IN THE COURT OF APPEAL OF NEW ZEALAND

CA158/2017
[2017] NZCA 607

BETWEEN	NORTHLAND ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY FOR PRIMARY INDUSTRIES First Respondent
	COMPTROLLER OF CUSTOMS Second Respondent
	THE CHIEF EXECUTIVE OF THE MINISTRY FOR CULTURE AND HERITAGE Third Respondent

Hearing:	14 September 2017
Court:	Harrison, Cooper and Clifford JJ
Counsel:	D M Salmon and HAT Bush for Appellant J K Gorman for First and Second Respondents B R Arapere for Third Respondent
Judgment:	19 December 2017 at 11.30 am

JUDGMENT OF THE COURT

A The appellant's application to adduce further evidence is granted.

B The appeal is dismissed.

C The appellant must pay one set of costs to the first and second respondents for a standard appeal on a band A basis, to be shared between them, and usual disbursements. The appellant also must pay the third respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The appellant, Northland Environmental Protection Society Inc (NEPS), is a public interest group whose purposes include the protection of all indigenous ecosystems in Northland. According to Ms Fiona Furrell, the Chairperson of NEPS, it has given particular emphasis to adverse effects associated with the mining and export of swamp kauri. NEPS is concerned that swamp kauri is being mined, milled and exported from New Zealand in circumstances prohibited under the Forests Act 1949 and the Protected Objects Act 1975. It is also concerned about the environmental impact of that activity, including on wetlands where swamp kauri had been recovered.

[2] NEPS commenced a proceeding in the High Court under the Judicature Amendment Act 1972 and the Declaratory Judgments Act 1908 seeking declarations that illegal exports were occurring, and that the respondents — the Chief Executive of the Ministry for Primary Industries (MPI), Comptroller of the New Zealand Customs Service (Customs), and the Chief Executive of the Ministry for Culture and Heritage — were not complying with statutory duties to prevent the unlawful export.

[3] NEPS was unsuccessful in the High Court and now appeals.[1]

Swamp kauri

[4] Swamp kauri refers to kauri trees and stumps buried and preserved in what used to be swamp for anywhere between 800 and 60,000 years. Many of the original kauri trees were of great size and became buried in swamps following an event causing

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1 *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry of Primary Industries* [2017] NZHC 308.

them to fall and die naturally. As noted by Toogood J, the unique swamp conditions have preserved the trees and stumps intact.[2] They are now highly valued as culturally significant taonga and as witnesses to natural events of scientific and ecological significance. They are also of high commercial value, as a consequence of the size of the timber pieces that can be milled, together with the ancient age of the timber. This distinguishes swamp kauri timber from other New Zealand indigenous timbers.

[5] Swamp kauri is extracted almost exclusively from non-indigenous scrubland and farmland in Northland. Mr Mathew Bartholomew, the Manager Sustainable Forest Management employed by the Chief Executive of MPI, who swore an affidavit in opposition to the claim, said that this is the consequence of controls in the Forests Act on the milling and export of stump and root material. Per volume prices for swamp kauri exports generally range between $1,500 per cubic metre and $6,000 per cubic metre. The price varies according to the work required to produce a given item and its size. Stump timber attracts the lower value, and the higher value will be paid for table tops and other finished and manufactured products. Some items sell for well in excess of $6,000 per cubic metre.

[6] Exports of swamp kauri in 2008 and 2009 were of limited volumes: 127.5 cubic metres and 151.9 cubic metres respectively. However, the amount of swamp kauri exported grew between 2010 and 2015 from 326.6 cubic metres to 2,758.7 cubic metres, an increase of over 740 per cent. Mr Bartholomew deposed that the highest annual value of exports in that period was in 2014, when 3,635.5 cubic metres were exported. A little over 91 per cent of the value exported between 2010 and 2015 was exported to China. The volume exported has remained relatively consistent since 2013.

[7] Table tops are the major element of the finished or manufactured indigenous timber products made from swamp kauri and exported overseas. Other products include ornamental carved temple poles and "carvings".[3]

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2 At [1].
3 At [7].

The High Court claim

[8] NEPS pursued claims against MPI, which has primary responsibility for regulating the export of swamp kauri under the Forests Act; Customs, which is responsible for clearance of goods at the New Zealand border; and the Ministry for Culture and Heritage, which is responsible for administering the Protected Objects Act.

[9] NEPS focused on two different types of exported kauri. First, large slabs of kauri claimed to be table tops, finished in various ways and exported without legs. Second, kauri temple poles: entire logs that have been carved or painted. It sought declarations that the table tops and poles are not "finished or manufactured indigenous timber product[s]" within the meaning of that term defined in the Forests Act.[4] This meant that neither could lawfully be exported under the Forests Act. NEPS sought further declarations that MPI and Customs had acted unreasonably in taking at face value exporter claims that products were finished or manufactured indigenous timber products. It also sought a declaration that swamp kauri is a "fossil" and a "protected New Zealand object" in terms of relevant provisions of the Protected Objects Act and thus that their export is prohibited under that Act.[5]

[10] Toogood J declined to make the declarations because he did not accept the interpretation of the statutes urged by NEPS and, in the case of the alleged unreasonable actions of MPI, because they related to exports that had occurred in the past and declaratory relief could have no practical effect.

[11] NEPS has appealed against the Judge's refusal to make the declarations. In the discussion that follows, we deal with the appeal so far as it relates to the Forests Act, then with the issues concerning the Protected Objects Act, and finally with the unreasonableness issue.

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4 Forests Act 1949, s 2, definition of "finished or manufactured indigenous timber product".

5 Protected Objects Act 1975, s 2, definition of "protected New Zealand object" and sch 4, cl 5(1), definition of "fossil".

