be a conflict between that activity and the resources that are being protected, and whether that then gets consent or not is a matter that goes through that section 104 process as opposed to the plan process that we're talking about.

WINKELMANN CJ:

So what is wrong with Mr Maassen's model that you can, as you get closer down to the detail, your documents can depart from the strict language of the parent policy statement when you can become confident that the reconciliation is appropriate between conflicting policies?

MR ALLAN:

Well, I think the language can depart from the language used in the higher order instruments and it can certainly become much more detailed in terms of a whole range of factors. But we would say that certainly for the CPS stage you need to, by giving effect to it, you need to keep the same essential outcome in terms of these resources and you get a lot more flexibility elsewhere, and where the policies leave space for discretion, discretion can be used, but where the policies are essentially saying these are things for which there is an environmental bottom line, to use the language, you can't.

WINKELMANN CJ:

And on your analysis until you get to consent basis there's no real opportunity for reconciliation of conflict? It's just simply a faithful reiteration down the path?

MR ALLAN:

In terms of the policies relating to the protection, yes. In terms of the – you then start dealing though with the mechanism you will use and the rule you will use and that gives flexibility in terms of applications and then, of course, the outcome of those applications is subject to the separate exercise.

I'm conscious that I'm over my allocation of time. Perhaps if I can just quickly address the discussions regarding process that Mr Maassen put to you in terms of section 32, section 61 and section 293 of the Act.

Section 32 is the section that deals with the process through which councils and then the Environment Court goes when setting provisions in a plan or an instrument. Carries out an evaluation. Has to use what's the most appropriate way of achieving the objectives. That's in section 32(1)(b) – sorry, section 32(1)(a): "Examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act;" and then in (b): "Examine whether the provisions in the proposal," and this is to do with plans, "are the most appropriate way to achieve the objectives by doing certain things." So we would say that in terms of that evaluation it is, in the range of options that are available to the consent authority or, sorry, the territorial authority, is that which is left after the policy framework from the CPS identifies matters to be avoided or effects to be avoided. So it is constrained by that process.

The same we would say is true under the section 61 process provision which – this is where the Regional Council is told what it needs to do to put in place its regional policy statement, so that applies in this case. But the requirement in section 62(3), which is the one we've been talking about, to give effect to the NZCPS again limits the range of matters that the Regional Council can put in place and put in its regional policy statement.

Finally, there was a discussion about section 293 which is the one that the Environment Court was looking at at the tail end of its decision, and my point here is that while the Environment Court used section 293 and while it can be used in circumstances where there is a departure from the New Zealand Coastal Policy Statement, of course, in this case where we appealed to the High Court on the basis that the Environment Court itself departed from the New Zealand Coastal Policy Statement, so we would say this is certainly an appropriate matter to have been taken there and then obviously moved on.

Ma'am, I think those are probably enough from me. It's time to pass over to my friends. If you have any further questions I'm happy to answer them.

WINKELMANN CJ:

Thank you, Mr Allan. Costs. I said I was going to be asking everyone about costs and since you won't be having a right a right of reply, will you, I don't think?

MR ALLAN:

We don't have – we have a short presentation tomorrow, I think, after the – and we have –

WINKELMANN CJ:

Well, you can deal with it then if you like.

MR ALLAN:

I think that might be best.

WINKELMANN CJ:

Yes, it might, because then everyone will be talking about it so…

MR ALLAN:

Yes.

WINKELMANN CJ:

Seems rather depressing to be talking about costs this early on.

MR ALLAN:

Indeed. In that case, thank you.

WINKELMANN CJ:

Thank you. Mr Anderson, are you next?

MR ANDERSON:

Yes, thank you, your Honour. I probably need to apologise in advance for any coughing, spluttering and croaky voice…

WINKELMANN CJ:

Yes, well, I was going to enquire after your wellbeing but then I didn't want to reveal that you had COVID, but then I think you've just done so.

MR ANDERSON:

All right, it gets out.

WINKELMANN CJ:

You're not too bad, you're not too poorly?

MR ANDERSON:

No, it's like having a, well, for me, a bad head cold, nothing worse. The other thing is that my friend, Ms Sefton, is still with me but her camera is turned off so that I can see the whole Court on the screen.

WINKELMANN CJ:

Thank you.

MR ANDERSON:

If the Court pleases, I'd like to address some of the points that have cropped up during arguments so far, and first of all touch on Policy 9 and the avoid policies, and with Policy 9 I wonder if we're able to bring that up on the screen?

The point was made that the Port policy has somewhat firmer language than the aquaculture policy and I think that's correct, and also when you're talking about a national transport report and shipping network there may well be an underlying assumption that that is of critical importance to the country, and there was some discussion around the distinction between subclauses (a) and

(b) and the Court mentioned that in (b) considering where, how and when to provide does not include the word “whether”, which is absolutely correct.

The point I want to make is that even if the Port policy is expressed somewhat more strongly than the aquaculture policy, the relationship between the Port policy and the related Policy 6 which refers to providing for infrastructure where it has a functional need to be in the coastal environment, and the avoid policies remains much the same. Because what’s being said by those policies is essentially do both of these things: provide for ports but also avoid certain effects, avoid the significant effects in other cases and avoid, remedy or mitigate in other cases as well.

And that leads to a similar conflict point or the same conflict point as was discussed this morning where the Court, there was some discussion around, well, what happens when you have an irreconcilable difference, what if it’s not possible to provide for port activities while at the same time avoiding the effects that have to be avoided? And the point I want to make about that conflict is that it doesn’t arise at the policy level. There’s no conflict in saying “do one thing while avoiding another –

WILLIAM YOUNG J:
Well, unless doing one thing necessarily breaches the avoid requirement.

MR ANDERSON:
Yes, that's correct. If the language was such that the two are necessarily contradictory then there would be a conflict, but I don’t think that's the case here and think the conflict arises when you have a specific fact situation in front of you. So if, for example, there is an application for resource consent – and I think this would be the most common example – you may have a fact scenario, and a number were mentioned this morning, where it’s not possible to provide for certain port activities while at the same time avoiding adverse effects.

I'm about to step into an area that's already been debated with Mr Allan, but I think where that leads is that the most obvious part of the RMA framework to resolve those sorts of conflict is the resource consent process.

Now in that regard, there are some difficulties which the Court questioned Mr Allan on and there is the obvious point that the language in section 104 is different in that it refers to "have regard to". But that doesn't necessarily make the position easy because where you have policies and plans which include both, or give effect to both the Port and the avoid policy, and you have a New Zealand Coastal Policy Statement which is essentially the embodiment of Part 2, your starting point is that you're in much the same position. But in that scenario, and I'm referring to *Davidson* I think is the most relevant authority, if that consent puts you in a scenario where there is an irreconcilable conflict, that's the place where the words in the statute provide two avenues. One is that those provisions are only one of a number of factors which must be had regard to, so other factors. An extreme example may relate to whether the Port is able to continue operating, and also there is the subject to Part 2 proviso where in terms of *Davidson*, and I do want to stress that these, I think, should be very rare cases, but in terms of *Davidson* if you have that irreconcilable conflict then it is possible to have a look at Part 2 guidance on how it should be resolved.

I appreciate the points that have been made in argument that it may seem a little bit odd that you have a policy and planning framework where you go through a series of steps with a strict avoid policy and then at the very end open the door to a broader evaluation, but I think it should be noted that the avoid policies in the NZCPS are quite narrow. The pure avoid policies relate to matters of national significance and in most consenting instances you are not going to be dealing with policies which are both providing for important port infrastructure and providing for the avoidance of certain effects. Now beyond that, like Mr Allan I'm very conscious that that's a point which is, well, I think it's an issue in the East West Link case. So it's my point –

GLAZEBROOK J:

And perhaps if the submissions of Forest and Bird are different in this case than in that case we could have a reconciliation of the actual submission that's being made.

WINKELMANN CJ:

It's all right, we'll come to that later.

MR ANDERSON:

Sorry, your Honour, just to be clear, I'm for Otago Regional Council.

WINKELMANN CJ:

Yes, we've got so many parties –

GLAZEBROOK J:

Sorry. We've got so many parties I got totally confused as to who was acting for who.

WINKELMANN CJ:

It's nice that it's someone other than me doing that for a change.

MR ANDERSON:

Truth be told, I'm not quite sure where I fit into all of this. But anyway, I'm here now…

WINKELMANN CJ:

Carry on.

MR ANDERSON:

And so essentially that's a similar point to the one Mr Allan just made and that's the Otago Regional's Council submission, that if when we're talking about – I forget the colourful phrase that was used to do with Mr Andersen shimmying – but the logical place for that to happen is the resource consent stage.

The next point, very briefly, there was some discussion earlier about the section 104D threshold, so that's the threshold that in this instance the Port would have to get through to be able to apply for consent, and that's relevant when there is non-complying activity status. There are the two pathways: one is effects are minor, and that's uncontentious; the other is that the proposal is in line with the relevant, sorry, the policies and objectives of the relevant plan. And just the point I wish to note about that – and here it is on the screen – is that the test to not be contrary to those objectives and policies. I don't think there's clarity around what that actually means but I think it is reasonably clear that it is both different and less strict than "giving effect to", and again I'm conscious that that's the issue in the East West Link case, and I'm noting it only as part of the, I guess, the framework that shows how the Port company may be able to apply for consent for activities in the future.

The other point, and this is just a minor correction, there was reference to section 330 of the Resource Management Act and the emergency power that gives the Port company and the requirement to subsequently apply for resource consent. If we're able to scroll down to 330A, I just wanted to note that consent is only required if there is a continuing adverse effect, it's not the case that consent's required for the emergency works themselves, and it seems to me that if there was a continuing adverse effect either/or is something that can or should be stopped, or it would be a natural consequence of the works which were permitted under section 330 and form part of the permitted baseline, so I don't see that as in any way problematic to anything.

The other point which has cropped up is the prospect of the channel being expanded into the Aramoana salt marsh, which has been raised as an example where it's reasonably clear that any activity in the avoid policy would come into conflict, or likely come into conflict, and generally I think that's correct because the – and this is in written submissions – but the salt marsh is within the scope of Policy 11(a)(vi) because it's held under the Conservation Act. If we're able to go to the first, second and third respondents' bundle, item 15, which is a copy of the *Gazette* notice – and if

we can scroll down just a little bit until we start to see – so that *Gazette* notice is just by way of illustration. It records the particular values for which the land is held, and similarly the proposed regional policy statement contains schedules and policies which provide for the identification of things like outstanding natural features and their attributes, but if we use this as an example, when assessing whether there is an adverse effect, it's not quite as simple as saying that's the Aramoana salt marsh and it's captured by Policy 11, therefore nothing can happen. There actually needs to be an examination of the extent to which those values exist in that location and with any proposed activity what effect there will actually be, and – now the example given, this is probably a reasonably clear and obvious case where there is going to be an effect if there's a significant intrusion into the salt marsh, but I do just want to illustrate that the establishment of whether there will be effects is sometimes not as clear cut as it might seem.

The other point which has cropped up in argument is the distinction between existing port activities and expanded port activities. I think for the most part there is no issue with existing port activities. They're consented. When it comes time to replace consents they form part of the existing environment. It's really, or the debate that we've been having, is really about what happens when the Port needs to expand or carry out a new activity.

GLAZEBROOK J:
Or repair, I think, was one issue as well.

MR ANDERSON:
Yes, I think it's possible that repairing something existing could cause a new effect (inaudible 15:43:34).

WILLIAM YOUNG J:
And just one little point, I think, Mr Andersen (with an "e") made, is that the idea of maintaining an existing operation is a bit slippery because the Port would have to adapt itself to changes in shipping practices.

MR ANDERSON:

Yes, I agree with that point and it's expressly contemplated by Policy 9 which in subclause (b) in fact uses the word development of shipping capacity, I think, from memory.

So those are the points that have cropped up in argument which I wanted to respond to.

I've provided an outline of written submission and I apologise that that's a little bit longer than is normal, and I propose to just deal with that topic by topic, rather than word by word.

WINKELMANN CJ:

Mr Anderson, how are we going with your time allocation? Because I know we kept Mr Allan a bit past his time allocation.

MR ANDERSON:

I think we're okay. I was allocated an hour and I think we're only half way through that, and I don't have much left to say.

WINKELMANN CJ:

So you'd carry on tomorrow morning and then Royal Forest has how long?

ELLEN FRANCE J:

Until 11.15.

MR SMITH:

The plan was that I would have an hour which would run through to 11.15.

WINKELMANN CJ:

So you'd have to be on by 10.15.

WINKELMANN CJ:

So do you think you could finish in the next, say, 10 or so minutes this afternoon and then 15 minutes tomorrow, or do we need to start a bit early tomorrow?

MR ANDERSON:

I definitely think I could finish within a short time this afternoon and maybe another short time tomorrow morning.

WINKELMANN CJ:

Okay, go ahead then.

MR ANDERSON:

So the oral submissions to make are generally directed towards the policy, planning and consenting framework. The purpose of doing that is simply to show that even when we apply *King Salmon* to this case there remains a consenting pathway for the Port and there remains a logical place for any conflict of facts once the consent process is reached and, to a lesser extent, at the plan stage, and the resource consent part of that process has just been talked about at length with both me and Mr Allan.

So starting at the top – and this is paragraphs 4 onwards of the outline – is the Coastal Policy Statement, I think I've already covered all that's written down there, and then it takes to the Regional Policy Statement, starting at paragraph 12. The point that does need to be stressed, as it has been many times, is that the words in the Act are given effect to and that's what the Otago Regional Council has to do. There was some discussion around the proposed wording in Mr Andersen's submissions and possible alternatives. That's problematic in terms of the Coastal Policy Statement because what needs to happen first is the identification of the protected values, which is provided for in the Regional Policy Statement and I don't think we need to look at the references, are Policies 3.2.1, 3.2.3, 3.2.8 and Schedules 3 and 4.

The problem with an exception at this stage is that in terms of the values which may be affected covers everything, and it may be that at the plan stage there are areas identified where consideration lead to prohibited activity status. I'm not suggesting that is likely, but I don't think that possibly can be foreclosed at this stage without relevant environmental values first being identified.

WILLIAMS J:
Can that be done without a mandate for it in the RPS?

MR ANDERSON:
Sorry, I missed part of that.

WILLIAMS J:
Can an exceptions clause be provided in the plan without a mandate for it in general, if abstract, terms in the RPS?

MR ANDERSON:
Well, in the Coastal Policy Statement there's Policy 7 which provides for policy statements and plans to identify areas which are appropriate for development. This is Policy 7(1)(a) and (b), inappropriate, and may be inappropriate without consideration of effects through a resource consent process.

So to include wording at this point which says port activities no matter what values they're affecting where would cut across that process as well as the other policies, but at the regional policy statement stage there is no reason why there couldn't be a policy which is in accord with Policy 7 and is providing a stair that when it comes to port activities they do need to be recognised in the way that the Port policy contemplates and that unless there is certainty as to adverse effects which must be avoided you would not expect to see prohibited activity status. Those are not the words that would be used but that's that the effects that it would have, and even without those words the combined effect of Policy 7 and Policy 9 is essentially that.

So that's the regional policy statement.

Then we come to regional and district plans. Just as context, in the current regional coastal plan the most restrictive activity status for port activities is discretionary. A new regional coastal plan is in the Regional Council's, or provided for in the Regional Council's long-term plan in 2025, which given other programmes to do with freshwater and other things is nothing more than an indication.

When it comes to preparing plans the key thing is essentially what we've just discussed which is that plans can set activity status and that can have the effect if activity status is prohibited that there is no opportunity for a port activity to be considered through the resource consent process.

I do not think that is very likely except in cases where there is sufficient information to know with complete certainty that an activity will cause effects which must be avoided and that there is no way of avoiding that or ensuring that it's transitory or less than minor or otherwise might be okay, and that the simple reason for that, without listing all of the provisions in section 32, is that the NZCPS in Policy 9 provides for ports in reasonably strong language and tells us that ports are very important, and so to survive a section 32 analysis it would have to be the clearest possible case that a port activity should have prohibited activity status.

GLAZEBROOK J:
Should have what, sorry?

MR ANDERSON:
Should have prohibited activity status. That would be rare and only when it is certain that there are effects which would happen which must be avoided. Commented before, I see n reason why a regional policy statement couldn't include direction to that effect, given the Port policy in the NZCPS.

WINKELMANN CJ:

You see no reason why a regional policy statement shouldn't include what direction?

MR ANDERSON:

Direction that when considering activity status is prohibited or non-complying or whatever else, the importance of ports and their functional needs need to be recognised and that unless there is complete certainty as to effects which must be avoided they should not have prohibited activity status. Rather specific facts should be able to be tested by the resource consent application.

GLAZEBROOK J:

Can I just ask, is that port activity status as discretionary as that on land or does that somehow apply in the CMA as well?

MR ANDERSON:

The sea as well, the coastal marine area.

WILLIAMS J:

Right.

MR ANDERSON:

It's the regional coastal plan which, I forget how old it is, but it is somewhat out of date.

WINKELMANN CJ:

I think, Mr Anderson, we'll take the adjournment at this point, and you'll be okay in 15 minutes in the morning you think?

MR ANDERSON:

Yes your Honour.

COURT ADJOURNS: 3.57 PM

COURT RESUMES ON THURSDAY 12 MAY 2022 AT 10.03 AM

WINKELMANN CJ:

Mōrena. So before we start with Mr Anderson, most people I think are aware that we've got some issue with the document sharing system. So I think, Mr Anderson, you're not really taking us to documents, are you, so I thought we'd complete your submissions then hopefully the technician will be here, we'll adjourn for about 15 minutes and we should be able to make that 15 minutes up just by having a slightly shortened lunchtime. Does that suit everybody?

MR ANDERSON:

Yes, your Honour, thank you.

WINKELMANN CJ:

Are you feeling all right today, Mr Anderson?

MR ANDERSON:

Yes, when I woke up I was still breathing so could be okay.

WINKELMANN CJ:

You woke up; that was a good start.

MR ANDERSON:

Yes, exactly.

WINKELMANN CJ:

Take it away.

MRAND

So I was at paragraph 25 in the outline of oral submissions and that is referring to the *King Salmon* decision where there was comment to do with it being improbable that minor or transitory effects would result in an activity being prohibited. Just to expand slightly on that, the comment in *King Salmon* was made in context of two of the four avoid policies – that's Policies 13 and

15 which relate to outstanding natural character, landscape and features – and it referred expressly to the introductory words of those policies which use the word “inappropriate” in context of protecting the relevant values from inappropriate use and development which is in contrast to policies, or to Policy 11 in particular, which does not use that phrase in its introductory words. So the point I wish to make is that when giving meaning to the avoid policies there may be a distinction in how directive those policies are as between Policy 11 which relates to indigenous biodiversity and the Policies 14 and 15 which relate to outstanding natural character, landscape and features. Relevant to that is section 6 of the Act where there is a similar distinction in wording in that the references to “character, landscape and features” use the word “appropriate” whereas the reference to indigenous biodiversity does not.

The only other point I have to make relates to a topic which was addressed yesterday which was whether there can be a policy in the regional policy statement which gives effect to Policy 7 in the New Zealand Coastal Policy Statement in providing a consenting pathway for port activities, and in my submissions yesterday I said that the wording that’s presently proposed doesn’t work because it tends to be permissive of activities with effects which are to be avoided.

I thought it might be helpful overnight to think about what a policy could in fact say and so by way of illustration, if it was intended to have a policy which is to give some certainty as to the ability to apply for consent, I think such a policy could say: “Where a port activity may, but is not certain, to have adverse effects contrary to Policies 3.2.2(a), 3.2.4(a), 3.2.9(a) or 3.2.12(a) that cannot be avoided, provide for consideration of effects through a resource consent application.”

The effect of such a policy would be unless there is certainty that an activity would have effects which must be avoided, there would not be prohibited activity status, and a policy like that does not need to have any further overlay such as a necessity test or a not practicable alternative requirement or similar along the lines that were discussed yesterday and relate to all port activities,

and that to me seems appropriate, given the Port policy and Policy 7 in the NZCPS.

GLAZEBROOK J:

Probably two questions. How would that resource consent be worked through and, secondly, I would have thought that was self-evident anyway in that if it wasn't certain it would have adverse effects then presumably somebody would reply for a resource consent whether it was an avoid policy or not and then argue that there were no adverse effects or that they were minor, depending upon the status?

MR ANDERSON:

Well, in answer to the first –

GLAZEBROOK J:

Ie, non-complying or otherwise.

MR ANDERSON:

In answer to the first question, this doesn't resolve how a resource consent would be dealt with, it only addresses the concern raised by the appellant that activities may be prohibited without the opportunity for resource consent application.

GLAZEBROOK J:

Okay, fine. If just perhaps then you can say how you say they would be addressed?

MR ANDERSON:

Well, I'm not…

WINKELMANN CJ:

Would it be more, inclined to – oh, carry on, answer that question. Sorry, Mr Anderson, go ahead and answer Justice Glazebrook's question, I was interrupting you.

MR ANDERSON:

Yes, your Honour, would you mind repeating the question? I've lost track.

GLAZEBROOK J:

So activities being prohibited, except I can't see why activities would be prohibited if they're uncertain to have an effect that she be avoided – oh, yes, you did say that yesterday, I think, yes.

WINKELMANN CJ:

I was just going to ask, wouldn't it be more straightforward drafting just to say that those activities aren't prohibited rather than – because I'm concerned that such a policy as you've articulated creates other kind of thresholds that may not be intended. It might just be much more straightforward to say they're not prohibited unless it's certain.

MR ANDERSON:

Well, I think prohibited activity status can only be dealt with at the plan level under section 77A, but certainly if – I'm sorry, I don't know the answer to this, if it's possible to have a policy that says there "shan't be prohibited unless the adverse effects are certain", I'd be equally happy with that wording.

WILLIAMS J:

I think section 55 allows that, doesn't it? The directive part of it is the first part of it, isn't it? The one that was the basis for Policy 29.

