IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA97/2017
[2018] NZCA 316

BETWEEN	R J DAVIDSON FAMILY TRUST Appellant
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing:	22 and 23 November 2017
Court:	Cooper, Asher and Brown JJ
Counsel:	J D K Gardner-Hopkins and B S Carruthers for Appellant J W Maassen, N Jessen and M W G Riordan for First Respondent J C Ironside for Kenepuru and Central Sounds Residents Association Inc and Friends of Nelson Haven and Tasman Bay Inc as Interested Parties
Judgment:	21 August 2018 at 1 pm

JUDGMENT OF THE COURT

A The questions of law are answered as follows:

Question:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer:

Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.

Question:

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer:

No.

B The appeal is dismissed.

C Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] This case concerns an important issue about the role of pt 2 of the Resource Management Act 1991 (the Act), in the consideration by consent authorities of applications for resource consent. It raises what is meant by the words "subject to Part 2" in s 104(1) of the Act.

[2] Section 104(1) sets out the matters which a consent authority must have regard to. They include any actual and potential effects on the environment of allowing the

activity, and any relevant provisions of various planning documents which are listed in s 104(1)(b). The consent authority is directed to have regard to these matters "subject to Part 2".

[3] There are four sections in pt 2 of the Act. The first is s 5 which states the purpose of the Act and sets out a definition of "sustainable management". Section 6 sets out matters of national importance which are to be recognised and provided for by all persons exercising functions and powers under the Act. Section 7 sets out another list of matters to which persons exercising functions and powers are to have "particular regard". Finally, s 8 requires functionaries under the Act to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). It is clear that pt 2 is of central importance to the scheme of the Act.

[4] It is also necessary to consider the extent to which the reasoning of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, a case involving an application for a plan change, should be applied in the case of applications for resource consent.[1]

[5] In form, the appeal is a second appeal with the leave of this Court against a determination of the High Court.[2] This Court granted leave to pursue two questions on the second appeal.[3] Before setting those questions out it will be appropriate to give some background.

A proposed mussel farm

[6] The appellant applied to the respondent for resource consent to establish and operate a mussel farm adjacent to and surrounding the southern end of an unnamed promontory jutting out into the northern end of Beatrix Bay in Pelorus Sounds. The proposed farm would be in two separate blocks: one, lying to the southeast of the promontory, 5.166 hectares in area, and the other lying to the southwest, comprising 2.206 hectares, having a total area of 7.372 hectares. The farm would

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1 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

2 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 [High Court judgment].

3 *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194.

consist of a number of lines with an anchor at each end, and a single warp rising to the surface. At the surface would be a "backbone" with dropper lines extending to approximately 12 metres depth (not to the sea floor). Each structure set would be spaced 12 to 20 metres apart. In addition to mussels, the application sought to cultivate scallops, oysters and algae.[4]

Environment Court decision

[7] The application was heard by an independent commissioner, retired Environment Court Judge Kenderdine on 21 May 2014, and in accordance with her decision, the application was declined by the Council on 2 July 2014. The appellant then appealed to the Environment Court. Two incorporated societies, Kenepuru and Central Sounds Residents Association Inc, and Friends of Nelson Haven and Tasman Bay Inc, who had lodged submissions on the application, joined in the Environment Court appeal under s 274 of the Act, in support of the Council's decision.[5]

[8] The site of the proposed farm was within the Coastal Marine Zone 2 in the Marlborough Sounds Resource Management Plan (the Sounds Plan). In that zone, marine farms are provided for (within 50–200 m of the shore) as discretionary activities. Because the proposed farm would extend beyond 200 m from the shore, the activity required consent as a non-complying activity under r 35.5 of the Sounds Plan.

[9] The Sounds Plan, which became operative on 28 February 2003 is a combined district, regional and regional coastal plan. Relevant provisions of the Sounds Plan were reviewed by the Environment Court in its judgment, which confirmed the Council's decision.[6] Those provisions dealt with natural character, indigenous vegetation and habitats of indigenous fauna, landscape and public access. The site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. The King Shag is a Nationally Endangered species in

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4 This description of the application is taken from the Environment Court's decision, *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [5] [Environment Court decision].

5 Those societies appeared as parties in this Court ("the interested parties").

6 Environment Court decision, above n 4, at [137]–[153].

the *New Zealand Threat Classification System* published by the Department of Conservation, with a stable population of between 250–1,000 mature individuals.[7]

[10] The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[11] Having reviewed the relevant objectives and policies, the Environment Court expressed doubt that the Sounds Plan could be said to fully implement pt 2 of the Act, identifying in particular the risk of extinction of the King Shag, an event of low probability but high potential impact.[8] The potential adverse effects on King Shags was one of the main factual issues considered by the Environment Court.