The Forests Act declarations

[12] Section 67C(1) of the Forests Act prohibits the export of New Zealand indigenous timber unless it falls within one of the stated exceptions. For present purposes, the relevant exception is in s 67C(1)(b): "any finished or manufactured indigenous timber product, regardless of the source of the timber used in the product". Section 67C(3) provides:

> (3) No indigenous timber (other than personal effects and any finished or manufactured indigenous timber products) may be exported from New Zealand—
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> (a) unless—
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> (i) a notice of intention to export has been given to the Secretary in a form approved by the Secretary; and
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> (ii) the notice of intention includes or is accompanied by a statement of the source of the timber; and
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> (iii) the timber has been presented to a forestry officer for inspection and he or she has inspected and approved it; and
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> (b) until the expiry of a period (if any) specified for the purposes of this paragraph in the notice of intention.

[13] It can be seen that the requirement to give a notice of intention to export does not apply in the case of any finished or manufactured indigenous timber products. However, although not required to do so, those exporting finished or manufactured indigenous timber products may engage in a voluntary process whereby exporters will present proposed exports to MPI, enabling MPI to express a view on whether it too considers the proposed export to be a finished or manufactured indigenous timber product.

[14] The expression "finished or manufactured timber product" is defined in s 2 of the Forests Act as follows:

> **finished or manufactured indigenous timber product—**
>
> (a) means any indigenous wood product that has been manufactured into its final shape and form and is ready to be installed or used for its intended purpose without the need for any further machining or other modification; and

(b) includes a complete item or a component of an item (whether assembled or in kitset form) such as joinery, furniture, toys, tools, and household utensils, household fixtures such as rails and toilet seats, ornaments such as picture frames and carvings, and similar items; but

(c) does not include dressed or rough sawn timber, mouldings, panelling, furniture blanks, joinery blanks, building blanks, or similar items

[15] This was the crucial provision the High Court had to construe to resolve this part of the case.

The High Court claim

[16] The declarations sought by NEPS in the High Court were summarised by Toogood J in the following terms:[6]

(a) Ancient swamp kauri table-tops, whether described as "rusticated table-tops", "table slabs", "table-tops", "slabs" or otherwise, are not [finished or manufactured indigenous timber products] within the definition in s 2 of the Forests Act 1949, unless:

(i) their actual intended end use at the time of export is as a table;

(ii) they do not require any further machining or other modification, including any further coating of paint, oil or lacquer, sanding or other finishing, to be in its final shape and form and ready to be installed our used;

(iii) they

1. include any intended legs, stand or other mounting (whether assembled or in kitform), or, alternatively[;]

2. they include all necessary routing, machining or other preparation for the installation of intended legs stand, or other mounting; and

(iv) they are completed beyond the state of being dressed or rough sawn timber.

(b) Ancient swamp kauri logs with light surface carvings or decoration are not [finished or manufactured indigenous timber products] within the definition of s 2 of the Forests Act 1949.

[17] Toogood J approached the interpretative task by noting first that the prohibition on the export of New Zealand indigenous timber was in pt 3A of the Forests Act, which

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6 *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry of Primary Industries*, above n 1, at [35].

contains provisions relating to indigenous forests. He considered it significant that the statutory purpose of pt 3A "is to promote the sustainable forest management of indigenous forest land".[7]

[18] The term "sustainable forest management" is defined in s 2 as:

> … the management of an area of indigenous forest land in a way that maintains the ability of the forest growing on that land to continue to provide a full range of products and amenities in perpetuity while retaining the forest's natural values.

[19] The Judge reasoned from this that the definition of "finished or manufactured indigenous timber product" was intended to function as part of a number of measures designed to discourage the felling of indigenous forests except as part of a New Zealand-based industry involving the production of furniture or other finished products.[8] The wording of s 67B did not support a proposition advanced by NEPS that a more general conservation purpose was served by the prohibition on export, so as to inhibit the recovery and export of the swamp kauri, which had been buried for centuries. In this respect, he expressed agreement with an observation made by McGechan J in *Ancient Trees of New Zealand Ltd v Attorney-General* that "there should not be undue emphasis upon added value processing of kauri remnants before export is permitted. This is forests legislation, not employment protection legislation."[9]

[20] As to para (a) of the definition of "finished or manufactured indigenous timber product" NEPS submitted that if the shape and form of the product could be altered after exportation, it cannot be regarded as being in its final shape or form at that point. The Judge considered the fact that a product could be modified by an overseas purchaser — whether by re-staining or repainting, drilling holes or slots in a table top so as to facilitate the attachment of legs or a base, or making other modifications for that purpose — did not mean that the product when exported was not in its "final shape and form" or "ready to be installed and used for its intended purpose without the need

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7 At [38], quoting Forests Act, s 67B.
8 At [39]–[40].
9 At [41], quoting *Ancient Trees of New Zealand Ltd v The Attorney-General* HC Wellington CP483/93, 29 April 1994 at 23.

for any further machining or other modification". A crucial part of para (a) in the Judge's view was the reference to the "need" for further modification.[10]

[21] As to para (b) of the definition, NEPS submitted that the words "(whether assembled or in kitset form)" qualify the words "component of an item". Consequently any component of an item made of indigenous timber must either be assembled (so that if it is a table with a top made of swamp kauri the base must be attached) or in a kitset form (so that in the case of a table top made from swamp kauri it must have its base and the means for attaching the base included with the table top at the time of the export). The Judge rejected that submission. He noted that the examples given in para (b) of the definition showed that the words in parentheses qualified both complete items and components. He reasoned that it could not have been Parliament's intention that, for example, wooden toilet seats were unable to be exported without cisterns, or that wooden picture frames could not be exported without the pictures inserted. Such an approach would make little sense and do nothing to achieve the purpose of sustainable forest management.[11]

[22] In terms of para (c), NEPS submitted that the paragraph operated as a "proviso" or a "trumping provision".[12] A product that would otherwise be in its final shape and form, and be able to be used for its intended purpose without further machining or modification, but that was also "dressed or rough sawn timber" could not be a finished or manufactured indigenous timber product.[13] The Judge rejected this submission as well. He considered that para (c) was intended to be "illustrative or explanatory of items not intended by Parliament to be included in the definition, and given for the avoidance of doubt".[14] In his view, the items listed in the paragraph would not in normal circumstances fall within para (a). None of them were in their "final shape or form", and para (c) clarified that was the case.

