

## Have the Goal Posts Shifted? Implications of the Supreme Court King Salmon Decision.

### Introduction

The purpose of the RMA is to achieve "sustainable management". In general terms the Courts have determined whether this purpose is met by taking an overall judgment approach to the economic benefits and environmental effects of a plan or consent proposal. New Zealand's highest Court has now shed doubt on the appropriateness of an overall judgment, preferring an approach that applies a strict interpretation of planning documents, when they are worded in prescriptive terms.

On 17 April 2014 the New Zealand Supreme Court released its decisions on two appeals in relation to New Zealand King Salmon's ("King Salmon") proposals to establish salmon farms in the Marlborough Sounds. The decision on Environmental Defence Society Inc ("EDS") appeal will have a direct effect on decisions made on district and regional plans, fundamentally changing the approach away from an "overall judgment" to a more specific disciplined focus. The Supreme Court decision's influence on resource consent decision making is yet to be determined.

The decision will affect the manner in which the New Zealand Coastal Policy Statement (NZCPS), and potentially other National Policy Statements (NPS), are applied in relation to Part 2 of the RMA. The decision finds that decision makers need not turn to Part 2 at all, when considering the making or changing of a plan within the scope of the NZCPS. Whether or not this reasoning applies to other NPS is likely to depend on the particular drafting of that NPS and the circumstances in a particular case.

The decision is significant for the findings it makes in respect of the application of an overall judgment, and environmental bottom lines.

In respect of the overall judgment, the Supreme Court narrows its application in two respects. Firstly, as noted above, decision makers are not to turn to Part 2 (nor do an overall judgment pursuant to it) when making decisions on plans that are on matters fully addressed by the NZCPS. Secondly, when interpreting the NZCPS itself, which was found to be carefully drafted, an overall judgment should not be resorted to, unless there is a very clear conflict between provisions, and no guidance as to the relative weight to be applied.

In respect of environmental bottom lines, the Supreme Court found that while section 5 is open textured and sets the RMA's overall objective, there is a "protective element" to the concept of sustainable management. As such it is legitimate for an instrument such as the NZCPS to give effect to that protective element by setting environmental bottom lines.

In the end, the Court considered that the Board should not have considered King Salmon's proposal using the overall broad judgment but should have dealt with the application in terms of the NZCPS, saying that "*given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted.*"<sup>1</sup> The appeal was allowed with the Court deciding that the Papatua plan change did not give effect to the NZCPS.<sup>2</sup>

### Background

The basis of these proceedings began when King Salmon proposed to establish and operate nine additional salmon farms to the six it already operated in the Marlborough Sounds. At eight of the proposed sites King Salmon sought, by way of plan change, to change the current activity status of marine farming from prohibited to discretionary, and lodged concurrent resource consent applications. The other site, White Horse Rock, was not within an existing prohibited activity status area and resource consent only was sought for this site as a discretionary activity.

---

<sup>1</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] [153]

<sup>2</sup> *Ibid* [174]

King Salmon applied directly to the Board of Inquiry ("Board") after various avenues were explored through council and the Environment Court.<sup>3</sup> The Board found that part of the proposal was contrary to policies in the NZCPS.<sup>4</sup> Despite that finding the Board approved some of those plan change applications<sup>5</sup> because, under their overall broad judgment pursuant to Part 2 of the RMA, the proposal achieved the RMA's purpose.<sup>6</sup> Ultimately the Board approved four of the eight plan changes and granted resource consent for those sites and declined the White Horse Rock resource consent application.<sup>7</sup>

The Board's decision was appealed to the High Court by Sustain Our Sounds ("SOS") and EDS. This summary focuses only on the EDS appeal. EDS was opposed to the salmon farms' location in an outstanding landscape and natural landscape area. EDS argued that the Board had misapplied the NZCPS and that the Board did not consider alternatives in relation to the Papatua and Waitata sites. The High Court dismissed the appeal.<sup>8</sup>

EDS sought and received leave to appeal directly to the Supreme Court.<sup>9</sup> The Supreme Court considered:

- Whether the NZCPS has standards or policies which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, did the Papatua Plan Change comply with s67(3)(b) RMA because it did not give effect to NZCPS Policies 13 and 15;
- Whether the Board gave effect to the NZCPS in coming to a balanced judgment; and
- Was the Board obliged to consider alternative sites when a plan change is located in an outstanding natural landscape or outstanding natural character area?

## Key rulings

### Relationship between Part 2 and requirement to "give effect to" the NZCPS

The Supreme Court placed a great deal of weight on the fact that the statutory purpose of the NZCPS is to state policies in order to achieve the RMA's purpose.<sup>10</sup> As such " *in principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and **there is no need to refer back to the part when determining a plan change.**"*<sup>11</sup> (emphasis added) The Court was very clear on this point. For example, it further stated " *we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be part 2 and not the NZCPS.*"<sup>12</sup> And further:

*"National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment."*<sup>13</sup>

It is helpful to consider these statements in respect of the relevance of Part 2 alongside the Supreme Court's findings of what the requirement to "give effect to" the NZCPS entails. The Court confirmed previous case law that it provides a " *strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement...A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.*"<sup>14</sup>

The impact of these statements is that the NZCPS and potentially other NPS are not to be interpreted as subject to an overall judgment under Part 2, when it comes to decisions on plans. The Court identified 3 caveats when a council would be justified in referring back to Part 2:

