

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. C 119 /2008

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND

IN THE MATTER of an application for declaration under section 311 of the Act

BETWEEN BARRHILL CHERTSEY IRRIGATION LIMITED

(ENV-2008-CHC-130)

Applicant

Hearing: at Christchurch on 30-31 July 2008

Court: Environment Judge J A Smith (presiding)
Environment Commissioner D H Menzies
Environment Commissioner C E Manning

Submissions: Ms J M Appleyard and Mr B G Williams for Barrhill Chertsey Irrigation Limited, Electricity Ashburton Limited, Ashburton District Council, Eiffelton Community Group Irrigation Scheme (**Barrhill Chertsey**)
Ms M C Dysart for the Canterbury Regional Council (**the Regional Council**)
Mr N R W Davidson, Mr C N Whata and Mr D J Minhinnick for the Rangitata Diversion Race Management Limited (**RDRML**)

Date of Decision: 31st October 2008

DECISION OF THE ENVIRONMENT COURT



1. The Court concludes that, subject to final drafting, the following declarations could be made.
 - A: The Rangitata Diversion Race can be utilised as a method to convey water taken from the Rakaia River by Barrhill Chertsey under their consents without affecting consent CRC 011237 held by the RDRML.
 - B: Once waters have been taken in accordance with the relevant consents of Barrhill Chertsey and RDRML and entered into the Rangitata Diversion Race they may be attributable by the parties in terms of any agreement reached between them to the full extent of the combined consents granted.
 - C: To the extent that any new consent may seek to utilise existing water or further waters introduced into the diversion race, such consents would then form part of the attributable total consents subject to the terms of any agreement between the relevant consent holders.
 - D: The grant of a new consent to Barrhill Chertsey overlapping with RDRML infrastructure or consent areas will not adversely affect RDRML's existing consents.
2. A joint memorandum on proposed wording is to be filed in fifteen working days. The Court will thereafter issue final directions.
3. No order as to costs.

REASONS

[1] *Whisky is for drinking, water is for fighting over* [Mark Twain].

Introduction

[2] Barrhill Chertsey hold resource consents to take water from the Rakaia River and use it for both irrigation and electricity purposes. They also hold associated consents



allowing them to discharge water to the Rakaia River and to build and maintain intake and discharge structures.

[3] RDRML hold a suite of consents enabling it to take water from the Rangitata River and use that water for the purposes of supplying water for stock, irrigation and electricity generation. There are also consents enabling discharge of water, contaminant materials and the like to the Rakaia River, and construct and maintain the diversionary structures necessary. There are associated consents relating to the South Hinds River and South Ashburton River, including consents for discharge of water through the Highbank Power Station and the Montalto Power Station. A table of the full suite of consents are annexed hereto and marked "A".

[4] The RDRML irrigation scheme has been operative for in excess of 50 years, whereas the Barrhill Chertsey scheme is still at the conceptual stage, although consents have been granted.

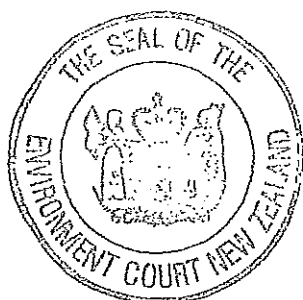
[5] In broad terms Barrhill Chertsey has conceived a programme to combine the water from both Barrhill Chertsey and RDRML consents, utilise the existing RDRML water distribution infrastructure and construct new elements for it, together with a new hydro-electric project. This would thus enable expansion of the infrastructure, a greater area to be covered and rationalise distribution of water between the two schemes.

The declarations

[6] All parties accept that there may be some legal doubt as to how far such an arrangement can go and accordingly Barrhill Chertsey have sought declarations from the Court in the following terms:

The first declaration : the isolated transitional option

That the implementation of a proposal by BCIL to use, with the consent of Rangitata Diversion Race Management Limited (RDRML), the Rangitata Diversion Race (the Race) as a method to convey water from the Rakaia River



can be achieved without the need to vary consent CRC011237 held by RDRML or any RDRML consent as set out in Schedule 1 [our annexure "A"];

The second declaration : the transitional option

That the implementation of a proposal as set out in schedule 3 by BCIL to use water for irrigation which is water authorised to be taken from the Rangitata River under CRC011237 and the Ashburton River under CRC011245, both being consents held by RDRML, and which would otherwise be used for hydroelectric generation at Highbank Power Station can be achieved without the need to vary consent CRC011237 held by RDRML or any other RDRML consent as set out in Schedule 1;

The third declaration : the water swap

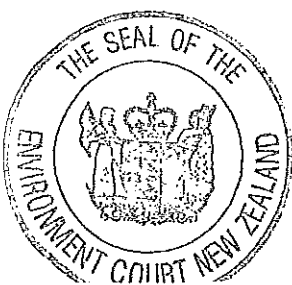
That the implementation of a proposal as set out in schedule 3 by BCIL to (1) use water for the irrigation of the area coloured light blue on the map in Schedule 2 which is water taken from the Rakaia River (under consent CRC990088); and (2) to use water for the irrigation of the area coloured pink on the map in Schedule 2 which is water taken from the Rangitata and Ashburton River (under consents CRC011237 and CRC011245) can be achieved by BCIL itself applying for the necessary consents without the need to vary consent CRC011237 held by RDRML or any other RDRML consent as set out in Schedule 1.

This has also been referred to by counsel as the *clip-on* option, for reasons which will become clear later.

[7] During the course of the hearing the original application for the fourth declaration was modified and, on reflection, should be modified further by the Court to now read:

The fourth declaration : [modified]

Would the grant of a consent to BCIL affect RDRML's existing consents or any rights to renew or vary RDRML's consents?



Procedure adopted

[8] It is clear that both Barrhill Chertsey and RDRML see some real benefits in an integrated proposal such as that being contemplated. However Mr Davidson, most responsibly for the RDRML, acknowledged that it was important that a full argument was put to the Court in order that it could properly consider the ramifications in this very complex and difficult area. We are indeed indebted to all counsel for the detailed and thorough way in which they have considered the issues which arise, and Mr Davidson for RDRML for presenting much of the background information which enables us to understand the subtleties between the consents as granted and the application and argument as framed at the resource consent level.