[12] The New Zealand Coastal Policy Statement 2010 (NZCPS) was also relevant to the application. It was important, because at the time of the Environment Court decision, the NZCPS had not been implemented in the Sounds Plan.[9] The Environment Court identified as particularly relevant provisions in the NZCPS Policies 6(2) and 8(b) (aquaculture), 11 (indigenous biodiversity), 13 (preservation of natural character), and 15 (natural features and natural landscapes).

[13] Having identified the relevant provisions of the Sounds Plan and the NZCPS, the Environment Court turned to a comprehensive consideration of the effects of the proposal. It found:

(a) The proposal was unlikely to add any adverse cumulative effects to the water in Beatrix Bay that were more than minimal in the context of larger "natural" variations. However, whether there would be changes to the food web in a way that affected the King Shags was unknown.[10]

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7 At [97].
8 At [153].
9 At [155].
10 At [184].

(b) There were unlikely to be adverse effects on the rocky reef system adjacent to the proposed farm.[11]

(c) There would only be very minor (if any) independent or cumulative effects on the intertidal zone.[12]

(d) There would be adverse effects on King Shag habitat, adverse effects on the populations of New Zealand King Shags and their prey and a low probability (very unlikely but possible) that the King Shag would become extinct as a result of the application.[13] The Court however considered it could not assess these effects against the effects of other major environmental "stressors" (pastoral farming, exotic forestry, deforestation, dredging and trawling as well as river flood events and oscillations in weather patterns).[14]

(e) The proposal would compromise the integrity of the adjacent promontory from a visual/aesthetic/natural character perspective: this would be a significant adverse effect.[15]

(f) The cumulative effect, on top of the accumulated effects of the other mussel farms in the area would be significant. This would be contrary to Policy 13(1)(b) of the NZCPS.[16] Policy 13(1)(b) of the NZCPS requires significant adverse effects to be avoided so as to preserve the natural character of the coastal environment and protect it from inappropriate use and development.

(g) There would be no more than minor adverse effects on navigational safety.[17]

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11 At [189].
12 At [190]–[192].
13 At [206].
14 At [207].
15 At [225].
16 At [233].
17 At [239].

(h) Adverse effects on fishing and access were likely to be minor.[18]

(i) While noting it had received "minimal evidence" on the issue of economic effects, the Court accepted there would be a "producer surplus and consumer surplus which would give benefits to society".[19] It was also prepared to take into account social benefits of employment, but it could not make any quantitative comparison of net benefits of the proposed marine farm with the net benefits of the status quo.[20]

[14] As the application required consent for a non-complying activity the Environment Court could only grant consent if either s 104D(1)(a) or (b) applied. These so called "gateway tests" provide respectively that a consent authority may grant a non-complying activity consent only if it is satisfied that either the adverse effects of the activity on the environment will be minor or the application is for an activity that will not be contrary to the objectives and policies of a relevant plan. On the basis of its consideration of the proposal's effects the Court was satisfied that there would be significant adverse effects on the environment. This meant it could only contemplate granting consent if the application could be brought within s 104D(1)(b). On this issue, the Court was satisfied that the application could not be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although that was what it described as a "close-run judgment".[21]

[15] The Court therefore turned to consider the merits of the application having regard to the statutory considerations set out in s 104(1) of the Act. At the outset, the Court addressed the words "subject to Part 2" which precede the list of matters to which the Council must have regard set out in paragraphs (a) to (c) of the subsection. The Court considered that the decision in *King Salmon* had the effect that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the "intervening statutory documents", there is no need to look at pt 2 of the Act.[22] It held:

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18 At [243].
19 At [244].
20 At [244]–[245].
21 At [249].
22 At [259].

> [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.
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> (Footnotes omitted.)

[16] The last sentence in that extract from the Environment Court's decision had a footnote reference to *King Salmon* at [137]–[138], to which we will refer below.

[17] Turning (as required by s 104(1)(a)) to the actual and potential effects of allowing the activity the Court gave this summary of its findings which took into account other identified "stressors" in the area:[23]

> (1) likely net social (financial and employment) benefits;
>
> (2) a likely significant adverse effect on the natural feature which is the promontory;
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> (3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
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> (4) likely adverse cumulative effects on the amenity of users of the Bay;
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> (5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
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> (6) very likely a reduction in feeding habitat of New Zealand King Shags;
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> (7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
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> (8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

[18] Considering the proposal in terms of the relevant policies in the Sounds Plan, the Court concluded that "on balance" resource consent should be refused on the basis that the proposal would inappropriately reduce the habitat of King Shags, contrary to

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23 At [269].

a key policy requiring adverse effects to be avoided on areas of significant ecological value.[24]