<sup>3</sup> *Pelorus Wildlife Sanctuaries Ltd v Marlborough DC* [2011] NZEnvC 20

<sup>4</sup> Final Report and Decision of the Board of Inquiry into the NZ King Salmon Proposal, at [777], [789], [1236] and [1250]

<sup>5</sup> *ibid*, page 373

<sup>6</sup> *Ibid* at [1185] and [1227]

<sup>7</sup> *ibid*, page 373

<sup>8</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2013] NZRMA 371 (HC)

<sup>9</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZSC [101]

<sup>10</sup> Section 56 RMA, *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZSC [85]

<sup>11</sup> *Ibid.*,

<sup>12</sup> *ibid* [86 (a)]

<sup>13</sup> *ibid* [86 (b)]

<sup>14</sup> *Ibid* [80]

- If any part or the whole of the NZCPS was asserted to be invalid that issue would need to be resolved before it could be determined whether there was a requirement to give effect to it.
- If the NZCPS did not provide complete coverage of the matter concerned, a decision maker may have to consider whether Part 2 provides assistance in dealing with the matters not covered.
- If there is uncertainty of meaning of provisions, reference to Part 2 may be justified to assist in a "purposive interpretation".<sup>15</sup>

And in conclusion:

*"For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.<sup>16</sup> ...The requirement to "give effect to" the NZCPS is intended to constrain decision makers."<sup>17</sup>*

### **Overall broad judgment**

The findings summarised above in respect of the relationship between Part 2 generally and the NZCPS is one area in which the application of the overall broad judgement approach is narrowed by the Supreme Court.

There is a second context in which the Court also made significant statements on the concept of an overall broad judgment. In the context of the NZCPS, the Court took care to observe the apparent careful and deliberately different drafting of the various objectives and policies, with some being prescriptive, and others allowing flexibility. The Court found that in the context of such deliberate drafting, an overall judgment of the NZCPS's provisions would minimise the significance of those differences.<sup>18</sup> When taking into account the careful choice between prescriptive and flexible policies the Court considered there would be only infrequent occurrences of provisions pulling in different directions with no assistance given as to which should be given more weight. It should only be after this careful analysis is undertaken that section 5 can be turned to assist in resolving a narrow conflict. The Court repeated that "s 5 should not be treated as the primary operative decision-making provision"<sup>19</sup> but instead advised that a "thoroughgoing attempt to reconcile"<sup>20</sup> conflicting provisions should be undertaken.

Other reasons given for rejecting the overall judgment approach in relation to the NZCPS included the fact the approach creates uncertainty<sup>21</sup>, and the fact that the NZCPS was the product of an elaborate and involved process prescribed in the Act which would really be unjustified if it was ultimately to be read down as just a list of relevant factors.<sup>22</sup>

### **Environmental bottom lines**

The Court noted the desirability for certainty and stated that "*If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes.*"<sup>23</sup> The Court accepted that section 5 is "open textured" and sets out the "RMA's overall objective". Far from assuming that documents such as the NZCPS are similarly "open textured", such documents give substance to the words of Part 2 and reflect considered choices. The Court was clear that environmental protection is an essential and legitimate element of the concept of sustainable management, fully entitled to impose environmental bottom lines.<sup>24</sup>

The Supreme Court considered that policies 13(1)(a),(b) and 15(a),(b), provided a bottom line by requiring that adverse effects, or significant adverse effects be avoided.<sup>25</sup> In discussing the meaning of the word "avoid" the Court stated "*...we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence*

---

<sup>15</sup>ibid [88]

<sup>16</sup> ibid [90]

<sup>17</sup> ibid [91]

<sup>18</sup> Ibid [127]

<sup>19</sup> Ibid [130]

<sup>20</sup> Ibid [131]

<sup>21</sup> Ibid [137]

<sup>22</sup> Ibid [136]

<sup>23</sup> Ibid [137]

<sup>24</sup> Ibid [151 – 152]

<sup>25</sup> Ibid [132]

of<sup>26</sup>...Under the "overall judgment" approach a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force".<sup>27</sup> The Supreme Court considered that setting bottom lines is "consistent with the definition of sustainable management," consistent with the ability to class certain activities as prohibited and that there was "no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities."<sup>28</sup>

## Alternatives

The Court also found that the need to consider alternatives will depend on the circumstances of the application. The need was more likely in the context of a plan change to enable the exclusive use, and adverse effects on, an important public resource for private gain.<sup>29</sup>

## Conclusion

The significance of this decision could be wide ranging. It has direct implications on the content of coastal plans around the country. Its influence on the content of other regional and district plans as they relate to NPS and even regional policy statements is yet to be determined, but will not doubt be the focus of participants in planning processes from now on. It is also likely that the Supreme Court's statements in respect of environmental bottom lines and the appropriateness of the overall judgment approach will be tested in the context of decisions on resource consents.

Anderson Lloyd is a leading provider of legal services to businesses, institutions and organisations throughout the country relating to environmental law and planning issues. For further information on the significance of the Supreme Court's King Salmon decision and its implications for you, please contact one of our specialist [resource management team](#).

---

<sup>26</sup> Ibid [96]

<sup>27</sup> Ibid [97]

<sup>28</sup> Ibid [132]

<sup>29</sup> Ibid [173]