

BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 62

IN THE MATTER of the Resource Management Act 1991 (**the Act**) and of appeals pursuant to section 120 of the Act

BETWEEN SIMONS HILL STATION LIMITED AND
SIMONS PASS STATION LIMITED

(ENV-2012-CHC-00043)

SIMONS HILL STATION LIMITED

(ENV-2012-CHC-00044)

SIMONS PASS STATION LIMITED

(ENV-2012-CHC-00078)

Applicants and Appellants

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED

(ENV-2012-CHC-00045)

(ENV-2012-CHC-00046)

(ENV-2012-CHC-00079)

Appellants

AND CANTERBURY REGIONAL COUNCIL

Respondent

Hearing: at Christchurch on 22 February 2013.

Court: Environment Judge J E Borthwick
Sitting alone pursuant to section 279 of the Act



Appearances: K G Reid and N D Daines for Simons Hill Station Limited and
 Simons Pass Station Limited
 P Anderson and S Gepp for Royal Forest and Bird Protection
 Society of New Zealand Incorporated
 P J Milne for Mackenzie Guardians Incorporated
 M Dysart for Canterbury Regional Council

Date of Decision: 17 April 2013.

Date of Issue: 17 April 2013.

**DECISION OF THE ENVIRONMENT COURT
 ON PRELIMINARY ISSUES**

A: Pursuant to section 279 of the Resource Management Act 1991 the Environment Court finds, subject to effects, the proposed use of water for irrigating pasture for livestock other than sheep (non-dairy) and beef is within the scope of the applications.

B: The applicants are to file a reporting memorandum as to the status of any additional applications for resource consent lodged with the Regional and District Councils by **2 September 2013**.

C: Costs are reserved.

REASONS

Introduction

[1] The Royal Forest and Bird Protection Society of New Zealand Inc has raised an important jurisdictional issue – whether the Canterbury Regional Council when granting consent, erred in its finding that modifications made to the consent applications are within scope of the applications lodged. By way of relief Royal Forest and Bird would have the court find that the modifications are not within scope. The consequence of such a decision would be that the court could not uphold (at least in part) the Regional Council’s decision to grant consent.¹

¹ The notice of appeal pleads by way of relief that the court could require the amended application be re-notified. This relief is beyond the scope of the court’s jurisdiction.



[2] These appeals were filed in April 2012 and since then the parties have been engaged in mediation in an endeavour to settle their interests. The appeals did not settle and in December 2012 the jurisdictional issue, together with a second issue concerning additional resource consents that are required if the applicants convert part of their existing farm operation to dairying, were set down for hearing.

[3] The position of Royal Forest and Bird and Mackenzie Guardians Incorporated (a section 274 party) is that the consent applications were modified after their notification. However that position is not shared by the applicants, Simons Pass Station Limited and Simons Hill Station Limited, or the Regional Council, who say that the applications have not been modified.

[4] At the heart of the differences between the parties is the substance of the activity in relation to which consents are sought. In particular, whether the activity for which consents were lodged is to take and use water to irrigate pasture and crops *or* whether the activity is a partial dairy conversion. If it is the latter, then the timing of the additional applications for resource consent needed to authorise the conversion is also in issue. It is implicit from Royal Forest and Bird and Mackenzie Guardians' approach that they regard the activity as including a dairy conversion and that the applicants should have made the necessary applications for a dairy conversion at the same time as applying for water permits to take and use water to irrigate pasture for grazing.

Definitions

[5] The parties and deponents have used the term "dairying" for different purposes. In this decision, the term "dairying" means the use of resources (both natural and physical) for the purpose of milk production including its processing and storage. Where this involves a change from an existing farm operation this activity may also be referred to as a dairy conversion. This is distinct from the grazing of dairy livestock, such as milking cows and sheep, which are an example of stock type.

