

ORAL LEAVE HEARING

MS GREY:

May it please Your Honours, Ms Grey for the applicants.

WINKELMANN CJ:

Ms Grey.

MS GREY:

Thank you, Ma'am.

MR NATHAN:

Yes, kaiwhakawā tēnā koutou, ko Nathan aho, ki Kuīni māua, ko Galbreath, Brook Waimarama Sanctuary Trust. May it please Your Honours, my name is Nathan. I appear with my friend Mr Galbreath for the first respondent, Brook Waimarama Sanctuary Trust.

WINKELMANN CJ:

Tēnā kōrua.

MR ANDERSON:

E ngā kaiwhakawā o te Kōti Mana Nui, tēnā koutou. Ko Anderson toku ingoa. Kei konei māua ko Pike mo te Kaiwhakahē tuarua. May it please the Court, counsel's name is Anderson. I appear with Ms Pike for the second respondent.

WINKELMANN CJ:

Tēnā kōrua.

MR LINKHORN:

E ngā kaiwhakawā tēnā koutou, ko Craig Linkhorn ahau, kei konei māua, ko Rachael Ennor mo te kaiwhakahē tuatoru, Te Kaunihera o Whakatū. Linkhorn and Ennor for the third respondent, Nelson City Council.

WINKELMANN CJ:

Tēnā kōrua, Mr Linkhorn. So have counsel discussed the conduct of today's leave hearing?

MS GREY:

No, Ma'am.

WINKELMANN CJ:

Right. I understand from the submissions that Mr Linkhorn, you propose simply to adopt the submissions of the second respondent, is that correct?

MR LINKHORN:

We follow the second respondent on the main issue but essentially seek to be extracted from the proceeding by submitting that the freshwater rule issue proposed not be one that's granted leave.

WINKELMANN CJ:

Right, but do you wish to be heard today in the leave hearing?

MS LINKHORN:

On that point, Your Honour.

MR NATHAN:

Similarly, Your Honours, the first respondent is happy to follow the lead of the Crown in relation to the key point regarding section 13 and section 15 of the RMA but does have a short point that I would wish to make which more relates to whether this is a matter of general and public importance.

WINKELMANN CJ:

So, what we propose is that Ms Grey and the Crown have 20 minutes each and then each of the other respondents take a short time to address the particular issues they wish. Does that suit?

MR ANDERSON:

As Your Honour pleases.

WINKELMANN CJ:

And then you would have only a very short period of strictly in reply if you wish to, Ms Grey.

MS GREY:

Yes, Ma'am.

WINKELMANN CJ:

Ms Grey.

MS GREY:

Thank you, Ma'am, and I'm assuming Your Honours have read the submissions filed so I'll just go straight to the three critical points. The first point is the application of section 13(1)(d) of the Resource Management Act 1991 to the intentional or incidental aerial or other deposit of poison baits onto the bed of a river, and it's submitted prima facie, the language of section 13(1)(d) applies to the aerial deposit of poison baits. The High Court found that hazardous substances are not substances. The Court of Appeal disagreed but found that there should not be dual obligations for the same activity.

GLAZEBROOK J:

Can you just perhaps slow down just slightly because it's relative – I know we said 20 minutes but it's better that we understand, sorry.

MS GREY:

Absolutely, Ma'am, I'm sorry. So –

WINKELMANN CJ:

So the High Court said it wasn't?

MS GREY:

It effectively said "A hazardous substance is not a substance for the purpose of section 13" and the Court of Appeal said that it was a substance for the

purposes of section 13 but its reason for declining the application was that it said that there shouldn't be dual obligations for the same activity, and it's respectfully submitted that there's no principle of law that an activity cannot trigger more than one legal obligation. The principle of law is based on the rule of law that Parliament is supreme and if Parliament creates multiple obligations under one Act or under a variety of Acts then all of those obligations must be complied with. It is not for the Court or for the executive to choose which one should be complied with and which ones can be overlooked.

The second point is if there is some principle that one obligation can be preferred and others can be ignored then the legal maxim that must apply to that is the principle of *generalia specialibus non derogant* that the general must yield to the specific and in the case of Part 3 of the Resource Management Act, it's very clear that there are some general obligations in relation to land in section 9 and in relation to discharges in section 15 but there are also some more specific obligations in sections 12 and 13 which relate to the sensitive land-water interface and Parliament has chosen in section 12 to impose additional obligations for the coastal marine area and in section 13, additional obligations for fresh water for the riverbeds where the land meets the fresh water. It is submitted that those provisions, and particularly in this case, section 13(1)(d) is a specific provision that must apply if indeed there is to be a choice of which one section should apply and which should be overlooked.

