RJ Davidson Family Trust v Marlborough District Council

High Court Wellington CIV-2016-406-14; [2017] NZHC 52
21 November 2016; 31 January 2017
Cull J

Resource consents — Mussel farming — Regard to Part 2 — Evidence — Insufficient evidence to grant application — Potential effects — "Potential" — Precautionary approach — Criminal Justice Act 1985, ss 139 and 140; Resource Management Act 1991, ss 3, 5, 6, 7, 8, 56, 57, 59, 62, 64, 67, 87, 87A, 104, 104D, 171, 274, 299 and 301; Children Act 1989 (UK), s 31(2); Fugitive Offenders Act 1967 (UK), s 4.

The appellant applied for resource consent to establish a mussel farm in Beatrix Bay in the Pelorus Sounds. If the proposal was granted, then the farm would have been the 38th mussel farm in Beatrix Bay.

The Marlborough District Council declined to issue resource consent, and the appellant appealed to the Environment Court. At that appeal the Council adduced evidence from an ecologist and an avian ecologist who canvassed the adverse effects of a further farm in Beatrix Bay, and in particular the detrimental effects on the New Zealand King Shag. The appellant did not adduce any expert evidence in reply.

The Environment Court refused to grant the resource consent. The Environment Court predicted that the adverse effects to the King Shag's habitat caused by the application would be minor, but that the cumulative adverse effects could be serious. Taking a precautionary approach, in light of what it considered to be inadequate information about the cumulative effects, the Court declined the application. The appellant appealed.

The appellant contended that the Environment Court erred in a number of respects. It failed to apply Part 2 of the Resource Management Act 1991 (the Act). It required the appellant to prove what it asserted, and adopted a different standard of proof from the civil standard when predicting future risk. It found that the appellant's application could contribute to the extinction of the King Shag.

Held: (dismissing the appeal)

(1) The Environment Court did not err in failing to have specific regard to Part 2 of the Act. The relevant provisions of the planning documents on which the Court relied had already given substance to the

principles in Part 2. The Court also gave consideration to the appellant's submissions on considerations under Part 2, but disagreed with the appellant's position (see [76], [77], [82], [85], [86], [87]).

Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 applied.

(2) The Environment Court did not err by failing to seek submissions on whether Part 2 of the Act was an overriding consideration under s 104(1)(a)–(c) of the Act, and by relying on two cases which were delivered during the Court's deliberations. The cases which the Court relied upon applied the relevant and binding authority, and any failure to seek further submissions on those cases was not material (see [89], [92]).

(3) If there is insufficient information upon which a consent authority can properly determine a resource consent application, the consent authority may decline the application. It was for the appellant to determine whether to adduce further evidence, and the Environment Court was entitled to dismiss the application on the basis it had insufficient information to determine it (see [101], [102]).

(4) Under s 104(1) of the Act the consent authority must have regard to, among other things, any actual and potential effects on the environment. The word "potential" denotes something other than proof, and cannot be assessed on the balance of probabilities. Instead it is appropriate to assess risks that carry less than a 50 per cent chance of eventuating. The assessment of potential effects depends on an evaluation of all the evidence, on the balance of probabilities, but does not depend on proving that potential effects will be more likely than not to occur (see [126], [127], [128], [129], [133]).

Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337 referred to.

Queenstown Lakes District Council v Hawthorn Estate Ltd [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA) referred to.

(5) The Environment Court did not err in finding that the appellant's application could contribute to the extinction of King Shags. Where there is some uncertainty in the vulnerability of a small population of species, it is correct to take a precautionary approach to its management. The Court was clear that its precautionary approach was based on a prediction that the King Shag could potentially be driven to extinction by the accumulated and accumulative effects of the mussel farms in Beatrix Bay. The Court did not err in finding that the adverse effect on the King Shag's habitat under the proposed site would be minor, but that the cumulative adverse effects could be serious (see [146], [147], [148], [149], [150]).

(6) Section 104(1) of the Act requires a consideration of "any actual or potential effects". The Environment Court's reference to "accumulative effects" was unnecessary, and invited confusion and uncertainty (see [160], [161]).

Dye v Auckland Regional Council [2002] 1 NZLR 337, [2001] NZRMA 513 (CA) referred to.

Other cases mentioned in judgment

Appealing Wanaka Inc v Queenstown Lakes District Council [2015] NZEnvC 139.

Athey v Leonati [1996] 3 SCR 458, (1996) 140 DLR (4th) 235.
Benton v Miller & Poulgrain (a firm) [2005] 1 NZLR 66 (CA).
Commissioner of Police v Ombudsman [1988] 1 NZLR 385, (1988) 3 CRNZ 268 (CA).
Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150, [1994] NZRMA 145 (HC).
Fernandez v Government of Singapore [1971] 1 WLR 987, [1971] 2 All ER 691 (HL).
Janiak v Ippolito [1985] 1 SCR 146, (1985) 16 DLR (4th) 1.
Kuku Mara Partnership (Beatrix Bay) v Marlborough District Council EnvC Wellington W39/2004, 2 September 2004.
Long Bay-Okura Great Park Society Inc v North Shore City Council EnvC Auckland A078/08, 16 July 2008.
Malec v JC Hutton Pty Ltd [1990] HCA 20, (1990) 169 CLR 638.
Mallett v McMonagle [1970] AC 166, [1969] 2 All ER 178 (HL).
Manukau City Council v Trustees of the Mangere Lawn Cemetery (1991) 15 NZTPA 58 (HC).
McGhee v National Coal Board [1972] 3 All ER 1008, [1973] 1 WLR 1 (HL).
New Zealand Transport Agency v Architectural Centre Inc [2015] NZHC 1991, [2015] NZRMA 375.
R v W [1998] 1 NZLR 35 (CA).
Re H (minors) [1996] AC 563, [1996] 1 All ER 1 (HL).
RJ Davidson Family Trust v Marlborough District Council [2016] NZEnvC 81.
Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council [2006] NZRMA 193 (HC).
Saddle Views Estate Ltd v Dunedin City Council [2014] NZHC 2897, (2014) 18 ELRNZ 97.
Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 40, [2014] 1 NZLR 673, [2014] NZRMA 421.
Thumb Point Station Ltd v Auckland Council [2015] NZHC 1035, [2016] NZRMA 55.
Whangaroa Maritime Recreational Park Steering Group v Northland Regional Council [2014] NZEnvC 92.

Potential effects

The RJ Davidson Family Trust appealed a decision of the Environment Court which declined a resource consent for a mussel farm on the basis that the cumulative effects of the application could be detrimental to an endangered species.

JDK Gardiner-Hopkins and *D Owen* for the appellant.
JW Maassen and *N Jessen* for the respondent.
JC Ironside for s 301 parties.

CULL J.

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Introduction

[1] This appeal and cross-appeal concerns a proposal for a mussel farm in Beatrix Bay in Pelorus Sounds. The farm is proposed to be in two blocks, either side of a promontory, covering a total of 7.37 ha. If the proposal was granted, it would be the 38th mussel farm in Beatrix Bay. The other 37 existing mussel farms occupy approximately 304.4 ha, forming a "necklace" lining the shoreline edge of Beatrix Bay.

[2] The application was lodged by the appellant (the Trust) and was heard by an independent commissioner, SE Kenderdine,[1] who issued a decision on 21 May 2014, declining resource consent. The Marlborough District Council (the Council) declined to issue a resource consent on 2 July 2014.

[3] The Trust appealed the Council decision to the Environment Court and, in so doing, amended its proposal in order to reduce impacts on the environment. The amended proposal split the proposed farm into two separate blocks, reducing the total area from 8.982 ha to 7.372 ha.

[4] The appeal was heard by the Environment Court, comprised of one judge and two commissioners.

[5] At the appeal hearing, two incorporated societies, Kenepuru and Central Sounds Residents Association and Friends of Nelson Haven Inc (the Societies), joined the appeal pursuant to s 274 of the Resource Management Act 1991 (the RMA) in support of the Council's decision. The Council adduced evidence from an ecologist and an avian ecologist who canvassed the adverse effects of a further farm in Beatrix Bay and, in particular, the detrimental effect on an endangered species, the New Zealand King Shag, and its population and habitat. This ecological evidence was in addition to the evidence previously adduced before Commissioner Kenderdine on the natural character of Beatrix Bay, the landscape values of a promontory at the northern end of the Bay, the amenities for visitors and the few residents of Beatrix Bay as well as the safety aspects of reducing navigational options.

[6] Following an eight day hearing,[2] the Environment Court issued its decision on 9 May 2016. The majority decision refused the resource

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1 A retired Environment Court Judge with very extensive experience in and knowledge of the Marlborough Sounds. See *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at n 3.

2 The hearing proceeded on 4–8 and 11–12 May 2015 and 17 July 2015.

consent sought. The minority decision held that the application should be granted with standard mussel farm conditions to be advised by the Council.

[7] The Trust appealed the Environment Court decision on five grounds and the Council cross-appealed on four grounds. Counsel accepted that only if the Trust's appeal succeeds, are determinations required on the four cross-appeal grounds.

[8] The Societies gave notice under s 301 of the RMA to appear and were heard in opposition to the Trust appeal.

Part I: Background

The application

[9] In making its application for consent to establish and operate the 7.372 ha mussel farm in Beatrix Bay, the Trust's application also sought consent to disturb the seabed with anchoring devices, to take and discharge coastal sea water, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest. The description of the site, the landscape and seascape setting was set out succinctly in the Environment Court's decision. The descriptions are as follows:[3]

> [5] The application is for a site adjacent to and surrounding the southern end of an un-named promontory ("the northern promontory") which juts out into the northern end of Beatrix Bay. The amended proposal is to split the farm into two separate blocks (a south-east section of 5.166 hectares and a southwest section of 2.206 hectares) either side of the point of the promontory, with a reduced total area of 7.372 hectares. The farm is otherwise of standard design: it is to consist of a number of lines with an anchor at each end and a single warp rising to the surface. At the surface is a backbone with dropper lines extending to approximately 12m depth (not to the sea floor). Each structure set is spaced 12 to 20 m apart. ...
>
> 0.3 The Mussel farm site
>
> [11] The site is an area of shallow coastal water – between 22 m and 42 m deep – adjacent to the northern promontory. Dr D I Taylor, an ecologist called by the Appellant, described the benthic environment below the farm's two blocks as primarily soft mud sediments with a small area of mud/shell hash and coarser sand/shell hash sediments at the inshore margin. A bedrock/boulder reef habitat extends to the southwest of the promontory to around 35 m from the closest proposed mussel lines. It was to avoid interfering with this reef that the Appellant divided its proposed farm into the two blocks described.
>
> [12] On the site current speeds are generally below 4 cm per second which is considered to be in the low to moderate range. Higher flushing events of up to 10 cm per second occur periodically throughout the water column and strong currents up to 20 cm per second have been recorded in the lower section of the water column. Flow direction is generally balanced east/west around the end of the promontory.

