Clearwater Mussels Ltd v Marlborough District Council

[2019] NZHC 961

High Court, Blenheim (CIV-2018-406-21) 15, 16 October 2018;
Grice J 3 May 2019

Appeals — High Court — Respondent District Council refused to grant appellant company resource consent for the operation of mussel farms in the Marlborough Sounds — Relevant planning framework — The King Shag — Adverse effect — Whether appellant had been denied a fair hearing — Natural justice — Natural character — Landscape values — Economic factors — Grounds of appeal not made out — Resource Management Act 1991, ss 6(a), 6(b), 6(c).

This proceeding concerned an appeal against *Clearwater Mussels Ltd v Marlborough District Council* [2018] NZEnvC 88, which declined an appeal against Marlborough District Council's refusal to grant consent to Clearwater Mussels Ltd (Clearwater) for the operation of mussel farms at Pig Bay, in the outer Marlborough Sounds.

On appeal, Clearwater submitted that the Environment Court: (i) made an error of law by misinterpreting and misapplying relevant policy, and could not have reasonably reached the conclusion it did on evidence before it regarding the ecological impact on the King Shag; (ii) denied Clearwater a fair hearing as no party put to Clearwater's orthinological expert (M), that the farms would adversely affect the King Shag due to the proximity of the colony, roosting site, or disturbance of the feeding shags by boats; (iii) did not adequately identify its reasons and could not have reasonably reached the conclusion it did on the evidence before it in terms of its natural character findings; (iv) did not adequately identify its reasons and could not have reasonably reached the conclusion it did on the evidence before it regarding its landscape analysis; and (v) made an error of law by failing to have regard to material considerations; had not adequately identified its reasons; and could not have reasonably reached the conclusion it did on the evidence before it regarding economic factors.

The issues on appeal were: (i) the effect of the farms on the King Shag; (ii) the natural character and landscape of the area; and (iii) the consideration of economic factors.

Held, (1) regarding the King Shag, the dispute was as to the effects of the proposal on the King Shag and whether the Environment Court was correct in its view that the small risk to the species amounted to an adverse effect. The Environment Court was required to take the evidence, expert and otherwise, and reach a view on possible adverse effects, and determine how best to deal with them within the requirements of the Resource Management Act 1991 (the RMA) and planning documents. In this case, the Environment Court had ample evidence before it to conclude that the proposals would give rise to potential adverse effects on the King Shag. Its findings on the likely adverse effects to the King Shag were open, based on the evidence it had before it. The Environment Court had not made any factual errors, and certainly none so severe that they constituted an error of law. Clearwater's argument that the Environment Court made an error of law when it interpreted Policy 11(a) of the *New Zealand Coastal Policy Statement* as meaning that no risk, however infinitesimal, was tolerable

in respect of a vulnerable or threatened species, was rejected. The ground of appeal concerning the King Shag was not made out. (paras 73, 85, 88, 91, 92, 98, 101)

(2) The second ground of appeal was whether Clearwater had been denied a fair hearing because the Environment Court's views on the risks of human activity to the King Shag should have been specifically put to M, particularly concerns about the effects of boat movements. The Environment Court may not have accepted all of M's views, but it was common for a court to prefer the evidence of one expert over that of another. A specialist court, such as the Environment Court, regularly considered expert evidence and was experienced in evaluating the evidence and assessing risks. It did so here. The general principle of fairness was not violated. There was no obligation on the Environment Court to put to M its view on the weight it would place on the evidence pertinent to the issue. All that was required was that Clearwater received a fair opportunity to put its case, and it did. As there was no error of law on this point, this particular ground of appeal failed. (paras 102, 107, 109, 113)

(3) Regarding natural character, Clearwater had submitted that the Environment Court had not followed the approach it identified in regard to natural character, and that if the Environment Court was taking a "factual and science based" inquiry it ought to have used the evidence of Clearwater's witness (D) as a starting point on the biotic and abiotic elements of natural character. The Environment Court was required to consider the evidence of a number of witnesses, not just D. Its considerations were much wider than the matters covered by D. The Environment Court had also taken into account the degradation of the visual impacts and people's perceptions of naturalness, disruption of the biotic characteristics and values, including the submerged ridge and the effect on the flora and fauna, including the King Shag. This ground of appeal failed. (paras 114, 116, 124, 131, 133)

(4) In relation to Clearwater's submission that the Environment Court had failed to give reasons by not specifically referring to D's evidence, the Environment Court did consider D's evidence. It was for the Environment Court to weigh the evidence it received and consider all the elements that go into natural character. There was no obligation to record every finding on every point each witness made. In this case, the Environment Court's reasoning, and the basis for its conclusions, were clear. There was no error of law on this ground. (paras 134-136)

(5) Clearwater's submissions regarding landscape values did not differ materially from those dealt with under natural character. For the same reasons, this ground of appeal must fail. (paras 137, 138)

(6) Regarding economic factors, Clearwater had conceded at the hearing that even if they were successful in establishing the "economic factors" ground as an error of law, it would not amount to a material error. It would not of itself (without other grounds on appeal succeeding) justify the matter being remitted to the Environment Court. This was because, in this case, the environmental and ecological effects and natural character and landscape issues overrode the economic factors. This ground of appeal would have failed were it pursued. The Environment Court had not erred in reaching its conclusion that it "overwhelmingly" found that the appropriate outcome was to decline the appeals. (paras 139, 144, 145)

Cases referred to

Air New Zealand Ltd v Mahon [1983] NZLR 662, [1984] AC 808 (PC)

Ayrburn Farm Estates Ltd v Queenstown Lakes District Council [2012] NZHC 735, [2013] NZRMA 126

Contact Energy Ltd v Waikato Regional Council (2007) 14 ELRNZ 128 (HC)

Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)
Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442
Guardians of Paku Bay Assoc Inc v Waikato Regional Council [2012] 1 NZLR 271, (2011) 16 ELRNZ 544 (HC)
Hunt v Auckland City Council [1996] NZRMA 49 (HC)
Hutchinson Bros Ltd v Auckland City Council (1988) 13 NZTPA 39 (HC)
Lau v Auckland Council [2017] NZHC 1010
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638 (HCA)
Man O'War Station Ltd v Auckland Council [2017] NZCA 24, (2017) 19 ELRNZ 662
Meridian Energy Ltd v Central Otago District Council [2011] 1 NZLR 482, [2010] NZRMA 477 (HC)
Moriarty v North Shore City Council [1994] NZRMA 433 (HC)
New Zealand Suncern Construction Ltd v Auckland City Council (1997) 3 ELRNZ 230 (HC)
RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52, (2017) 19 ELRNZ 628
Russell v Manukau City Council [1996] NZRMA 35 (HC)
Sean Investments Pty Ltd v MacKeller [1981] FCA 191, (1981) 38 ALR 363
Skinner v Tauranga District Council HC Auckland AP98/02, 5 March 2003
Stark v Waitakere City Council [1994] 3 NZLR 614 (HC)
Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd [2014] NZSC 40, [2014] 1 NZLR 673, (2014) 17 ELRNZ 520
Young v Queenstown Lakes District Council [2014] NZHC 414, (2014) 18 ELRNZ 1

Appeal

This was an unsuccessful appeal against an Environment Court decision which declined an appeal against the Marlborough District Council's refusal to grant consent for the operation of mussel farms at Pig Bay, Marlborough.

Q Davies and *A L Hills* for appellant
M J Radich for respondent
J Ironside and *M Wright* for Friends of Nelson Haven and Tasman Bay and Environmental Defence Society
C Marchant in person
M Marchant for Marchant family and others

Cur adv vult

GRICE J

Background

[1] This is an appeal from an Environment Court decision declining an appeal from the Marlborough District Council's (the Council) refusal to grant consent to Clearwater Mussels Ltd (Clearwater) for the operation of mussel farms at Pig Bay, Te Anamāhanga, in the outer Marlborough Sounds. The issues on appeal are: the effect of the farms on the King Shag, the natural character and landscape of the area; and the consideration of economic factors.[1] The farms continue in operation pursuant to the provisions of the Resource Management Act 1991 (the Act) pending the final outcome of these proceedings.

1 *Clearwater Mussels Ltd v Marlborough District Council* [2018] NZEnvC 88.

