

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

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

**CIV-2021-409-565  
[2022] NZHC 2219**

UNDER the Environment Canterbury (Transitional  
Governance Arrangements) Act 2016

IN THE MATTER of an appeal under s 25 of the Act

BETWEEN SYNLAIT MILK LIMITED  
Appellant

AND CANTERBURY REGIONAL COUNCIL  
Respondent

Hearing: On the papers

Appearances: E J Chapman and J A Robinson for Appellant  
P A C Maw and I F Edwards for Respondent  
B G Williams and K I Jacomb for Fonterra Limited

Judgment: 1 September 2022

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**JUDGMENT OF DUNNINGHAM J**

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*This judgment was delivered by me on 1 September 2022 at 2.30 pm, pursuant to  
r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar  
Date:*

## **Introduction**

[1] This judgment considers the proposed settlement of an appeal by Synlait Milk Ltd (Synlait) against the decision of the Canterbury Regional Council (the Council) on Plan Change 7 to the Canterbury Land and Water Regional Plan (Plan Change 7).

[2] Synlait and the Council have reached agreement on how this appeal should be resolved. That agreement is supported by Fonterra Ltd, which is the only party to this appeal.<sup>1</sup>

[3] The parties seek the Court's approval of the proposed amendments to the Canterbury Land and Water Regional Plan (CLWRP) as negotiated, under the Court's power to substitute its decision for that of the Council. In support of the request that orders are made in accordance with the settlement negotiated, the parties have filed a detailed joint memorandum setting out:

- (a) the procedural background applicable to Plan Change 7;
- (b) the context to the issues raised in the appeal;
- (c) the issues raised in the appeal and the proposed settlement including, in particular, the alleged error of law that has occurred in relation to Policy 14.4.28 and Policy 14.4.41; and
- (d) the proposed amendments to Plan Change 7 to the CLWRP.

[4] This judgment draws largely from counsels' joint memorandum, which I accept as accurately setting out the issues arising and the relevant law. However, I also convened a telephone conference with the parties on 26 August 2022 to ensure my judgment accurately reflected the issue on appeal and the reasons for the parties consenting to the proposed amendment.

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<sup>1</sup> Under s 301 Resource Management Act 1991 (RMA).

## **Procedural background to Plan Change 7**

[5] Plan Change 7 was publicly notified on 20 July 2019.<sup>2</sup> There are three components to Plan Change 7; Parts A, B and C.

[6] For the purposes of this appeal, the relevant part of Plan Change 7 is Part B, which primarily relates to the Orari-Temuka-Opihi-Pareora sub-region (being section 14 of the CLWRP) and introduced or amended provisions to introduce catchment-specific freshwater outcomes, limits and provisions for the sub-region, and amended the region-wide provisions in the CLWRP insofar as they relate to the Orari-Temuka-Opihi-Pareora sub-region.

[7] Synlait lodged a submission on Plan Change 7 addressing all Parts. However, the subject matter of Synlait's appeal stems from its submission on Part B of Plan Change 7.

[8] The Council delegated the hearing of submissions in evidence on Plan Change 7 to independent hearing commissioners. The recommendations of those hearing commissioners were adopted by the Council as its decision on 17 November 2021 and subsequently publicly notified on 20 November 2021.

[9] Section 25 of the Environment Canterbury (Transitional Governance Arrangements) Act 2016 (ECan Act) restricts appeals to the High Court on questions of law only. On 10 December 2021, Synlait lodged an appeal in the High Court against the Council's decision pursuant to s 25 of the ECan Act. That appeal alleges the Council erred with respect to Policies 14.4.28 and 14.4.41 (the Policies) of Part B of Plan Change 7.

## **The appeal**

[10] The issues raised in the Synlait appeal relate to the policy framework introduced by Plan Change 7 as it applies to industrial nitrogen losses in two freshwater management units within the Orari-Temuka-Opihi-Pareora sub-region.

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<sup>2</sup> Pursuant to cl 5 of the first schedule of the RMA.

Those units are the Orari Freshwater Management Unit and the Timaru Freshwater Management Unit.

[11] Within those units, certain areas have been identified as High Nitrogen Concentration Areas, and Plan Change 7 sought to manage nitrogen losses in those areas by imposing stricter regulations on farming land use activities. For the Orari Freshwater Management Unit, that area is referred to as the Rangitata Orton High Nitrogen Concentration Area. For the Timaru Freshwater Management Unit, the area is referred to as the Levels Plain Nitrogen Concentration Area. Each of these areas is subject to a specific policy direction in regards to industrial nitrogen loss. For the first area, it is Policy 14.4.28 and for the second, it is Policy 14.4.41.

[12] These Policies, and associated provisions, introduce a framework intended to reduce nutrient leaching in those High Nitrogen Concentration Areas in order to avoid exceedances of the New Zealand Drinking Water Standards and of the national bottom line values under the National Policy Statement for Freshwater Management 2014.

[13] The Policies form part of a wider framework introduced through Plan Change 7 to reduce nutrient leaching in those High Nitrogen Concentration Areas from both industrial processes and farming land use activities. The level of reductions required under the Policies vary, depending on whether the point source discharge of nitrogen stems from an industrial or trade waste process or from a farming activity.

[14] The notified version of the Policies requires point source discharges of nitrogen from industrial or trade waste disposal activities to reduce nitrogen loads by 30 per cent below current consented rates by 1 January 2035 unless the point source discharge was from a farming activity that is subject to nitrogen loss reductions in Table 14(zc) of the CLWRP.