Issues

[6] Having heard from the parties at the last pre-hearing conference, the issues identified by the court for determination were as follows:



- (a) whether the activities authorised by the consents are outside the scope of the applications; and
- (b) whether it is permissible to amend the scope of an application on the basis that the amendments do not increase the effects of the activity on the environment (legal argument only).²

[7] At the preliminary hearing Royal Forest and Bird and Mackenzie Guardians' submissions recast the issues as follows:

(aa) whether the taking *and* use of water for the purpose of supporting a dairy farming operation or combined sheep and dairy farming operation are activities within the scope of the original applications as publicly notified;

(bb) whether it was permissible for the Consent Authority to accept amendments of the applications at the first instance hearing, and to specifically grant consent for the taking *and* use of water for irrigation for the purpose of supporting dairy farming or combined sheep and dairy farming.

[8] Implicit in their approach is that the activity for which consents are sought includes dairying. In contrast, the applicants and the Regional Council argue that the activity for which consents are sought is the irrigation of pasture and crops. As a consequence the parties do not address the same issues in their submissions in that they have a different understanding of the activity in relation to which consents are sought.

The application for resource consent and Assessment of Environmental Effects

[9] These appeals concern four out of a group of 104 applications for water permits and associated other consents in the Upper Waitaki catchment that were heard and decided together.³

[10] The applications lodged during February 2006 by Simons Hill Station Ltd and Simons Pass Station Ltd would authorise the taking *and* use of water from either Lake

² Minutes dated 23 January 2013 and 15 February 2013.

³ Report and Decision of Hearing Commissioners, *Part A – Catchment Wide Issues*.



Pukaki or the Pukaki Canal. These applications were considered under the Proposed Canterbury Natural Resources Regional Plan (**PNRRP**) and the Transitional Regional Plan.⁴

[11] The applications lodged by Simons Hill Station Ltd and Simons Pass Station Ltd in December 2007 would authorise the taking *and* use of water from the Tekapo Stilling Basin. These applications were considered in relation to the Waitaki Catchment Water Allocation Regional Plan and the Transitional Regional Plan.

[12] The applicants applied for water permits and, in the case of the proposed take of water from the Tekapo Stilling Basin, a discharge permit (water to water). From the Hearing Commissioners' decisions it appears that the status of the applications varied; being either discretionary or non-complying activities.

[13] More particularly, the applications describe the activity for which consents were sought as either "A water permit to take *and* use up to [litres/second specified] of water for spray irrigation of pasture and crops, for stock water and domestic use ..." or "A water permit to take up to [litres/second specified] of water for spray irrigation of pasture and crops, for stock water and domestic use ...". Nothing arises in the differences in the descriptions.

[14] Under the heading *Description of Proposed Activity* in the Assessment of Environmental Effects (**AEE**) attached to each application, the description of the activity is expanded upon as follows (relevantly):

To grow pasture and crops for livestock farming, the applicant proposes to develop and irrigate 2,400 ha within the shaded irrigated area located northeast of the Pukaki River, as shown in Appendix A.

[15] The proposed land uses for the irrigation water are described thus:



⁴ At paragraph [10] of her affidavit, Ms Sullivan states that the consent authority wrongly considered these applications under the Waitaki Regional Plan, but I am not told that anything rides on the outcome of this preliminary legal issue or indeed the substantive appeal if that is the case.

Irrigation will allow new pasture and crops to be planted and provides the potential to produce pasture and crops at a similar level to other areas in Canterbury. The initial plan is to graze sheep and beef cattle as a fattening unit with the possibility of other stock types introduced at a later date. Stock numbers and types will vary according to the time of year and the economics of different enterprise type. Stocking rates are estimated to reach 12 to 15su/ha.

[16] The four applications are framed in similar terms. The key parameters specified are the annual volume and rate of take; the location of the land to be irrigated; the type of irrigation infrastructure; stocking rate and finally an assessment of the efficient and reasonable use of water. The effects of the use of irrigation water are described and quantified in relation to the rate of vertical drainage; effects on surface water and groundwater; nitrate concentration arising from the change in land use and changes to nitrate-nitrogen concentrations in Lake Benmore. In the 2007 consent applications an effect on natural character, landscape and visual amenity values is noted with the advice that the applicants are to engage an expert to report on these matters.

The grant of consent

[17] The applicants and Regional Council submit that the consents granted are subject to conditions based on the key parameters and quantified effects noted in [16] above.

