**INTRODUCTION**

Marine farming has generated its share of groundbreaking jurisprudence under the Resource Management Act 1991 (RMA). Most recently, the High Court in *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 determined that general recourse to pt 2 of the RMA is not available in deciding resource consent applications. The Court found that the reasoning of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 applies to s 104, such that the terms of the relevant planning instruments will dictate the fate of a consent application, unless found to be invalid, incomplete or uncertain.

In this article, I respectfully offer the humble opinion that this approach to the application of pt 2, under s 104 of the Act, is wrong. When Parliament moved in 1993 to make all other s 104 considerations “subject to Part 2”, it meant exactly that. Part 2 of the RMA is fundamental, and was intended by Parliament to have an “overarching” position.

The *Davidson* decision turns this legislative instruction on its head. Consideration of the objectives and policies of planning instruments is no longer subject to pt 2. The opposite would apply. Consideration of the provisions of pt 2 is made subject to the objectives and policies of the planning instruments. Planning instruments are thereby not just the “frame” within which resource consent decisions are made, but the “straitjacket”.

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**ENVIRONMENT COURT DECISION IN DAVIDSON**

The case at issue involved a non-complying activity application for a mussel farm in Beatrix Bay in Pelorus Sound (covering a total of 7.37 hectares).

In *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 the Environment Court found that, when considered cumulatively with the 37 existing mussel farms in Beatrix Bay, the adverse effects on natural character, and on King Shag habitat, would be significant. While the first gateway in s 104D of the RMA was therefore not passed, the proposal was not seen as contrary to the objectives and policies of the Marlborough Sounds Resource Management Plan (Sounds Plan) as a whole.

Before assessing the merits of the application under s 104, the Court addressed the relationship between pt 2 and the
other s 104(1) matters as a preliminary issue (albeit not one apparently addressed by counsel in the case).

First, the Environment Court questioned the accuracy of its earlier decision in KPF Investments Ltd v Marlborough District Council [2014] NZEnVC 152, (2014) 18 ELRNZ 367, where (in the words of the Court in Davidson at [253]) it had concluded that the “overall broad judgment under Part 2” as to whether a proposal would promote the sustainable management of natural and physical resources still applies (ie despite King Salmon). In doing so, the Court in Davidson referred to Thumb Point Station Ltd v Auckland Council [2015] NZHC 1035, [2016] NZRMA 55, a case dealing with the subdivision rules of the Hauraki Gulf Islands District Plan, in which context the High Court found that the Environment Court was generally entitled to rely on the settled plan provisions as giving effect to the purpose and principles of the Act.

In Davidson at [257] the Environment Court also questioned the “accuracy” of the High Court’s description of pt 2 as “the engine room” of the RMA in Auckland City Council v John Woolley Trust (2008) 14 ELRNZ 106 (HC) at [47], as applied by the High Court in the Basin Bridge Project case, New Zealand Transport Agency v Architectural Centre Inc [2015] NZHC 1991, (2015) 19 ELRNZ 163 (Basin Bridge). In the latter case, the words “subject to Part 2” in s 171 of the RMA were found (by the Board of Inquiry appointed to consider that project) to justify retention of pt 2 as the “focal point of the assessment” rather than the planning instruments (see Basin Bridge at [102]).

The Environment Court referenced the Supreme Court’s observation in King Salmon at [151] that the provisions in pt 2 are not “operative” in the sense of being sections under which particular planning decisions are made. It reasoned that King Salmon modified the Court of Appeal’s formulation of the meaning of the words “subject to” in Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257 (CA). There the Court of Appeal had stated:

“The qualification ‘Subject to’ is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.” (at 260)

The Environment Court stated:

“We now know, in the light of King Salmon, that it is not merely a ‘conflict’ which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.” (at [259]; emphasis added)

After deciding that the approach in King Salmon logically applied to resource consent applications, the Environment Court made the following observation:

“We note that the majority of the Supreme Court in King Salmon was clearly of the view that its reasoning would apply to applications for resource consents.” (at [260])

The Environment Court then set out a detailed decision-making framework whereby relevant effects are assessed in light of the objectives and policies of the planning instruments, and whereby recourse to pt 2 is only made if there is some “relevant deficiency” in those instruments (at [262]). The question to ask under s 104 is whether the proposed activity would “achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan” (at [262]).