MR ANDERSON:

Yes, it may well, your Honour. I guess the point for me –

WILLIAMS J:

Subsection (2), yes.

MR ANDERSON:

Sorry, doesn't that relate to a national policy statement, making a direction?

WILLIAMS J:

Yes, but doesn't the Coastal Policy Statement provision refer back to 55, rather than repeat it? I don't know, I'm just doing this from memory from just in discursive reading beforehand. I thought there was a provision later that said "apply section 55 with appropriate modification", something like that. Anyway, I don't want to distract us.

MR ANDERSON:

I'm sorry, I don't know the answer to that, but I guess the key point –

WINKELMANN CJ:

Well, somebody else probably will. One of the other counsel following on after you will no doubt be able to clarify it. I think Mr Allan knows now. He's – do you?

MR ALLAN:

Section 57(2) I think does that.

WILLIAMS J:

Right.

GLAZEBROOK J:

You don't want to answer how the resource consent would deal with that? Sorry, I don't mean…

WINKELMANN CJ:

Do you want to?

MR ANDERSON:

Me?

GLAZEBROOK J:

Yes, I probably mean do you want to answer that, and I can understand that you might say no was the reason I put the question that way.

MR ANDERSON:

Well, the answer in my short time available is that it's in the manner I submitted yesterday which refers to *Davidson* and picked up on the points that you still end up with a position where you have a New Zealand Coastal Policy Statement and subordinate policies and plan provisions which give you the embodiment of Part 2 and if you have avoid provisions which are clear and directive, in most cases that is going to dictate how the consent evaluation under 104 is determined. However, there may be instances where at that factual level you do have an irreconcilable difference or similar and in that scenario there is either the mechanism referred to in *Davidson* which essentially is to revert to Part 2 because the plan provisions and policy statement does not provide you with the answer or to use the evaluation under 104 itself where the plan and policy statement provisions are one of a number of factors which must be, to which regard must be had.

GLAZEBROOK J:

And even at that stage you don't think necessity and no practical alternative provides some sort of guidance?

MR ANDERSON:

Well, I think concepts like that may provide some guidance at that stage. I really hesitate to get too far into hypotheticals but, you know, if you were considering an outstanding natural landscape and a minor incursion into it in contrast with significant positive effects, then that would suggest that the concepts of "necessity" and "no practicable alternative" are not the only concepts that come into play. But whereas if you –

WINKELMANN CJ:

Or social utility of what's planned might come into play, for instance, mightn't it?

MR ANDERSON:

Yes, that's probably a much clearer way of putting it.

WILLIAMS J:

That's walking you back into a general weighing up, isn't it?

MR ANDERSON:

Only where the plan and policy statement provisions do not provide the answer and an example of that might be a point which was raised yesterday, possibly by you, your Honour, that the Port policy refers to consideration of where, when and how to provide for ports. It does not use the word "whether" and one view of that is that it's implicit that there are to be ports. So if you consider a very extreme scenario where a port simply cannot operate without doing something which has an effect on something which is to be avoided, you could view that as a scenario where a policy statement doesn't give you the answer because it's saying "provide for ports and avoid these effects" and it's not possible in that actual scenario to do both therefore you need to look elsewhere. So just, I guess I do need to be clearer that I am not suggesting that when you get to section 104, yes, they'll weigh everything up. I am submitting that when you get to section 104, when you're assessing or evaluating effects you're doing that against provisions of the relevant plan or plans and policy statements and that where those provisions contain clear avoid policies the effects referred to must be avoided. It is only where you get into the conflict situation, perhaps of the nature I've just described but I don't want to foreclose the possibility that there are other examples, that you need to look more broadly, and in saying that I'm trying to encapsulate what was said in *Davidson.*

WINKELMANN CJ:

So I suppose if it wasn't necessary you might say there's no conflict. If it wasn't, if there was a practical alternative, you might say there's no conflict.

MR ANDERSON:

Yes, that's right, your Honour.

WILLIAMS J:

Another way of thinking about that is that if strong policies like that, and I agree policy 9 just assumes there are going to be ports, and the background documents suggest quite a decent knowledge of the likelihood of necessary expansion due to change in the nature of shipping.

MR ANDERSON:

Mhm.

WILLIAMS J:

That the Ports are kind of market takers here, they don't have any choices. If the ships get bigger you've got to take them or you don't get ships. So another way of thinking about this is simply if policies which contemplate changes like that are in conflict internally within the CPS, then it's implicit in the CPS that the decider has to come to its own reconciliation. You wouldn't think that the draft is intended to put –

MR ANDERSON:

No.

WILLIAMS J:

– two conflicting ideas into a document so as to render them insoluble except by reference to another document. The better sense of it would be that they intended the decider to make an appropriate choice between two strong policies.

MR ANDERSON:

Did you mean in the scenario where it is not possible to do both things?

WILLIAMS J:

That's right. So the classic example in this case would be ships are now 30% larger, Gen5 ships or whatever it might be, and I'm afraid you're going to have to lose 10% of the salt marsh or Port Otago loses either its passenger liners or its container ships, a scenario that's probably economically deeply

problematic. So in those sorts of situations an expert and grown-up decider would just have to resolve it and probably by reference to the idea of absolute necessity. I mean, it's not hard, is it? Deciders do these things all the time, particularly in the planning area.

MR ANDERSON:

No, that's what consent authorities do day-in, day-out. And so if the scenario we are talking about is that essentially it's the Port's continued operation in light of the fact that, you know, ship sizes may change and we're not talking about a static world, the Port needs to keep developing to be able to keep operating. But if we're talking about that sort of conflict then I agree. You would not think that the authors of New Zealand Coastal Policy Statement intended that you simply end up with an insoluble stalemate. But my agreement does come with that significant qualification that that is the continued port operation versus the environmental effect.

WINKELMANN CJ:

So there's a factual inquiry that has to go on in relation to the particular situation to determine if, in fact, there's a conflict?

MR ANDERSON:

Correct, and that really is at the heart of everything I have to say is that you only know if you've got a conflict when you've got some facts in front of you.

WILLIAMS J:

That's true but it would be useful to have some guidance about what to do when you do so that they don't have to keep coming up through the appeal chain to figure that out.

MR ANDERSON:

Yes, I agree with that.

WILLIAMS J:

Preferably in the RPS, do you think?

MR ANDERSON:

Well, I'm not sure what further guidance the RPS is able to provide while also giving effect to the New Zealand Coastal Policy Statement because the maker of the RPS clearly only has the information that we have in front of us now when it comes to the sorts of conflicts that we're talking about and is constrained by the requirement to give effect to the NZCPS.

WILLIAMS J:

Although on my interpretation, which I think you agreed with, that would be giving effect to it.

MR ANDERSON:

You mean if we were to add some words that in the event of an irreconcilable conflict?

WILLIAMS J:

I don't think we'd want to draft it right here, Mr Anderson.

MR ANDERSON:

No.

WILLIAMS J:

But yes, that's the – the general gist is what do you do if you can't resolve it between – the conflict – can't obviously resolve the conflict between competing policies? You imply a compromise that the decider has to resolve without the necessity of recourse to other less precise tools like Part 2.

MR ANDERSON:

Well, I don't think we can do that at the RPS stage because we cannot change what the NZCPS policies say. We cannot change their meaning. The position that we have is essentially policies which say "provide for this while avoiding that". In most scenarios, most factual scenarios, those things work together just fine. It is only if you get to an extreme factual scenario where it

is not in fact possible to provide for, in this case, a port, while also avoiding certain effects, that there is a conflict that needs to be resolved and…

WILLIAMS J:
You see, the problem, Mr Anderson, is that with big complex infrastructure and particularly with big ports, that's exactly when you're going to get this problem.

MR ANDERSON:
Yes, I see the problem, but I think given NZCPS, given the requirement to effect to, the place where guidance can be provided is what this Court may have to say as to how section 104 is given effect to.

WINKELMANN CJ:
So, Mr Anderson, do you have anything else you wanted to say?

MR ANDERSON:
No, I don't. Those are my submissions, your Honour.

WINKELMANN CJ:
Thank you. Well, I understand the technician is in the building so we'll just adjourn hopefully for no longer than 15 minutes so he can have a go at fixing the technology problem.

COURT ADJOURNS: 10.30 AM

COURT RESUMES: 10.46 AM

WINKELMANN CJ:
The situation is that we're going to have to go old school because the system is broken, we need a new unit apparently, so counsel will have to give us references if they want to take us to documents. So next we've got Royal Forest and Bird don't we I think. Mr Smith?

MR SMITH:

Tēnā e ngā Kaiwhakawā. I am in the fortunate position that what the Chief Justice has said causes me no trouble at all because I have old school paper with me. The points that I'm going to address I'm going to do in four sections. The first thing I'm going to do is go briefly to *King Salmon* and draw attention to about half a dozen passages that, in my submission, provide the baseline for the exercise that this Court has engaged in of really conducting the equivalent exercise to the *King Salmon* exercise, but in the context of Policy 9 rather than Policy 8.

The second thing I am then going to do, which I anticipate will comprise the bulk of my time, is to drop down into the NZCPS and to spend some time both working through the document as a whole but then in particular looking at Policy 9 and the particular language it uses, and asking how we apply those *King Salmon* tests to the Policy 9 language.

The third thing I propose to do is to actually turn up the proposed Regional Policy Statement, which I'm not sure is a document we've actually had cause to look at so far.

Then finally, and it maybe that I touch on this final point on the way through, to address some of the methodological questions, if I can put it that way, about at which stage of the enquiry we conduct this reconciliation exercise and how whatever we do at the planning and consenting stages, might talk to each other or not, as the case may be, and Forest and Bird's submission on that, of course, is that the two process, talk to each other very closely indeed. So that avoid is indeed what is provided for at the top level policy that cascades all the way down. It is the embodiment of Part 2 in the coastal environment and it, in substance, tells you what needs to be done at the consenting stage.

So to begin with the first topic. Some selected highlights from *King Salmon*. The copy of *King Salmon* I have been working from is from my learned friend for the appellant's authorities at tab 11. Your Honours are working off your own electronic sets, is that right, or hard copy sets?

WILLIAMS J:

Tab 11 of what sorry?

MR SMITH:

Tab 11 of the appellant's authorities, or your working copy of *King Salmon* if you have one obviously. The first of these half a dozen or so paragraphs is para 96, and I should say there's, in general terms, a more exhaustive treatment of *King Salmon* in our written submissions from paragraph 48 through 74. So this is very much the edited highlights that seem relevant now but paragraph 96 addresses what avoid means, where it is used in the avoidance policies, and so picking up on the fourth line: "Our concern is with the interpretation of 'avoid' as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that 'avoid' has its ordinary meaning of 'not allow' or 'prevent the occurrence of'." And to paraphrase, it's hard to see what else it could mean in that context. So "avoid" means "avoid".

Then over the page at paragraph 102 we have a discussion of the meaning of the word "inappropriate", which is used in both section 6, but then carries through to Policies 13 and 15 of the NZCPS and in other places, and the submission that had been made and found favour in some quarters is that inappropriate in those policies provided a freestanding further test, but then picking up at line 45 at paragraph 102: "… the standard for inappropriateness relates back to the natural characterise and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic region-wide approach. The word 'inappropriate' in policies 13… and 15... bears the same meaning. To illustrate, the effect of policy 13… is that there is a policy to preserve the natural characterise of the coastal environment and to protect it from inappropriate subdivision, use, and development by *avoiding the adverse effects*…". So it doesn't provide an external further test, it tells you what is inappropriate.

Then the third of these, this one is a little cluster of paragraphs starting at paragraph 127. Paragraph 127 makes the point that when the NZCPS is considered it is apparent that different language has been deliberately used

and that some policies are more prescriptive than others. The Court in *King Salmon* at least regarded words such as "consider" or "recognise" as being in the less prescriptive category, and without unduly pre-empting the argument about Policy 9 footnote 132 on the word "recognise" specifically instances the Port's use of recognise in the Port's policy as being an example of this less directive form of policy. So say I don't want to pre-empt the argument, and I couldn't say that's anything other than obiter, but that appears to be the position there. Then at the end: "By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15…": et cetera.

Over the page to 129 and 130, in my submission 129 and 130 read against the rest of the judgment provide really the, it is the 129 and 130 exercise that we are now engaged in, in relation to Policy 9. So the decision-maker must first identify the policies that are relevant. Those expressed in more directive terms carry greater weight than those expressed in les directive terms."

WINKELMANN CJ:
Sorry, what paragraph are you at?

MR SMITH:
This is paragraph 129 your Honour. "Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, 'avoid' is a stronger direction than 'take account of'. That said, however, we accept that there may be instances where particular policies in the NZCPS 'pull in different directions'. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed."

Then 130: "Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as

possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5." So that is the test.

The Court then goes on to apply that to Policy 8 in the following paragraph at 131, and picking up at the fourth line of that, line 26 of the page: "In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other."

Then: "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." And of course our submission, which I am about to come to against the CPS, is that one can say the same thing about Policy 8 as the majority in the Court of Appeal and the High Court did.

So before leaving the judgment there's just one final cluster of paragraphs which is first 142. This picks up further on the point about the importance of the language that has been used, that was made at paragraph 127 that I took your Honours to just before. Starting at line 44 acknowledge: "The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But… is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils 'give effect to' it… and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language is used does not have the same 'openness' as the language of pt 2," that's sections 5 to 8, "and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background." So it's not a statute but nor is it something that's been scrawled on a napkin.

Then coming to the final two paragraphs that I wanted to refer to, 146, line 47: "Policies 13… and 15… are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse

effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed."

Then finally paragraph 152, which perhaps I refer to because it tends to – it aligns in some respects with the *RJ Davidson* approach about what the NZCPS and these instruments do: "The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility… the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13… and 15." And obviously the same point would apply about Policy 11.

So as I have said the issue here is applying those general, the test articulated those general observations about the nature of the NZCPS, does the same analysis apply for Policy 9 for ports as the Supreme Court found in *King Salmon* applied to Policy 8 Aquaculture. So the NZCPS, again the one I've been working from is in the case on appeal, it's the first document in the second volume I think, it's tab 8 of my system or 301.151.

So I'm going to begin with a bit of a page turn and then drop back to talk in more detail about Policy 9. So beginning on internal page 5 with the preamble. The first substantial paragraph: "The coastal environment has characteristics, qualities and uses that mean there are particular challenges in promoting sustainable management."

Then the third bullet: "the coast environment contains established infrastructure connecting New Zealand internally and internationally such as

ports…" So the Minister is unsurprisingly alive to the existence of ports and the fact that they are within the coastal environment.

Then coming down though to the next cluster of bullets: "The coastal environment is facing the following key issues…" So then we have the second bullet: "loss of natural character, landscape values and wild or scenic areas along extensive areas of the coast…"

Third bullet: "continuing decline in species, habitats and ecosystems in the coastal environment under pressures from subdivision and use…" and other matters there. So we can see that the matters that are recognised in the second limb of the definition of "sustainable management" in section 5, and that are enlivened in section 6(a), (b) and (c) of the RMA, are of, in particularly sharp focus in the coastal environment because these are matters where, are regarded by the Minister as key issues.

Then the fourth bullet: "demand for coastal sites for infrastructure uses (including energy generation) and for aquaculture to meet the economic, social and cultural needs of people and communities." So all that perhaps really does is to identify that these issues are top of mind for the Minister.

Then we come through to the objectives.

WILLIAMS J:
The reference to ports wasn't in the original Board of Inquiry draft, was it? It was inserted by the Minister?

MR SMITH:
I'm not aware of the answer but I'll take it from you your Honour.

WILLIAMS J:
I was going to ask you if you've got access to any of the reasons the Minister might have offered for inserting a specific reference to port infrastructure, but you don't know?

MR SMITH:
I don't know.

WILLIAMS J:
Okay.

MR SMITH:
Objectives on page 9.

GLAZEBROOK J:
And it would be useful to know if that is the case exactly what – because I'd be surprised if that third bullet point in the preamble was the first time national ports were referenced but it may well be but…

MR SMITH:
I've made a note.

WILLIAMS J:
Thank you.

MR SMITH:
So then the Objectives is on page 9 of the document. Again most relevantly we've got Objectives 1 and 2, which in a very straightforward way track through in the case of Objective 1 to Policy 11 and back up to section 6(c) of the Act. So that's really about biodiversity. Then Objective 2, which refers to natural character and natural features and landscape values and so therefore tracks down in to Policy 13 and 15 of the NZCPS, and up into section 6(a) and 6(b) of Part 2 of the Act.

Then over the page on Objective 6 we have the objective that – well there is an objective: "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 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 third bullet: "and functionally some uses and developments can only be located on the coast or in the coastal marine area." All I would say about that is it could have but did not say "or in an area of special protected values to be protected under Objectives 1 and 2."

Then we come to the policies in the document. I think we would pick up at Policy 6, which is the general policy, recognising that there are to be activities in the coastal environment and in some cases in the coastal marine area.

Policy 7, the strategic planning policy which is a procedural fulcrum which requires regional councils in their regional instruments to consider and deal with this valance through objectives, policies and rules.

Then Policies 8 and 9, which I'll mention only to locate them at this stage because I'm about to talk about them in much more detail.

Then perhaps finally Policies 11, 13 and 15, 13 and 15 most, of course the ones that were directly considered in *King Salmon* and looking at Policy 13 first we have a graduated level of protection that's been referred to where you avoid adverse effects on natural character in areas with outstanding natural character and avoid significant adverse effects in other areas.
Then that is the same structure that is used in Policy 15 and again Policy 11 adopts the same broad structure but without, to the extent it might be relevant, the express reference to the inappropriate use and development standard.

Coming now to drop into Policy 9.

GLAZEBROOK J:
You didn't mention Policy 7. Was there a reason for that?

MR SMITH:
I did mention Policy 7.

GLAZEBROOK J:

Oh did you? Sorry.

MR SMITH:

That was the one I described as a procedural fulcrum which directs regional councils –

GLAZEBROOK J:

Sorry, I've got that, yes. Sorry.

MR SMITH:

So the first point I would make about the nature of Policies 11, 13 and 15, and it follows from the finding of *King Salmon* that "avoid" means "avoid" is that their application can't be reconciled away because if you are, by definition if you are contemplating a situation where one of the effects that is to be avoided under 11, 13 or 15 is not being avoided, you are not giving effect in its terms to those policies.

WINKELMANN CJ:

Can I ask you to clarify. Are you speaking about the policy plan level, or are you speaking about the consent level? Are you speaking about the policy and plan level?

MR SMITH:

I'm speaking about the policy and plan level. At the moment I'm really speaking about simply the interpretation of the NZCPS as an instrument and conducting the exercise and the interpretation of that instrument contemplated at 1239 and 130 of *King Salmon*. So what we are engaged in is attempting to reconcile, trying our very best to reconcile, recognising that if we look hard enough things that appear to be inconsistent will probably dissolve, but recognising in a conceptual level that there may be cases where that doesn't happen, we should make those as narrow as possible, and identifying those areas where the two policies are irreconcilable, and if they are irreconcilable we should try and work out which prevails by looking at the NZCPS as a

whole and by *King Salmon* says looking at section 5, I would suggest that extends to Part 2, but ultimately the touchstone being section 5 in the way expressed in *King Salmon* and, of course recently in a different context in the *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 case.

So the point I'm making about 11, 13 and 15 is they can't be reconciled away because avoid means avoid. We may, as an intellectual exercise, need to consider whether another policy is irreconcilably in conflict with them, but we can't reach an interpretation where they can be reconciled in the sense that 11, 13 and 15 don't require these things to be avoided in some cases. The way we would deal with any pulling in different directions is by saying the other policy irreconcilably conflicts with 11, 13 and 15, and the only circumstances in which we could do that would be if we were satisfied in terms of the test set down in 129 and 130 of *King Salmon*, that that was the case despite our very best endeavours.

So then looking at Policy 9 –

WINKELMANN CJ:
But are you assuming that "recognise" is less powerful than "avoid"?

MR SMITH:
I'm not assuming that at this stage. That is my submission at the next stage.

WINKELMANN CJ:
Okay.

MR SMITH:
But the proposition I just made is intended to stand independently of that and to say that if it is the case that recognise is as powerful as avoid, that means there's an irreconcilable conflict. It doesn't meant that you can reconcile the policies in a way that leads to these things not being avoided, because that's

just not what 11, 13 and 15 means, as this Court has already determined in *King Salmon*.

ELLEN FRANCE J:

So if they do pull in different directions, you approach that in accordance with *King Salmon*, what happens then, on your approach?

MR SMITH:

On my approach you first reduce that, you look very hard at your first impression and you see, well, when I look at these words as carefully as I can, bearing in mind they've been very carefully chosen, bearing in mind the Minister was alive to the existence of, in this case, ports, alive to the need to avoid effects on these protected values, is there really still no way I can reconcile these things. If you have reached the conclusion that there isn't, you have reached the conclusion having made that area of irreconcilable difference as narrow as you can, and then what *King Salmon* says is you attempt to determine which policy prevails in that irreconcilable conflict, reading the NZCPS and applying part, section 5 of the RMA, what I would say, and this is jumping ahead slightly to the methodological stage, is that it might be possible, this is still talking as an analytical structure rather than a submission on the facts of this case, this is intended to hold generally, that you can determine that irreconcilable conflict at a level of the NZCPS itself, at the national level. You can say, well I can see that this should always be the case. But it may also be that it doesn't dissolve, it doesn't clarify –

GLAZEBROOK J:

I'm sorry, can I just check you mean by an amendment to the NZCPS because we've, when you say determine at the national level.

MR SMITH:

Sorry, I meant as a matter of interpretation of the national level instrument. So, yes, amendment of the NZCPS is a different way this might, and if there is perceived to be any issue in the interpretation and drafting of the NZCPS, that might be resolved, but I say if you've identified what seems to be an

irreconcilable difference, you might first yourself, well can I resolve which of those prevails simply at the level of the NZCPS, knowing that will apply nationally.