[2] Te Anamāhanga, also known as Port Gore, is 55 kilometres from central Wellington. It is one of New Zealand's more remote locations. By road it is more than three hours from Blenheim, the last section of which is on a private road. Small boats may be launched off a beach but there are no wharves or jetties there. Vessels accessing Te Anamāhanga do so by rounding either Cape Lambert from the west or Cape Jackson from the east. Both of these capes project into the northern entrance of Cook Strait. There is a scattering of houses with few permanent residents. Sheep farming, tourism, tramping, fishing, diving, nature conservation and marine farming are the predominant activities in the area.

[3] Pig Bay is a small embayment in the outer western waters of Te Anamāhanga. It is largely free of manmade structures. Pig Bay and wider Te Anamāhanga are home to one of New Zealand's rarest and most threatened indigenous sea birds, the King Shag. This bird has a satellite colony and a roosting site at either end of Pig Bay, as well as two core colonies within foraging range.

[4] Outer Te Anamāhanga has a strong current, high food turnover, relative shelter and deep water. It is well suited to mussel farming.

[5] Clearwater operates the two marine farms at Pig Bay. Combined the farms cover approximately six hectares. The smaller two-hectare farm grows green shell mussels, blue shell mussels and dredge oysters (site 8165/northern site). The larger four-hectare farm grows green shell and blue shell mussels (site 8166/southern site).

[6] Clearwater took over operation of these farms in 2014 and acquired them in 2016. The existing resource consents expired in 2014.

[7] Existing mussel farming, as opposed to new farming, is a "discretionary activity" under the operative Marlborough Sounds Resource Management Plan (the Sounds Plan).[2] Clearwater applied for new discretionary activity resource consents from the Council for the farms that would last a further 20 years (the Proposals).[3] Those applications were made in 2014.

[8] The Council hearings committee turned down the applications in June 2016. The Council declined the consent primarily on the basis that there would be undue adverse effects on the visual amenity values, the natural character of the coastal environment and landscape values. It was the Council's conclusion that granting the consents would be incompatible with the relevant objectives and policies of the New Zealand Coastal Policy Statement 2010 (the Coastal Policy Statement).

[9] Clearwater appealed to the Environment Court.[4] The Environment Court considered the issues on appeal afresh on the evidence. It noted, however, it must have regard to the Council's decision.[5] The Environment Court declined the appeal but did so on different grounds than those of the Council.[6]

[10] Appearing at the appeal hearing, and at the earlier hearings, were Mr C Marchant and interested parties represented by Ms M Marchant. She appeared on behalf of the Marchant family interests as well as 30 other long-term residents of the

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2 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), r 35.4.

3 Clearwater varied its application to a smaller coverage area for the farms in the court at the hearing before the Environment Court.

4 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1.

5 Resource Management Act 1991, ss 290 and 290A.

6 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [16].

area.[7] The Friends of Nelson Haven & Tasman Bay Inc (the Friends) and Environmental Defence Society Inc (EDS) also appeared and made submissions.[8] The Council and these other parties oppose the appeal.

The Environment Court decision

[11] The Environment Court noted that as the appeal was under s 290 of the Act, it had the same powers, duties and discretions in determining the appeal as the Council had in determining the original application.

[12] As Clearwater's Proposals were for discretionary activities, the Environment Court had to consider them with reference to the matters in s 104(1) and s 104(2A) of the Act. The matters outlined in these sections included: any adverse actual/potential environmental effect caused by the activity;[9] the relevant provisions of the applicable plans;[10] any other relevant and reasonably necessary matters; and the value of the investment of the existing consent holder in operating the marine farms.

[13] The Court began by assessing the weight to be given to the relevant provisions or plans. Section 104(1) of the Act requires that regard be given to the relevant plans and provisions but does not ascribe weight to them. The Environment Court concluded that considerable weight should be given to the Coastal Policy Statement on the basis of both its statutory purpose,[11] and to the objectives/policies directly related to the issues relevant to these proceedings such as the King Shag colonies, natural character, landscape, amenity values and appropriate marine farm use of the coastal marine area.

[14] The Court further noted that significant weight should be given to the various provisions of the Sounds Plan. This was because it had no relevant incompatibilities with the Coastal Policy Statement and the provisions were material to the matters before the Court.[12]

[15] The Court noted that ch 35 of the Sounds Plan set out the rules for the three Coastal Marine (CM) zones labelled CM1, CM2 and CM3. The Proposals fell within the bounds of CM1. In CM1, the establishment of *new* marine farms is a prohibited activity.[13] Existing farms, like those now belonging to Clearwater, were not prohibited but were governed by "spot zoning" in CM1. This resulted in already existing marine farms being classified as controlled or discretionary activities.[14]

[16] The Court identified the relevant objectives and policies in the Coastal Policy and the Sounds Plan.[15] Provisions of particular relevance it identified were the Environmental Management Plan mapping relating to identified areas of Outstanding Natural Character (ONC) and Outstanding Natural Features and Landscapes (ONFL).

[17] I now turn to the considerations that the Environment Court focused on.

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7 Resource Management Act 1991, s 274.

8 Section 274.

9 Subject to the Courts discretion to disregard an adverse effect if the Plan permits an activity with that effect.

10 In this case: the Marlborough Regional Policy Statement; Environmental Management Plan; New Zealand Coastal Policy Statement 2010; and Marlborough Sounds Resource Management Plan.

11 Which, pursuant to s 56 of the Act, is to state the objectives and policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand.

12 Resource Management Act 1991, ss 75 and 76.

13 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), r 35.6.

14 Rule 35.

15 New Zealand Coastal Policy Statement 2010, objectives 1, 2, 4, and 6 and policies 6, 8, 11, 13, 14 and 15; Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), ch 2, 4, 5, 8, 9, and 19.

Consideration 1: King Shag and ecological impacts

[18] To deal with the ecological effects of the Proposals on the King Shag, its prey and habitat, the Court began by identifying the relevant policy and plan provisions,[16] and assessing the ecology evidence.

[19] The Court recognised the difficulties attendant here as there was no reliable scientific baseline for determining how the Proposals would impact on the King Shag.

[20] The Court noted that the relevant sites were in Pig Bay which was within the "Sounds Important Bird Area", as designated in maps published by the Royal Forest and Bird Protection Society of New Zealand Inc. This "Important Bird Area" designation indicated a seabird area of global significance. The Court noted that significant numbers of King Shag fed within the Sounds but its marine habitat was largely unprotected.

[21] The Court found that the "Important Bird Area" mapping was of significant weight. It signalled areas of importance for the survival of the bird species in light of the protection priorities set out under s 6 of the Act and the Coastal Policy Statement and the Sounds Plan.[17] The relevant provisions of s 6 at issue are:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna: …

[22] Dr McClellan, an orthinological expert called by Clearwater, was of the opinion that the King Shag population had been stable for about 50 years. However, the Court noted Dr Fisher, an orthinological expert called by the Council and interested parties, did not agree. Dr Fisher said there were limitations the data gathered as the basis for Dr McClellan's opinion.

[23] The Court concluded that the population remained vulnerable to a significant risk of decline.

[24] The Court said three points of dispute arose among the experts on the King Shag issue: first, the risks and benefits that marine farms may present for King Shag prey; secondly, the risks or benefits to the King Shag if the marine farms were removed and dredging or trawling increased in place of the farms in Pig Bay; and thirdly, the environmental compensation or enhancement that would arise from Clearwater's proposal to help reduce pests in the area.

[25] The Court noted that much of the evidence before it on the feeding habits of the King Shag was in the form of contested hypotheses which were incapable of being verified without further scientific study. It did, however, make the following evidentiary findings:

(a) The King Shag's foraging typically occurs in water depths of around 20 to 40 metres, which is the same depth normally occupied by marine farms

16 New Zealand Coastal Policy Statement 2010, objective 1 and policy 3.1 and 11; Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), ch 4, 9.4 and 9.2, objectives 4.3.1, 9.2.1.1 and policies 4.3.1.2, 9.2.1.1.14-17, 9.2.1.1.1, 9.4.1.1, 9.4.1.1.1, 9.2.1.1.1 and 9.2.1.1.1.9.

17 Resource Management Act 1991, s 6.

(as in this case). There is, however, insufficient scientific evidence to indicate if this is a good or bad thing for the birds;

(b) The benthos (sea bottom) of soft silt and clay substratum was conducive to the presence of flatfish which is a prey of the birds. The benthos beneath the proposed sites was dominated by this kind of substratum. This was true of most of Te Anamāhanga.

[26] The Court was unable to reach any conclusions as to the benthic (deep water) or general feeding habits of the birds, their preferred form of prey, and the impact that a marine farm may have on the prey and the bird's hunting ability.

