IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-

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

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

BETWEEN **RANGITATA DIVERSION RACE MANAGEMENT LIMITED** a duly incorporated company having its registered office at 18 Kermode Street, Ashburton 7740

Appellant

A N D **CANTERBURY REGIONAL COUNCIL** a local authority constituted under the Local Authority Government Act 2002 having its principal office at 17 Gill Simpson Drive, Christchurch

Respondent

NOTICE OF APPEAL UNDER SECTION 66 OF THE ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS & IMPROVED WATER MANAGEMENT) ACT 2010

Dated: 3 March 2016

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NOTICE OF APPEAL UNDER SECTION 66 OF THE ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS & IMPROVED WATER MANAGEMENT) ACT 2010

TAKE NOTICE that the Appellant hereby appeals to the High Court against the following decisions of the Canterbury Regional Council ("the Respondent") contained in the Report and Recommendations of the Hearing Commissioners on Proposed Plan Change 2 to the Canterbury Land and Water Regional Plan dated 21 December 2015 which were publicly notified on 3 February 2016 ("the Decision") **UPON THE GROUNDS** that the Respondent made errors of law in parts of the Decision.

The Appellant lodged submissions and further submissions on the provisions that the Appellant appeals.

1. **Parts of the Decision Appealed**

1.1 The Appellant appeals against parts of the Decision in relation to Proposed Plan Change 2 to the Canterbury Land and Water Regional Plan ("Plan"). In particular, the following parts of the Decision are appealed:

(a) Policy 13.4.13(ba).

(b) Policy 13.4.13(bb).

2. **Policy 13.4.13(ba)**

Errors of Law

2.1 The Appellant alleges that the Respondent made errors of law in respect of Policy 13.4.13(ba) in that:

(a) It made a decision which lacked jurisdiction because it was outside the scope of the submissions on the Plan and therefore the decisions which the Respondent had the jurisdiction to make. As a result there was a breach of the principles of natural justice

in that the Appellant was deprived of an opportunity to respond to the decision made.

(b) It made a decision in relation to which there was no evidence or which, on the evidence, it could not reasonably have made.

(c) The Decision failed to undertake a further evaluation of Policy 13.4.13(ba) in accordance with s 32AA of the Act.

(d) Policy 13.4.13(ba) does not give effect to the Decision.

Questions of Law

2.2 The Appellant alleges that the above errors of law give rise to the following questions of law:

(a) Did the Respondent have jurisdiction to make the change to Policy 13.4.13(ba), which prescribes a nitrogen loss calculation of the lesser of that required by Policy 13.4.13(b) or 20 kgN per hectare per year?

(b) In the alternative, did the Respondent, in deciding on the wording of Policy 13.4.13(ba), make a decision that was not open to it on the evidence?

(c) In the alternative, did the Respondent fail to undertake a proper analysis under s 32AA of the Act, in that it failed to:

(i) Undertake the evaluation at a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(ba) through the rule framework (rule 13.5.22) as required by ss 32(1)(c) and 32AA(1)(c) of the Act?

(ii) Identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that

are anticipated from the implementation of Policy 13.4.13(ba) through the rule framework (rule 13.5.22) as required by ss 32(2) and 32AA(1)(b) of the Act?

(d) In the alternative, did the Respondent err in settling the wording of Policy 13.4.13(ba) in that it does not give effect to the Decision?

Grounds of Appeal

2.3 The Plan as notified provided for land use intensification or changes in land use on a maximum of 30,000 hectares of land, provided that the nitrogen loss calculation was limited to no more than 27 kg per hectare per year. This was provided for in Policy 13.4.13(c).

2.4 The wording of Policy 13.4.13(ba) in the Decision is:

> (ba) requiring for any land where a resource consent has been granted, between 1 January 2014 and 15 February 2016, to increase nitrogen losses beyond the nitrogen baseline, **the nitrogen loss calculation to be limited to the lesser of that required by Policy 13.4.13(b) or 20 kgN per hectare per year**; and

2.5 No submissions on the Plan expressly sought that the nitrogen loss calculation for land use intensification or changes in land use be limited to 20 kgN per hectare per year. Further, this change is not raised by or within the ambit of what was reasonably and fairly raised in submissions on the Plan.