WINKELMANN CJ:

I'm finding it hard to follow what this means when people are doing things like deciding their policies and amending their plans because it only conflicts in relation to facts, doesn't it? These things don't conflict in the abstract so I don't really, I'm finding it hard to follow what you say it means?

MR SMITH:

We must always construct hypotheticals so work out these things, conflict of course, but the whole exercise today is, in that sense, abstract. We have no facts. There's no evidence about any of these matters that my learned friends are relying on to raise the conflict. So that's the answer –

WINKELMANN CJ:

But we have a little bit more than nothing. So we have a port that is operating in quite a complex area, and so your postulating that when you are formulating the policy you, what would it mean for the policy and the plan, would it mean that you might have to say that avoid prevails therefore activities will be marked as prohibited in the plan for this port in the salt marsh area?

MR SMITH:

What I'm saying, yes, is that when you come to draft your regional policy statement you might, if the issue couldn't be resolved at a higher level, it might become clear at the regional level what the answer to this conflict that was irreconcilable at the national level was, and which should prevail in the particular regional circumstances. There would be a right answer to that question because it would be a matter of, are you giving effect to the NZCPS or not, but that judgment need not be but could be attempted at the regional policy statement or regional plan level, or it may be, and as a matter of giving certainty and ideal planning practice obviously you want as much to be

resolved in these kind of respects as you can. But it might also be that if it really is a fact specific issue, and there really is an irreconcilable conflict that flows all the way down and can't be resolved at any of the policy levels, that you do end up in the *RJ Davidson* situation.

WINKELMANN CJ:
So you're saying that you can, if you have enough facts about some operation when you're at the regional policy/regional planning stage, you can make some quite clear directive decisions, but those decisions cannot be of a nature of giving away any of the avoid?

MR SMITH:
Yes.

GLAZEBROOK J:
Well, that's not what you said, because you said you can make a decision that one policy prevails over another, and then you can even do that at the consent level.

WINKELMANN CJ:
Cannot be avoid because nothing ever prevails over avoid.

MR SMITH:
So –

GLAZEBROOK J:
Then you don't, you're not conceding, there can be – well you can concede there'd be an irreconcilable conflict but it will always be decided one way.

MR SMITH:
Yes, that's what I'm saying on the facts on this case. So what I'm saying is as an analytical structure there can be situations where policies are irreconcilable, that's what *King Salmon* says, and I'm proposing a way in which as you drop down through the level of detail you might have serial

opportunities to resolve what appeared irreconcilable at the level of the NZCPS itself, if indeed you were in such a situation. But on –

GLAZEBROOK J:
It would be odd as a matter of interpretation, though, to say that somebody's made such a mistake in a high level document that it's put in there irreconcilable policy.

MR SMITH:
Absolutely. No argument with that whatever. We should try our very hardest, as *King Salmon* says in 129 and 130, to dissolve these apparent inconsistences, and if they're existing consistencies, to make them as narrow as possible.

WILLIAMS J:
Your basic thesis, though, is that there is none, because avoid always wins?

MR SMITH:
Yes.

WINKELMANN CJ:
But another scenario is you might be able to give away something where it's not like that, at a higher level, that's your point, but not in the case of avoid?

MR SMITH:
Yes, yes. So conceptually there might be policies that have irreconcilable differences but the apparent difference, if any, with the avoid policy is reconcilable because avoid wins, to put it in, use a term of art.

WILLIAMS J:
Yes.

MR SMITH:
So looking then at Policy 9 and saying that we are engaged now in this exercise of asking is this irreconcilably in conflict with Policies 11, 13 and 15,

or is there a way we can read the two together, because if there is a way we can read the two together, we should do that, and if we've been through the exercise of trying to read the two together, we can be satisfied that we've identified the narrowest possible area of conflict if, indeed, there is one. So we've got sort of two and a half limbs, if I can put it that way, probably I'll call them three. We have what we seem to insist on calling the chapeau, although I would rather prefer to find a local but similarly elegant term for that.

WILLIAMS J:
Hat.

MR SMITH:
Hat. Pōtae.

WILLIAMS J:
Pōtae, that's an excellent word Mr Smith, we're going to adopt that.

WINKELMANN CJ:
Justice Palmer claims credit, I don't know why, with chapeau entering our lexicon, but pōtae is better.

MR SMITH:
So we have the pōtae, and then we have the limbs (a) and (b). So the first thing, I mean (a) on the fats of this case is not really in play or of any difficulty. It's what might be called a reverse sensitivity policy, to make sure other things that you do in the coastal environment don't adversely effect the efficient and safe operation of ports. Then we've got (b) which is consider where, when and how to provide for the efficient and safe operation of the Ports and the national network referred to in the pōtae. The development of their capacity for shipping and their connections with other transports modes. So the question then is can we reconcile a direction to the consent – the policy maker to consider where, when and how to provide for the efficient and safe operation of ports. With that being against the background that the where and how can't be in a way that has an effect that is required to be avoided by 11,

13 and 15, and as a matter of language my submission is quite clearly we can. That the policy-makers can consider where, when and how to provide for ports, against the background that there is a limited category of places they can't put them, and that –

WILLIAMS J:
So 11, 13 and 15 tell you where and how not.

MR SMITH:
Yes.

WILLIAMS J:
So that works in the abstract but –

GLAZEBROOK J:
Well it works on the language but not necessarily in practice, does it, because in practice you may not be able to have the safe and efficient operation of a port without encroaching.

WINKELMANN CJ:
And what happens if it becomes apparent through some development international trade that it's necessary for the economic viability of our national for a new port to be put somewhere where it isn't currently.

MR SMITH:
Well that is another new hypothetical which I'm loathe to engage in, but my answer would be that is a matter of policy, a policy judgement that was for the Minister, that raises a policy choice between whether we allow for ports or whether we protect areas of significant indigenous biodiversity, which we know from the objectives that the Minister was concerned, or a particular concern in the coastal environment. So it's not an abstract question, it's not a question where the Minister didn't have the opportunity and shouldn't be taken to have turned her mind to this issue, because we know she was alive to these issues from the text, and we can see the words that are written, and we

can also see, for example, if we look down to the policy below, in Policy 10, for reclamation that she was alive to the existence of the word “unless” and the ability to have said in Policies 11, 13 and 15 that, “thou shalt not do things that have these effects unless”, and your Honours will see that the things that follow “unless” and the rest of the policy in 10(1)(a), (b), (c), (d), then the various regulating factors in 10(2) bear a resemblance to the sliver that we’ve been discussing in argument about whether it can be created as a matter of judicial interpretation of the quite different words of Policy 9.

WILLIAMS J:

But it starts from the opposite proposition, doesn’t it? It’s not that helpful to you because it says “no reclamation unless”. You were never going to get a policy that said “no ports unless”.

MR SMITH:

No, but you might have got a policy that said “no adverse effects unless”. So 10, I'm comparing –

WILLIAMS J:

Or you can read 9 as the Minister being fully aware of the fact that there are the number of ports there are, that they are necessary, and we can't plan to kill them. You can just, that’s just sensible, isn't it?

MR SMITH:

No one is arguing that a – no one could argue either as a matter of a general proposition or because it is written in the pōtae to Policy 9, that our nation does not, that a sustainable national transport system does not require an efficient national network of safe ports. It’s a question of whether we can put, make that do such heavy lifting that it implicitly includes something like everything from the word “unless” on down in Policy 10(1) and (2) in circumstances where the actual avoidance policies that we’re concerned with, 11, 13 and 15, do not contain that express carve out that was specifically drafted in for these policies – reclamation policy and that even if it hadn't been, would clearly have been available to the Minister as a matter of drafting.

The reason, though, that I draw attention particularly to Policy 10 is the suggestion – it's 11.30. Your Honour, did your Honour mention earlier making up the time by shortening lunchtime.

WINKELMANN CJ:
Yes, not by eliminating morning tea, you're quite right. Are you happy to take a break there?

MR SMITH:
I'm happy to take a break there.

WINKELMANN CJ:
I'm sure you are. Now how are we going with time?

MR SMITH:
I think I've been going for, someone will correct me, 45 minutes.

WINKELMANN CJ:
Yes, but I'm not just concerned about you Mr Smith, I'm concerned about the whole thing.

MR SMITH:
No, no, but if I stuck to my original timing, which would require me to speed up slightly, but that's my burden, I would be done at 12, and perhaps counsel can confer over the morning adjournment, but I don't think that should create any problems.

WINKELMANN CJ:
I think you'll need to, yes, because on the timetable you were meant to have been finished by 11.15. We lost 15 minutes, but that would still be, we're still behind, but perhaps counsel can just have a look at the timetable. Having looked at the submissions I did wonder if – actually Ngāti Whātua has not got very much time at all. We'll adjourn. Leave it to you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:
So where did we get to on timing Mr Smith?

MR SMITH:
We've had a discussion amongst counsel and the point has fairly been made that if we have over-run then we should be the ones to give the time back, which is fair, and so between us Forest and Bird, EDS and the Regional Council, we'll cut back our reply, which is currently 20 and 30 minutes, for a total of 50, to 35 between us, which will get us back the 15 minutes we've over-run, and then I understand the 15 minute IT adjournment will be made back by starting back at two or running through to 1.15?

WINKELMANN CJ:
We'll start back at two, and I'm not going to be your timekeeper, I expect you all to keep your own time, because I'm a notoriously bad timekeeper.

MR SMITH:
Well I shall then say out loud, so that I can keep my own time, that I have 15 minutes to go, which will take me to about five past 12.

WINKELMANN CJ:
Well start now.

MR SMITH:
So the next point I wanted to move to is this notion of making the exception, if there is one, the area that is irreconcilable as narrow as possible, and so of course our primary submission is that you don't get to that because they can be reconciled in favour of the avoidance policies, but the next point is how does one make any exception as narrow as possible, and in particular how

would that work reading Policy 9 if you're not with me on the first point, and so what we would say is that the exception has to be one that is required in order to recognise the need for an efficient national network of safe ports that does the things that are set out in the pōtae to Policy 9, servicing national and international shipping with efficient connections with other transport nodes, and so that is not a concept of – that is a question of without doing this thing is it just not possible to recognise what the policy requires you to recognise. So it's not a question of practicality or practicable, which I'm told are terms of art, to some extent, in the resource management context, and at least contextually may incorporate considerations other than possibility, although what they mean is, of course, is a matter in their particular context, so we say not possible to recognise the things that Policy 9 requires you to recognise is the sine qua non, and what we say about that is that the flavour of those words, at least, is not about cruise ships, which is the example that's been given. So national and international shipping I think in ordinary usage would tend to refer to the carriage of goods by sea rather than recreational cruise ships, and one might also say that that's consistent with the general flavour that we're talking about, a national transport system, an efficient network of ports with efficient connections with other transport modes.

The second point I would make is that we're talking about something that is a minimum requirement in order to recognise the need for a national network of safe ports. So the assessment that we're talking about needs to involve, if we are talking about such an assessment, a network effect, and that maybe something that arises from the effect on an individual port, but it's not the same, it's not automatically satisfied because there is an effect on an individual port because the thing the policy is protecting is the network.

GLAZEBROOK J:

Although one assumes that if there already is an existing port, that that was seen to be part of the network or else one would have thought it would've been excluded.

MR SMITH:

I'm not arguing that it's not, I couldn't argue that it's not part of the network. What I'm saying is could there still be an efficient and safe network, an efficient network of safe ports, even if this particular thing could not happen at this particular port, because it's the network that's protected.

GLAZEBROOK J:

Although if you're looking down at consents and regional and, it's difficult to say that they have to say, oh well actually it's fine because Auckland's working well, or Whangārei.

MR SMITH:

Well it's difficult for the region but what's protected is the national network.

WILLIAM YOUNG J:

Would you be applying, isn't there a risk that you apply that to – if you look at one port and you say, well we can just ignore and the ships can go to Bluff –

WINKELMANN CJ:

Sorry, I can't hear you?

WILLIAM YOUNG J:

Sorry, if you take your approach it would be like, it might involve the decision-maker saying, well so much for Port Chalmers, there's a port at Bluff so we'll just assume that the network will be okay with that, but then at Bluff there's going to be the same sort of argument, and in Wellington and in Lyttelton. I mean you can't sort of just salami it, can you?

WINKELMANN CJ:

No, you're putting emphasis on network when, in fact, obviously it's not just intended to be a network, it's also intended to supply local areas. Network is a descriptor not necessarily the objective that's being preserved.

MR SMITH:

Well I would certainly say that in my primary submission, that all of this is descriptive, and that the things to be done are set out in limbs (a) and (b) and they can certainly be done while avoiding, and I would have to recognise that a network is made up of individual links, and that the general proposition that the network of national ports must still service the different regions, is a sound one, if that is the value that is protected by Policy 9, but I would submit that is still not the same thing as saying that it is automatically the case that an effect on an individual port engages Policy 9, interpreted in that way, and I take also his Honour Justice Young's point that if the table has six legs and can stand with four of them, and you pull out the first, is it right to say when you come to pull out the first leg, well that's' fine because the table can still stand, even though if I do that to a table of three legs the table will fall over. My answer to that is yes. In these circumstances that is the case.

WILLIAMS J:

As long as you don't lean on the corner without a leg.

MR SMITH:

Well, yes, perhaps it depends on the table design.

WINKELMANN CJ:

Can I just ask you for context of this argument anyway, just to be clear, you were saying how do you keep the conflict as narrow as possible.

MR SMITH:

Yes.

WINKELMANN CJ:

So this is all we're on. You're going to tell us what happens when – you're coming to what happens when you've got to the point where you know there's this conflict. This is the prior factual enquiry.

MR SMITH:

This is the prior factual enquiry, you keep the conflict as narrow as possible and so whichever way, I mean my basic submission, of course, on the conflict is that for essentially the same reasons I've already traversed that if there is an irreconcilable conflict, that it's resolved in favour of the avoidance policies because those are the things that are more emphasised in the objectives of the NZCPS and in section 6(a) through (c) of the Act itself, and that if one is looking to find a weight of emphasis to act as a tiebreaker, that is one where finds it. However, in any event, whatever, whenever one has to – the point runs the other way as well which is that if the Court is considering a situation, it says it's not with me on that and says if there is an irreconcilable conflict Policy 9 does or may in particular circumstances prevail over the avoidance policies, then I say well that can only be in the case where there is an irreconcilable conflict, and that needs to be made as narrow as possible, and that is about, as I said, at least the two points there which are, I didn't think properly read the policy is really about cruise ships, and that it is a policy directed at a network, albeit one made up of individual links, not at the individual links for their own sake, and that it has to be applied in that context.

WILLIAMS J:

Even though tourism is the number 2 industry, at least prior to COVID.

MR SMITH:

These are all matters of policy, and so what we are doing is interpreting the words that are there –

WILLIAMS J:

But why – my point is why is freight okay if they're shifting cellphones, but not tourism?

MR SMITH:

Well because the thing that is protected by Policy 9, as I interpret it, as I'm submitting it should be interpreted, is the freight. The tourism would come in

under a different policy which whatever might be said about Policy 6, that's where one would look. It is weaker than Policy 9 and wouldn't prevail.

WINKELMANN CJ:
Is the word "freight" there?

MR SMITH:
No, "freight" isn't there.

WINKELMANN CJ:
Neither are "goods". It just says transport and transport transports people, animals, goods.

MR SMITH:
The submission is that servicing that national and international shipping, that the word "shipping" is, connotes the carriage of goods but I –

WILLIAMS J:
Well, connotes ships anyway.

MR SMITH:
Well that's the interpretation question is what does it connote, of course.

WILLIAM YOUNG J:
It wouldn't include a ferry?

MR SMITH:
A passenger ferry?

WILLIAM YOUNG J:
A passenger ferry.

WINKELMANN CJ:
You've got a tricky argument here Mr Smith.

WILLIAM YOUNG J:

And does it include a ferry that takes cars. I mean why dont' we just say ships are ships, shipping is a collective reference to things that happen with ships.

MR SMITH:

I take the argument.

WINKELMANN CJ:

It's not your best argument. But your point is to keep it true to the language.

MR SMITH:

The point is to illustrate that we need to keep it – well not, we need to keep it as narrow as possible, so I'm not sure it's quite right to stop at we need to keep it to the language because obviously it needs to be a reading of the language but all of the cautions in *King Salmon* about how this is a carefully drawn document, and we wouldn't expect there to be irreconcilable conflicts and so we should do our very best to make sure there are not, might mean that reaches for available interpretations of the two policies that allow them to be reconciled, before reaching the conclusion that they can't be reconciled, and that might lead you to adopt a meaning of Policy 9 that is not the first one that springs to me, provided that it is still an available meaning that allows it to be reconciled with policies 11, 13 and 15 because that would allow the document to work as a whole to keep – well that would eliminate an area of irreconcilable conflict, but in any event the area of irreconcilable conflict should be kept as narrow as possible.

WILLIAMS J:

Doesn't that analysis work in the opposite direction as well?

MR SMITH:

In principle, yes, but what I would say is that "avoid" means "avoid" and so –

WILLIAMS J:

Ship means ship?

MR SMITH:

Ship means ship, “avoid” means “avoid”, one word means the same thing if you repeat it, I suppose it doesn’t take – you rather make the point that my rhetoric didn’t carry me very far, but the point I'm making is a shorthand reference to *King Salmon* where it says “avoid” means “not allow” and that that point has been determined and that therefore my submission is that the path to read down, as it were, 11, 13 and 15 is closed.

WINKELMANN CJ:

So you’re saying you don’t read down the imperative demand. You read down the language of what’s permitted under 9. You don’t read down the imperative command “avoid”, or “recognise” but you read down…

WILLIAM YOUNG J:

“Require”.

MR SMITH:

“Require”, the way that the majority in the Court of Appeal did, which is obviously an available way of reconciling these policies because the majority of the Court of Appeal thought that it was, and I use “available” in the sense of, you know, reasonably available.

WINKELMANN CJ:

And once you’ve read it down on your primary submission you get through the irreconcilable conflict, and on your primary submission “avoid” trumps and it just can’t, the conflict is resolved in that way?

MR SMITH:

Yes, and I would say – I think I'm going to have to abandon my effort to go through the RPS itself, but I would say we also don’t shy away from the consequence that that tips, like the bucket fountain, down through the various instruments and into the consenting stage. If that is what the NZCPS means then that is what the RPS has to give effect to, that is what the regional plan has to give effect to, and applying the *Davidson* approach which we adopt,

well, first properly drawn plans may not leave room for a discretion the other way, but if they do so that you do end up in a section 104 situation, you apply *RJ Davidson*. NZCPS is the embodiment of Part 2 in the coastal environment and so the result follows, and we do not shy away from that simple proposition.

So that is the end of my allocated time. You will be seeing me again for reply and briefly Forest and Bird's role in East West.

WINKELMANN CJ:
Yes, so when we see you again, I'm going to ask all counsel to think about the critical cross-issue here, splitting of costs, and also the fact that it's not – some of the respondents are supporting the appellant so it's a slightly complex costs issue. So we'd be assisted by simple suggestions from counsel.

MR SMITH:
Thank you and I did say I was about to depart, if I can just finish with that one piece of housekeeping for Justice Williams about the provenance of the reference to ports in the preamble. I can't directly answer that but perhaps the most useful –

WILLIAMS J:
I meant Policy 9 itself.

MR SMITH:
Yes, the most useful document is in Marlborough District Council's bundle, volume 2, tab 19, which is about a 10 page document entitled "Summary of Board of Inquiry Recommendations and Minister of Conservation's Decision."

WILLIAMS J:
That's not particularly helpful. That's all there is? Is there nothing behind the Minster's insertion of Policies 8 and 9 at the late stage?

MR SMITH:

I'm told the next document is the section 32 report.

WILLIAMS J:

Yes, I've read that too. Is that all there is?

MR SMITH:

In that case I'm not aware of anything else.

WILLIAMS J:

Okay. Thank you.

MR ENRIGHT:

May it please the Court. I might start with the topic of threshold, and this is from the perspective of the consent, Part 6 RMA, and the first point, as my learned friend has just said for Forest and Bird, is that normally the answer should be derived from applying the reconciliation exercise, but that in circumstances where it's not, my submission is that there is a threshold inherent in section 5 RMA and in Part 2, so it's not necessary to go to a necessary threshold as such. Instead the better path is to confirm that section 5 in particular has its own set of directive bottom lines, albeit that these are perhaps more contextual than those in the NZCPS. So if you do get to that point of irreconcilable competing policies, it is permissible to revert to Part 2 and section 5. But on –

WINKELMANN CJ:

So what level are you talking about here Mr Enright? Are you talking about at the level of policy and plan or at the level of consent?

MR ENRIGHT:

Well actually it's both.

WINKELMANN CJ:

Okay.

MR ENRIGHT:

And so the starting point, if we –

WINKELMANN CJ:

So your position is more permissive of reconciliation than is the position of Forest and Bird?

MR ENRIGHT:

Well, yes, conditionally yes, but I do adopt my friend's submission that, you know, normally the avoid, if you apply the direct policies the avoid policies, the answer should be clear, but I do accept that there may be situations, particularly at consenting stage, where you have an "irreconcilable conflict" scenario, and so my submission is, if we look at what *King Salmon* said about Part 2 and section 5, and if I could take you to paragraph 24 of that decision. I think it was tab 11 of the appellant authorities.

WILLIAMS J:

Which decision, sorry?

MR ENRIGHT:

King Salmon, your Honour.

GLAZEBROOK J:

And paragraph, sorry?

MR ENRIGHT:

Paragraph 24. Now there's obviously more than one reference by the Court to the meaning of "sustainable management" but this is probably a key part where the observations are made about how the definitions in (a), definition, is broadly framed and that section 5 states a guiding principle, and then if we go down to (c): "There has been some controversy concerning the effect of the word 'while' in the definition," and if one reads to the end of para (c) you will note in the last sentence there, over page, use of the word "while" before subparas (a), (b) and (c) must be observed in the course of management, in

other words “while” means “at the same time as”. So the short point there is by reference to section 5(2), there are intrinsically bottom lines in section 5 in the definition of “sustainable management”. So elsewhere in *King Salmon* it also refers to “protection” being a core element of Part 2 in any event.