[9] Indeed, Mr Davidson was counsel for RDRML during the various consent phases and was thus able to communicate to us the flavour of the various hearings, particularly as it related to:

- (a) the ecology and preservation of the existing waters of the Rangitata;
- (b) the conservation orders; and
- (c) the aspirations of the various parties who had taken part in those proceedings.

[10] In addition, this Court at the preliminary hearing required public notification of the fact that it was dealing with these declarations to ensure that any other interested parties had the opportunity to give notice and participate if they wished to do so. Given the particularly broad way in which that public notice was given, we are satisfied that any other party wishing to participate in these proceedings has received adequate public notice of the nature of these proceedings.

[11] Furthermore, we are satisfied that the evidence advanced for both RDRML and the Regional Council is sufficient that we are adequately aware of the issues relating to these catchments. In particular, Mr Davidson has given us all the resource consent applications and accompanying documents, including evidence of some witnesses and papers relating to the water conservation order. He has referred to these in detail



throughout his submissions to the Court. We accept that that approach was entirely appropriate given the nature of the declarations sought.

[12] For practical purposes, however, much of this information is peripheral to the key issues before the Court. However, it gives a background and flavour. Nevertheless, it is necessary for us to summarise our conclusions rather than cite in detail the many hundreds of pages relating to those consents. We explicitly record that we have had full regard, not only to all the affidavits filed in these proceedings, but also to the RDRML resource consent application and the water conservation orders in reaching our conclusions. A full understanding of the background to our conclusions would require detailed reference to those documents.

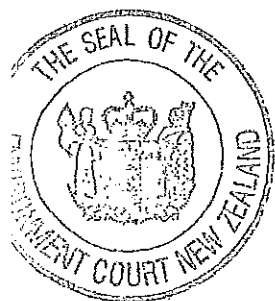
Scope of the declarations

[13] These declarations are of some particular importance, relating as they do to tens of thousands of hectares of land between the Rangitata and Rakaia Rivers. Moreover, the application raises novel questions of interpretation of resource consents. This is not only of widespread interest to the resource management community but also of general importance. The particular issue is:

the extent to which a resource consent is conditioned by the application and supporting documentation filed beyond the express conditions included within the consent.

[14] This has widespread application with particular force in respect of water consents given the current approach of the Canterbury Regional Council to look at splitting take and use consents and allowing transfers of part of those under section 136 of the Act. Furthermore, issues arise relating to property interests in such consents, giving rise to some considerations parallel with this case. An example is described in *Hampton v Canterbury Regional Council*¹ decided contemporaneously.

¹ Decision C102/2008.



[15] The consideration of these matters has also raised several other important questions:

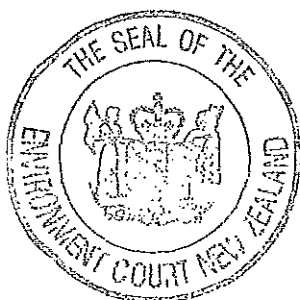
- (1) can a new consent derogate from the existing RDRML consents?
- (2) can a new consent extend the original RDRML consents without allowing a revisiting of the original consents (i.e. the clip-on argument)?

What is proposed?

[16] It is difficult for this Court to compress the complex propositions involved in this case into simplistic statements. Nevertheless, it is important that the public has some understanding of the general issues leading to this declaration application. To that extent, a more detailed explanation can be obtained by reading the consents not only of RDRML but also all the background information and affidavits before this Court. Suffice to say that it is the intent of Barrhill Chertsey to supply water into the RDRML irrigation system plus to new areas which Barrhill Chertsey and RDRML or other authorised parties may agree on. The consent holders would also draw out some of those volumes in the area currently served by RDRML, enabling new areas to be serviced by extensions to the irrigation system.

[17] It is necessary for us to refer to the annexed plan attached as "B". We have used numbers as follows:

- 1 Mayfield Hinds irrigation in operation;
- 2 Valetta irrigation area in operation;
- 3 Greenstreet irrigation consented area;
- 4 Ashburton Lyndhurst irrigation area in operation;
- 5 Barrhill Chertsey irrigation consented area;
- 6 South Barrhill Chertsey irrigation area; possibly covered by the Barrhill Chertsey consent;
- 7 North Barrhill Chertsey irrigation area; possibly covered by the Barrhill Chertsey consent;
- 8 currently unirrigated and unconsented area.



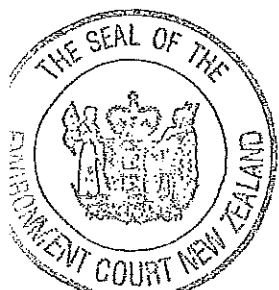
[18] Arguably, the current Barrhill Chertsey consent enables irrigation of areas 5, 6 and 7 (Barrhill Chertsey, South Barrhill Chertsey, North Barrhill Chertsey), and area 3 (Greenstreet). The consent may be even broader than this, depending on its construction. Currently RDRML irrigate areas 1, 2 and 4 (Mayfield Hinds, Valetta and Ashburton Lyndhurst). Whether either consent currently authorises area 8 to be irrigated is an issue for declaration. However Barrhill Chertsey are currently progressing a consent to irrigate this area and other areas covered by the RDRML consents.

[19] In simple terms, by creating an integrated infrastructure system Barrhill Chertsey and RDRML could combine waters from the Rangitata and Rakaia Rivers. This would enable them to service not only areas currently irrigated by RDRML but those for which Barrhill Chertsey have consents and some of area 8.

[20] There are significant complications in dealing with the matter on this broad basis. The greatest of these is that RDRML's consents have been operated for many decades, whereas Barrhill Chertsey's have not yet been implemented. The RDRML infrastructure would cost many millions of dollars to replicate or replace.

[21] Further, there are subtleties around the application of water and the periods when it is applied, which lead to shoulder periods, particularly when waters are available for use through electricity systems, especially the TrustPower Highbank Power Station. We are told, however, that the Highbank Station is old. Barrhill Chertsey also anticipate a new station to be built slightly upstream of Highbank on the Rakaia, but which may use some of the tail-race structure of Highbank itself.