[27] The Court then turned to the risk of the birds being disturbed by visiting vessels. It concluded that the continuation of marine farming at the sites would pose a degree of disturbance to the King Shag through human activity. The Court viewed this as significant. Specifically, it said regular maintenance, seeding and harvesting activities posed a risk of disturbing a colony of the birds around two and a half kilometres away.[18] The Court was careful to say it did not overstate this risk due to the other regular activities that were ongoing in nearby areas. It gave little weight to the submission of Clearwater that if the farms remained they would act as a deterrent to commercial fishing or dredging activities in the same locality. This was primarily due to the rare occurrence of those activities in the locality, and the proximity of the farms to the foreshore and reef.

[28] Finally, the Court addressed Clearwater's proposed predator and pest programme offered by way of mitigation. This plan consisted primarily of fixing a predator-free fence installed in the area in 1992. Clearwater argued it would help restore indigenous habitats and ecosystems, offer a net improvement in both the natural character and landscapes in the area and provide significant benefits for the King Shag. The Court indicated it found Clearwater's programme did not significantly weigh in favour of the Proposals. This was largely due to the lack of certainty. The Court considered them to be more conceptual than practical in design.

[29] The Court evaluated the Proposals against the backdrop of the relevant Coastal Policy Statement and Sounds Plan provisions. Given the potential negative impacts that the farm would have on the King Shag, the Court found that both the Sounds Plan and Coastal Policy Statement provisions counted against the Proposals to some extent.[19]

[30] Generally, the Court was concerned about the potential adverse impact that the Proposals would have on the King Shag; the ecological and biodiversity values; and the lack of effective ecological mitigation offered by Clearwater. The Proposals were supported by neither the Coastal Policy Statement nor the Sounds Plan.

[31] The Court said declining the Proposals would likely mean a net positive potential ecological effect generally, and that granting the Proposals would not recognise and provide for the matters in s 6(c) of the Act.

Consideration 2: Natural character and landscape values

[32] The Court began by noting that its findings in relation to the King Shag and ecological/biodiversity values would inform its conclusions on issues of natural character and landscape values. The Court, as well as commenting on the driving force of the provisions in the Sounds Plan and Coastal Policy Statement, identified the

18 The satellite breeding colony of King Shags at Hunia Rock was two and a half kilometres away from the farms. The roosting site at Taratara was one kilometre from the farms.

19 New Zealand Coastal Policy Statement 2010, objective 1 and policy 11; Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), objective 4.3.1, 9.2.1.1, 9.4.1.1 and 9.4.1.1.1.

matters of national importance recognised in ss 6(a) and (b) of the Act as guiding its assessment of natural charter and landscape values. The relevant parts of s 6 read:

> **6 Matters of national importance**
>
> …
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development: …

[33] In assessing natural character, the Court had the benefit of extensive expert evidence. It noted natural character was a separate issue to that of landscape. It quoted Mr Bentley, a landscape architect called as an expert by the Council, as follows:

> … natural character is the level of actual (abiotic and biotic) and perceived (perceptual and experiential) "naturalness" within a geographical area and is part of landscape. It is a measure of the degree of human modification of a landscape/seascape or ecosystem expressed in terms of:
>
> i. Ecological naturalness (Indigenous nature); and
>
> ii. Landscape naturalness (perception of nature).

[34] The Court tackled the evaluation of the Proposals against the backdrop of the relevant Coastal Policy Statement and Sounds Plan provisions. It identified the relevant provisions of the Coastal Policy Statement and Sounds Plan.[20] It evaluated the existing natural character of Te Anamāhanga as a whole and found it was of higher natural character.

[35] Turning to the effects that the Proposals would have on this existing natural character, the Court found that they would:

(a) Fail to keep intact the relevant natural character of the areas in terms of the Sounds Plan. The mitigation offered by Clearwater (the reduction of the area of the farms) failed to effectively manage the development to avoid degradation of natural character. This concern was partly linked back to the risk that human activity associated with the operation of the marine farms posed to the King Shag; and

(b) Cause localised degradation to natural character arising from the perception of the uniform grid of lines and buoys, and the night time navigation lighting. These physical changes in the environment would disrupt the relationship between landform and seascape at Pig Bay and create a perception of scenic character being tamed for commercial usage. A reduction of the number of lines could not mitigate this adverse effect sufficiently.

[36] The Court found that the Proposals would offend against the natural character provisions of both the Coastal Policy Statement and the Sounds Plan, failed to recognise and provide for the matters in s 6(a) of the Act,[21] and would have a significant adverse effect on the natural character of Pig Bay in Te Anamāhanga.

[37] The Court moved on to evaluate the landscape impact of the Proposals. The Court accepted that Policy 15 of the Coastal Policy Statement applied to Pig Bay as it was included in the outer Sounds Outstanding Natural Landscapes. Pig Bay was also an Outstanding Natural Feature. Policy 15(a) of the Coastal Policy Statement reads:

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20 Specifically, New Zealand Coastal Policy Statement 2010, objective 2 and policy 13, 14; Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), ch 2, 5 and 9, Appendix 1 and 2, and objective 2.2.1, and policies 2.2.1.1, 2.2.1.2, 2.2.1.6, 2.2.1.7 and 2.2.1.8.

21 Which refer to the preservation of the coastal environment.

> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment.

[38] The Court found that the Proposals would degrade several of the key values of the Outstanding Natural Landscape and features at Pig Bay. Specifically, the biophysical value through the degradation of the natural character of Cape Lambert and interconnecting waters. The natural character would be made less exceptional, and a largely unmodified coast would be rendered less remote and wild.

[39] The Court was not satisfied the proposals would keep intact the relevant natural character areas under the Sounds Plan. Clearwater's mitigation proposals would not effectively manage this impact. It would be more consistent with Policy 15(a) of the Coastal Policy Statement to reject the Proposals. The Proposals were also unsupported by and inconsistent with the relevant provisions of the Sounds Plan.[22]

[40] In looking at the amenity values and public access associated with the area, the Court found that the proposal would degrade the amenity values protected in the relevant planning provisions. It rejected the submission that the Proposals would maintain and enhance the amenity values. The Court said a rejection of the Proposals would better respond to the Coastal Policy Statement and Sounds Plan.

[41] The Court concluded on this issue:[23]

> [210] For those reasons, we find that the Proposals would:
>
> (a) offend the natural character objectives and policies of the Sounds Plan and the [Coastal Policy Statement];
>
> (b) fail to recognise and provide for the matters in s 6(a) [of the Act]; and
>
> (c) therefore, would have a significant adverse effect on the natural character of Pig Bay and Port Gore.

Consideration 3: Clearwater's investment and benefits of the proposals

[42] The Court recognised that it must have regard to the value of Clearwater's investment as a consent holder.[24] It noted although Clearwater's investment in the farms was relatively modest, it would be wrong to be dismissive of the investment or loss of revenue from a rejection of the applications. Nevertheless, there was nothing in the Act, Coastal Policy Statement or Sounds Plan that directed the Court to protect against a loss of investment that might be suffered by Clearwater. The Court noted this was in contrast to the effects of the ecology, natural character and landscape protection values. If the economic impact was larger, on a regional or national scale, it said, it might have been different.

[43] The Court indicated that due to the economic impact of the decision, it would be important to provide reasonable decommissioning arrangements. Its decision was interim to allow for that.

Conclusion

[44] The appeal was dismissed. Directions were given as to the decommissioning. Orders were made to protect commercially sensitive information and costs were reserved.[25]

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22 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), objectives 9.2.1.1 and 9.4.1.1, and Policies 2.2.1.8, 9.2.1.1.1, 9.2.1.1.2, 9.1.1.1.14 and 9.4.1.1.1.

23 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [210].

24 Resource Management Act 1991, s 104(2A).

25 Sections 42 and 277.

Standard of appeal

[45] Section 299 of the Act allows a party to a proceeding before the Environment Court to appeal to the High Court on a question of law on any decision, report, or recommendation of the Environment Court. Appellate intervention is, therefore, confined to a point of law and only justified if the Environment Court can be shown to have:[26]

(a) Applied a wrong legal test; or

(b) Come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or

(c) Taken 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.