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3 Footnotes omitted.

> [13] The northern promontory adjacent to the site extends around 700 m into the bay, dividing the northern coastline of Beatrix Bay into two relatively sheltered embayments. The western slopes of the promontory are dominated by rough pasture mixed with tauhinu scrub, gorse, pig fern, and occasional wilding pines. Further regeneration is inhibited by dry conditions combined with grazing stock (eg cattle), feral pig rooting and goat and hare grazing. Vegetation cover on the eastern side of the promontory is more advanced by it also inhibited by feral animals and stock.
>
> 0.4 The landscape and seascape setting
>
> [14] Beatrix Bay, containing approximately 2,000 ha, is one of the largest bays in Pelorus Sound (total 38,477 ha). It is roughly circular with a coastline of about 22 km. Some sense of the scale of the Bay can be gleaned from the fact that the northern promontory, where the site is, cannot be identified when entering from the south, but looms quite large from close to. The western side of Beatrix Bay is a long near-island running from Kaitira, the East Entry point to Pelorus Sound (from Cook Strait), to Whakamawahi Point. It is connected by a low isthmus along the northern side of Beatrix Bay to the Mount Stoke massif. The slopes of that hill form the higher (1,000 m above sea level) east and south-east margin of the bay. The southern end of the bay descends to Te Puaraka Point. The wide southwestern end of Beatrix Bay opens to the rest of Pelorus Sound: south to Clova and Crail Bays, south-west to inner Pelorus Sound and west to Tawhitinui Reach.
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> [15] The relatively sheltered water of the "Mid Pelorus Marine Character Area" is described in the plan as "... turbid and warm and the seafloor as mostly mud with conspicuous sparse marine life fringed by narrow cobble reef. Most of Beatrix Bay is 30 to 36 m deep with a seabed of soft sediment (the most common type of habitat in the Marlborough Sounds).
>
> ...
>
> [17] There are 37 existing marine farms (approximately 304.4 ha in total) located around the edge of Beatrix Bay. Backbones (surface structures) on the 37 marine farms span approximately 8.5 km (33%) of total shoreline length at sea level (but more under water). Approximately 85% of the surface area (2,000 ha) of Beatrix Bay is not occupied by mussel farms.

[10] At the hearing, a map was produced showing Beatrix Bay and the King Shag foraging in detail. It illustrates the necklace arrangement of the granted marine farms, together with the dates of the grant of those farms.

[11] The key issue, as framed by the Environment Court, was: should there be another marine farm in Beatrix Bay?

The statutory context

[12] The RMA establishes the various types of resource consent in s 87,[4] and the classes of activity that can be consented in s 87A.[5] In particular, s 87A provides for non-complying activities as follows:

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4 For example land use, subdivision and coastal permit.

5 For example permitted, controlled, discretionary and non-complying.

87A Classes of activities

...

(5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—

(a) decline the consent; or

(b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

[13] The relevance of the class of activity in this case arises from the fact that the site of the proposed mussel farm is located within Coastal Marine Zone 2 (CMZ2) in the Marlborough Sounds Resource Management Plan (the Sounds Plan). As the Environment Court described it, the CMZ2 is a zone in which "appropriate" marine farms are provided for, at least close to the shore, as discretionary activities.[6]

[14] The Trust's proposed farm extends beyond 200 m from the shore, rendering the status of the activity under r 35.5 of the Sounds Plan as non-complying.

[15] For that reason, s 104D of the RMA applies, with particular restrictions for non-complying activities. Those restrictions are the gateways which must be passed before consent may be granted. Section 104D provides:

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of section 95A(2)(a)[9] in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

[16] In summary, the gateways which must be passed are:

(a) Section 104D(1)(a) – where the adverse effects of the activity will be minor. This is known as the first gateway.

(b) Section 104D(1)(b) – where the activity is not contrary to the objectives and policies of the relevant plan. In this case it is the Sounds Plan. This is known as the second gateway.

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6 At [18], n 16: Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) p 9-4: Objective (9.2.1) 1.14 and n 17: r 35.4.2.9 of the Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) where "close" means between 50 m and 200 m of the shore within CMZ2.

[17] If one of those gateways is passed, s 104 of the RMA applies. Section 104 provides:[7]

> **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—
> (a) any actual and potential effects on the environment of 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.
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.
> ...
> (3) A consent authority must not,—
> ...
> (c) grant a resource consent contrary to—
> (i) section 107, 107A, or 217:
> (ii) an Order in Council in force under section 152:
> (iii) any regulations:
> (iv) wāhi tapu conditions included in a customary marine title order or agreement:
> (v) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011:
> (d) grant a resource consent if the application should have been notified and was not.
> ...
> (5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.
> (6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.
> (7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

[18] In this appeal the Trust's submissions focused on the words "subject to Part 2" in s 104(1), namely the purpose and principles of the

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7 Emphasis added.

Act. This is because of the enabling provisions in ss 5 and 7, which provide for efficient use and development of natural and physical resources for social, economic and cultural well-being.

Hierarchy of planning instruments

[19] The RMA establishes a hierarchy of planning instruments,[8] which are as follows:

(a) First, there are the national instruments which are the responsibility of central government. This includes the New Zealand Coastal Policy Statement (NZCPS), which is a mandatory document[9] and its purpose is to state policies in order to achieve the purpose of the RMA in relation to the coastal environment.[10] The NZCPS, which came into force in 2010, is a key instrument in these proceedings.

(b) Second, there are the documents which are the responsibility of regional councils, namely regional policy statements (RPS) and regional plans. There must be one RPS for each region, which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[11] The RPS may identify methods to implement policies, although not rules.[12] The RPS must give effect to the NZCPS.[13] The RPS for the Marlborough Sounds became operative in 1995, so predates the current NZCPS.

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans. There must be at least one regional coastal plan for each region.[14] The regional plan must state the objectives for the region, the policies to implement, the objectives and the rules (if any) to implement the policies.[15] They may also contain methods other than rules.[16] The Sounds Plan is a combined plan (incorporating both regional and district plan requirements (the third level[17])), reflecting the Council's status as a Unitary Authority. It covers the coastal environment as well as land use matters. The Sounds Plan must give effect to both the NZCPS and RPS.[18]

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8 These have been helpfully described by the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 [*King Salmon*] at [11].

9 RMA, s 57(1). Other National Policy Statements are "optional" – refer RMA, ss 45–55.

10 RMA, s 56.

11 RMA, s 59.

12 RMA, s 62(1).

13 RMA, s 62(3).

14 RMA, s 64(1).

15 RMA, s 67(1).

16 RMA, s 67(2)(b).

17 The district plan, which sits "lowest" in the hierarchy, is not relevant here so its provisions are not discussed further.

18 RMA, s 67(3).

[20] The Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*) explained the hierarchy as follows:[19]

> The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[21] In light of *King Salmon*, the Environment Court observed that the statutory instruments are of even more importance now than previously because the effects on the environment are not necessarily or usually the relevant effects inferred from Part 2, but the potential effects particularised in the statutory instruments.

[22] Earlier, the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd* said this about a district plan under the RMA:[20]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[23] The issue in the principal ground of appeal in this case is whether the majority of the Environment Court erred by considering the statutory instruments to the exclusion of Part 2 of the RMA in reaching its determination.

The NZCPS

[24] The NZCPS contains a number of relevant provisions applicable to the determination of the application.

[25] For completeness, the relevant policies are set out as follows:

> (a) **Policy 3 – Precautionary approach:**
>
> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>
> (a) avoidable social and economic loss and harm to communities does not occur;
>
> (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and

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19 *King Salmon*, above n 8, at [14].

20 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337 at [10] per Elias CJ.

(c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

(b) **Policy 8 – Aquaculture:**

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognizing that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

(c) **Policy 11 – Indigenous biological diversity:**

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

...

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

...

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

...

(ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;

...

(iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

...

[26] The Environment Court also considered Policy 13, which requires the preservation of the natural character of the coastal environment and the protection of it from inappropriate use and development. Policy 15 protects the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision and development, and requires the avoidance of adverse or significant adverse effects on natural features and natural landscapes in the coastal environment.

The Marlborough Regional Policy Statement (MRPS)

[27] The MRPS became operative in 1995, well before the Sounds Plan, which became operative in 2003[21] and the NZCPS, which was operative in 2010. Because the MRPS became operative before the Sounds Plan, the Environment Court considered its provisions were deemed to be given effect in the Sounds Plan. Because it contained broad objectives, it was seen to be of little assistance to the Environment Court, except to note that there is an objective to ensure that "natural species diversity and integrity of marine habitats [should] be maintained and enhanced".[22]

The Sounds Plan

[28] The Sounds Plan became operative in 2003 (also before the current NZCPS)[23] and is described by the Environment Court as a combined district, regional and regional coastal plan.[24]

[29] Chapter 2 (Natural Character) focuses on integrating the values and interests identified in other chapters which promote activities, while avoiding, remedying and mitigating adverse effects on the identified values.[25]

[30] One of the themes of the Sounds Plan is avoiding effects of use or development within those areas of the coastal environment which are predominantly in their natural state and which have not been compromised,[26] while encouraging appropriate use and development in areas where the natural character of the coastal environment has already been compromised and where the adverse effects of such activities can be avoided, remedied and mitigated.[27]

[31] Chapter 4 deals with Habitats of Indigenous Fauna. Two particularly relevant policies are:

Policy 1.1	Identify areas of significant ecological value which incorporate areas of indigenous vegetation and habitats of indigenous fauna.
Policy 1.2	Avoid, remedy or mitigate the adverse effects of land and water use on areas of significant ecological value.

