

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

**I TE KŌTI MATUA O AOTEAROA  
ŌTAUTAHI ROHE**

**CIV-**

**Under** Environment Canterbury  
(Transitional Governance  
Arrangements) Act 2016

**In the Matter** of an appeal a decision of  
Environment Canterbury under  
section 25 of the Act

**Between** **MARK EDGAR MULLIGAN** of  
1421 Earl Road, Geraldine

**First Appellant**

*Continued on next page*

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**NOTICE OF APPEAL  
DATED: 10 DECEMBER 2021**

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**And** **IAN JAMES KERSE** of 204  
Silverton Road, Arundel

**Second Appellant**

**And** **NEIL SYDNEY KINGSTON** of  
131 Peel Forest Road, Arundel

**Third Appellant**

**And** **CANTERBURY REGIONAL  
COUNCIL KAUNIHERA  
TAIAO KI WAITAHA** a  
Regional Council having its  
registered address at 200  
Tuam Street Christchurch 8011

**Respondent**

**To:** The Registrar  
High Court  
Christchurch Registry

**And to:** Environment Canterbury

**TAKE NOTICE THAT** Mark Edgar Mulligan, Ian James Kerse, and Neil Sydney Kingston (the **Appellants**) will appeal to the High Court against a decision of Canterbury Regional Council Kaunihera Taiao ki Waitaha (**Environment Canterbury**) on provisions and matters raised in submissions on Plan Change 7 (**PC7**) to the Canterbury Land and Water Plan on the grounds that the decision errs in law and on the further grounds set out in this Notice of Appeal.

1. The decision was publicly notified on 20 November 2021.
2. The parts of the decision the Appellants are appealing are:
  - (a) The Decision to reject the relief requested by the Appellants in its entirety, including:
  - (b) Imposing pro-rata restrictions on Coopers Creek,
  - (c) Imposing a 50 litres per second (**l/s**) minimum flow on Coopers Creek, and
  - (d) Declining to apply an annual water take volume limit as an alternative to imposing a minimum flow,
  - (e) Declining the secondary relief of 10 l/s minimum flow for Coopers Creek<sup>1</sup> sought by the Appellants (together the **Decision**).
3. This appeal is made under section 25 of the Environment Canterbury (Transitional Governance Arrangements) Act 2016.

## **GROUNDINGS**

### **First Error**

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<sup>1</sup> Evidence in Chief of Keri Johnston dated 17 July 2020 at [70] and Appendix 2.

4. Environment Canterbury erred by applying the Orari Conjunctive Use Zone (**OCUZ**) principles and presumptions to the Appellants' takes tainting its conclusions on minimum flow.
5. Environment Canterbury wrongly found, contrary to the evidence, that all of the Appellants' takes were located within the OCUZ and therefore required management in accordance with that zone.<sup>2</sup>
6. The unchallenged evidence was that only one of the bores (K37/0684) from one of the takes (CRC192454) is located in the OCUZ as it is identified on the Planning Maps<sup>3</sup>.
7. Environment Canterbury applied the wrong threshold when assessing the evidence of Ms Johnston about interconnectedness; concluding it failed to meet the threshold of "*demonstrated through field testing in accordance with Schedule 9*"<sup>4</sup>.
8. Environment Canterbury predicated its conclusions "on the principles underpinning the OCUZ"<sup>5</sup>. In light of the evidence that only one of the takes was within the OCUZ this approach proceeded on a mistake of fact.

**Question of Law 1:**

9. *Did Environment Canterbury wrongly apply the OCUZ principles and presumptions to the Appellants' allocation to reach conclusions not available to a reasonable decision maker on the evidence?*

**Second Error**

10. Having identified interconnectedness between the Orari River and Coopers Creek<sup>6</sup> the Decision failed to manage the Coopers Creek flows consistently with the rest of the Orari Freshwater Management Unit (**FMU**).

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<sup>2</sup> Section 42A Reply Report at 24.17

<sup>3</sup> Canterbury Land and Water Regional Plan, Plan Change 7 – Canterbury Map Series, Map B – 083.