[19] The Court then turned to the NZCPS, recording its view that the site was not in an appropriate area having regard to adverse effects on King Shag habitat which could not be avoided as directed by Policy 11.[25] The Court also relied on the precautionary approach contained in Policy 3 of the NZCPS. Its discussion of this aspect of the case concluded with the words: "[n]o party argued that the NZCPS was uncertain or incomplete so there is no need to apply the "subject to Part 2" qualification in s 104 RMA."[26]

[20] Weighing the proposal under the Sounds Plan and the NZCPS, the Court judged that the "undoubted benefits" were outweighed by the costs it would impose on the environment. It noted in particular that the proposal did not avoid or sufficiently mitigate:[27]

> (1) the direct minor effect of changing a small volume of the habitat of King Shag;
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> (2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;
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> (3) the more than minor adverse effects on the landscape feature of the northern promontory; and
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> (4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

High Court judgment

[21] The appellant's appeal to the High Court raised four questions. For present purposes, we only need to be concerned with the first which asked whether

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24 At [274].

25 Policy 11 of the NZCPS seeks to protect indigenous biological diversity in the coastal environment, including amongst other things by avoiding adverse effects of activities on indigenous taxa that are listed as threatened, and on the habitats of indigenous species.

26 Environment Court decision, above n 4, at [287].

27 At [282].

the Environment Court erred in failing to apply pt 2 of the Act in considering the application for resource consent under s 104.

[22] Cull J noted the Supreme Court's conclusion in *King Salmon* that the NZCPS gave substance to the principles in pt 2 of the Act in relation to New Zealand's coastal environment.[28] She also referred to the discussion of s 5 in *King Salmon*, noting the Supreme Court's observation that it was not intended to be an "operative provision" under which particular planning decisions are made.[29]

[23] The Judge considered that the Supreme Court had rejected the "overall judgment" approach in relation to the "implementation of the NZCPS in particular", as the approach would be "inconsistent with the elaborate process required before a national coastal policy statement can be issued …".[30] The Judge then held that the reasoning in *King Salmon* applied to s 104(1), because the relevant provisions of the planning documents, including the NZCPS had already given substance to the principles in pt 2 of the Act.[31] She considered *King Salmon* applied equally to s 104 considerations as it does to a plan change.[32] She also accepted a broad submission that had been made to her by the respondent that it would be inconsistent with the scheme of the Act and *King Salmon* to allow regional or district plans "to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications".[33]

[24] Dealing with a specific argument that the Environment Court had erred by not applying ss 5(2) and 7(b) of the Act, the Judge pointed out that even if the Environment Court had paid specific attention to pt 2, it was not clear that the enabling provisions of pt 2 would have been given pre-eminent consideration.[34] In any event, the Environment Court had taken into account the likely net social benefits in assessing the effects of the proposal.[35] It had also found that issues under s 7(b), which requires decision makers under the Act to have particular regard to the efficient

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28 High Court judgment, above n 2, at [73].
29 At [74], referring to *King Salmon*, above n 1, at [151].
30 At [75], referring to *King Salmon*, above n 1, at [136] and [137].
31 At [76].
32 At [78].
33 At [77].
34 At [85]. The Judge was contrasting the "enabling" aspects of the definition of sustainable management in s 5(2) with protective provisions in s 5 and elsewhere in pt 2.
35 At [86].

use and development of natural and physical resources, was largely irrelevant because it did not deal with the protection of resources. Finally, the Judge concluded that the appellant had not identified any deficiency in the relevant planning instruments such as would justify resort to pt 2 in accordance with *King Salmon*.[36]

The appeal to this Court

[25] This Court granted leave to appeal on the following questions of law:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

[26] The balance of this judgment will address the first question. As will become clear, the terms of the answer we give to the first question effectively dictate the answer to the second.

First question — consideration of Part 2 of the Act

Appellant's submissions

[27] Mr Gardner-Hopkins for the appellant presented a comprehensive argument based on the text and purpose of s 104(1), its legislative history and the wider scheme of the Act. He submitted that the approach taken in *King Salmon* to plan changes should not apply in the case of applications for resource consents. Rather, in considering resource consent applications, pt 2 of the Act must be considered as well as the statutory documents referred to in s 104(1), and in the case of conflict pt 2 will prevail.

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[36] At [88].

[28] Counsel noted that the words "subject to Part 2" have often been construed, in the context of cases involving resource consents, as enabling or requiring reference to the provisions in pt 2 of the Act. Cases where such references have been made include decisions of this Court, including *Queenstown Lakes District Council v Hawthorn Estate Ltd* in which it was said:[37]

> [50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:
>
> > … Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to …

[29] The words "[s]ubject to Part II" in the statute as it then was were subsequently relocated in subs (1) but that does not detract from the argument. In addition, in *Central Plains Water Trust v Synlait Ltd* this Court said:[38]

> Section 104(1) requires the consent authority inter alia to comply with the overarching provisions of Part 2. Among the matters to which the authority is required by Part 2 to have particular regard is the efficient use of natural and physical resources (s 7(b)). That theme (1) consideration is of very great importance. It is recognised not only by the RMA but increasingly within the general principles of law which provide a context for adjudication.