[23] This reasoning led the Judge to conclude that the declaration sought by NEPS in relation to table tops was not in reality a declaration of the meaning of the statutory

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10 *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry of Primary Industries*, above n 1, at [44]–[45].
11 At [48].
12 At [51].
13 At [51].
14 At [52].

wording. Rather, NEPS was seeking a revision of the statutory definition intended to meet NEPS's view that only the export of complete tables (whether made up or in kitset form) should be permitted. That view was not sustainable on the plain wording of the section.[15]

[24] Similarly, the declaration that kauri logs "with light surface carving or decoration" did not fall within the category defined by the statutory wording and simply raised the question of the degree of carving necessary in any particular case to meet the test expressed in the Act.[16] The Judge concluded:

> [56] I am not persuaded that any attempt at making a declaration about the meaning of a description which covers an unlimited variety of potential timber products will assist in the enforcement of the legislation. A practical approach to the application of the definition is required. Whether a table-top or a piece of carved timber made from ancient swamp kauri is sufficiently finished to fall within the category of permitted exports will be a matter of fact and degree for determination on a case by case basis. The statutory purpose of protecting and maintaining New Zealand's living indigenous trees does not call for pedantic scrutiny in MPI's decision-making about the export of ancient swamp kauri. A commonsense approach, founded in any case on evidence which demonstrates that the export product in question is finished to a state in which it is reasonably fit for its intended purpose, will usually be sufficient to determine whether the questioned product meets the statutory test.

The appeal

[25] NEPS submitted that the Judge was wrong to focus solely on the purpose stated in s 67B. Its counsel, Mr Salmon, argued that the purpose should be read in light of the scheme of the Forests Act as a whole, noting that the interpretation of the definition of "finished or manufactured indigenous timber product" must be one that can be applied appropriately to a product intended for export that had been sourced not only from a living indigenous tree recently felled, but also from swamp kauri. Mr Salmon identified wider purposes served by the legislation. One such purpose was referred to in *Ancient Trees* where McGechan J referred to what he described as an evident secondary purpose behind the legislative restraint on the export of raw indigenous timber: "elements of employment promotion, regional development, and pure

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15 At [54].
16 At [55].

economic theory".[17] Another purpose to which Mr Salmon referred was dampening export demand.

[26] Mr Salmon essentially enlarged on the arguments unsuccessfully advanced in the High Court about the interpretation of paras (a)–(c) of the definition of "finished or manufactured indigenous timber product". In relation to para (a), he submitted that a product is only in its final shape and form when the shape, finish and physical contours of the product will not be changed through further cutting or shaping and the appearance of the product will not be changed through further altering or finishing. Drilling holes or slots in a table top to attach legs or a base, or drilling holes in a timber door for the attachment of hinges are clear examples of modifications without which the product would not be able to be used for its intended purpose. The product is thus not in its final shape and form. He also argued it can legitimately be inferred that products with minimal sanding, oiling or varnishing at the point of export are not in their final form.

[27] Turning to para (b), Mr Salmon accepted that "(whether assembled or in kitset form)" applies to both a complete item and a component of an item. But he submitted that in each case, the Forests Act envisages that the product must only be exported either in "assembled or in kitset form". He claimed that ensuring kauri products are only exported in assembled or kitset form would provide added protection and assurance that the products being exported would be in their final shape and form. This would support both the narrower purpose of sustainable forest management and a wider conservation purpose by dampening the added pressure of an export market and ensuring economic value is maximised in New Zealand.

[28] Mr Salmon criticised the Judge's conclusion that para (c) of the definition was intended to be illustrative only. He suggested that approach required the word "but" at the end of para (b) to be disregarded. A more natural interpretation was to treat "but" as a legislative direction that para (c) provides a general qualification on the meaning to be derived from paras (a) and (b). Further, even if the Judge was right to hold that items listed in para (c) will not usually meet the definition in para (a), that

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17 *Ancient Trees*, above n 9, at 22.

approach does not address the position where a particular item, while in its final shape or form, nevertheless falls within para (c). Mr Salmon submitted that for para (c) to have any effect at all, it must qualify the definition in para (a).

[29] He argued the declarations sought should be granted as they simply apply the section to particular exports and would provide a framework by which to assess individual exports, still allowing for case-by-case examination of particular products.

Analysis

[30] Part 3A of the Forests Act was inserted by the Forests Amendment Act 1993. As has been seen, the express statutory purpose of the new part of the Act is set out in s 67B, which refers to promoting the sustainable forest management of indigenous forest land. Not surprisingly, in introducing the Bill, the Minister of Forestry referred specifically to that purpose.[18]

[31] The principal provisions of the new pt 3A are s 67C, which provides for the prohibition on the export of certain indigenous forest produce, and s 67D, which contains prohibitions on milling any indigenous timber at a sawmill unless certain requirements are satisfied. These requirements may broadly be described for present purposes as allowing timber to be milled when it is taken from areas subject to registered sustainable forest management plans,[19] or if the Chief Executive of MPI is satisfied the timber is salvaged timber that has not been harvested from indigenous forest land or is windthrown timber on land that is not subject to a registered sustainable forest management plan.[20] The effect of these provisions is that, as salvaged timber or timber that has died of natural causes, swamp kauri can generally only be milled where it is sourced from either non-indigenous forest land or from land that is not subject to a registered sustainable forest management plan or permit.