Ultimately the Court found that “the objectives and policies of the Sounds Plan, reinforced by the more directive policies of the NZCPS, require that we should refuse the consents sought” (at [297]).

HIGH COURT DECISION IN DAVIDSON

On appeal to the High Court (RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52), the Davidson Family Trust (as applicant for the mussel farm) argued that the Environment Court had wrongly relegated pt 2 of the RMA to a “back seat” role (at [64]–[65]), despite the specific statutory wording in s 104(1) that all other considerations are “subject to Part 2”.

It argued that the Supreme Court’s consideration in King Salmon arose in the context of a plan change and a different statutory directive, whereby under s 67(3) a regional plan must “give effect to” the New Zealand Coastal Policy Statement (NZCPS).

The High Court addressed the argument in a relatively brief way. The Court also recorded the observation in King Salmon that s 5 is not intended to be an “operative” provision, and that the Supreme Court had rejected
the “overall judgment” approach “in relation to the implementation of the NZCPS in particular” (at [75]; emphasis added).

On that basis, the High Court then stated:

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

GETTING BACK TO BASICS – A NOTE ON LEGAL METHOD

As can be seen from this account, central to both the Environment Court and High Court decisions in Davidson is the proposition that the reasoning in King Salmon applies to resource consent applications. The Environment Court stated that the majority of the Supreme Court was “clearly of [that] view” (at [260]).

On their face, there is nothing in the paragraphs of the Supreme Court’s decision referenced by the Environment Court which contains an express statement from the Supreme Court that it was intending its reasoning to apply to applications for resource consent. More fundamentally, the language and structure of s 104 of the RMA was simply not before the Supreme Court in King Salmon.

As I now explain, in my respectful opinion, as a matter of basic legal method the Supreme Court’s decision does not displace over 20 years of case law, established by decisions made through all levels of the courts, as to the manner in which s 104 considerations are to be considered and applied “subject to” pt 2 of the RMA.

It is accepted that there are observations in the Supreme Court’s judgment in King Salmon that do not favour application of an “overall judgment” approach, at least in relation to implementation of the NZCPS. The question of whether pt 2 sets up an “overall judgment” approach, or was intended to establish “bottom lines”, is however a different issue, and is beyond the scope of this article. However applied (ie either way), you essentially do not get to pt 2 in considering a resource consent application under Davidson.

To determine whether the Supreme Court’s decision in King Salmon can correctly be said to have reset the law under s 104, reference to basic principles of legal method seems to be required.

Under our legal system, through the doctrine of precedent, cases can create rules of more general application. The aspect of a decision which other courts will follow is known as the “ratio” (shorthand for “ratio decidendi”, meaning “the reason for the decision”) (see Jacinta Ruru, Paul Scott and Duncan Webb The New Zealand Legal System: Structures and Processes (6th ed, LexisNexis, Wellington, 2016) at 392).

To determine the “ratio” of a decision, ie that part of the decision which would be binding in future cases, it is crucial to identify:

• the issue before the court; and
• the material facts of the case, ie those facts which are essential to the making of the decision.

The rule set in any decision made by a court is, strictly speaking, confined within the issue before that court, in the context of the material facts.

In contrast to the ratio are non-binding statements of law which are only indirectly relevant to the decision, known as “obiter dicta” (or simply “obiter”). Notably, the Environment Court in Davidson at [258] described as “presumably obiter” the observation of the Supreme Court in King Salmon that the provisions of pt 2 are not “operative” in the sense of being decisions under which particular planning decisions are made. Yet the Environment Court (and subsequently the High Court) determined to apply that very statement, in sweeping aside 20 years of jurisprudence as to the place of pt 2 under s 104 of the RMA.

