Irenë McGlone 300315669

# Part 2 RMA in *RJ Davidson Family Trust*: Retreat or Advance?

*A case note prepared for the use and furtherance of EDS litigation.*

## *I Introduction*

Four years downstream from the Supreme Court's decision in *King Salmon*,[1] how does the recent August 2018 decision of the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* reflect the future survival of the *King Salmon* approach? While *King Salmon* was widely regarded as heralding a new dawn for RMA jurisprudence, the *Davidson* decision has upheld little hope for the Act's chronic Part 2 weaknesses: inconsistency, uncertainty and instrumentalist discretion. This essay considers the route by which the Court of Appeal's narrow interpretation of *King Salmon* was arrived at, and contemplates the viability of alternative approaches. Locating the decision within the operative, not academic, reality of the Act, it ultimately stands the thrust of *King Salmon*'s principles may be carried through in name only.

## *II The Court of Appeal decision*

The Court of Appeal decision in *Davidson* contends with the extent to which the *King Salmon* decision, on the application of pt 2 of the RMA to plan changes, applies to resource consents determinations. The case was an appeal from a High Court decision which, along with the Environment Court, held that the *King Salmon* reasoning does apply to resource consents, and that where there is a planning document that is not insufficient, there is no ability to refer to pt 2 in determining an application for resource consent.[2] The Court of Appeal reversed only some aspects of this decision insofar as they held decision makers are permitted to recourse to pt 2, determining that the words "subject to pt 2" in s 104 distinguished *King Salmon*'s applicability.[3] The Court rejected and narrowed the application of *King Salmon* to resource consents, while simultaneously accepting the High Court and Environment Courts' respective reasoning that it would be "inconsistent" with the scheme of the RMA and *King Salmon* to "render regional and district plans ineffective by general recourse to pt 2" in deciding resource consent applications.[4] Ultimately the appeal was dismissed as the error made by the High Court was not material to their finding; given the conclusive finding in

---

1 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 ['*King Salmon*'].

2 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [15].

3 *Davidson*, above n 2, at [72].

4 *Davidson*, above n 2, at [75].

the Supreme Court that pt 2 is given sufficient effect in the Sounds Plan and NZCPS, pt 2 was not open for consideration.[5]

However the issue of when pt 2 applies to resource consent applications has arguably left more questions raised than answered. The case law as it stands now assumes a position that can be described, at best, as a place of limbo. The Court of Appeal was not prepared to extend the *King Salmon* "invalidity, incomplete coverage or uncertainty" caveats as the criteria for when pt 2 may be considered in planning documents other than the NZCPS under s 104.[6] If a plan has been prepared "having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes", the Court held that reference to pt 2 "would not add anything to the evaluative exercise", however "absent such assurance, or if in doubt, it will be appropriate and necessary to do so".[7]

To summarise, the starting point in the *King Salmon* decision is that substantive recourse to pt 2 is not permitted, unless one of the caveats applies. In contrast, the starting point in the *Davidson* decision is that "emphasis" to pt 2 is given if the plan has not been "competently prepared", otherwise recourse to pt 2 will "add little value" and "could not justify an outcome contrary to the thrust of the policies".[8] The meaning the Court gives the words "subject to pt 2" is "absent such assurance, if in doubt".[9] This leaves the circumstances in which a court may look at pt 2 vastly wider, close to justifying 'just in case' recourse to pt 2.

## *III Was there an alternative approach for Court of Appeal to take?*

Given the acceptance of the high water mark in *King Salmon* of an 'environmental bottom lines' approach,[10] was it then necessary for the Court to retreat in its application of this principle and strongly distinguish plan changes and resource consents based on the statutory context? Underlying the judgment as a whole, there appears to be more aligning with the *King Salmon* approach than distinguishing it, despite its narrow conclusion that *King Salmon* was not intended to extend to resource

---

5 *Davidson*], above n 2, at [81].

6 *Davidson*, above n 2, at [76].

7 *Davidson*, above n 2, at [75].

8 *Davidson*, above n 2, at [74].

9 *Davidson,* above n 2, at [75].

10 *Davidson,* above n 2, at [60].

consents because of the wording "subject to pt 2" in s 104.[11] In assessing the viability of this approach, the lower courts' extensive engagement with alternative approaches to interpreting this wording provides a useful yardstick and shows the matter is not as clear-cut as the Court Appeal holds.

