

*under:* Resource Management Act 1991 and the Environment  
Canterbury (Temporary Commissioners & Improved  
Water Management) Act 2010

*in the matter of:* an appeal under section 66 of the Act

*between:* **Barrhill Chertsey Irrigation Limited**, New Zealand  
company No 922777  
*Appellant*

*and:* **Canterbury Regional Council** a local authority  
constituted under the Local Government Act 2002  
having its principal office at 200 Tuam Street,  
Christchurch  
*Respondent*

## Notice of appeal by Barrhill Chertsey Irrigation Limited

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Dated: 20 July 2017

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REFERENCE: B G Williams (ben.williams@chapmantripp.com)  
A D W Brent (allan.brent@chapmantripp.com)

## NOTICE OF APPEAL BY BARRHILL CHERTSEY IRRIGATION LIMITED

**Take notice** that Barrhill Chertsey Irrigation Limited (*Barrhill*) appeals to the High Court parts of the decision of the Canterbury Regional Council (*the Respondent*) described as the "*Proposed Plan Change 5 to the Canterbury Land and Water Regional Plan - Report and Recommendations of the Hearing Commissioners adopted by Respondent as its decision on 15 June 2017*", which was publicly notified on 24 June 2017 (*the Decision*) **upon the grounds** that the Respondent made errors of law in respect of parts of the Decision.

Barrhill was a submitter and further submitter on proposed Plan Change 5 (PC 5) to the Canterbury Land & Water Regional Plan (LWRP).

### DECISION APPEALED

- 1 Barrhill appeals against those parts of the Decision relating to:
  - 1.1 the failure in Policy 4.41C(b) to make ongoing provision for irrigation schemes holding existing resource consents;
  - 1.2 the revision of the 'irrigation proxies' in Method s28.4 and Table s28; and
  - 1.3 all provisions as required to give effect to any further and consequential relief arising from the above.

### GROUNDINGS OF APPEAL

- 2 The Appellant alleges that the Respondent made the following errors of law.

#### **Policy 4.41C(b) – Restrictions on irrigation schemes**

##### ***Background and alleged errors***

- 3 The Decisions version of Policy 4.41C(b) provides (footnotes included):

4.41C Maintain water<sup>56</sup> quality in Orange, Green and Light Blue Nutrient Allocation Zones, and improve water quality in Red Nutrient Allocation Zones and Lake Zones by requiring:

...

(b) discharge permits granted to irrigation schemes or principal water suppliers to be subject to conditions that restrict the total nitrogen loss to a limit not exceeding:

(i) the Baseline GMP Loss Rate (or Equivalent Baseline GMP Loss rate where any one of the criteria in clauses (a) to (c) of Rule 5.42B is met),<sup>60</sup> for any

land within the Red, Lake or Orange Nutrient Allocation Zones; and

- (ii) a total of 5kg/ha/yr above the Baseline GMP Loss Rate<sup>61</sup> (or Equivalent Baseline GMP Loss Rate where any one of the criteria in clauses (a) to (c) of Rule 5.42B is met)<sup>62</sup> for any land within the Green or Light Blue Allocation Zones.

except that where the nitrogen loss from the land is authorised by a condition on an existing water permit or discharge permit granted to an irrigation scheme or principal water supplier and intensification on that land or change of land use occurred prior to 13 February 2016, the new discharge permit is to include a condition that limits the nitrogen loss to a rate that is not greater than the aggregated Good Management Practice Loss Rate for the land.<sup>63</sup>

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<sup>56</sup> Cl16(2) of Schedule 1 to the RMA - alteration of minor effect

...