My third point on section 13(1)(d) is that the purpose of the aerial discharge of poisons is not to dispose of the baits in the air, it's not a disposal of contaminants. The purpose is to spread the baits over the entire treatment area, including water courses in riverbeds, to try to bait and poison rodents and other nominated predators. So this is clearly a section 13(1)(d) matter. The section 15 discharge is simply the method that is used to achieve the section 13(1)(d) purpose.

The fourth point is submitted that there is no evidence that the Minister, in passing his exemption regulations under section 360(1)(h) of the Resource Management Act ever considered the specific situation of discharge to riverbeds. His evidence, and the advice he gave to Cabinet, was all very general advice, and this was despite advice to him that there is a risk of significant adverse effects when poison baits are spread, and that's in the business case that the Ministry was provided with prior to making his decision, and it's despite the warning label on 1080 poison baits, "Deadly poison, harmful to aquatic organisms", and the warning label on brodifacoum poison baits, "Harmful to aquatic organisms and bioaccumulative".

The point I've just mentioned and the final point go to my argument under the lawfulness of the regulations and to the application of section 13(1)(d). The Resource Management (Exemption) Regulations 2017 remove the opportunity to consider amenity effects, site-specific effects, community values, and they remove the opportunity to impose conditions to help avoid, remedy, or mitigate effects, or conditions for cost recovery for monitoring or compliance. In the particular case of the Brook Valley, 44 conditions were imposed by an independent commissioner to help manage, avoid, remedy, mitigate the potential effects of the discharge adjacent to the city, and these included, for example, buffer zones between sensitive adjacent camping ground and farmland, and other requirements for consultation and notification. The conditions were all removed because of the Resource Management (Exemption) Regulations which effectively created permitted activity status for that discharge and so in –

O'REGAN J:

But that's effectively always going to happen when an exemption regulations passes. Is there anything unusual about this situation?

MS GREY:

What's unusual, Sir, is it doesn't achieve sustainable management. Those conditions were imposed for the purpose of avoiding the remedy of mitigating the effects after a Commissioner heard on the specifics of this case.

So this case is a very good example to highlight that the exemption regulations, at least in some situations, don't achieve the purposes of the Resource Management Act and, indeed, in the terms of other decisions are repugnant to that Act.

WINKELMANN CJ:

Can I just take you back to your earlier submission in relation to how sections 13 and 15 relate? How do you say your submission fits with the ability under section 360(1)(h) to pass regulations exempting activities from the provisions of section 15 which explicitly relates to, it goes to say explicitly the discharge of contaminants, "In relation to any area of land, air, or water specified in the regulations"?

MS GREY:

I think section 360(1)(h) can only provide exemptions from section 15 of the Act and not section 13, because that's what's stated in that section. But further, if a responsible Minister is considering passing regulations under that section the responsible Minister does have constraints on their powers, they must act lawfully, reasonably and fairly. A contaminant can include, for example, warm water, and there may be very good reasons why a Minister may wish to exempt warm water from going through a resource management process if some new issue arose. But if you think about it, the discharge of a deadly poison and deadly poison baits into water courses and onto land in circumstances where they're known to kill the very wildlife that's to be protected is an extremely, well, an extreme use of section 360(1)(h), and my submission is that although the Minister does have powers it is outside of the Minister's powers and unreasonable to create such a broad exemption.

WINKELMANN CJ:

So I'm just struggling to see what the gap is between section 15 and 13, between discharge, exempting people from any requirements in relation to discharge of contaminants into water and restrictions on deposits into water. What's the gap?

MS GREY:

Yes, and a deposit is a subset of a discharge by definition under the Act. But what's different is section 13, like section 12, relates to sensitive locations where Parliament has chosen to give additional protection. And so although a Minister may be entitled to give some general exemption regulations, he can't be assumed to have acted lawfully or reasonably in exempting – he's given the widest possible exemption, purported to give a complete exemption from the entirety of section 15 for a deadly poison which is the most toxic category of substance that we've got in absolutely any circumstance, including section 12 and 13, which are the sensitive interfaces, and my submission is that although section 360(1)(h) does give the Minister powers under section 15 it could never have been intended by Parliament to create such a broad exemption for such a sensitive location for such a toxic substance.

GLAZEBROOK J:

There seems to be a double argument, it's nothing to do – well, perhaps I should ask you. Are you saying that it couldn't even have been done as an exemption under section 15 even if there was a – and that is because, you say, what?