[18] Water quality is of moment in these proceedings and the Regional Council advises that each consent is subject to a nutrient budget; essentially a discharge allowance per property.⁵ The nutrient budget applies to both point and non-point discharges and, the Regional Council says, the budget includes consented and non-consented activities.⁶ Thus the applicant has a nutrient budget that is to apply irrespective of the kind of farming that they carry out. Importantly, the inputs to calculate the nutrient budget in the applications have not changed.⁷ At least in terms of nutrient outputs the applications limit future land use activities for which irrigation water may be applied.⁸

[19] The Commissioners granted consent to take *and* use water for (relevantly) the spray irrigation of pasture and crops. Key conditions of consent state where water is to

⁵ Transcript at 112 and submission at [44].

⁶ Transcript at 112.

⁷ Transcript at 114.



be taken (or, as the case may be, diverted) and that it is only to be used for the spray irrigation of 2,400 hectares per irrigation season.

The Law

Principles derived from case law

[20] The relevant case law addressed by the parties is uncontroversial; a consent authority has no jurisdiction to grant a consent which extends beyond the ambit of the consent application: *Shell Oil New Zealand Ltd v Porirua City Council*.⁹ Every resource consent is limited by the terms of the original application and any documents incorporated in it by reference which defines the scope of the consent authority's jurisdiction: *Darroch v Whangarei District Council*.¹⁰ A consent which purports to grant more than what is sought in the application is ultra vires to that extent: *Manners-Wood v Queenstown Lakes District Council*.¹¹

[21] When considering what was sought it is the substance or gist of the application that counts. Regard must be had to the circumstances that existed at the time the application was made and relevant also is the basis that the application was received and dealt with by the consent authority: *Sutton v Moule*.¹²

[22] As to how much detail must be contained in an application and AEE the Planning Tribunal in *AFFCO NZ Ltd v Far North District Council* held:¹³

From those provisions we infer that it is intended that the proposed activity the subject of the resource consent application is to be described with sufficient particularity to enable those various functions to be performed. The proposed activity has to be described in detail sufficient to enable the effects of carrying it on to be assessed in the way described by the Fourth Schedule. The description is intended to include whatever information is required for a consent authority to understand its nature and the effects that it would have on the environment. The description is expected to be full enough that a would-be submitter could give reasons for a submission about it and state the general nature of conditions sought.

⁸ CRC Closing submissions at [19].

⁹ CA 57/05, 19 May 2005 at [5].

¹⁰ Planning Tribunal, Judge Sheppard, A18/93 at [27].

¹¹ Environment Court Judge Dwyer, W077/07 at [22].

¹² Court of Appeal (1992) 2 NZRMA 41.

¹³ [1994] NZRMA 224 at 14.



The application needs to have such particulars that the consent authority would need to be able to have regard to the effects of allowing the activity, and to decide what conditions to impose to avoid, remedy or mitigate adverse effects without abdicating from its duty by postponing consideration of details or delegating them to officials. (The limits on delegation were authoritatively described in *Turner v Wilson* [1971] NZLR 833; 4 NZTPA 104 (CA).)

[23] A number of cases have affirmed the principle that the end-use of a resource consent is relevant when considering the effects of the activity on the environment. Judge Sheppard sets out a summary of cases in *Beadle v Minister of Corrections*.¹⁴

[24] An application may be amended following notification, however the amendments cannot alter the substance of the application: *Waitakere City Council v Estate Homes Ltd*.¹⁵ The Supreme Court decision was the latest in a series of cases which affirm the proposition that amendments are permissible if they are within the scope defined by the original application. The most well known of these being the decision of *Darroch v Whangarei District Council* where Judge Sheppard stated:

... In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required.

[25] In *Haslam v Selwyn District Council* (1993) 2 NZRMA 628 Judge Sheppard explained the rationale for this principle:

The Resource Management Act provides procedures for application for resource consent that are designed to enable all persons who wish to take part to do so. The combination of the requirements for individual notice to those directly affected, general public notice, access to the application and accompanying information, and freedom to make submissions and be heard on them assure that result. In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submission.



Environment Court Judge Sheppard, A74/02 8 April 2002.
[2006] NZSC 112.