[22] There are some important features of the Rangitata consents. The first is that the river is subject to a Water Conservation Order and the water allocation is regulated. The distribution during irrigation from 10 September to 9 May is as follows:



<u>Allocation</u>	<u>Total Seasonal Allocation</u>
Mayfield-Hinds irrigation allocation 16.5 cumecs	320 million m ³
Valetta Irrigation Co-operative Society 4.4 cumecs	85 million m ³
Ashburton Lyndhurst Irrigation Society 13 cumecs	250 millionm ³
Ashburton County Stockwater 1.2 cumecs (maximum depending on demand)	
Private stockwater .08 cumecs	
Individual irrigation 0.04 cumecs	523,000 m ³

[23] There are two major sources for this allocation, namely the Rangitata consent and the South Ashburton consent. These authorise water diverted to the race to be used for stockwater to:

- (a) the Ashburton District Council stockwater network;
- (b) individual users along the Rangitata diversion race (**the Race**);
- (c) irrigation water for Mayfield-Hinds, Valetta and Ashburton Lyndhurst irrigation scheme;
- (d) individual irrigators;
- (e) electricity generation at Montalto and Highbank power stations; and
- (f) all supplementary takes from the Race;
- (g) the use on the Montalto and Highbank power and cooling water systems.

[24] The maximum rate for take from the Rangitata is 30.7, such that the combined take with the South Ashburton River does not exceed 35.4 cumecs. There is a relationship between the amount taken and the flows in the various rivers. The consequence of all of this is that the RDRML irrigation schemes have a very high level of reliability. It was acknowledged that the Barrhill Chertsey consents would not give its members the same level of reliability. Accordingly any contractual arrangement between the pair would need to ensure that RDRML priority is maintained unless there is a specific agreement to the contrary by all of the participants.

The consents that were obtained

[25] The RDRML Race consent was renewed consequent on an application filed in December 2000 and that involved detailed descriptions of the existing scheme. It



referred to the three community irrigation schemes, the two hydro-electric power stations, the Ashburton District Council stockwater system and the various private stockwater and irrigation systems supplied by RDRML. It noted that these served a total farming area of approximately 64,000 hectares (this was supported by figures showing the three public schemes). It was made clear in the application that *water may occasionally be used for other purposes as required such as fire-fighting.*

[26] Balanced against these statements were several statements within the assessment of effects which in our view demonstrated that the scheme was not intended to be a closed system. For example, at page 5 of the AEE:

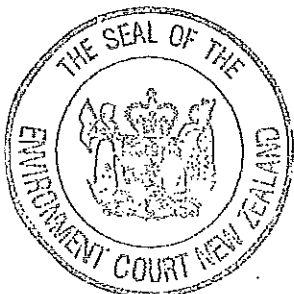
The RDR is the dominant water extraction from the Rangitata River. The race currently supplies water to three irrigation schemes with an area of around 64,000 hectares ...

[27] Elsewhere it was stated at page 121 in the Conclusion: *this will allow the continued operation of the RDR in a manner that maintains the positive social and economic effects which the scheme provides ...*

[28] In evidence Mr G Brown, a director of the Ashburton Lyndhurst Irrigation Society indicated that the area watered by the farmers had increased for those irrigated at the outset. He noted initially the schemes were designed for 5/8ths of the land held by the farm to be under irrigation. The majority now irrigate 100% of their contracted area within their farm. The improved application efficiency has been carried out without additional water being sourced.

[29] Finally, in the history of the Race, at page 3 of the RDRML assessment of effects it is noted that the original purpose of the Race was to irrigate as much land as possible between the Rangitata and Rakaia Rivers. The potential for hydro-electric power generation when irrigation supply was not required was also recognised.

[30] The conditions of consent essentially limited the control to a maximum take for use for irrigation and stockwater purposes and to generate electricity at Montalto and Highbank power stations. No other particular conditions were set. Both the conditions



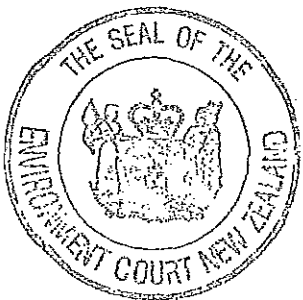
for the Rangitata and South Ashburton Rivers are expressed for the same general purpose with the exclusion of a reference to the Montalto power station in the South Ashburton River case.

[31] The key question therefore is the extent to which the application and the assessment of effects limits the broad words of the consent and requires the water to be only used for the three schemes identified and in respect of the power stations with the minor additional cases we have already noted. It seems to be common ground and we hold, that the consent as expressed would not prevent minor changes in the application within the irrigation area adjacent to the existing reticulation or the like. The question is the extent of change envisaged in this case and whether that would represent a fundamental change in the nature of consent.

The Barrhill Chertsey consents

[32] The Barrhill Chertsey consents permit the take of up to 17 cumecs and the diversion of up to 40 cumecs from the Rakaia River for the purpose of irrigation of up to 40,000 ha and electricity generation. This river is again subject to a Water Conservation Order made much earlier (1988) than the Rangitata Order (2006). The Barrhill Chertsey consent does not specify the area in which the water irrigation may occur. However, the application did provide an indicative area, being area 5. We can only assume that area 5 is approximately 40,000 ha.

[33] The constraints upon the Barrhill Chertsey consent are such that the Barrhill Chertsey consent would be required to cease its take relatively early in a decreasing flow due to the effect of the Water Conservation Order. The end effect of this is that it must be said the water from the Rakaia River in terms of the Barrhill Chertsey consent would provide significantly less reliability for water supply to irrigators than that covered by RDRML consents. It appeared to be common ground that there are likely to be periods when the Barrhill Chertsey consent would be under restriction when the RDRML consents would not be. Whether this was in every irrigation year was not made clear to the Court.



Did the information supplied by RDRML justify the application or limit its scope?