MS GREY:

Because the hierarchy of the RMA requires sustainable management, Part 2 has the mandatory considerations to achieve sustainable management, Part 3 has the duties and obligations, the whole structure of the Act.

GLAZEBROOK J:

So the argument is that the regulation-making power has to cede to the general powers that are the beginning of the Act, is that...

MS GREY:

Yes, that's correct, Ma'am. And the Supreme Court has said that in the *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 case, that there is –

GLAZEBROOK J:

Yes, I was checking that.

O'REGAN J:

So there are two different arguments...

GLAZEBROOK J:

Yes.

O'REGAN J:

One is the exemption couldn't work to exempt from section 13 and the other is the exemption was just an invalid use of the power anyway?

MS GREY:

Yes, exactly, Sir, thank you. Just while I'm dealing with section 13, I can just cover off the Council's Freshwater Rule 9.3 because what happened in the Brook Valley case, the application for resource consent never addressed section 13(1)(d) and it never addressed Freshwater Rule 9.3 of the Nelson plan which says it's a prohibited activity to discharge a waste, radioactive, or toxic substance to the bed of a river, and my submission is that's a very sensible provision for a plan to say. That wasn't considered at all in the resource consent. The application of section 13(1)(d) and rule 9.3 of the Nelson plan came up when counsel got involved advising the Brook Valley after the exemption regulations came into play and that's when those issues came up. Because of the way the Court of Appeal hearing went and the Court found that section 13(1)(d) didn't apply, the logical conclusion from that was that rule 9.3 didn't apply either and so we didn't have ready argument about that.

I accept that the public interest in rule 9.3 itself is less than the public interest in the application of section 13(1)(d) because that's a matter of national interest, clearly. We have a massive aerial poisoning programme going on in New Zealand at the moment and planned for the future with some significant levels of public concern which has resulted in a national hīkoi throughout the

country and numerous protests and DOC says numerous threats to it. There is considerable interest in the best way of achieving protection of our native birds because everybody, of course, wants the same thing, it's just how best to achieve that. But my submission is although the Minister had his policy of wanting a predator-free 2050 strategy, that is a policy, it's not a law, and the law must prevail.

O'REGAN J:

But you accept that rule 9.3 only comes into play if the Court of Appeal was wrong about certain...

MS GREY:

Yes, that's accepted, Sir, and it's accepted that if the Court of Appeal was wrong and section 13(1)(d) does apply then the very clear language in Freshwater Rule 9.3 is that it would be a prohibited activity to then discharge poison baits onto the bed of the river, and this is a water catchment area, it's the maps that were in evidence in the Court of Appeal, it's just interlaced with streams.

WINKELMANN CJ:

So can I just get this straight, are you saying that there is a difference between the water that's regulated under section 13 and the water that's regulated under section 15? Because you say that section 13 deals with particularly special places?

MS GREY:

Yes. I say, Ma'am, that section 15 deals with any discharges, whether to air, to water, to land, or to land and then to water, whereas section 13 deals with the particular land-freshwater interface which, in my submission, Parliament has identified that interface as a particularly sensitive location because it deals generally with land in s 9 of the RMA but it's imposed additional protections for beds of rivers, and equally for the coastal marine area and land interface in section 12, it's created very similar, slightly different wording, but very similar protections.

GLAZEBROOK J:

How would there ever be a regulation under section 15, then?

MS GREY:

Well, my submission is that there could be a regulation under section 360(1)(h).

GLAZEBROOK J:

Is it 360 for section 15, an exemption from section –

MS GREY:

There could be a regulation – there could be, but not –

GLAZEBROOK J:

Well, how? If it's just land, is it?

MS GREY:

It could be if it was just land, or it could be if it was a very insignificant-type effect.

WINKELMANN CJ:

A dam or a pond or – no, not a pond.

MS GREY:

And the background to section 360(1)(h), I've learned from my friends, was actually to comply with an international treaty obligation for a very specific purpose. It was never intended as a significant component of the RMA. The provisions in the RMA that deal with national environment standards have got a whole code for public consultation and for assessing adverse effects and for modifying those and imposing conditions and constraints and indeed, that's what the Minister normally has done in relation to electromagnetic radiation and telecommunications and a whole range of other discharges and other adverse effects where he's wished to create a separate code but because of the advice that he got from the Government departments was that

there may be significant adverse effects from the aerial discharge of poison, he could not proceed with that. He was advised there would be legal risk of trying to proceed with a national environment standard so he's tried to find a shortcut.