So the short point is if you do, in the “irreconcilable” scenario we’ve been discussing, have to revert to Part 2, you don’t then suddenly step into an overall broad judgment approach. Instead you have constrained fettered discretion in terms of bottom lines in Part 2.

A useful example of a threshold approach is Justice Palmer’s decision in the *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492 decision. That’s in appellant authorities at tab 5, and conveniently Justice Palmer sort of summarises the ratio at the start in paragraph 2 of his judgment, and in paragraph 2 at (d) he makes the finding that there are cultural bottom lines in the, he calls it, the RCEP, which is the Regional Coastal Environmental Plan, so the Coastal Plan in other words, and refers to the cultural bottom lines that policy IW 2 requires adverse effects on Rangataua Bay to be avoided “where practicable”, and then another threshold reference to “avoided” unless there were “no practicable alternative locations”.

So the reason for drawing your attention to that paragraph is just to put to the Court that if the Court’s considering applying some sort of threshold approach, that is common within the RMA context, this idea of having no practical alternative locations, avoidance of effects is not possible, et cetera. So those kinds of thresholds are relatively common in a coastal planning context.

If we also go to paragraph 129…

GLAZEBROOK J:
Paragraph 129 of this decision?

MR ENRIGHT:

Same decision, sorry. Yes, of this decision. It's the slightly – essentially repeats the point made in paragraph 2 but just a slightly – paragraphs 129 to 130, and at 130 Justice Palmer notes that whether the cultural bottom lines in the coastal plan are engaged depends on whether those thresholds are met. Then of assistance, the decision has page numbers in the top right-hand corner and – I'll just find the page number. Sorry, actually I'll use the decision page number. So decision page number 733 is an appendix of the relevant planning instruments and if you look at page 733 of the decision sets out Policy NH 5 and NH 11. "NH" stands for "natural heritage". It's an example where the plan has itself provided for a conflict between the national grid where it's necessary to provide for the national grid vis-à-vis other values, which includes the cultural values, and so Policy NH 5 refers to the national grid. Policy NH 11 gives a threshold stepped approach of how to reconcile a proposal to put the national grid transmission lines in an area of high values. As you'll see there, there are four steps: no practical alternative location, avoidance of effects not possible, and then two other thresholds. So the only reason –

GLAZEBROOK J:

Can you give me that page number again, please?

MR ENRIGHT:

Yes, sorry, it's the decision page number, reported page number 733. Sorry, it was confusing about that before. Again, I just want to draw that to your attention because it's an example where the coastal plan has drafted its own set of thresholds, specific to that region, obviously.

So in my written synopsis I've just drawn – in terms of this issue of threshold – I have just raised a question about is this going to be problem if we have this idea of a narrow pathway solely for the true exception and then a threshold approach apprise – applies. There's always going to be a tension around new proposals trying to fit within the terms of any exception, a narrow pathway becoming a wide pathway, as I've said in my written synopsis.

That's all I had to say on the threshold topic.

Turning to the first topic, environmental bottom lines and tikanga, and the definition of "tikanga" by reference Manuhuia Bennett, that tikanga was the "right person, doing the right thing, in the right way", will be familiar to the Court, and, of course, there's been a great variety of jurisprudence both at this level and in courts below this level around the issue of tikanga. I suppose my starting point is that it's not the day for this debate to be had, whether tikanga includes environmental bottom lines, it's not relevant to the questions of law, but I have given some examples arising from case law where there are bottom lines in terms of environmental effects and the examples given are listed at my paragraph 3, including one his Honour, Justice Williams, was involved in which was the *TV3 Network Services Ltd v Waikato DC* [1997] NZRMA 539 (HC) decision, the television translator. So they are just examples where, I submit, you can have bottom lines recognised by or consistent with tikanga in case law.

It may be worth just taking you to section 58 of the RMA, and this is my paragraph 4 of that synopsis, and the Act is in the folder called "Authorities", Part 5, and hopefully you've found that. Section 58(1) –

WINKELMANN CJ:
So it's not in the appellant's authorities? It's in…

MR ENRIGHT:
No, the folder is just called "Authorities".

WILLIAMS J:
Just 58 even, not…

MR ENRIGHT:
Bracket 58 – sorry, section 58 RMA.

WINKELMANN CJ:

It's in Part 5?

MR ENRIGHT:

Part 5, that's right. This is a point made again by Justice Palmer in that *Tauranga Environmental Protection* decision I took you to about section 58(1)(b) does enable – or a coastal policy statement may state objectives and policies about (b), protection of characteristics of coastal environment of special value to tangata whenua. So there is a statutory discretion to address matters of importance to tangata whenua in the NZCPS as you would expect.

Other than that point, I've just reflected on my paras 5 and 6 of my synopsis that there were competing positions as between the various iwi authorities and their tikanga and their perspective of whether reclamation was appropriate. There's obviously no one unified position on that but there was a unified position on the fact the Manukau is a taonga and because of both its mauri or life force, and it's role of habitat requiring active protection in terms of Treaty principles, but no agreement on how active protection should be addressed or implemented in the context of the East West project. So there is a degree of context, of course, in relation to tikanga and, of course variations as between individual iwi and hapū on what their tikanga is, but potentially some universal principles as well.

Moving off that topic to the issue of Treaty principles. It's an answer in part to a submission made by my friends to the supporting mana whenua or iwi authority party, that Treaty principles and tangata whenua interests will always end up second best if you apply a strict approach to the directive language in the NZCPS because they don't have the same, you know, use of language such as "avoid". Instead language such as Policy 2 referring to "taking account of the principles of Te Tiriti and various different Acts which are both relational and otherwise, but do include requirement under Policy 2(g) to provide for protection of areas of special value to Māori. But if you are applying a strict directive language approach, there's no avoid type language

in Policy 2, or the supporting objective, Objective 3. That is correct but in my submission this Court has already in *King Salmon* made the point that section 8 RMA, the duty to have regard to the principles of the Treaty, may have a supervening effect, even in relation to the NZCPS, and if I can just take you to paragraph 88 of that decision, which was in the appellant's authorities. You'll see that this is where the Court gave the three caveats, which have subsequently been discussed inter alia the *Davidson* decision around when can you revert to Part 2, and it's the second category of interest, which is about line 7: "Second, there may be instances where the NZCPS does not 'cover the field' and a decision-maker will have to consider whether pt 2 provides assistance…"

Then the next sentence: "Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications…' et cetera. So in my submission that obiter statement leaves open the ability to have regard to Treaty rights and interests, even where, if they were in conflict with directive policies in the NZCPS, and in an appropriate Treaty rights and interests might prevail, even over avoid directive policies. So my submission is that is, that obiter should be confirmed in the context of this case, and that would –

WILLIAMS J:
So you mean if *King Salmon* had been Tau Ihu iwi salmon, they might have won?

MR ENRIGHT:
Yes. If the probative evidence – essentially if the evidence, the Court found on the evidence that that was necessary to give effect to Treaty rights and interests, that might override the Policy 11, 13 or 15 argument, in my submission, and it's because of the obvious point the constitutional importance and procedural substantive implications, as this Court has said.

GLAZEBROOK J:
Probably a salmon farm that could be anywhere wouldn't be the best example of where that might happen.

MR ENRIGHT:
No.

GLAZEBROOK J:
But you're speaking in a more general sense?

MR ENRIGHT:
In an abstract and that's, thank you your Honour, that's a fair point. It's not a carte blanche either but I mean I've given you one example which doesn't necessarily involve Treaty rights and interests, but the idea of having a marae on a beach which is an ONL and instead of that being contrary to the outstanding values, it is entirely consistent to have the presence of the kaitiaki there and also if you look at Policy 15 of the NZCPS it includes the cultural dimension of landscape.

So the hypothetical just given about section 8 would have to arise in the context of a particular scenario, I accept that. There's a second layer of answer around the directive language issue in my para 9.1 of my synopsis. The other point to make, of course, is that the priorities that were identified in 2010 in the NZCPS were prepared having regard to relevant Treaty and tangata whenua interests for the coastal environment.

If we just bring up the NZCPS. Perhaps we start with Policy 15, I just wanted to close that point off. Policy 15(c)(viii) you'll note this is for ONLs. "Cultural and spiritual values for tangata whenua, identified by working as far as practicable, in accordance with tikanga Māori: including their expressions as cultural landscapes and features." So there's an overt reference obviously to that lens, but it's also, in my submission, clear that Policy 2 requires that you provide a Māori lens, or a mātauranga Māori lens in relation to the other policies. Also, for example, Policy 2(c) refers to: "… incorporate mātauranga

Māori in regional policy statements, in plans, and in the consideration of applications for resource consents… for designation." Then in (g)(ii) that's the reference to protection and special sites et cetera. So there is that te ao Māori lens also required.

So in my submission environmental bottom lines are not necessarily inconsistent with Treaty principles, whether they are consistent would require a contextual assessment of the relevant Treaty principles when engaged by the evidence.

WINKELMANN CJ:
How are you going with your time?

MR ENRIGHT:
I should be done in five minutes, unless, so I think I'll be slightly ahead.

WINKELMANN CJ:
Nice. I thought you were slower, but there we are. Carry on.

MR ENRIGHT:
No, I don't think so. I noticed my friend did crib two minutes off me, but anyway, I won't hold it against him.

WINKELMANN CJ:
You'll move past that.

MR ENRIGHT:
I'll move past it. Thank you your Honour. Just dealing with the second limb of section 104D RMA, and perhaps we need to bring that up.

WINKELMANN CJ:
We can't bring it up.

MR ENRIGHT:
Sorry your Honour.

WINKELMANN CJ:

We each need to bring it up.

WILLIAMS J:

You're allowed to mention it though. Just don't bring it up.

MR ENRIGHT:

I'm grateful.

WINKELMANN CJ:

It's not in Part 5, it's in another part?

MR ENRIGHT:

No, it's Part 6

WINKELMANN CJ:

So we need to go back to that next one down.

MR ENRIGHT:

So as the Court will recall this is the non-complying threshold, you know, two-step test and it's the second limb, obviously, of the East West Link that's of particular importance because in East West the effects were more than minor therefore it had to get through the second limb, and you'll note the language in (b) referring to: "…will not be contrary to the objectives and policies of – (i) the relevant plan… relevant proposed plan…" so that language about relevance and so the submission point here is, well, you do have to look at what policies are actually material and materially relevant when you're deciding whether contrary or not, and if the policy, if the proposal fails a directive policy that's not material then it should not fail the second limb, and that should answer the question of the criticism about, you know, tripping the wire. It could be any old directive policy that says "avoid".

WINKELMANN CJ:

Can you just restate that submission?

MR ENRIGHT:

Yes, well it's, my para 11 of my synopsis probably is the point, your Honour.

WINKELMANN CJ:

Thank you.

MR ENRIGHT:

So that's the oral synopsis that the second limb does – you do need to consider materiality as part of your assessment of relevance, and that should get around the "tripping the wire" problem that I've just identified.

So my last point, and it's at para 16 of my synopsis, relates to materiality of the objectives in the NZCPS, and this was error 6 in the East West Link appeal, that the Board failed to have regard to relevant objectives, including Objectives 1, 3 and 6, and the reason I've mentioned this point is that the submissions of at least two of the other parties, that's the Port and Mana Whenua parties in support, both emphasise the importance of having regard to the instrument as a whole which, of course, includes the objectives as well as the policies, and, of course, I respectfully agree with that point but if the objectives are material in terms of how you read the policies, that must reinforce the materiality of the error of the Board in not having regard to Objectives 1, 3 and 6.

Those are my submissions, thank you, your Honour.

WINKELMANN CJ:

Thank you, Mr Enright. Ms Casey.

MS CASEY QC:

May it please the Court. I'm hoping your Honours have before you both the Waka Kotahi submissions of 5 April and the outline of oral submissions and annexures that were provided yesterday evening. I wanted to apologise in advance for the bulk of that material but it turns out it may have been a bit prescient. We were concerned that you wouldn't have access to the case on

appeal from the East West so we put a lot of material in that annex, and I was also, in last night's preparation, not entirely sure what I'd be needing to address from this morning's aspect. So while there's a lot of material there, not all of it's particularly relevant to the submissions I'm going to be making and what is there, I hope, is a useful resource since we can't go into anything else.

If I may also ask if you have the submissions of my learned friend, Mr Lanning, from the Auckland Council available because I would like to be referring to those.

WINKELMANN CJ:
Yes.

GLAZEBROOK J:
Sorry, which one, please?

MS CASEY QC:
Auckland Council submissions of 5 April.

WINKELMANN CJ:
They have "Simpson Grierson" on it.

ELLEN FRANCE J:
That's the one with the plans at the back.

MS CASEY QC:
Yes, with the overlay maps. That's largely what I'm wanting to take you to so…

WINKELMANN CJ:
We've got a lot of submissions.

MS CASEY QC:

Yes, I'm conscious of this, your Honour, and I think we're the seventh party you're hearing from in two days, so – and the only document that I haven't handed up that I will want to refer to is the Coastal Policy Statement itself, but I'm assuming that won't be too problematic.

So starting from my oral submissions outline (which is only a few pages long actually even though it looks much bigger), as I've said at the start there are three issues that I want to touch on in my 45 minutes today. The first is just to address some of the issues, well, particular issues raised yesterday and this morning which will be reasonably succinct, I hope. Then, secondly, I want to talk about the overlapping issues between the East West and the Port Otago appeals because Waka Kotahi is grateful for the opportunity to address the Court in this appeal and we're trying to limit it to that issue where we see the overlap rather than going back to the other points at issue in the East West appeal. The third is to raise an issue, that is related to the East West appeal in that my learned friends from Royal Forest and Bird appear to have changed position on a foundational matter in the East West appeal, and I'll come to that in more detail as the third part of my submissions today. I raise it because it looks like a substantive change in position, and it would be fundamental to the East West appeal and I note, of course, Forest and Bird filed submissions after Waka Kotahi which is why we addressed that in the reply filed and served yesterday.

WINKELMANN CJ:

Did you mention this to Mr Smith?

MS CASEY QC:

Your Honour, we didn't, because we were putting this together and I gave it to him last night, and I was anticipating that it would be addressed this morning if we could, but I'm in a slightly difficult position here.

WINKELMANN CJ:

Well, I mean, it maybe that you don't come to it before the luncheon adjournment and that you have a chance to talk to him about it. Or we could adjourn a little bit early and then come back earlier still to enable you to do that.

MS CASEY QC:

Yes, and I was planning to address it last in any event.

WINKELMANN CJ:

So that might be the way to go. Once you get to the point we might – because if there is no change in position then…

MS CASEY QC:

Well your Honour I'd probably still address, if my learned friend thinks that it isn't a change of position, I'd probably still want to address my submissions on that point anyway.

WINKELMANN CJ:

Yes, it'll still be a lot clearer for us though.

MS CASEY QC:

Yes it will be. So if I could start, anyway, with the issues raised on day 1 and this is to address the question of "have regard to" and Waka Kotahi's position in relation to Part 6 and "have regard to". Your Honour, Justice Glazebrook, made an observation yesterday in relation to Waka Kotahi in the East West appeal, and I'm grateful for the opportunity to clarify Waka Kotahi's position because it's very much not Waka Kotahi's position that a decision-maker in Part 6 could disregard all the part entirely from the New Zealand Coastal Policy Statement, and that was a position set out in our written submissions, and I accept and acknowledgement that I may have miscommunicated that position in discussions –

GLAZEBROOK J:

No, I don't think so. It's just a question to your friend who was saying, well it – well just seeing whether the submission was open slather at that stage or otherwise it wasn't – sorry, and if I implied that had been your position it wasn't what I had understood it to be from the previous hearing.

MS CASEY QC:

Thank you your Honour. I was concerned I may have, in our exchanges around *RJ Davidson*, I may have conveyed the impression, because it is absolute, Waka Kotahi absolutely agrees that the overall judgement pre-*King Salmon* approach has no place in Part 6. So I summarise very briefly my paragraph 4 that Waka Kotahi's position is that: "…it is possible under Part 6 for a proposal to be consented even if it cannot avoid all adverse effects covered by the 'avoid' policies, but that the strongly directive policies will be central to the consenting inquiry, and they set a high threshold/place a significant burden on the applicant to justify this."

And in my written submissions, and the Court is familiar with this, we rely on the approach of *RJ Davidson*, not as my learned friend from Forest and Bird expressed it, which is, well you resolve everything and avoid wins, but we do the fair appraisal that it will normally be the case that the avoid policies give a clear steer on the outcome, but in a complex case, and we obviously say East West is one, a fair appraisal of the policies is required. We also refer in written submissions to the *Trans-Tasman Resources* consent decision, and both the Court of Appeal where they talk about the correct approach to when the decision-maker has to take into account the NZCPS and the avoid policies, which requires, again, that it be a strong justification, and this Court's approach to consent the third step of your Honour Justice Glazebrook's three-step process, where you address the factors that are relevant to section 10(1)(a) of the EEZ Act, which is the broader RMA equivalent provision, and I think your Honour refers to balancing, bearing in mind the purpose statement, and we say those are all different ways of expressing what we say is the correct approach in the "have regard to" situation.

I also want to refer to my learned friend Mr Lanning's submissions for Auckland Council because, again, it's another way, at paragraph 3.4 my friend expresses it in a slightly different way but again Waka Kotahi would endorse this approach and I would just briefly refer to that. My learned friend says: "The 'avoid policies' compel applicants and decision-makers to engage directly with them. The starting point – but not *necessarily* the end point – is that the relevant effects are to be avoided."

WINKELMANN CJ:
Did you say paragraph…

MS CASEY QC:
3.4 on page 9 of my learned friend's submissions.

GLAZEBROOK J:
Can you just give me two seconds? It's only so that I'm absolutely certain that when I come back to this I'm going to remember which submissions you're referring to.

MS CASEY QC:
Actually, it's referenced in my outline as well at paragraph 4 so –

GLAZEBROOK J:
Yes, thank you.

MS CASEY QC:
So it's paragraph 3.4 of the Auckland Council's submissions. "The starting point – but not *necessarily* the end point – is that the relevant effects are to be avoided." Talks about the AUP recognition of infrastructure, there is a relatively small "policy window" to allow for the consideration of infrastructure proposals that respond to the "avoid policies" with appropriate design elements and mitigation, and that the East West is an example of this, and your Honours also –

WILLIAMS J:

It does sound like a flash way of saying “avoid” doesn’t mean “avoid”.

MS CASEY QC:

“Avoid” doesn’t mean “absolutely avoid”, your Honour.

WINKELMANN CJ:

But is a – you know, if the decision-makers on the ground who are doing this stuff day in and day out with not a great time to reflect, that does look like open slather. I mean you’re saying it’s a complex situation, that East West is an incredibly huge project and may or may not be incredibly important to Auckland, but what about the sort of ordinary situations? Why can’t that just be a large highway through the whole avoid policy?

MS CASEY QC:

Your Honour, because I think of the factors that you’ve been talking about earlier in most cases the NZCPS application will, as it says in *Davidson*, give you a pretty clear steer on the result. It is the complex cases that we’re talking about here which, because of their complexity and because of their likely significant impact on environmental issues and other factors, the RMA process works to elevate that decision to a Board of Inquiry. So this is not intended from either my learned friend or myself to be open slather. It is that the sort of policy approach, sort of decision-making approach that has been canvassed by all parties this morning is aligned with this, and I was going to say my learned friend, Mr Anderson, for the Otago Regional Council, his description of how he thought these policies would land in the consenting framework we also agree with. We think that’s correct. So it is – usually you will not need to go any further than if only the NZCPS is engaged and there’s an obvious answer. But what we say in paragraph 5 of my outline is that –

WINKELMANN CJ:

What I’m struggling with is why it’s because it’s a complex case.

MS CASEY QC:

Because it involves with, engages with a lot of policies and a lot of objectives, both inside and outside the NZCPS. So water quality, public access, importance of infrastructure. Transport links to ports are engaged in this because we've got the internal ports there. We've got a lot of enabling and constraining policies all in the mix, so there is no clear answer in a case like this, and I think it has been a consistent theme from most of the parties, yesterday and today, is that where there isn't a clear answer the decision-maker does have some flexibility and I think part of the discussion is what does that flexibility look like. So my learned friend from Otago Regional Council this morning outlined how he thought the consent processes would work. We see that as aligned with Waka Kotahi's position and the Council's positions. They will be exceptions to the usual situation that we have, I think the Court's referred to it as an "irreconcilable conflict". I would tend to use a slightly different approach that on a case-by-case basis when we get to the facts on the ground there will be proposals that have unavoidable effects in areas where the NZCPS say they must be avoided, and in those situations you're in that complex reconciliation and Waka –

GLAZEBROOK J:

Well, just because they have them, surely there is a duty first to make sure they don't?

MS CASEY QC:

Absolutely.

GLAZEBROOK J:

So you accept in this – necessity, I suppose, is the easiest way of putting that.

MS CASEY QC:

I would absolutely accept that the first thing when faced with a policy that engages the "avoid" directives is to avoid to the maximum extent practicable those adverse effects. Then when you get to the point that there are effects that are not avoidable, so unavoidable effects, then you must look to whether

they can be mitigated, remedied, offset, back to effectively no material harm threshold.

WILLIAMS J:
This does sound like you can avoid "avoid" if you're big enough.

MS CASEY QC:
Your Honour, certainly that is not the case. But in a situation –

GLAZEBROOK J:
Because it might be that you get to the stage they have unavoidable effects so you just can't do it.

MS CASEY QC:
Yes, absolutely.

GLAZEBROOK J:
All right.

MS CASEY QC:
Yes –

WINKELMANN CJ:
And how do you pick where that is?

WILLIAMS J:
That's the rub.

