

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV-2017-

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

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

BETWEEN **WAITAKI IRRIGATORS COLLECTIVE LIMITED**
a duly incorporated company having its registered office at Oamaru, Irrigators Collective

Appellant

AND **CANTERBURY REGIONAL COUNCIL**
a local authority constituted under the Local Authority Government Act 2002 having its principal office at Christchurch

Respondent

NOTICE OF APPEAL

Dated 20 July 2017

PP-309024-7-13-V2-e

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TO: The Registrar, High Court, Christchurch

And to: The Canterbury Regional Council

And to: The submitters specified in schedule 1 to this Notice of Appeal

TAKE NOTICE that the Appellant hereby appeals to the High Court against the decision of the Canterbury Regional Council (**the Respondent**) contained in the Report and Recommendations of the Hearing Commissioners on Proposed Plan Change 5 (**PC5**) to the Canterbury Land and Water Regional Plan dated 1 June 2017 and publicly notified on 24 June 2017 (**the Decision**) **UPON THE GROUNDS** that the Respondent made errors of law in parts of the Decision.

Part of Decision Appealed

1. That part of the decision to make amendments to Rule 15B.5.8.

Errors of Law

First alleged error of law – scope for amendments

2. The Respondent made amendments to Rule 15B.5.8 when there were no submissions seeking such amendments, in particular, the inclusion of new sub-clause (c), being additional conditions required to be met to attract permitted activity status.

Second alleged error of law – unreasonableness

3. The Respondent's decision to make amendments to Rule 15B.5.8, and in particular to include additional sub-clause (c), is unreasonable in that:
 - (a) It is based upon a conclusion without evidence or one to which on the evidence before it could not reasonably have come to; and
 - (b) It is based upon a logical fallacy and is clearly unsupportable.

Questions of Law

4. The questions of law to be resolved are:
- Q1. Did the Respondent err in law by making amendments identified in paragraph 2 above that were outside of its jurisdiction under clause 10 of the First Schedule of the RMA?
 - Q2. Was there evidence before the Respondent upon which it was reasonably capable of supporting the amendments made to Rule 15B.5.8 identified in paragraph 2 above?
 - Q3. Was the Respondent's decision to make the amendments to Rule 15B.5.8 unreasonable?

Grounds of Appeal

First alleged error of law – scope of amendments

- 5. The Appellant had sought an alternative framework be included within PC5 including an alternative rule to replace notified Rule 15B.5.8. The alternative rules sought by the Appellant were rejected by the Respondent, and instead a new sub-clause (c) was included.
- 6. This change was not sought by the Appellant in its original submission and nor was it sought by any other submitter.
- 7. Accordingly, the change went beyond the range of permissible amendments able to be made to the plan in terms of the Respondent's jurisdiction to make changes pursuant to clause 10, First Schedule of the Resource Management Act 1991.

Second alleged error of law – unreasonableness

- 8. Changes made to the Rule by the inclusion of new sub-clause (c) afford permitted activity status to the use of land for farming activity within the zones identified in clause (c), where the land is subject to a water permit that authorises the use of water for irrigation; and (relevantly):
 - (i) The permit was granted between 1 November 2009 and 13 February 2016; and

...

(iii) The permit is subject to conditions which require the preparation and implementation of a plan to mitigate the effects of the loss of nutrients to water and that plan specifies auditing requirements; and

(iv) The conditions of the permit have not been changed since 13 February 2016; ...

9. In relation to the farmers within the identified zones who hold permits granted between 1 November 2009 and 13 February 2016, many have been required to subsequently vary terms of their consents to address matters unrelated to water quality issues of the kind that address sub-clause (c)(iii).
10. These would include, but are not limited to, changes voluntarily made by the farmers to bring minimum flow and other environmental flow regime provisions into line with changes recently made operative to the Waitaki Catchment Water Allocation Regional Plan via Plan Change 3, inter alia.
11. Such changes may lead to the issue of derivative consents after 13 February 2016, such that permitted activity status under the rule will not apply to those farmers, despite the changes not altering conditions pertaining to the effects of the loss of nutrients to water contemplated by new sub-clause (c)(iii).
12. By way of further example, other changes that are not related to the purpose of the rule, but would be captured by it, might be for the purpose of giving effect to a transfer into the name of a new land-owning entity.
13. To the extent that permitted activity status is not available due to the issue of derivative consents being in effect in terms of water quality issues after 13 February 2016, this is an outcome that is not likely to have been foreseen by the Respondent when it made its decision and/or it is irrational or arbitrary.
14. The amended rule also leads to the arbitrary result that permitted activity status will only be available to some farmers supplied by a scheme or water supplier, and not others, despite all farmers being party to a water supply agreement controlling all of the land use activities subject to a requirement to prepare and operate in accordance with a Farm Environmental Management Plan that addresses nutrient management issues.

15. The rule as presently drafted would afford permitted activity status only where the use of land is managed in terms of nutrient management issues via conditions to water permits, while not extending to the use of farming within a scheme or where the farming activity is managed in accordance with a Farm Environmental Management Plan as a condition of the supply agreement.
16. The limited date range in Rule 15B.5.8(c)(i) means that amendments are not able to be sought to the existing water permits to introduce conditions requiring that operations be in accordance with a Farm Environmental Management Plan addressing nutrient management issues, because that would lead to the issue of a new 'derivative' consent after 13 February 2016 excluding permitted activity status in consequence.

Relief Sought

17. The Appellant seeks the following relief:
 - (1) That the appeal is allowed;
 - (2) A declaration that the Respondent erred in relation to the questions of law set out in this Notice of Appeal;
 - (3) That the Respondent's decisions are quashed;
 - (4) That the Respondent is directed to reconsider Plan Change 5 in light of the High Court's findings on the matters set out above;
 - (5) The costs of this appeal.

Dated this 20th day of July 2017.

P J Page for B Irving
Solicitor for Waitaki Irrigators Collective Limited

This Notice of Appeal is filed by **BRIDGET IRVING** for the Waitaki Irrigators Collective Limited, whose address for service is at the offices of Gallaway Cook Allan, Corner High and Princes Streets, Dunedin.

Documents for service on the Waitaki Irrigators Collective Limited may be left at the address for service or may be:

- (a) Posted to the solicitor at PO Box 143, Dunedin;
- (b) Transmitted to the solicitor by email to ;

and in either case, copied to Counsel Prudence Steven QC at pru@prusteven.co.nz.