BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 81

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act
BETWEEN	R J DAVIDSON FAMILY TRUST
	(ENV-2014-CHC-34)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner I Buchanan Dr A J Sutherland as special advisor under section 259 of the Act
Hearing:	at Blenheim on 4 to 8 and 11, 12 May 2015 and 17 July 2015
Appearances:	J D K Gardner-Hopkins, A M Cameron and E J Hudspith for Davidson Family Trust J W Maassen for Marlborough District Council J C Ironside for Kenepuru and Central Sounds Residents Assn Inc. and Friends of Nelson Haven and Tasman Bay Inc. – section 274 parties
Date of Decision:	9 May 2016
Date of Issue:	9 May 2016

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A: Under section 290 of the Resource Management Act 1991 the Environment Court:

4.10 Economic effects

[244] Despite the court's attempt to explain how to analyse these in *Port Gore Marine Farms v Marlborough District Council*[342] we received minimal evidence on this issue. We accept that there will be a producer surplus and consumer surplus which would give benefits to society. We also take into account the social benefits of employment identified by Mr M G Holland[343] even though strictly speaking that may be double counting benefits.

[245] Beyond that we are not able to make any quantitative comparison of the net benefits of the proposed marine farm with the net benefits of the status quo (i.e. no farm).

5. Evaluation

5.1 Preliminary issues: the gateway tests and the Commissioner's Decision

The gateway tests

[246] As noted earlier, this is an application for a non-complying marine farm under the Sounds Plan. As such we must be satisfied that it passes one of the gateways in section 104(D) RMA before consideration can be given to granting consent.

[247] We have found that some of the adverse effects are likely to be more than minor, so the first gateway is not passed. As for the second, Mr Maassen submitted that the test is a blunt one: "If a proposal is contrary to any material objective or policy, it fails the second gateway test". He relied on the judgment of Fogarty J in *Queenstown Central Limited v Queenstown Lakes District Council* where Fogarty described it as an error of law to "finess… out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed as a whole the objectives allowed … the activity"[344].

342 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [200] and [201].
343 M G Holland evidence-in-chief para 23 [Environment Court document 5].
344 See *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [39].

[248] Strictly Forgarty J's statement may have been obiter because "errors of law" found by Fogarty were (he said) sufficient to dispose of the appeals[345]. In any event we respectfully prefer to follow the Court of Appeal in *Dye* where Tipping J wrote that the correct question was whether the application was consistent "on a fair appraisal of the objectives and policies as a whole"[346]. Otherwise we prefer not to lengthen this decision and simply refer to other decisions of the court: *Cookson Road Character Preservation Society Inc v Rotorua District Council*[347], *Calveley & Anor v Kaipara District Council*[348] and *Saddle Views Estate Ltd v Dunedin City Council*[349].

[249] As it happens, because the Sounds Plan tries to be "all things to all people", as another division of the Environment Court recorded a planner's view[350], it is difficult for an application to be contrary to the objectives and policies of the plan: "... nominally non-complying activities are effectively discretionary". We consider the second threshold test is met because the application cannot be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although this is quite a close-run judgment in this case.

The Council's decision (section 290A)

[250] The court is required to have regard to the Council decision which refused the consents sought. In this case the decision of the Council's Commissioner cannot guide us because the application considered by Commissioner Kenderdine is markedly different from that put to us. In bringing the appeal the Appellant has radically altered the layout of the proposed marine farm so that we are being asked to determine a different and smaller proposal than that presented to the Commissioner. This is particularly important in relation to the key findings of the Commissioner on access, natural character, landscape and amenity on which the decision to decline the application was based.

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345 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [3] to [6].

346 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

347 *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC [194] at [46]-[51].

348 *Calveley & Anor v Kaipara District Council* [2014] NZEnvC 182 at [142].

349 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1 at [82].

350 *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466 (EnvtC) at [86]. We understand the court was quoting Ms S Dawson the planner then advising the Council.

[251] On the effect of the proposal on King Shag, Commissioner Kenderdine wrote[351]:

> The protection of the King Shag habitat is a role not only for future decision makers, but for the applicant if this proposal goes ahead through monitoring and conditions. A large scale monitoring programme will assist in this regard. Meanwhile the King Shag population has been stable for 50 years and it appears to have adaptively managed its (new) aquaculture environment (s6(c)).