And my submission is that although section 13(1)(h) is broad language, it would be wholly inconsistent with the purposes of the RMA to just have a statutory code for national environment standards which must meet these criteria of no significant adverse effects and public consultation and all the processes that go with that, and then on the other hand, if the Minister can't meet those, he can just slip out the side and pass regulations that have got no constraints, no checks and balances, and no protections for the community.

Just on the public interest point, my friends say there's no public interest. My submission is that there's considerable public interest, both in the discharge of poisons to our environment and to our water courses, and we have the freshwater management strategy to try and protect our fresh water, we have a considerable public awareness of the long-term effects of pollution and of the concerns about ecocide, but there's also significant constitutional concerns and I just remind Your Honours of the triangle we learn at law school, the separation of powers, with the legislature whose role is to make the law, the executive whose role on the bottom left is to implement the law, and judiciary whose role is to interpret the law.

In my submission, what we have here, section 13(1)(d), the legislature has passed the law and unfortunately, the Court of Appeal has overlooked that law or read that law down to not apply but my submission is that it is a constitutional point on the rule of law and Parliamentary supremacy. In relation to the Resource Management (Exemption) Regulations, if we look at the same triangle, in this case, it's the relationship between the legislature and the executive and my submission is that the executive has exceeded its powers by passing regulations that are inconsistent with the statutory code.

And on my other point, the other third matter that's before the Court that I haven't addressed yet, the principle for imposing costs, the judiciary has a very important role in managing checks and balances on executive powers. If members of the public cannot access justice, if they cannot afford to come to Court or they fear their entity will be wound up by costs that they cannot pay when you're trying to raise a matter of public interest, the judiciary cannot engage in their role and the executive effectively get the freedom to operate as they see fit without the constitutional checks and balances on power.

And so although in this case it's accepted that the lower courts have made decisions on the case, my submission is that it's very important to look beyond the principles of imposing costs and look to the administration of justice in the higher-level type issues when considering costs, particularly in public interest cases which are challenging the exercise of executive powers, and where there's a use of a public resource.

WINKELMANN CJ:

Thank you.

MS GREY:

Thank you, Ma'am.

WINKELMANN CJ:

Mr Anderson.

MR ANDERSON:

Your Honours, the use of poison for predator control is a matter that evokes strong reactions among members of the public. It is, at least in that sense, controversial. It is undoubtedly important that this activity is conducted and regulated lawfully. The essence of this case is whether the exemption regulations here provided authority for the drops of brodifacoum that were carried out in accordance with their terms. Both the High Court and the Court of Appeal held that those discharges of brodifacoum at issue were authorised by law.

The Minister for the Environment, the second respondent, opposes the appeal here on the basis that there is no realistic prospect of different findings being made on appeal. The relationship between sections 13 and 15 of the Resource Management Act and, in turn, the exemption regulations, is sufficiently clear as a matter of statutory interpretation and practice. The exemption regulations themselves fall squarely within their empowering provision and they were made for an environmental purpose that's consistent with the Resource Management Act. The issue of costs and the concession applied by the Courts is, in the Minister's submission, a fact-specific inquiry that would not justify the grant of leave. So the submission for the Minister is the Court should exercise its discretion not to grant leave in these particular circumstances.

Your Honours, I turn to address the interface or the interplay between sections 13 and 15 of the RMA first, as it's the matter that the Court's expressed an interest in its minute. Both Courts, both the High Court and the Court of Appeal, essentially reached the same ultimate conclusion regarding that interplay, namely that section 13(1)(d) would only require consent for deposits that do not occur as part of the discharge for which consent may be granted under section 15. As the Court of Appeal put it, "If the deposit is an inherent part of a section 15 discharge it must be concluded that consent under section 15 authorise the deposit." The issue is one of statutory interpretation. The Court of Appeal undertook an orthodox analysis of sections 13 and 15 in the context of Part 3 of the Act and in the context of the Act as a whole and concluded that separate consents were not required for the same aspect of the same overall activity, and I think that's an important point that the Court made. It wasn't saying the same activity per se couldn't require multiple consents, and the Court referred to a dairy factory as an example of a programme, an activity that would require multiple consents, land use consents, water take, discharge to air, water, land, but the same aspect of the same activity. And both Courts concluded, having reviewed those provisions in the round and in their particular contexts, that those

provisions in Part 3 are meant to complement one another rather than create duplicate and parallel processes.