Since *King Salmon,* varying approaches have been taken by the Environment Court as to the applicability of its reasoning to the resource consent context. In *KPF Investments Ltd v Marlborough District Council,* the Environment Court drew a strong distinction between the breadth of resource consent applications, holding the *King Salmon* reasoning was limited in this context because "the evaluation under s 104 RMA… is wider than the plan change test".[12] However, later the same Court in *Saddle View Estate Ltd v Dunedin City Council* assessed the approach taken in *KPF Investments* and found it did not give sufficient weight to the reasoning behind the Supreme Court's decision, and that section 5 was not intended to be an operative provision under which directives of the planning hierarchy be overridden.[13] The *Saddle View* Court held the correct interpretation stood that Pt 2 factors are opened up where there is sufficient conflict in the s 104(1)(a)-(c) factors, an approach consistent with *King Salmon.*[14]

The Environment Court in *Davidson* undertook its own survey of whether the overall broad judgment approach under pt 2 applies in terms of resource consent applications following *King Salmon*. The Court held it did not, firstly assessing the *Thumb Point Station Ltd v Auckland City Council* decision in which the High Court held pt 2 should not be applied unless there is a deficiency in the planning document being relied on. In all other circumstances, absent this narrow "one exception", the Environment Court held they were "entitled to rely on a settled plan as giving effect to the purposes and principles of the Act".[15] This approach was subsequently confirmed by the Environment Court in *Appealing Wanaka Inc v Queenstown Lakes District Council,*[16] which held that the reference in *Thumb Point* to "deficiency" was a reference to the "caveats" in *King Salmon* which speci-

---

11 *Davidson,* above n 2, at [75].

12 *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152 at [198].

13 *Saddle Views Estate Limited v Dunedin City Council* (2014) 18 ELRNZ 97 (HC) at [151].

14 Ibid.

15 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].

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

fied pt 2 would not apply "absent any allegation of invalidity, incomplete coverage or uncertainty of meaning".[17]

The Environment Court in *Davidson* contrasted the interpretation of *King Salmon* taken by the High Court in *New Zealand Transport Authority v Architectural Centre Inc & Ors* (*'Basin Bridge'*) in respect of s 171 RMA with the wording, "subject to Part 2 of the Act". It considered the *Basin Bridge* assertion that pt 2 was the "engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where pt 2 is clearly excluded or limited in application by other specific provisions in the Act".[18] In light of *King Salmon*'s decision that s 5 was "…a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation", the Environment Court rejected the *Basin Bridge* approach to the preeminence of pt 2 in the determination of individual applications.[19]

The Environment Court held that the phrase "subject to Part 2" does not "give specific direction to apply Part 2 in all cases, but only in certain circumstances".[20] It applied the explanation given by Cooke P for the Court of Appeal in *Environmental Defence Society Inc v Maungonui County Council* (a 1989 decision prior to the enactment of the RMA) on the meaning of "subject to" as a qualification. In that decision, Cooke P held it was a "standard drafting method of making clear that the other provision referred to are to prevail in the event of conflict".[21] The Environment Court determined on this reasoning that *King Salmon* broadened this qualification to invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, therefore concluding "there is no need to look at Part 2 of the RMA even in s 104".[22]

The High Court decision focussed on the similarities between the circumstances of the *King Salmon* and *Davidson* respectively to hold that the reasoning of *King Salmon* did apply to s 104 resource

---

17 *King Salmon* at [357] per Arnold J.

18 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [111].

19 *RJ Davidson Family Trust v Marlborough District Council* [2014] NZEnvC 81 at [256].

20 Ibid.

21 *Environmental Defence Society Inc v Maungonui County Council* 3 NZLR 257 at 260.

22 *Davidson*, above n 19, at [259].

consent applications.[23] The Court took a broader view of the extent to which *King Salmon* reasoning, based on the RMA's structure and operation, applied than the Court of Appeal, giving particular weight to the discussion of hierarchy of planning documents and whether or not s 5 was intended to be operative.[24]

Returning to the Court of Appeal decision against this background, it can be seen the Court was correct to give sufficient weight to Parliament's amendment of s 104. Responding to early decisions such as *Batchelor v Tauranga District Council*, in which the Environment Court held pt 2 considerations were not an overriding consideration in s 104 applications, Parliament responded by enacting the "subject to Part 2" Amendment in 1993.[25] However as the above reasoning shows, it was clearly open for the Court to take a more aligned approach with *King Salmon* and hold "subject to Part 2" to mean not where there is "doubt or lack of assurance", but where the *King Salmon* caveats are present, there is a higher standard. Absent a definition of "subject to pt 2" from Parliament, an approach more consistent with the *King Salmon* directive should have been taken.