GLAZEBROOK J:
Well, again, it might be a –

WINKELMANN CJ:
Can you answer, Ms Casey?

GLAZEBROOK J:

– “necessity” sounds like a – well, what do you say it is?

WINKELMANN CJ:

How do you pick where that is? How do you pick where it means you can’t do it?

MS CASEY QC:

If I could go through the three phases which is what you see in the consenting in East West. First of all the Board looked at: “Have adverse effects in these areas been avoided to the maximum extent practicable?”

GLAZEBROOK J:

No, but that doesn’t answer the first question.

MS CASEY QC:

No, I’m sorry, your Honour, it’s a process. There’s –

GLAZEBROOK J:

Okay, so has – sorry.

MS CASEY QC:

That’s step 1. Step 2 which the Board did was then: “Are we able to put in conditions that would bring the net harm back to zero at least?” So can we remedy, mitigate and offset so that there is no overall material harm to the environment? That’s only step 2. Then you have to move to step 3 which is what the Board did because you’ve still – because you haven’t been able to avoid all the adverse effects even though you can remedy, mitigate and offset them back to net zero. The avoid policies are stronger than that. We agree to that extent with my friends from Forest and Bird. Then you have to step back and go: “Is this proposal nonetheless justified?” and that, I suspect, is the equivalent to the “necessary” test that your Honour’s been exchanging.

GLAZEBROOK J:

I doubt it, actually, because that would not come at step 3. It would come at step 1 because –

MS CASEY QC:

Well, your Honour –

WINKELMANN CJ:

It seems quite strangely structured, yes.

MS CASEY QC:

Maybe from the sense that from a reality of a consenting process the Board or decision-maker is not just considering adverse effects and ecology in these areas; they are also considering cultural effects, et cetera, et cetera. So they go through each effect.

WINKELMANN CJ:

But to be fair to them, I think they did more than you've suggested. Didn't they look at whether there are alternatives? I thought they did look at whether there are alternatives.

MS CASEY QC:

Yes, your Honour. Sorry, you're jumping through to a step-by-step process which I've expressed this way in my submissions. I'm not trying to say that this is the way it must always be done. I'm not trying to say that this is – I'm giving summaries of what the Board did, but obviously they were much more engaged in this. They looked to see whether all effects that could be avoided were avoided. They looked to see whether the outstanding effects could be mitigated, remedied and offset so that there was no material harm. They were satisfied that that was the case, and they also looked at whether the proposal itself was justified – sorry, not the proposal, but that the giving consent for this proposal met important objectives under the RMA, NZCPS and the other policy statements, including national policy statements that were engaged, and that was the fair appraisal balancing assessment that *RJ Davidson* and

TTR talk about. So all three limbs, whichever order they are in, in my respectful submission, are critical where the avoid policies or any strongly directive policy in any of the policy statements are engaged, and that is creates a threshold that's necessary and important and it absolutely includes in it, your Honour, the concept of "you have to put this road here" because if you can put your road somewhere else then the effects to the environment could be avoided, so you'd fail at that first step.

WINKELMANN CJ:

So this stage, this is not really a particularly logical staged process? You're not putting it forward as the staged process you'd follow?

MS CASEY QC:

No, I'm just saying these are the three elements that had to be included, and I think, with respect, what I'm hoping to convey is that they largely encapsulate the sort of concepts that I understand have been exchanged with parties before the Court already. It will be an exception that a proposal gets through that fails to avoid even before mitigation, adverse effects on sensitive areas, it must be the exception, and as I say your Honour at paragraph 6 of my outline: "Consents that allow for material harm to a protected value that is not able to be mitigated, remedied or offset by conditions will be vanishingly rare." It's hard to imagine a justification analysis that could allow a consent to be given for a proposal that after consideration of remedy/mitigation and offset, didn't at least return to zero, and the East West Link is not in that category. We're in a category where we do get back to zero. So the threshold, however it's expressed your Honour, is high and with a submission it's enormously high if you can't remedy, offset or –

WINKELMANN CJ:

This is a slightly different proposition at 6 where, what's the proposition in *King Salmon* which is the situations in which you can't avoid conflict between them will be rare. Because here this is conflict and you allow mitigation, remedying and offsetting, which is a different scenario.

MS CASEY QC:

Yes it is your Honour and that's the point about being in Part 6 and the consent and we very much endorse the submissions you've heard earlier that reconciliation of the policies through textual analysis alone is not what the RMA contemplates and it's not a useful approach to how Part 6 should work. Text is important because it gives you the strength of the directives but the assessment has to be at the proposal on the ground and how it engages across all the policies, and it is that broad assessment of once you're satisfied that, if you've got all unavoidable effects have been avoided, and so what is left is absolutely unavoidable, in a practicable sense, and once you're satisfied that what is left can be mitigated, remedied or offset to an appropriate level, you still have to meet the high threshold of justification in – and justification in this sense is in terms of the RMA itself and the policies and objectives that give effect to it. Not just, of course, the policies in the NZCPS because other national policy statements will be relevant but –

WILLIAMS J:

So you agree with Judge Jackson's formulation generally speaking?

MS CASEY QC:

Your Honour I'm not in a position – no, actually I don't.

WILLIAMS J:

Well he includes avoid, remedy and mitigate.

MS CASEY QC:

Yes.

WILLIAMS J:

In response to avoid, which is what you're arguing for?

MS CASEY QC:

No, we put in a much, a very important first step your Honour, which is first you have to avoid everything you can, and I agree with –

WILLIAMS J:

I suspect Judge Jackson would say that too.

MS CASEY QC:

And then, but in the way he's expressed it, and I think the concern that was raised in the lower courts, and I must be careful I'm not engaged in the Port Otago appeal, what he's missing is, or what the words as he wrote could be missing was the concept that actually no it's not good enough to actually go in and do adverse effects that could be avoided so long as you remedy or mitigate them afterwards. The avoid policies mean more than that. They mean you have to strive to avoid the adverse effects in the first place, and that's –

WINKELMANN CJ:

Do you – sorry.

MS CASEY QC:

Sorry your Honour.

GLAZEBROOK J:

I'm fairly sure he did have that step in before he got to the end step but…

WINKELMANN CJ:

But his policy as drafted didn't appear to I think everybody accepts that.

GLAZEBROOK J:

No, well when it got to the bottom I think, not…

WINKELMANN CJ:

Yes. I was just going to ask, do you accept what I think most people have suggested which is that in that whole avoid to the extent possible means – well the necessary question means you also have to consider whether a thing has to be done there, you have to be satisfied that there's no reasonable alternative by doing it somewhere else where you can avoid all those effects.

MS CASEY QC:

Absolutely, that's built in. If you could do it somewhere else and avoid those effects then they're not unavoidable. So I suppose I would put the threshold is have we, are we satisfied that there are unavoidable effects. If we don't get to that we don't have an irreconcilable issue. Sorry your Honour, I think you were about to ask a second question.

WINKELMANN CJ:

I was just going to say, Mr Smith's other point was you also have to make sure that you do know more than you need to for the recognise type policies.

MS CASEY QC:

Yes your Honour. I was going to come to that. That's predicated on the basis that my learned friend was, and again helpfully quite blunt on, is that because avoid is so important you should read down every other policy that conflates with it. We don't accept that as a premise. It's starting on a premise that avoid is an absolute prohibition, which obviously we don't think it is, but it's also unbalancing the NZCPS to read it in that way. My learned friend referred to 11, 13 and 15 quite frequently, and they are ones that have got an intuitive value characteristic but he didn't refer to the fourth avoid policy, which is for the enjoyment of surf breaks, and we get to a position where if the enjoyment of surf breaks has absolute priority such that we're reading down, enabling infrastructure, such that we're reading down enabling ports, such that we're reading down overcoming tourism in favour of goods and limiting those, we don't agree at all. Necessary in that sense, I respectfully submit, is not a useful gloss to put into the RMA and again I would adopt Mr Andersen, for the Otago Regional Council's approach, was sometimes those concepts are useful but the RMA itself and the policy statements have quite carefully worded threshold directions that are actually engaging with the very issues, and that, if I could just briefly take you to the annex 2 to my hand-up, which is –

WINKELMANN CJ:

So instead of "necessary" it would have to be "requires" here, for instance.

MS CASEY QC:

Well, your Honour, it begs the question, necessary required for what?

WINKELMANN CJ:

Well, in what, here for the Port.

MS CASEY QC:

Yes, but then what is the Port policy enabling, it's enabling economic, social wellbeing. So if it's necessary so that the Port can continue operating, that's a very high threshold.

WINKELMANN CJ:

That's a question of interpretation isn't it? So whether it includes expansion which, yes.

MS CASEY QC:

Yes, but then you go through an enabling policy such as water quality. Now the world's not going to end if we don't improve the water quality in the Manukau Inlet. So is it necessary for the improvement of the water quality in the Manukau Inlet for us to build these reclamations. Forget about the road, say that there was a great initiative by DOC or someone to increase water quality. It would never meet a necessary requirement because it isn't necessary. Similar with the Ōtāhuhu portage way. If there was a group that said, right we can do this, to do it we're going to cause some adverse effects on a sensitive area, which we're confident can be fully mitigated and remedied, but the adverse effects will happen. Now the enabling policy, the necessity just isn't there. In one sense it's a nice to have, we don't need it for anything. In another sense it's very necessary because it's an enhancement of our environment and makes the world a better place, and it's similar with –

WILLIAMS J:

But that's a little bit too post-modern isn't it? I mean the issue here is, is it necessary in terms of the language of the policies. So it's pretty clear from the policies that existing ports are necessary, and need to be, it's pretty clear

from the policies that roads are necessary, right. You've got to establish whether a road located where, which is what seven talks about, is in the spot that you happen to be arguing for. You have to establish that necessity. I'd be worried if you didn't have to.

MS CASEY QC:
Exactly.

WILLIAMS J:
So why is necessity a problem?

MS CASEY QC:
If we're talking necessity in that sense, your Honour, it isn't, and I can take you to that's already reflected in the provisions of the AUP –

WILLIAMS J:
Yes I know, we've already talked about that. But my point is it's got to be necessary in service of one or more of the policies, otherwise we're not even interested in hearing about it, and then it's got to be necessary there, or we're not interested in hearing about it.

MS CASEY QC:
Yes, and conceptually absolutely, and in a way it's like the justification analysis under section 5 of the BORA.

WILLIAMS J:
Yes it's just justification is also a little bit too post-modern. I mean what is "justified", what does that mean? Does it just mean a good idea?

MS CASEY QC:
Well, hence *Hensen* of, oh, we have to have a sufficiently important objectives, has to be rationally connected, it has to be minimally appearing.

WILLIAMS J:
Oh, you want to turn this into a BORA exercise.

MS CASEY QC:

No I'm not your Honour, I think I'd get shot by every other counsel in the room if I did, but respectfully the concepts are the same, and the point that I'm trying to make, and probably not very well, is that the caution would be for the Court to impose a standard necessary because in fact it's not needed because that's what the regional policies, and indeed the NZCPS itself, have done, and they are very nuanced and quite specific thresholds that become relevant to the decision-maker, and if I could just show you my annex 2 you'll get – well actually if I could start with the Coastal Policy Statement itself you'll see it's got, if I could it the internal modifiers setting the threshold that a decision-maker should be looking for, you'll see them developed down the policy cascade. So if I could start at the Coastal Policy Statement at Objective 6. Your Honour, I'm conscious of time. Before I start into documents would it be…

WINKELMANN CJ:

Yes. How are you going for time?

MS CASEY QC:

Not well I have to say. I'll have a talk with my learned friends over the break.

WINKELMANN CJ:

We'll come back at two, and can you have a talk to Mr Smith and to the others about, Mr Smith about the issues, and the others about timing, and Mr Smith about time.

MS CASEY QC:

Thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.07 PM

WINKELMANN CJ:
Ms Casey.

MS CASEY QC:
Thank you, your Honours. We were at the point where I was endeavouring to address the issue that has been talked around yesterday and today about what is the threshold that a decision-maker should be looking at, assuming that exceptions to an avoid policy can be provided at a consent level, which I understand is the question that has been put to me.

So I am answering that question in the context of three things: that we're in a situation where a proposal cannot avoid all adverse effects in a sensitive area on a practicable basis; that the proposal can result through conditions in no net harm to the environment, to the protected value in the environment, through remedy, mitigation and offset; and the third is that the proposal is strongly supported by other policies and objectives in the RMA, including the NZCPS' policies objectives, but, of course, if the project engages with other policy and objectives, those as well.

So in that context is there a test or a general rule or a threshold that this Court might consider providing guidance to a decision-maker with?

Waka Kotahi broadly agrees with the submissions from my learned friends from the Otago Regional Council that the concepts that have been discussed in the Court in general terms can provide guidance in some situations and maybe in many situations, but, respectfully, the infinite variety of ways in which the various policies and objectives functioning under the RMA can combine, and can combine with particular proposals, thinking wider than infrastructure now, you know, all the sorts of proposals that can come up, would suggest that there should be real caution urged before imposing or passing down a rule, a one-size-fits-all rule of general application, and the point that I was coming to before the break was that it's also respectfully

submitted that it's not necessary because this is one of the primary functions of the cascade of planning of policy objectives and planning provisions under the RMA is to provide that real guidance with its own internal qualifiers and requirements for decision-makers, and that's where I was just before the break was that I wished to take you through just an example of that cascade and obviously it's one close to EWL's heart.

But if I could start with, please, the New Zealand Coastal Policy Statement itself and just starting with the preamble, and I know your Honours are getting very familiar with this but it's, for this particular example, I think it's quite useful. So the preamble – we're back, thank you.

COURT CLERK:
It's quite sketchy but I'll do my best.

MS CASEY QC:
The preamble, here we go, thank you. The preamble in its second paragraph there records the challenges and the fourth dot point records that natural and physical resources are important to the economic and social wellbeing of the nation and communities, and including areas with high natural character, landscape and amenity values. So using and use of resources, including sensitive areas, can be important.

So, your Honour, Justice Williams, asked me before are we saying that there's special treatment for major infrastructure? Answer is yes, the coastal policy itself recognises that there may be a clash at this level and it is important that major infrastructure, electricity transmission, ports, climate change adaption, do get special treatment in that recognition.

So then it's down to – that's acknowledging that there's potential conflict there, and if I could now go down to Objective 6. This is a core enabling directive and "enable" in my respectful submission is strong and it is again peoples and communities provide for their social, economic and cultural wellbeing for their health and safety, through use and development, and notes at 2 the

protection of values in the coastal environment "does not preclude use and development in appropriate places and forms, and within appropriate limits". Again, it's recognising a direct conflict, or potential for direct conflict, and the second point confirms that again. Some uses which depend on the use of natural and physical resources in the coastal environment are important. So, respectfully, the necessity test is already built in in terms of infrastructure and the Coastal Policy Statement recognises that it meets that test.

Then Policy 6 spells that out in more detail, if we can go to Policy 6 which is on page 13.

WILLIAMS J:
I must say I'm struggling with your analysis here. On that basis infrastructure always wins. That can't be what you mean.

MS CASEY QC:
No, your Honour, but if there's – is infrastructure important? Yes.

WILLIAMS J:
Of course.

MS CASEY QC:
Is this particular infrastructure important is something that then gets discussed down in the lower policy layers. Is infrastructure –

WILLIAMS J:
All Objective 6 does is repeat section 5. Obviously. I mean, the whole point in this is the reconciliation of humanity with environment in order to provide for the communities while sustaining the environment. It's the entire paradigm of the Act.

MS CASEY QC:
Yes, your Honour, and –

WILLIAMS J:

So if it wasn't in there, there'd be something wrong.

MS CASEY QC:

Exactly, and Policy 6(a) and Policy 6(d) both use – and my point is they are using strong directives. How strong does the justification need to be to allow an exception to an avoid policy? This tells you that these are strong enabling policies, so the balance is there. It's allowing you to balance, and I also wanted to point out that Policy 6 uses very similar words to –

GLAZEBROOK J:

Sorry, I'm having the same trouble as Justice Williams. How does it tell you that it overrides "avoid"?

MS CASEY QC:

Your Honour, I'll come to that. I don't think it overrides "avoid". What it does is say these are factors that may give the strong justification that you need to, to have a consent where you can't avoid all adverse effects. Anything less than something at this strength is not going to cut it, is I guess what I'm saying. These are examples of important considerations that could allow you to have a consent but the balancing, where's the threshold, is – it starts to be portrayed as it does in section 6 of the Act in terms of matters of national l importance, and in the NZCPS by giving you these are of equal or close to equal weight, and depending on circumstances may adjust, but they're up there. So a proposal that didn't engage with such strongly enabling policy wouldn't get anywhere near this threshold. So this is why we're saying you don't need to impose a one size fits all threshold, because they start to build here, and they're seen even more clearly in Policy 10, if I could just take you down to there where this is an example in even as high level as the NZCPS, that the threshold has been set. This is one where the Minister is happy to set the threshold and, so that's down on page 15, Policy 10. This is avoid reclamation unless, and these are "land outside the coastal marine area is not available for the proposed activity", and these are strict and tight thresholds and requirements that the Minister is happy to set for this activity, and what

we'll see as we go down the policy chain is that then regional and unitary authority start setting their own thresholds on activities in relation to those other broader parts. So this is all to say this is how thresholds are, guidance as to thresholds are provided. So switching from there through to the –

WILLIAMS J:
What do you say to the submission by Mr Smith that this very balancing exercise built into Policy 10 is nowhere to be seen in, for example, Policy 9, or the infrastructure policy?

MS CASEY QC:
Pretty much, your Honour, what I've just said, which is that Policy 10 Reclamation, the Minister felt comfortable saying, I'm going to set the thresholds here. This is how that's going to work in reclamation. Policy 9, Policy 6, the other water policy, the public access policies. I've expressed in very broad directive policy phrase "recognise, enable, provide for" but the Minister isn't saying I can reconcile them myself. That comes lower down the chain.

WILLIAMS J:
Right, so you say inherent in these strong words is the occasional duty to reconcile?

MS CASEY QC:
Yes.

WILLIAMS J:
Reconcile superficially irreconcilable phrases?

MS CASEY QC:
Because it's –

WILLIAMS J:
Protect ONLs, keep ports running, for example.

MS CASEY QC:

Yes, and there will be facts – times on the ground where they are, you can't achieve them both fully, in which case a judgement call has to be made as to how you can maximise your achievement of both. That's why I don't use the language of trumping, I think they both remain valid and important and they both have to be maximised, and in EWL there's a lot of those that all have to be maximised and hence the 600 or so page decision, and that's clear appraisal balancing, so yes.

But you see the similar language start to appear further down the chain. If I can take you to my annex 2, which is just headed "Examples", and we're thinking about what is the guidance for a decision-maker a to what they should be thinking about whether to grant consent, and obviously the drainage reclamation one is in very strong terms, as you'd expect, because it's pretty much just giving effect to those strong directives in NZCPS Policy 10. But then in infrastructure, and this is just a selection your Honours, the policy window debate that we had in EWL is covered in my written submissions in EWL. So these are just examples of how the plans worked to guide the decision-makers, and how nuanced they are for different circumstances. So for infrastructure you'll see that the directive is that the benefits are recognised. That development of infrastructure is enable. Then there is, for new or major upgrades in scheduled areas.

Now scheduled areas are sensitive areas, so we're in sensitive areas in the plan already. This is what the AUP requires the decision-maker to take into account and consider and the list starts over the page. So you have to consider the economic, cultural and social benefits and the adverse effects not providing it, whether it has a functional or operational need to be located in there. Down to (d) "whether there are any practicable alternative locations, routes or designs, which would avoid, or reduce adverse effects on the values… (e) the extent of existing adverse effects… (f) how the proposed infrastructure contributes to the strategic form or functions, or enables the planned growth and intensification of Auckland."

Now that's a classic example of the location of the plan and the community interest reflecting in the plan being delivered into a policy to guide the decision-maker, and this is how the cascade is supposed to work.

WILLIAMS J:
Can you just tell me what, if anything, is above this in the RPS?

MS CASEY QC:
Yes.

WILLIAMS J:
On this subject.

MS CASEY QC:
Heaps. So this is –

WILLIAMS J:
Yes, it's all about heaps.

MS CASEY QC:
It is all about heaps. So this is the infrastructure chapter and it goes through repairs and maintenance, it goes through –

WILLIAMS J:
Is the plan in the RPS all in one document?

MS CASEY QC:
Yes.

WILLIAMS J:
Okay, I didn't understand that, right.

MS CASEY QC:
Yes.

WILLIAMS J:

So the relevant RPS policies are those sitting above that list?

MS CASEY QC:

No, this is the policy sorry. This is –

WILLIAMS J:

I see, sorry, this is the RPS for our purposes?

MS CASEY QC:

This is a core element of the RPS for your purposes.

WILLIAMS J:

Sorry, I thought we were talking about plans. I've got you.

MS CASEY QC:

No, the plans then turn into how those translate to activity status rules, but this is guiding a decision-maker. This is how the decision-maker is directed to consider whether to grant permission for new infrastructure in a scheduled i.e. a sensitive area.

WILLIAMS J:

So you would say that the reconciling factors should be in the RPS?

MS CASEY QC:

They, AUP has elected to put extensive policy factors in there, and certainly from the point of view of East West Limited that was important because we were then able to come to the Board and to you and say, there are policy windows here that allow us in and provide guidance for the decision-maker. I'm not comfortable providing a response on general planning but my learned friend for the Auckland Council Mr Lanning does talk about the AUP and the importance of these provisions.

WINKELMANN CJ:

Yes, so just talking about your timing.

MS CASEY QC:

Yes your Honour. We've had a discussion with counsel, and I'm very great to my learned friend Mr Majurey, that I'm allowed to steal some of his timing. Of course we're a litlte bit late with the IT.

WINKELMANN CJ:

You've probably already stolen it.