The Court of Appeal was fortified in its conclusion in that respect by the extended definition of “discharge”. A discharge includes, “To emit, to deposit, to allow to escape,” it very clearly deals with both solid forms, liquid forms, gaseous forms. The “allow to escape” makes clear that it covers unintentional discharges as well as intentional discharges. But the point that the Court made was that if a deposit is part of a discharge and “discharge” is defined to include “deposit”, surely a discharge permit under section 15 would – and the words used would necessarily embrace any eventual deposit of the contaminant on the bed of a river if that is where it came to rest – and that would be considered as one of the environmental effects under section 15 in granting a discharge permit and I will come to that specifically.

But if you are authorised to make a discharge to water or land, or land where the contaminant may ultimately end up entering water, it must be anticipated that a deposit of contaminant could result, it’s a matter of physics, gravity, that the ultimate contaminant could end up on the land, on the bed of a river, even in fact, if the contaminant was on the top of a water surface it could end up on the bed of a river, bearing in mind that “bed” is defined to include, in relation to a river, the area where the water is at its fullest point without over-topping its banks.

Section 15 is very clearly the governing provision when it comes to the discharge of contaminants. There is a specific and restrictive regime relating to contaminants. In a discharge of vertebrate toxic agents in accordance with these regulations it’s hard to think of a more prototypical discharge of contaminants than this.

WINKELMANN CJ:

Can I just ask you what you make of the difference between the foot, the sock, of section 15(1) and that of section 13(1)? Because section 15(1) includes, “Or other regulations,” but section 13(1) doesn’t.

MR ANDERSON:

Yes, Your Honour. In terms of 15(1) it does refer to, "Or other regulations," and my submission with regards to that is that it must be regulations under section 360(1)(h), in fact they are the only ones that can relate to that particular aspect. Section 13 refers to NES's rules or resource consents, it doesn't refer to regulations. The reason for that, Your Honour, is, in my submission, that it doesn't need to, because in section 15 you govern squarely contaminants and the discharge of contaminants, including the deposits, and if you are exempted from that requirement the flip side of that coin is that you can undertake that activity and should, as a result, a deposit occur on the bed of a lake or a river it is captured by section 15 in that consenting regime.

GLAZEBROOK J:

Same question as Ms Grey, when does section 13 apply then? Because you say you don't actually need a section 13.

MR ANDERSON:

So section 13 I think – and this is a point I was about to come to in terms of what section 13's really about – if one looks at section 13 it's about the beds of lakes or rivers, it's not about the fresh water flowing over it. So my learned friend, Ms Grey, has referred to the freshwater land interface, which certainly a lot of beds are, although beds are also and rivers are defined to include continually or intermittently flowing streams, it may well be a dry bed, but it's concerned with the land underpinning the water, it's not concerned with the water. When one looks at section 13 itself –

GLAZEBROOK J:

I think that's a bit ridiculous, because it's not going to deposit there and stay there unless it's, well, possibly unless it's led, but even then I'm not sure because it will seep into the river. I mean, why are you so concerned about the beds of rivers then? It must be because of the water aspect to it.

MR ANDERSON:

The water flow aspect to it. So if one looks at the –

GLAZEBROOK J:

Well, but you've just said it's not relevant, it's the deposit that's relevant.

MR ANDERSON:

Well, I said it's not concerned about contamination I should say, Your Honour, contamination of the water that's squarely a section 15 issue. I apologise.

GLAZEBROOK J:

All right, yes, I understand that submission. Sorry, I was...

MR ANDERSON:

But I think –

GLAZEBROOK J:

Although it must be, mustn't it? I mean, it must be concerned about contamination of the river, if you're not allowed to deposit something. It could be concerned with unblocking the flow I suppose but...

MR ANDERSON:

Well, when one looks at the section 13(1) and the provisions, and this is something that the High Court made more of than the Court of Appeal was that those matters do appear to relate to disturbance.

GLAZEBROOK J:

All right. So more a disturbance then.

MR ANDERSON:

More a disturbance issue, Your Honour, yes. But just turning back to the section 15 issue, a key point that is made for the second respondent here is that, and the Court of Appeal accepted, is that requiring dual consents would not result in any additional environmental protection. In fact there are more stringent consenting requirements provided for in discharge permits. So in my –

GLAZEBROOK J:

Well, that might be the case, but wouldn't the argument be that you actually can't have an exemption by regulation under section 13 so that in fact it would provide additional protections? Because 360 only allows you to exempt from 15. I mean, obviously if you're looking at two consents that might be the case but if you get an exemption then section 13, where it is explicitly not included as an exemption, you would in fact get additional protections. And so you have to say, well, it wasn't intended that be the case, that somehow Parliament might have overlooked section 13 when it said you could have that exemption.