Plainly there needs to be a limit on the extent of the amendments that can be made without re-advertising or requiring a fresh application, otherwise those who might have taken part had they known of the amendment might be excluded.

The Regional Council's processing of the applications

[26] The Regional Council filed an affidavit from Ms B Sullivan. Ms Sullivan is the Council's Principal Consents Advisor and was the Project Manager for the Waitaki group of consent applications at the time those applications were filed. In her affidavit she sets out the relevant background to the lodgment and hearing of the applications for resource consent.¹⁶ The Regional Council made certain requests for further information pursuant to section 92 and those requests were responded to prior to notification. More requests for information followed notification.

[27] The Regional Council did not invoke section 88 and return the applications on the grounds that they were incomplete. Instead it receipted the applications for lodgment.

[28] In each case the resource consent applications were notified in the following terms:

- "... crops and pasture, for stock water and domestic purposes ..."
- or
- "... pasture and crops for grazing stock, and for domestic and stockwater purposes ..."¹⁷

[29] Ms Sullivan reproduced some of the public notices for the 104 water permits applications. In doing so she highlights examples where milking dairy cows have been excluded from the public notices of consent applications.



¹⁶ Dated 25 January 2013.

¹⁷ Affidavit of B Sullivan at [40].

Other consents required

[30] The applications did not indicate, as they were required to do under the Resource Management (Forms, Fees, and Procedure) Regulations 2003, that additional consents were needed from the District Council to give effect to the proposed taking and use of water to irrigate pasture and crops. Furthermore, there are a raft of other consents required if the applicants are intent on pursuing dairying, including Regional Council permits authorising the use of water to wash-down dairy sheds and secondly, the discharge of effluent through centre pivots, as well as consents from the District Council.

Request for further information

[31] Ms Sullivan deposed that given uncertainty around the timing and outcomes of consent hearings for water permits within the Upper Waitaki Catchment, applicants generally did not want to finalise decisions around additional resource consent applications that may be required to give effect to their proposals. Commonly further consents were required from both the Mackenzie District Council and the Regional Council, but because of the uncertainty over timing and outcome, many applicants did not pursue these until they knew how much water was consented and the area available to irrigate.¹⁸

[32] The Regional Council made requests for further information prior to the notification of these applications. The requests include an assessment of the effects on landscape values and water quality, both farm specific and cumulative on a catchment wide basis.¹⁹ The applicants were not in a position to respond to the request for landscape and water quality assessments prior to notification, advising instead that steps were being taken to provide this information and that evidence would be called on both topics at the Regional Council hearing.

[33] A request for information concerning the use of water for stock water and for domestic purposes in relation to two consent applications was responded to by the applicants advising that the water required would be in addition to the take sought.



Affidavit of B Sullivan at [24].
Affidavit of B Sullivan at [27] and [29].

Calculations for stock water are based on 18 stock units per hectare over 2,400 hectares based on rising one year heifers and rising two year heifers.²⁰

[34] In her affidavit Ms Sullivan does not explain what she means by the term “dairying” and she appears to use the term in two different ways. She referred to “dairying” in the context of a dairy conversion when she deposed that “[u]ntil the details of a dairying operation were confirmed, the Council would have been unable to determine whether or not a discharge permit, or any additional permits, would be required”.²¹ Ms Sullivan also referred to “dairying” meaning dairy livestock when she deposed that the Regional Council’s practice was that unless “dairying” was specifically excluded by an applicant, it would require an applicant to consider the effects of the use of water for dairying on water quality prior to notification. Typically applicants made decisions on the farming operation either prior to or during the consent hearing.²²

Affidavit of Mr P L Glasson

[35] The applicants have filed an affidavit from project manager Mr P L Glasson. He was responsible for providing further information to the Regional Council requested under section 92 of the Act. In his communications with the Regional Council he affirmed that “dairying” was included within the proposal and that the applicants wished to maintain flexibility as to the land uses to be pursued.²³ Again, no explanation is offered by the deponent as to what he means by “dairying”. No copies of any written communication with the Regional Council were appended to his affidavit. The Regional Council has subsequently advised that it has no record of any communications prior to notification of the application.²⁴ As the relevant communications are those prior to notification (and therefore available to members of the public interested in making a submission) I am unable to place any weight on his deposition.