[32] The feeding habitat of King Shag is identified in volume 2 of the Sounds Plan as an "Area of Significant Ecological Value" (AOEV),[28]

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21 The Sounds Plan was made operative in 2003 in two parts, on 28 February and 28 March. The Environment Court referred to 2008. See further at marlborough.govt.nz; and the Sounds Plan, above n 6, at 2.

22 *RJ Davidson Family Trust*, above n 1, at [154] and refer objective 5.3.10 [MRPS p 44].

23 It comprises three volumes: Volume 1 contains the objectives, policies and methods; Volume 2 the rules; and Volume 3 the maps.

24 *RJ Davidson Family Trust*, above n 1, at [137], and Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) at 1-1.

25 At [2.1].

26 Policy (2) 1.1, Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) at 2-3.

27 Policy (2) 1.2, Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) at 2-3.

28 Appendix B, notation 1/11.

and the subject site is within a King Shag AOEV area. Importantly, that triggers discretionary activity consent[29] (not a non-complying or prohibited status). The anticipated environmental result is maintaining population numbers and distribution of species.[30]

[33] Chapter 9 deals with the Coastal Marine Area. Within s 9.2.1, Objective 1 seeks the accommodation of appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. Policy 1.14 seeks to enable a range of activities in appropriate places in the Sounds. Zoning is one of the methods of implementation of that objective and policy. Three zones are established for marine farms. The first, CMZ1 prohibits marine farming, and covers much of the Sounds. The CMZ2 provides for marine farming as either controlled or discretionary within 200 m of the shore, and non-complying beyond that. The CMZ3 provides for salmon farming as discretionary activities and farming of other finfish as non-complying.

[34] Chapter 35 outlines the rules and regulations related to the Coastal Marine Zones. In terms of the rules, general assessment criteria are contained in r 35.4.1, with specific assessment criteria found in r 35.4.2.9. They include reference to "likely" effects on the habitat of indigenous species, water quality and ecology.

The Environment Court decision

[35] Having posed the key issue as to whether there should be another marine farm in Beatrix Bay, the Court identified a set of issues arising from each of the planning documents.

[36] In relation to the policies of the Sounds Plan and the natural character of the area, the Environment Court raised these issues:

(a) Is the natural character of the area around the site compromised? And, if so, to what extent?
(b) Can any adverse effects of the mussel farm on coastal land forms, flat fish, King Shag and their habitats, water quality and scenic landscape values be appropriately avoided, remedied or mitigated?

[37] In relation to the NZCPS policies, namely Policy 6(2) and Policy 11, the Environment Court considered the following questions:

> Will the proposed mussel farm cause adverse effects on:
> (a) The King Shag species?
> (b) The habitat of King Shags?
> (c) Effects which are significant on the reef system around the promontory?

[38] In considering policies 13 and 15 of the NZCPS, the questions raised for the Environment Court were:

(a) Will the proposed mussel farm cause adverse effects:

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29 Section 4.4 – Methods of Implementation, Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) at 4-4.

30 Section 4.5 – Anticipated Environmental Results, Marlborough District Council "Marlborough Sounds Resource Management Plan" (2003) at 4-5.

(i) To the natural character of Beatrix Bay?
(ii) To the natural features in, or landscape of, Beatrix Bay?

(b) If the answer to question (a) is "yes" will any of those effects be significant?
(c) Will the proposed mussel farm, together with other mussel farms, cause cumulative adverse effects on the natural character/natural features/landscape of Beatrix Bay?

[39] The majority of the Environment Court found that there was adequate information to predict that:[31]

(a) King Shag habitat will be changed by shell drop and sedimentation;
(b) the effects of the farm accumulate and are likely to be adverse;
(c) it is as likely as not there will be adverse effects on the populations of New Zealand King Shags and their prey; and
(d) there is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[40] The Environment Court then considered the more important predicted non-neutral effects of the Trust application with the "accumulative" effects of other identified stressors which the Court considered under the Sounds Plan and the NZCPS. These were in addition to the potential effects of concern, which the Court considered under the Sounds Plan's objectives and policies.

[41] The Court concluded that a summary of the more important predicted non-neutral effects of the application were:[32]

(a) the likely net social (financial and employment) benefits;
(b) a likely significant adverse effect on the natural feature which is the promontory;
(c) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
(d) likely adverse cumulative effects on the amenity of users of the Bay;
(e) 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);
(f) very likely a reduction in feeding habitat of New Zealand King Shags;
(g) very likely more than minor (11 per cent) 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
(h) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

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31 *RJ Davidson Family Trust*, above n 1, at [206].
32 At [269].

[42] The majority held that after considering all the matters raised by the parties and after weighing all the relevant factors including the objectives and policies of the Sounds Plan, reinforced by the more directive policies of the NZCPS, the Court should refuse the consents sought.[33]

[43] The majority, noting that it had attempted to assist the Trust by assessing the information and making predictions where it could, stated further that if its assessments were too inaccurate, then the alternative outcome was clear, that is, that there was inadequate information supplied by the Trust (and other parties) to determine that the application should be granted. On that basis, the majority said it would exercise its discretion under s 104(6) of the RMA to decline to grant consents.

[44] In summary, the minority judgment states:

(a) An adverse effect on King Shag habitat is likely (that is, more than minor but less than significant) at a cumulative Bay-wide scale.
(b) There is no evidence that the adverse effect on the King Shag habitat is having any adverse effect on the population of King Shag generally and the Duffers Reef Colony in particular.
(c) There is a low risk that mussel farms in the outer Pelorus Sounds may have adverse effects on the Duffers Reef Colony of King Shag.
(d) The proposal is unlikely to have significant adverse visual effects on the natural character and landscape of the promontory or cumulatively on the natural character and landscape of Beatrix Bay.
(e) The proposal is likely to have no more than minor adverse effects on non-visual aspects of natural character including benthic and water column effects, recreational amenity, navigation and King Shag.

[45] In the result, the minority stated that the application should be granted with standard mussel farm conditions to be advised by the Council and noted that the majority decision to refuse the application was a disproportionate response to the extremely unlikely risk that an additional marine farm in Beatrix Bay may contribute to a decline in the King Shag population in the Marlborough Sounds. The minority viewed the proposal as an appropriate development in the coastal marine area.

New Zealand King Shag and its habitat

[46] A distinguishing feature between the Environment Court decision and that of Commissioner Kenderdine was the additional evidence and focus on the importance of the habitat of Beatrix Bay to the New Zealand King Shag.

[47] The Environment Court described the New Zealand King Shag and its habitat on the basis of the evidence of three witnesses. The first

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33 At [297].

was R Schuckard (Mr Schuckard), who holds an MSc in biology, has conducted long-term studies in monitoring of New Zealand King Shag since 1991 and is a committee member of the Societies appearing in this proceeding. He was not an independent witness. The second was Mr Davidson, a Trustee of the appellant Trust and a biologist, who authored the DOC study in 1994, identifying the King Shag habitat. He too, was not independent and gave evidence, renouncing his status as an expert witness in these proceedings. The third witness was PR Fisher (Dr Fisher), an independent avian ecologist, who has studied the King Shag and was called by the Council.

[48] The Environment Court summarised the evidence on the New Zealand King Shag, its habitat and population and it is set out below.[34]

> 2. New Zealand King Shags and their habitat
>
> 2.1 Description, population and conservation status
>
> [88] One aspect of the environment in which the site is located is of particular importance in this case. It stems from the fact that Beatrix Bay is within the extent of occurrence ("EOO") of the endemic New Zealand King Shag. The New Zealand King Shag ("King Shag") is one of 16 taxa of blue-eyed shags. Like almost all *Leucocarbo* shags, it is dimorphic: males are larger and heavier than females and they tend to feed in deeper water.
>
> [89] The King Shag is a large black and white bird with pink feet and white bars on its black wings. It has yellowish-orange patches of bare skin at the base of the bill. It is smaller than the Black Shag and larger than the Pied Shag (with which it can be confused).
>
> ...
>
> [96] We conclude that King Shag numbers in the four main colonies have been approximately the same since 1991 and there is no declining trend in total numbers, but that finding is subject to the qualifications stated by Dr Fisher who elaborated on this in his rebuttal evidence: "the colony counts cannot be used to determine the long term *'stability'* of the population because the count[s] do ... not reflect the number of breeding pairs, successful breeding attempts or age and sex ratio of birds, the latter determining the number of potential breeding pairs".
>
> *Status*
>
> [97] The King Shag is a Nationally Endangered species in the *New Zealand Threat Classification System* published by the Department of Conservation. As at 2012 the criteria for King Shag's inclusion as a "Nationally Endangered Species" were that it had a small (250–1,000 mature individuals), stable population. It was also described as "Range Restricted".
>
> [98] The *IUCN Red List Categories and Criteria (the Red List)* categorises taxa by assessing them under five sets of criteria:
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> A: Reduction in population;

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34 Footnotes omitted from original source.

B: Geographic range (EOO or AOO – see next paragraph – or both);

C: Small population size and declining population;

D: Very small or restricted population size;

E: Quantitative analysis showing the probability of extinction in the wild meets a threshold.

[99] Obviously the "AOO" needs explanation. The *Red List* states:

> Area of occupancy is defined as the area within its 'extent of occurrence' which is occupied by a taxon, excluding cases of vagrancy. The measure reflects the fact that a taxon will not usually occur throughout the area of its extent of occurrence, which may contain unsuitable or unoccupied habitats. In some cases (eg irreplaceable colonial nesting sites, crucial feeding sites for migratory taxa) the area of occupancy is the smallest area essential at any stage to the survival of existing populations of a taxon. The size of the area of occupancy will be a function of the scale at which it is measured, and should be at a scale appropriate to relevant biological aspects of the taxon, the nature of threats and the available data ...

[100] King Shag is identified as *vulnerable* by the International Union for the Conservation of Nature and Natural Resources (IUCN) in the *Red List*. *Vulnerable* is one of the three 'threatened' species in the *Red List*.