The Court of Appeal placed great weight on the fact the Supreme Court in *King Salmon* did not expressly extend its ratio to resource consent. However this does not preclude the Court of Appeal from applying the caveats approach to the "subject to pt 2" interpretation.[26] While the issue of resource consents was not within the scope of the legal question before the Supreme Court, the fact the Supreme Court undertook an extensive review of the functioning of pt 2 in relation to planning documents to settle the law before reaching this decision, particularly in its clarification of the caveats basis of reasoning, gives strong instructive guidance as to approach.

The Court of Appeal's argument for distinguishing *King Salmon* on the grounds that there cannot "be the same assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of Part 2 of the Act" holds some viability as discussed below, but is a dubious line of distinction to be made here. *King Salmon* focusses extensively on the hierarchical planning structures under the Act and the fact that pt 2 is not designed for operative use. Aside from the extensive reasons beyond the scope of this paper as to why case-by-case substantive decision-

---

23 *RJ Davidson Family Trust v Marlborough District Council* [2017] HZHC 52 at [93].

24 *Davidson*, above n 21, at [74].

25 See also *Foxley Engineering Ltd v Wellington City Council* PT Wellington W12/94, 16 March 1994 at 40; *Campbell v Southland District Council* PT Wellington W114/91, 14 December 1994; *Shell Oil New Zealand Ltd v Auckland City Council* PT Auckland W8/94, 2 February 1994 at 10

26 *Davidson*, above n 2, at [70].

making should not, and was not intended to, be done through pt 2,[27] as a matter of legal method this contravenes the Act's planning hierarchy. On this reasoning, substantive decision making under s 5 is hardly precluded at all. A decision maker can, if it "appears" that a plan has not been prepared in a way that "appropriately" reflects the provisions of pt 2, become "a case where the consent authority is "required to give emphasis to Part 2".[28] Therefore pt 2 is not used merely to resolve conflicts, but in cases where there is even apparent uncertainty, pt 2 is given emphasis. Further against the realisation of the 'bottom lines' approach, the dextrous language employed in the judgment, such as "appropriately reflects", too easily calls for a overly subjective, 'cherry-picking' assessment of whether a proposed plan caters for the particular resource consent.

## *IV Concluding Analysis: Will It Make Any Difference ?*

Say the Court of Appeal did hold stronger, narrower directives as to when pt 2 could be referred to, aligning better with the *King Salmon* jurisprudence. Could it really be said that substantial change would ensue? While the decisions in *Davidson* and *King Salmon* overall are indubitably a step in the right direction in semantics at least, it is too early to assume an 'environmental bottom line' with limited substantive recourse to pt 2 will follow. These decisions must be framed in the inevitably skeptical reality of the RMA as a "political football" since its inception.[29]

Simon Upton, one of the architects of the Act, contemplated s 5 drafting would result in "bottom lines" and no "trade-offs", to otherwise avoid sustainable management that "sinks back into being a mealy-mouthed manifesto whose meaning is whatever decision-makers on the day want it to be".[30] It is now thoroughly accepted that s 5 has moved away from this vision and become an unwieldy, operative provision; as discussed by Upton, Atkins and Willis, a "broad definition of sustainable management that gives no primary to bio-physical effects", further undermined by the courts' application of an 'overall broad judgement' approach.[31] While *King Salmon* and *Davidson* may offer some positive restriction on the use of pt 2, this restriction operates only if the Court's wording avoids the fate of erosion through instrumentalist interpretation. The authors' writing does not hide its frustration at the reduction of pt 2 (and the Act more generally) to the minutiae of a particular ,

---

27 *King Salmon,* above n 1, at [24].

28 *Davidson*, above n 2, at [75].

29 Simon Berry "The Final Straw for the RMA? Some Shortcoming of the Resource Legislation Reform Bill 2015" (2016) RMJ 8 at 11.

30 SD Upton "The Stace Hammond Grace Lecture: Purpose and Principle in the Resource Management Act" (1995) 3 Wai Law Rev 17 at 20.