Affidavit of Ms J R Miller

[36] For completeness I record that an affidavit from Ms J R Miller attaches a discharge permit granted to D R McIntyre. The affidavit was not referred to by any



²⁰ Aqualinc letters dated 4 June 2008.

²¹ Affidavit of B Sullivan at [37].

²² Affidavit of B Sullivan at [44].

²³ Affidavit of Peter Lloyd Glasson dated 8 February 2013.

²⁴ Affidavit of L Hull dated 18 March 2013.

party and as I am not sure of its relevance to these proceedings, I place no weight on the same.

Legal Submissions

[37] The Regional Council summarised the opposing views of the parties this way:

- (a) either dairy livestock is outside the scope of the applications as it was not specified in the applications and AEEs; or
- (b) the scope of the applications includes the concept of grazing by stock of any kind – subject to the limits specified in the application. Thus it is reasonable to conclude that stock other than sheep and beef may be introduced over the 35 year duration of the consent.

It is important to record that this summary reflects the applicant's and Regional Council's understanding of the preliminary issues to be determined. As noted earlier, Royal Forest and Bird and Mackenzie Guardians Inc addressed different issues in their submissions.

[38] The Regional Council's position is that where an application is to take *and* use water for spray irrigation of pasture and that application does not exclude livestock by type, the Regional Council assumes no livestock is excluded and processes the application on this basis. These applications did not exclude dairy livestock but instead stated that while the applicants' initial plan is to graze sheep and beef cattle as a fattening unit other stock types may be introduced in the future. The Regional Council accepted and processed the application on the basis that water required for spray irrigation of pasture for grazing and that the grazing of dairy livestock was not excluded.

[39] Counsel for the Regional Council submits that the context in which these applications were made cannot be ignored. The methods in PNRRP to manage water quantity had unraveled²⁵ and with the prospect of the resource being fully or over-allocated most applicants focused their efforts in securing a water permit authorising the take of water ahead of activities in relation to its use.²⁶ Prior to notification the Regional

²⁵ Transcript at 112, and a reference to rule WQN9 in the PNRRP.

²⁶ Transcript at 115 and also the Affidavit of B Sullivan at [35].



Council says that where irrigation was proposed it had a broad understanding of the intended land use activities as many applicants assessed the likely volume of water required based on a range of farming activities that could be undertaken over the next 35 years. With a large number of applications having been placed on hold for several years it was not unusual for the range of land use activities to be confirmed immediately before or during the Regional Council hearing.

[40] The Regional Council says requiring applicants to particularise livestock for a 35 year consent would prevent consent holders from diversifying their farm operation (at least without a change of conditions), and consequently their ability to respond to change in the market and to innovate.²⁷

[41] Counsel for the applicants, Mr K Reid, submits “dairying” – I understand him to mean dairy livestock – is within the ambit of the applications lodged with the Regional Council and, if the court accepts that submission, then it follows that the applications have not been amended.²⁸ Citing the Court of Appeal decision of *Sutton v Moule*, the “substance and gist” of the applications was that water could be used for a range of pastoral activities, but that at the time the applications were lodged no decision had been made as to the eventual land use. The estimate of stocking rates is consistent with the use of land for dairying.²⁹ As for the circumstances that existed at the time the applications were lodged, the applicants say those circumstances are relevant to this preliminary jurisdictional issue and agree with the background set out in Ms Sullivan’s affidavit.³⁰ Finally, Mr Reid submits, the manner by which the Regional Council dealt with the applications is also relevant. The Regional Council did not seek further particulars about the land uses of irrigation water. The requests for further information are evidence of the Regional Council’s working assumption that dairy livestock was included.³¹



²⁷ Transcript at 126.

²⁸ Applicant’s submissions at [4].

²⁹ Applicant’s submissions at [21].

³⁰ Applicant’s submissions at [24-26].

³¹ Applicant’s submissions at [27-35].