[49] The Environment Court heard evidence on the geographic range of the King Shag and the proximity of King Shag colonies to the proposed site of the Trust's mussel farm and foraging areas. The Environment Court concluded that Beatrix Bay is part of the area of occupancy of King Shag and that the area outside the ring of mussel farms is used for foraging and feeding, including the foraging depth for male and female King Shags. The Environment Court concluded that King Shags forage within mussel farms only very infrequently because their prey, the flatfish on or in the changed seafloor underneath the farms, has a reduced presence.[35]

[50] The Court specifically noted Dr Fisher's evidence that, although the whole of the Marlborough Sounds was a "significant habitat" for King Shags, he was also of the opinion that Pelorus Sound, with the specific areas noted on a 1991/1992 map, is the core feeding area for the birds from the Duffers Reef colony. The Sound sits just north and approximate to the promontory in Beatrix Bay either side of which the proposed mussel farm will be based.

Legal authorities on management of risk to King Shag

[51] By way of background, the Supreme Court decision in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* (*SOS*)[36] dismissed an appeal challenging a Board of Inquiries decision, allowing a change to the Sounds Plan for salmon farming, from a prohibited activity to a discretionary activity in eight locations. In the course of the judgment,

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35 At [134].

36 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, [2014] NZRMA 421.

the Supreme Court had particular regard to the significance of the King Shag foraging habitat. In addition to citing with approval the 2007 IUCN Guidelines for the application of the precautionary principle, the Supreme Court concluded it should be applied to the threatened status of the King Shag:

> [66] The "cumulative additions of nitrogen, increases in phytoplankton and consequential reduction in water clarity" were also potentially of significance for the King Shag foraging habitat. This merited a precautionary approach, given the threatened status and limited geographic range of the King Shag.

[52] The Supreme Court also addressed the secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach. This, the Court said, will depend on an assessment of a combination of factors, including the extent of the environmental risk, the importance of the activity, the degree of uncertainty and the extent to which an adaptive management approach will sufficiently diminish the risk in the uncertainty.

[53] The question the Court addressed was whether any adaptive management regime can be considered consistent with a precautionary approach. The answer to the question of whether risk and uncertainty will be diminished sufficiently for an adaptive management regime to be consistent with a precautionary approach will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. The Court gave as an example the annihilation of an endangered species:[37]

> For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach.

[54] The Supreme Court found that it was open to the *SOS* Board of Inquiry to consider the adaptive management regime as being consistent with a proper precautionary approach. The Court said:

> [140] In this case, while a change in trophic state would be grave, the experts were agreed it was unlikely. Further, the information deficit is effectively to be remedied before the farms are stocked and before feed levels are increased. Remedial action will be taken if there is any significant shift in water quality. The Board was thus entitled to consider that the four factors it had identified were met. In this case, given the uncertainty will largely be eliminated and the risk managed to the Board's satisfaction by the conditions imposed, it was open to the Board to consider that the adaptive management regime it had approved, in the plan and the consent conditions, was consistent with a proper precautionary approach.

[55] Submissions were made by the Council distinguishing the considerations in that case from the factors in this case. As this hearing

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37 At [139].

focussed on the specific points on appeal and the issue of adaptive management was not relevant to the parties' arguments, this aspect is taken no further.

[56] For completeness, the Environment Court also assessed the significance of protecting the King Shag feeding habitat in *Kuku Mara Partnership v Marlborough District Council*.[38]

Part II: Appeal

This Court's approach to appeals

[57] Under s 299 of the RMA, there is a right of appeal to the High Court from the Environment Court. The approach by the High Court on such appeals has been well settled. In *Countdown Properties (Northlands) Ltd v Dunedin City Council* the High Court set out when it will interfere with decisions of the Tribunal, namely only if it considers that the Tribunal:[39]

(a) applied a wrong legal test; or
(b) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
(c) took into account matters which it should not have taken into account; or
(d) failed to take into account matters which it should have taken into account.

[58] The Court warned against interfering with findings of fact and identifying errors of law:[40]

> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349 at 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: see *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 at 81–82.
>
> In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke P in *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 at 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

[59] Those well settled principles are particularly applicable to this Court's determinations on the grounds of the cross-appeal, if the substantive appeal is not upheld.

[60] The Trust advanced four grounds of appeal. Although there are four grounds, the Trust submits that the first ground is the most important. Did the Environment Court err:

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38 *Kuku Mara Partnership (Beatrix Bay) v Marlborough District Council* EnvC Wellington W39/2004, 2 September 2004 at [404]–[405].

39 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150, [1994] NZRMA 145 (HC) at 153, citing *Manukau City Council v Trustees of the Mangere Lawn Cemetery* (1991) 15 NZTPA 58 (HC) at 60.

40 At 153.

(1) in failing to apply Part 2 of the RMA in considering this application for resource consent under s 104?

(2)
  (i) in requiring the appellant to prove what it asserts and thereby creating an additional onus of proof on the appellant, and
  (ii) adopting a standard different from the civil standard of proof predicting future risk?

(3) in finding that the appellant's application could contribute to the extinction of King Shags, when the likelihood of that occurrence was remote?

(4) in finding that the appellant could not challenge the basis on which the Council had adopted areas of significant ecological value in its plan?

Ground 1 – Did the Environment Court err in failing to apply Part 2 of the RMA in considering this application for resource consent under s 104?

[61] The Trust asserts that the majority of the Environment Court adopted an erroneous approach, when it failed to apply the plain statutory language of s 104(1) which requires a decision-maker, when considering a resource consent application, to have regard to the relevant matters prescribed, "subject to Part 2".[41]

[62] Section 104 of the RMA comes into play because the Environment Court found that although the Trust's application was for a non-complying activity, it was satisfied that the second threshold test was met under s 104D(1)(b),[42] although noting, "this is quite a close-run judgment in this case".

[63] The Environment Court gave consideration to the statutory wording of s 104(1), namely "subject to Part 2", and found that the phrase does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances. In *King Salmon* the Supreme Court held that, absent invalidity, incomplete coverage or uncertainty of meaning in the statutory planning documents, there is no need to look at Part 2 of the RMA.[43] The majority of the Environment Court found that the Supreme Court's reasoning in *King Salmon* applied to an application for resource consent, although it was not obliged to give effect to the NZCPS, merely to have regard to it, which is itself subject to Part 2 of the RMA.

[64] Counsel for the Trust, Mr Gardner-Hopkins, submits that the Environment Court was in error to apply *King Salmon* in disregarding or narrowly confining its consideration of Part 2, when the Supreme Court's consideration in *King Salmon* arose in the context of a Plan change and a different statutory directive. In *King Salmon*, the statutory requirement was s 67(3) where a regional plan must "give effect to ... any New Zealand Coastal Policy Statement" The Trust argues that, rather than Part 2 having primacy as required by s 104(1) of the RMA, it was given

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41 Set out at [17] above.
42 Test set out at [16] above.
43 *King Salmon*, above n 8.

a "back seat" by the Environment Court, only to be considered in narrow circumstances.

[65] The Trust submits that there is a different statutory directive in the context of this case, which limits King Salmon's applicability. It asserts that the Supreme Court did not consider the meaning of the term, "subject to Part 2". The majority of the Environment Court interpreted the Supreme Court's judgment as meaning that Part 2 takes a back seat when considering factors listed in s 104, despite the specific statutory wording in s 104 that they are "subject to Part 2". This approach by the Environment Court, the Trust submits, was erroneous, in that the majority did not apply the plain language of s 104, which requires the decision-maker to have regard to the matters in Part 2 of the RMA.

[66] The Trust relied on the High Court decision in *New Zealand Transport Agency v Architectural Centre Inc* (*Basin Bridge*)[44] That case concerned s 171 of the RMA which, similarly to s 104, lists matters that a decision-maker must have regard to, "subject to Part 2". Brown J agreed with the submissions for the Save the Basin Campaign and the Mount Victoria Residents Association, that the context of s 171 demanded a different approach to that taken by the Supreme Court in *King Salmon*.[45] Thus, unlike a plan change under s 67, the Court held that the NZCPS (or any other planning document) does not determine the outcome of the s 171 assessment.

[67] The Environment Court did not apply *Basin Bridge* as it was inconsistent with *King Salmon*. To consider the appellant's argument, it is appropriate to consider the Supreme Court's judgment in *King Salmon* and its applicability to this proceeding.

Does King Salmon apply to this resource consent application?

[68] The Supreme Court in *King Salmon* considered what was meant by the requirement to "give effect to" the NZCPS in the context of an application to change the regional coastal plan. The Board at the first hearing had ultimately determined the application by reference to Part 2 of the RMA rather than the NZCPS, granting plan changes and resource consents for four sites. It did so on the basis that s 66(1) of the RMA requires a regional council to prepare and change any regional plan "in accordance with" Part 2. The same section (s 66) requires the Council to "give effect to" the NZCPS. The Board considered that Policy 8, enabling aquaculture subject to conditions, conflicted with Policies 13 and 15, requiring the avoidance of adverse effects from activities on the natural character of outstanding landscapes in the coastal environment.

[69] The Supreme Court overturned the Board's decision. Because the NZCPS was intended to give substance to the provisions of Part 2 of the RMA, there was no need to refer back to Part 2 when considering the

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44 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 [*Basin Bridge*].

45 At [117].

plan change. In summary, the Court gave the following reasons for this interpretation:[46]

(a) There is a reasonably elaborate process for issuing a coastal policy statement, making it implausible for Part 2 to be the ultimate determinant, not the NZCPS.
(b) The NZCPS gives Ministers some control over regional decisions, so it is difficult to see why the RMA would require regional councils to go beyond the NZCPS to Part 2, with Part 2 effectively trumping the NZCPS.

[70] This interpretation, which treats the NZCPS as giving substance to Part 2, was given with the following three caveats:[47]

(a) If there was an issue as to the lawfulness of the NZCPS, this would need to be resolved before determining whether a decision-maker was acting in accordance with Part 2.
(b) There may be instances where the NZCPS does not cover a scenario and it is necessary to refer to Part 2.
(c) Reference to Part 2 may be justified to assist with interpretation where there is uncertainty.