[46] How much weight the Environment Court chooses to give relevant policy or evidence is a matter solely for the Environment Court. This cannot be reconsidered as a question of law.[27] Similarly, the merits of the case dressed up as an error of law will not be considered.[28] Planning and resource management policy are, for obvious reasons, matters that will not be considered by this Court.[29]

[47] In *Countdown Properties (Northland) Ltd* the High Court said:[30]

The Court warned against interfering with findings of fact and identifying errors of law:

> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mongonui 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 W A Habgood Ltd* (1987) 12 NZTPA 76 at 81-82. …

[48] It is insufficient for an error of law simply to be identified, the error must be a material one, impacting the final result reached by the Environment Court.[31]

[49] In *Guardians of Paku Bay Assoc Inc v Waikato Regional Council*, the High Court recognised the deference to be shown to the Environment Court as an expert tribunal when determining planning questions:[32]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

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26 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34] citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).

27 *Stark v Waitakere City Council* [1994] 3 NZLR 614 (HC); *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

28 *Young v Queenstown Lakes District Council* [2014] NZHC 414, (2014) 18 ELRNZ 1 at [19] citing *Sean Investments Pty Ltd v MacKeller* [1981] FCA 191, (1981) 38 ALR 363.

29 *Russell v Manukau City Council* [1996] NZRMA 35 (HC).

30 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 26, at 153.

31 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 26.

32 *Guardians of Paku Bay Assoc Inc v Waikato Regional Council* [2012] 1 NZLR 271, (2011) 16 ELRNZ 544 (HC).

[50] This Court must also be vigilant in resisting attempts by litigants to use an appeal to the High Court as a mechanism to re-litigate factual findings made by the Environment Court.[33] Nevertheless, it is possible for findings of fact to amount to an error of law. As noted recently in *Lau v Auckland Council* there are two primary hurdles that need to be jumped when an appeal is founded almost entirely on criticisms of factual findings:[34]

(i) First, the appellant will need to show a seriously arguable case that factual findings by the Environment Court are actually incorrect. An appeal court will not interfere where there is an available evidential basis for the Court's finding.

(ii) Second, the applicant will need to show that the factual errors are, in combination and in the context of the whole decision, so grave as to constitute an error of law. That is, it is seriously arguable that: (1) the Court has made a finding of fact which is based on no evidence, based on evidence inconsistent with or contradictory of another finding of fact, or contradictory of the only reasonable conclusion of fact available on the evidence; and (2) the errors of fact are so significant and extensive that the Environment Court, had it properly directed itself, may well have reached a different decision overall on the matter before it.

[51] It must generally be the want of evidence, rather than the weight of the evidence, that forms the basis of an argument that factual errors are so severe they constitute an error of law.[35]

Grounds of appeal

[52] The appeal grounds initially raised by Clearwater in its notice of appeal were refined before and during the hearing. The grounds can be summarised as follows:

(a) The Environment Court made an error of law by misinterpreting and misapplying relevant policy and could not have reasonably reached the conclusion it did on evidence before it regarding the ecological impact on the King Shag;

(b) The Environment Court denied Clearwater a fair hearing as no party put to Dr McClellan, Clearwater's ornithologist, that the farms would adversely affect the King Shag due to the proximity of the colony, roosting site, or disturbance of the feeding shags by boats;

(c) The Environment Court did not adequately identify its reasons and could not have reasonably reached the conclusion it did on the evidence before it in terms of its natural character findings;[36]

(d) The Environment Court did not adequately identify its reasons and could not have reasonably reached the conclusion it did on the evidence before it regarding its landscape analysis;[37] and

(e) The Environment Court made an error of law, failed to have regard to material considerations, did not adequately identify its reasons and could

33 At [32]; *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) 3 ELRNZ 230 (HC) at 240.

34 *Lau v Auckland Council* [2017] NZHC 1010 at [6(d)] (footnotes omitted).

35 *Moriarty v North Shore City Council*, above n 27, at 437; *Hunt v Auckland City Council* [1996] NZRMA 49 (HC) at 4-5; *Skinner v Tauranga District Council* HC Auckland AP98/02, 5 March 2003 at [13]; *Guardians of Paku Bay Assoc Inc v Waikato Regional Council*, above n 32, at [31].

36 In its written submissions, Clearwater noted it no longer pursued its ground of appeal that the scale that the Court used to assess natural character was inconsistent.

37 In its written submissions, Clearwater indicated it no longer pursued a ground of appeal initially advanced that the scale which the Court used to assess landscape was inconsistent.

not have reasonably reached the conclusion it did on the evidence before it regarding economic factors.

[53] Clearwater says the landscape and natural character analyses are intertwined and therefore if there is an error of law in relation to natural character findings of the Environment Court the appeal should be allowed in respect of the landscape findings.

Relevant planning framework

[54] The Proposals by Clearwater required consent as discretionary activities under the Act.[38] Therefore they needed to be evaluated under the statutory imperatives contained in s 104 of the Act. Section 104 provides that when considering an application for resource consent, the consent authority must have regard to (among other things) any "actual or potential effects" on the environment of allowing the activity, as well as the provisions of the relevant planning documents.

[55] Consent authorities must therefore recognise and provide for, as matters of national importance:

(a) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development; and

(b) The protection of areas of significant habitat of indigenous fauna.

[56] In this case the relevant planning documents were:

(a) The Coastal Policy Statement;

(b) Marlborough Regional Policy Statement (RPS);

(c) The Sounds Plan;

(d) The Proposed Marlborough Environment Plan (the MEP).[39]

[57] These documents were developed to achieve the purposes of the Act. Of particular relevance here is that the purposes included the protection of Outstanding Natural Landscapes and areas of significant habitat for indigenous fauna. Each document provides subsidiary policies and rules to achieve the level of protection required by the Act.

[58] The Coastal Policy Statement sets the national objectives and policies. The Regional Coastal Policy Statement must be consistent with the natural objectives and policies. The Regional Coastal Policy Statement is the Sounds Plan. In this case, the decision maker must also consider both the proposed MEP and the RPS.

Outstanding natural character

[59] The Coastal Policy Statement requires that adverse effects on areas of the coastal environment with outstanding natural character or landscape values be avoided.[40] The requirement to avoid adverse effects means to *not allow* or to *prevent the occurrence* of such effects.[41] Similar directives appear in the Sounds Plan, the MEP and the RPS.

[60] The Sounds Plan contains the Objectives and Policies which relate to the natural landscape.[42] It requires decisions made in relation to development within areas of outstanding natural features and landscapes to:[43]

38 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), r 35.4.

39 The MEP, it is not yet operational and is subject to the submission process at present. Counsel indicated it would likely be sometime before it was operative.

40 New Zealand Coastal Policy Statement 2010, Policy 11, 13(1)(a) and 15(1)(a).

41 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442 at [62] and [92]-[97].

42 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), ch 5.

43 Policy 1.1.

> Avoid, remedy and mitigate adverse effects of subdivision, use and development, including activities and structures, on the visual quality of outstanding natural features and landscapes identified according to the criteria in Appendix 1.

[61] As the proposals related to an area of Outstanding Natural Landscape (ONL) in the Sounds Plan, the tolerance for adverse effects from or related to the Proposals was low. The adverse effects must be avoided, remedied or mitigated.

[62] The Sounds Plan and the MEP both require adverse effects of development to be avoided where the environment is predominantly in its natural state.[44] The application of the relevant objectives and policies of the Sounds Plan is intended to lead to the preservation of areas of uncompromised natural character in the coastal environment.[45] Similarly, the application of the MEP objectives, policies, methods and of rules as they relate to natural character should ensure:

> The intactness of the individual coastal marine and coastal terrestrial areas of the Marlborough Sounds is retained in order to preserve the natural character of the Sounds.

Indigenous flora and fauna

[63] Chapter 4 of the Sounds Plan identifies the primary resource management issue relating to the ecological values within the Marlborough Sounds as being to protect indigenous flora and fauna. Chapter 4 addresses the degradation of the habitat of indigenous fauna. The first objective of Chapter 4 is to protect significant indigenous flora and fauna and their habitats from the adverse effects of use and development.

[64] All parties agreed that the area where the marine farms were proposed formed part of the Marlborough Sounds Important Bird Area, which is recognised for its global significance to sea birds.

Coastal Marine Area

[65] Policy 1.2 of Chapter 9 of the Sounds Plan requires adverse effects from development in the coastal environment as far as practicable to be avoided. An anticipated environmental result of the application of these objectives and policies (and the rules) is that:

> The adverse effects of occupation of coastal space [will] be avoided, remedied or mitigated to the fullest extent practicable.