[42] Royal Forest and Bird and Mackenzie Guardians focus their submission on the applications and supporting AEEs and what a reasonable member of the public would have understood from them.

[43] On the scope issue Royal Forest and Bird and Mackenzie Guardians submit:

- (a) actual land uses that would result if consent was granted needed to be specified in the applications because:
 - (i) the Regional Council (as the consent authority) when deciding whether to grant consents is required to consider the reasonably foreseeable effects of the activity;³²
 - (ii) the applications and their AEEs limited consideration of effects to irrigated sheep and beef and cropping;
 - (iii) the Regional Council, as consent authority, therefore would not have considered the reasonably foreseeable effects of dairying.³³

- (b) the information provided in the applications was deficient in that it did not provide information about a “dairying operation” in the following respects:
 - (i) it does not identify other consents that are required;
 - (ii) there is no assessment of effects for consents which have yet to be applied for;
 - (iii) the PNRRP requires the land use to be specified in an application for resource consent, and dairying was not mentioned;
 - (iv) the AEEs do not describe the dairying even in general terms; the assessments of effects are based on irrigated sheep and beef activities;
 - (v) the applications do not describe the infrastructure required for a dairying operation.³⁴

- (c) if the applications and AEEs were intended to cover “dairy cows” then it is deficient in respect of the information provided. So much so, that the



³² Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [14].

³³ Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [13-15].

³⁴ Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [16-19].

applications are a nullity at least in respect of that particular “activity”.

The applications:

- (i) do not identify other consents that are required;
 - (ii) do not describe the infrastructure required for a dairying operation;
 - (iii) fail to assess the effects of dairying.
- (d) the substance and gist of the applications is that irrigation was to be used to intensify an existing sheep and beef operation:
- (i) reference to other stock types being introduced is unsupported by an assessment of the effects of those other stock types.³⁵
- (e) it would not be clear to an ordinary member of the public that the application was intended to cover dairying and it is plausible that other persons may have submitted on the applications had they been aware of the same.³⁶

[44] Royal Forest and Bird and Mackenzie Guardians highlight the fact that nowhere is dairying mentioned in the applications. The effects on water quality are based on a change in the applicants’ existing land use activities to irrigated sheep and beef. They submit that the reference to heifers in the applicants’ response to the Regional Council’s request for information as to stock-water requirements would not have been sufficient for an objective reader to conclude that the applicants intend carrying out a dairying operation.³⁷ It is plausible that other persons may have lodged a submission on the applications and appealed the grant if they had appreciated that the original application could “potentially support a dairy farming operation”. A person reading the application and AEE could not have apprehended that the application could extend to “an activity facilitating the conversion of these properties to dairy farming”.³⁸ Ultimately, Royal Forest and Bird and Mackenzie Guardians argue that the use of water for dairying is a “significant change in land use, and is not within the substance of the applications”.³⁹



³⁵ Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [25-28].

³⁶ Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [29-32].

³⁷ Royal Forest and Bird submissions in reply at [8].

³⁸ Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [3(b)(iv)].

³⁹ Joint Submissions Royal Forest and Bird and Mackenzie Guardians at [3].

Discussion and findings

[45] While the parties addressed extensively the case law around the scope of consent applications and permissible modifications to the same, the principles derived are of little assistance without a proper understanding of the activity or proposal for which consents are sought.

[46] Unless expressly allowed by a rule in a plan or a resource consent no person may take, use, dam, or divert any water (other than open coastal water); *per* section 14(1) and (2).⁴⁰ In regulations to the Act, a form is prescribed for an application for resource consent.⁴¹ The form requires an applicant to identify the types of resource consents sought; to describe the *activity* to which the application relates and state whether additional consents are required. The form is to be accompanied by an assessment of environmental effects which is prepared in accordance with the Fourth Schedule of the Act. In the Fourth Schedule and elsewhere in the Act, *activity* and *proposal* appear to be used interchangeably.⁴²

Issue: what is the activity for which consents are sought?