[71] The Supreme Court emphasised that:[48]

> The RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to Part 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

[72] The same three documents, which were of importance to the *King Salmon* case, apply to this case. They are the NZCPS, the MRPS and the Sounds Plan.

[73] Of importance, the majority held that the NZCPS gave substance to the principles in Part 2 of the RMA in relation to New Zealand's coastal environment by translating the general principles to more specific or focussed objectives and policies. Thus, when a regional council was considering a plan change in relation to the coastal environment, it was acting in accordance with Part 2 by giving effect to the NZCPS. William Young J considered that when planning authorities were required to "give effect to" the NZCPS, those words meant implement and was a strong directive creating a firm obligation on planning authorities.

[74] The Court in *King Salmon* also addressed the way in which a decision-maker must take into account the planning documents. In particular, the "necessary analysis" should be undertaken on the basis of

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46 At [86].
47 At [88].
48 At [30].

the NZCPS, informed by s 5. Section 5 should not be treated as the primary operative decision-making provision.[49] The Court said:

> [151] Section 5 is not intended to be an operative revision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open textured nature of Part 2, Parliament has provided for a hierarchy of documents for purpose of which is to flesh out the principles in s 5 and the remainder of Part 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 Part 2 remains relevant. It does not follow from the statutory scheme that because Part 2 is open textured, all or some of the planning documents that sit under it must be interpreted as being open textured.

[75] The Supreme Court rejected the "overall judgment" approach in relation to the implementation of the NZCPS in particular. It is inconsistent with the elaborate process required before a national coastal policy statement can be issued and the overall judgment approach created uncertainty.[50]

[76] I find that the reasoning in *King Salmon* does apply to s 104(1) because the relevant provisions of the planning documents, which include the NZCPS, have already given substance to the principles in Part 2. Where, however, as the Supreme Court held, there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to Part 2 should then occur.

[77] I also consider that the Environment Court's decision was consistent with *King Salmon* and the majority correctly applied it to the different context of s 104. I accept Council's submission that it would be inconsistent with the scheme of the RMA and *King Salmon* to allow Regional or District Plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications. It could result in decision-makers being more restrained when making district plans, applying the *King Salmon* approach, than they would when determining resource consent applications.

[78] In the event that I am wrong in finding that the approach in *King Salmon* applies equally to s 104 considerations as it does to a plan change, I turn to consider the Trust's submission that the majority decision erred in failing to have regard to Part 2 of the RMA.

Did the Environment Court err in failing to have specific regard to Part 2?

[79] The thrust of the Trust's submission is that the Environment Court, in failing to have regard to Part 2 of the RMA, overlooked ss 5(2) and 7(b) of the Act. Under s 5(2) sustainable management is defined as meaning the management of "the use, development and protection of natural and physical resources in a way which enables people and communities to provide for their social, economical and cultural well-being".

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49 At [130].
50 At [136] and [137].

[80] Further, under s 7, all decision-makers excercising functions and powers under the RMA shall have particular regard to "the efficient use and development of natural and physical resources". The appellant argues that if those considerations had been taken into account by the Environment Court, the future financial and long term benefit to the beneficiaries of the Trust would have been considered and the resource consent may well have been granted.

[81] The appellant's argument is that under s 104(1), the statement "subject to Part 2" requires the Council to do more than look at the planning documents; they must also have regard to Part 2, specifically ss 5(2) and 7(b).

[82] I consider there are two problems with the Trust's argument. The first is that the appellant focuses on ss 5(2) and 7(b) in Part 2 only. Part 2 of the RMA includes four sections: s 5 – purpose; s 6 – matters of national importance; s 7 – other matters; and s 8 – Treaty of Waitangi principles.

[83] Section 5(2) requires the decision-maker to:

(a) sustain the potential of natural and physical resources (s 5(2)(a));
(b) safeguard the life support and capacity of air, water, soil and ecosystems (s 5(2)(b)); and
(c) avoid, remedy or mitigate any adverse effects of activities on the environment.

[84] Although s 5(2) was framed in the appellant's submission as an enabling provision to provide for people in communities and their social, economic and cultural well-being, the decision-maker must also have regard to future sustenance of the resource and the avoidance or mitigation of any adverse effects on the environment.

[85] Section 6 reinforces matters of national importance and places a mandatory consideration on a decision-maker to preserve the natural character of the coastal environment (including the coastal marine area) and protect them from inappropriate use and development (s 6(a)). It also requires, under s 6(c), the decision-maker to protect significant habitats' indigenous fauna. Equally, s 7(d) and (g) require the decision-maker to have "particular regard" to intrinsic values of ecosystems and any finite characteristics of natural and physical resources. Even if the Environment Court had paid specific attention to Part 2, it was not a given that the enabling provisions under Part 2 were to be given pre-eminent consideration.

[86] The second problem with the Trust's argument is that the Environment Court did give consideration to the Trust's submission and took into account Part 2 considerations, but disagreed with the Trust's position. Notwithstanding its finding that because no party to the proceeding argued that the NZCPS was uncertain or incomplete, there was no need to apply the "subject to Part 2" qualification in s 104 of the RMA,[51] the Environment Court went on to take into account the likely net

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51 The *King Salmon* approach.

social (financial and employment) benefits in assessing the non-neutral effects of the Trust's application.[52]

[87] The Environment Court also had particular regard to s 7(b) of the RMA, finding that it was largely irrelevant in this case, because the subsection was concerned only with two of the elements of sustainable management of resources – their use and development. It did not deal with the third, namely protection. As the Environment Court viewed this case as essentially being about the protection of the resources in the environment around the site, it did not ask for further submissions on protection and did not take the matter further. That assessment and judgment was open to the Environment Court and I find no reason to interfere with it.

[88] Further, the Trust took no issue with any deficiency in the planning instruments, namely the NZCPS and the Sounds Plan, to demonstrate that the purpose and principles under Part 2 of the RMA were not taken into account in the planning documents. Despite the Trust's submission to the Court that *King Salmon* does not apply to this application, it was open to the Trust to challenge any deficiency in the Part 2 considerations in the planning documents. The Environment Court considered the requirements of the Sounds Plan and the NZCPS and on both considerations found that resource consent should be refused. On the basis of the Sounds Plan the proposed application inappropriately reduces the habitat of King Shag,[53] and the majority found there was no uncertainty or incompleteness in the NZCPS requiring that the Court apply the "subject to Part 2" qualification in s 104 of the RMA.[54]

Procedural error

[89] The Trust submits that the Environment Court also erred procedurally, by failing to seek submissions on whether Part 2 of the RMA was an overriding consideration under s 104(l)(a)–(c) and relied on two cases which were delivered during the Environment Court's 10 months' deliberation.

[90] Following the Environment Court hearing, two further High Court decisions were delivered and considered by the Environment Court. In *Thumb Point Station Ltd v Auckland Council*[55] the High Court applied *King Salmon* in considering the relevance of Part 2 to its consideration of a plan change.

[91] The second decision, *Appealing Wanaka Inc v Queenstown Lakes District Council*, also considered a plan change.[56] The Environment Court confirmed the *Thumb Point* approach to Part 2, as articulated by Arnold J in *King Salmon*, that resort to Part 2 is neither necessary or helpful, absent the three caveats.

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52 *RJ Davidson Family Trust*, above n 1, at [269(1)] and [275]: "we also take into account the (social) and (economic) benefits of the proposed farm".
53 At [274].
54 At [287].
55 *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035, [2016] NZRMA 55.
56 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

[92] Given both of those cases applied *King Salmon*, in the context of plan change applications, which was relevant and binding authority, I do not consider any oversight by the Environment Court to seek further submissions from Counsel on those cases, to be material. The applicability of *King Salmon* to this resource consent application had already been the subject of submissions at the hearing.

Conclusion

[93] I find that the Environment Court has not erred in that:

(a) it did give consideration to aspects of Part 2 of the RMA, namely the social, financial and employment aspects of ss 5 and 7;
(b) it was not required to consider Part 2 of the RMA beyond its expression in the planning documents, as the Court correctly applied the Supreme Court's decision in *King Salmon* to s 104 of the RMA; and
(c) there was no procedural error in the Environment Court not seeking further submissions from counsel, following the hearing, on two decisions which applied the binding authority of the Supreme Court's *King Salmon* decision to plan change applications.

Ground 2 – Did the Environment Court (i) err in requiring the appellant to prove what it asserts and thereby create an additional onus of proof on the appellant, and (ii) adopt a standard different from the civil standard of proof of balance of probabilities?

[94] The Trust asserts that the Environment Court erred in its approach to both the burden of proof and standard of proof by interpreting s 104(6) to increase the burden imposed on an applicant to provide information and satisfy the Court as to the effects of the application. It further erred by rejecting the civil standard of "the balance of probabilities" in assessing the evidence about potential affects.

Section 104(6) "additional" onus

[95] The Trust submits that the Environment Court interpreted s 104(6) as imposing an onus on an applicant to supply enough relevant information to enable the determination of the issue.

[96] This ground of appeal arises from the Trust's decision not to call independent evidence on the King Shag foraging habitat. Instead, the Trust decided to challenge the methodological basis for including the notation in the Plan as an area of ecological value with national significance and to submit that there was no, or insufficient, evidence that any "tipping point" has been reached in respect of the cumulative effects, relevant under the Sounds Plan and the NZCPS.[57] The Trust's complaint here is that the Environment Court down-played the concessions obtained through cross-examination, such as the comparison of area of mussel

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57 *RJ Davidson Family Trust*, above n 1, at [204].

farms with the foraging area of King Shags, which Dr Fisher agreed had not been done.

[97] The respondent submits that the Court's assessment of the evidence was fair and that it was entitled to dismiss the application because it had inadequate information. The respondent also noted that the application was denied after a full assessment of factors in s 104, and not only s 104(6).