MS CASEY QC:

I've stolen some your Honour, and I will go very fast from now. So your Honour those are the submissions basically to say a general 156 or threshold test needs to be approached with some caution given the nuances of the policy and planning documents involved. But of course the issue in the East West appeal wasn't an appeal that the Board had applied the wrong threshold. The issued in the East West appeal was that the Board had erred in law by taking into account mitigation, remedy and offset in granting the consent for a proposal that engaged the avoid policies, and I'm grateful to my learned friend for Royal Forest and Bird who has confirmed that that remains their position. The reference in his written submissions to "material harm" along the lines of the *TTR* decision, was not intended to suggest to the Court that the threshold should be material harm. Rather that that was consistent with an approach that for the avoid policies would allow minor or transitory effects to be disregarded.

I do agree with my learned friend for Otago Regional Council that I don't think you can – the reason that this Court could do that in *King Salmon* was because of the term "inappropriate". I think if you're reading the policies as strict rules, there's no basis to read it in, but that's beside the point. So my learned friend, my annex 1 I do, I can't take you through it now given time, but your Honours it does create and emphasise the position of East West Limited in the EWL appeal, which is that to read the NZCPS is not only an absolute veto against any adverse effects or more than minor or transitory, it doesn't really matter, ain a sensitive area before consideration of mitigation, offset or remedial condition, would lack totally lack environmental utility, would be

irrational and would be contrary to the RMA and the provisions that allow the NZCPS to be, or what the NZCPS require in terms of giving effect to section 5 and Part 2, particularly given the four areas of focus of the NZCPS, of the avoid policies, which are natural character, natural landscape, biodiversity and the enjoyment of surf breaks. Respectfully it can –

GLAZEBROOK J:
How do you reconcile mitigate and offset against avoid in what are only the sensitive areas?

MS CASEY QC:
As policy it makes sense, your Honour, because they are, one, they're strength of directive, so it's avoid. and then avoid significant, and then mitigate, remedy, I don't know, I'm not sure it even refers to offset, that's more in section 104. A, they're indication of strength and B the direction to avoid is still strong and there, and that's why I was starting with, earlier today, was you must still avoid them. That is still the objective. So you have to avoid them to the extent possible. So it's not a regime like *TTR* under 10(1)(b) with the protect where the Court said, look, we take a holistic view of the proposal and step back and you can cause harm provided you remedy or mitigate it. The avoid policies direct you to first of all avoid to the greatest extent possible, or practicable, and then in limited exception circumstances we say because they're not absolute it's possible to justify provided that you can also remedy, mitigate and offset to an acceptable level. So they still work as policies but they definitely don't work as rules because they don't make sense as rules, and that is one of the key submissions that we've made.

So your Honours the narrative in annex A respectfully is still of value and I am grateful to my learned friend. I asked him whether Royal Forest and Bird, because you'll see in annex A I refer to Ms Gepp changing position in closing submissions in reply in East West and allowing mitigation. I understand Royal Forest and Bird say, no, that's not their position, mitigation, remedy and offset are out and, your Honours, that was the error of law, the primary error of law

urged in East West Limited and we respectfully submit that the Board didn't err in law in that regard.

Just in the few minutes I've got left just to say annex 3 was prepared on the basis that, to respond to the Court of Appeal in Port Otago drawing a distinction between activities and effects. I understand from exchanges through the hearing that no one is actually taking that very far, but as we say in the outline that doesn't seem to be a distinction of substance, and we've just given you extracts from the AUP which illustrate that, and you'll see that the scheduled tables of activities we've also highlighted various non-complying or discretionary activities which under Royal Forest and Bird's approach to the avoid policies would all be effectively prohibited. So that's that annex.

Annex 4 is in support of the submission that if mitigate, remedy and offset is taken into account the East West Link would meet any threshold of material harm, by a long way, and on the effects that were the subject of the appeal, actually also meets minor or less than minor if those factors can be taken into account. So that's annex 4.

WINKELMANN CJ:
Is that just a repeat of your earlier submissions. Does this, in any way, respond to the Otago case, decision of the Court of Appeal?

MS CASEY QC:
Well, your Honour, because then I move to just again very briefly my oral outline and I've noted at 11 that we think there are two key overlapping issues. One is whether avoid means an absolute veto, and the second is how that applies in Part 6, and this is relevant to that second point. The avoid means absolute veto. At paragraph 12 of my outline just summarises Waka Kotahi's written submissions in here, which are a further summary of a lot of what you heard in the East West appeal, and –

WINKELMANN CJ:
And what you've just been going through?

MS CASEY QC:
At a high level. Then, so paragraph 13 talks about what the Court of Appeal in *Port Otago* say is a consequence of its approach in Part 6 consenting.

13.1, your Honours, I've already touched on.

13.2, this is where this comes in, what I've just been discussing, is that the Court of Appeal appears to be imposing sort of a *TTR* strike-out or a preliminary inquiry and suggest that if an activity has any adverse effects, we're not sure about avoid, mitigate or remedy from *Port Otago*, that's the approach to take. Our respectful submission is that the *TTR* 10(1)(b) approach isn't the correct approach, it's not part of the RMA, and the Supreme Court's *TTR* approach in relation to (1)(b) is better, and then overall, your Honour, the summary of Waka Kotahi's position on the Port Otago appeal in relation to the matters that overlap with East West Limited is summarised at my paragraph 14.

WINKELMANN CJ:
I'm struggling to find just where your submissions that has paragraph 14.

GLAZEBROOK J:
No, I can't see them.

WILLIAMS J:
Mine does.

ELLEN FRANCE J:
In the outline.

MS CASEY QC:
It's at – sorry, your Honour, I've been –

WINKELMANN CJ:

The oral outline doesn't seem to have paragraph 14 in it.

WILLIAMS J:

Page 4.

GLAZEBROOK J:

There might be submissions as well.

WILLIAMS J:

There are.

MS CASEY QC:

Sorry, then none of that would have made sense to your Honour.

WINKELMANN CJ:

I see. I was on the annexure. I'd skipped over –

MS CASEY QC:

No, your Honour, that was – I'm sorry, I should have signposted that more carefully. So that was just a very –

WINKELMANN CJ:

I was listening anyway.

MS CASEY QC:

Thank you, your Honour. So that was – taking two minutes off my learned friend –

WILLIAMS J:

Can I ask one question? It's a narrow one, I hope. You say no one size fits all, leave it to the regional councils to construct the reconciliation rules. Yes?

MS CASEY QC:

No. Thank you for asking.

WILLIAMS J:

Okay, then I'm glad I did.

MS CASEY QC:

Because I'm talking from Part 6 consenting, so – and I took the question to me this morning to be what is a threshold that a decision-maker should apply. Now whether that's set in a plan or is read into 104 I'm neutral on, because I'm – it's how should the decision be made and I think that a lot of the issue between my learned friends in the Port Otago appeal is, well, whatever the threshold is, should it be set in the plan or in the consenting decision itself, and my submissions are neutral on that. The point is either way a one-size-fits-all isn't necessary under the RMA and –

WILLIAMS J:

What do you mean by a one-size-fits-all and why is it so problematic for you?

MS CASEY QC:

Well, if the proposition was should this Court find that an exception to the avoid policies is possible but only if it meets four criteria, for example. I thought that's what we were discussing.

WILLIAMS J:

Right, yes, good. So we're roughly on the same page?

MS CASEY QC:

Yes.

WILLIAMS J:

How in that scenario do you avoid resource management creep that happened pre-2010 and even after 2010 pre-*King Salmon* without someone setting a firm one-size-fits-all parameter, high up the chain?

MS CASEY QC:

That's a very complex policy question, your Honour, and I think –

WILLIAMS J:
But it's a crucial question.

MS CASEY QC:
It is a crucial question. I think the answer I would give, and with great respect, is that that is a policy design question, and the answer is probably through policy design.

WILLIAMS J:
You mean in the CPS?

MS CASEY QC:
In the CPS, the RMA under its current review.

GLAZEBROOK J:
Although the argument against you is that the New Zealand Coastal Policy Statement has set that and set that quite clearly and it's not for the lower order and at the consent area to undo what's been done.

MS CASEY QC:
If the NZCPS is interpreted as imposing absolutely rules –

GLAZEBROOK J:
Well, no, it doesn't have to impose absolute rules, but in accordance with *King Salmon* it's got directive, very directive rules, very directive policies, which in some circumstances can equate to the ordinary meaning of "rule".

MS CASEY QC:
Yes.

GLAZEBROOK J:
And in other circumstances it's got permissive ones that if you reconcile the two you're permitted to do those as long as you avoid the effects.

MS CASEY QC:

Your Honour, my first response is I don't think that that is a fair and valid –

GLAZEBROOK J:

Well, you mightn't but that's your submission in respect of that rather than…

WINKELMANN CJ:

Well, yes, you can't probably say anything. That's – Justice Glazebrook is saying this is what might be said against your design point, that it's already designed there, and that's the very issue.

MS CASEY QC:

Yes. If that is the way it's designed and has to be given effect to through the policies, I suppose we come back to, and, your Honour, this is where I think I first started with the East West appeal was nonetheless in Part 6, according to one of my learned friends, I think Mr Allan, there's wriggle room built into the RMA to allow – there's that tension between how much you dictate from the top and how much flexibility you allow an expert decision-maker, and the RMA has set that through Part 5 and Part 6, so that would be my substantive response to if you interpret the NZCPS that way.

GLAZEBROOK J:

It's just I find you're slithering even more than anybody else because you accept supposedly that you avoid as far as possible then when you're actually describing the process you say there's this amazing flexibility and that's where I'm having trouble with your submission because what you say at various times then comes down to an open slather at the bottom as far as I can make out.

MS CASEY QC:

Well, your Honour, I apologise then because I'm not conveying my client's position very clearly. It's highly constrained decision-making by an expert body subject to and requiring to fully engage with and give effect to all the relevant policies, appropriately taken into account, appropriately reconciled

and appropriately balanced. There is certainly no suggestion from Waka Kotahi that it's open slather nor that it needed an open-slather approach to get a consent, and a lawful consent, for this activity. So I do apologise if I have been not conveying that with any accuracy.

WINKELMANN CJ:
Right, so does that take you….

MS CASEY QC:
It does, your Honour, thank you.

WINKELMANN CJ:
Mr Majurey, you may come forward from your remote position.

MR MAJUREY:
Could we have section 104 come up, please? The benefit of being tailing Charlie is that the field has been well ploughed. The downside is it's usually tailing Charlie who faces the ME109s, not that I'm likely in the Supreme Court to, the Luftwaffe.

So because you have had the detail, and my focus is on the Part 6 decision-making, I'm going to strip it back a bit and concentrate on two things, highlight a number of factors from section 104.

GLAZEBROOK J:
Can you please just – thank you.

MR MAJUREY:
So I'll start with section 104 and some observations and then go to my one-page oral that was circulated last night, and to begin by saying as the Court will be well aware, ever since *King Salmon* was decided, almost day-in, day-out, there have been discussions and contested views about what it means in the Part 6 context. So important to remind ourselves what section 104 actually requires.

So if we start with subsection (1) and just work our way through several points. The first is an – apologies, this is 101 stuff but it is important. So the reference "subject to Part 2" is well known and as recognised by the Court of Appeal in *Port Otago*, and I think this is common ground, Part 2 is the touchstone for decision-making under section 104. Now Part 2 may not be a precise tool, as Justice Williams mentioned, but that is what Parliament has directed, and just to note in relation to my friend, Mr Enright's, comment about, or discussion on, section 5 being considered as a bottom line of sorts, there has been a recent decision by Justice Edwards that I came across this morning just for reference to the Court. It's *Muaūpoko Tribal Authority Incorporated v Minister for Environment*. The reference is [2022] NZHC 883. The case –

WILLIAMS J:
Just a second.

WINKELMANN CJ:
You'll send us a copy of it, won't you?

MR MAJUREY:
Yes, I will. It's a case that involves the National –

WILLIAMS J:
Can you just give me the page number, would you mind?

MR MAJUREY:
883.

WINKELMANN CJ:
883?

MR MAJUREY:
Yes, 883. Sorry, I'm not speaking loud enough.

WINKELMANN CJ:
No, it's the mask.

MR MAJUREY:
A case that involves the National Policy Statement on Freshwater and it's known as the "vegetable exemption case" which will have some notoriety to it, and at 136 to 137 Justice Edwards confirms that in the judgment, and I'll read from 137: "Rather than incorporating environmental bottom lines, I consider the Supreme Court to have found that section 5(2) may allow for the statement of environmental bottom lines in planning documents, such as the NZCPS at issue in that case."

We then move to the "have regard to" threshold and, as the Court's aware, just to note that by comparison to the different thresholds in Part 2: section 6 "recognise and provide for", section 7 "particular regard to", and section 8 "take into account".

We then go to, of importance in this case, (1)(b): "Any relevant provisions of," and you have the list of instruments there. I say it's important to take note there that it's any relevant provision of those instruments, so in the case of the NZCPS it's the relevant provisions, not trying to have an internally reconciled version of the NZCPS as a whole, and I say that's important in the totality of section 104 where Part 2 comes into play. So, for example, with the Treaty provisions, those are further highlighted by, for example, section 6(e), 7(a) and 8.

Then, finally, (1)(ab). That came in by amendment in 2017 and I say that's quite important in this case because when you work your way through it in terms of the ability to have regard to the offsetting or compensation for adverse effects. That is directly relevant in terms of, to use the language that's been used in this case, does "avoid" mean "avoid".

So I just want to make those comments in terms of section 104 which I say is important.

WILLIAMS J:

What does that tell you, that you can ignore…

MR MAJUREY:

No.

WILLIAMS J:

Sorry – that you are not constrained by highly directive language in the documents above you, because you just have to have regard to them?

MR MAJUREY:

What it says is what Parliament has directed in the totality of section 104 the NZCPS and the provisions of it are in play, subject to Part 2, and, of course, every consideration à la *TTR* has to be meaningfully engaged with. So it can't be disregarded. It's not a shopping list, just –

WILLIAMS J:

No, "disregarded" is the wrong phrase. Obviously you can't disregard it because it says you have to have regard to it. But if it says "do not", say, does "have regard to" mean you're not bound to "not"?

MR MAJUREY:

Double negatives. What it potentially means in terms of the facts and the policy settings is that the decision may be that you don't avoid because there's a rational basis to do so.

WILLIAMS J:

So, yes, as long as you're being rational?

MR MAJUREY:

As long as you're being rational, you are taking into account on the evidence and the policy settings and giving those full engagement, and, of course, there will be a continuum in terms of the factual matrix, and that's why the hypotheticals only take you so far because the decision this Court is going to

be make à la *TTR* is going to deal with roads and ports but also every coastal activity across Aotearoa.

WILLIAMS J:
Yes. Well, every one that needs a consent anyway.

MR MAJUREY:
Yes.

WILLIAMS J:
But doesn't that mean you're walking back into…

MR MAJUREY:
No.

WILLIAMS J:
Just throw it up all in the air and see how it lands, as long as it lands rationally?

MR MAJUREY:
No. Because there is the ability to have appellate interventions, again, like *TTR*, if the considerations haven't been properly engaged with and rationally decided upon then it won't survive. If they –

WILLIAMS J:
Well, it depends on what the Appellate Courts say because if the Appellate Courts also think you throw it up in the air then that won't change it.

MR MAJUREY:
Well, that'll come back to what the evidence was and what the policy settings was for the particular issue.

WINKELMANN CJ:

We've had lots of different counsel explain their conception of how structured that decision-making could be by reference to the policy documents, regulations, et cetera. Did anybody's formulation fit your conception?

MR MAJUREY:

I'm probably an outlier amongst my friends, if that's one way to conceive it, because I simply come back to what does section 104 say, what did Parliament intend, and of course the directions, the directives in the NZCPS are important and serious, but they're not considered in a vacuum.

GLAZEBROOK J:

But isn't the point of *King Salmon* that what's in the NZCPS actually embodies the higher level view in that particular context, Part 2, and the choices have already been made at that point. So to say that you override the choices in the New Zealand Coastal Policy Statement to the extent they're relevant by saying you just have to make a rationale consideration of all of the factors, aren't you going back to an overall judgment, which *King Salmon* says don't.

MR MAJUREY:

I say no. Two points, one is, and I take on board what my friend Mr Enright said about the acknowledgement of the Treaty but, as I recall it at least, the interaction between the different policies such as the avoid ones and the Treaty ones weren't in play in terms of the specifics in that particular case, and in terms of what the higher law, or the higher consideration in section 104 it's Part 2, and against that, I know it's become a bit circular in the sense of so what are the considerations that come into effect, and I'll come onto this with one of the examples –

GLAZEBROOK J:

I can't understand an argument that says that the Treaty might override something because that may or may not be dealt with properly in the NZCPS in a particular instance, but I thought your argument was wider than that and

said you just have a rational consideration that anything that might be relevant. But is that not the case, have I misunderstood you?

MR MAJUREY:

Again, in the abstract it's difficult to gain purchase on exactly what we are discussing and try to decide. The challenge for this Court is to come up with a framework like the three-step approach in *TTR* that sets the framework for all decision-makers that depends on the facts and the policy settings.

GLAZEBROOK J:

Well we have to proceed from the *King Salmon* case, and just to say section 104 – just do section 104 doesn't really take us far because *King Salmon* has said, you know, this policy language conveys an intent, sometimes a very powerful intent, and what your colleagues have said is that really that helps us structure the decision-making so it's not just a mish-mash, an overall judgment, and that you, and everyone I think has said that you therefore give very powerful weight to the notion of avoiding and that carries on guiding your decision and you work hard to narrow down the point of conflict et cetera. So you don't, do you disagree with that or…

MR MAJUREY:

Well *King Salmon* wasn't a Part 6 case, in my submission, and nor was there the considered operation of the regime of section 104, that's not a criticism at all, it just was a very different case.

WINKELMANN CJ:

Yes.

MR MAJUREY:

In the meantime, as I've mentioned, Parliament has amended 104 to bring in subsection (1) – sorry (2B). That is directly relevant to these matters of avoidance because there Parliament says that it's a relevant mandatory consideration if an applicant is compensating or unfairly offsetting an adverse effect.

WINKELMANN CJ:

Well can I just ask then you think that the others' formulations are wrong? I'm just trying to understand what you're saying.

MR MAJUREY:

I'm not saying they're wrong.

WINKELMANN CJ:

Because the other counsel, just about all of them apart from Mr Smith, yes, apart from a couple, who have said that you can –

GLAZEBROOK J:

Or even Mr Smith probably.

WINKELMANN CJ:

Well they've said it's a very powerful language and you have to do a very structured decision-making, it's not some sort of freeform thing, and they've also said, most counsel have said that there is some ability to compromise the avoid standard, but it's a narrow corridor of opportunity, and are you saying that or are you saying, no, it is really, once you get here it really is overall judgement. What are you saying?

MR MAJUREY:

No, I don't think the rhetorical flourishes help us in terms of overall broad judgement or bottom lines. It is what are the relevant considerations at play in a particular case on its facts and its policy settings. Now that doesn't give you the specificity that I apprehend you're looking for but I am not saying it's a free-flow make it up and just sort of see where the convenience lies. If – and again I'll go to a hypothetical even though I've said they're not particularly useful – if there's an area of benthic value, it's the last and only one in New Zealand, then obviously the threshold is going to be very, very high. So I'm not saying "avoid" is unimportant. It'll come back to its context. That's not another way of saying "overall broad judgement".

WINKELMANN CJ:

So you really do think that the statements help structure it?

MR MAJUREY:

Sorry, I missed that, Ma'am.

WINKELMANN CJ:

The policy statements do help structure your decision-making then?

MR MAJUREY:

Yes, they do.

WILLIAMS J:

They just don't bind?

MR MAJUREY:

They don't necessarily bind. It'll come back to the particular circumstances.

WILLIAMS J:

What about the rules in a plan? Do they bind?

MR MAJUREY:

Rules bind.

WILLIAMS J:

Why?

MR MAJUREY:

Because that's the force of law they have in the Act.

WILLIAMS J:

Well, you see, you just have to have regard to them under section 104.

MR MAJUREY:

It'll come back to, for example, are there, in recognising there are rules for different parts of the environment, how prescriptive those rules actually are in terms of what…

WILLIAMS J:

So you can't have a dairy on that corner, and I want to put a dairy on that corner and I say to the consent authority: "You just have to have regard to that. You're not bound by it, and I've got a really reason to put a dairy here because there isn't one for another 300 metres." Well, maybe I should make it one of those coffee places, whatever they're called.

MR MAJUREY:

It's sort of analogous to be able to specify departures, I think you're saying, Sir.

WILLIAMS J:

Well, it's just if they're rules, they're rules, but you say 104 just requires you to have regard to them, not be bound by them.

MR MAJUREY:

You're not bound by them but nor is "have regard to" just a passing reference and have you ticked the box. *TTR* makes that very clear and that's a good –

WILLIAM YOUNG J:

Well, they must be bound to some extent because the rules will define the status of the activity.

MR MAJUREY:

Correct.

WILLIAM YOUNG J:

So to that extent the rule is conclusive.

MR MAJUREY:

That's right. I am conscious of time and my friends. In my one-pager, if you have that…

WINKELMANN CJ:

It just helps us if we understand how you differ from everybody on this submission, I suppose, Mr Majurey.

MR MAJUREY:

Yes, and perhaps as an indication of that I've given an example, this was both in our original submissions and in this one, in terms of the interplay between the respective policies and objectives, and I've given the example whether it's a tauranga waka complex proposal that's new, whether it's an aquaculture proposal in terms of a taonga species, that may have effects on nationally recognised surf breaks, it may affect the landscape. Just because the wording says "avoid" rather than "recognise" I say is not the answer in itself. So going back to my reference to Part 2 being the touchstone, then I've referred to *McGuire* v *Hastings District Council* [2002] 2 NZLR 577 (PC). Those well known trilogies: section 6(e), 7(a) and 8 all come into play and must be engaged with.

WINKELMANN CJ:

So the language may give you the answer but it won't necessarily because all of those things have to be engaged with?