[32] Section 67C(1) relevantly provides:[21]

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18 (30 June 1992) 526 NZPD 9643.

19 Forests Act, s 67D(1)(a).

20 Section 67D(1)(b)(iv) and (v). The prohibition does not apply in other circumstances (referred to in s 67D(1)(b)(i)–(iii) and (c)–(e)), which we need not discuss here.

21 The omitted subs (1)(f) relates to tree fern trunks and fibres.

67C Prohibition on export of certain indigenous forest produce

(1) No person shall export from New Zealand indigenous timber, except the following:

(a) any grade of sawn beech or sawn rimu (other than wood chips), where the Secretary has stated in writing that he or she is satisfied that the timber has been taken from an area subject to, and managed in accordance with, a registered sustainable forest management plan or registered sustainable forest management permit:

(b) any finished or manufactured indigenous timber product, regardless of the source of the timber used in the product:

(c) any personal effects:

(d) any stump or root, whether whole or sawn, where the Secretary has stated in writing that he or she is satisfied that the timber has been taken from an area subject to, and managed in accordance with, a registered sustainable forest management plan:

(e) any salvaged stump or salvaged root, whether whole or sawn, where the Secretary has stated in writing that he or she is satisfied that the timber has been taken from an area that is not indigenous forest land:

…

(g) any indigenous timber—

(i) from a planted indigenous forest, if that timber is, or is from, a shrub, bush, seedling, or sapling; or

(ii) other than indigenous timber to which subparagraph (i) applies, if the Secretary has stated in writing that he or she is satisfied that the timber has been harvested from a planted indigenous forest; or

(iii) harvested from a forest subject to a forest sink covenant established in accordance with Part 3B.

[33] The purpose of sustainable forest management is reflected in subs (1)(a), which enables sawn beech or sawn rimu to be exported where the Secretary is satisfied the timber has been taken from an area subject to and managed in accordance with a registered sustainable forest management plan.

[34] Paragraph (b) of the subsection, with which we are primarily concerned here, refers to finished or manufactured indigenous timber products, regardless of their

source, and together with the exclusion of wood chips in para (a), reflects what appears from the parliamentary materials to have been an intention that exported timber should comprise products to which value has been added by processes carried out in New Zealand. In moving that the Bill that became the Forests Amendment Act 1993 be read a second time, the Minister of Conservation said:[22]

> At the end of the day the Government chose to continue the export ban on wood-chips and logs because it wanted to move the mentality of the sawmilling industry to manufacturing high-value, added-value products in New Zealand, and to move away from the very volatile international trade in wood-chips so that we can get the very best result for a very much diminishing resource here in New Zealand.

[35] The apparent breadth of s 67C(1)(b), which applies "regardless of the source of the timber used", must be seen in the context of the prohibition on milling indigenous timber in s 67D. As mentioned, s 67D(1) prevents the milling of any indigenous timber at a sawmill unless the sawmill is registered and the harvesting of the timber that is milled falls within one of five stated categories. One of those categories applies to timber that has been:[23]

> … harvested from an area of land subject to, and managed in accordance with, a registered sustainable forest management plan or a registered sustainable forest management permit and the harvest is in accordance with an annual logging plan approved under section 67H.

[36] It follows from this that, in general, finished or manufactured indigenous timber products may be exported under s 67C(1)(b). But that provision takes effect in the context of s 67D(1)(a), which ensures that if the timber that has been finished or manufactured into a product for export has come from a forest it must be a forest that is being sustainably managed.

[37] We accept, as Mr Salmon contended, that it is possible to discern in these provisions a purpose wider than that stated in s 67B: to ensure that value is added to exported timber. But we do not see in the drafting of pt 3A an intent to dampen export demand and the parliamentary materials do not suggest that was a motivating consideration. If that were the objective it is not unreasonable to infer it would have been stated, and implemented directly by controlling the amount of timber exported.

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22 (11 March 1993) 533 NZPD 13940.

23 Forests Act, s 67D(1)(a).

The intent rather was to ensure that the forests are sustainably managed and that if timber is to be exported it be in the form of a product to which value has been added.

[38] It was common ground between the parties that pt 3A of the Forests Act applies to control the export of swamp kauri. As Ms Gorman, who appeared for the Chief Executive of MPI and the Comptroller of Customs pointed out, Toogood J's discussion of the statutory purpose did not have the consequence that the Forests Act would not apply to swamp kauri. On the contrary, the general prohibition on the export of indigenous timber stated at the outset of s 67C(1) must apply unless s 67C(1)(b) can properly be applied to authorise the export of particular finished or manufactured indigenous timber products. The voluntary process undertaken by exporters with MPI was for the purpose of facilitating application of the Forests Act to swamp kauri products. We also accept Mr Salmon's proposition that the architecture of the Forests Act is such that the definition of "finished or manufactured indigenous timber product" will need to be applied in respect of indigenous timber that is both felled and salvaged. There is no basis upon which the meaning of the definition could alter having regard to the origin of the wood. And s 67C(1)(b) applies "regardless of the source of the timber used in the product".

[39] It is in this context that the three paragraphs of the definition of "finished or manufactured indigenous timber product" must be construed. The definition must be read as a whole, para (a) setting out the meaning of the term, para (b) essentially giving further detail as to the meaning and para (c) stating what is not included in the definition.

[40] The essential difficulty with Mr Salmon's argument concerning table tops is that para (b) extends the definition to components. So long as a component fits within para (a) (that is, it has been manufactured into its final shape and form) it will be within the definition. A table top (a component of a table) will be ready for its intended use if it does not need any further machining or other modification to be used as a table top. The fact that the table top requires alteration as part of the installation process does not mean that it was not in its final shape and form or ready to be installed prior to that. The process of installation should not be regarded as something that would take

the component outside of the definition. Mr Salmon's interpretation would subvert the intended extension of the definition to include components.