We note from the Commissioner's decision that the Council officers' section 42A report did not appear overly concerned with effects on King Shags or their habitat, and recommended that consent be granted. Mr Gardner-Hopkins submitted that the Council had (belatedly) taken a significantly different approach to this appeal than to previous applications where consents were supported. Mr Maassen's response was that this was the first application for some time that impinged on the King Shag habitat ecological overlay, which had resulted in the Council "taking a hard look" at this application to ensure the integrity of this component of the Sounds Plan. This was not a determinative factor for the Commissioner, but is for us.

[252] We now turn to consider the merits of the application as a whole under section 104 RMA, but before we do, there is a preliminary issue as to the relationship between the matters we must have regard to under section 104(1) RMA and Part 2 of the RMA.

5.2 "Subject to Part 2" in the light of the effect of *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*

The correct application of 'subject to Part 2'

[253] As for the application of section 104 Mr Maassen submitted that in *KPF Investments v Marlborough District Council*[352] ("*KPF*") where the Environment Court concluded that the overall broad judgment under Part 2 whether a proposal would promote the sustainable management of natural and physical resources still applies.

351 Council Decision at para 279.

352 *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152 at [202].

[254] We now doubt whether that is quite accurate as a result of more recent decisions. In *Thumb Point Station Ltd v Auckland City Council*[353] ("*Thumb Point*") the implications of the majority decision in *King Salmon*[354] for the application of section 104 RMA were summarised by the High Court as being that:

> In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is one exception, however, where there is a deficiency in the plan. In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act.
> [Footnote omitted]

[255] In *Appealing Wanaka Inc v Queenstown Lakes District Council*[355] the Environment Court agreed with the *Thumb Point* summary, and explained[356] that the reference to any "deficiency" in *Thumb Point* was a reference to the "caveats" identified by Arnold J in *King Salmon* in the following passage[357]:

> ... it is difficult to see that resort to Part 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.
> [Emphasis added]

[256] We note that a similar issue about the phrase 'subject to Part 2 ...' came before the High Court in *New Zealand Transport Authority v Architectural Centre Inc & Ors*[358] ("*NZTA*"). While *NZTA* was concerned with section 171 RMA, the identical wording — "subject to Part 2 of the Act" — also occurs. The reasoning behind Brown J's decision is not completely obvious.

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353 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].
354 *King Salmon* above n 26.
355 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.
356 *Appealing Wanaka Inc v Queenstown Lakes District Council* at [44]-[45].
357 *King Salmon* above n 26, at [90].
358 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [108].

[257] Brown J quoted, and seemed to accept a passage in *Auckland City Council v The John Woolley Trust*[359] ("*Woolley*") which was an appeal about a resource consent under the RMA. Randerson J wrote:

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*[360], that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

While we doubt if anything turns on the metaphor, we respectfully question its accuracy: Part 2 of the RMA appears to us — if a nautical image is to be used — to be more akin to the bridge or, nowadays the operations room, on a flagship.

[258] In contrast, in *King Salmon* Arnold J simply described section 5 as "… a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;"[361]. Alternatively it is "… a carefully formulated statement of principle intended to guide those who make decisions under the RMA[362]". Later Arnold J also observed (presumably obiter) that the provisions in Part 2 are not operative provisions in the sense of being sections under which particular planning decisions are made[363], rather they "comprise a guide for the performance of the specific legislative functions". These passages suggest *Woolley* may need to be applied carefully in future.

[259] Brown J's other approach to the application of the phrase 'subject to Part 2 …' was simply to adopt[364] what the Board wrote[365]:

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359 *Auckland City Council v The John Woolley Trust* [2008] NZRMA 260 (HC) at [47].
360 *Auckland City Council v Auckland Regional Council* [1999] NZRMA 145.
361 *King Salmon* above n 26, at [24(a)].
362 *King Salmon* above n 26, at [25].
363 *King Salmon* above n 26, at [151].
364 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [118].
365 Decision of the Board of Inquiry into the Basin Bridge (29 August 2014) para [183].

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with ... the provisions of Part 2*.

The difficulty is that the phrase 'subject to Part 2' does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances. As Cooke P explained for the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*[366] (a case under the Town and Country Planning Act 1977): "The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict". We now know, in the light of *King Salmon*, that it is not merely a "conflict" which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.