MR ANDERSON:

My argument, Your Honour, is that when Parliament was concerned with contamination and the discharge of contaminants to water, including any resulting deposit, section 15 was the provision that provided for that and the provisions –

GLAZEBROOK J:

Look, I understand that but...

MR ANDERSON:

Yes, but I take the point about the exemption regulations, they do take away the need for a consent under section 15. But the point I was just making, if we take the regulations out of play and we're looking at the relationship between the two –

GLAZEBROOK J:

Certainly, I agree.

MR ANDERSON:

And on that point my argument is that there is no gap essentially for section 13 to fill. With regards to the making of the regulations, the executive here has determined that the use of these three specific vertebrate-toxic agents, which are some of the most heavily regulated substances available,

and importantly, in accordance with the regulations and the other regulatory constraints that apply, is of sufficiently minor effect to justify their exemption from section 15.

So this isn't a case where consideration hasn't been given to the prospect of these contaminants ending up in water. In fact, if one looks at the exemption regulations themselves, the exemption that we're talking about here with brodifacoum, it very clearly focuses on discharges to air, land, or water, and uses those words specifically. So it's not a case of the executive having overlooked that possibility. A very clear process or a very detailed process was gone through commencing with the Parliamentary Commissioner for the Environment's report on the use of 1080 and other poisons. A business case was then built up to consider whether the regulatory constraints under other regimes was such that an exemption could reasonably be granted, and after considering that report and weighing the necessary considerations, the Executive Council passed those regulations to exempt these limited types of discharges.

With regards to brodifacoum, it's very important to recognise that we're talking about deposits or discharges in either offshore islands or in this particular case, within a fenced sanctuary within New Zealand, so a good example in Wellington is Zealandia which has a very similar fenced structure, in fact, it's the exact same type of fence constructor as in the Nelson example. But it is limited to particular areas.

That actually brings me to my submissions on the exemption regulations and their lawfulness themselves because the regulations, Your Honours, are squarely within their empowering provision and they represent a rational response to what are existential threats to New Zealand's native flora and fauna caused by introduced predators. As both Courts below recognised, the scope of section 360(1)(h) is very broad.

GLAZEBROOK J:

But is that right in the context of the Act? So you would, I think, have to meet Ms Grey's point that they have to fit within, nevertheless, the overall provisions at the beginning of the Act.

MR ANDERSON:

In part 2, Your Honour, absolutely, and the *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 case is the classic example of a discretionary power that must be exercised in accordance with the purpose of the Act, and that was something that has been confronted and has been dealt with both in the High Court and the Court of Appeal. But dealing first with the scope of the provision, my submission, Your Honour, is that while the scope of that provision is broad, the exercise here in relation to these regulations is actually a very tailored and limited exercise of the power. It is not a situation which you're in any way pushing against the four corners of the empowering provision. You're well within that provision.

But to turn to Your Honours' point about the aims or the purpose of the Act, the regulations to further the aims of the Act and represent a legitimate policy choice, so my learned friend referred to the *King Salmon* case which I understand Your Honour presided on. That is a situation where the New Zealand Coastal Policy Statement makes policy choices that then flow down through the hierarchy. In this particular case, the High Court and Court of Appeal held that the purpose of the regulations here to protect New Zealand's native flora and fauna from introduced predators was consistent with the RMA's sustainable management purpose and its supporting principles.

Allegations of improper purpose by the Ministry and a failure to consider mandatory relevant considerations were squarely considered and rejected by both Courts on the facts of the case.

To sum up on the validity of the regulations, the Resource Management Act is not a no-risk regime. The regulations are not invalid because they could have

some effects on the environment but provided the regulations and their conditions, and the other regulatory constraints are complied with, the adverse effects on the environment will be no more than minor. The regulations themselves do not leave vertebrate-toxic agents unregulated. The Hazardous Substances and New Organisms Act 1996 and regulations under that Act apply, as does the Agricultural Compounds and Veterinary Medicines Act 1997 and the Health Act 1956. Those provisions apply and were considered when the regulations were made in coming to the conclusion that the discharge of these type of contaminants is sufficiently regulated under other means such that an exemption is warranted if these conditions are complied with.

Your Honours, just touching briefly on the costs appeal, the submission for the second respondent is that the decision on costs was squarely in line with the precedent. The extent of a concession for a public interest case applied here. A 10% concession was applied by the presiding judge, having viewed the conduct of the litigation before him. That is inherently a fact-specific enquiry and I would submit that the costs appeal is not something that justifies a grant of leave.

WINKELMANN CJ:

Thank you.