[41] We accept that the words "(whether assembled or in kitset form)" that appear in para (b) should be applied to both complete items and components of an item. This was in fact the approach taken by the High Court. However, that does not lead to the consequence for which Mr Salmon contends. It would authorise, for example, a table top and separate legs to be exported "in kitset form". But that does not mean that the table top alone would not be covered by the definition in para (a) and it would serve no rational purpose that we can discern to read the legislation in that way.

[42] We consider Toogood J correctly held that the definition must be applied at the time of export.[24] It cannot matter after that point what use the intended recipient of the product makes of it; the secondary statutory purpose of adding value to the timber will already have been achieved. A table top may be affixed by a number of means to the structure that is to support it. That could be done with glue, or with methods involving the creation of appropriate holes or indentations. Another possibility, given the weight of any substantial kauri table, would be to rely on support by trestles. We do not consider that the expression "ready to be installed" should be construed so as to prevent such minor alterations that might be carried out subsequent to export as part of the process of installation.

[43] It is instructive here to consider examples given of components in para (b) of the definition. These include toilet seats. Like Toogood J, we would not consider the affixing of screws or bolts to a toilet seat as taking it outside the ambit of the definition. Nor do we accept Mr Salmon's argument that it can legitimately be inferred that products with minimal sanding, oiling or varnishing at the point of export are not in their "final form". It would only be if it could be said at the time of export that such actions were necessary that it would be legitimate to reach such a conclusion: the reference in para (a) to the *need* for further machining or modification must be properly taken into account.

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[24] *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry of Primary Industries*, above n 1, at [46].

[44] Again, contrary to Mr Salmon's submission, we do not see para (c) of the definition as "trumping" paras (a) and (b). All of the items listed in para (c) are products that might be installed or placed in buildings but are likely to be modified or adapted for that purpose. The common denominator appears to be that more work will be necessary to render the products into their final shape and form. This is clear in the case of blanks. And while dressed or rough-sawn timber, if cut to a standard length, might on occasion be ready for use in certain kinds of building without the need for further machining or modification, they do not fit readily into the concept of a product "manufactured into its final shape and form". NEPS argued that anything comprised of "dressed or rough-sawn timber" is not a finished or manufactured indigenous timber product. We accept that would be so if the product could not be brought within para (a) of the definition, and para (c) would simply underline that conclusion. But, we do not see para (c) as invariably operating so as to exclude products that would otherwise fall within para (a). In many cases, para (c) would have effect to exclude from the definition items not falling within para (a). We are therefore not persuaded Toogood J erred when he spoke of the items listed in para (c) as illustrating the kind of products not embraced by para (a).

[45] Nothing in the statutory purposes that we have discussed above leads to a different conclusion. For these various reasons, we do not consider that Toogood J's interpretation of the definition was incorrect. It follows that the first declaration sought by NEPS was properly declined insofar as table tops are concerned.

[46] The reasoning with respect to the logs with "light surface carvings or decoration" is different but again leads to the same result. As set out above, in this case the declaration sought by NEPS was that ancient swamp kauri logs with light surface carvings or decoration are not within the definition.

[47] Mr Salmon's argument for this declaration was based on evidence relating to a number of temple poles or carvings claimed to be exported for exhibition in Chinese temples. NEPS argued that the carvings were clearly shams designed to get through the export controls. The examples relied on showed only light surface carving, painting or etching leaving the underlying wood as little disturbed as possible. NEPS complained also that there is no evidence that the temple poles or carvings had ever

been installed at sites in China where they were said to be exported. Mr Salmon submitted that granting the declaration sought would give a signal that MPI and Customs must take a realistic approach to the proposed export of such items, considering what was their likely intended use.

[48] We consider Toogood J rightly concluded that the terms of this declaration simply raised an issue as to the degree of carving necessary in any particular case to meet the test expressed in the Forests Act. That is an essential factual question and we do not consider that a declaration ostensibly sought for the purpose of elucidating the statutory provision would be appropriate, or if made, of any practical assistance. The question for MPI and Customs would remain the factual one of whether any particular lightly carved or decorated log was in fact a "finished or manufactured indigenous timber product" having regard to the definition of that term.

[49] No doubt it will be appropriate for MPI and Customs to be sceptical of claims that lightly etched poles have been "manufactured into … final shape and form" and to seek assurances where the nature of any other item is such as to call into question whether that is so. However, that is an issue requiring consideration on a case-by-case basis and we do not consider the Judge erred in declining to make the declarations sought.

The Protected Objects Act declarations

[50] NEPS alleges that ancient swamp kauri is a protected New Zealand object under the Protected Objects Act. It claims that the Ministry for Culture and Heritage had not treated the swamp kauri as such and had failed to require exporters to obtain the necessary approvals for export under the Act. It is said that the Chief Executive has also failed to apply the criteria for export of protected New Zealand objects in s 7A of the Protected Objects Act and consequently has erred in law.

[51] Section 2 of the Protected Objects Act defines "protected New Zealand object" as follows:

> **protected New Zealand object** means an object forming part of the movable cultural heritage of New Zealand that—

(a) is of importance to New Zealand, or to a part of New Zealand, for aesthetic, archaeological, architectural, artistic, cultural, historical, literary, scientific, social, spiritual, technological, or traditional reasons; and

(b) falls within 1 or more of the categories of protected objects set out in Schedule 4

[52] Schedule 4 to the Protected Objects Act, entitled "Categories of protected New Zealand objects", contains the categories within one or more of which the object must fall in order to be within the definition. Category 5 is headed "Natural science objects". The category is described in cl 5(2) of the schedule as follows:

(2) This category consists of extant or extinct native organisms, products of animal and plant behaviour (such as nests, coprolites, and kauri gum), fossils, fluids, rocks, and minerals (including, but not limited to, ventifacts, obsidians, pumices, meteorites, and tektites) of New Zealand origin or related to New Zealand.