[66] Volume 2 of the Sounds Plan contains the rules. These sit under the policies. In addition to the activity status rule for the present Proposals (Rule 35.5) the Rules identify specific assessment criteria. The relevant provisions are:

> **GENERAL ASSESSMENT CRITERIA**
>
> **Rule 35.4.1.1.5.3**
>
> The likely effects of the proposal on any significant environmental features and in the particular that the proposal does not:
>
> (a) Adversely affect any habitat of any indigenous species or any ecological value identified in Appendix B;
> (b) Compromise the integrity of any terrestrial or marine ecosystem;
> (c) Diminish the natural character of the locality, having regard to the natural character areas identified in Appendix Two, Volume One.
>
> **Rule 35.4.2.7**
>
> **Occupation of the Coastal Marine Area**
>
> (a) The effect on other users of the coastal environment.
> (b) The effect on cultural and landscape values.

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44 Chapter 2, Policy 1.1; Proposed Marlborough Environmental Plan, ch 6.

45 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), r 2.4.

(c) Any effects on the ecology, fauna and flora of the surrounding environment.

[67] These policy directives are mandatory components of the evaluative and discretionary exercise that the Environment Court (and earlier the Council) undertook when considering the Proposals.

[68] In summary, assessing the effects of these proposals requires appropriate application of the relevant objectives, policies and rules. This should result in an outcome which avoids the effects of a proposal as far as practicable or ensures that any such effects are remedied or mitigated to the fullest extent practicable.

Coastal marine zones

[69] Under the Sounds Plan the proposed marine farms are located in coastal marine zone 1 (CMZ1).

[70] Marine farming in CMZ1 is, subject to limited exceptions, a prohibited activity. This prohibition on marine farming in CMZ1 recognises that: "these areas are identified as being where marine farming will have a significant adverse effect on navigational safety, recreational activities, natural character, ecological systems or cultural, residential or amenity values".[46] The zoning of the farms that are the subject of the Proposals came about as the result of negotiations with the then operators to finalise the provisions of the plan in 1999. As a result of a consent order made then, the existing marine farms retained their original activity status until they expired in September 2014. They then became discretionary activities.

[71] To assist in considering the actual and potential effects of the Proposals against the legislative framework the Environment Court heard evidence from a number of experts and planners. Mr C Marchant and Ms M Marchant also appeared as interested parties and provided first hand evidence of their observations. They have resided in the area for many years and in fact had discovered the King Shag colony at Hunia Rock.[47]

Ground 1: the King Shag

[72] There is no dispute that the King Shag is endangered, vulnerable, threatened and at risk of extinction. It is common ground that it is an indigenous species of significant ecological value. Nor is there any dispute about the application of the statutory instruments in relation to the protection of the King Shag in the area of the Proposals.

[73] The contest here is as to the effects of the Proposals on the King Shag and whether the Environment Court was correct in its view that the small risk to the species amounted to an adverse effect. Clearwater says the adverse effect which the Court found did exist was not supported by the evidence. It further says the matters it raises on appeal are not just factual, but rather errors of law, because:

(a) There was no evidence to support the Court's findings of the adverse effects on the King Shag.

(b) If there were adverse effects they were so minor as to be insignificant and therefore should not have been taken into account.

[74] Clearwater submits these amount to errors of law and the Court failed to identify adequate reasons for its finding, misinterpreted relevant policies and reached an unreasonable conclusion. I will tackle each of those issues.

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46 Marlborough District Council *Marlborough Sounds Resource Management Plan* (District Plan), ch 9.

47 They said the colony had been established for some time by the time they were able to identify birds as King Shags in 2012.

Reasonableness and failure to give reasons

[75] This ground of appeal alleges the Court was in error because there was insufficient evidence available for it to come to its conclusion concerning the adverse effects on the King Shag by boat disturbances. In other words, the Court's finding was unreasonable or inadequate reasons were given for it.

[76] Clearwater points specifically to the following Environment Court conclusions:[48]

> ***Overall findings concerning King Shag and ecological effects***
>
> [117] Therefore, we find on the evidence as follows:
>
> (a) the Proposals would, in net terms, give rise to an adverse potential effect to King Shag and, hence, to ecological and biodiversity values (particularly in view of King Shag's Threatened status). The effect is one of disturbance from human activity associated with the maintenance and operation of the farms. While there may be a relatively small risk of such an effect, it is not an insignificant one;
>
> …
>
> (e) a decision to decline the coastal permits for the Proposals would likely mean a net positive potential ecological effect, including on King Shag. That is in the sense that it would increase potential for undisturbed foraging and roosting opportunities for King Shag within its identified IBA (and in a relatively remote part of the Outer Sounds) …

[77] Clearwater argues that the Court's conclusion that the King Shag was at risk due to disturbance from visiting vessels was unreasonable because the Court relied on selected portions of the joint witness statement of the experts to the exclusion of other evidence. Specifically, Clearwater points to the Court citing the following as supporting the risks posed by boat disturbance:

> [91] In particular, the Ecology [Joint Witness Statement] records the following points of agreement between the experts:
>
> …
>
> 73. Coastal and open water aquaculture activities (shell and finfish farms) may cause disturbance of birds (foraging and at colonies) by vessel movements, and may affect habitat availability and prey abundance and distribution.
>
> …
>
> 77. The species is readily disturbed/flighty, which can result In adults prematurely departing nests when boats pass colonies. In these situations, eggs can be damaged or lost to the sea. The nervous behaviour of birds makes them difficult to approach at colonies to capture for tagging/detailed studies. …

Clearwater submits that these are generic statements that must be assessed in the context of all of the evidence, and it was incorrect of the Court to conclude that it was the consensus position of the experts that the farming operations " … would present an actual disturbance risk".[49] This evidence, it says, should have been viewed in light of the other evidence given, particularly by Dr McClellan.

[78] To further this argument, Clearwater pointed to the evidence that was available to the Court that supported its position that there was no material disturbance risk posed to the King Shag. Specifically, Clearwater noted it was unchallenged that:

(a) The farms involved are only visited up to 21 days a year[50] by marine farm servicing vessels;

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48 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1.

49 At [116].

50 With a 20 per cent margin of error.

(b) The farms are two and a half kilometres from the nearest breeding colony (Hunia Rock Satellite Colony) and one kilometre from the nearest roosting site (Taratara);

(c) The most conservative recommendations for excluding vessels around the breeding and roosting colonies are 1,000 metres and 300 metres respectively; and

(d) King Shag can be approached relatively closely while resting without being disturbed.

[79] Clearwater's managing director gave evidence about the number of visits to the farms and said there could be up to a 20 per cent variation the number of visits by vessels. He also gave evidence as to the length of stay of the vessels. Applying a 20% variation, at the upper end of the range the vessels could in fact visit up to 25 times a year and stay for up to 15 hours a day.[51]

[80] Clearwater noted that the Court had concluded there was insufficient scientific knowledge about the King Shag in relation to its feeding and the impact of the farms on this.[52] Clearwater submitted that this was untrue. It said as the effects of boat disturbance on the King Shag was a topic referred in research by Dr Chris Lalas in 2001.[53] His research paper was referred to by both ornithological expert witnesses but was not put into evidence. Clearwater did note, however, that Dr Fisher (one of the experts) in his evidence in chief noted that "the effect of disturbance from boats approaching colonies during the breeding season and on foraging success of NZ king shags at sea are an unknown but both potential adverse effects that need to be considered and quantified in an assessment of effects."

[81] Clearwater also pointed to the recommendation from the Department of Conservation its action plan for sea bird conservation in New Zealand that no boat should approach closer than 100 metres of the colonies during the breeding season (March to August). Clearwater said there was nothing in the evidence to suggest that marine farms would have an effect on the King Shag at a distance of two and a half kilometres or anything approaching that distance. Therefore, Clearwater submits, that in Dr McClellan's words "disturbance is likely to be of minimal concern, as no mussel farms were located in close proximity to colonies". She also said that the King Shag was less likely to be affected than other species and could be approached relatively closely while resting.

[82] Clearwater noted the Court made factual findings that vessels already travel through Port Gore to service other marine farms in Melville Cove and also for recreation, commercial diving and trawling. Furthermore, there are other activities which cause disturbance such as diving excursions to the Mikhail Lermontov wreck and aircraft movements to and from the Marchant property. It was also noted the farm was established before the King Shag colony was discovered.[54] Later in its judgment, the Court did expressly note that any additional disturbance from the Proposals would be very small in the context of the ongoing disturbance in the important bird area.[55]

51 The experts also agreed that the King Shag forages within a circumference of some 25 kilometres. The marine farm activities and related activities including vessel movement were within that foraging area. The marine farms were two and a half kilometres from the satellite breeding colony Hunia and only one kilometre from the first known shag roosting site in Port Gore at Taratara. Three other larger breeding colonies were also within the foraging range.