MR ANDERSON:

E te Kōti Mana Nui, anei aku tāpaetanga mo te Kaiwhakahē tuarua. May it please the Court, those are the submissions for the second respondent.

WINKELMANN CJ:

Thank you, Mr Anderson. Mr Nathan.

MR NATHAN:

Your Honours, the point that I wish to make was particularly in relation to the question of this case having general public importance and it ties really to what my friend Ms Grey has said in her submissions about this being a

massive aerial poisoning programme, there being a national hīkoi and that DOC were saying it proceeded to threats in relation to it. Those things may well all be true but they don't bear any connection to this case. It's difficult to see the general or public importance given that this drop of brodifacoum has occurred, hugely successfully, I should add, about 18 months ago.

The appellant is not an organisation with a national presence. It has held itself out as being interested in the local, that is, the Nelson community, and more particularly, the community in the Brook Valley. Its aims and objects are to help ensure the security and safety of our amenities and infrastructure, accessways, parks, parking, drainage, streetscape, walking, cycling, et cetera. It's to provide a point of contact for members with concerns, issues about amenity or infrastructure, and lastly, to provide a point of contact for the Nelson City Council or other agencies to consult with, and to respond to, local concerns and initiatives.

O'REGAN J:

But we're concerned with the issue, not with the appellant, aren't we?

MR NATHAN:

Yes, I understand that, Your Honour, but in my submission, it's relevant to the issue if the appellant in fact has no connection with that issue. This is purely hypothetical for both the appellant and actually all of the –

WINKELMANN CJ:

Well, I mean, no, that's not correct, because the point the appellant is making is to do with the development of the law and that is the critical issue that we're concerned with. So whether or not the appellant's a national body doesn't help you in your submissions. So was there any other point you wished to make?

MR NATHAN:

Simply to emphasise that the submission around the massive aerial poisoning programme again overlooks that the regulations specifically require the

brodifacoum – the restrictions around brodifacoum are fenced sanctuaries and offshore islands so it isn't a massive aerial poisoning programme.

Then lastly, just in relation to the question of costs, that Your Honour simply note that the first respondent agrees that the appropriate discount was made in the Court's below in relation to the costs awards and notes that other security of the costs in the Court of Appeal none of those costs have been paid. So while I accept that the importance of access to justice for organisations like the appellant, that's not the same as saying that that access to justice should be risk-free.

Those are my submissions, unless you have any other questions.

WINKELMANN CJ:

Thank you. Mr Linkhorn.

MR LINKHORN:

I just want to very briefly address the Court on the hierarchy of issues and the reasons why the third respondent submits that the freshwater rule proposed issue is just too peripheral. The third respondent otherwise supports the second respondent.

The issues seems to fall out as being the allegation that the regulations are invalid, so that they don't give an exemption from section 15. Secondly, that if the applicant is wrong on that and the regs are valid to address the section 15 restrictions then section 13(1)(d) is in play, so that the regs alone aren't the whole answer. And if the appellant is wrong on that also the appellant then reaches for the Nelson Regional Management Plan, Resource Management Plan, to say that there's an express prohibition in Freshwater Rule 9.3 of that plan on placing toxic material in beds and banks of rivers, so the drop shouldn't haven't occurred because it would have that effect. And the third respondent says that even if the Court were to conclude that the second issue, the interface between sections 13 and 15 justified leave to appeal, this

third issue is just too peripheral to justify leave as a matter of general or public importance.

WINKELMANN CJ:

I thought that Ms Grey conceded that the issue only arose if the Court of Appeal was wrong?

MR LINKHORN:

Yes, and I made a note about it being a consequential issue, and that was an agreed position before the Court of Appeal. But I didn't take from her submission this morning that she was abandoning it as a point to bring into this Court if possible, and if so I don't need to say anything further of course.

GLAZEBROOK J:

But isn't it a necessary – it would necessarily fall out of that, wouldn't it, if the regulations weren't valid and the interface came, wouldn't it necessarily fall of that, so doesn't it have to be here?

MR LINKHORN:

That's the debate, with respect, Your Honour –

GLAZEBROOK J:

Well, why wouldn't it have to be here if...

MR LINKHORN:

– in the sense that it could be in. But we submit that it's possible for this Court to draw a line and say –

GLAZEBROOK J:

But why would we do that if we were going to grant leave, and if we found on the first two points why wouldn't the third point necessarily arise.

MR LINKHORN:

That's certainly a tenable way through, Your Honour, of course, but –

GLAZEBROOK J:

Well, what we do otherwise, say the first two apply, and then what?