[34] We have concluded on the facts that much of the information supplied by both applicants was descriptive in order to justify the extent of the grant before the Council. In general terms we do not think that the information as to the ways in which the water was to be used was necessarily intended to restrict the scope of the application. For example, in the case of the RDRML consent it is very clear to us that individual irrigators within the area may change or new areas may be added as needs dictate. It is also clear that any surplus water may be utilised for electricity generation. We do not believe there is any basis upon which it could be assumed the Highbank Station would not be upgraded or replaced.

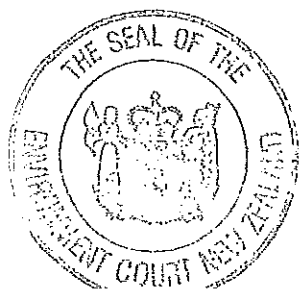
[35] Accordingly more efficient electricity production or use of the water is clearly intended to achieve gains without necessarily reducing the volume of the water utilised.

[36] In this case we consider that the areas for water application were not regarded by the commissioners as particularly critical because:

- (a) all or some of the water could be utilised for electricity generation and thereby returned to the river;
- (b) all of the water might be utilised for irrigation purposes in which case none would be returned to the river;
- (c) the water returned to the Rakaia was still lost to the Rangitata.

[37] In the first case the water is not being returned to the Rangitata or South Ashburton Rivers but to the Rakaia. However, nothing we have seen in the documents shows that all or any of the water take would necessarily be utilised for electricity production. Nor is there any basis we can read such a requirement into the consent.

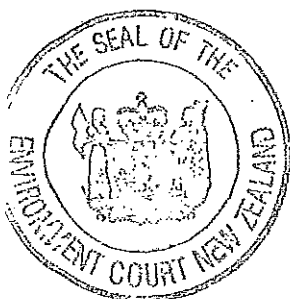
[38] On the other hand there is no requirement that all or any of the water would necessarily be applied to irrigation. It appears possible that in certain circumstances and at particular times of the year the company might consider utilising all available water for power production if that represented a more efficient outcome. It may not take or use any water given the consent is permissive not mandatory.



[39] The question is then whether the relationship to inground hydrology was a factor which bore upon the consideration by the commissioners notwithstanding it was not included within the conditions of consent. Our tentative view is that in the particular circumstances of this consent the particular destination (if any) of the take waters between the Rangitata and Rakaia Rivers was not essential to the grant of consent. We have reached that conclusion because the consent clearly contemplated a discharge to the Rakaia River via electricity and also via groundwater given the proximity of at least the Ashburton Lyndhurst scheme to the Rakaia River.

[40] We ask ourselves if Area 8 had been substituted for the Ashburton Lyndhurst scheme whether that would have excited a different range of interest in the Ashburton Lyndhurst area. Given that Area 8 is closer to the Rangitata River and the south branch of the Ashburton River we are not aware of any particular additional effects that would be likely to occur. Whilst there may have been persons who indirectly benefited from the groundwater application in the Ashburton Lyndhurst zone, that does not appear to have been the focus of the application itself nor the consideration of the commissioners. Nor was an indirect groundwater benefit assured by the consent. We do agree however that a distribution out of the area bounded by State Highway One, the Rakaia and Rangitata Rivers, may have changed the very nature of the application.

[41] To cite an extreme example, the bottling and sale overseas of that water would clearly be outside the terms of the RDRML consent. Reading the Barrhill Chertsey and RDRML consents as a whole we can conclude that in each case some 64,000 hectares or 40,000 hectares were intended to be irrigated between the Rakaia and Rangitata Rivers. We tentatively conclude that no other limits were implied. We need only express a tentative view as to the limits of the application area because the matter was not put to the Court on this basis. It was accepted by Barrhill Chertsey that resource consents would need to be applied for for the application of the RDRML and Barrhill Chertsey consent waters to new areas.



Declaration 1: Can the applications to change the areas to which water is applied be undertaken without varying consent CRC 011237?

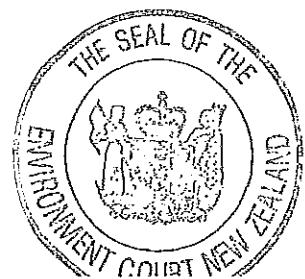
[42] This proposition is predicated upon an agreement between RDRML and Barrhill Chertsey as to the use of the water conveyance (**Race**) system owned by RDRML. We were asked to proceed on the assumption that the parties could enter into a satisfactory arrangement. On the face of it there is nothing within the RDRML consent or the Barrhill Chertsey consent which specifies the means by which Barrhill Chertsey convey water for irrigation.

[43] Looking at the matter on a broader conceptual basis, in terms of Part 2 of the Act, enabling people and communities the joint use of such infrastructure has significant advantages. It avoids duplication of a conveyance system and the inconvenience and cost of its impact upon the local farming community. Moreover there may be direct effects, visual or otherwise, from the installation of a second infrastructure system which would be avoided by the common use of the Race.

[44] However we do recognise on deeper reflection that there are aspects of the combination of water within the Race that may be of concern. This relates to the mixing of water from the Rakaia and Rangitata Rivers. In that regard we understand that salmon are able to detect whether the water is from the Rakaia or Rangitata Rivers. However, currently RDRML water discharges to the Rakaia River. Therefore any mingling with Barrhill Chertsey water will simply mean that Rakaia water will be mixed with any water from the Rangitata, South Ashburton and return to its own source if discharged to the river.

[45] There is the prospect of water within the existing Race adding to the underground aquifers in certain areas where extra water is carried. Nevertheless even with a duplicate system that prospect could occur in exactly the same way given that Barrhill Chertsey may very well duplicate certain parts of the infrastructure in the same places as RDRML if it is not able to use the Race.

[46] In short we have concluded that the use of the RDRML infrastructure by Barrhill Chertsey cannot be said to contradict either of the consents or the various application



evidence and supporting documents that were filed with the Council. Furthermore, even if there are minor effects as a result of the common use of that infrastructure, we conclude in terms of sustainable management principles of the Act that the enablement of the broader community both in terms of reduction in cost and avoidance of duplication and potential effects of a second infrastructure system over at least part of the network has significant advantages justifying its utilisation.