MR MAJUREY:

Yes, Ma'am. So it's not the approach, and I know this is not what *King Salmon* says in its totality, that "avoid" just means "avoid" and everything else follows in behind that.

So just to complete my time, in paragraph 10 I say – this is on the one-pager – if the effects of an activity do not avoid adverse effects where an NZCPS avoid policy is in play, the section 104 question is not whether a resource consent application can depart from the RPS/NZCPS. Rather, it is whether an

evaluation of all the relevant section 104 considerations permits the grant of consent where they are all engaged with on a rational basis.

Similarly, section 104 does not prescribe that an applicant must reconcile the NZCPS policies in a way that gives effect to any avoidance policies, by test of necessity or no practical alternatives, before finding the policies are in conflict.

Those are my submissions, Ma'am.

WINKELMANN CJ:
Thank you. So this is you in reply, Mr Smith.

MR SMITH:
This is me in reply, your Honour. I should let you know we've lost about 10 minutes against our target timetable. So I will try to speak quickly but the good news is I only have three things to say, although one of them may drag me in slightly deep water.

So the three things I have to say are, one, about what was alleged to be a change of position on this foundational issue as it was put; the second is, and this is the deep water, the topic of the test and where it is located and what it might be; and the third unglamorous topic is costs which it's probably time to start talking about.

So on the first topic, my learned friend for Waka Kotahi accurately summarised the discussion we have had. There has been no change in Forest and Bird's position. All I would add to that, and it may be that it emerges from my learned friend's outline, but the problematic reference that gave my learned friend some trouble is at the end of paragraph 67 of our written submissions, I apprehend, which –

GLAZEBROOK J:
Paragraph, sorry, did you say 67 or 57?

MR SMITH:

67, where I perhaps slightly loosely analogised the idea that an avoid policy would not prevent minor or transitory adverse effect with the idea under the EEZ Act that what you are concerned about is material harm, and so my learned friend has fairly said, well, those are in substance slightly different concepts and all that was intended to be conveyed in the written submission is that they address the same high-level issue that if something isn't a big deal, it drops below some threshold, you're not concerned about it, and that's as far as that point went.

So what I really wanted to address with this speaking slot, which is sort of doing double duty for Forest and Bird as an East West Link party and a Port Otago party who's saying something about what the East West Link parties have just said, I think in fairness that really is the question of section 104 and is that where you locate the solution to this problem we've all been grappling with, and the answer to that in Forest and Bird's submission is no, it is not, that *RJ Davidson* gives you the answer to that and it flows from the fact that the NZCPS embodies Part 2 in the coastal environment, section 104 says it is subject to Part 2, and so if the NZCPS creates bottom lines then those can't be departed from in the consenting stage and that's the same reasoning as was applied in relation to the section 10(1)(b) bottom line in the EEZ Act. So we say that where you need to locate any gateway, if there is one, is in the NZCPS, a proper interpretation of that, such that giving effect to it and regarding it as the embodiment of Part 2 in the coastal environment still means that this gateway, whatever it may be, exists, and that is the level at which the analysis needs to take place and once you've done that you can't depart from that at the consent stage because if you're going to do that why do you have this highly ordered policy-making process?

What I would say is that it seems that no one who would benefit from the exception your Honours have been trying to articulate has been happy with the way it's been articulated or has been able to offer an acceptable version of what it might be, and that perhaps is a caution about whether it exists, I would say. My learned friend for Waka Kotahi started from the proposition that a

proposal may be complex, and she seated the complexity in its engagement with multiple factors both inside and outside the New Zealand Coastal Policy Statement, and suggested that although it wasn't limiting, this was more likely to occur with large projects than with small projects. Well I would start from the proposition that it can't be the case that factors outside the NZCPS can be used as part of this reconciliation exercise, which is about the policies in the NZCPS and –

WILLIAMS J:
I think she was talking about in a consent application.

MR SMITH:
Well when, perhaps, and what I would say to that then is –

WILLIAMS J:
You can't.

MR SMITH:
Well you can't when you properly seat the reconciliation in the part of the process it should sit in, there's no room for that. There was then, and again perhaps with due allowance for where my learned friend was arguing that this should sit in the process, a need to assess whether what was proposed was justified and in order for it to be justified, as I understood it, it was said adverse effects that had to be avoided had to be avoided where practicable, where it wasn't practicable to avoid them they had to be remedied or mitigated back to zero, and that there then had to be a strong reason found in one of the enabling policies that supported the proposal. What I would say about that is that's not a test, and none of that is found anywhere in the language of the NZCPS. The concept of practicable, I'm not sure what was intended there, but certainly our position would be that if you are contemplating, and of course our primary argument is that the avoidance policies prevailed, to use slightly loose language. But if you are contemplating a situation where another policy might have, might prevail, it has to be because it is not possible to achieve the value protected by the other policy, or it is not possible to

achieve them both at the same time, and that's not – if it is suggested that "practicable" means something different than "possible" that is not accepted.

WILLIAMS J:
What do you do with section 104(2B) I think it is, the offset clause (A) or (B), whichever one it is, which makes it a mandatory relevant consideration if you say offsets don't work because they don't avoid. How do you recognise those just as a matter of public law?

MR SMITH:
Well the higher order instruments say, well it's not higher order to the RMA of course.

WILLIAMS J:
No.

MR SMITH:
But it is not the case that –

WILLIAMS J:
My point is that on your analysis the CPS overrides 104(2A) or (2B) or whichever one it is.

MR SMITH:
And *King Salmon* said it is not inconsistent with the structure of the RMA –

WINKELMANN CJ:
Can we put that up again, Mr Lye.

GLAZEBROOK J:
But it may not override it anyway because it doesn't just apply an avoidance policies offset, it applies in any policy. So you can land up with an adverse effect and you're deciding whether it's a significant adverse effects or something less significant and it says you can take into account offsets, but

that's just generic rather than necessarily just applying in an avoid situation I would have thought.

WINKELMANN CJ:

In other words it doesn't have to be given effect in every single decision. It might just be given effect where it can apply. That would be your answer probably.

MR SMITH:

That would be my answer. Thank you.

GLAZEBROOK J:

I mean it may apply in an avoid situation depending upon what you actually decide avoid means and whether avoid can include offsets so it just – because that is an issue in the other appeal. As to whether an offset meets the avoid standard or not, which is a different matter than…

MR SMITH:

Yes, but I would adopt the answer that the existence of that reference in 104(2B), if that's where it is, doesn't answer the question that that is an actually operative consideration under the substantive instruments that are being considered in every case.

WILLIAMS J:

Sorry, it's not. It's (ab), isn't it? Yes, 104(1)(ab).

MR SMITH:

Yes. So one could have regard to that but say: "But we are required to avoid this adverse effect," and if it can't be avoided, whatever that may mean, to Justice Glazebrook's point, "having regard to it" doesn't take you very far in making the actual decision you have to make.

WILLIAMS J:
Well, except that one way of interpreting that is it says you can't have regard to it, since you must not take it into account.

MR SMITH:
I can see the point your Honour's putting to me on the text, I think. As a way – that would entail though that any policy which said that something could be anything less than or more than – anything that was more onerous than an avoid, remedy, mitigate, offset standard would not be able to be applied.

WILLIAMS J:
Shall we call that the Majurey approach?

MR SMITH:
Happily, that is the short points I wanted to make on the test, recognising that I've had a fair go already.

On the question of costs, I think in the – and I should say I've discussed this in general terms with our side of the room but not with the other side of the room.

WINKELMANN CJ:
Can you define your side?

MR SMITH:
I was referring to EDS and I believe ORC, though not directly. Is that right?

UNIDENTIFIED SPEAKER:
They're on our side, yes.

MR SMITH:
Well, yes, I was referring to them as being on our side and I was questioning whether anyone had in fact spoken directly to them. Anyway, I will say I'm not

speaking for anyone else but I'm hopeful that our fellow travellers wouldn't disagree with what I'm about to say.

In the Court of Appeal there were costs awards in favour of each of EDS, ORC and Forest and Bird against Port Otago, and there was, I believe, no costs award made against MDC. If we are the successful party, we'd be happy with the same result.

WILLIAM YOUNG J:
And if unsuccessful?

MR SMITH:
If we're not successful, we and I, we as Forest and Bird at least, and I believe EDS, would say we're a public interest litigant.

WILLIAM YOUNG J:
So heads you win, tails the other side lose.

WINKELMANN CJ:
That's the nature of public interest litigation, yes.

MR SMITH:
That is the position that results where there's a public interest litigant against a private interest litigant. Then just for the East West Link parties other than Forest and Bird, we'd suggest that the costs of their participation in this hearing lie where they fall either way, as in they wouldn't be entitled to or liable for costs, for this specific hearing, having been invited to intervene in it.

If your Honours please, those are my submissions.

WINKELMANN CJ:
Can I just clarify, your side of the room is EDS, Royal Forest and Bird. Ngāti Whātua, because Mr Enright seemed to be nodding with you. Port Otago Regional –

MR SMITH:

Otago Regional Council. I was intending to encompass Otago Regional Council on our side of the room.

WINKELMANN CJ:

Yes.

MR SMITH:

I was intending to encompass Ngāti Whātua Ōrākei Whai Maia in our side of the room so that they are an EWL specific party, so they would be within the category of people who neither get nor pay costs.

WINKELMANN CJ:

Yes, drop them out then. Thank you, it was very helpful.

MR ALLAN:

Ms Wright for EDS.

WINKELMANN CJ:

Thank you.

MS WRIGHT:

Tēnā koutou ngā Hōnore. I only have a couple of short points for EDS. There's been a lot said so there's not a lot left to say. Two are points of clarification and one goes to the term "avoid". The first point of clarification simply relates to annex 2 that was put up by counsel for the East West Link, and just to clarify in response to questions from Justice Williams that those were not the RPS provisions.

WILLIAMS J:

They're not?

MS WRIGHT:

The RPS provisions are found in Part B of the Unitary Plan.

WILLIAMS J:
So those are the plan provisions?

MS WRIGHT:
Regional Plan and District Plan. The Unitary Plan takes an approach where some provisions apply at both levels.

The first point in response of two, response to Waka Kotahi submission that surf breaks are not a matter of national importance under section 6, and it is important to clarify that all of the matters captured in the avoid policies in the Port Otago appeal are in fact matters that fall within section 6. Surf breaks fall within section 6(a) and section 6(c). They can be either a natural feature or an aspect of natural character, and this is confirmed when you refer to the New Zealand Coastal Policy Statement. I won't take your Honours there. You've been to the Coastal Policy Statement enough. But Policy 13 expressly refers to surf breaks as one aspect of natural character, and then Policy 15 relates to natural features as well as landscapes and the definition of "surf breaks" in glossary refers to surf breaks as natural features.

WILLIAMS J:
Even if this one is created as much by the groyne as by anything else?

MS WRIGHT:
That is the submission of Mr Anderson as counsel. I'm personally not –

WILLIAMS J:
No, me neither.

MS WRIGHT:
– on top of the science in terms of the generation of the wave, but either way that is a factor that will contribute to whether or not a specific activity does or does not have an adverse effect on it in a practical sense.

WILLIAMS J:

Actually, I was wrong. It's not the groyne. It was the dumping.

MS WRIGHT:

Whare Kerikeri (15:12:15)

WILLIAMS J:

Yes, on the other side of the channel, or, sorry, it's the nature of the channel along that stretch that creates the lift, I think, from memory.

MS WRIGHT:

Correct.

The second point in response to the East West Link submissions goes to what the term "avoid" means, and Ms Casey has submitted that "avoid" is not "absolutely avoid" or "strive to avoid", and similar propositions were put in a Port Otago appeal where we had "mostly avoid" or "avoid if at all possible". In EDS' submission "avoid" simply means what it says. It means "avoid" and that is the only term that is used in the four policies referred to as the avoid policies in the Port Otago proceedings, and that, as the Court of Appeal did in its decision, can be contrasted against the terms of art I referred to just before and also to "avoid, remedy and mitigate", and in EDS' submission that is not an absolute approach in plan-making. That simply reflects what the policies in the New Zealand Coastal Policy Statement say.

The point, as I have said, is that "avoid" simply means what it says and the question then is what you do with that, not whether you read words into that policy, and in the planning context what EDS says you do with that has been extensively traversed but for reference is set out in section 5 of its submissions, and, as pointed to by Mr Smith in his oral submissions, is encapsulated at paragraphs 127 to 131 of *King Salmon* decision.

So the final administrative point to refer to is costs and EDS is in the same position as Forest and Bird. If the appeal is dismissed it would seek costs.

If the appeal is allowed EDS would oppose costs being awarded against it on the basis it is a public interest litigant.

Counsel for Otago Regional Council I understand is not going to be presenting in response to the East West Link parties but will address the Court on costs and those are the submissions for EDS.

WINKELMANN CJ:
Thank you. So would that be you now Mr Anderson?

MR ANDERSON:
Yes it would your Honour. So as just stated nothing to say in reply that has not already been said, and on the question of costs Mr Smith has successfully read my mind, as one of the parties on this side of the table, so I endorse his description of that position.

WINKELMANN CJ:
Thank you. Admirably short. Mr Maassen?

MR MAASSEN:
Thank you your Honour. So his Honour Justice Young asked whether there was any information about the intersection of avoidance policies reports and we've done some –

WILLIAMS J:
Sorry, can you say that again?

MR MAASSEN:
The intersection of avoidance policies resources with ports in New Zealand, and we've done some research and supplied through Dropbox examples of maps where those points of intersection exist. It's very prominent in Tauranga Harbour, which of course is the second largest harbour in New Zealand, and they're also significant cultural value resource sin the

Tauranga Harbour associated with Matakana Island and Mount Maunganui. So that's an example. Picton's got some examples.

WINKELMANN CJ:
What about Auckland, Waitematā ?

MR MAASSEN:
Not so much, about 10% of the coastline, so less of an issue in the Waitematā.

WINKELMANN CJ:
And the Manukau, because I think we heard that it was quite high in Manukau?

MR MAASSEN:
Sorry I don't have that information, just would we could gather, but since his Honour liked Google I thought he liked these maps, and so there's plenty there for him to think about. But the point is it's real and this case is by no means exceptional.

The second point is that the Council that I represent advanced the desirability of the need for more detailed planning through the chain of instruments, and in particular better direction where the avoidance policies apply, because these are important to constrain and be very relevant to decision-making and therefore to define any exceptions. So the Council to that extent is acting in favour of the environment as much as it is in favour of the true exceptions that should exist, and essentially sees the need for this as fundamental to the rule of law, to provide people with confidence in plans, which is their intended purpose, so I sit against strongly EDS position and the Otago Regional Council's position, which is just leave it until later and deal with it at the consent stage and a consent case-by-case basis. I think that's quite unrealistic to expect planners to cope with such large applications and try and reach a judgment without proper policy, and that which is particularly relevant to these special resources. So my submission is that where the rule of law

doesn't apply, the vulnerable and the environment misses out, so you should define your exceptions, and you should confront those issues through policy making because at the end of the day if you come to a consent the person who can afford the most experts and run through the process and so some sort of balancing is going to win, which is not really the structure, in my submission, of the Act, and I wanted to refer you to two pieces of information about an example of highly directive planning about indigenous biodiversity in a regional plan. So what I've supplied in your electronic materials is two things. A decision of the Environment Court that pre-dated *King Salmon* called *Day v Manawatu-Wanganui Regional Council* [2012] Environment Court 182 at part 3 of that decision.

WILLIAMS J:
102 or 182?

MR MAASSEN:
182.

GLAZEBROOK J:
Is this something, sorry, just so that I can find it. Is it something we've just been provided with is it?

MR MAASSEN:
It's been dropped into the appellant's authorities I think.

WINKELMANN CJ:
It's saved in the supplementary folder is it?

MR MAASSEN:
Yes, and I think your Honours will find that very illuminating –

WINKELMANN CJ:
Well no, not necessarily.

GLAZEBROOK J:

Yes, so, sorry. Can we find it, have we got it that we can put up for everybody?

MR MEAD:

It's been emailed and it's also been put in the authorities folder.

GLAZEBROOK J:

Yes, I've got an email but it doesn't seem to have what you're talking – so there's a case?

MR MAASSEN:

It's the case of the Environment Court and part 3 of the decision concerns indigenous biodiversity and I'm not sure I want to go through the decision right now.

GLAZEBROOK J:

No, I can understand, I just wanted to be able to locate it, that was all.

MR MAASSEN:

The other piece of information is the policy that has dropped out of that decision, and I'm referring you in particular to Policy 13-4 just to give you just to give you a practical indication of how the Courts are engaging with this issue of providing very directive decision-making policy to constrain decision-making in areas of things like indigenous biodiversity where avoidance policies apply, and it's a very structured cascade which is highly constraining on decision-makers. I'm not holding it up –

GLAZEBROOK J:

No, I've got that, it was the decision I didn't have.

MR MAASSEN:

I'm not holding it up to you as the perfect example but it's the sort of business or work that in my submission you would expect to find to address these

issues in a regional plan. Now this is the regional plan component. It's not the regional policy statement. So you get this more detail as you go down, and what I would say is that Judge Jackson's exceptions or allowance is the first cut and there is going to be another cut at the regional coastal plan level, and the point I want to make about that is that Ms Anderson for ORC said, oh the decision of Judge Jackson is premature. Well actually what he meant is premature, it should be left to the consent stage, which I've dealt with, but when you look at it all his Honour was doing was actually closing a door to the Port having the opportunity in any circumstances to claim that it should override the avoidance, and the opportunity for a resource consent where there needs to be some evaluation and in my submission his Honour found as a matter of fact that he had sufficient information to at least go that far. Now if, as Mr Anderson says, they find with proper further analysis of those resources there's something extraordinary, and it could cut the other way, less extraordinary, that will refine the development of the policy at the regional coastal plan, so to say it's premature, we can't do anything now is really to challenge the Judge's specialist findings of fact in this case. It's not really a question of law, it's a question of assessment.

I accept that whether or not the words or the conclusion is valid is a legal question, but if you read the judgment his Honour was in two minds and then he says: "Well I was finally persuaded by Mr Anderson's client in the evidence that we should at least provide some direction at this point." So it was a deliberative decision and the point I also wanted to make about this is EDS said we appealed because we were worried about avoid, remedy or mitigate. In my respectful submission that is not correct, because those were words that were simply put up for the Council to lead a discussion, because the wording does not finalise. The critical attack that they made to the decision was the decision at paragraph 122 that the avoidance policies could, in appropriate circumstances, yield to the Port policy. That was the essence of the notice of appeal because they said the avoidance policies trumped. So that was the gravamen of the argument in front of Justice Gendall and it morphed somewhat in the Court of Appeal to, oh well avoid, remedy and

mitigates the problem. But that's the, I'm just making the point that actually there was no determination of the Court on the precise wording.

In relation to the distinction between effects and activities, which Mr Allan –

WILLIAMS J:
Before you deal with that, can you tell me, and maybe I should know this, these are the detailed and prescriptive provisions in the plan. Are there reconciliation clauses other than Judge Jackson's more general ones in the policy statement or is Judge Jackson's it? Sorry, no, I've confused myself. In the *Manawatu* case are there RPS provisions which provided a basis for this, or did they just jump straight from the CPS?

MR MAASSEN:
Okay. So just to answer that question somewhat obliquely, I had the privilege of running this projec.t

WILLIAMS J:
I thought so.

MR MAASSEN:
It's a one plan and so what that means is part 1 is the RPS and part 2 is the regional plan and so they're a combined instrument which is now where you should be going. So the answer to your question is you'll find the answer to that question in chapter 6. When I finished that project I decided to take it out of my mind. It was such a big project so I can't remember exactly what chapter 6 did, but the philosophy was we would in the policy in the second part of the plan very much provide strong direction about constraining decision-making on consents for these special resources, as what should be the dominant policy and most relevant policy for determining the outcome for these resources. So that's the thing. So I'm sorry I answered that in a very broad way.

WILLIAMS J:

Just one more thing. It would probably help if you could just get someone to send in chapter 6.

MR MAASSEN:

Certainly. So the crucial point made according to Mr Allan is that the NZCPS deals with effects not activities, and in my submission, that's wrong. If you look at Policy 4, Policy 6 and Policy 7(b) they all talk about strategic planning as being managing activities and in my submission – well you'll appreciate that how my counsel is engaged in this process is about the importance of strategic planning and getting it right. Further, EDS' argument about the difference between the "give effect to obligation" and the "have regard to". You'll be aware that I argued the *Davidson* decision and my argument there was that planning matters and people have always been saying well you just have regard to when you go back to Part 2, and the argument was no, actually the product of the Part 5 process is hopefully well-constructed local plans that provide you with a high level of direction about how to deal, particularly with the environmental bottom lines, and that is because the case-by-case is a failure and planners can't manage complexity at that level. They really, there's no disrespect, but the ordinary council planner does need strong policy direction. That's just a human story, but it's the reality. So I find myself in the position of advocating for the environment even though I'm on the Port Otago side here saying I caution you against the case-by-case approach that's urged to you and somehow as –

WINKELMANN CJ:

Case-by-case at what level?

MR MAASSEN:

At the consent level because – or what Mr Anderson said which is shunt it down to there, that's Mr Anderson for ORC, because then you get into a death by a thousand cuts and then everyone complains that they haven't got a coherent framework in which to apply, which is the point of planning, that they have a consistent framework to apply. So in my submission you should

resists the invitation of Mr Anderson for ORC to write a really strong judgment about how you, in this case, how you conduct a 104 analysis as opposed to how you do good strategic planning consistent with *King Salmon* but facing the hard case where there are real conflict. That's, in my submission, what this case is actually about.

WINKELMANN CJ:
What about the risk that you don't have sufficient facts to handle the resolution of the conflict higher up the chain away from the case-by-case basis?