<sup>60</sup> Fonterra Co-operative Group Ltd PC5LWRP-1160; Central Plains Water Ltd PC5LWRP-518A; Hunter Downs Development Company Ltd PC5 LWRP-386;

<sup>61</sup> Federated Farmers PC5 LWRP-2297A

<sup>62</sup> Fonterra Co-operative Group Ltd PC5LWRP-1160; Central Plains Water Ltd PC5LWRP-518A; Hunter Downs Development Company Ltd PC5 LWRP-386;

<sup>63</sup> Hunter Downs Development Company Ltd PC5 LWRP-117A; Central Plains Water Ltd PC5 LWRP-630C

- 4 One of the effects of Policy 4.41C is to limit the nitrogen losses on land that is irrigated by an irrigation scheme to the aggregated Good Management Practice Loss Rate for the farming activity that was occurring prior to notification of PC 5 on 13 February 2016 (noting that the Good Management Practice Loss Rate is defined with reference to the "*farming activity carried out over the most recent four year period*"). In the case of the Barrhill it:
- 4.1 holds resource consents that allow for the expansion of the Barrhill Chertsey Irrigation Scheme (*Scheme*) which would now be significantly limited upon the renewal of any consent in light of Policy 4.41C; and
- 4.2 undertook irrigation development after notification that will not reflect the farming activity carried out in four years preceding notification (i.e. the Good Management Practice Loss Rate as at 13 February 2016). Such development was undertaken lawfully but will now in effect be regarded as having not been undertaken.

- 5 A further effect of Policy 4.41C is to provide for an alternative pathway that does not utilise the Farm Portal “*where any one of the criteria in clauses (a) to (c) of Rule 5.42B is met*”. It is not clear how those criteria would be applied to an irrigation scheme where nutrients may be managed on an aggregated ‘all-of-scheme’ basis.
- 6 Barrhill asserts that in making the Decision as to the final text of Policy 4.41C(b), that the Respondent came to a decision:
- 6.1 on no evidence, or one that it could not reasonably have come to on the evidence;
- 6.2 outside the jurisdiction conferred by clause 10 of Schedule 1 of the RMA in that the amendments were not reasonably and fairly within the scope of the submissions that are cited as reasons for the relief;
- 6.3 that it was not lawfully able to come to without making a further evaluation of the costs and benefits (including the potential limit on irrigation scheme development that would occur under the policy) under sections 32 and 32AA of the Resource Management Act 1991 (*RMA*);
- 6.4 that reflects an improper application of the legal test deriving from the line of authority based around *Queenstown Lakes District Council v Hawthorn Estate Ltd*<sup>1</sup> (*Hawthorn*) as to the ‘environment’; and
- 6.5 is in breach of section 30(4) of the RMA in the context of other rules allowing permitted intensification and the effect of the policy being to reallocate resource already allocated under existing resource consents.

**Questions of law**

- 7 Barrhill alleges the errors set out give rise to the following questions of law:
- 7.1 Did the Respondent reach a decision on the wording of Policy 4.41C that fails to provide for activities authorised under existing resource consents in circumstances where:
- (a) there was no evidence that could reasonably support that decision;
- (b) there was no jurisdiction to make the decision;

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<sup>1</sup> *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299.

- (c) failed to have regard to the potential impacts on irrigation schemes and others who hold existing resource consents that have not been implemented as was required by sections 32 and 32AA;
- (d) its Decision has the effect of 'reallocating' the resource in a manner that is *ultra vires* in light of section 30(4) of the RMA;
- (e) it has failed to apply the legal test as to the 'environment' deriving from the *Hawthorn* line of authority.

7.2 Did the Respondent reach a decision on the wording of Policy 4.41C (as it relates to use of an alternative consenting pathway) that lacks clarity or leads to irrational results such that it is a decision that could not have been reasonably reached.

#### **Method s28.4 and Table s28**

##### ***Background and alleged errors***

- 8 In its Decision, the Respondent has amended Method s28.4 by deleting the exceptions for travelling and spray line irrigation systems on soils with a profile available water (*PAW*) of 40 to 80mm.
- 9 This exception had been included in the notified version of the plan change to recognise the specific efficiency constraints to those irrigation systems.
- 10 The effect of the Decision is that most travelling and spray line irrigation systems will be unable to meet the required discharge limits, making them either a non-complying or prohibited activity.
- 11 There was no submission seeking that relief and all evidence appears to have supported the exception being retained (rather than deleted).
- 12 Barrhill asserts that in making the Decision as to the final text of Policy 4.41C(b), it is one that:
  - 12.1 it came to on no evidence, or could not reasonably have come to on the evidence;
  - 12.2 is outside the jurisdiction conferred by clause 10 of Schedule 1 of the RMA in that the amendments were not reasonably and fairly within the scope of any submission;

12.3 it was not lawfully able to come to without making a further evaluation of the costs and benefits of removing the exception under sections 32 and 32AA of the RMA.