[47] I have not been assisted in my consideration of the competing legal arguments by evidence addressing the relevant plans and the rules requiring consent for activities caught by the restrictions of section 14 of the Act. While the applicants sought and were granted consents “to take *and* use” water, it is not clear to me whether “use” means “use of water” as per section 14 of the Act or something else. And related to this whether separate consents are required for the taking and the use of water. From the evidence adduced, it seems likely that “use” of water is concerned with the purpose for which the water is to be taken (i.e. irrigation of pasture and crops) and the management of effects arising from the irrigation of land.

[48] Mr Reid submits that no consent is required to allow a particular farming system.⁴³ The purport of this submission is not explained, but I take him to mean that consent is not required to enable farming of any particular type of livestock. In that regard none of the deponents referred to rules in a plan requiring consent for certain



⁴⁰ Water does not include water in any form while in any pipe, tank, or cistern.

⁴¹ Resource Management (Forms, Fees, and Procedure) Regulations 2003, Form 9.

⁴² For example “activity” is used in s92 whereas “proposal” is used in ss 102 and 103.

livestock, although counsel for Royal Forest and Bird noted that there are rules in the District Plan regulating the traffic effects of pastoral intensification. Furthermore, the parties do not refer to any rules requiring permits for discharges, such as effluent from grazing stock or the application of nitrates-nitrogen to support dairy farming. In the absence of evidence I surmise that at the time the applications were lodged the Regional Plan sought to control the effects of the discharge of contaminants (somehow) through a water permit and that this was the purpose of requiring information be provided in the applications as to the intended land uses. In support of this, Ms Dysart's advice was that the water permits include a condition setting a nutrient budget for point and non-point source discharges for the two properties concerned.⁴⁴

[49] Standing back, and considering the applications and AEEs in the round, I have asked myself – what is the activity for which the applicants are seeking consent? The activity for which consent is sought is the taking of water. The purpose of taking water (aka the Regional Council's "use"?) is to irrigate pasture and grow crops. Thus the activity is the combined taking of water for the purpose of growing pasture and crops.

[50] I find on balance that it would have been clear to an ordinary member of the public who was considering making a submission that the applications did not constrain the use of water for spray irrigation of pasture to grazing sheep or beef. The identity of stock type may be germane to effects on the environment including those on water quantity and quality. It will be a matter for evidence at the substantive hearing whether the effects arising in relation to dairy livestock (sheep or cows) is the same in nature and/or extent as those quantified for irrigated sheep and beef.

[51] Over the duration of a 35 year consent, it is easy to envisage that farming practices will change and I find that it is desirable that a consent holder be able to respond within the parameters of the application and grant.

[52] As to whether it was necessary to specify that the take *and* use of water was in relation to dairying, it is my tentative conclusion (in the absence of evidence as to controls over livestock in the District or Regional Plan or as to the vires of rules or

⁴³ Applicants' submissions at [54].

⁴⁴ Transcript at 112-113.



conditions managing the discharge/effects of contaminants through a water permit) that there is no requirement either under the Act or any statutory planning instrument, to apply for consents associated with a future dairy conversion proposal. If and when the applicants propose a dairy conversion and seek consents enabling the same, the merits of this new activity will take into consideration the effects on the environment of the consented activities together with the effects of any additional consents sought; per *Hawthorn Estates Ltd Queenstown Lakes District Council*.⁴⁵

[53] I conclude that it was sufficient to describe the activity by specifying only that consents are required for the irrigation of pasture for grazing and cropping and by describing the activity's effects.

Other matters

[54] Finally, the receipt of the applications for lodgment and subsequent processing by the Regional Council is relevant. Ms Sullivan deposed that at the time the applications were lodged the Regional Council generally required an assessment of the use of water on water quality for dairying applications. Unless "dairying" was excluded from an application, the effects of the use of dairying (in context I understand Ms Sullivan to mean dairy livestock), on water quality was required prior to notification. However, in the case of the Upper Waitaki Catchment all applicants, irrespective of the proposed use of water, were requested to assess water quality for both their own activities and on a catchment wide basis.⁴⁶ As noted above, Ms Sullivan also deposed that "[u]ntil the details of a dairying operation were confirmed, the Council would have been unable to determine whether or not a discharge permit, or any additional permits, would be required."⁴⁷ There is nothing to suggest from this, that Regional Council has dealt with the applications as if they were a proposal for a dairy conversion – rather the converse is true and unless the applicants confirmed they were intending upon a *dairy operation* the Regional Council was not in a position to identify whether additional consents were required. The Regional Council's focus has been and remains on water quantity and quality and landscape effects as these may be influenced by different stock types. This is consistent with Ms Dysart's advice that in the absence of an application



⁴⁵ [2006] NZRMA 424.