[98] The Environment Court expressed its concern about the cross-examination by the Trust, when the Trust had not called independent expert evidence and appeared to suggest that it was Dr Fisher's problem that he had not made the appropriate comparisons. The question is whether the Court has placed an additional increased onus or burden on the applicant to supply adequate information for the Court to determine the application. The King Shag habitat issue did not come to the fore until the appeal to the Environment Court. For that reason, the appellant did not have sufficient information to address the Council's objection. The Trust was in effect a respondent to the Council's position and made a tactical decision to cross-examine the Council's experts and not adduce further independent evidence.

[99] Section 104(6) states simply that "a consent authority may decline an application for resource consent on the grounds that it has inadequate information to determine the application".

[100] Although it was open to the Environment Court on appeal to request further information or give an opportunity to the appellant to provide further information, it had the jurisdiction to dismiss the application where it considered it lacked evidence. Section 104(6) provides this jurisdiction. The Environment Court relied on the discretion under s 104(6) of the RMA to decline the consent, in the event that any of its other assessments are too inaccurate.

[101] If there is insufficient information upon which a consent authority can properly determine a resource consent application, the consent authority may decline the application. There is no additional onus on the applicant, particularly in these circumstances, where the opposing party called an avian expert at the appellate level.[58] It was for the Trust to determine whether to adduce further evidence.

[102] However, the Environment Court was entitled to dismiss the application on the basis that it had inadequate information to determine it. This aspect of this ground of appeal is not upheld.

Conclusion

[103] The Environment Court did not err in dismissing the application on the basis that it had inadequate information to determine it. The applicant can elect not to adduce further evidence, if it chooses, but runs the risk of having its application declined, if the information is inadequate. There is no additional onus on the applicant.

The standard of proof for future effects

[104] The Environment Court in this case predicted that the adverse effect of the change to King Shag habitat by the Trust's proposal will be

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58 At [131].

minor but that the cumulative adverse effects could be serious. The Court then adopted the precautionary approach and exercised its discretion under s 104(1)(c), taking cumulative effects into account, but to the extent that it had inadequate information about those, declined the application under s 104(6).

[105] The wording the Court used is as follows:

> [280] We have predicted that the adverse effect of the change to King Shag habitat under the site will be minor given the extent of potential habitat in the Sounds. On the other hand we have also predicted that the accumulative adverse effects could be serious. Counsel for the Appellant warned us against the "real risk of loading a (new) potential effect upon multiple (existing) potential effects to arrive at an unrealistic potential cumulative effect scenario". Some *Dye*-induced confusion in that submission aside, we have heeded the warning. However, the prediction remains: potentially the King Shag could be driven to extinction by the accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay. That is a low probability event, but extinction is indubitably a significantly adverse effect which would be exacerbated, to a small extent, by the Davidson proposal.
>
> [281] The precautionary approach suggests both that we should exercise our discretion under section 104(1)(c) to take accumulative effects into account, and – to the extent we have inadequate information about those – to consider declining the application under section 104(6) RMA (after taking into account in the Appellant's favour that the Council did not, it appears, ask for further information about this before the Commissioner's hearing).

[106] The Environment Court was influenced by Lord Diplock's judgment, in giving the opinion of the House of Lords in *Fernandez v Government of Singapore*, where he referred to "the balance of probabilities" as:[59]

> ... a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in mind of the Court as to the existence of facts, so as to entitle the Court to treat them as data capable of giving rise to legal consequences.

[107] He continued:[60]

> But the phrase ['the balance of probabilities'] is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a Court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on it happening are fractionally less than evens.

[108] The Environment Court considered this issue in *Long Bay-Okura Great Park Society Inc v North Shore City Council*

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59 *Fernandez v Government of Singapore* [1971] 1 WLR 987, [1971] 2 All ER 691 (HL) at 696.

60 At 696.

(*Long Bay-Okura*) and considered it was bound by the advice of the Lord Diplock's judgment for the Privy Council in *Fernandez*.[61] In the case before this Court, the Environment Court relied on *Saddle Views Estate Ltd v Dunedin City Council* where Whata J noted that the burden of proof is a "complex issue" in RMA cases.[62] While accepting that facts must be proved on the balance of probabilities, the Court found that the same standard could not apply to its consideration of future predictions. That would involve an "awkward" assessment of the probability of a probability.

[109] The appellant submits that the Court erred by failing to assess the various future risks on the balance of probabilities. The appellant cites the High Court's decision in *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (*Buller District Council*) for the proposition that there is no separate and special standard of proof, where Panckhurst J said:[63]

> As the House of Lords said *In Re H (Minors)* [1996] AC 563 in a markedly different context, there are only two standards of proof, being beyond reasonable doubt and on the balance of probabilities, but:
>
> Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. (Lord Nicholls at 586).
>
> This speech and others in the case, discuss the need in relation to proof to have regard to the particular context, and where risk assessment is involved to consider in particular the seriousness of the consequence (or impact) in deciding whether a matter is proved. But, so long as these considerations are observed, the standard of proof is unaltered. **There is no separate and special standard of proof which falls somewhere between the criminal and civil standards.**

[110] In dismissing the application, the Environment Court said that assessing future probabilities on the balance of probabilities was unworkable. On the other hand, the Court accepted that questions of fact must be decided on the balance of probabilities or on "the preponderance of the evidence". It is important therefore to clarify the approach to future predictions or assessment of risk.

How should future predictions be assessed?

[111] There are a number of cases in which the assessment of future events has been considered.

[112] The New Zealand Court of Appeal considered the standard of proof in relation to future predictions in *Commissioner of Police v Ombudsman*.[64] Cooke P (as he then was) stated:[65]

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61 *Long Bay-Okura Great Park Society Inc v North Shore City Council* EnvC Auckland A078/08, 16 July 2008 at [321].

62 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZHC 2897, (2014) 18 ELRNZ 97 at [90], referenced in *RJ Davidson Family Trust*, above n 1, at [33].

63 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC) at [73] (emphasis added).

64 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, (1988) 3 CRNZ 268 (CA).

> ... To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is serious or real and substantial risk to a protected interest, a risk that might well eventuate. This Court has given "likely" that sense in a line of criminal cases, a recent example of which is *R v Piri* [1987] 1 NZLR 66. ...
>
> Whether such a risk exists must be largely a matter of judgment. In that sense a reference to onus of proof is not fully apt:
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> > compare the observations in *McDonald v Director of Social Security* (1984) 1 FCR 354 about the inapplicability of adversary proceedings concepts, such as the onus of proof, in administrative proceedings. (The Court's emphasis).

[113] There are a number of decisions which do not apply the civil standard to predictions of future effects, but give weight to their relative likelihood. In *Athey v Leonati* the Supreme Court of Canada, referring to a number of superior court overseas decisions,[66] said that:[67]

> [F]uture events need not be proven on a balance of probabilities. Instead they are simply given weight according to their relative likelihood ...

[114] *Mallett v McMonagle* concerned the principle of a loss of a chance.[68] The House of Lords considered the appropriate quantum of damages for a claim under the Fatal Accidents Act 1846, where an award was intended to provide the deceased's family with the income that would otherwise have been provided by him if he were alive. In that context, Lord Diplock discussed the distinction between proving a past fact and assessing a future or hypothetical possibility.

[115] This reflects the settled law in New Zealand also: a plaintiff can claim damages for a loss of a chance.[69] Assessing a loss of a chance depends on hypothesising what would have happened if the defendant had not acted tortiously (or in breach of contract). In such cases, it is not necessary for the plaintiff to prove its loss on the balance of probabilities, but will be awarded damages proportionate to the chance that it lost.

[116] In *Fernandez v Government of Singapore*, the House of Lords was unanimous in its agreement with Lord Diplock's judgment.[70] The case concerned the extradition of an accused charged with bribery. The House of Lords was considering whether, pursuant to s 4(1)(c) of the Fugitive Offenders Act 1967, the accused "might, if returned, be detained or restricted in his personal liberty by reason of his political opinions".

[117] In the courts below, it was held that the accused needed to show on the balance of probabilities that there was a reasonable chance of his being restricted or detained. However, Lord Diplock noted that neither

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65 At 391.

66 *Mallett v McMonagle* [1970] AC 166, [1969] 2 All ER 178 (HL) at 190–191 per Lord Diplock; *Janiak v Ippolito* [1985] 1 SCR 146, (1985) 16 DLR (4th) 1; and *Malec v JC Hutton Pty Ltd* [1990] HCA 20, (1990) 169 CLR 638.

67 *Athey v Leonati* [1996] 3 SCR 458, (1996) 140 DLR (4th) 235 at [27].

68 *Mallett*, above n 66.

69 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).

70 *Fernandez*, above n 59, quoted above at [108]–[109].

the Magistrate nor the Court of Appeal applied that standard. Instead, the word in the Act, might, was expanded in those courts to mean "there is a reasonable chance that he will" or "there are substantial grounds for thinking that he might". Lord Diplock continued with the passage cited in *Long Bay-Okura*. Lord Diplock gives two further examples in English law where the balance of probabilities is not applied: first, in assessing damages for personal injuries; and secondly, in determining whether to grant an injunction on the ground that irreparable harm may be caused.

[118] The Canadian and Australian cases cited in *Long Bay-Okura* concern the first example given by Lord Diplock. In *Malec v J C Hutton Proprietary Ltd*, the plaintiff brought proceedings against his employer (a meatworks) after he was diagnosed with brucellosis, a disease acquired from animals.[71] The plaintiff thereafter was diagnosed with a neurotic illness. The expert evidence was that the neurotic condition was likely caused by the brucelliosis. The Court declined to award the full damages sought, however, finding that it was likely the plaintiff would have developed a similar neurotic condition as a result of an unrelated back condition. The High Court of Australia expressed the law as being that, when assessing damages:[72]

> A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. ... But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof.

[119] A similar approach was taken in *McGhee v National Coal Board*.[73] There, the plaintiff had developed dermatitis after cleaning out brick kilns for his employer. No washing facilities were provided so the plaintiff bicycled home covered in sweat and grime. The evidence was that the effect of the dirt on the skin was cumulative: the longer the plaintiff was exposed to the dirt and sweat without having an opportunity to wash, the greater the chance of his developing dermatitis. Lord Reid was of the view that it could not be proved that the lack of washing facilities was a necessary precondition of the resulting disease. However, it was sufficient for establishing causation that the employer's action (in failing to provide washing facilities) materially increased the risk of injury. The opinion of Lord Salmon was similar and he noted that, "the approach by the courts below confuses the balance of probability test with the nature of causation".