[30] In addition, Mr Gardner-Hopkins was able to refer to various High Court judgments taking the same approach.[39] Numerous Environment Court decisions could also be quoted for the same proposition.

[31] Counsel noted that the expression "subject to Part 2" also occurs in s 171(1) of the Act in the context of considering notices of requirement. The drafting of s 171(1) follows a similar pattern to that of s 104(1), requiring consideration, "subject to Part 2", of the effects on the environment of allowing the requirement, as well as the

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37 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

38 *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [92(a)].

39 *Wilson v Selwyn District Council* [2005] NZRMA 76 (HC) at [79]; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 at [67] and [72]; and *Auckland City Council v John Woolley Trust* [2008] NZRMA 260.

provisions of any relevant policy statement or plan. Section 171 was considered by the Privy Council in *McGuire v Hastings District Court*.[40] Writing for the Board, Lord Cooke discussed the various provisions in pt 2 of the Act before noting that s 171 is expressly made subject to pt 2, including ss 6, 7 and 8. He wrote: "[t]his means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict."[41]

[32] Similar observations were made in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council*.[42] And in another case involving a requirement, Brown J took the same approach, distinguishing *King Salmon* on the basis that the relevant statutory provisions discussed in the latter did not include the phrase "subject to Part 2".[43]

[33] Mr Gardner-Hopkins traced the history of s 104 noting that as originally enacted, pt 2 was listed as one of the matters to which a consent authority was to have regard; it was the seventh in a list that began by referring to any relevant rules of a plan or proposed plan, then mentioned relevant policies or objectives of such plans, then national policy statements, the NZCPS and regional policy statements as well as other matters. That drafting approach led the Full Court of the High Court to observe that although the section directed the consent authority to have regard to pt 2, it was "but one in a list of such matters and is given no special prominence".[44]

[34] It was shortly after that the Act was amended, placing the words "subject to Part 2" near the beginning of the section. The Ministry for the Environment produced a departmental report on the Resource Management Act Amendment Bill, in April 1993. The report was provided for the Chairman of the Planning and Development Select Committee, to assist its consideration of the Bill. At page 62, the observation was made:

> The main change to section 104 was the rewriting of section 104(4). This was done to clarify that Part [2] was not one of a list of matters that had to be had

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40 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.
41 At [22].
42 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68].
43 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 at [117].
44 *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 (HC) at 89.

> regard to but was an overriding matter, as it is with the whole Act including the next section, 105, where decisions are made on applications.

[35] Consistent with this, when introducing the Resource Management Act Amendment Bill 1993, the Minister for the Environment said:[45]

> Part [2] of the Resource Management Act sets out its purpose and the key principles of the Act. It is fundamental, and applies to all persons whenever exercising any powers and functions under the Act. The current references in the Act in Part [2] are being interpreted as downgrading the status of Part [2]. Amendments in this Bill restore the purpose and principles to their proper over-arching position.

[36] Mr Gardner-Hopkins supplemented these arguments by reference to the fact that under sch 4 of the Act, every application for resource consent must include an assessment of the activity "against the matters set out in Part 2". This was not a requirement of the legislation as originally enacted, but the result of s 125 of the Resource Management Amendment Act 2013. Once again, it is relevant to note the explanation given in the departmental report on what was then the Resource Management Reform Bill 2012. That document referred to the proposed new sch 4 as requiring applications to consider provisions of the Act and other planning documents relevant at the decision-making stage of the application process. There was a specific reference to pt 2 of the Act as well as any relevant documents listed in s 104(1)(b) including the district or regional plan and any relevant national environmental standards.[46]

[37] Later in that document, it was observed:[47]

> Part 2, which sets out the purpose and principles of the RMA, is the part against which decisions under section 104 are made. Ultimately, all decisions on resource consents must demonstrably contribute towards the purpose of the Act.

[38] This reform found its way into the forms provided in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. A new Form 9, the prescribed form for an application for resource consent states, in paragraph eight: "I

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45 (15 December 1992) 532 NZPD 13179.

46 Ministry for the Environment *Departmental Report on the Resource Management Reform Bill 2012* (April 2013).

47 At 82.

attach an assessment of the proposed activity against the matters set out in Part 2 of the Resource Management Act 1991." This form was required to be used from 3 March 2015.[48] The Supreme Court's decision in *King Salmon* had been delivered over 10 months earlier on 17 April 2014.

[39] In the balance of his submission, Mr Gardner-Hopkins addressed various arguments as to why the Supreme Court's decision in *King Salmon* should be confined to cases involving plan changes, the context in which the decision arose.

