



King Salmon: A Year On...

In the last year, the RMA world has begun to see the ramifications of the decision of the Supreme Court in the land mark case *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38*.

The case concerned King Salmon's proposal to establish and operate additional salmon farms in the Marlborough Sounds.

After a lengthy saga of decisions and appeals, three questions were put to the Supreme Court:

1. Whether the New Zealand Coastal Policy Statement (NZCPS) has standards or policies which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, did the Papatua Plan Change comply with s67(3)(b) RMA even though it did not give effect to NZCPS Policies 13 and 15;
2. Whether the Board of Inquiry gave effect to the NZCPS in coming to a balanced judgment; and
3. Whether the Board was obliged to consider alternative sites because the plan change was located in an outstanding natural landscape or outstanding natural character area.

The Supreme Court overturned the decisions of the High Court and the Board of Inquiry, and declined to grant the consent. Its decision turned on the interpretation of section 5 of the RMA, the characterisation of the relationship between the RMA and the NZCPS and the relationship between policies and objectives within the NZCPS, and the definitions of "avoid", "inappropriate" and "give effect to" as used in the RMA and NZCPS.

King Salmon was a case the outcome of which was very much determined on its somewhat unusual combination of facts, but decisions in the past year have shown that the Supreme Court's decision will not be "confined to its facts".



KEY FINDINGS OF THE SUPREME COURT

Two findings in particular (which are detailed below) have stimulated considerable debate: the Supreme Court's interpretation of "avoid"; and its critique of the "overall broad judgement" approach.

MEANING OF "AVOID"

The Court found that "avoid" in Policies 13 and 15 of the NZCPS bears its ordinary meaning of "not allow" or "prevent occurrence of". Policies 13 and 15 were therefore seen as being "bottom lines" and having a binding effect on decision makers.

This is a far stricter interpretation – giving authorities much less discretion than the prevailing "overall broad judgement" approach. However, the effect of this was softened somewhat by the Court's findings that:

1. In section 5 RMA, in the sequence of "avoiding, remedying or mitigating" – "remedying" and "mitigating" indicate that developments which might have adverse effects on particular sites can be permitted if those effects are mitigated and/or remedied.
2. "Avoid" must be considered against the background of the particular goals that the avoidance means to achieve. Similarly, what is "inappropriate" should also be assessed by what is being protected – the higher the value being protected, the more likely that the development will be inappropriate.
3. In discussing "avoid adverse effects" the Court appears to suggest that some activities with minor or transitory effects would not fall foul of the absolute requirement to avoid adverse effects in areas of outstanding natural value, where their avoidance is not necessary or relevant to preserve the natural character of the coastal environment, or protect natural features and landscapes.

THE "OVERALL BROAD JUDGEMENT" APPROACH

Section 5 of the RMA provides that the purpose of the RMA is to provide for sustainable management. From the enactment of the RMA up until this decision, courts had been developing and applying an "overall broad judgement" approach regarding the benefits of proposals because this was considered best to serve the purpose in section 5.

This approach was not taken by the Supreme Court in *King Salmon*.

The Board of Inquiry had ultimately decided the King Salmon applications by reference to section 66 RMA which provides:

66 *Matters to be considered by regional council (plans)*

(1) A regional council must prepare and change any regional plan in accordance with—

...

(b) the provisions of Part 2;

The Supreme Court held that the NZCPS is to be considered as complying with Part 2 of the Act, that Part 2 would be implemented if effect was given to the NZCPS, and that councils do not have to go beyond the NZCPS, back to the RMA when formulating or changing a regional or coastal plan that must give effect to the NZCPS.

The Court found that the prevailing "overall broad judgement" approach was inappropriate because the wording of policies 13(1)(a) and 15(a) of the NZCPS mean that they are essentially bottom lines. Such an approach would create uncertainty, be inconsistent with the coastal consent process, and would have the potential to undermine the strategic region wide approach that the NZCPS requires regional councils to take to planning.

The Supreme Court accepted that there were tensions between policies in the NZCPS, but read down the extent of that conflict. It said that tensions will be infrequent and that conflicts between policies dissolves when attention is paid to how the policies are expressed. Conflicts that remain should be kept as narrow as possible. Analysis of conflicts should be undertaken under the NZCPS and be informed by section 5 of the RMA. Section 5 should not be treated as the primary decision making provision.



