

In the High Court of New Zealand  
Christchurch Registry

CIV-

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*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:* **Dairy Holdings Limited**, New Zealand company  
No 1122216  
*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 Dairy Holdings 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)

**Chapman Tripp**  
T: +64 3 353 4130  
F: +64 3 365 4587

60 Cashel Street  
PO Box 2510, Christchurch 8140  
New Zealand

www.chapmantripp.com  
Auckland, Wellington,  
Christchurch



## **NOTICE OF APPEAL BY DAIRY HOLDINGS LIMITED**

**Take notice** that Dairy Holdings Limited (*DHL*) 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.

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

### **DECISION APPEALED**

- 1 DHL appeals against those parts of the Decision relating to:
  - 1.1 the inclusion of Policy 4.38A without amendment to accommodate existing but unimplemented resource consents;
  - 1.2 the inclusion of Policy 4.38AB;
  - 1.3 the failure in Policy 4.41C(b) to make ongoing provision for irrigation schemes holding existing resource consents;
  - 1.4 the revision of the 'irrigation proxies' in Method s28.4 and Table s28; and
  - 1.5 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 4.38A**

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

- 3 The Decisions version of Policy 4.38A provides (footnotes included):
  - 4.38A Within the Red, Orange, Green or Light Blue Nutrient Allocation Zones, only consider the granting of an application for resource consent to exceed the ~~nitrogen baseline~~<sup>33</sup> thresholds in Policy 4.37(a), Policy 4.38(a) or Policy 4.38AA(a) where:
    - (a) the nitrogen baseline has been lawfully exceeded prior to 13 February 2016 and the application contains evidence that

directly and specifically establishes that<sup>34</sup> the exceedance was lawful; and

(b) the nitrogen loss calculation remains below the lesser of the Good Management Practice Loss Rate or the nitrogen loss calculation that occurred in the four years prior to 13 February 2016.

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33 Cl16(2) of Schedule 1 to the RMA – alteration of minor effect

34 Fertiliser Association of New Zealand PC5 LWRP-1291A

- 4 One of the effects of Policy 4.38A is to limit development in Red, Orange, Green or Light Blue allocation zones to that which had been actually implemented prior to 13 February 2016. In a number of cases resource consents are held that permit intensification but which have not been fully implemented.
- 5 This includes, for example, DHL's Coryston property which is in an Orange Zone (for which limited intensification was able to occur under the operative version of the LWRP) and holds resource consent – but for which it appears further intensification will be either a prohibited or a non-complying activity. DHL considers such a position unjustified and unreasonable on the evidence before the Hearing Panel.
- 6 DHL asserts that in making the Decision as to the final text of Policy 4.38A, the Respondent came to a decision that:
  - 6.1 has not had regard to evidence discussing the presence of existing but unimplemented resource consents;
  - 6.2 it was not lawfully able to come to without making a further evaluation of the costs and benefits (including the potential limit on intensification that would occur under the policy) under sections 32 and 32AA of the Resource Management Act 1991 (RMA);
  - 6.3 is more restrictive than the National Policy Statement on Freshwater Management 2014, in circumstances where the Respondent has not adequately considered the costs and benefits of the restrictions in accordance with section 32 of the RMA;
  - 6.4 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'.

**Questions of law**

7 DHL 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 4.38A that fails to provide for activities authorised under existing resource consents in circumstances where:

- (a) it has not had sufficient regard to the evidence that addressed the existence of unimplemented resource consents;
- (b) the regard to the potential impacts on those who hold existing resource consents that have not been implemented has not been considered to a level of detail that corresponds to the scale of the potential effect as was required by sections 32 and 32AA;
- (c) it has failed to apply the legal test as to the 'environment' deriving from the *Hawthorn* line of authority;
- (d) it does not give effect to Part A of the National Policy Statement on Freshwater Management 2014 (as required by section 67(3) of the RMA).