[53] It is also necessary to note cl 5(3) and (4) of the schedule. These provide as follows:

(3) Objects in this category include—

(a) a category of type specimen as defined by the current edition of the International Code of Botanical Nomenclature, the International Code of Zoological Nomenclature, or the International Code of Nomenclature of Bacteria: Bacteriological Code:

(b) a specimen considered to be scientifically important for defining a taxon through having been illustrated in the original description, or new material subsequently illustrated (that is, hypotypes) and used to expand or refine this description in the scientific literature:

(c) a specimen of an extant or extinct plant or rock or mineral, animal, or other organism or fossil or part thereof including any developmental stage, shell, or skeletal or supporting element, of which there is not a sufficient selection in New Zealand public collections to define the variation, range, and environmental context of the taxon or object.

(4) Duplicates of a category of type specimen as defined by the current edition of the International Code of Botanical Nomenclature, the International Code of Zoological Nomenclature, or the International Code of Nomenclature of Bacteria: Bacteriological Code may be excluded from this category if there is sufficient original type material held in New Zealand public collections to define the taxon.

[54] NEPS maintains that ancient swamp kauri fall within cl 5(2) because the individual examples are "fossils", which is defined in cl 5(1) as follows:

> **fossil**, irrespective of how it is preserved, means an object constituting the remains or traces of a non-human organism that lived in New Zealand prior to human habitation; including (but not limited to) the whole organism or parts of it, or trace evidence of its behaviour

[55] Section 5(1)(a) of the Protected Objects Act contains a prohibition on exports. In simple terms, it provides that a person may not export, or attempt to export a protected New Zealand object from New Zealand unless the person has made application for permission to the Chief Executive of the Ministry for Culture and Heritage, the application has been granted, a certificate of permission issued and the export conforms with any terms and conditions imposed by the authorisation.[25] The Chief Executive's discretion to grant an application to export a protected New Zealand object is restricted by criteria set out in s 7A.

[56] Under s 5(2) of the Protected Objects Act, anyone who exports or attempts to export a protected New Zealand object without the necessary permission commits an offence. There are substantial penalties: fines for individuals of up to $100,000 or imprisonment for up to five years, and fines for body corporates of up to $200,000.[26]

The High Court claim

[57] NEPS sought declarations that:

(a) ancient swamp kauri is a protected New Zealand object for the purposes of the Protected Objects Act; and

(b) the Ministry for Culture and Heritage has acted unlawfully in failing to implement the Protected Objects Act in respect of the export of ancient swamp kauri.

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25 Protected Objects Act, s 5(1)(a). Section 5(1)(b) provides for exemptions by notice in the Gazette and is not relevant here.

26 Section 5(2).

[58] The principal argument advanced by NEPS in the High Court was that all swamp kauri falls within the definition of a "protected New Zealand object" in s 5 of the Protected Objects Act. The effect of that argument, if correct, would have been to require the Chief Executive of the Ministry for Culture and Heritage to grant permission in the case of every export. The Judge rejected the argument, expressing the view that on a plain reading of the Protected Objects Act, swamp kauri as an entire species or class of objects could not be regarded as a protected object. Rather, the scheme of the Protected Objects Act was directed towards the protection of individual objects or collections of objects forming part of New Zealand's important cultural heritage.[27] He also doubted that the swamp kauri came within the definition of "fossil", holding that even if it did, it could not reasonably be said that every piece of swamp kauri was of importance to New Zealand in terms of the relevant statutory criteria.[28]

[59] The Judge expressed the view that it could not have been Parliament's intention to create what would be "an impossibly onerous administrative role" for the Ministry for Culture and Heritage under the Protected Objects Act, "requiring it to consider all exports of a wide range of natural resources in order to assess the importance of each object against the criteria in the Act".[29]

The appeal

[60] Ms Bush, who argued this aspect of the appeal for NEPS, submitted that Toogood J had erred by failing to analyse the statutory definition of "fossil" in terms of the uncontested evidence that ancient swamp kauri frequently predates human habitation of New Zealand, is preserved, and is the remains of the whole or part of a non-human organism. Consequently, the definition of "fossil" would apply. Each log would be a "fossil" and therefore a natural science object in terms of cl 5(2) of sch 4 and a protected New Zealand object within the definition of that term in s 2(1) of the Protected Objects Act. To the extent that para (a) of the definition requires that the object be "of importance to New Zealand" Ms Bush submitted that ancient swamp

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27 *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry of Primary Industries*, above n 1, at [78].
28 At [78]–[79].
29 At [82].

kauri is of artistic, cultural and historical significance. She relied on Ms Furrell's evidence that it is regarded as the oldest workable wood in the world, of great size, limited supply, unique character and beauty as a finished wood product.

[61] Ms Bush submitted that the High Court was wrong to hold it could not have been Parliament's intention that the Protected Objects Act would apply to regulate the export of all ancient swamp kauri, and she emphasised that cl 5(2) of sch 4 is expressed in wide terms. She contrasted the drafting of the current provisions with those of the Act when enacted as the Antiquities Act 1975. In its original form the Antiquities Act referred only to "[a]ny type specimen of any animal, plant, or mineral existing or formerly existing in New Zealand".[30] Ms Bush emphasised that cl 5(2) and (3) have a wider ambit. She argued that Toogood J's concerns about the potentially onerous administrative role for the Ministry for Culture and Heritage were overstated because under s 5(1)(b) of the Protected Objects Act the Chief Executive could exempt any category of protected New Zealand objects from the requirements of s 5(1)(a) if satisfied that sufficient examples of that category are held in public ownership.

