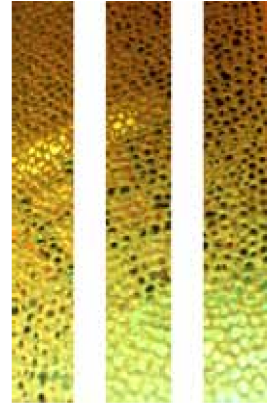


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The Implications of the SOS and EDS Judgments

Remarks to the Resource Management Law Association
and New Zealand Planning Institute Q&A Panel Session
13 August, Buddle Findlay, Wellington

I have five points to make in five minutes.

- 1 These judgments indicate what can be achieved by determined groups of ordinary citizens.**

In particular, it was a privilege for me to represent Sustain Our Sounds, several leading members of which are here tonight – Rob Schuckard and Clare Pinder. I also pay tribute particularly to the late Danny Boulton, who died just after the judgments came out.

Without their determination and dedication to the Marlborough Sounds, these judgments would not be what they are.

- 2 The judgments also demonstrate the need for lawyers always to examine the law from first principles – not to assume that the law is as they want it to be.**

There can be a tendency in any specialised area of legal practice – and I've seen it both in relation to tax avoidance law and resource management law – for specialist practitioners to assume that the law is as they think it is and should be. But the courts of general jurisdiction will apply the law in the same way to any area of practice.

So, the overall judgment approach, which the Environment Courts and resource management bar appeared to adopt as an article of faith – was comprehensively rejected by the Supreme Court when it had the opportunity

to consider it. As it should have, since it lacks principle and leads courts to apply discretion, not law.

3 At a very high level, the way in which these judgments work is this:

- a. SOS made a big argument: that part 2 of the RMA contained environmental bottom lines and the overall judgment approach was unlawful
- b. And smaller arguments: that the plan change and consent conditions here did not adequately safeguard water quality, and the adaptive management approach was not consistent with the precautionary principle – so all four farms could not go ahead.
- c. EDS made a medium sized argument: that the wording of the Coastal Policy Statement contained an environmental bottom line and prevented one farm from going ahead.
- d. In the two judgments, the Court:
 - i. Accepted a modified version of SOS's big argument: part 2 *can* require environmental bottom lines, and whether the Act does depends on the terms of the subsidiary instruments.
 - ii. Combined that with EDS's medium sized argument to find that there are environmental bottom lines in the the CPS.
 - iii. And struck down the overall judgment approach.
 - iv. And accepted SOS's arguments in principle about the RMA safeguarding water quality, clarifying the relationship between adaptive management and the precautionary approach
 - v. But found on the facts that the Board of Inquiry here was satisfied that water quality would be protected by its decisions.

4 This is consistent with the time honoured tradition of judicial statecraft by Supreme Courts around the world, which can change the law dramatically while preserving a formal victory for the established order on the facts.

- a. These are clever and sophisticated judgments, like the 2013 *NZMC Water judgment*.
- b. It is the most thoroughgoing judicial reconsideration of the interpretation of the RMA since its enactment in 1991.
- c. The cancelling of one farm shows the Court really means it.
- d. But it has not, yet, drawn a kneejerk legislative response from the government.
- e. And, crucially, it puts the power of determining whether there *are* environmental bottom lines in the hands of those who approve the subsidiary instruments under the RMA.

5 And that is the most important implication: the terms in which the Coastal Policy Statement, the Regional Plan, the Regional Policy Statement, the District Plan are expressed matter.

Those on either side of an environmental issue should be directing their efforts to ensuring that those words favour their interests.

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