**Policy 4.38AB**

**Background and alleged errors**

8 The Decisions version of Policy 4.38A provides (footnotes included):

4.38AB When considering any application for resource consent for the use of land for a farming activity, the consent authority ~~must-should~~<sup>32</sup> not disregard any adverse effect of the proposed activity on water quality on the basis that this Plan permits an activity with that effect.

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<sup>32</sup> Maungatahi Farms Ltd PC5 LWRP-2794A

9 The effect of the final wording of Policy 4.38AB is to remove (or at least give significant emphasis given the word "should") any regard being had to the permitted baseline.

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

- 10 DHL asserts that the decision to include Policy 4.38AB in PC 5 is:
- 10.1 *ultra vires* in that it is repugnant to section 104(2) of the RMA; and
  - 10.2 requires decision-makers always to place a policy before the statutory discretion conferred by section 104(2) of the RMA and so represents a decision to which it could not reasonably have come.

**Questions of law**

- 11 DHL alleges the errors set out give rise to the following questions of law:
- 11.1 Is the Council’s decision to include Policy 4.38AB consistent with section 104(2) of the RMA, a provision in the empowering enactment; and
  - 11.2 Is the Respondent’s decision to include Policy 4.38AB reasonable given its direction to decision-makers to place a policy before a statutory discretion.

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

**Background and alleged errors**

- 12 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

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<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

- 13 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 that which was occurring prior to 13 February 2016.
- 14 In the case of DHL it receives (or can receive) water from a number of irrigation schemes and in some instances has undertaken development over the last 4 year period. It appears that the renewal of any resource consent held by a scheme would not include:
  - 14.1 land where further irrigation development may occur after 13 February 2016 (even where such development can occur by virtue of existing resource consents); and
  - 14.2 for land that was developed in the 4 years preceding 13 February 2016, it would be limited to the "*farming activity carried out over the most recent four year period*". It is very unclear how that would apply where the use of land has changed following conversion to irrigation).
- 15 DHL asserts that in making the Decision as to the final text of Policy 4.41C(b), the Respondent came to a decision that:
  - 15.1 it came to on no evidence, or could not reasonably have come to on the evidence;
  - 15.2 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 the submissions that are cited as reasons for the relief;

- 15.3 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);
- 15.4 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>2</sup> (*Hawthorn*) as to the 'environment'; and
- 15.5 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**

- 16 DHL alleges the errors set out give rise to the following questions of law:
  - 16.1 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;
    - (c) there has been insufficient 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.

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<sup>2</sup> *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299.

- 16.2 Did the Respondent reach a decision on the wording of Policy 4.41C that does not give effect to the reasons for the Decision; and
- 16.3 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 such that it is a decision that could not have been reasonably reached.

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

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

- 17 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.
- 18 This exception had been included in the notified version of the plan change to recognise the specific efficiency constraints to those irrigation systems.
- 19 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.
- 20 There was no submission seeking that relief and all evidence appears to have supported the exception being retained (rather than deleted).
- 21 DHL asserts that in making the Decision as to the final text of Policy 4.41C(b), it is one that:
- 21.1 it came to on no evidence, or could not reasonably have come to on the evidence;
- 21.2 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;
- 21.3 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***

- 22 DHL alleges the errors set out give rise to the following questions of law:
- 22.1 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

**RELIEF**

- 23 DHL submits that this Court should allow this appeal and make orders:
- 23.1 Policy 4.38A is amended to provide that existing but unimplemented resource consents are treated on the same basis as those that have been implemented (such as that set out in the original DHL submission);
  - 23.2 Policy 4.38AB is deleted;
  - 23.3 Policy 4.41C(b) is amended to:
    - (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) ensure 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
  - 23.4 Method s28.4 and Table s28 are amended to reinstate the exception in Method s28 and Table s28;
  - 23.5 Such alternative and further relief as is necessary to give effect to the concerns raised; or
  - 23.6 In the alternative, remit it to the Respondent for reconsideration on the basis of the findings of this Court;
  - 23.7 For costs of and incidental to these proceedings.

Date: 20 July 2017

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Ben Williams / Allan Brent  
Counsel for Dairy Holdings 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)