52 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [85] and [87].

53 The research related to the Otago area not the Marlborough Sounds.

54 At [92]. The Marchants said the colony had been established for some time by the time they were able to identify the birds as King Shag in 2012.

55 At [114].

[83] With reference to the important bird area, Clearwater argues that the logical conclusion of the Environment Court's decision was that there should be no boats within the important bird area despite the fact that the important bird area covers the majority of the sounds.

[84] In summary, Clearwater argues it was unreasonable for the Court to conclude that that the Proposals would have an adverse impact on the King Shag. It further says that any effect from passing boats could be dealt with as a condition on the consent. Clearwater suggests that the condition could have been that no vessel associated with the farm could travel within one kilometre of the breeding colony or 300 meters of the roosting site. In its submission there could be no risk of an adverse impact on the King Shag with these parameters and for the Court to conclude otherwise was unreasonable.

[85] The assessment of risk of future events is difficult generally. In this case the adverse effects are uncertain, but they may result in a significant loss to an endangered species. The Environment Court is required to take the evidence, expert and otherwise and reach a view on possible adverse effects and determine how best to deal with them within the requirements of the Act and planning documents.

[86] Future hypothetical effects are not susceptible of proof in the same way that present facts are able to be proven. In *RJ Davidson Family Trust v Marlborough District Council*, the High Court, when assessing the risks attendant on proposals for a marine farm in the Sounds, said:[56]

> [118] … 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.
>
> …
>
> [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.
>
> …
>
> [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.[57] There is no basis for this Court to interfere with the majority's decision.

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56 *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, (2017) 19 ELRNZ 628 at [118] citing *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 (HCA) at 642-643.

57 At [106].

[87] The Court noted it relied largely, although not to the exclusion of other evidence, on the Joint Statement. It noted: the extreme vulnerability of the King Shag in that it was an endangered species deserving of high protection; the farms were within the foraging range of six colonies or breeding sites (well within the foraging area of a breeding site); that the birds were flighty and easily disturbed particularly when nesting which may have disastrous effects for any eggs in the nest. On Clearwater's own evidence was that the farms would likely attract vessels movements to and from the farms for on up to 25 days a year and each could spend up to 15 hours at the farm. They would be in the vicinity of the King Shag colonies and breeding area in Pig Bay.[58] These were additional movements to any existing activity in the bay.

[88] The Environment Court in this case had ample evidence before it to conclude that the proposals would give rise to potential adverse effects on the King Shag.

[89] There was disagreement between the experts as to the distance boats need to keep from the important bird sites and much of the guidance was based on anecdotal rather than scientific evidence. With this lack of clarity, and agreement between the experts that activities and boat movements can adversely affect the birds, it was open to the Court to conclude there was a "relatively small risk".[59] It was careful not to overstate this conclusion.

[90] A further point raised by Clearwater was that if the matter was of concern the Court it could have imposed a condition that no vessel associated with the farm could travel within one kilometre of the breeding colony or within 300 metres of the resting site. I do not consider the Environment Court made any error of law for failing to come up with such a condition. In any event, a condition was unlikely to sufficiently mitigate the risk in relation to the King Shag given the extreme vulnerability of the bird and its endangered status. A small risk of annihilation of an endangered species requires more rigorous protection.[60]

[91] The Environment Court's findings on the likely adverse effects to the King Shag were open based on the evidence it had before it. Clearwater is contesting the weight the Court gave to the evidence. It is not a case of a complete lack of evidence. The Court did not make any factual errors and certainly none so severe they constitute an error of law.[61]

Error of law

[92] Clearwater submits that the Environment Court made an error of law when it interpreted Policy 11(a) of the Coastal Policy Statement as meaning that no risk, however infinitesimal, is tolerable in respect of a vulnerable or threatened species.

[93] That policy provides:

> 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;

58 Two and a half kilometres from the nearest breeding colony and one kilometre from the nearest roosting site.

59 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [117(a)].

60 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, (2014) 17 ELRNZ 520 at [66] made similar comments about managing risk by an adaptive management approach.

61 *Moriarty v North Shore City Council*, above n 27, at 437; *Hunt v Auckland City Council*, above n 35, at 4-5; *Skinner v Tauranga District Council*, above n 35, at [13]; *Guardians of Paku Bay Assoc Inc v Waikato Regional Council*, above n 32, at [31].

iii. indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;

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

v. areas containing nationally significant examples of indigenous community types; and

vi. areas set aside for full or partial protection of indigenous biological diversity under other legislation; …

[94] Clearwater submits that the approach taken by the Environment Court is inconsistent with the Supreme Court's decision in *New Zealand King Salmon Co*.[62] Specifically, Clearwater pointed to William Young J's minority decision when he said:

> [201] … I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[95] Clearwater said the majority's response was contained in the following:

> [144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the [Coastal Policy Statement], any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within polices 13 and 15. This, it is said, would be unworkable. We do not accept this.
>
> [145] The definition of "effect" in s 3 s broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or development may enhance the natural character of an area.

[96] Clearwater said these words were echoed in the Court of Appeal's decision in *Man O'War Station Ltd v Auckland Council*:[63]

> [65] As the majority judgment indicates, however, much turns on what is sought to be protected. And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.

62 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 41, at [17].

63 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662.

[97] In summary, Clearwater submitted that the combined effect of the Supreme Court's decision in *New Zealand King Salmon Co* and the Court of Appeal's decision in *Man O'War* is to reject the notion that every activity, with a perceptible potential adverse effect near a threatened species, must be prohibited. The corollary of this, in Clearwater's submission, was that the risk caused by up to 25 boat movements per year cannot be said to be a risk to be avoided in terms of the relevant policy provisions.

[98] This argument cannot be sustained on the evidence. All the experts were agreed on the significant vulnerability and risks facing the King Shag as a species in the sounds. It was up to the Court to assess the risk on the evidence of the activities generated by the Proposals on the foraging, roosting and breeding of the King Shag.[64] The Environment Court concluded that the risks caused by boat movements were relatively small but none the less in its assessment presented a risk.[65]

[99] Furthermore, s 3 of the Act defines "effect" widely to include "any potential effect of low probability which has a high potential impact". Under s 104(1)(a) of the Act, a consent authority must have regard to any actual and potential effects on the environment of allowing the activity. All effects must be considered.

[100] Given the gravity of the consequences to the King Shag species if even one bird suffered adverse effects, the Environment Court was entitled to take the approach to protect an endangered species with a risk (albeit small) of annihilation of the species. A small risk of annihilation of an endangered species requires more rigorous protection of the bird.[66]

[101] This ground of appeal is not made out.

Ground 2: natural justice

[102] Mr Davies, for Clearwater, said that Clearwater was denied a fair hearing because the Environment Court's views on the risks of human activity to the King Shag should have been specifically put to Dr McClellan, the orthinological expert for Clearwater. Mr Davies says there was no discussion by the Environment Court members about the boats disturbing birds on the water, so Dr McClellan was not specifically alerted to the views of the Court on the evidence concerning the effects of disturbance by boats on the King Shag.

[103] Clearwater says that rather than relying on the generic statements in the Joint Statement the Court should have put the relevant matters to its expert, Dr McClellan, so she could comment. In particular, Clearwater submits that the Environment Court should have put its concerns about the effects of boat movements to her.

[104] Clearwater cites *Meridian Energy Ltd v Central Otago District Council* to support its proposition that the Court's failure to put to Dr McClellan that the King Shag was at risk due to the disturbance by visiting vessels was an error of law because it denied Clearwater the right to a fair hearing.[67]

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64 The relevant expert opinion diverged on the risk posed by the Proposals. It agreed on the extreme vulnerability of the King Shag; the significance of the loss of even one bird on its survival as a species; its low population numbers, its flighty behaviour if disturbed and the likely particular vulnerability of colonies and nesting sites of the size of those affected by the proposal. The experts agreed on the need for a high level of protection. This in the context of the uncertainty about many aspects of its ecology and behaviour.

65 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [117(a)].

66 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd*, above n 60, at [66] made similar comments about managing risk by an adaptive management approach.

67 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477 (HC).