Looking back at King Salmon itself, the material facts (within which the ratio is nested) were that:

• a Board of Inquiry had found that a particular salmon farm would have significant adverse effects on an area of outstanding natural character and outstanding natural landscape value; and
• policies 13 and 15 of the NZCPS require that adverse effects on outstanding natural character and landscape areas must be avoided.
The issue in the case was that the Board of Inquiry had nevertheless granted the plan change on the basis that this would “give effect to” the NZCPS “as a whole” (see King Salmon at [5] and [81]).

Having set out the Board of Inquiry’s approach in that regard, the Supreme Court stated:

“The effect of the Board’s view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106]–[148] below whether this approach is correct.” (at [83])

For various reasons the Supreme Court determined that this approach was not correct. The Court found that given the Board’s findings on the facts in relation to policies 13 and 15 of the NZCPS, the plan change should not have been granted because the plan change did not comply with s 67(3)(b), as the directions in these specific policies would not be given effect to.

The ratio of the case is that the NZCPS is not to be applied in an “overall” way. A plan change (or indeed any lower-order planning instrument) that does not meet the strongly-worded directives of policies 13 and 15 will not give effect to that instrument, and so cannot be approved.

Seen in that context, and approached as a matter of basic legal method, there is simply nothing in the decision that has a direct bearing on the issues at stake in Davidson or indeed any case involving an application for resource consent being considered in the context of s 104 of the RMA.

The Supreme Court was not addressing the express reference to pt 2 in s 104(1) in reaching its findings. The words “subject to Part 2” simply do not appear in the judgment. Section 104 is not addressed in any specific way at all. Nor is the body of case law referred to below determining the meaning of the words “subject to Part 2” in that context, or within the very similar wording expressed in s 171 (for designations).

The Supreme Court’s finding that s 5 is not an operative provision could only be obiter accordingly, at least regarding the application of s 104. The Environment Court was right to record that, but not to apply that reasoning as the basis of its decision, and nor (with respect) was the High Court. That was not the issue before the Supreme Court on the material facts of the case, and King Salmon does not reset the law as to the circumstances in which recourse can be made to pt 2 of the RMA for a resource consent application (or designation).

PARLIAMENT’S INTENT AND CASES ADOPTING IT

When first enacted, s 104 of the RMA set pt 2 considerations within a list of matters that the consent authority was required to have regard to.

For that reason, the High Court in Batchelor v Tauranga District Council (No 2) [1993] 2 NZLR 84 (HC) determined that pt 2, which includes s 5, is but one in a list of matters and is “given no special prominence” (at 89).

In response to that decision, Parliament moved to restructure s 104 and place pt 2 directly at the forefront, where it sits now. Section 171 was also amended in that way at the same time.

In introducing the Bill that became the Resource Management Amendment 1993, the then Minister for the Environment (the Hon Rob Storey) stated:

“Part II of the Resource Management Act sets out its purpose and the key principles of the Act. It is fundamental, and applies to all persons whenever exercising any powers and functions under the Act. The current references in the Act in Part II are being interpreted as downgrading the status of Part II. Amendments in this Bill restore the purpose and principles to their proper overarching position.” (532 NZPD 13179)

Ever since Parliament intervened in this way, the courts have consistently, and I suggest with respect faithfully, applied Parliament’s express intent.

I have not attempted to count them, but there must be literally hundreds of Environment Court decisions made under s 104 whereby, following consideration of the other s 104 matters (including effects on the environment, the provisions of the planning instruments, and other relevant matters) the Court has stepped back and considered how to apply its overall discretion to grant or refuse consent, focusing squarely on pt 2 considerations. Exemplifying that approach, in Lee v Auckland City Council [1995] NZRMA 241 (PT) at 248 the Planning Tribunal referred to s 5 as the “lodestar” of the Act “which guides the provisions of s 104”, with the Tribunal being “guided by the over-arching purpose of sustainable management as defined”.