2.6 As a result, the Appellant says that the Respondent lacked jurisdiction to amend Policy 13.4.13 by deleting Policy 13.4.13(c) and inserting Policy 13.4.13(ba) because it was outside the scope of the submissions on the Plan and therefore the decisions which the Respondent had the jurisdiction to make.

2.7 As a result there was a breach of the principles of natural justice in that the Appellant was deprived of an opportunity to respond to the decision made. This is notwithstanding that the Decision records that:

> [565] In doing that, we have confined ourselves to options presented in the submissions or the section 42A Report, and to combinations or refinements of them. We have refrained from searching for other options of our own initiative, that being beyond our function as hearing commissioners, and risking depriving submitters of opportunity to respond.

2.8 Further, no submitters produced evidence which suggested that the nitrogen loss calculation for land use intensification or changes in land use enabled under the Plan be limited to 20 kgN per hectare per year. Accordingly, in determining the wording of Policy 13.4.13(ba) the Respondent made a decision in relation to which there was no evidence or which, on the evidence, it could not reasonably have made

2.9 Section 32AA of the Act requires the Respondent to carry out a further evaluation for changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed, in accordance with s 32(1) to (4) of the Act, and at a level of detail that corresponds to the scale and significance of the changes. The Appellant says that the Respondent failed to meet the legal requirements of ss 32(1), 32(2) and 32AA of the Act because:

(a) The officers' s 42A reply (Officer's Reply for Council Hearing, 21 August 2015) did not recommend that the nitrogen loss rates for land use intensification or changes in land use enabled under the Plan be reduced from 27kg/N/ha to 20kg/N/ha.

(b) In that regard, the version of Policy 13.4.13 which was recommended by the officers in reply included the following 13.4.13(c):

> enabling increases in nitrogen losses, beyond that for the nitrogen baseline on a maximum of 15,000ha of land, provided the groundwater nitrogen concentration for the catchment as a whole has reduced below 9.1/l and the nitrogen loss calculation for the land is the lesser of that required by policy 13.5.13(b) or 27kg per hectare per year.

(c) The officers prepared a s 32AA evaluation[1] and it is consistent with the above recommendations (i.e. the relevant option uses 27 kg/N/ha not 20 kg/N/ha).

(d) On the topic of irrigation schemes and new irrigation the Decision (section 6.11) states:

> [405] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them.

(e) Within Appendix A to the Decision, under Policy 13.4.13, a number of the decisions reference the following text:

> This submission point asks for various amendments to notified provisions. We have reviewed the provision in the light of all those requests, with a view to accepting all that would (having regard to the effectiveness and efficiency of the body of provisions), be most appropriate for achieving the objectives of the LWRP (taking into account the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions and risks of acting or not acting), and contribute to a coherent body of provisions that would assist the CRC to carry out its functions in attaining the purpose of the RMA. In the result, we recommend some of the amendments requested and do not recommend others. Without addressing each in detail, we consider that those we do not recommend would not contribute to making the provision a coherent measure that would assist the CRC as intended. The amendments we recommend are contained in the marked-up version of the Plan in Appendix B to this report.

[1] Officer's Reply For Council Reply Hearing, Evaluation under Section 32AA, September 2015.

(f) The Hearing Commissioners had before them extensive evidence from a number of parties about the implications of the provisions in the Plan, including evidence from the Appellant seeking a higher nitrogen loss calculation for land use intensification or changes in land use enabled under the Plan of 39 kg/N/ha per year. Despite that, nothing in the Decision identifies and then assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(ba) through the rule framework (rule 13.5.22) as required by ss 32(2) and 32AA(1)(b) of the Act.

(g) Further, it cannot be said that the Decision at paragraph 405 or in Appendix A contains a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(ba) through the rule framework (rule 13.5.22). This is in stark contrast to the further evaluation which had been prepared by the officers[2] and which relevant option uses 27 kg/N/ha not 20 kg/N/ha.

2.10 Finally it is noted that the wording of Policy 13.4.13(ba) does not give effect to the Decision and to that extent may have been mistakenly framed by the Respondent. In particular:

(a) In relation to further land use intensification or changes in land use the Decision finds that:

> [399] Consequently, we find that further intensification occurring after decisions on Plan Change 2 are made by the CRC, should be solely restricted to land that was or will be irrigated under the Rangitata Diversion Race Management Limited consent CRC121664 prior to its expiry on 26 May 2019. Following the expiry of that consent, any further intensification could only be enabled by way of a further plan change. We recommend that Policy 13.4.13 and Rule 13.5.22 are amended accordingly. We note that the risk of not acting in this manner would be to allow

[2] Officer's Reply For Council Reply Hearing, Evaluation under Section 32AA, September 2015.

even further degradation of the catchment's water quality, given the uncertainty associated with managed aquifer recharge.