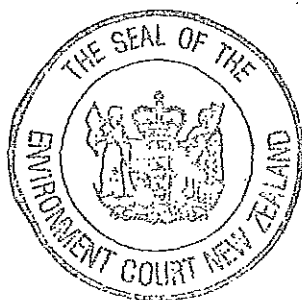
[47] Accordingly in practical terms we conclude that the first declaration can properly be made that:

the Rangitata Diversion Race infrastructure can be utilised as a method to convey water taken from the Rakaia River by Barrhill Chertsey without affecting consent CRC 011237 held by the RDRML.

Declaration 2 – the transitional option

[48] The expression of this in the application is complicated and difficult to follow. In this regard reference needs to be made to Schedule 3 which is annexed hereto as Annexure “B”. Even reference to the second declaration transitional option facts do not greatly assist the Court in understanding precisely what declaration is being sought. The submissions of counsel for Barrhill Chertsey indicated that Barrhill Chertsey may occasionally take more water from the race than it discharges into it. Essentially this would be water that is not being used for irrigation but would have previously been available for the Highbank Power Station. In terms of the RDRML consent that water would still be used for irrigation but not within the 64,000 ha generally indicated in the applications for consent. There are consequences to this, namely:

- (a) that most of the waters that go through the power station would eventually return to the Rakaia River; whereas
- (b) the application of these waters on to the Barrhill Chertsey consent areas will mean a commensurate reduction in the flows that would otherwise have gone through the power station by being used to supplement the Barrhill Chertsey consents;



- (c) this reduction in flows would largely be in the shoulder season when water is not being taken at its full consent rate.

[49] In essence we can see no distinction between this and the third declaration which is essentially the water swap application. We shall now discuss that distinction before considering both together.

Declaration 3 – water swap

[50] Water would be added to the race by Barrhill and one of the existing RDRML sub-schemes, Ashburton Lyndhurst, would at times be supplied with water from the race which in whole or in part would be sourced from the Rakaia. An equal volume of water would then be available in the race to irrigate a new area, Area 8. This would of course require a distribution infrastructure to be constructed. We understand the party to do so would need to obtain consents. Barrhill has currently applied for such consents.

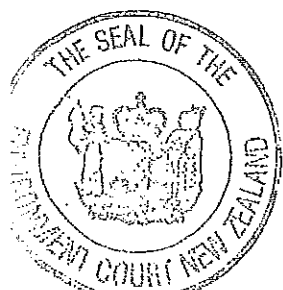
[51] Both of these declarations involve the utilisation of waters outside the indicative areas shown in the original applications for consent. The issue is the scope of the application and the extent to which the data in the AEE and the evidence was used to justify rather than limit the application.

[52] We accept that it is clear that a consent cannot exceed the scope of the application. We also agree that both the Barrhill Chertsey and the RDRML consents are open on their face and unambiguous. The Privy Council noted in *Opuia Ferries Ltd v Fullers Bay of Islands Ltd*²:

- (1) the public document is not to be construed in the same way as a contract;
- (2) that extrinsic evidence may be used to identify a thing or place referred to in a public document.

The Privy Council noted:

² [2003] 3 NZLR paras 19-21.



*In Slough Estates Ltd v Slough Borough Council*³ Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very different thing from using evidence of facts known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in it. As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence.

And the fourth issue: *what then would an ordinary member of the public make of the information contained in the timetable?*

[53] By analogy we have concluded that the test in this case is to ascertain what an ordinary member of the public would understand of the consents granted to Barrhill Chertsey and RDRML. In particular, the question which arises in this case is whether the reference to irrigation waters is conditioned either by total area or location.

[54] In the High Court R Hansen J. noted in *Retail Properties Ltd v Papakura District Council et al*⁴:

[39] *Other decisions of the Planning Tribunal and Environment Court have favoured a less restrictive approach which permits reference to the application for the consent even if it is not expressly referred to in the consent itself. This was the conclusion reached in Clevedon Protection Society v Warren Fowler after a lengthy review of the authorities and a discussion of the practicalities and application for consent.*

[40] *In that case the learned Judge relied to some extent on the decision of the Court of Appeal in Sutton v Moule*⁵ *where reference was made to a lease attached to an application under the Town and Country Planning Act for the purpose of construing the scope of the application. This was critical to*

³ [1971] AC 958 at p. 962.

⁴ [2006] ELRNZ 157 at para 39.

⁵ [1992] 2 NZRMA 41.



a determination of whether the terms of the consent were ultra vires beyond the scope of the application.

Although Sutton v Moule did not go beyond anything said in Attorney General v Codner⁶ the application being expressly referred to in the consent it affirmed that the scope of a consent must be limited by the terms of the application to which it relates.

[41] If that is so express reference to the application in the consent is an unnecessary pre-condition to reference to it for the purpose of interpretation. It would be anomalous if the application could be referred to for the purpose of determining whether a consent was ultra vires but not for the purpose of interpreting its terms.

[55] With respect, we conclude that the decisions of *Attorney General v Codner* as affirmed in *Opua Ferries Ltd v Fullers Bay of Islands Ltd* in the Privy Council make it clear that an unambiguous consent cannot be modified by reference to its underlying documents. We do not understand anything in *Retail Properties v Papakura District Council* to derogate from that. Accordingly where there is uncertainty as to the wording of a particular consent it is possible to refer to the underlying documents.

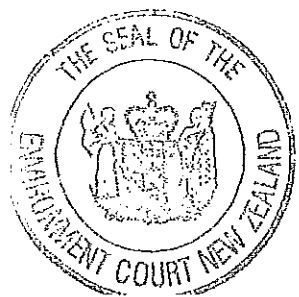
Is there uncertainty in terms of the consent?

[56] It is clear that both consents are extremely broadly worded. In the case of the RDRML consents the water is to be taken and diverted to the Rangitata diversion race ... *and used for stockwater, irrigation and electricity generation.*

[57] The connection therefore between the race and its use is clear. Thus any use must utilise the Race including electricity generation.

[58] The Barrhill Chertsey consents do not have particular infrastructure referred to but merely note *for the purpose of irrigation of up to 40,000 hectares and electricity*

⁶ [1973] 1 NZLR 545.