[40] Here, he emphasised the different statutory framework, discussed by the Supreme Court, including s 67(3) of the Act, under which a regional plan must "give effect to", amongst other things, any NZCPS.[49] He also referred to the Supreme Court's conclusion that by giving effect to the NZCPS, the Council would necessarily be acting "in accordance with" pt 2, obviating any need for that part to be referred to again. Caveats to this were invalidity, incomplete coverage or uncertainty; in those instances, reference to pt 2 might be justified and provide assistance, as opposed to pt 2 being referred to as a matter of course. Mr Gardner-Hopkins argued that there was nothing in *King Salmon* that suggested the Supreme Court intended its decision would be applied to resource consent applications as well as plan changes. Mr Gardner-Hopkins also endeavoured to confine the Supreme Court's observations about s 5 and the other provisions in pt 2 not being "operative" provisions to the plan and plan change context. He submitted that the language of s 104(1) and its direct reference to pt 2 must give the latter something of an "operative" role and function. On the approach taken in *McGuire*, pt 2 might override the other matters required to be considered in s 104(1) in the case of conflict.

[41] In the present case, Mr Gardner-Hopkins submitted that the Environment Court erred by not having regard to pt 2, wrongly regarding itself as precluded from doing so by *King Salmon*. The High Court had wrongly concluded the reasoning in *King Salmon* precluded resort to pt 2 because the relevant provisions of the

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48 See Regulation 7 of the Resource Management (Forms, Fees and Procedure) Amendment Regulations 2014.

49 Section 67(3)(b).

planning documents including the NZCPS had already applied pt 2. Although the Environment Court had referred to s 7(b), it had found it largely irrelevant, and the High Court was not justified in concluding that the Environment Court would have arrived at the same outcome had it applied pt 2 as a whole, including those aspects of it that were enabling. Instead, the Environment Court had regarded the issues as effectively determined by the relevant plan and NZCPS provisions it discussed. This was to elevate the planning documents above pt 2, instead of affording the latter its "overarching" significance.

Respondent's submissions

[42] For the respondent, Mr Maassen submitted that the Environment Court was bound to apply the NZCPS by reason of its correct assessment that the NZCPS was neither uncertain nor incomplete and, consequently, there was no reason to apply the "subject to Part 2" qualification in s 104. The clear outcomes mandated by the NZCPS were faithful expressions with greater particularity of the requirements of pt 2 on indigenous biodiversity, which was the kernel of the case. In advancing this argument, Mr Maassen contended that the Environment Court had not purported to shut out resort to pt 2 in an appropriate case; however, in view of its findings on the NZCPS there was no need to consider pt 2. To the extent that the Environment Court had also implied that pt 2 should not be considered where the provisions of the regional coastal plan were clear, Mr Maassen disagreed. Depending on the circumstances of the case, there could be a valid contention that the provisions were deficient in meeting the objectives in pt 2. That was not the case here, because the outcomes sought to be achieved by the Sounds Plan were harmonious with the relevant policies in the NZCPS.

[43] Mr Maassen argued that the words "subject to Part 2" in s 104(1) did not authorise case-by-case resort to pt 2 in the context of resource consent applications, uninfluenced by clear directions of the planning documents. In this respect, he submitted the Act contemplates "planning" as opposed to "ad hoc" decision-making. The public are entitled to expect that planning strategies will be implemented and to organise their lives and make investment decisions based on those strategies; decisions

made under s 104 should be informed by the policy of the relevant planning documents.

[44] In argument, Mr Maassen's position was clarified to the extent that in accordance with the reasoning in *McGuire*, he accepted pt 2 must be considered, and would override the provisions of planning instruments in the event of a conflict. As he put it, there must be no barriers to a decision-maker's access to pt 2. However, a conclusion that the provisions of a relevant policy statement or plan were comprehensive in achieving the outcomes contemplated by pt 2 would not constitute such a barrier. He placed some weight on observations made by Fogarty J in *Wilson v Selwyn District Council*.[50] Fogarty J said:

> [79] Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part [2], to have regard to it, "shall have regard". The qualifier "subject to Part [2]", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose of one or more of the provisions in Part [2], in the context of the application for this resource consent.

[45] In accordance with this approach, Mr Maassen submitted that the appropriate starting point is the proposition that the plans fulfil their purpose in achieving pt 2, but the consent authority could form a reasoned opinion upon scrutiny that the relevant provision does not pursue the purpose or one or more of the provisions of pt 2 in the context of the application for the particular resource consent. Mr Maassen argued such an approach was consistent with *King Salmon* because of the starting assumption that plans were fulfilling their intended purpose.

Analysis

[46] Section 104(1) provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

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[50] *Wilson v Selwyn District Council*, above n 39. Fogarty J's interpretation of "the environment" in that case was reversed by this Court in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, above n 37, but this Court did not criticise what was said at [79].