[120] Apart from the assessment of future contingencies, an approach other than the balance of probabilities is appropriate where the

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71 *Malec*, above n 66.
72 At 642–643.
73 *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1 (HL).

language of the statute requires. In *R v W*,[74] the Court of Appeal considered the meaning of "likely" in the phrase "likely to lead to identification" in ss 139 and 140 of the Criminal Justice Act 1985, which prohibit the publication of certain names in criminal proceedings. Richardson P explained that the meaning of "likely" in a statute depends on the context and gave numerous examples of how the word has been interpreted. Relevantly, the term often denotes something other than "more probable than not".

[121] The particular issue in *Buller District Council* was the extent to which certain mitigation plans were likely to be successful in reducing predation and therefore be likely to enhance the relevant populations of kiwi and patrickensis snails. In other words, the effect at issue was a "prediction" not a finding of past fact.

[122] This passage quoted at [109] above confirms that there is no separate, higher standard of proof between the balance of probabilities and beyond reasonable doubt. That is not necessarily in conflict with the proposition that there are situations which make "proof" or the balance of probabilities unworkable. The Court there quoted from *Re H (minors)*, a decision of the House of Lords which illustrates this distinction.

[123] In *Re H (minors)* the Court considered the standard of proof that applied in the context of s 31(2) of the Children Act 1989.[75] That section provides that a court may make a care or supervision order only if it is satisfied:

> (a) that the child concerned is suffering, or is likely to suffer, significant harm; ...

[124] It was the first limb of this requirement (that the child is presently suffering harm) which gave rise to the discussion about burden of proof. It was argued that, because of the seriousness of the allegations being made about a person, something other than the usual civil standard of proof should apply. A majority of the House of Lords rejected this proposition.

[125] However, the second limb (whether the child is likely to suffer) requires a separate assessment of future risk. In this regard, the court must be satisfied of any relevant fact on the balance of probabilities (for example, whether the person creating the risk has previously caused suffering) and then "evaluate" the risk. There must be evidence to establish the risk, but it is not necessary to prove that it is more likely than not that the particular risk will eventuate. The word "likely" was held to mean "a real possibility", which is less than "more likely than not".

RMA context

[126] The standard for assessing risks is set out in s 104(1) of the RMA. The consent authority must have regard to, among other things,

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74 *R v W* [1998] 1 NZLR 35 (CA).
75 *Re H (minors)* [1996] AC 563, [1996] 1 All ER 1 (HL).

"any actual and **potential effects** on the environment of allowing the activity".[76]

[127] There are two RMA decisions which are relevant. *Queenstown Lakes District Council v Hawthorn Estate Ltd* concerned an application for subdivision and land use for a non-complying activity.[77] The key issue was whether a consent authority should take account of the environment as it might be in the future, assuming that unimplemented resource consents would be given effect to in the future. The Court of Appeal determined that a future environment was relevant to a determination of a resource consent application and it could be determined in a practical way, by receiving evidence about any resource consents granted by the consent authority in the past, in relation to the surrounding area and whether those consents were likely to be implemented. The Court held the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a District Plan.

[128] The second is *Discount Brands Ltd v Westfield (New Zealand) Ltd*,[78] where the Supreme Court held that an authority had to have sufficiently comprehensive information to satisfy itself that the activity would not have any adverse effect on the environment which was more than minor and it would not have any adverse effect, unless it was de minimus or a remote possibility.

[129] Determining actual effects on the environment is relatively straightforward, because it concerns existing factual circumstances that can be proved on the balance of probabilities. However, the authority must also take into account potential effects on the environment. The word "potential" denotes something other than proof, and cannot be assessed on the balance of probabilities. Instead, it was appropriate to assess risks that carry less than a 50 per cent chance of eventuating. In particular, the risk of species extinction is much less than 50 per cent and it cannot be proved that extinction is more likely than not to occur. Instead, it is appropriate to assess existing facts on the balance of probabilities, and consider whether any particular evidence is proved to that standard. The assessment of potential effects then depends on an evaluation of all of the evidence but does not depend on proving that potential effect will more likely than not occur.

[130] The Environment Court considered that a "probability of a probability" was an unworkable concept. The law requires that the authority (or the court) be satisfied (on the balance of probabilities) that the risk of some future event occurring is likely, albeit that it is a low probability event. That is not the same as requiring that the future event is proved on the balance of probabilities.

[131] At [39] the Environment Court reiterated that facts must be proved "on the preponderance of the evidence". Although this is a

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76 Emphasis added.

77 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).

78 *Discount Brands Ltd*, above n 20.

somewhat uncertain term, the Environment Court's reference to "preponderance of evidence" simply describes the range of factual matters adduced for the assessment of the decision-maker. It is part of the assessment in reaching a decision on the balance of probabilities and was another way of describing the civil standard. There is no particular magic about its different title. The Court then adopted a likelihood scale for assessing the probabilities of future risks. That accords with the wording of the statute and is not in conflict with orthodox legal principles. The Court approached the assessment of the evidence before it and future prediction appropriately. The facts of what has occurred and has been scientifically observed was evidence, which was assessed on a balance of probability test.

[132] In relation to future risk, the Court then considered the future risk on the evidence that was available to it and in its assessment took into account a significant relevant factor, namely the potential for the King Shag to be driven to extinction by the "accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay". Although that was a low probability event, in the Court's assessment, extinction was undoubtedly a significantly adverse effect which would be exacerbated, to a small extent, by the Trust's proposal. The Court predicted that the accumulative adverse effects could be serious. I note that the Court did not assess the risk as de minimus or as a remote possibility.[79] There is no basis for this Court to interfere with the majority's decision.

Conclusion

[133] The Court did not err in its assessment of the evidence and future prediction, which was consistent with legal authority. The Court satisfied itself (on the balance of probabilities) that the risk of some future event occurring is likely, albeit that it is a low probability event. That is not the same as requiring that the future event is proved on the balance of probabilities. It requires that any existing fact or any past event is proved to that standard, and those facts form the basis of probability assessments for future events.

Ground 3 – Did the Environment Court err in finding that the appellant's application could contribute to the extinction of King Shags, when the likelihood of that occurrence was remote?

Trust's submission

[134] The Trust submits that the New Zealand King Shag is recognised as:

(a) "Nationally endangered" in the NZ Threat Classification System, on the basis that it has a small (250–1,000 mature individuals), stable population.
(b) "Vulnerable" (or threatened) by the International Union for the Conservation of Nature and Natural Resources (IUCN) in its Red

79 *Discount Brands Ltd*, above n 20, at [106].

> list, because it is "facing a high risk of extinction in the wild in the medium-term future" as it has a population of "less than 1,000 individuals" and is restricted to "five or less locations".

[135] The Trust does not dispute that the King Shag is endangered, vulnerable, threatened and at risk of extinction. However, it says that there was no evidence before the Court on which the majority could conclude that "extinction ... would be exacerbated, to a small extent, by the [Trust's] proposal".

[136] Adopting the test applied in *Basin Bridge*, the Trust submits that the "true and only reasonable conclusion" from the evidence is that the likelihood of the Trust's proposal contributing to the extinction of King Shags is so remote that it can be disregarded.[80]

[137] The Trust relied on the evidence before the Court from witnesses "opposing" its application. The Trust pointed to the evidence of Mr Schuckard, who did not offer a view on the scale of impacts on King Shags, and made no mention of the potential for the Trust's proposal to exacerbate the risk of King Shag extinction. Dr Fisher did not express a view on the potential for the Trust's proposal to exacerbate the risk of King Shag extinction and Mr Butler, who relied on Dr Fisher, said that it seemed:

> unlikely that anyone mussel farm will cause a wholesale decline or crash in population numbers, but every mussel farm that removes foraging area will increase the pressure on the species through an increase in energy expenditure and decrease in breeding. As a consequence it will contribute to the fragility of the population.

[138] The Trust drew attention to the response by Mr Butler to a question from the Court:

> Q King Shags, you've talked there about the potential for extinction. Now I would have thought that was an event or a potential effect of a fairly low probability insofar as we can assess that, but pretty high potential impact.
>
> A Mhm, yes, I would agree and extinction is a remote possibility, but my, again, I don't want to exceed my brief, but my understanding of such matters is that by losing a – that it's not a linear loss. Birds and a lot of other rare animal populations can after losing a certain smallish percentage then go into irretrievable decline.

[139] The Trust additionally submitted that the evidence showed that the entire Marlborough Sounds was within the King Shag's foraging range. By simple operation of maths, the area of the Trust's proposed farm site was miniscule in comparison and Dr Fisher had not, however, taken into account the extent of the foraging area and the area of the mussel farms.

[140] Further, because the Schuckard surveys were insufficient to establish relative importance of feeding areas, there was no evidence that the Trust's site was more important that other areas. In addition,

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80 *Basin Bridge*, above n 44, at [19]–[22].

Mr Schuckard gave evidence that if historic counts at colonies are adjusted for birds, the numbers of shags appear to have been stable for at least the past 50 years – and possibly over 100 years – which would suggest a long-term balance between recruitment and mortality. Yet, the Trust submits, there has been development of approximately 575 mussel farms in the Sounds (and most, if not all, of the 37 mussel farms in Beatrix Bay) within that period.

[141] For the above reasons, the Trust submits the only true and reasonable conclusion on the evidence is that stated in the minority decision, that King Shag numbers are not declining and "the likelihood of this farm resulting in the extinction of the species is so remote that it cannot be considered as a credible threat in the context of the definition of effect under s 3 RMA".

Discussion

[142] While Dr Fisher may not have opined on the effects of the Trust's proposal itself, he expressed a clear view, which plainly influenced the majority decision. He said:

> It is in my opinion that the cumulative effects of the proposed mussel farm and exclusion from significant foraging habitat in Beatrix Bay will be detrimental to King Shags and be more than minor.

[143] Further, Mr Butler conceded that one more mussel farm "will contribute to the fragility of the population". As noted above,[81] the only independent avian expert witness was Dr Fisher. Mr Butler was not independent and expressed reservations about going beyond his brief.