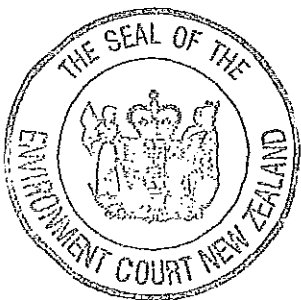
generation. In this case the location of the 40,000 hectares and electricity generation are not so clear. They must be supplied by the water take but reference to extrinsic documents is necessary to clarify their meaning. We have concluded that no reasonable person could conclude that this would permit irrigation outside the region, i.e. shipping the water to another country for irrigation. It is unclear as to what 40,000 hectares, if any, are limited and in that regard reference would need to be made to the entire background documentation in order to ascertain more clearly its intent.

RDRML consent

[59] Our conclusion in respect of the RDRML consent is that:

- (a) the RDRML consent is clearly not limited nor intended to be limited by the consent to conveying only water from those sources. There is neither any resource management reason nor any reason on the face of the consent for there to be any ambiguity. Quite simply it is not intended that the Race system be used exclusively to convey water from only the Rangitata and Ashburton Rivers;
- (b) so far as the places to which the water is to be delivered we conclude it is clear on the face of that consent that these are areas which can be serviced from the Race itself.
- (c) there is no constraint intent in the consent itself [nor we note in the application or accompanying documents] that there could be no extensions to the race system or new areas included. We do accept however, as Mr Davidson said, that it would be intended that the areas serviced in terms of the existing RDRML consents would be largely within the areas indicated in its maps. However, on its face this would not prevent a new consent to extend the Race into a new irrigation area but using the existing infrastructure.

[60] Accordingly, without it being necessary for us to undertake a detailed analysis of the overall purpose of the RDRML consent from the accompanying documents we have concluded that the RDRML consent itself is clear that the Race is simply a method of conveying waters from the location of the consented take for irrigation and electricity



generation purposes. Other consents could utilise the same infrastructure to deliver water to other areas. Nevertheless consents may be required for that to occur.

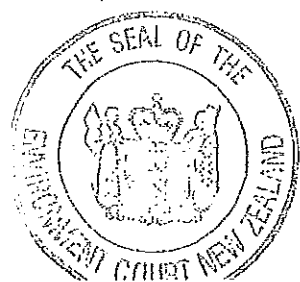
[61] Out of an abundance of caution, in case we are wrong in this first proposition, we have also considered carefully the background documentation referred to us by Mr Davidson. We are not able to conclude on the basis of that documentation that the applicant ever intended that only the water from the two takes would be utilised to irrigate areas generally indicated within its application. Nor can we conclude that only those irrigators that were operating at the time the consent was applied for were intended to be included. Nevertheless it is clear that any increased areas were intended to be incremental on the existing infrastructure and within the same general area.

[62] Although we have concluded tentatively that the area covered by the consent is likely to be the entire area between the Rangitata and Rakaia, a more constrained construction would not prevent further areas obtaining consents utilising the water in terms of the original consent CRC 011237. We conclude that the takes and utilisation of the diversion race would be unaffected if new areas were added. The issue would then be whether the new areas were justified and whether they had any particular effects on existing users.

Barrhill Chertsey's consent

[63] We have similarly concluded that the application for consent for Barrhill Chertsey did not specify the method by which the water was to be conveyed for irrigation. Accordingly, as we have already held, there is nothing in the terms of that consent to prevent the utilisation of the RDRML diversion race system for the distribution of water.

[64] However, we conclude that the reference to the 40,000 ha application area requires further understanding of the area to be included by reference to the background documents. In our view a reference to the application itself demonstrates that the 40,000 ha indicated was that shown as the Barrhill Chertsey irrigation area, Area 5. Although minor variations in the 40,000 ha to include perhaps some of the south Barrhill might be possible in terms of the current consent, there is an area constraint explicit in the



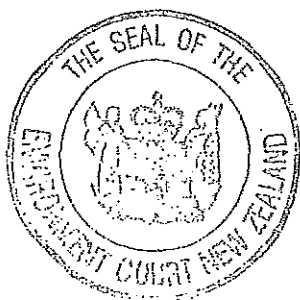
accompanying documents. Accordingly areas 6, 7 and 8 are currently not included in either the RDRML or Barrhill Chertsey consents. Although minor encroachment into these areas is contemplated in both consents, major development would require consents. However this would not alter or constrain existing consents.

The mixing and joint use of water

[65] This conclusion recognises that there could be two or more major consents contributing to the water in the Race and that it will not be possible to keep that water separate. Accordingly we accept that there are times when the RDRML irrigators will be serviced by Barrhill Chertsey water, and times when Barrhill Chertsey irrigators would be serviced by RDRML water. In most cases this would be mixed water and it would simply not be possible to identify the separate contributors.

[66] It is certainly possible, in a technical sense, to say that in those cases both RDRML and Barrhill Chertsey may not be applying the water in accordance with their consent. It is however clear that in total the water being applied would be in accordance with the combination of consents. The novel question for this Court is whether both parties would be complying with their own consent in doing so.

[67] In our view this requires us to interpret the consents and the declaration in terms of the single purpose of the Act, being sustainable management as that term is defined under Part 2. Given our views as to the value of a common infrastructure it must follow that both the Race and the water within it should be regarded as having elements of a public or common good. Although the water in the Race is subject to a consent for take and use by particular individuals, it nevertheless retains both public and private elements. Firstly, it constitutes a private good to the individual irrigators or electricity company utilising the water, but thereafter at least a proportion of that water re-enters the public domain either in the rivers or by way of groundwater penetration. The water subject to evaporation or evapotranspiration re-enters the water cycle again for re-use in a broader sense. Even the water within the Rangitata and Rakaia Rivers is only in that waterway for a short period of time. Water will join the system as precipitation or snow, rejoin the river either by way of direct flow or via the various aquifers which feed the



rivers. The water may rejoin aquifers or the sea at some point, or be subject to evaporation or evapotranspiration.