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

…

[47] For the reasons addressed by Mr Gardner-Hopkins summarised above[51] we are satisfied that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so. As Mr Gardner-Hopkins demonstrated, the change made in 1993 was plainly designed to preserve the preeminent role of pt 2, containing as it does the statement of the Act's purpose and principles. As we understand it, there was in the end no contest between the present parties about the consent authority's ability to refer to pt 2 in an appropriate case.[52]

[48] That conclusion also follows from the provisions in pt 2 itself. Sections 5–8 of the Act provide:

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[51] At [27]–[38].

[52] Although we did not call on the interested parties orally at the hearing, their written submissions were to the same effect.

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

6 Matters of national importance

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 recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:

(h) the management of significant risks from natural hazards.

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—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) *[Repealed]*

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[49] The Supreme Court observed in *King Salmon* that s 5 was not intended to be an "operative provision", in the sense that particular planning decisions are not made under it.[53] It went on to observe that the hierarchy of planning documents in the Act was intended to:[54]

> … flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant.

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53 *King Salmon*, above n 1, at [151].
54 At [151].

[50] These statements of the law are of course binding on this Court and, with respect, an accurate description of the relationship between the planning documents and pt 2. In summary, the structure of the Act requires pt 2 to have a direct influence on the content of the planning documents. While other provisions express the machinery by which that process is achieved, they are underpinned by pt 2. Thus, to give just one example, s 63(1) of the Act states that the purpose of the preparation, implementation, and administration of regional plans is to assist a regional Council to carry out any of its functions in order to achieve the purpose of the Act. So there is a direct link to s 5 where the purpose of the Act is set out.[55]

[51] In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt 2. Such applications are not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2.

[52] In any event, as can be seen from the provisions of pt 2 set out above, each of ss 6, 7 and 8 begins with an instruction, which is to be carried out "[i]n achieving the purpose of this Act", thus giving s 5 a particular role. Further, in each case the instruction is given to "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources". We consider those instructions must be complied with in an appropriate way in disposing of any application for a resource consent, and indeed it is untenable to suggest to the contrary. That conclusion would apply even without the words "subject to Part 2" in s 104(1); but they underline the conclusion. As the Privy Council said in *McGuire* ss 6, 7 and 8 constitute "strong directions, to be borne in mind at every stage of the planning process".[56] While it is true, as the Supreme Court in *King Salmon* observed, that s 5 is not a provision under which particular planning decisions are

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55 To similar effect is s 59 which enacts that the purpose of a regional policy statement is to "achieve the purpose of the Act" in various stated ways; and s 72 which states the purpose of district plans in the same language that is used for regional plans, thus embracing the purpose of the Act.

56 *McGuire v Hastings District Council*, above n 40, at [21].

made, the reference to pt 2 in s 104(1) enlivens ss 5–8 in the case of applications for resource consent.

[53] The real question is whether the ability to consider pt 2 in the context of resource consents is subject to any limitations of a kind contemplated by *King Salmon* in the case of changes to a regional coastal plan. The answer to that question must begin with an analysis of what was decided in *King Salmon*.

[54] At the outset, it may be noted that *King Salmon* concerns the same plan, the Sounds Plan, with which we are concerned in the current appeal. It should also be noted that the judgment was written on the assumption that because no party had challenged the NZCPS there was acceptance that it conformed with the Act's requirements, and with pt 2 in particular.[57] That assumption remains appropriate.

[55] The second point to note is that what was in issue on the appeal determined by the Supreme Court was a proposed change to the Sounds Plan to accommodate a salmon farm at Papatua in Port Gore. The Board of Inquiry appointed to determine the plan change at first instance determined that the area affected was of "outstanding natural character and landscape value." If implemented, the proposal would have very high adverse visual effects. The directions in Policy 13(1)(a) and Policy 15(1)(a) of the NZCPS would not be given effect to.[58] Those policies are respectively:

> 1. To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> > a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character …
> >
> > …
>
> 1. To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> > a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment …

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57 *King Salmon*, above n 1, at [33].
58 At [19].