<sup>4</sup> Section 42A Reply Report at 24.18

<sup>5</sup> Section 42A Reply Report at 24.6

<sup>6</sup> Section 42A Reply Report at 24.7

11. The Decision relied on the Section 42A Reply Report. The Section 42A Reply Report accepted the calculation of observed Mean Annual Low Flow (MALF) for Coopers Creek carried out by the witness for the Appellants, being 28l/s. Evidence demonstrated naturalised MALF was in the order of 7% higher than observed MALF.
12. Environment Canterbury imposed a minimum flow for Coopers Creek of 50l/s, which equates to 167% of MALF.
13. By way of contrast, Environment Canterbury imposed a minimum flow of 500l/s up to 2040 and 900l/s after 2040 for the Orari River equating to 26% of MALF and 50% of MALF respectively.
14. Further Environment Canterbury imposed pro rata restrictions on water takes from Coopers Creek, a regime fundamentally different from the water sharing regime for the Orari River and other waterbodies within the Orari FMU<sup>7</sup>.

**Question of Law 2:**

15. *Is the decision unreasonable because the Decision fails to apply a consistent approach, without any explanation, to setting minimum flows by reference to a proportion of MALF?*

**Question of Law 3:**

16. *Is the decision unreasonable because the Decision fails to apply a consistent approach, without any explanation, to the imposition of restrictions on water takes for Coopers Creek compared with other waterbodies within the Orari FMU.*

**Question of Law 4:**

17. *Was the imposition of a 50l/s minimum flow with pro rata restrictions for Coopers Creek reasonably available to Environment Canterbury on the evidence?*

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<sup>7</sup> Report and Recommendations of the Hearing Commissioners Appendix B – Part 1 – PC7 to the LWRP Plan Change 7 Provisions – Inclusive of Recommended Amendments Table 14(h) on Page 159.

### Third Error

18. Environment Canterbury failed to assess the economic effects of the Decision on the Appellants as part of the analysis required by section 32 of the Resource Management Act 1991.
19. In the section 32 assessment in support of Plan Change 7, Environment Canterbury wrongly assessed the costs and benefits of the Plan Change with reference to the existing resource consents held by some (but not all) of the Appellants. It stated<sup>8</sup>:

*“While the reliability for these groundwater users will be reduced under the revised flow and allocation regime, the restrictions reflect the original groundwater permits held by the consent holders.”*

20. Environment Canterbury did not account for reliability effects on all relevant permit holders affected by the proposed minimum flow regime.
21. The ‘revised flow and allocation regime’ imposed does not reflect the existing consents conditions which do not have pro rata restrictions in the case of the two permits at issue and have no minimum flow conditions at all in the case of the other permit.
22. Neither the Section 42A report, the section 42A Reply Report nor the Decision (which relied on the section 42A reports) identified or correct this error.

#### Question of Law 5:

23. *Do the operative Plan provisions form the ‘status quo’ against which economic effects of the plan change options are to be assessed pursuant to section 32 of the Resource Management Act 1991?*

#### Question of Law 6

24. *Did Environment Canterbury consider irrelevant matters (being the existing resource consents subject to a different minimum flow and restriction regime) when assessing the Plan Change under section 32?*

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<sup>8</sup> Section 32 Report at 10.7.2

**Question of Law 7**

25. *Was the conclusion that the loss of reliability would reflect the level experienced under existing groundwater permits reasonably available on the evidence?*

**Question of Law 8**

26. *In the event the existing resource consents are relevant to the analysis of the Plan Change options, did Environment Canterbury fail to take into account relevant considerations (being the existing resource consents not subject to any minimum flow conditions) when evaluating Plan Change 7?*

**Fourth Error**

27. Environment Canterbury erred by declining the 10 l/s minimum flow secondary relief sought by the Appellants<sup>9</sup> without evaluation, or assessment relative to alternatives, or giving reasons.
28. In light of the accepted evidence regarding MALF of 28 l/s<sup>10</sup> the failure to analyse the secondary relief sought by the Appellants was unreasonable.
29. Based on the accepted evidence, and Environment Canterbury's conclusion that a minimum flow is appropriate<sup>11</sup> Environment Canterbury was required to assess the merits of the secondary relief proposed by the Appellants.
30. There was no analysis in the section 42A Reply Report of the proposed 10l/s minimum flow.