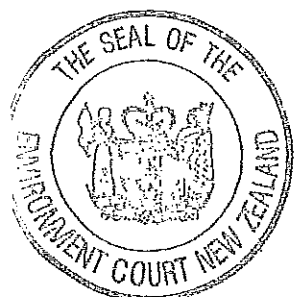
[68] In that regard we have therefore concluded that given both the public and private elements of water its presence within the Race cannot be regarded as specifying that individual molecules of water will be attributed in certain ways. The race itself loses water to the aquifers and by evaporation and is no doubt subject to direct rainfall increase and the like.

[69] In particular we have concluded that the enabling provisions of the Act intend to enable communities to provide for their welfare and this must include the ability to provide for irrigation schemes. In that regard the critical issue is that no party exceed the terms of their consent in respect of the amount of water taken or the combined areas covered by the existing consents or any new consents.

[70] In that regard it would be appropriate that the Regional Council consents had attached to them as a note any formal agreement entered into with another party advising apportionment and priority issues so that these would be available to the public. With that simple qualification we have concluded that once waters are in the Race they can be attributed to any of the purposes in terms of any agreement entered into by the parties to the extent of the combined consents of those parties.

[71] Accordingly we would make the following modified declarations in respect of declarations 2 and 3:

- (B) *that once waters have been taken in accordance with the relevant consents of Barrhill Chertsey and RDRML and entered into the Rangitata Diversion Race they may be attributable by the parties in terms of any agreement reached between them to the full extent of the combined consents granted;*
- (C) *to the extent that any new consent may seek to utilise existing water or further waters introduced into the diversion race, such consents would then form part of the attributable total consents subject to the terms of any agreement between the relevant consent holders.*



Would the grant of a consent to Barrhill Chertsey affect RDRML's existing consents or any rights to renew or vary RDRML's consents?

[72] The fourth declaration is essentially parasitic upon the earlier ones. It follows from our earlier conclusions that the grant of any further consents utilising the RDRML consents could not derogate from its existing consents.

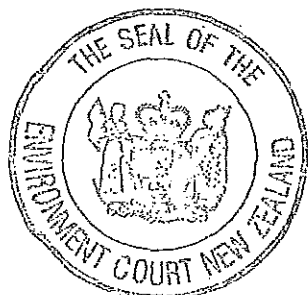
[73] The second part of the question in our view goes too far in that it questions whether it would affect any rights to renew or vary the RDRML consent. We have no details of the way in which RDRML may seek to renew or vary its consents. Given that they enure for another 30 years or so, we cannot speculate why RDRML may wish to vary them or the basis of renewal. We conclude that we would need far more precise information as to the arrangements between the parties and the terms of any rights or renewals sought to be able to answer this question.

[74] Given our view that the contemplated arrangement and consents do not derogate from the existing consents it would appear that continuing consents in exactly the same terms should not have any particular impact upon questions of renewal. Nevertheless there is a wide discretion for councils as to the matters they can take into account. The joint utilisation of a common infrastructure may in fact be a benefit of any further application and may even imbed RDRML as the infrastructure supplier in that area.

[75] However, we consider that we can make the simple declaration:

(D) That the grant of a new consent to Barrhill Chertsey overlapping with RDRML infrastructure or consent areas will not adversely affect RDRML's existing consents.

This declaration follows from our earlier conclusions. Although similar to declaration A we conclude it may serve some separate purpose.



Final comments

[76] Although there may be times the various parties are utilising mixed water there may also be times when each party is utilising only their own water. In particular, given the priority of the RDRML water it appears to us that there are going to be times in each season where RDRML may be the only party servicing its irrigation clients when Barrhill Chertsey is not able to take. Of course it may be possible that all the parties in the irrigation system agree to some rateable reduction but that is not currently suggested.

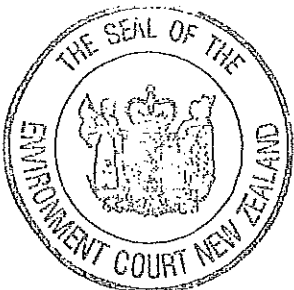
[77] In our view the type of approach suggested by Barrhill Chertsey and RDRML represents a practical, pragmatic and cost-effective approach to water which has both private and public elements. Given that there is no particular ownership of the water itself (although there is privatisation of use from time to time) it should in our view be seen in a similar way to electricity or air, namely that it is not necessary to identify the source of particular particles or parts of that.

[78] Nevertheless the consents, to the extent they address the private uses which may be made of it, can be seen as recording the appropriate uses which can be made of this water and the general areas to which it may be applied. There is nothing to prevent the water being placed into a common system and thereby being drawn from that *pool*. Nor can we see anything in the resource consents that prevent such a course.

[79] On this basis it appears to us that the declarations in the forms we have outlined are generally appropriate. We have not however had the benefit of considered opinions as to the precise wording and wish to give the parties an opportunity to comment on the declaration wording.

Directions

[80] Accordingly we direct:



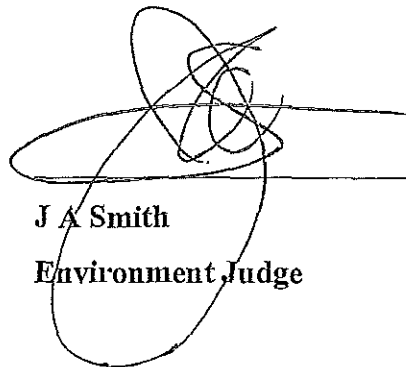
- (1) *the draft wording of the declarations is to be considered by the parties and a joint memorandum to be filed within fifteen working days. The Court will thereafter consider the memorandum and issue final declarations.*

Costs

[81] The parties have indicated to us that costs are not in issue. We consider that the matter is one of broad public interest and has been fully and properly argued before this Court given its general importance. We make no order for costs. We record our gratitude to counsel for their assistance on this difficult topic.