[144] The Trust's own evidence did not support the conclusion stated by the minority in the Environment Court, because it accepted that there was insufficient information to reach a conclusion on the threats to the King Shag species. Further, it was not disputed that the species is rare, endangered and not adaptable to habitat changes, and that there will be a risk of adverse effects on its population.

[145] The minority of the Environment Court relied on a finding that the King Shag population was stable, but Mr Maassen criticised this finding for lacking evidential foundation. The evidence relied on by the minority was as to population counts of the species. The evidence of Dr Fisher was that population counts are inherently problematic for identifying threatened species; assessing population dynamics gives a more accurate picture of the species.

[146] I accept the submission for the Council and the intervening parties that, where there is some uncertainty in the vulnerability of a small population of species, it was correct to take a precautionary approach to its management and the Environment Court's assessment of the risks to the King Shag was without error. There was evidence for its finding that the proposed mussel farm would cover an area of more than 10 ha with detritus and inhibit flatfish, thereby removing foraging habitat for the

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81 At [49].

King Shag. This effect would add cumulatively to the existing environmental stressors on the species.

[147] The Environment Court found that the adverse effect of the changed King Shag habitat under the site will be minor given the extent of potential habitat in the Sounds. On the other hand, the Environment Court also predicted that the "accumulative adverse effects could be serious". The Court was clear that its precautionary approach was based on a prediction that the King Shag could potentially be driven to extinction by the accumulated and "accumulative" effects of mussel farms which are part of the environment in Beatrix Bay. Although that was a low probability event, extinction is a significantly adverse effect which would be exacerbated, to a small extent, by the Trust proposal.

[148] For that reason, the majority of the Environment Court exercised its discretion under s 104(1)(c) to take cumulative effects into account. To the extent that the available information was inadequate, it declined the application under s 104(6), after taking into account that the Council did not ask for further information about this aspect before the Commissioner's hearing. Nor did the Court for that matter, but it was entitled to decline the application on the information it had available.[82]

[149] It should be noted that before the Environment Court hearing, adequate notice was given to the Trust by way of case management directions and memoranda, to alert the Trust to the King Shag issue. There was ample opportunity for the Trust to call rebuttal evidence to the Council's expert evidence, if it chose to do so.

Conclusion

[150] The Environment Court majority did not err in finding that the adverse effect on King Shag habitat under the proposed site will be minor but that the cumulative adverse effects could be serious. The Court did not accept that the likelihood of extinction was remote. This was a finding available to it. The fact that the majority and minority reached different evaluative judgments based on the information available does not mean that there has been an error of law. Accordingly, this ground fails.

Ground 4 – Did the Environment Court err in finding that the appellant could not challenge the basis on which the Council had adopted areas of significant ecological value in its plan?

[151] The Environment Court held it was too late for the appellant to challenge the notation of the area of significant ecological value (AOEV) in its plan, when the Sounds Plan was implemented in 2003 and the Trust did not adduce any expert evidence to demonstrate that the habitat of Beatrix Bay was not King Shag habitat.[83]

[152] Mr Gardner-Hopkins for the Trust submits that the basis for the AOEV were based on 1991 and 1992 surveys reported in 1994, then incorporated in the 1995 Davidson report and imported into the Sounds Plan. The Trust raised a number of concerns with the methodology behind

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82 Discussed above at [95]–[103].
83 At [273].

the original Schuckard surveys and sought to challenge the notation in the plan accordingly.

[153] These, and other criticisms of the methodology underlying the AOEV notations, were not addressed by the Environment Court when considering the Trust's submission on the relevance of the AOEV notations, given its position that it was "far too late" to challenge the basis of those AOEV notations. Significantly, the Environment Court had, earlier in its decision, accepted at least some of Dr Clement's criticisms of the (incorrect) conclusions that might be drawn from the Schuckard study, including the conclusion that:[84]

> ... the study's original Figure 8 map and its caption, "Main feeding area of king shags from Duffers Reef" is simply a conclusion that cannot be drawn based on the data collected. It would be more appropriate to say that the map simply represents observed feeding locations of king shags from Duffers Reef.

[154] Authorities were cited to demonstrate that a court can assess designations within a plan such as "outstanding" landscape[85] but here there was no evidential base adduced by the Trust to show that the AOEV was inaccurate. Although the Trust chose to challenge the methodology behind the AOEV, it was open to the Environment Court to require substantive evidence that the King Shag habitat was inaccurately designated on the plan.

Conclusion

[155] There was no error of law in the Environment Court dismissing the Trust's challenge to the AOEV in the plan, when there was no substantive evidence that the King Shag habitat was inaccurately designated on the plan.

Part III: Cross Appeal

[156] There were four grounds advanced by the Council by way of cross-appeal. These grounds required a determination, only if the substantive appeals succeeded and the matter was referred back to the Environment Court. The Council submitted that the Environment Court erred:

(a) by applying an incorrect test under s 104D(1)(b) in concluding that the proposed activity could pass the jurisdictional threshold or gateway for a non-complying activity, when the proposed marine farm was contrary to the objectives and policies of the Sounds Plan;
(b) in its interpretation of the Sounds Plan in stating that policy 1.2 rendered cumulative effects on natural character irrelevant;

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84 Dr Clement had been called by the Trust to explain the limitations in the Schuckard surveys.

85 *Whangaroa Maritime Recreational Park Steering Group v Northland Regional Council* [2014] NZEnvC 92.

(c) failing to consider as an additional and relevant matter under s 104 of the RMA the factor known as "precedent effect"; and
(d) in describing the cumulative effects of the proposal additional marine farm in addition to existing environmental effects of marine farming and other stressors as "accumulative", which are to be considered under s 104(1)(c) not s 104(1)(a).

[157] Mr Maassen for the Council submits that even if the appeal is not upheld and referred back to the Environment Court, the cross-appeal grounds one and four were important to future Environment Court proceedings and it would be helpful for those grounds to be determined.
[158] As I have not upheld the substantive appeal and the matter is not being referred back to the Environment Court, a determination on each of the cross-appeal grounds is not required. Because there was no agreement among the parties on cross-appeal ground one and the appeal was not upheld, the threshold test issue under s 104D(1)(b) should be determined at another time, with full argument.
[159] However, there is one matter relating to the fourth ground of the cross-appeal, on which all parties were agreed and that is the coining of a new term by the Environment Court of "accumulative effects". This raises the interpretation of s 3 of the RMA, which provides the definition of "effect":[86]

> **3 Meaning of effect**
> In this Act, unless the context otherwise requires, the term **effect** includes—
> (a) any positive or adverse effect; and
> (b) any temporary or permanent effect; and
> (c) any past, present, or future effect; and
> (d) any **cumulative** effect which arises over time or in combination with other effects—
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
> (e) any potential effect of high probability; and
> (f) any potential effect of low probability which has a high potential impact.

[160] The definition of "effect" does not include "accumulated effects". The Environment Court, having considered the Court of Appeal's decision in *Dye v Auckland Regional Council*,[87] determined that the *Dye* decision did not take into account that all stressors, regardless of who or what causes them, caused cumulative effects on ecosystems. The Environment Court considered that the *Dye* view was static and did not accommodate potential future effects. For that reason, the majority called such potential future effects "accumulative effects", so as not to confuse its analysis with that in *Dye*.
[161] All parties were agreed that the description of "accumulated" effects was an unhelpful gloss on the statutory language of the RMA and was outside the statutory definition of "effect". Such a description added

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86 RMA, s 3 (emphasis added).
87 *Dye v Auckland Regional Council* [2002] 1 NZLR 337, [2001] NZRMA 513 (CA).

an unnecessary complication to an assessment of the current environment, which under s 104(1) requires a consideration of "any actual and **potential** effects on the environment of allowing an activity". Although the Environment Court was attempting to clarify the distinction between the *Dye* approach and a potential effect in the future, I agree that importing new terminology in a statutory definition invites confusion, creates uncertainty and in light of the statutory wording of 104(1)(a), is unnecessary.

Part IV: Conclusion

[162] The appeal and cross appeal are dismissed. For the reasons set out under each of the grounds of appeal below, I find that the Environment Court did not make any errors of law, such that its majority decision should be overturned.

Ground 1:

(1) In determining whether the Environment Court has erred in failing to have regard to Part 2 of the RMA, I find that the Environment Court has not erred in that:
   (a) it did give consideration to aspects of Part 2 of the RMA, namely the social, financial and employment aspects of ss 5 and 7; and
   (b) it was not required to consider Part 2 of the RMA beyond its expression in the planning documents, as the Court correctly applied the Supreme Court's decision in *King Salmon* to this s 104 of the RMA application.

(2) Further, there was no procedural error in the Environment Court not seeking further submissions from counsel, following the hearing, on two decisions which applied the binding authority of the Supreme Court's *King Salmon* decision to plan change applications.

Ground 2:

(1) The Environment Court did not err in dismissing the application on the basis that it had inadequate information to determine it. The applicant can elect not to adduce further evidence, if it chooses, but runs the risk of having its application declined if the information is inadequate. There is no additional onus on the applicant.

(2) The Court did not err in its assessment of the evidence and future prediction, which was consistent with legal authority. The Court satisfied itself that the risk of some future event occurring is likely, albeit that it is a low probability event. It was not necessary for the future event to be proved on the balance of probabilities. Any existing fact or any past event must be proved to that standard, and those facts form the basis of probability assessments for future events.

Ground 3:

The Environment Court majority did not err in finding that the adverse effect on King Shag habitat under the proposed site will be minor but that the cumulative adverse effects could be serious. The Court did not accept that the likelihood of extinction was remote. This was a finding available to the majority. The fact that the majority and minority reached different evaluative judgments based on the information available does not mean that there has been an error of law.

Ground 4:

There was no error of law in the Environment Court dismissing the Trust's challenge to the areas of significant ecological value in the plan, when there was no substantive evidence before the Court that the King Shag habitat was inaccurately designated on the plan.

Costs

[163] Counsel are to file memoranda on costs within six weeks, in the absence of reaching agreement.

Reported by: Kerry Puddle, *Barrister and Solicitor*