

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 107/2019
[2020] NZSC 38

BETWEEN PORT OTAGO LIMITED
 Applicant

AND ENVIRONMENTAL DEFENCE SOCIETY
 INCORPORATED
 First Respondent

 OTAGO REGIONAL COUNCIL
 Second Respondent

 ROYAL FOREST AND BIRD
 PROTECTION SOCIETY OF NEW
 ZEALAND INCORPORATED
 Third Respondent

 MARLBOROUGH DISTRICT COUNCIL
 Fourth Respondent

Hearing: 18 March 2020

Court: Winkelmann CJ, O'Regan and Ellen France JJ

Counsel: L A Andersen QC for Applicant
 D A Allan and M C Wright for First Respondent
 A J Logan for Second Respondent
 P D Anderson and W D Jennings for Third Respondent
 J W Maassen and B D Mead for Fourth Respondent

Judgment: 22 April 2020

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay costs of \$2,000 plus usual disbursements to each of the first, second and third respondents.**
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REASONS

Introduction

[1] This proposed appeal relates to provisions in the Proposed Otago Regional Policy Statement (the Proposed Policy Statement) prepared by the Otago Regional Council, the second respondent, as they affect ports in Otago. In particular, the issue is whether the rules in the Proposed Policy Statement governing the established ports¹ give effect to the Avoidance Policies in the New Zealand Coastal Policy Statement 2010.²

Background

[2] This issue was the subject of mediation run by the Environment Court in 2017. The issue was not resolved and the matter went to hearing in the Environment Court in 2018. The Environment Court in its interim decision of 28 September 2018 (the interim decision) essentially adopted the view taken by the applicant, Port Otago Ltd (Port Otago), that it was not necessary for the provisions of the Proposed Policy Statement to require port activities in all cases to avoid the effects in the Avoidance Policies in the New Zealand Coastal Policy Statement.³

[3] The Environmental Defence Society Inc (EDS), the first respondent, supported by the Otago Regional Council and the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird), the third respondent, appealed to the High Court under s 299 of the Resource Management Act 1991 from the interim decision.

[4] Gendall J in the High Court allowed the appeal.⁴ The interim decision was set aside and the matter remitted to the Environment Court to reconsider in light of the High Court judgment.⁵ The Judge considered that the Environment Court had not properly implemented the New Zealand Coastal Policy Statement in the Proposed

¹ One at Port Chalmers and one at Dunedin.

² The relevant Avoidance Policies deal with avoiding specified effects on indigenous biological diversity (Policy 11), natural character (Policy 13), natural features and landscapes (Policy 15) and surf breaks (Policy 16).

³ *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 (Judge Jackson and Commissioners Dunlop and Bunting).

⁴ *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278 [HC judgment].

⁵ At [116].

Policy Statement, contrary to this Court’s decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd (King Salmon)*.⁶

The proposed appeal

[5] Port Otago, supported by the fourth respondent, the Marlborough District Council (the District Council), seeks leave to appeal directly to this Court from the decision of the High Court. Port Otago and the District Council claim that there are errors of principle in the High Court decision which will adversely impact upon port and other infrastructure activities and which warrant granting leave to appeal. One of their key submissions is that the High Court misapplied the law as set out in *King Salmon*.⁷ They see that point as most acute in relation to the statement in the High Court judgment that activities that breach the values protected by the Avoidance Policies would “inevitably” be prohibited activities under the regional plan and that adaptive management is not available as a means of avoiding such effects.⁸

[6] In opposing leave, EDS, the Otago Regional Council and Forest and Bird say that while there is some incongruence between the statement in the High Court judgment, relied on by Port Otago and the District Council, and *King Salmon* this is not a basis for granting leave.⁹ The submission was also made that Port Otago and the District Council are essentially seeking to re-litigate *King Salmon*. Finally, EDS, the Otago Regional Council and Forest and Bird say the outcome reached by the High Court is the correct one.¹⁰

⁶ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*).

⁷ The submissions also focussed on the need for consideration to be given to the correct approach to the interpretation and implementation of Policy 9 of the New Zealand Coastal Policy Statement, particularly as it applied to existing ports or other infrastructure and noting that *King Salmon* dealt with a new proposal for marine farming. The District Council also developed the submission that *King Salmon* envisaged exceptions to what counsel describes as the textual analysis adopted by the Court, and that the present case provided the opportunity to explore those exceptions.

⁸ HC judgment, above n 4, at [55]. See also at [52] and [82].

⁹ These respondents expressed differing views as to the nature and extent and/or practical relevance of the High Court approach on the point.

¹⁰ In developing this submission, counsel for EDS, the Otago Regional Council and Forest and Bird discussed the statutory scheme of the Resource Management Act 1991 and the hierarchy of planning instruments.

Our assessment

[7] After considering the parties' submissions, both written and oral, we accept the submissions for Port Otago and the District Council that the proposed appeal raises a question of general and public importance and general commercial significance. That question is whether the High Court misapplied this Court's decision in *King Salmon*.¹¹ The decision is one with real implications for the existing ports and one which may well raise issues of significance beyond these particular facts.

[8] We are not, however, satisfied that there are exceptional circumstances justifying a direct appeal to this Court.¹²

[9] Port Otago and the District Council submit that the exceptional circumstances threshold is met because the issues raised by the proposed appeal are of constitutional and national significance which require a definitive and authoritative determination. They also emphasise, amongst other matters, the importance of clarifying the approach to be taken to the Environment Court's specialist jurisdiction. On this aspect of the criteria for leave to appeal, we accept the submissions for the parties opposing leave. There is no reason why the Court of Appeal could not address these issues and provide the necessary clarification of the position.¹³ We add that this course would have the added benefit of providing this Court with the Court of Appeal's views should the matter subsequently proceed further.

Result

[10] The application for leave to appeal is accordingly dismissed.

¹¹ Senior Courts Act 2016, s 74(2). There is force in the submissions for EDS, the Otago Regional Council and Forest and Bird that the proposed appeal would otherwise seek to have the Court re-visit *King Salmon*.

¹² Section 75(b).

¹³ Leave to appeal out of time will need to be sought.

[11] The applicant must pay costs of \$2,000 plus usual disbursements to each of the first, second and third respondents.

Solicitors:

McMillan&Co, Dunedin for Applicant

Ellis Gould, Auckland for First Respondent

Ross Dowling Marquet Griffin, Dunedin for Second Respondent

P D Anderson, Royal Forest and Bird Protection Society of New Zealand, Christchurch for Third Respondent

B D Mead, Marlborough District Council, Blenheim for Fourth Respondent