

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-

UNDER the Environment Canterbury (Temporary
Commissioners and Improved Water
Management) Act 2010

IN THE MATTER of an appeal under s 66 of the Act

BETWEEN COMBINED CANTERBURY PROVINCES,
FEDERATED FARMERS OF NEW
ZEALAND INCORPORATED

Appellant

AND CANTERBURY REGIONAL COUNCIL

Respondent

**NOTICE OF APPEAL AGAINST A DECISION OF THE
COUNCIL ON POINTS OF LAW**

4 March 2016

Federated Farmers of New Zealand
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1. **TAKE NOTICE** that Combined Canterbury Provinces, Federated Farmers of New Zealand Incorporated ("Federated Farmers") appeals to the High Court against a decision of the Canterbury Regional Council ("the Council") upon the grounds that the decision is erroneous in law.

Introduction

2. This notice is given under the provisions of section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 ("the Act").
3. The decision of the Canterbury Regional Council appealed against is the decision on the Canterbury Regional Council's Plan Change 2 (Hinds/Hekeao Plains Area) to the Canterbury Land and Water Regional Plan ("the Decision").
4. Federated Farmers received notice of the Decision on 13 February 2016.
5. Federated Farmers made submissions on the originating matter and appeared before the Hearing Commissioners who heard submissions in the originating matter.

Background

6. On 27 September 2014 the Council notified a proposed variation (identified at the time as Variation 2) to its proposed Land and Water Regional Plan. The Council followed the process set out in Schedule 1 to the Resource Management Act ("the RMA"), eventually notifying its decisions on submissions to what subsequently became known as Plan Change 2, notification which was received by Federated Farmers on 13 February 2016.
7. Federated Farmers appeals against the whole of the decision, with particular reference to parts of the Decision, in particular Policy 13.4.18, Rule 13.5.31 and the definition of "Deep Groundwater", being the policy, rule and definition that control the distinction between deep groundwater and groundwater that is not deep groundwater.

The Application of Part 2 of the RMA

The Error of Law Alleged

8. The error of law alleged is that the Council erred in law in its Decision:

At paragraph [177], where the Council failed to take into account matters which it should have taken into account when it found, in deciding submissions on Plan Change 2 so as to give effect to the superior instruments, that it did not need to resort to Part 2 of the RMA for direction.

The Questions of Law to be Resolved

9. The question of law to be resolved is:

Whether the Council should, when it found that there were inconsistencies in superior instruments, have resorted to Part 2 of the RMA for direction.

The Grounds of Appeal

10. The grounds of appeal are that:

- (i) At [172] of the Decision, the Council states that it accepts that the Plan Change has to give effect to multiple provisions of applicable instruments, particularly relevant directions in the National Policy Statement for Freshwater Management, and it states that it has considered whether those provisions compete, or pull in different directions, so that they cannot be reconciled. At [173] of the Decision, the Council states that it has reviewed the applicable policies of the Canterbury Regional Policy Statement.
- (ii) At [175] of the Decision, the Council states that it is not persuaded that the policies of the Canterbury Regional Policy Statement are incapable of being reconciled within the instrument itself, so as to necessitate recourse to Part 2 of the RMA to resolve conflicts.
- (iii) At [176] of the Decision, the Council states that it has also considered whether the superior instruments "cover the

field”, and comes to the view that the National Policy Statement for Freshwater Management does not cover the field.

- (iv) In the case *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors*,¹ the Supreme Court discussed the requirement to “give effect” to a superior instrument, in that case the New Zealand Coastal Policy Statement (“the NZCPS”). The Court found that:

In principle, by giving effect to the NZCPS, a regional council is necessarily acting “in accordance with” pt 2 and there is no need to refer back to the part when determining a plan change.