THE EFFECT OF THE DECISION

King Salmon has certainly altered the approach to plan change processes markedly, and to the interpretation and application of the NZCPS.

The “overall broad judgement approach” has so far been maintained in decisions made on resource consent applications, but weight has been given to the Supreme Court’s findings in a range of fora.

There is still contention over the extent of the effect of *King Salmon* on resource consent decisions. In deciding a resource consent application, a consenting authority must “have regard to” effects on the environment, national standards, policy statements the NZCPS etc – this wording is different to that under consideration by the Supreme Court. This gives rise to the opinion that it is a planning decision and its effect should therefore be confined to that arena. The attitude that appears to have emerged, however, is that *King Salmon* is not binding on authorities granting resource consents, but is given some weight.

CASES APPLYING KING SALMON

In addition to the debate the decision has generated, five cases have directly applied the Supreme Court’s finding (as described below) and the decision has been considered in 11 further cases.

MAN O’WAR v AUCKLAND COUNCIL

In this decision, the Environment Court decided to reread the evidence of an interim decision to reflect the Supreme Court findings. The Court found that any adverse effects of the proposal were either minor or transitory and, determining that this complied with the Supreme Court decision, granted the consent for which Man O’War had applied. This is significant because it appeared that this door was left open by the Court in *King Salmon* rather than being definitively decided, and *Man O’War* may therefore be extending the decision.

The Environment Court did not feel it necessary to consider whether the decision applies in respect of decisions under s 104 as the answer was presented another way and it would not be appropriate to consider such a legal question where the argument had been brief and ‘on the papers’. This is representative of the cautious attitude we have seen taken by authorities in applying the findings of the Supreme Court in removed factual contexts.

CASES APPLYING KING SALMON (CONTINUED)

TAYLOR v DUNEDIN CITY COUNCIL

Here, the Environment Court took from the *King Salmon* decision that plans need to be read carefully and coherently as a whole.

KPF v MARLBOROUGH DISTRICT COUNCIL

The Environment Court re-evaluated *Re Skydive Queenstown Ltd* in light of *King Salmon* – finding that the “broad judgement” approach needs to be read subject to *King Salmon*.

The Court noted that it believed the Sounds Plan had been represented as less sophisticated than it is in the Supreme Court decision. The Supreme Court decision says that “*within the overall Marlborough Sounds landscape... the Council identified particular landscapes as “outstanding.”*”

The Environment Court’s take was that the Plan goes beyond that and identifies the “areas of outstanding landscape value”. The Court accepts that “landscape” can be considered at various scales, depending on context – as recognised by the Supreme Court in *King Salmon*, but says those scales cannot be so large or small that they warp the meaning of the word used by Parliament. The Environment Court concluded, given the wide definition of environment(s) in section 2 of the RMA and areal terms used in section 6, that Parliament did not intend “landscape” to be used in the modern broader senses whether as a substitute for “environment” or as a “landscape type”.

SADDLE VIEWS ESTATE v DUNEDIN CITY COUNCIL

In considering the positive and negative effects of the proposal before it, the Court said that *King Salmon* is an important statement that Part 2 of the RMA and the higher statutory order documents must be applied as particularised in regional and district plans.

COOK ADAM TRUSTEES v QUEENSTOWN LAKES DISTRICT COUNCIL

To determine whether a plan change would be allowed, the Court adopted the tests set out in the *Monk* decision, qualified as a result of the *King Salmon* decision to have resort to Part 2 of the RMA only if there is a problem with any of the statutory documents that the Court has to consider.

CONCLUSION

Generally from *King Salmon* the Courts appear to have taken on board the Supreme Court’s view on the hierarchy of planning documents, the importance of wording and the need to carefully consider and reconcile apparent conflicts. However, the full effect of the decision is yet to be determined and the extent to which courts and councils are willing to use the Supreme Court’s findings in discrete factual contexts remains to be seen.

QUESTIONS, COMMENTS AND FURTHER INFORMATION

If you have any questions, comments or would like any further information on any of the matters in this report, please contact the authors:

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