[62] Ms Arapere, who appeared for the Chief Executive, submitted that Toogood J was correct to find that bulk natural materials such as swamp kauri (as opposed to individual specimens or objects made of swamp kauri) could not meet the definition of a protected New Zealand object. She relied on the "plain language" of the Protected Objects Act, its purpose and the practical ramifications of NEPS's suggested interpretation.

Analysis

[63] Ms Arapere's plain language argument was that "object" could not in its ordinary meaning embrace what she described as an "entire species such as swamp kauri". The word "object" is defined in s 2(1) of the Protected Objects Act so as to include a "collection or assemblage of objects". We agree that the statutory language implies that the protected object must be representative of some class (to use, deliberately, a word not used in the legislation) rather than a collection or assemblage

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30 Antiquities Act 1975, s 2, definition of "antiquity".

that is coextensive with the entire class. However, we do not think the swamp kauri can be described as "an entire species" to use Ms Arapere's term.

[64] It is also possible that a collection of objects could be important because it consists of individual objects each of which is important. If each individual object is of importance (applying the statutory considerations) it would not be sensible to construe the Act as inapplicable simply because each individual object would be protected. Take as an illustration paintings by Goldie. Art objects are in category 2 of sch 4, which specifically includes paintings.[31] Individually each painting would be an object forming part of the movable cultural heritage of New Zealand, and of importance to New Zealand for aesthetic, artistic, cultural, historical or traditional reasons.[32] However, cl 2(2) of sch 4 provides:

> (2) An object is included in this category if it is—
>
> (a) not represented by at least 2 comparable examples permanently held in New Zealand public collections; and
>
> (b) made by—
>
> (i) an artist or maker born in or related to New Zealand and who is no longer living; or
>
> (ii) a living artist or maker born in or related to New Zealand where that artist or maker is not the owner; and
>
> (c) not less than 50 years old.

[65] It can be seen that cl 2(2)(b)(ii) operates so as to reduce the number of items that might otherwise be captured as being within category 2. The reduction is on the basis of scarcity; death of the artist or, in the case of a living artist, the fact that the painting has passed out of his or her ownership; and age, by requiring that the painting be not less than 50 years old.[33]

[66] In terms of the definition of "protected New Zealand objects", the Goldie paintings are within para (a), but will not fall within para (b), because they would not be within a category of protected objects in sch 4. Although paintings are mentioned

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31 Protected Objects Act, sch 4, cl 2(1)(m).
32 Section 2(a), definition of "protected New Zealand object".
33 Schedule 4, cl 2(2)(c).

in cl 2(1) of that schedule, the requirements of cl 2(2) are not met because there are obviously more than two comparable examples permanently held in New Zealand public collections.[34]

[67] We consider that the other categories of protected New Zealand objects in sch 4 have been drafted so as to achieve a similar restrictive outcome, the approach differing according to the objects in question. Category 1, for example, deals amongst other things with historical objects relating to New Zealand but that are of non-New Zealand origin. The potential breadth of that category is reduced by the requirement that the historical objects must have been in New Zealand for not less than 50 years, not be represented by at least two comparable examples permanently held in New Zealand public collections and, in the case of objects of Polynesian creation or modification, be brought to New Zealand before 1800.[35] Once again, a potentially broad class is reduced by the drafting of the provision.

[68] The same approach is used in the third category, dealing with documentary heritage objects. There are similar criteria based upon representation in New Zealand public collections and age, which limit the number of objects within the category notwithstanding that they might be considered to be of importance to New Zealand in terms of para (a) of the definition of "protected New Zealand object".[36] An equivalent approach is also seen in category 8 (science, technology, industry, economy, and transport objects)[37] and category 9 (social history objects).[38] We consider this context is of assistance in interpreting category 5, where we think a similar approach is taken.

[69] Clause 5(2) states what the category consists of but cl 5(3) states what the "objects in this category include". We accept that this language is not precisely the same as that employed in the other categories we have mentioned, which in each case (except for category 1) states that "An object is included in this category if", but we do not consider the difference is significant. In our view, the wording of cl 5(3) must

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34 Schedule 4, cl 2(2)(a).
35 Schedule 4, cl 1.
36 Schedule 4, cl 3(3).
37 Schedule 4, cl 8(3).
38 Schedule 4, cl 9(4).

be intended to reduce the very broad ambit of cl 5(2); otherwise the category would be impractically wide.

[70] Leaving cl 5(3) on one side, take the case of kauri gum, which is expressly mentioned in cl 5(2). Kauri gum is of importance to New Zealand for historic reasons, at least. Paragraph (a) of the definition of "protected new Zealand object" in s 2 therefore extends to it. But it may safely be assumed that it was not intended that every example of kauri gum would be a protected New Zealand object. To take an even more obvious example, "rocks" are within cl 5(2), but clearly intended to be limited by cl 5(3). We see no basis in the drafting of cl 5(2) to distinguish between particular items referred to in it, and in our view all would be potentially subject to limitation by virtue of the further detail given about the objects found in cl 5(3) (and cl 5(4), which refers to duplicates).

[71] Turning then to swamp kauri, the wording of cl 5(3)(a) refers to a "category of type specimen" as defined in various international codes. "Type specimen" is defined in s 2 as meaning "the specimen on which is based an original published description of the animal, plant, or mineral of which the specimen serves as an example". Counsel did not specifically address the meaning of this sub-clause, but it is plainly limiting and could not be applied across the board to swamp kauri. The same applies in respect of cl (3)(b) and (c): an individual swamp kauri log could not be considered to be scientifically important for defining a taxon, or have any role in defining the variation, range and environmental context of a taxon or object. In addition, cl 5(4) provides that duplicates of specified categories of type specimen may be excluded from the category if there is sufficient original type material held in New Zealand public collections to define the taxon. This is a further indication that the provisions of cl 5(3) were not intended to extend to individual swamp kauri logs.