(b) However, Policy 13.4.13(ba) (in combination with rule 13.5.22) has the effect of precluding this as it will require land irrigated with water supplied by the Appellant to comply with a nitrogen loss calculation which is the lesser of that required by Policy 13.4.13(b) or 20 kgN per hectare per year. This is unachievable. It is further unclear what version of OVERSEER™ the 20 kg/N/ha refers to.

(c) The Decision contains no further discussion on Policy 13.4.13(ba) or the change in the nitrogen loss rate from 27 kg/N/ha to 20 kg/N/ha.

(d) Accordingly, the Appellant says that Policy 13.4.13(ba) does not give effect to the Decision.

Relief sought

2.11 The Appellant seeks:

(a) That the appeal be allowed;

(b) That Policy 13.4.13(ba) be amended to delete reference to a nitrogen loss calculation of the lesser of that required by Policy 13.4.13(b) or 20 kgN per hectare per year and replace it with a figure of 27 kg/N/ha per year (and include footnote F3 "Calculated using Overseer version 6.0");

(c) Alternatively, that the matter be referred back to the Respondent for reconsideration in light of the findings of this Honourable Court;

(d) Such further or other relief as may be appropriate;

(e) The costs of and incidental to these proceedings.

3. **Policy 13.4.13(bb)**

Errors of Law

3.1 The Appellant alleges that the Respondent made errors of law in respect of Policy 13.4.13(bb) in that:

(a) Policy 13.4.13(bb) does not give effect to the Decision.

(b) The Decision failed to undertake a further evaluation of Policy 13.4.13(bb) in accordance with s 32AA of the Act.

Questions of Law

3.2 The Appellant alleges that the above error of law gives rise to the following questions of law:

(a) Did the Respondent err in settling the wording of Policy 13.4.13(bb) in that it does not give effect to the Decision?

(b) In the alternative, did the Respondent fail to undertake a proper analysis under s 32AA of the Act, in that it failed to:

(i) Undertake the evaluation at a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(bb) through the rule framework (rule 13.5.22) as required by ss 32(1)(c) and 32AA(1)(c) of the Act?

(ii) Identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(bb) through the rule framework (rule 13.5.22) as required by ss 32(2) and 32AA(1)(b) of the Act?

Grounds of Appeal

3.3 Policy 13.4.13(bb) provides:

> (bb) subject to Policy 13.4.13(b), allowing irrigation of land with water from an irrigation scheme or principal water supplier, only if that land was not already being irrigated at 15 February 2016, and only if the irrigation is established under and prior to the expiry of resource consent CRC121664; and

3.4 The intention of Policy 13.4.13(bb) and related rule 13.5.22 would appear to be to limit losses from land irrigated with irrigation scheme water to land that was irrigated prior to the expiry of the consent held by the Appellant (CRC121664 which is expressly referenced in rule 13.5.22). However, the Appellant is concerned that the provision may have the effect of precluding the conjunctive use of water supplied pursuant to consent CRC121664 with groundwater (or water supplied by another irrigation scheme) on properties that have been irrigated prior to 15 February 2016 (i.e. where that irrigation has occurred under an existing consent). This concern is compounded if there is potential for the term "land" in Policy 13.4.3(bb) to be read as "property".

3.5 Policy 13.4.13(bb) seems to be a new policy that was inserted in the Plan by the Decision. The Decision has no commentary explaining the rationale for the wording adopted.

3.6 In relation to further land use intensification or changes in land use the Decision finds that:

> [399] Consequently, we find that further intensification occurring after decisions on Plan Change 2 are made by the CRC, should be solely restricted to land that was or will be irrigated under the Rangitata Diversion Race Management Limited consent CRC121664 prior to its expiry on 26 May 2019. Following the expiry of that consent, any further intensification could only be enabled by way of a further plan change. We recommend that Policy 13.4.13 and Rule 13.5.22 are amended accordingly. We note that the risk of not acting in this manner would be to allow even further degradation of the catchment's water quality, given the uncertainty associated with managed aquifer recharge.