[56] Notwithstanding its conclusions on these issues, in applying s 5, the Board considered that the appropriateness of the area for aquaculture, specifically for salmon farming, weighed heavily in favour of granting consent. Consequently, the proposed zone would be appropriate.[59]

[57] The Supreme Court in *King Salmon* held that the relevant directions in Policies 13 and 15 of the NZCPS had the overall purpose of preserving the natural character of the coastal environment, and protecting it from inappropriate use and development. If an affected area was "outstanding", such adverse effects were required to be avoided. In less sensitive areas, the requirement was to avoid "*significant* adverse effects".[60] "Avoid" was to be interpreted as meaning "not allow" or "prevent the occurrence of".[61]

[58] The Court noted that under s 67(3) of the Act, a regional plan must give effect to any national policy statement, any NZCPS and any regional policy statement. To "give effect" was to implement, and this was a matter of "firm obligation".[62]

[59] It is clear that the Court considered the NZCPS would not be given effect to if the plan were changed as proposed, because of the Board of Inquiry's finding that implementing the change would result in significant adverse effects on areas with outstanding natural character and landscape. And, as this Court observed in *Man O'War Station Ltd v Auckland Council*, the "overall judgment" approach was rejected because of the prescriptive nature of the relevant provisions in Policies 13 and 15 of the NZCPS and the statutory obligation to give effect to them.[63] The policies were specific and clear in what they prohibited. As the Supreme Court in *King Salmon* said:[64]

> [The Board] considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a),

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59 At [19].
60 At [62] (emphasis added).
61 At [62].
62 At [77].
63 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 at [56]–[57].
64 *King Salmon*, above n 1, at [153].

> the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. … The policies give effect to the protective element of sustainable management.

And following that:

> [154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

[60] There were other relevant aspects of the statutory context that underpinned the Supreme Court's approach. These included s 58(a) of the Act which empowered the Minister, by means of the NZCPS, to set national priorities in relation to the preservation of the natural character of the coastal environment.[65] This was clearly fundamental to what we consider to be a contextual rejection of the "overall judgment" approach.[66] For example, the Court said:[67]

> The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one.

[61] The Court applied a similar analysis to s 58(d), (f) and (gb), which enabled the Minister to include in an NZCPS objectives and policies concerning the Crown's interests in the coastal marine area, the implementation of New Zealand's international obligations affecting the coastal environment and the protection of protected rights.

[62] We note also the Court's discussion of s 58(e) of the Act, which provides that an NZCPS may state objectives or policies about matters to be included in regional coastal plans for the preservation of the natural character of the coastal environment. That may include "the activities that are required to be specified as restricted coastal activities" because of their "significant or irreversible adverse effects" or because they relate to areas with "significant" conservation value. The Court observed:[68]

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65 The discussion of the provisions of s 58 here and in the following paragraphs reflect its form prior to the enactment of the Resource Legislation Amendment Act 2017.

66 At [118]–[121].

67 At [118].

68 At [121].

> The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[63] In this context, the Court also mentioned ss 55 and 57. It noted that s 55(2) relevantly provided that if a national policy statement so directs, a regional council must amend a regional policy statement or regional plan to include specific objectives or policies to give effect to matters specified in a national policy statement. Section 55(3), which provides that a regional council must also take "any other action that is specified in the national policy statement" and other related provisions made clear a regional council's obligation to give effect to the NZCPS and the role of the NZCPS as what the Court described as a "mechanism for Ministerial control".[69]

[64] Significantly the Court also addressed applications for private plan changes. The ability to make such applications was held not to support adoption of an "overall judgment" approach, essentially because the decision-maker would always have to take into account the region wide perspective that the NZCPS required.[70]

[65] The Court referred to "additional factors" that supported rejection of the "overall judgment" approach "in relation to the implementation of the NZCPS." This included the general point that it would be inconsistent with the elaborate process required before an NZCPS can be issued, and secondly the uncertainty that would be created by adoption of the "overall judgment" approach.[71]

[66] We see these various passages in the judgment as part of the Court's rejection of the "overall judgment" approach in the context of plan provisions implementing the NZCPS. Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the Court intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications. There are a number of additional reasons which support this conclusion.

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69 At [125].
70 At [135].
71 At [136].

[67] First, the Court made no reference to s 104 of the Act nor to the words "subject to Part 2". If what it said was intended to be of general application across the board, affecting not only plan provisions under pt 4 of the Act, but also resource consents under pt 6, we think it inevitable that the Court would have said so. We say that especially because of the frequency with which pt 2 has historically been referred to in decision-making on resource consent applications. The "overall judgment" approach has also frequently been applied in the context of resource consent applications. If the Supreme Court's intention had been to reject that approach it would be very surprising that it did not say so. We think the point is obvious from the preceding discussion, but note in any event that in its discussion of whether the Board had been correct to utilise the "overall judgment" approach the Court's reasoning was expressly tied to the "plan change context under consideration". It was in that context that the Court said the "overall judgment" approach would not recognise environmental bottom lines.[72]

[68] Secondly, we do not consider that what the Supreme Court said at [137]–[138] indicates it intended its reasoning to be generally applicable, including to resource consents, as the Environment Court considered was the case. The Supreme Court's observation at the outset of [137] that the "overall judgment" approach creates uncertainty is certainly of a general nature, but the context is established by what immediately follows:[73]

> The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. 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.