[260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.[367]

[261] We consider that *Thumb Point* is, with respect, more accurate than *NZTA* on how to apply *King Salmon* in the context of section 104. Further, *Woolley* may now need to be applied with caution. None of those cases were cited to us by counsel but since no party relied strongly on Part 2 of the Act as over-riding considerations under section 104(1)(a) to (c), we consider it is unnecessary to seek further submissions. Rather this

366 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 (CA) at 202.

367 *King Salmon* above n 26, at [137]-[138].

exercise is simply the court trying to articulate the correct way of applying *King Salmon* in a section 104 context in the face of conflicting High Court decisions and the court's own erroneous decision in *KPF*[368].

Summary

[262] In summary we hold that the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask:

(1) "Does the proposed activity, after: assessing the relevant potential effects of the proposal in the light of the objectives, policies and rules of the relevant district plans[369];

(2) having regard to any other relevant statutory instruments[370] but placing different weight on their objectives and policies depending on whether:

  (a) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;

  (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may over-ride the district plan even if it does not need to be given effect to; and/or

  (c) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to Part 2 of the Act, can be remedied by the intermediate document rather than by recourse to Part 2;

(3) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and

(4) weighing these conclusions with any other relevant considerations[371]

— achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan?"

368 *KPF* above n 352.
369 I.e. the operative district plan and any proposed plan (including a plan change).
370 Under section 104(1)(b) RMA.
371 E.g. under section 104(1)(c) and 290A RMA.

[263] Whether that process can still be called an "overall broad judgement" is open to some doubt. The breadth of the judgment depends on the following matters in the district or regional plan:

- the status of the activity for which consent is applied;
- the particularity (or lack of it) in the relevant objectives and policies about the effects of the activity; and
- the existence of any uncertainty, incompleteness or illegality (in those plans or in any higher order instruments).

Consequently we consider that in *KPF*[372] the court may have overstated the width of the judgment under section 104 at least if the *KPF* approach is applied to other district plans which are more particular than the rather generalised Sounds Plan.

Incomplete tests for efficiency

[264] There is one other matter: it appears all district or regional plans are incomplete in the sense that they are not Stalinist Five-year Plans: they do not attempt to resolve the most efficient use of all resources: see *Meridian Energy Ltd v Central Otago District Council*[373]. While plans give guidance and/or directions (particularised implementations of Part 2 RMA) in policies, which are deemed to be appropriate (which includes efficient) — *King Salmon*[374] — some activities are stated by rules to be discretionary or non-complying so that more efficient uses can be ascertained on a case-by-case basis.

[265] That means that one aspect of Part 2 of the RMA may often need to be looked at as a result of *King Salmon*. That is section 7(b) which states:

> 7 **Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (b) the efficient use and development of natural and physical resources:

372 *KPF* above n 352, at [200].
373 *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at 118.
374 *King Salmon* above n 26, at [24] (d).

...

[266] Efficiency is, in our view, one of the least well understood concepts in the RMA. First it is important to understand that efficiency is a neutral concept: the efficient use of a resource cannot be ascertained until there are policies by which it can be assessed. Second, the standalone efficiency of a use of a resource can be ascertained by comparing the probability of environmental gains with the risk of adverse effects, or in 'economic' terms ascertaining whether the benefits exceed the costs. However, since those are rarely quantified, that assessment of efficiency (e.g. that refusing consent to a wind farm will "waste" the wind resource) adds little to the overall assessment. The third and potentially most useful point is that efficiency can be assessed in a practical and relative way. Efficiency asks "does the proposed use of the resource implement the relevant policies and achieve the objectives better[375] than the current (or permitted) use of the resource?" Consequently we consider there may be an extra step in the ultimate evaluation as follows:

> Having particular regard to section 7(b) RMA by assessing (at least) is the proposal more efficient in implementing the policies and achieving the objectives of the relevant plan than the status quo (or the permitted activities in the plan)?

[267] We have not needed to ask for further submissions on this issue because section 7(b) is largely irrelevant in this case. That is because the subsection is only concerned with two of the elements of sustainable management of resources — their use and development — not their third: protection. This case is essentially about the protection of the resources in the environment around the site and so we take this issue no further here.

5.3 Having regard to the potential effects of the mussel farm

[268] When considering the effects of the proposal and their consequences the consent authority should consider those effects as avoided, remedied or mitigated by any conditions of consent. We have done so in this case. However, there is one exception,

375 It is possible, especially in the absence of section 6 matters, to quantify and compare net benefits of a proposal with those of the status quo — see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.