

IN THE SUPREME COURT OF NEW ZEALAND

**SC 82/2013
[2014] NZSC 41**

BETWEEN ENVIRONMENT DEFENCE SOCIETY
INCORPORATED
Appellant

AND THE NEW ZEALAND KING SALMON
COMPANY LIMITED
First Respondent

SUSTAIN OUR SOUNDS
INCORPORATED
Second Respondent

MARLBOROUGH DISTRICT
COUNCIL
Third Respondent

MINISTER OF CONSERVATION AND
DIRECTOR-GENERAL OF MINISTRY
FOR PRIMARY INDUSTRIES
Fourth Respondents

SC 84/2013

BETWEEN SUSTAIN OUR SOUNDS
INCORPORATED
Appellant

AND THE NEW ZEALAND KING SALMON
COMPANY LIMITED
First Respondent

ENVIRONMENTAL DEFENCE
SOCIETY INCORPORATED
Second Respondent

MARLBOROUGH DISTRICT
COUNCIL
Third Respondent

MINISTER OF CONSERVATION AND
DIRECTOR-GENERAL OF MINISTRY
FOR PRIMARY INDUSTRIES
Fourth Respondents

Hearing: 16 October 2013

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: D A Kirkpatrick, R B Enright and N M de Wit for
Environmental Defence Society Incorporated
D A Nolan, A S Butler and D J Minhinnick for The New
Zealand King Salmon Company Limited
M S R Palmer and K R M Littlejohn for Sustain Our Sounds
Incorporated
P A McCarthy for Minister of Conservation and Director-
General of Ministry for Primary Industries
S F Quinn for Marlborough District Council
P T Beverley and D G Allen for the Board of Inquiry

Judgment: 17 April 2014

JUDGMENT OF THE COURT

- A. The application under s 149V of the Resource Management Act 1991 by the Environmental Defence Society for leave to appeal the decision of the High Court dated 8 August 2013 is granted. The questions of law for determination on the appeal are:**
- (a) **Was the Board of Inquiry’s approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:**
- (i) **Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.**
- (ii) **Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal Policy Statement under s 67(3)(b) of the Act in coming to a “balanced judgment” or assessment “in the round” in considering conflicting policies.**

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

B. The application under s 149V of the Resource Management Act 1991 by Sustain Our Sounds Incorporated for leave to appeal the decision of the High Court dated 8 August 2013 is granted. The question of law for determination on the appeal is:

Was the conclusion of the Board of Inquiry that the key environmental effects of the plan change in issue would be adequately managed by the maximum feed discharge levels set in the plan and the consent conditions it proposed to impose in granting the resource consent to King Salmon one made in accordance with the Act and open to it?

REASONS

[1] On 18 October 2013, this Court granted leave to appeal against a judgment of Dobson J¹ to the Environmental Defence Society Inc (EDS) in SC 82/2013 and to Sustain Our Sounds Inc (SOS) in SC 84/2013.² Dobson J had dismissed an appeal on questions of law from a decision of a Board of Inquiry, which had granted plan changes and resource consents to the New Zealand King Salmon Company Ltd in relation to four salmon farms in the Marlborough Sounds.³ The questions on which leave to appeal to this Court were granted are set out above.

[2] The appeals were heard together from 19 to 22 November 2013 and judgments have been issued today in *Environmental Defence Society Inc v The New*

¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371.

² *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101.

³ Board of Inquiry *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013.

*Zealand King Salmon Co Ltd*⁴ (the “EDS appeal”) and *Sustain our Sounds Inc v The New Zealand King Salmon Company*⁵ (the “SOS appeal”).

[3] As indicated in our judgment on the EDS appeal,⁶ this judgment deals with:

- (a) the reasons leave was granted; and
- (b) why the Court did not hear oral submissions from the Board of Inquiry and took no account of its written submissions.

Reason for grant of leave

[4] Leave to this Court was granted after applications were made by EDS and SOS under s 149V of the Resource Management Act 1991 (RMA) to appeal against the decision of the High Court. The relevant parts of s 149V are as follows:

149V Appeal from decisions only on question of law

...

- (5) No appeal may be made to the Court of Appeal from a determination of the High Court under this section.
- (6) However, a party may apply to the Supreme Court for leave to bring an appeal to that court against a determination of the High Court and, for this purpose, sections 12 to 15 of the Supreme Court Act 2003 apply with any necessary modifications.
- (7) If the Supreme Court refuses to give leave for an appeal (on the grounds that exceptional circumstances have not been established under section 14 of the Supreme Court Act 2003), but considers that a further appeal from the determination of the High Court is justified, the court may remit the proposed appeal to the Court of Appeal.

...

- (9) Despite any enactment to the contrary,—

...

⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

⁵ *Sustain Our Sounds Inc v The New Zealand King Salmon Company Co Ltd* [2014] NZSC 40.