MR LINKHORN:

The reasons why, Your Honour, are that no relief is sought from this Court about the rule and the plan, it's not listed, Freshwater Rule 9.3 is not listed in the points of law that the intending, appellant want to argue before you, if you see para 22 of the submissions in support.

GLAZEBROOK J:

Well, do you say it wouldn't apply?

MR LINKHORN:

It could come back into issue, Your Honour...

GLAZEBROOK J:

No, no, but is your argument that it doesn't apply?

MR LINKHORN:

Yes, that's correct, in that the applicant today asserts that it arises as a third issue and in the High Court His Honour Justice Churchman reasoned through that and said why it didn't apply on the basis of submissions made by Nelson City then, and that reasoning is not grappled with, with respect, in the applicant's submissions before the Court today.

WINKELMANN CJ:

Is your submission simply that it's not an issue for this Court because this Court would simply be concerned with the ability of the regulations and the relationship between section 15 and 13?

MR LINKHORN:

Yes, Your Honour.

WINKELMANN CJ:

Not the consequence of that?

MR LINKHORN:

Yes, Your Honour.

GLAZEBROOK J:

But do you say it doesn't apply?

MR LINKHORN:

Yes, it was –

GLAZEBROOK J:

It's your submission that that rule doesn't apply?

O'REGAN J:

Well, you've got a High Court decision saying that.

MR LINKHORN:

That's right, Your Honour.

O'REGAN J:

So doesn't Ms Grey have to have the opportunity to try and get that set aside, if we find for her on all the other issues?

MR LINKHORN:

Well, the reason for me standing here today right now is because we note that it's put in the points for which leave is sought but it's not developed at all.

O'REGAN J:

But this is only a leave stage.

MR LINKHORN:

And if leave is granted on the second issue and it's necessarily consequential in Your Honours' opinion, then of course I can't take the point further.

O'REGAN J:

Well, I think that the problem would be if we gave leave and the applicant succeeded in the appeal, they'd still be facing the fact there's a High Court decision saying Rule 9.3 doesn't apply, which the Council would be bound by, wouldn't it?

MR LINKHORN:

Correct, Sir. The poison drop has occurred, no further drop is proposed. The plan is an instrument that exists from time to time and is of course reviewed and varied from time to time equally. But I take Your Honour's point.

WINKELMANN CJ:

So the Court of Appeal's finding was that it didn't apply because section 13(1)(d) didn't apply, so it was bound up in its finding about the relationship between the two?

MR LINKHORN:

So they said it didn't arise, Your Honour.

O'REGAN J:

They effectively didn't get to this issue.

WINKELMANN CJ:

Yes.

MR LINKHORN:

They didn't get to it. The High Court did, at 74 to 75 of its decision, and reasoned through it, and we say, with respect, that's what Ms Grey hasn't grappled with today, beyond raising it.

O'REGAN J:

But I don't think she really, she doesn't really have to at the leave stage though. I mean, if it's a consequential issue arising out of the main issue

about section 13 and 15 interface then for my part it seems to me it's just part of the mix that we would have to address on the appeal.

MR LINKHORN:

I can't take that issue further, Your Honours.

O'REGAN J:

And we would have to hear from you, yes.

MR LINKHORN:

Those are the submissions for the third respondent, thank you.

WINKELMANN CJ:

Thank you, Mr Linkhorn. Right, Ms Grey, just briefly.

MS GREY:

Thank you, Your Honours. I don't think there's much I need to address in reply unless there's any matters Your Honours are particularly interested in. Just a couple of very quick points. The Parliamentary Commissioner for the Environment did not recommend that brodifacoum be included in any exemption regulations. The Parliamentary Commissioner said that brodifacoum was cruel and it was bioaccumulative and that the inclusion of brodifacoum was a matter that the Minister himself came up with after the event. And my friend has said there are plenty of other regulatory controls, experience, and my client has shown that although there are laws there's no enforcement of those laws and that is the serious problem for the communities because at least under the Resource Management Act they have an opportunity to be involved in what the controls should be that are site-specific and that take into account the amenity values and that take into account their own community values and which enable the Council, as a regulatory authority, to put conditions in to cost recover for monitoring and enforcement. The experience has shown that if there's no cost recovery for monitoring and enforcement the laws do not get enforced.

I think Your Honours seem to have a good understanding of the other issues that have been raised but I'm happy to answer any questions if you have any.

WINKELMANN CJ:

Thank you, Ms Grey. Thank you, counsel. We'll take some time to consider this decision and deal with it in the usual way.

COURT ADJOURNS: 12.28 PM