[69] We accept that the Court went on to refer to Environment Court decisions allowing appeals from the District Council with the result that renewal applications for marine farms in the Marlborough Sounds were declined. It contrasted this with the Board's decision in the case before it, as an illustration of the uncertainties that arise. We consider this was simply underlining the possibility of different outcomes

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72 At [108].
73 At [137].

where an overall judgment is applied. This is a long way from establishing that the Court intended to proscribe an "overall judgment" approach in the case of resource consent applications generally.

[70] Thirdly, resource consents fall to be addressed under s 104(1) and, as we have demonstrated, the statutory language plainly contemplates direct consideration of pt 2 matters. The Act's general provisions dealing with resource consents do not respond to the same or similar reasoning to that which led the Supreme Court to reject the "overall judgment" approach in *King Salmon*. There is no equivalent in the resource consent setting to the range of provisions that the Supreme Court was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented: the various matters of obligation discussed above. Nor can there be the same assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of pt 2 of the Act. That is of course the outcome desired and anticipated, but it will not necessarily be achieved.

[71] Where the NZCPS is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that *King Salmon* would be applied in such cases. The way in which that would occur would vary. Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.

[72] On the other hand, if a proposal were affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.

[73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".[74]

[74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

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[74] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

[75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[76] We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS.[75] While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plan prepared without the need to comply with ministerial directions.

[77] As we have seen, the High Court Judge apparently considered that the reasoning in *King Salmon* applied with equal force to resource consent applications as to plan changes. She appears to have proceeded on the basis that consent authorities will not be permitted to consider the provisions of pt 2 in evaluating resource consent applications, unless the plan is deficient in some respect. For the reasons we have given, we do not consider that is correct, and it is contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 as "strong directions, to be borne in mind at every stage of the planning process".[76]

[78] However, in the circumstances of this case the error is not significant and the Judge was clearly correct when she held that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to pt 2 in deciding resource consent applications.

[79] In the present case, as has been seen, the Environment Court based its decision to dismiss the appeal on the impact of the proposal on the habitat of King Shags, adverse effects on landscape and the natural character of Beatrix Bay. In terms of

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75 *King Salmon*, above n 1, at [90].
76 *McGuire v Hastings District Council*, above n 40, at [21].

the NZCPS, the site was inappropriate having regard to the adverse effect on King Shag habitat which could not be avoided, contrary to Policy 11. As has been seen, in terms of the Sounds Plan, the site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. Associated policies drew attention to the likely adverse effects of proposals on feeding habitat, the probability of a decrease in numbers of King Shags, the probability of adverse effects occurring and the probability of adverse effects being avoided, remedied or mitigated. The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[80] The Environment Court's decision was clearly justified having regard to the NZCPS and the Sounds Plan. It took the approach, justified by *King Salmon*, that there was no need to apply the "subject to Part 2" qualification in s 104(1) because there was no suggestion that the NZCPS was uncertain or incomplete.[77] It also decided "on balance" that the proposal should be rejected if considered solely in terms of the Sounds Plan.[78] Although it had earlier said the Sounds Plan did not fully implement pt 2 of the Act, this was referring in particular to the risk of extinction of King Shags, a matter clearly dealt with in the NZCPS in any event.[79]

[81] We do not discern any error in this approach. If there had been reference to pt 2, it could not have justified a decision that departed from what the NZCPS required. In our view, while the Court might properly have considered pt 2 more extensively than its passing reference to s 7(b), the thrust of the relevant NZCPS policies and the Sounds Plan could not properly have been put on one side calling pt 2 in aid.

[82] Having regard to the foregoing discussion we agree with Cull J's conclusion that it would be inconsistent with the scheme of the Act to allow regional or district plans to be "rendered ineffective" by general recourse to pt 2 in deciding resource consent applications, providing the plans have been properly prepared in

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77 Environment Court decision, above n 4, at [287].
78 At [274].
79 At [153].

accordance with pt 2. We do not consider however that *King Salmon* prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome. That was so in the present case because of both the NZCPS and the Sounds Plan.

Result

[83] These conclusions lead us to answer the questions posed as follows:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer: Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.[80]

(b) If the first answer is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer: No.

[84] The appeal is dismissed.

[85] Normally we deal with costs on the basis of submissions made by the parties at the conclusion of the hearing. In this case, although we heard the parties at that stage we consider that it will be appropriate for brief submissions to be filed having regard to the outcome of the appeal. We invite submissions accordingly. They should

[80] We note that the Environment Court could have relied on pt 2 to fill the gap left by the shortcomings it had identified in the provisions of the Sounds Plan dealing with King Shags, but there was no need to do so having regard to the provisions of the NZCPS that it applied.

deal not only with the substantive appeal but also costs on the application for leave to appeal which was opposed by the respondent.

[86] Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

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