DATED at CHRISTCHURCH this 31st day of October 2008

For the Court:


J A Smith
Environment Judge



Issued: - 3 NOV 2008

Schedule 1: RDRML and BCI consents

RDRML consents
<p>CRC011237 to dam the Rangitata River, by means of a rock weir, take and divert water from the Rangitata River into the Rangitata Diversion Race by means of the Klondyke Intake structure and use water for the purposes of supplying water for stock water, irrigation and electricity generation.</p>
<p>CRC011239 to deposit material on, excavate and disturb the bed of the Rangitata River, and divert water within the riverbed, for the purpose of maintaining and reconstructing the rock weir, Klondyke intake structure and causeway.</p>
<p>CRC011240 to discharge water from the Rangitata Diversion Race to the Rangitata River for emergency spilling only.</p>
<p>CRC011241 to discharge water and contaminants from the Rangitata Diversion Race Sandtrap to the Rangitata River via a spillway.</p>
<p>CRC011242 to deposit material on, excavate and disturb the bed of the Rangitata River, and divert water within the riverbed, for the purpose of maintaining the Rangitata Diversion Race Sandtrap Outlet.</p>
<p>CRC011243 to deposit material on, excavate and disturb the bed of the Rangitata River, and the riverbank at Klondyke Bend, and divert water within the riverbed, for the purposes of maintaining and extending riverbank protection works.</p>
<p>CRC011244 to discharge water from the Rangitata Diversion Race to the South Hinds River via a syphonic siphon.</p>
<p>CRC011245 To dam the South Ashburton River by means of a weir and intake structure to a maximum height of 1.5 metres above the riverbed, and to divert and take water continuously at a maximum rate of 7.1 cubic metres per-second from the South Ashburton River into the Rangitata Diversion Race via an Intake structure, at or about map reference NZMS 260 K36:819-192, and to use water for irrigation and stockwater purposes, and to generate electricity at Highbank Power Station.</p>
<p>CRC011246 to discharge water and contaminants from the South Ashburton River Intake Structure into the South Ashburton River.</p>
<p>CRC011247 to discharge water from the Rangitata Diversion Race and Montalto Power Station to the South Ashburton River via a siphonic siphon and radial gate.</p>
<p>CRC011248 to discharge water from the Rangitata Diversion Race and Montalto Power Station to the North Ashburton River.</p>
<p>CRC011249 to discharge water and contaminants from the Rangitata Diversion Race, Montalto Power Station and Highbank Power Station into the Rakaia River by means of the Highbank Power Station Tailrace.</p>



<p>CRC011251 to deposit material on, and excavate and disturb the bed of the Rakala River to maintain riverbank protection works and extend protection works further downstream, to maintain a cutting to divert water from the Highbank Power Station Tailrace to the mainstream of the Rakala River, and to maintain a river braid channel to the tailrace to assist the passage of adult salmon.</p>
<p>CRC011252 to divert a braid of the Rakala River to allow salmon to return to the Rakala River.</p>
<p>CRC011253 to carry out occasional maintenance works, such as relining, degravelling and weed clearance on 61 culverts bisecting the Rangitata Diversion Race canals.</p>
<p>CRC011254 to discharge water and contaminants into the Rangitata River, being small quantities of sediment which may be discharged into water during maintenance and riverbed control works.</p>
<p>CRC011255 to discharge water and contaminants into the Rakala River, being small quantities of sediment which may be discharged into water during maintenance and riverbed control works.</p>
<p>CRC011450 to divert water within the bed of the Rangitata River within 1,000 metres upstream and downstream of map reference NZMS 260 J36:697-112 and between map references NZMS 260 J36:683-131 and NZMS 260 J36:690-127, to enable riverbed protection works and the maintenance of the Rangitata Diversion Race sandtrap outlet respectively.</p>
<p>CRC051179 To divert water</p>
<p>CRC051180 To discharge water to water</p>
<p>CRC070275 To disturb the bed and banks of a river.</p>
<p>CRC080840 To discharge water into water.</p>
<p>CRC080926 To dam water.</p>
<p>CRC082583 To divert water.</p>
<p>CRC961754 to deposit material on, and excavate and disturb the bed of the South Hinds R, Silverstream Drain, North Hinds R, South Ashburton R, Stevenson Strm, Bowyers Strm, Taylors Strm, North Ashburton R, Dry Crk, and the Rangitata R intake race at or about map references NZMS K36:773-115; K36:789-130; K36:800-169; K36:819-192; K36:843-255; K36-844-256; K36:883-257; K36:940-271; K36:010-326 and J36:681-144, for the purpose of repairing siphon structures.</p>
<p>CRC961755 to take water from the Rangitata River, at or about map reference J36:688-128, for stockwater supply.</p>



<p>CRC961756 to discharge water and contaminants to the South Hinds River, Silverstream Drain, North Hinds River, South Ashburton River, Stevenson Stream, Bowyers Stream, Taylors Stream, North Ashburton River and Dry Stream at or about map references K36:773-115; K36:789-130; K36:800-169; K36:819-192; K36:834-255; K36:844-256; K36:883-257; K36:940-271; K36:010-326 for the purpose of dewatering siphon structures for repair.</p>
<p>CRC992194 to discharge water and contaminants from the Rangitata Diversion Race sandtrap to the Rangitata River, at or about map reference NZMS 260 J36:691-129, for dewatering purposes.</p>
<p>SCY690779 SCY690781 SCY690782 SCY690784 SCY690786 SCY690788 SCY690789</p> <p><i>Various take consents with volumetric limits currently operating under section 124</i></p>

BCI consents
<p>CRC990088 to take up to 17 cubic metres per second (cumecs) of water and to divert up to 40 cumecs of water from the Rakala River for the purpose of irrigation of up to 40,000 hectares and electricity generation</p>
<p>CRC990089 to discharge up to 80 cubic metres per second of water and sediment to the Rakala River</p>
<p>CRC990133 to disturb the bed of the Rakala River to maintain existing river bank protection and facilitate the diversion of water to an Intake structure and discharge of water and sediment</p>
<p>CRC000132 to discharge up to 17 cumecs and up to 7 cumecs of bywash water to the Rakala River</p>
<p>CRC000133 to place an intake structure on and disturb the bed of the Rakala River</p>
<p>CRC000134 to disturb the bed of the Rakala River to facilitate the discharge of water and to form discharge channels</p>



Appendix A: Proposed irrigated areas

B