### **The appeal and the proposed settlement**

[15] The parties consider Synlait's appeal gives rise to a question of law, being whether the Council came to a conclusion which, on the evidence, it could not reasonably have come to because the recommended changes to the Policies do not reflect the reasoning given in the Council's decision.

[16] In its original submission on Plan Change 7, Synlait supported the two nitrogen reduction Policies in principle, but requested an amendment to the Policies to exempt discharges which are associated with a farming activity from the requirement to reduce nitrogen losses. The reasoning behind Synlait's submission, and the relief sought, was that any industry discharge applied as part of a farming activity should only be subject to the controls relating to the farming activity and not the industrial or trade waste controls as well.

[17] Having considered Synlait's submission and associated evidence, the Council reporting officers, in their s 42A Reply Report, recommended that an exemption for discharges associated with a farming activity would be appropriate and recommended changes to the wording of the Policies on that basis.

[18] The hearing commissioners recommended accepting, in part, Synlait's relief in respect of the Policies, and in doing so adopted the recommendations and reasons set out by the Council reporting officers in their s 42A report. However, the parties say the changes the hearing commissioners recommended to the wording of the Policies does not fully reflect the recommendations and reasons given in the s 42A Reply Report.

[19] The specific wording of the Policies recommended by the hearing commissioners, and adopted by the Council, departed from the wording proposed in s 42A Reply Report and was as follows:

**Rangitata Orton High Nitrogen Concentration Area**

14.4.28 Assist in achieving water quality targets in the Rangitata Orton High Nitrogen Concentration Area by requiring ~~in addition to Policy 14.419,~~ point source discharges of nitrogen from industrial or trade waste disposal activities to reduce nitrogen ~~losses~~-load by 30% below current consented rates by 1 January 2035, unless the point source discharge is from a farming activity that is subject to the stepped nitrogen loss reductions required by Table 14(zc).

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### Levels Plain High Nitrogen Concentration Area

14.4.41 Assist in achieving water quality targets in the Levels Plain High Nitrogen Concentration Area by requiring, in addition to Policy 14.4.19, point source discharges of nitrogen from industrial or trade waste disposal activities to reduce nitrogen losses-load by 30% below current consented rates by 1 January 2035 unless the point source discharge is from a farming activity that is subject to the stepped nitrogen loss reductions required by Table 14(zc).

(footnotes omitted)

[20] Synlait alleges the Council’s decision in relation to drafting the Policies does not align with its decision to adopt the recommendations and reasons specified by Council officers in the s 42A Reply Report. The s 42A Reply Report recommended the Policies say, “unless the point source discharge is *occurring as part of a farming activity* that is subject to the stepped nitrogen loss reductions in Table 14(zc)” rather than the language which the Commissioners recommended, which said, “unless the point source discharge is *from a farming activity* that is subject to the stepped nitrogen loss reductions in Table 14(zc)”. (emphasis added)

[21] The parties’ concern is that the wording adopted by the Commissioners is not as broad as those recommended by council officers, and which the Commissioners purported to adopt, and could lead to activities being caught by both sets of controls which was not intended.

[22] By way of example, Synlait owns a cheese factory in the Orari-Temuka-Opihi-Paereora sub-region and holds a resource consent authorising the discharge of whey by-product on farms within 30 kilometres of the factory. This includes areas in both the Rangitata Orton High Nitrogen Concentration Area and the Levels Plain High Nitrogen Concentration Area. The concern is that there could be a doubling up of the nitrogen reduction controls on such activities if the more confined wording of “from a farming activity” was retained. There is greater clarity if the broader wording of “occurring as part of a farming activity” is used.

### **Discussion**

[23] I accept that an inconsistency between the reasoning of the hearing’s panel and the provisions adopted would be an error of law in respect of which this Court has

jurisdiction. Here, as Mr Maw, for the Council, confirmed, the intention is only one or the other control would apply to a discharge. The change of wording proposed on appeal better achieves that goal and is consistent with the reasoning of the Commissioners, who accepted the recommendations of the Council officers.

[24] Under r 20.19 of the High Court Rules and ss 300 – 307 of the RMA (which apply with “necessary modifications” under the provisions of the ECan Act), this Court has the following jurisdiction. Where it considers an appeal should be allowed, it may:

- (a) make any decision it thinks should have been made;
- (b) direct the decision-maker –
  - (i) to rehear the proceedings concerned; or
  - (ii) to consider or determine (whether for the first time or again) any matters the Court directs; or
  - (iii) to enter judgment for any party to the proceedings the Court directs;
- (c) make any order the Court thinks just, including any order as to costs.

[25] In the present case, the parties request that the Court approve the proposed amendments to the policies in Plan Change 7 under its power to substitute its decision for that of the Council, rather than remit the matter back to the Council. This approach has been adopted in respect of other decisions and related to the CLWRP.<sup>3</sup>

[26] I agree that is an appropriate course of action.

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<sup>3</sup> *Combined Canterbury Provinces v Canterbury Regional Council* [2016] NZHC 1965 at [8] – [11]; and *Waitaki Irrigators Collective Ltd v Canterbury Regional Council* [2018] NZHC 2064 at [29]-31].

## **Outcome**

[27] I order that Policies 14.4.28 and 14.4.41 of Plan Change 7 to the Canterbury Land and Water Regional Plan both be amended by deleting the word “from” before the words “a farming activity” and replacing it with the words “occurring as part of”.

[28] The parties confirm there is no issue as to costs.

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