[72] Ms Bush's argument apparently sought to overcome these difficulties by emphasising the artistic, cultural and historical significance of swamp kauri for the purposes of para (a) of the definition of "protected New Zealand object" in s 2 of the Protected Objects Act. However, both paras (a) and (b) of the definition must be satisfied, and the only protected category that could possibly apply to swamp kauri is category 5, relating to natural science objects. Artistic, cultural and historical

significance do not appear to be relevant to this category. This misalignment is another reason why we do not consider that swamp kauri can be a protected object under the legislation. It must also be remembered that, in this case, the individual items of swamp kauri in issue have been modified for the purposes of export thereby reducing any value they might have as "natural science objects".

[73] For these reasons, we do not consider the Judge erred by declining to make the declarations sought under the Protected Objects Act.

Unreasonableness

[74] Although NEPS's statement of claim made allegations against both MPI and Customs, the declaratory relief sought was directed only to alleged unreasonable actions by MPI.

[75] NEPS's statement of claim identified particular instances in 2013 and 2015 in which it claimed MPI had approved shipments of ancient swamp kauri in the form of products claimed to be table tops or table top slabs and trunks or logs described as "carvings" or "Māori carvings". These instances were relied on as occasions when MPI had failed properly to consider whether the items in question should have been regarded as falling within the definition of "finished or manufactured indigenous timber product".

[76] NEPS sought to introduce further evidence at the hearing of the appeal intended to challenge Toogood J's conclusion that MPI has since taken appropriate steps to address the procedures it had in place to ensure that the export prohibition is properly policed. The Chief Executive of MPI objected to the evidence being admitted on the basis that it was not fresh, credible or cogent. It consisted of a series of videos posted on YouTube in mid-November 2016 by a company in the United States of America concerning new or recent arrivals of ancient swamp kauri timber; a screen shot of that company's website, dating from 30 September 2015, showing a new shipment of swamp kauri; and a letter and documents from MPI dated 9 August 2017 responding to an official information request. We have considered the evidence, and admit it, but in the end do not think that it adds to NEPS's claim for declaration relief.

[77] In declining the application for declarations that MPI had acted unreasonably in taking at face value claims made by exporters, Toogood J noted that the instances on which NEPS relied were "moot", the impugned exports having occurred well in the past.[39] While the evidence before the Court was sufficient to illustrate the basis for NEPS's concerns about the administration of the Forests Act, it fell well short of what would be required to support declarations that MPI had acted unreasonably in the way it processed the approval applications, or that the particular exports had occurred in breach of that Act.[40]

[78] Further, declaratory relief directed at condemning the approval of those exports by MPI or Customs as unreasonable or incorrect could have no practical effect. The Judge considered that was particularly the case because he thought it apparent from evidence before him that MPI had identified and had taken steps to address the need to do more than accept assertions by exporters about the degree of processing undertaken in respect of the products, and in their intended products overseas.[41]

[79] He emphasised that in any case where pre-export approval was sought or where MPI's attention was drawn to a proposed export, officials would be required to make their own assessment of whether the product in question met the statutory test for exemption from the prohibition on export.[42] These observations applied to MPI in its role in the voluntary inspection and approval process, and to Customs in fulfilling its obligations to police the statute at the border.

[80] As noted, however, the declarations that were sought in this part of the case were only sought against MPI. Toogood J discussed, without resolving the issue, whether the fact that the voluntary approvals process simply involved MPI giving an opinion meant that the individual decisions were not reviewable.[43] We can also proceed without resolving that question.

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39 *Northland Environmental Protection Society Inc v The Chief Executive of the Ministry of Primary Industries*, above n 1, at [65].
40 At [65].
41 At [66].
42 At [67].
43 At [64].

[81] NEPS's statement of claim and supporting affidavits identified many specific instances in which it was said that MPI had improperly approved shipments of swamp kauri in the form of table tops or slabs and poles. Where possible, these were responded to in affidavit evidence by senior forestry analysts employed by MPI. Because of the approach he took, Toogood J did not deal with the detail of NEPS's allegations or MPI's response. Had we concluded that the Judge had taken a wrong approach to the interpretation of the Forests Act it might have been appropriate to refer the case back to the High Court for further consideration of the factual disputes about particular items that have been exported. That said, an application for judicial review relying on so many alleged instances of unlawful exports, in a procedural setting that does not involve the cross-examination of deponents, would be of very doubtful utility.

[82] However, we have upheld the Judge's interpretation of the relevant statutory provisions. We add that, given the conclusions he reached about the statutory meaning, we are not persuaded that NEPS has established any error in the way the Judge exercised his discretion to decline relief on the unreasonableness issue.

Result

[83] NEPS's application to adduce further evidence is granted. But for the reasons we have given, the appeal is dismissed.

[84] The respondents sought costs on the appeal, which Mr Salmon opposed, referring to the public interest issues engaged by the litigation. Ms Gorman submitted that NEPS ought to pay increased costs because a plethora of evidence had been called with little attempt to focus the argument in a manageable way. She also complained that the Comptroller of Customs had been named as a respondent when the argument on appeal did not challenge the actions of Customs. However, the arguments were relevant to statutory provisions that have to be applied by Customs and naming it as a respondent did not add to the length of the hearing or the arguments that needed to be addressed.

[85] That said, we are satisfied costs should be awarded in favour of the respondents. Having regard to the public interest nature of the litigation, we consider it will be sufficient for NEPS to pay one set of costs to the Chief Executive of MPI

and the Comptroller of Customs, to be shared between them, and usual disbursements. NEPS also must pay the Chief Executive of the Ministry for Culture and Heritage costs and usual disbursements. Costs are to be calculated for a standard appeal on a band A basis.

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