**Question of Law 9:**

31. *Did Environment Canterbury fail to consider the 10 l/s minimum flow secondary relief? If the answer to the above is 'yes', was this failure unreasonable in light of the evidence?*

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<sup>9</sup> Evidence in Chief of Keri Johnston dated 17 July 2020 at [70] and Appendix 2.

<sup>10</sup> Reply Report at 24.5

<sup>11</sup> Reply Report at 24.6

**Question of Law 10:**

32. *Was Environment Canterbury required to give reasons for not accepting the secondary relief sought of a 10l/s minimum flow, and if so, did it do so?*

**Fifth Error**

33. Environment Canterbury failed to perform a proper evaluation pursuant to section 32AA of the Resource Management Act 1991.
34. The sum total of the reasons given for rejecting the Appellants' submissions was as follows:

*[346] We received comprehensive technical evidence on Coopers Creek (listed in Table 14(h) of PC7) on behalf of submitters Mark Mulligan, Ian Kerse and Neil Kingston. We have carefully considered their evidence but we are not persuaded that the relief they seek is appropriate. We prefer the assessment of the CRC Officers that is set out in the Reply Report and the amendments they recommended to Table 14(h).*

35. Pursuant to the Resource Management Act 1991, First Schedule Clause 10(2)(a) and (ab) the Decision must:
- (a) provide reasons for rejecting the submission,
  - (b) undertake further evaluation of proposed changes, and
  - (c) provide sufficient detail in the Decision of that further evaluation.

**Question of Law 11:**

36. *Did Environment Canterbury fail to meet its obligations pursuant to the Resource Management Act 1991, First Schedule Clause 10(2)(a) and (ab)?*

**Sixth Error**

37. The cumulative effect of errors 1-5 above led Environment Canterbury to a conclusion it could not have reached but for these errors.



**Question of Law 12:**

38. *Did the cumulation of errors 1-5 above lead Environment Canterbury to a Decision that is manifestly unreasonable and/or wrong in law?*


**RELIEF**

39. The Appellants seek the following relief:

- (a) That the appeal be allowed, and the Decision of Environment Canterbury set aside; and
- (b) That the Court substitute its own determination under Rule 21.14(a) of the High Court Rules 2016; or
- (c) In the alternative, that the matter be referred back to Environment Canterbury for reconsideration in light of the findings of this Court;
- (d) Such further or other relief as may be appropriate; and
- (e) Costs of and incidental to these proceedings including disbursements.

40. This notice of appeal is filed in reliance on section 25 of the Environment Canterbury (Transitional Governance Arrangements) Act 2016, sections 300-307 of the Resource Management Act 1991, and Part 20 of the High Court Rules 2016.

Dated at Dunedin on 10 December 2021



B Irving / R Crawford

Solicitor for the Appellants

This document is filed by **BRIDGET IRVING** solicitor for the Appellants of the firm Gallaway Cook Allan. The solicitor to contact is Rebecca Ann Crawford. The address for service of the Appellants is care of Gallaway Cook Allan, Level 2, 123 Vogel Street, Dunedin 9016.

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

- (a) Posted to the solicitor at PO Box 143, Dunedin 9054; or
- (b) Left for the solicitor at a document exchange for direction to DX YP80023; or
- (c) Transmitted to the solicitor by facsimile to (03) 477 5564; or
- (d) Emailed to the solicitor at [bridget.iring@gallawaycookallan.co.nz](mailto:bridget.iring@gallawaycookallan.co.nz) and [rebecca.crawford@gallawaycookallan.co.nz](mailto:rebecca.crawford@gallawaycookallan.co.nz).