However, the Court went on to identify three caveats to this principle, which it summarised as being “invalidity”, “incomplete coverage” and “uncertainty of meaning”. As regards “incomplete coverage”, the Supreme Court said:

... there may be instances where the NZCPS does not “cover the field” and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered

- (v) Accordingly, by not reviewing whether Part 2 of the RMA would have provided assistance in dealing with the matters not covered in the National Policy Statement for Freshwater Management, the Council has made an error of law.
- (vi) The Council has also made an error of law, in its consideration of whether the policies of the Canterbury Regional Policy Statement are incapable of being reconciled within the instrument itself, so as to necessitate recourse to Part 2 of the RMA to resolve conflicts, by not considering whether those policies are invalid or are of uncertain meaning.

Dealing with Deep Groundwater

The Error of Law Alleged

11. The error of law alleged is that the Council erred in law in its Decision:

¹ [2014] NZSC 38.

At paragraph [438], in that the Council came to a conclusion without evidence or one to which on the evidence it could not reasonably have come, when it determined that Rule 13.5.31 should be revised to require the substitute groundwater well to be at least 103m deep unless an applicant's site specific investigation demonstrates that a lesser depth is appropriate.

The Questions of Law to be Resolved

12. The questions of law to be resolved are:

Whether the Council came to a conclusion without evidence or one to which on the evidence it could not reasonably have come, when it determined that Rule 13.5.31 should be revised to require the substitute groundwater well to be at least 103m deep unless an applicant's site specific investigation demonstrates that a lesser depth is appropriate.

The Grounds of Appeal

13. The grounds of appeal are that:

- (i) At [438] of the Decision, the Council refers to expert evidence which recommends that deep groundwater takes be required to have a minimum depth of 50m.
- (ii) The Council then goes on to state that Council officers advised that in the Lower Hinds/Hekeao Plains area the average depth for deep groundwater wells ranged from 97m to 103m, and used that evidence to determine that Rule 13.5.31 should be revised to require the substitute groundwater well to be at least 103m deep, unless a site specific investigation demonstrates that a lesser depth is appropriate.
- (iii) Yet Policy 13.4.18 refers to "any water permit", and Rule 13.5.31 is uncertain as to what is meant by "deep groundwater" and the test for determining whether a lesser depth is appropriate is also uncertain.

The Relief Sought

14. The relief sought by Federated Farmers is that:

- i) the appeal be allowed;
- ii) this Court find that the Council erred in relation to the questions of law set out herein;
- iii) this Court quash the Council's decisions;
- iv) this Court direct the Council to reconsider its decisions on submissions on Plan Change 2 in the light of its findings on the questions of law set out herein;

and, without detracting from the more general relief set out in i) - iv) above, that:

- v) this Court direct the Council to make the following amendments to Plan Change 2:

Policy 13.4.18:

In the Lower Hinds/Hekeao Plains Area, with the exception of the Lower Hinds River/Hekeao, and until 30 June 2025 2025, any water permit relating to surface water or to groundwater that is hydraulically connected to surface water that is granted to replace an existing water permit will be subject to the minimum flow and allocation limits in Table 13(e).

Rule 13.5.31, Matter of Discretion 3:

The effects the take has on any other authorised abstraction, including interference effects as indicated, where appropriate, by an Aquifer Test or Step Aquifer Test undertaken in accordance with the requirements of Schedule 11 and well interference calculated in accordance with the method in Schedule 12;

Definition of "Deep Groundwater"

means groundwater that is abstracted from a depth of at least 10350m below ground level

and:

- vi) costs.

Dated at Auckland this 4th day of March 2016



Richard Gardner
Solicitor

This document is filed by Peter Richard Gardner, solicitor for the Appellant, of Federated Farmers of New Zealand, whose postal address is Private Bag 92-066, Auckland 1142. The address for service of the Appellant is:

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Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to the solicitor at Private Bag 92-066, Auckland 1142; or
- (c) transmitted to the solicitor by fax to (09) 379-0782
- (d) emailed to the solicitor at: rgardner@fedfarm.org.nz