⁶ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* above n 4, at [4] and [6].

- (b) the Supreme Court or the Court of Appeal, as the case may be, must determine an application for leave, or an appeal, to which this section applies as a matter of priority and urgency.

[5] As indicated s 149V(6) provides that ss 12 to 15 of the Supreme Court Act 2003 apply with any necessary modifications. Section 12(1) of the Supreme Court Act provides that appeals to this Court are to be heard only with the Court's leave. Under s 13(1), this Court must not give leave unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal. Section 13(2) provides that it is in the interests of justice for this Court to hear an appeal if it involves a matter of general or public importance⁷ or a matter of general commercial significance.⁸

[6] Section 14 provides that, where an appeal is to be made directly against a decision of a Court other than the Court of Appeal, in addition to being satisfied that it is necessary in the interests of justice to hear the appeal, the Court must be satisfied that there are exceptional circumstances justifying the direct appeal.

[7] In the context of s 149V, we consider that ss 13 and 14 of the Supreme Court Act mean that, where this Court is satisfied that it is in the interests of justice to hear a proposed appeal, it would normally remit the proposed appeal to the Court of Appeal unless satisfied that exceptional circumstances exist that mean this Court should hear the appeal.

[8] In both the EDS and the SOS appeals, leave was granted to appeal to this Court, rather than remitting the issue to the Court of Appeal under s 149V(7). In both cases, the appeals concerned a major aquaculture development that had been determined by the Minister of Conservation to involve matters of national significance and referred to a Board of Inquiry.

[9] In relation to the EDS appeal, the proposed appeal concerned an important issue as to the relationship between Part 2 of the RMA, (and s 5 in particular) and the hierarchy of instruments provided for in the RMA, including the New Zealand

⁷ Section 13(2)(a).

⁸ Section 13(2)(b).

Coastal Policy Statement.⁹ This issue has not been previously considered by this Court and it has the potential to affect all decisions under the RMA.

[10] In terms of the SOS application, the proposed appeal concerned the appropriate response of decision-making bodies when presented with scientific uncertainty and the interrelationship between the precautionary principle (as recognised in Policy 3 of the New Zealand Coastal Policy Statement) and an adaptive management approach. This also was a matter of major significance and one that has not been considered before by this Court.

[11] The above factors satisfied us that leave to appeal should be granted and that exceptional circumstances existed to require that appeal to be heard by this Court.

The Board's submissions

[12] The Board of Inquiry filed submissions covering both the EDS and SOS appeals. A decision maker cannot appear before this Court as of right¹⁰ and generally, any assistance that could be rendered by a decision maker will be of little value. This is because all the issues will be adequately developed by the respective parties.

[13] In rare cases a decision maker may be of assistance, for example, where there is a need for a contradictor or where it is important that the Court have a wider perspective than the parties may be able to provide. If a decision maker does appear, it should as far as possible act in a non-partisan fashion.¹¹

⁹ Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).

¹⁰ Under r 20.17 of the High Court Rules, the decision maker is entitled to be represented and heard at the hearing of an appeal on all matters (unless the decision maker is a District Court, or the Court directs otherwise). Under r 1.4(2)(b), that rule does not apply to appeals to this Court. Even in the High Court, the authorities indicate that the right of a decision maker to take active steps in an appeal should be exercised sparingly: for example, see *Fonterra Co-operative Group Ltd v Grate Kiwi Cheese Co Ltd* (2009) 19 PRNZ 824 (HC) and *Attorney-General v Howard* [2010] NZCA 58, [2011] 1 NZLR 58.

¹¹ *Attorney-General v Howard*, above n 10, at [145]; *NZ Paper Mills Ltd v Otago Acclimatisation Soc* [1992] 1 NZLR 400 (CA) at 403.

[14] With regard to the current case, we did not call on counsel for the Board to be heard orally and we did not take its submissions into account.¹² All issues were fully argued by the respective parties to the two appeals. Further, while the Board claimed that its submissions were non-partisan and there merely to assist the Court, numerous parts of the Board's submissions appeared to be entering the fray.

Solicitors:

DLA Phillips Fox, Auckland for Environmental Defence Society Incorporated

DLA Phillips Fox, Wellington for Marlborough District Council

Russell McVeagh, Wellington for The New Zealand King Salmon Company Limited

Dyhrberg Drayton, Wellington for Sustain Our Sounds Incorporated

Crown Law Office, Wellington for Minister of Conservation and Director-General of Ministry for Primary Industries

Buddle Findlay, Wellington for Board of Inquiry

¹² However, we do acknowledge that the Board in one respect provided helpful submissions pointing out a statutory provision on its function to which the Court's attention had not been directed (s 149J(2) of the Resource Management Act 1991, as amended by s 25 of the Resource Management Amendment Act 2013).