31 Simon Upton, Helen Atkins and Gerard Willis "Section 5 Re-visited: a Critique of Skelton & Memon's Analysis" (2002) 3 RMLJ 10 at 10.

unintelligible RMA lexicon that has developed. Will not decision makers and courts inevitably extend the applicability of the *King Salmon* caveats and the even broader *Davidson* directive? As two RMA practitioners wrote of *Davidson*'s effect, or lack thereof, "old habits die hard" under the RMA, "… expect to see decision makers relying more and more on the '*King Salmon* caveats' to get their part 2 fix".[32]

The broad *Davidson* approach does not accord well with the general tendency of decision makers to too readily conclude that there is a conflict between certain policies in a plan, Ceri Warnock warns. As discussed in *King Salmon,* "it does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents under it must be interpreted as being open-textured".[33] Warnock notes that, unlike the sustainable management purpose of the Act, the same could not be said of policy statements, many of which contain "highly specific", "set, clear obligations".[34] In the event of any "apparent internal conflict, policy statements need to be interpreted carefully, and the interpreter should closely scrutinise the words used in the statement itself to resolve the conflict"[35]. While this from *King Salmon* gives a clear directive in the plan change context, the *Davidson* decision contains no such tenacious directive towards resolution of plan wordings in resource consents. *Davidson* looks hopeful in its assertion the High Court was correct to hold, "it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to pt 2 in deciding resource consent applications".[36] However the answer to any apparent conflict, or mere doubt, is recourse to pt 2. The Court's wariness generally of the effectiveness of planning documents other than the NZCPS could be read as a mandate to justify routine recourse to pt 2.

This further supports the claim that an approach more conducive to bottom lines, and away from an "open-textured" view of planning documents, was open to the Court of Appeal to take. On a generous predictive reading, regional and district plans may tighten their wording towards strong, clear directives such as "avoid" in the NZCPS; on a more realistic forecast however, regional and district plans may adopt flexibility in their language to instrumentalist ends as a result of public consultation pressure, leading away from rigidity and favouring pt 2 discretion. This is especially true since

---

32 Hannah Marks and Georgina Thomas "King Salmon Reigns… For Now" (2017) 5 RMLJ 19 at 23.

33 Ceri Warnock and Maree Baker-Galloway 'Focus on Resource Management Law' (Lexis Nexis, Wellington, 2015) at 71.

34 Ibid.

35 Ibid.

36 *Davidson,* above n 2, at [78].

many planning instruments pre-date the *King Salmon* and *Davidson* decisions. As two RMA practitioners note, when 'bottom line' terms such as "avoid" were in incorporated into regional policy statements, they were contemplated in the context of room for interpretation (and likely overriding) within pt 2.[37]

Compounding this, concern has been expressed that the insufficiency of planning documents themselves may significantly undermine the effectiveness of a bottom-lines practice. Royden Somerville makes the salient point that National Policy Statements are not offering robust enough principles or criteria to deal with these issues, and so the *Davidson* Court is perhaps right to be wary. They are being dealt with on a case-by-case, factual basis, when in fact the Act contemplates a strong hierarchy of planning documents culminating in principled directives.[38] The former Chief of the Environment Court, Judge Bollard, has noted on this point, "perhaps if there were more national policy input there would be greater clarity borne from top level impetus, and an improved consistency of approach to resource management".[39] The need for comprehensive, robust policy directives to flow down the hierarchy is especially true in resource consent applications which, as Martin Williams highlights, are by their very nature an attempt to "depart from the framework of the district plan".[40]

Judge Bollard's statements on the "ever-present calls for environmental compromises and tradeoffs at the individual level" ring true in this *Davidson* context, concluding "…in the light of the continual cumulative effect changes within districts and regions that all too often belatedly disclose mediocre environmental qualities in the long term sense, if not irreversible degrading outcomes".[41] While the effect of *Davidson* as a safeguard is yet to be determined until further case law emerges, its ability to protect bottom lines, especially in overcoming the context in which it was released, looks dismal. As the former Chief Justice remarked extra-judicially, "environmental conflict is intrinsically much more difficult to resolve if the ends in view are not ordered in any way that provides a handle for decision makers, as by setting minimum standards which do confer rights of enforcement."[42] Ultimately, *Davidson* has lamentably failed to provide the clear approach to the rela-

---

37 H Marks and G Thomas, above n 28.

38 David Young *Values as Law: The History and Efficacy of the Resource Management Act* (Wellington, Institute of Policy Studies, 2001) at 57.

39 R J Bollard "Plans Under the RMA" (2002) 11 RMJ 2 at 3.

40 Martin Williams "Pt 2 of the RMA: 'Engine Room' or Back Seat Driver?" (2017) 5 RMJ 31 at 31.

41 John Bollard "Climate Change Issues from the Perspective of the Environment Court" (2008) 7 BRMB 127 at 130.

42 Sian Elias, Chief Justice of New Zealand "Righting Environmental Justice" (address to the Resource Management Law Association, Auckland, 25 July 2013).

tionship between planning documents and pt 2 that *King Salmon* contemplated, and coupled with the RMA context into which it was released, much uncertainty is left in its wake.