⁴⁶ Affidavit of B Sullivan at [28, 36, 44].

⁴⁷ Affidavit of B Sullivan at [37].

for consents for a dairying proposal the Regional Council is not in a position to have an informed view about the application of either section 102 or for that matter, section 103.⁴⁸

[55] That said, if the applicants cannot grow pasture without additional consents for other activities (such as the clearance of indigenous vegetation and earthworks and tracking) – then to this extent they can be rightly criticised for not having at least identified the need for these consents in their water permit applications as they were required to do. The applicants have recently acknowledged that consents required include land use activities which are inter-related with these water permits.⁴⁹ Furthermore, they now seek an adjournment of these proceedings sine die so that the consents required for a dairy conversion may be lodged with the relevant consent authority.

Issue: Did the Commissioners modify the consent applications?

[56] In their various Notices of Appeal Royal Forest and Bird plead, inter alia, that the Commissioners modified the applications by providing for a farming system to include dairy cows and secondly, by allowing the use of water to wash-down dairy sheds. These submissions are in line with their contention that it was necessary that the applicants specify in their applications that the consents are required as part of a proposal to convert the existing farm operation to dairying.

[57] As to the submission made in relation to the use of wash-down water, this pleading is simply incorrect. The Commissioners decline to consider the use of water for wash-down having been provided no evidence on this matter. Secondly, the Commissioners list the modifications made to the applications – dairying is not among them. Their consideration of dairy livestock is limited to any change in the scope of effects quantified in the applications; put another way the consideration is to whether the effects arising in relation to the use of water for irrigation of pasture and crops is sensitive to livestock type. This is clear from the finding that:

⁴⁸ Section 103 contains a presumption that where 2 or more applications for resource consents in relation to the same proposal have been made to a consent authority, and that consent authority has decided to hear the applications, the consent authority shall hear and decide those applications together unless certain circumstances apply.

⁴⁹ Applicants' memorandum dated 21 January 2013.



In relation to dairy cows, for reasons which will be evidence [sic] in the decision, we have concluded that any change providing for dairy cows on the applications sites will not result in any additional effect that would give rise to any scope issues.⁵⁰

Application to adjourn proceedings sine die

[58] These applications were lodged with the Regional Council in 2006. It is not clear why the applicants have yet to lodge applications for all of the additional consents required to enable the take and use of water to irrigate pasture and crops.

[59] In the circumstances I am not prepared to adjourn the proceedings sine die; judicial oversight of the proceedings is needed. Instead I adjourn the proceedings to **2 September 2013**, at which time the applicants are to file and serve a reporting memorandum detailing the lodgment of any additional consents applications, identifying the activity in relation to which the consent applications are made and finally, the timeline to process the applications by the relevant consent authorities.

Outcome

[60] Subject to effects I find that the proposed use of water for irrigating pasture for livestock other than sheep (non-dairy) and beef is within the scope of the applications. It follows that the applications were not modified following notification to enable a dairy conversion.

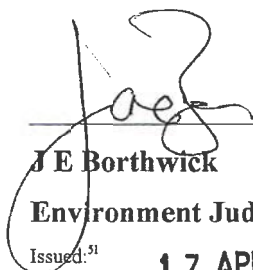
[61] Given this, it is not necessary to consider the second issue - whether it is permissible to amend the scope of an application on the basis that the amendments do not increase the effects of the activity.



⁵⁰ These statements appear in both decisions at [2.21] and [2.19] respectively.

[62] I will make directions about the issuing of a reporting memorandum in terms of paragraph 59 of this decision.

For the court:



J E Borthwick
Environment Judge
Issued:⁵¹ **17 APR 2013**



⁵¹ \\JEB\DD\Simons Pass Draft Decision April 2013.doc