[105] In *Meridian* the Environment Court had relied on another Environment Court decision that had not been referred to or relied on by the parties. The Environment Court applied an adaption of the approach set out in the earlier decision. If the applicant had known the Court would use that approach it would have materially affected the manner in which its case was presented. On appeal, the High Court concluded that the parties should have been warned by the Environment Court that it would use an approach that was not properly foreshadowed.[68]

[106] Mr Davies also noted that there was a general principle of fairness, as outlined in *Air New Zealand Ltd v Mahon*, that a case should be put fully to a party who was criticised in a decision.[69] The Privy Council in that decision was concerned with the lack of opportunity to respond given to Air New Zealand staff who were severely criticised in a report about their role in causing the Air New Zealand Erebus disaster and the manner in which they provided information to the Commission of Inquiry preparing the report. The Privy Council noted that the object of the rules of natural justice was to achieve fairness in the circumstances.

[107] Dr McClellan was not criticised in the sense that *Mahan* was concerned with. The Court may not have accepted all her views, but it is common for a Court to prefer the evidence of one expert over that of another. A specialist court such as the Environment Court regularly considers expert evidence and is experienced in evaluating the evidence and assessing risks. It did so here. The general principle of fairness has not been violated here.

[108] The situation complained of by Clearwater also significantly differs from that in *Meridian*. *Meridian* was concerned with a situation where the Court gave no notice that it would apply a substantially different test than that contemplated by the parties. That is not the situation here either. The risk to the King Shag from activity likely to result from the Proposals was an issue from the outset. Disturbance of the King Shag was squarely before the Court, even if, as Clearwater says, that issue was not specifically identified in the list of issues provided to the Court.

[109] The present appeal is not concerned with a significant and unexpected approach to assessment undertaken by the Environment Court without notice. Clearwater could not have been surprised that the disturbance of the King Shag by human activity or vessel movements to and from the farms was going to be an issue. Clearwater was not taken by surprise. Not only did the Joint Statement refer to it but Ms Marchant made submissions on it and Dr Fisher gave evidence on the issue.[70] There was no obligation on the Court to put to Dr McClellan its view on the weight it would place on the evidence pertinent to the issue. All that was required was that Clearwater received a fair opportunity to put its case. It did.

[110] It was up to the Environment Court to consider all the evidence, make such inferences as it considered appropriate and reach its conclusion. It was entitled to consider the behaviour of the birds when disturbed, whether when on the water or in the colonies and reach a conclusion that the likely vessel movements and activity generated by the proposals was sufficient to amount to a risk in the circumstances.

[111] Clearwater additionally submitted that if it had known that the issue of boat movement and its effects on the King Shag was going to be of such importance to the Court it would have considered calling Dr Lalas as his research was referred to by the experts.

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68 At [132]-[133].

69 *Air New Zealand Ltd v Mahon* [1983] NZLR 662 [1984] AC 808 (PC).

70 The evidence of the experts and the Joint Statement was filed and provided to all parties including Clearwater well in advance of the Environment Court hearing.

[112] The effects of the marine farms on the King Shag was a key issue from the outset. It was specifically dealt with by the orthinological experts. There was nothing to prevent Clearwater calling Dr Lalas as an expert or introducing his research in some manner other than it did. It is not uncommon for experts to refer to literature and research without putting into evidence the full report or calling the expert. That is what Clearwater's expert, Dr McClellan, did.

[113] There was no error of law under this ground of appeal. This ground of appeal fails.

Ground 3: natural character

[114] Clearwater takes no issue with the approach identified by the Court to be taken in its assessment of natural character.[71] The concern of Clearwater was with the Court's failure to adhere to that approach. It says the Court failed to address the material evidence in respect of ecological naturalness.

[115] Clearwater made two primary submissions under this head:

(a) That the Environment Court reached a conclusion it could not have reasonably reached on the evidence before it; and

(b) The Court failed to adequately identify reasons for its conclusion.

[116] Clearwater says the Court did not follow the approach it identified in regards to natural character. Clearwater submits that if the Court was taking a "factual and science based" inquiry it ought to have used the evidence of Clearwater's witness, Mr Davidson, as a starting point on the biotic and abiotic elements of natural character.

[117] Clearwater framed this issue as involving questions of law as follows:

(a) Mr Davidson's evidence was not contested and yet was not properly taken into account of;

(b) Mr Davidson's evidence was relied upon by Clearwater's landscape expert, Mr Glasson, yet Mr Glasson's evidence was largely rejected;

(c) As a consequence, Mr Davidson's evidence was indirectly rejected as well;

(d) No reasons were given for rejecting Mr Davidson's evidence on "ecological naturalness", when his evidence was unchallenged and accepted by all the landscape architects. Clearwater submits this points to a conclusion the Court could not have reasonably reached its decision on the evidence.

[118] I deal with these matters below.

The evidence on natural character

[119] Clearwater accepted that the Court was correct in saying that:[72]

> [154] The determination of the natural character values of an area involves a high degree of evaluative judgment. That is both as to the nature and degree of the natural character values of the environment and how an activity affects those values. Natural character assessment properly commences with consideration of the biophysical status of the area in question. As looks can deceive, this enquiry is an important first step in order to understand the degree of naturalness of (or degree of human modification to) the relevant area. It is both a factual and science-focussed enquiry. "Character" is a perceived value. Hence, once the degree of naturalness in the receiving environment is accurately gauged,

71 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [154].

72 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1.

> the second step in a natural character assessment is to evaluate how people would sense and experience the naturalness of that environment.

[120] Therefore, Clearwater accepts that in determining the natural character values of an area the relevant factors are:

(a) That it involves a high degree of evaluative judgment;

(b) That the evaluation is both as to the degree of the natural character values of the environment and how an activity affects those values;

(c) It commences with a consideration of the biophysical status of the area in question;

(d) An important first step is to understand the degree of naturalness (or degree of human modification) in the relevant area;

(e) It is both a factual and science-based inquiry;

(f) "Character" is a perceived value;

(g) The second step in a natural character assessment is to "evaluate how people would sense and experience the naturalness of the environment".

[121] Mr Davidson's evidence addressed the underwater elements of natural character and landscape. It focused on the marine environment and the effects of the proposals, primarily, on the benthos.[73] Mr Davidson had had extensive experience as a diver in the Sounds.

[122] Clearwater pointed to Mr Davidson's summary on natural character as follows:

> [55] Submitters have stated that Port Gore and the Pig Bay area have high natural character. Biological attributes or values of any area, form part of the assessment of natural character. The benthic environment of Port Gore supports remnant patches that still support high biological values relative to much of the Marlborough Sounds, and for that matter New Zealand's inshore coastal waters. In contrast, the soft sediment seafloor of most of Port Gore and the nearshore water of New Zealand are presently in a modified state in my opinion, and cannot be given a high biological score. Any attempt to rank modified habitats that no longer support biological attributes of importance will act to undermine the status of the remaining remnant sites that do retain values. The assessment of offshore areas of Pig Bay by Cawthron (Ellis *et al.* 2014) and my investigation of the seafloor under the mussel farms demonstrates these areas do not support biological features that would be considered significant.

[123] Mr Davidson said the presence of the farms had caused a change which was mild to mild/moderate on the sea floor. If it were removed a species composition shift would occur with an increasing abundance of organisms and the change may not be adverse.

[124] In general terms Mr Davidson's evidence was accepted and not challenged in relation to the biotic and abiotic components of the bethnic environment. The Court accepted his evidence confirming the shift in natural state of the sea bed.[74]

[125] However marine attributes of an area consist of more than benthic attributes. For instance, the drowned ridge, visiting and resident wildlife and physical surface modification were all matters considered by the Court as part of its evaluation. It concluded:

> [195] We accept the evidence of Mr Bentley as to the geomorphological significance of Cape Jackson as a drowned ridge crest. We also accept Ms Lucas' point that this significance, as a contributor to biophysical values, does not stop at the

73 Benthos: flora and fauna at the bottom of the sea.

74 The Court referred to Mr Davidson's evidence on a number of occasions: *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, [86].

> water line. Mr Bentley correctly acknowledged that the benthos had been modified by the history of aquaculture in the vicinity of Pig Bay. As the ecology evidence explained, it is also degraded from siltation from decades of terrestrial farming (as is the case for much of the Sounds). On the other hand, we agree with Mr Lucas that visiting and resident wildlife are a further important contributor to the natural character of the land and waters of Port Gore. The ecology evidence focussed primarily on King Shag. Given its threatened status, we find that the existing, albeit small and vulnerable, satellite King Shag colony at Hunia is one such important contributor to Port Gore's natural character. We agree with Ms Lucas that Mr Glasson's assessment was deficient in not properly accounting for the biophysical attributes of the waters of Port Gore and Pig Bay. On the matter of marine biophysical values, we generally find the evidence of Ms Lucas and Mr Bentley reliable, but not that of Mr Glasson.