**Questions of law**

13 Barrhill alleges the errors set out give rise to the following questions of law:

13.1 Did the Respondent delete the exception travelling and spray line irrigation systems referred to method s28 and Table s28 in circumstances where:

- (a) there was no jurisdiction to make the decision;
- (b) there was no evidence that could reasonably support that decision;
- (c) there has been insufficient regard to the potential impacts on farmers as required by sections 32 and 32AA

**Method s28.3 – fertiliser proxy**

**Background and alleged errors**

14 The Decision records<sup>2</sup> the process that led to the adoption of the 'fertiliser proxy' in Method s28.3 as notified. As that record shows, there was disagreement as to whether the notified or 'alternative' proxy should be adopted. Despite preferring certain evidence and deciding to retain the notified proxy, the Decision records that:<sup>3</sup>

*"However, we acknowledge that in some limited circumstances the fertiliser proxy in the plan change as notified may not be appropriate."*

15 The Decision then records consideration of "*alternative means to accommodate the concerns of submitters*", a clear reference to the alternative pathway provisions.

16 Noting that:

16.1 the Respondent explicitly acknowledged that the fertiliser proxy could be a source of inaccuracy of Farm Portal results; but

16.2 the alternative consenting pathway is not available or able to be applied to irrigation schemes (see para [5] above),

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<sup>2</sup> See the Report and Recommendations of the Hearing Commissioners between paragraphs [390] and [399].

<sup>3</sup> At [399].

the Respondent has not considered the full implications (i.e. costs and benefits) of errors in the fertiliser proxy which are unable to be remedied through the alternative consenting pathway as required by sections 32 and 32AA.

**Questions of Law**

17 Barrhill alleges the errors set out give rise to the following questions of law:

17.1 Did the Respondent retain Method s28.3 as notified in circumstances where:

- (a) it had failed to carry out a full evaluation and further evaluation of the potential effects of the outcome of its proposal, as required by sections 32 and 32AA;
- (b) it did not have regard to evidence that discussed issues with the use of the fertiliser proxy in relation to irrigation schemes.

**RELIEF**

18 Barrhill submits that this Court should allow this appeal and make orders:

18.1 In the case of Policy 4.41C(b):

- (a) strike out that part of the policy reading "*and intensification on that land or change of land use occurred prior to 13 February 2016*" (being the unlawful element of the policy);
- (b) ensuring the application of Good Management Practice Loss Rate is on the basis of irrigated landuse where conversion to irrigation has occurred (and not the farming activity that has been undertaken over the last 5 year period);
- (c) remove reference or clarify the application of the criteria in clauses (a) to (c) of Rule 5.42B; and
- (d) such alternative and further relief as is necessary to give effect to the concerns raised.

18.2 In the case of Method s28.4 and Table s28:

- (a) reinstate the exception in Method s28 and Table s28

18.3 In the case of Method 28.3:

18.4 amendments to correct the fertiliser proxy and application of the alternative consenting pathway to irrigation schemes,

or, in the alternative, remit it to the Respondent for reconsideration on the basis of the findings of this Court;

and

18.5 For costs of and incidental to these proceedings.

Date: 20 July 2017

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Ben Williams / Allan Brent  
Counsel for Barrhill Chertsey Irrigation Limited

This notice is filed by **Benjamin Grant Williams**, solicitor for the appellant, of the firm Chapman Tripp. The address for service of the appellant is at the offices of Chapman Tripp, Level 5, 60 Cashel Street, Christchurch, 8013. Documents for service on the appellant may be delivered to that address or may be:

- (a) posted to the solicitor at PO Box 2510, Christchurch; or
- (b) left for the solicitor at a document exchange for direction to DX WP21035, Christchurch;
- (c) transmitted to the solicitor by facsimile to facsimile number (03) 365 4587; or
- (d) emailed to the solicitor by email at [ben.williams@chapmantripp.com](mailto:ben.williams@chapmantripp.com)