MR MAASSEN:
There is that risk but the tension is "giving effect to" and some of those decisions have already been made, and as I indicated in my opening I do accept the avoidance policy is highly constraining. I just simply say it isn't so constraining that you are making an analysis of verbs of the subtlety that was being done in this case with Policy 9 so that you couldn't take those circumstances, but I'm not advocating for a position which is that the case-by-case is the only way to deal with the problem of circumstances because then the whole notion of planning falls apart.

WINKELMANN CJ:
And you're saying really any case you avoid – I think you're saying you avoid the problem with the facts because you don't necessarily – you're not creating rules higher up; you're creating frameworks.

MR MAASSEN:
Correct.

GLAZEBROOK J:
And they become more and more detailed as you go down so in fact I assume you say by the time you get to the local level that that planning can have an outlook over the actual position in that particular locality. Is that…

MR MAASSEN:

Correct. So Policy 13 that I've encouraged you to read, that was a very innovative plan in that it was the first time the Regional Council grasped terrestrial biodiversity management and it was done by some very progressive ecologists by modelling and I think you'll find – I'm not saying the policy is perfect but I think you'll find it is a good example of the practice of the Court because I felt that the Court lacked that sort of context for what the Courts were doing. This is a decision of Judge Thompson's division, pre-*King Salmon*, but they deal with, for example, the difference between offsets and harm minimisation and emphasise harm minimisation as your first point of call and if that's not achievable by a standard or a threshold then you go to the offset, and so there's a really good discussion about that topic in the decision as well, and I'm quite proud to say that I worked through and developed that planning regime and it's obviously standing the test of time.

WINKELMANN CJ:

Can I ask you one question, Mr Maassen? So Mr Anderson for the Otago Regional Council and Mr Allan, they structured their argument on the basis that there was this difference once you get to consent level which is that you get the legislative permission just to "have regard to" rather than "give effect to".

MR MAASSEN:

Yes.

WINKELMANN CJ:

What do you say about that in terms of your analysis?

MR MAASSEN:

I think it's completely wrong and I argued it in that way in *Davidson* and I think I made progress in arguing that that's just not how planning works, and so I think that "have regard to" does not operate in the way Mr Majurey says. You need to look at the word "relevant" and if you're looking at a bottom line which has been identified in the plan and is highly relevant and that controls

your discretion then that should carry and constrain your decision very much, and it's the same point I made in my written submissions about take account of the Treaty. I've got a case running in Hamilton at the moment, so this case had to be interposed in it, but the argument there is the ownership of water is a Treaty question which isn't just "take account of" following this Court's directions about customary property. So you can't look at simply these words as the final answer in terms of your judgment and I say the word "relevant" here and where you stand in terms of the context of the Act and the structure of the plans gives you a lot of information about the terrain you're standing on when you exercise that discretion. Of course, Parliament was going to say: "Consider these matters," but that doesn't mean to say that's a complete answer to what you should be doing. It's simply saying that's the first step, have regard to them, but in terms of your analysis, in terms of how the planning Act is structured, you've got to be constrained by discretions, by the Policy, to make it even sensible to be talking about planning otherwise we should all give up and a lot of money is spent on this exercise.

WILLIAM YOUNG J:
But isn't the – the upstream policies control the form of the rules.

MR MAASSEN:
Yes.

WILLIAM YOUNG J:
But beyond that, what's wrong with saying, okay, well, it determines what the activity is, whether it's a permitted activity, whether it's a discretionary activity, and so on. But once you've got to that, what's wrong with "have regard to" as opposed to "give effect to" because the "giving effect to" has already occurred in the plan?

MR MAASSEN:
Well, the activity classification simply gives you the scope of a discretion or create a jurisdictional gateway.

WILLIAM YOUNG J:

Yes, so if something has to be avoided the plan can say it's prohibited.

MR MAASSEN:

No, that's regarded as, with respect, quite a clumsy way to deal with those things. The better idea is to constrain using policy.

WILLIAM YOUNG J:

All right, well, then the discretion can be restricted in various ways and whatever, but once you've got the rules giving effect to the upstream instrument then what's wrong with a "have regard to" approach? I mean the coercive effect of the policy is effectively spent in terms of the rules, and after that I don't see what the issue is.

MR MAASSEN:

Well, I think the answer to that, in my respectful submission, is in *King Salmon*, that if you don't protect these bottom lines –

WILLIAM YOUNG J:

But *King Salmon* is a rule – is a plan case.

WINKELMANN CJ:

And a consent case effectively though in that case, wasn't it?

MR MAASSEN:

It was both, yes, and it was effectively treated the same way, you know, they were in convoy.

WILLIAM YOUNG J:

What, the Save Our Sounds was – I can't recall now actually. But wasn't the *King Salmon* itself about a rule change?

MR MAASSEN:

It was both an application for plan change and a resource consent that run in convoy because they can do that with aquaculture. So you knew exactly what

the plan change product was going to be and while it was declined on the implementation basis, I'm sure this Court had an eye to the fact that there were all these major effects that were engendered by the planning framework that enabled the resource consent. So that comes to my point.

WILLIAM YOUNG J:

Sorry, but if the plan provision is one that enables affects that are to be avoided in accordance with policies then something has gone wrong with the plan.

MR MAASSEN:

I think that's asking the rules and the activity class to somehow do the heavy lifting in terms of the outcomes and I think it's important not to see the opportunity to create a consent as the right to have something regarded equally, depending on what outcomes you achieve in the application, and that is why under an AEE you've go to assess it against the policies. That's what Schedule 4 says. So Schedule 4 which sets an AEE requires you to do an assessment against policies precisely because the policies matter.

WILLIAM YOUNG J:

No one is saying the policies don't matter.

MR MAASSEN:

I'm sorry, I didn't quite understand your point.

WILLIAM YOUNG J:

Sorry, well, even on – I mean I don't think Mr Majurey was saying the policies don't matter. He's simply saying that when you get to the consent stage then the statute's pretty clear.

MR MAASSEN:

Yes, except there is an element of the – there is an element in which the *King Salmon* is now definitively talked about bottom lines which I think is the environmental problem and they are to be treated differently. So I think those

which attract the avoidance policies are in that category, and I probably can't take it any further, that I've tried to be faithful to *King Salmon* but not make it unworkable which is how it has been applied, in my submission, in some ways. So…

I'm over time? Sorry. That's all, thank you very much.

WINKELMANN CJ:
Costs. You've got no costs?

MR MAASSEN:
Costs. I never was successful in this litigation so I haven't had the experience of being asked about that, but…

WINKELMANN CJ:
Well, you're not being asked because you're going to be successful now. Who knows?

MR MAASSEN:
The Council's position is it's tried to assist the Court through this process and it does accept the position of the other parties. So if the case was successful for the appellant, it would not be seeking costs against parties that have engaged as advocates for the environment because they have done so fairly and responsibly and it's not about that. We also don't expect costs awarded as submitted.

MR ANDERSEN QC:
If it pleases the Court, perhaps I'll deal with costs first since we're talking about it. My submission is that the cases should be dealt with separately. I mean there is overlap but they should be dealt with separately, and if – Port Otago has had to pay costs and not just been awarded but has – the parties have insisted on them being paid in respect of the process so far, so it would seek costs against the three principal contenders in terms of this appeal

and also to have the costs awards reversed that were made in the Courts below if it's successful.

WINKELMANN CJ:
And the principal contenders in your mind are EDS, Royal Forest and Bird, and…

MR ANDERSEN QC:
And the Regional Council, yes. Sorry, yes. We're not – we wouldn't seek costs against the parties in the other proceedings who spoke against –

WINKELMANN CJ:
What do you say about their public interest argument?

MR ANDERSEN QC:
Well, I mean I understand that there is that but the point that is made with regard to the Port is that they insisted on the costs being paid as we went through and it is – there's an element of risk in terms of this sort of litigation. Part of the problem – that's all I'll take it. I mean it's really a matter for the Court. If you decide that it's sufficiently appropriate then this is not –

WINKELMANN CJ:
You're not really saying it's not public interest? You're just saying –

MR ANDERSEN QC:
Yes.

WINKELMANN CJ:
– it hurts you've had to pay the costs.

WILLIAM YOUNG J:
Sauce for the goose is sauce for the gander.

WINKELMANN CJ:
Yes, that's your submission.

MR ANDERSEN QC:

Yes, that's basically it. I mean the costs really are the least of the Port's problems with regard to these issues. I'll be quite frank about it. The –

WINKELMANN CJ:

Yes.

MR ANDERSEN QC:

I want to talk about section 104 because it seems to me that, with respect, there's a little bit of confusion about 104. So let us think a little bit about – I want to take it backwards because – if you could bring up 104D, please – because this is really the important issue – no, 104, big D. This is the big issue here because it's, with respect, a little bit disingenuous to let it go down the procedure because essentially anything that the Port does in this area is going to be more than minor and unless it has got a policy supporting it and – it is going to have to fit within the 104D gate as a non-complying use.

Now with regard to the other matters that section 104 considers, they are all regulated by the activity status and so the lowest one is a discretionary activity and so policies have already been considered at the time that it's ruled to be a discretionary activity, and policies don't particularly need to be considered under 1-0-D, with the non-complying because if it's contrary to policy it doesn't get through the gate unless its effects are minor.

WILLIAMS J:

But if your client takes up Mr Maassen's suggestion and argues for the insertion of a policy that makes provision for necessary port activities and consents therefore, then you get through the 104D gate on policy without having to worry about effects.

MR ANDERSEN QC:

Absolutely.

WILLIAMS J:

Then why are you arguing against that?

MR ANDERSEN QC:

I'm not arguing against that, but the question that I ask is how realistic is it because in a situation where there is absolute opposition to a policy that enables the Port to argue that it should be able to breach the avoid policies, how likely is it going to be that it's ever going to get a policy that is more permissive than that policy. So we've got to deal with the realities here. Every project that the Port does is hotly contested, and so the issue that it is looking at is simply a means by which it can apply for consent, and essentially if it has got – what Judge Jackson did was give it that means at the top, so it's saying right at the top the Port has a chance. It can make an application in this situation if it can't otherwise meet the avoid policies.

WINKELMANN CJ:

Are you looking for a means or clarify that you have that means because you have the means and you just wanted language that made it clear, signalled it clearly?

MR ANDERSEN QC:

Yes, well, yes, language that makes it clear, you're quite right your Honour, because otherwise you spend the time arguing – hopefully this case will resolve – I mean the big point that's made in opposition is that "avoid" means "avoid" and you can't do anything about it, and that's really the key issue that is here, because if someone can be done, and if the – because although various of the parties against the Port have talked about the conflict, what they're really saying is that there is no conflict because the Port provision is subject. That is what was said in the original appeal and that's what this is about. Is the Port provision subject to the avoid provisions, because if it is subject to the avoid provisions, then there's absolutely nothing the Port can do.

WINKELMANN CJ:

Well it's subject to them, but the question is what "avoid" means. Oh, avoid means, and also whether it can be overridden.

MR ANDERSEN QC:

Sorry, I meant "subject" in the sense that avoid trumps it.

WINKELMANN CJ:

Okay, right.

MR ANDERSEN QC:

Yes, that's what it was meant, otherwise, I mean they've got to try and work together, and I agree with "subject" in that sense but I meant, the argument that's being raised is that it trumps it. If it doesn't trump it then there is the opportunity to deal with it. Judge Jackson sort of said, you know, let's put out front that it doesn't trump it and there is a means of dealing with it. I'm not suggesting that is the only way that it can happen and – but it was a very clever way, in my respectful submission, to deal with the problem that he had in front of him, and hopefully it perhaps short-circuits the sorts of arguments that are now being had. But so long as it, as long as there is the ability to deal with it, then that's fine, the Port can apply. But the problem that your Honour has raised, you say why not do it further down, well I can give you one very good reason which comes from what my learned friend Mr Anderson said. He said that it is possible that activities that have an avoid may result in prohibited activities, and so what's an activity – what, say, something that's like, could well happen on and it is the salt marsh, and I mean the channel runs right alongside it. If it was to be a prohibited activity that no incursion could be made on the salt marsh, then that would effectively negate any opportunity to extend the channel. Now cruise ships are coming back in, it is – I mean yes certainly it's a theoretical issue but we have to deal with these issues now because if there isn't the capacity to apply the Port's in trouble further down the line. Before COVID there were 115 cruise ships visited Port Otago in the calendar year, so it was a, it's a big activity for the Port.

Now the significance of this is if the Regional Council was proposing that there be a rule prohibiting any incursion onto the sale marsh, the Port would want to be able to challenge that. With the policies as they are now, they would have virtually no chance of success. If there was a policy, that's excluding Judge Jackson's, if there was a policy that enabled the Court to argue in a particular circumstance it might need to go into that area, then that gives us the perfect, it gives the Port the perfect basis to say, no, it shouldn't be a prohibited activity because it may need to be considered as part of the importance associated with the Port So what it does do is it gives the Port an argument if there is an effort being made to prohibit activities that might interfere with the future operation of the Port, and that's a good reason for having something right at the top making it clear that the Port does matter and its operations do matter, and there maybe something that has to be applied for.

Just following on from that I just want, if you think of policies at the top of the tree, from the Port's point of view what it's looking at is what may it be precluded from doing because it can't rely upon the policies, and so that's really the, whatever factual situation may occur in the future, and it doesn't know, it does not want to be precluded from doing it, and essentially the argument that you don't have anything in the top and you just argue with it later, well the Port's in an impossible position in that situation because either it would seem unlikely that it would get any development to be a discretionary activity. It would be wonderful and it might try but difficult to justify in light of the comments that you've heard in terms of the importance that's placed by the various bodies on it. That's why it was thought that if it's going to be non-complying it needs to have a policy to rely upon so that it can't be said that it is contrary to section 104D. A policy that gives a port the ability to apply is a policy that may enable it to squeak through 104D by saying, look, here we are, this is a good project and it can be justified. It doesn't give it the right to do that, but it's not talking about fanciful things because you've heard about the project next generation and oh well the Port should be fine because it's got it. Well, that's certainly true but it would not have got those consents if the interpretation of *King Salmon* that is now being advanced was in place at the

time, and I dont know whether it would have even have thought about applying for it because it was a very expensive, I mean it was an eight/nine year project to get it, and if a port is going to embark on that sort of project, it need – against the *King Salmon* type rules, it would be a pretty brave decision to make to go ahead with it.

So if, you know, it's not in a situation where – I mean the Regional Council, as you see has taken, with respect, taken a very hard line, and it's being conscious of the – my suggestion is it's very conscious of the criticism that it's received from, including in these proceedings, because it is the sole owner of the Port, and so it has, it is perhaps not as sympathetic to the Port's interests if it might be, if it was independent, because of the perceived conflict and, you know, this is part of the practical issues. But when it is suggested to you that, right, just leave this here and let it go down, what underlies that is that if the Court can't get something in at the top, it's going to make it very, very difficult for it to get consent further down, because without something in the policy statement that supports its position, it would be arguing that it gets through section 104D because of the conflict and the issues associated with it, and it would not be easy.

So far as the Ngāti Whātua position is in terms of their opposition, with respect to my learned friend, I don't actually see that their situation is any different to that which Port Otago is saying. The avoid policies to create a sort of bottom line, which means you've got to have a pretty good reason to be able to depart from them, and I didn't understand his position to be anything really more than that. He wasn't saying there are, he wasn't taking the hard line that Forest and Bird and EDS were taking, that there could be no exceptions irrespective, and in terms of what I understood him to say, I certainly support it, you know, it certainly was nothing that was contrary to what was suggested by Port Otago. It's certainly, it's got to absolutely make a case.

With regard to the inclusion of the Port in the NZCPS there doesn't seem to be any documents that identify why it happen that I could see, but what there was, was there was a working group, there was a 2008 draft report and a

working group chaired by Judge Kenderdine which reported back and dealt with various things and included in that was quite a bit of discussion about the Ports and the importance of the Ports, there's a – not in her report, but in the working papers which are publicly available. I can provide them if they would be of help but they really just point to the importance of the Port generally. What I recall happening, and I may be wrong but I just have a feeling that what happened was that the Ports, the CEOs of the Ports made representations to the Minister and that happened but I can't see any formal documents that related to that, so I think that was how that procedure resulted in the Ports getting in there.

WILLIAMS J:
There's no memorandum of decision by the Minister?

MR ANDERSEN QC:
Nothing that I can see, Sir, no. Well, I mean I had a look and had a look round but no, there's paper that sort of leads up to it but nothing that really seems to explain it. It just seems that then suddenly you had the 2010 report produced. But certainly it's very fortunate for the Ports that it's in it. It would – and that may have been the argument because without that it would not be able to argue against the avoid policies.

WILLIAMS J:
Yes. Well, the reference in the Board inquiry to Ports was about how pernicious their effects were in the environment.

MR ANDERSEN QC:
Yes.

WILLIAMS J:
So it wasn't looking good.

MR ANDERSEN QC:

That's right. There were those comments in there in the discussions, yes, the working paper, which had quite a bit more about the – and I suspect that what happened is when that came out and the Ports could see that this was likely to be – likely to create problems – my learned friend, Mr Maassen, has identified some of the Ports for problems. There's some that don't. Napier apparently doesn't and Wellington doesn't in the little bit of what we've been able to find out, nothing particularly significant or doesn't seem to have. That, of course, is one of the other issues that underlies this which Justice Kós identified in the Court of Appeal and sort of – because you can think of the Ports as a united body but in actual fact they're all in competition with each other and if one Port was unable to operate that would undoubtedly benefit others, so there are those sorts of competitive issues that flow around there, but in terms of actually protecting the Ports that was something that they all had a common interest in.

Your Honour, Justice Young, you asked, rules bind because of section 68 of the Act. It specifically requires rules to be complied with, so that you have the – I think the last thing that I really wanted to say in relation to it is that it would be very difficult anyway for the Port to make any application for consent and if it – the decisions that it has to make in terms of doing that is can it justify it in terms of looking at the policies, and it is going to – if "avoid" is held that it is non-negotiable then at least it knows exactly where it is and that the issue of that, the resolution of that one way or the other, is going to make that position entirely clear for a lot of cases. In my submission, it quite plainly doesn't and that then leads to what follows from that, and it would be, to avoid continual arguments and litigation, if there is something that makes it clear on what basis so far as the Port is concerned it can have a chance of applying for resource consent, and I'm not suggesting that Judge Jackson's words were the only ones that could achieve that but the important points about it are that it made it essentially clear that there had to be an inability to comply and very strong threshold, the inability to apply before you could even look at it, and that any adverse effects had to be the minimum possible and had to be – he didn't use the words "minimum possible", he used the words "avoid, remedy

or mitigate" and maybe putting them both together is sort of a – but – or one or the other. It doesn't entirely matter. The Court of Appeal read "avoid, remedy or mitigate" as simply meaning that once in you could do what you wanted, and it certainly hadn't been read that way prior to the Court of Appeal decision, and wasn't understood in that way, and I take your Honour's point that in fact that may inf act be a better answer than the minimum possible. Justice Williams, I understood say that is a possibility, and the point about it is that what is, isn't that the answer, that it's got to be effectively no alternative if it's going to go ahead and secondly, it's got to do what it can to remedy any impingement on the values that are protected, and if that is said right at the top, then it gives support a lot of protection further down when it happens, because that means that it can't, there can't be any rules that are inconsistent with that and it has a chance of applying if it needs to. So that was what I wanted to say, thank you.

WILLIAMS J:
Can I just, one of the Messrs Anderson, I don't think we have in any of the bundles of authorities a copy of the RPS. It would be very helpful to have the latest version of the RPS in electronic form please.

MR ANDERSEN QC:
You have parts of it.

WILLIAMS J:
I know, but I want the whole thing.

MR ANDERSEN QC:
Yes, I can organise that with counsel.

WILLIAMS J:
Thank you, and for your own edification section 68 doesn't say rules are binding, it just says they have the effect of regulation. The question if what that means.

MR ANDERSEN QC:

Sorry, yes, well I took that as being binding, yes, so –

WINKELMANN CJ:

Don't regulations bind?

MR ANDERSEN QC:

Yes.

WILLIAMS J:

Well not if the law says you have to have regard to them.

WILLIAM YOUNG J:

There are things in plans other than rules.

WILLIAMS J:

There are, yes.

MR ANDERSEN QC:

Yes. I must admit I took that, as soon as they have the effect of regulations if you don't comply with them then you're effectively in breach of a regulation.

WILLIAMS J:

Interestingly the argument in the East West Link case was that that distinction was irrelevant for the purposes of the consenting process because the NZCPS and the RPS, or the Unitary Plan, also had the effect of law and were binding. The regulation point was irrelevant. But we're stuck with section 104 that says "have regard to these regulations and those instruments".

MR ANDERSEN QC:

Yes.

WILLIAM YOUNG J:

I'm not so sure that it does mean that actually. I think “rules” mean “rules” and they control the uses, the activities which themselves give rise to the criteria that –

WILLIAMS J:

Yes, well that’s plainly the intention. The question is what the words mean.

MR ANDERSEN QC:

But if you think about 104 it only really regulates in any – if you took use is right, permitted uses are absolutely permitted. The controlled uses, basically they’re controlled, they’re permitted but with some controls on them. Then you’d have the two types of discretion, you’d have the restricted discretionary where there’s, the restrictions are quite clear, so once again there’s no policy issues. You have the discretionary, which, in which policy has already been considered in terms of making them discretionary. So the –

WILLIAMS J:

Yes, you don’t need to give us the 101 on 104, we know that.

MR ANDERSEN QC:

Yes, then the non-complying falls out so, the question is whether it really has any particular significance, the words “have regard” because the policies either have been factored in or they can't be contrary to policy.

WILLIAM YOUNG J:

Well if the policy requires, if the upstream policy requires that the activity be no more favoured than non-complying, then the policies bite at section 104D.

MR ANDERSEN QC:

Yes.

WINKELMANN CJ:

Have you finished Mr Andersen?

MR ANDERSEN QC:

Thank you.

WINKELMANN CJ:

Thank you all counsel for that assistance with this matter, and we will obviously take some time to consider our decisions. We will now retire.

COURT ADJOURNS: 4.04 PM