[126] Clearwater says that the evidence of Mr Davidson underpinned the evidence of the landscape witnesses Mr Glasson (for Clearwater) and Ms Lucas (for Friends).

[127] However, it was not because of Mr Glasson's reliance on Mr Davidson's evidence that the Court rejected Mr Glasson's evidence and preferred that of Ms Lucas.

[128] The Court reviewed the evidence of the landscape witnesses in respect of ecological naturalness and concluded that it agreed with the Council's landscape architect, Ms Lucas, that Mr Glasson's assessment was deficient because it failed to properly account for the biophysical attributes of the water in the area.[75]

[129] Ms Lucas in her evidence summarised what should be considered in evaluating the natural character and noted the issues Mr Glasson had omitted to consider. She said:

> Natural character appropriately involves *abiotic, biotic, and experimental attributes of the terrestrial and marine lands and of the waters, here the marine waters*. The drowned ridges complex, that links the South through to the North Island, is an important geomorphic feature. It is outstanding not just for what pokes out but also for what lies below; the drowned. This feature is prominent in and important to Port Gore's unique natural character. The marine environment that occupies the valley entrance, the outer waters of Te Anamāhanga, and the transitions from there to the bay waters within and to the Strait waters outside, are very important attributes of the natural character of the Cape's environs. Associated with these abiotic environs are the biotic relationships: migrating species, the visiting species, the resident species, their natural patterns and processes, their natural inter-connections, arrangements and associations — with each other and with abiotic attributes. Such attributes have been little recognised in the Appendix but are, in my assessment an important part of the natural character of Cape Lambert. These attributes have also not been adequately recognised or addressed by Mr Glasson.

[130] The Court also found Mr Glasson's evidence was unreliable because of his "slicing and dicing" of the terrestrial landscape for the purposes of his assessment:[76]

> [229] … As we find Mr Glasson's methodology was deficient in those terms, we do not accept his ultimate conclusions on this occasion.
>
> [230] Mr Glasson effectively derived two landscape units, subdivided at the stock-proof fence. On that basis, he applied the thirteen AOLV indicators to derive a "moderate" landscape value for the Pig Bay site (being the majority of Pig Bay from stock proof fence to Hunia) and ONF for Cape Lambert itself. He considered this was appropriately based on what is termed "natural science factors" (in terms of the modified *Pigeon Bay* factors). However, as Mr Glasson

75 At [195].

76 At [229] and [230] (emphasis added).

> himself acknowledged, a landscape should not be too finely sliced and diced in assessment terms. *We find he has erred in that regard by artificially distinguishing Cape Lambert, as ONF, from the majority of Pig Bay. Pig Bay is an embayment of Cape Lambert. For the reasons given by Ms Lucas, the landscape (including seascape) needs to be read as a single unit, for context, in order to then consider Pig Bay as a part of that landscape unit and, hence, reliably assess the effects of the Proposals on the identified landscape values of that landscape unit.*

Reasonableness

[131] In reaching these conclusions the Environment Court was required to consider the evidence of a number of witnesses, not just Mr Davidson. The Environment Court's considerations were much wider than the matters covered by Mr Davidson. The Court took also into account the degradation of the visual impacts and people's perceptions of naturalness, disruption of the biotic characteristics and values, including the submerged ridge and the effect on the flora and fauna, including the King Shag.[77]

[132] The Court was entitled to prefer the evidence of Ms Lucas to that of Mr Glasson. Ms Lucas' evidence took into account wider aspects of natural character than just the benthos. It is not correct to say the Court did not consider the evidence of Mr Davidson nor that Ms Glasson's evidence was solely dependent on Mr Davidson's evidence.

[133] This ground of appeals fails.

Failure to give reasons

[134] Clearwater submits that the Environment Court failed to give reasons by not specifically referring to Mr Davidson's evidence. As I have outlined above, the Court did consider Mr Davidson's evidence. His evidence about the natural character of the underwater environment was accepted by the landscape witnesses and by the Environment Court. However, it was for the Environment Court to weigh the evidence it received and consider all the elements that go into natural character. It is common ground that this determination of the natural character values of an area involves a high degree of evaluative judgment. This is for the Court.

[135] The Court's reasons for its decision must be sufficiently detailed to enable the appellate court to see and determine whether there is some factual basis upon which the conclusion can be supported or whether the Court has misdirected itself as to the law.[78] There is no obligation to record every finding on every point each witness makes.[79] In this case the Court's reasoning and the basis for its conclusions is clear.

[136] There is no error of law on this ground either.

Ground 4: Landscape values

[137] The appeal in relation to the Environment Court's findings on the landscape assessment is based on the submission that Mr Glasson was entitled to rely on Mr Davidson's assessment of the biophysical characteristics of the aquatic landscape and of the ecological effects. These arguments do not differ materially from those dealt with above under natural character.

[138] For the same reasons, the appeal must fail in relation to this ground.

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77 At [205].

78 *Hutchinson Bros Ltd v Auckland City Council* (1988) 13 NZTPA 39 (HC).

79 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [65].

Ground 5: Economic factors

[139] At the hearing, Mr Davies conceded that even if Clearwater were successful in establishing the "economic factors" ground as error of law it would not amount to a material error. It would not of itself (without other grounds on appeal succeeding) justify the matter being remitted to the Environment Court. This is because, in this case, the environmental and ecological effects and natural character and landscape issues override the economic factors.

[140] The Environment Court found in terms of economic and cultural wellbeing the farms contributed in a relatively small way to Clearwater's business and to the wellbeing of people and communities.[80] It commented it could readily be substituted given the capacity of Clearwater to shift its investment elsewhere such as the Sounds or Golden Bay and Tasman Bay.

[141] The Court then went on to note the difficulties of quantifying the economic efficiency in this case. However, it concluded that it was not important as "the evidence enables us to safely find that any loss of economic efficiency suffered by through declining the appeals would be very small and insignificant".[81] It also found "that any such loss would be strongly outweighed by the benefit of better consistency with the priorities set out by the NZSPS and Sounds plan in relation of the protection of ecological, natural character and landscape values … ".[82]

[142] Clearwater submitted that as the Court had suggested alternative for sites which were outside the Marlborough District it therefore did what the High Court in *Meridian* said was not permitted to do. In *Meridian* the High Court said:[83]

> [93] Given that the functions of territorial authorities listed in s 31 are "for the purpose of giving effect to this Act *in its district*" (our emphasis) we do not think that Parliament intended that applicants could be called upon to describe alternative sites beyond the relevant district. We should also add that while we doubt that the [Environment Court] had in mind that alternatives throughout the country would have to be considered, if that was in fact the intention there would be further problems. For a company like Meridian seeking a major wind farm site in the South Island (because the bulk of its customers are located in that island) a comparison of alternative sites in the north island would be largely meaningless.

[143] The High Court in *Meridian* was dealing with the requirement by the Environment Court that a detailed analysis of alternative sites should have been undertaken by the applicant. The Court in this case was not suggesting other sites be analysed as alternatives to the Proposals. It was merely observing the options Clearwater had open to it for investment given its existing interests in various areas.

[144] This ground of appeal would have failed were it pursued.

Conclusion

[145] I am of the view that the Environment Court did not err in reaching its conclusion that it "overwhelmingly" found that the appropriate outcome was to decline the appeals.[84]

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80 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [267].

81 At [267].

82 At [267].

83 *Meridian Energy Ltd v Central Otago District Council*, above n 67, at [93].

84 *Clearwater Mussels Ltd v Marlborough District Council*, above n 1, at [274].

Costs

[146] The parties indicated that the appropriate category for costs was 2B. There appears to be no reason why costs should not follow the event as is usual. If counsel are unable to agree, submissions should be filed as follows:

(a) Memoranda by the Council, Friends and other parties (preferably a joint memorandum) on or before 14 working days from the date of delivery of this judgment;

(b) Memorandum by Clearwater on or before a further 14 working days;

(c) The Council, Friends and other parties are to file and serve any reply (preferably in a joint memorandum) on or before a further three working days.

Appeal dismissed

Reported by Barbara Rea