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The Supreme Court was not addressing the express reference to pt 2 in s 104(1) in reaching its findings. The words “subject to Part 2” simply do not appear in the judgment. Section 104 is not addressed in any specific way at all. Nor is the body of case law referred to below determining the meaning of the words “subject to Part 2” in that context, or within the very similar wording expressed in s 171 (for designations).

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In McGuire v Hastings District Council [2002] 2 NZLR 577 (PC) at [21] the Privy Council recorded that “[t]he Act has a single broad purpose”. It went on to state that:

“… s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.” (at [22])

This observation of the Privy Council directly reflects and applies the earlier decision of the Court of Appeal in Mangonui County Council mentioned above.

As also mentioned earlier, in John Woolley Trust the High Court stated:

“Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.” (at [47])

This body of case law was applied by the High Court in Basin Bridge in upholding the Board of Inquiry’s reasoning. The High Court found that the Board of Inquiry had correctly analysed and understood the ratio of King Salmon – and the Court also observed that the provisions which King Salmon was concerned with did not contain the “subject to” drafting method addressed by the Court of Appeal in Mangonui County Council.

Returning to the legal method principles addressed earlier, it is unclear to me why both the Environment Court and the High Court in Davidson chose to apply the reasoning of decisions involving the preparation of planning instruments (Thumb Point and King Salmon, with the reasoning in the latter arguably obiter), instead of following what appear to me to represent aspects of the ratio of High (and superior) Court decisions addressing the specific statutory directive actually at issue in the case.

COMMENTS ON THE APPROACH IN DAVIDSON

In my opinion, the approach set out in Davidson has the potential to frustrate rather than promote sustainable management outcomes.

Instead of the provisions of the district and regional plan being applied “subject to Part 2” of the RMA, it is essentially the other way around. Part 2 is only applied subject to the provisions of the district or regional plan.

Earlier on in its judgment, the High Court in Davidson refers to the observations of the Supreme Court in Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17, [2005] 2 NZLR 597 at [10], where the Chief Justice described a district plan as the “frame” within which resource consents fall to be assessed.

With respect, what the Supreme Court was saying there is that the district plan provides a framework within which relevant effects fall to be considered, even given particular emphasis (in that case, effects on the amenity values of existing shopping centres for example). A similar approach was applied by the High Court in Tasti Products Ltd v Auckland Council [2016] NZHC 1673, [2017] NZRMA 22, also in a notification context, in terms of identifying relevant effects that should be given particular attention.

The approach in Davidson, however, is to reset this “frame” as an effective “straitjacket”. It may not be going too far to say that the approach taken establishes a “gateway” similar to that set out in the Act for non-complying activities, but through which all resource consent applications must now pass. The district plan objectives and policies become paramount. Unless found to be uncertain, invalid or incomplete, recourse to pt 2 for any party to the process (applicant or submitter) is unavailable.

In my further humble opinion, it is simply taking things too far to assume that the objectives and policies of a given planning instrument can pretend to be all things, suitable for application in all cases. Such provisions may not be “incomplete” or even necessarily invalid. There may however be features of a particular case which ought to be given some prominence in order to address the overarching provisions of pt 2 of the Act, as intended by Parliament. In a situation where conflict of that type arises, the conventional approach to the application of pt 2 should be maintained.

A resource consent is, after all, inherently an attempt to depart from the framework of the district plan. Where something new, innovative, perhaps not foreseen or even evolutionary arises over the 10- to 15-year lifetime of plan provisions, there must be scope to access pt 2 in deciding the fate of that proposal well beyond the limited strictures set by the High Court in Davidson.

As noted above, I leave to one side, and deliberately so, the more vexed question of whether the pt 2 provisions

Continued
themselves set “bottom lines” or retain scope for application of the overall judgment approach. I personally do not consider that the Supreme Court’s decision in King Salmon expressly overrules the overall judgment approach in that pt 2 setting, but instead as to the manner of application of NZCPS provisions.

Leaving that debate for another day, where I consider it properly resides, s 104 should in the meantime be left to work as was unarguably intended by Parliament, whereby issues of effects and the provisions of planning instruments assume no greater provenance than through their application “subject to Part 2”.

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