3.7 The wording of Policy 13.4.13(bb) appears to be inconsistent with the Decision because consent CRC121664 does not preclude the conjunctive use of water described at paragraph 3.4 above. Accordingly, the Appellant says that Policy 13.4.13(bb) does not give effect to the Decision.

3.8 Furthermore, s 32AA of the Act requires the Respondent to carry out a further evaluation for changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed, in accordance with s 32(1) to (4) of the Act, and at a level of detail that corresponds to the scale and significance of the changes. The Appellant says that the Respondent failed to meet the legal requirements of ss 32(1), 32(2) and 32AA of the Act because:

(a) The officers' s 42A reply (Officer's Reply for Council Hearing, 21 August 2015) did not recommend a policy in the form of or similar to Policy 13.4.13(bb).

(b) The officers prepared a s 32AA evaluation.[3]

(c) On the topic of irrigation schemes and new irrigation the Decision (section 6.11) states:

> [405] Proportionate to the scale and significance of the changes discussed above, for the purpose of section 32AA(1)(d) of the RMA we record that we have considered the options before us, being whether to make those changes or not; have identified that the changes are reasonably practicable; and have assessed that adopting them would more fully serve the provisions of the Act and subordinate instruments than not making them.

(d) Within Appendix A to the Decision, under Policy 13.4.13, a number of the decisions reference the following text:

[3] Officer's Reply For Council Reply Hearing, Evaluation under Section 32AA, September 2015.

This submission point asks for various amendments to notified provisions. We have reviewed the provision in the light of all those requests, with a view to accepting all that would (having regard to the effectiveness and efficiency of the body of provisions), be most appropriate for achieving the objectives of the LWRP (taking into account the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions and risks of acting or not acting), and contribute to a coherent body of provisions that would assist the CRC to carry out its functions in attaining the purpose of the RMA. In the result, we recommend some of the amendments requested and do not recommend others. Without addressing each in detail, we consider that those we do not recommend would not contribute to making the provision a coherent measure that would assist the CRC as intended. The amendments we recommend are contained in the marked-up version of the Plan in Appendix B to this report.

(e) The Hearing Commissioners had before them extensive evidence from a number of parties about the implications of the provisions in the Plan, including evidence from the Appellant and others as to the conjunctive use of irrigation scheme water with other water. Despite that, nothing in the Decision identifies and then assesses the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(bb) on such conjunctive use through the rule framework (rule 13.5.22) as required by ss 32(2) and 32AA(1)(b) of the Act.

(f) Further, it cannot be said that the Decision at paragraph 405 or in Appendix A contains a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of Policy 13.4.13(bb) through the rule framework (rule 13.5.22) on conjunctive use.

Relief sought

3.9 The Appellant seeks:

(a) That the appeal be allowed;

(b) That Policy 13.4.13(bb) be amended to clarify that it does not preclude the conjunctive use of water supplied pursuant to consent CRC121664 with groundwater (or water supplied by another irrigation scheme) on properties that have been irrigated prior to 15 February 2016 (i.e. where that irrigation has occurred under an existing consent);

(c) Alternatively, that the matter be referred back to the Respondent for reconsideration in light of the findings of this Honourable Court;

(d) Such further or other relief as may be appropriate;

(e) The costs of and incidental to these proceedings.

Dated this 3rd day of March 2016

Vanessa Jane Hamm
Counsel for the Appellant

TO: The Registrar of the High Court, Christchurch

AND TO: The Canterbury Regional Council

AND TO: Those parties who filed submissions and further submissions on the matter (to be advised).

This Notice of Appeal is filed by **VANESSA JANE HAMM**, solicitor for the Appellant of the firm Holland Beckett. The address for service of the Plaintiff is at the offices of Holland Beckett, Solicitors, 525 Cameron Road, Tauranga.

Documents for service on the Plaintiff may be left at the address for service or may be:

(a) posted to the solicitor at Private Bag 12011, Tauranga; or

(b) left for the solicitor at a document exchange for direction to DX HP40014, Tauranga; or
(c) transmitted to the solicitor by fax to 07 578 8055;
(d) emailed to the solicitor at vanessa.hamm@hobec.co.nz