IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 82/2022
[2023] NZSC 153

BETWEEN	CLOUD OCEAN WATER LIMITED Appellant
AND	AOTEAROA WATER ACTION INCORPORATED First Respondent
	CANTERBURY REGIONAL COUNCIL Second Respondent
	SOUTHRIDGE HOLDINGS LIMITED Third Respondent

Hearing:	22–23 March 2023
Further Submissions:	28 March 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and French JJ
Counsel:	A C Limmer, J R King and S A Chidgey for Appellant D A C Bullock and S G T Ma Ching for First Respondent P A C Maw and L F de Latour for Second Respondent D C Caldwell and J R Pullar for Third Respondent J M Appleyard and R E Robilliard for Te Ngāi Tūāhuriri Rūnanga Inc as Intervener
Judgment:	20 November 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs of $35,000 plus usual disbursements.

C There is no order as to costs in favour of or against the second or third respondent or the Intervener.

REASONS

	Para No
Winkelmann CJ, Glazebrook, O'Regan and French JJ	[1]
Williams J	[88]

WINKELMANN CJ, GLAZEBROOK, O'REGAN AND FRENCH JJ
(Given by O'Regan J)

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Introduction

[1] This appeal addresses issues arising when a resource consent to take and use groundwater is transferred to a new owner who wishes to use the allocated water for a different purpose from the use permitted under the consent. It involves interpretation of the provisions of the Canterbury Land and Water Regional Plan (LWRP). We will deal with this in some detail later, but in essence the issue before us is whether the LWRP allows the take and use consent in question to be decoupled and a new use consent to be granted independently, or whether a new take and use consent is required.

[2] The issues are important because they potentially impact the ability of transferees of resource consents in the Canterbury region to access the water allowed to be taken under the consent and apply it to a new use. This may have particular importance in cases where the groundwater resource is fully allocated or over-allocated.

Consents for water bottling operations

[3] In this case, the appellant is Cloud Ocean Water Ltd (Cloud Ocean). The issues on appeal apply equally to the position of the third respondent, Southridge Holdings Ltd (Southridge).[1] Cloud Ocean wishes to set up and operate a business bottling water for sale. In 2017, it acquired the site of a previous wool scouring business operated by Kaputone Woolscour (1994) Ltd (Kaputone) in Belfast, Christchurch. Kaputone held a resource consent to take and use groundwater from the bore at Belfast for industrial use (the wool scour).[2] The transfer of the resource consent was effected

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1 See below at [16]. Southridge Holdings Ltd was previously known as Rapaki Natural Resources Ltd and was referred to by that name in the lower Courts' decisions.

2 In its application for consent, Kaputone Woolscour (1994) Ltd described the use as "Industrial" and the type of industry as "Wool Scouring". It answered the question about the description of the activity to which the application related as "Scouring NZ Wool Second Stage Processors".

under s 136(2)(a) of the Resource Management Act 1991 (RMA)[3] and, after the transfer, the resource consent was re-issued in the name of Cloud Ocean.[4]

[4] It is common ground that the take and use consent acquired by Cloud Ocean from Kaputone did not permit the use of water for water bottling.[5]

[5] In late 2017, Cloud Ocean applied to the second respondent, the Canterbury Regional Council | Kaunihera Taiao ki Waitaha, also known as Environment Canterbury (ECan), to allow the water taken under the resource consent Cloud Ocean had acquired to be used for the purpose of its proposed water bottling business. ECan decided that neither public nor limited notification of the application was required and granted the application. It then granted an application to amalgamate the original consent with the new consent, so that the "take" aspect of the original take and use consent and the "use" aspect of the new consent were combined into a single take and use consent.

[6] A similar situation arose in relation to Southridge. In Southridge's case, it acquired two resource consents to take groundwater from Silver Fern Farms Ltd (Silver Fern), which had previously operated a freezing works, also in Belfast. One was a resource consent to take and use groundwater from five bores and the other was to take and use groundwater from three different bores. In both cases, the water was to be used for the freezing works.

[7] Southridge acquired the resource consents from Silver Fern and, like Cloud Ocean, it wished to set up and operate a water bottling business, at the Belfast freezing works site. It also applied to ECan to allow the water taken under the two resource consents to be used for commercial bottling. ECan allowed the applications to be made without notification and consented to water taken under the original

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3 The resource consent was first transferred to Canterbury Land Resources Ltd (CLRL) then, four days later, by CLRL to Cloud Ocean Water Ltd (Cloud Ocean).

4 Cloud Ocean also obtained a resource consent to construct a new bore as a new point of take of the groundwater. Later, the Canterbury Regional Council (ECan) gave consent to the use of the new bore to access groundwater subject to the take and use consent.

5 This was decided by the High Court in *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240, [2019] NZRMA 316 (Churchman J) at [148(a)]. The Court found the Cloud Ocean consent allowed only the take and use of water for the wool scouring operation: at [126]–[127].

consents to be used for a commercial bottling operation. It then amalgamated the old and new consents as it had in the case of Cloud Ocean.

AWA's challenge

[8] The first respondent, Aotearoa Water Action Inc (AWA) was incorporated to challenge the granting of consents to Cloud Ocean and Southridge. It commenced judicial review proceedings in the High Court, challenging the process by which the consents granted to Cloud Ocean and Southridge were made. It was unsuccessful in the High Court.[6]

[9] AWA appealed to the Court of Appeal and its appeal was allowed.[7] The Court of Appeal set aside ECan's decisions granting consents to Cloud Ocean and Southridge. The effect of that decision was to invalidate the consents under which Cloud Ocean and Southridge were permitted to take and use water for their proposed water bottling operations.[8] That restored the position to that applying before the relevant consents were granted, leaving Cloud Ocean and Southridge with consents to take water for uses that were no longer feasible.

ECan's position

[10] ECan opposed AWA's application to the High Court and AWA's appeal to the Court of Appeal, taking an active role in both. In this Court, ECan took a neutral position and abided this Court's decision on the appeal. However, its counsel, Mr Maw, made submissions about the LWRP, its interaction with other regional plans in Canterbury and issues that could arise if the Court of Appeal decision stands.

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6 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580 (Nation J) [HC judgment].

7 *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, [2022] 3 NZLR 918 (Kós P, Cooper and Brown JJ) [CA judgment].

8 At [132]–[133].

Appeal issues

[11] Cloud Ocean now appeals to this Court against the Court of Appeal judgment, leave having been granted by this Court.[9] It argues (with Southridge's support) that ECan dealt with the application for a new use consent correctly and that the consent granted by ECan is valid. The issue before us is whether that is correct.

[12] AWA filed an application to support the Court of Appeal judgment on other grounds, namely:

(a) That the Court of Appeal was wrong to reject AWA's argument that putting water into bottles was not a "use" of water for which a resource consent could be granted. AWA abandoned this ground, and we say no more about it.

(b) That the effects on the environment of the end use of plastic bottles were matters that should have been considered by ECan before it determined whether or not to notify Cloud Ocean's application (and, presumably, that of Southridge). This ground requires consideration only if the appeal is allowed. It was not addressed in the Court of Appeal's judgment.

(c) The adverse effects on cultural values and tikanga arising from the proposed water bottling activity were relevant matters that ECan should have considered before it determined whether or not to notify Cloud Ocean's application. This was also not addressed in the Court of Appeal's judgment.

[13] Te Ngāi Tūāhuriri Rūnanga Inc (the Rūnanga) was granted leave to intervene and its senior counsel, Ms Appleyard, presented submissions on the issue identified at [12](c) above. AWA adopted the submissions of the intervener on that point.

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9 *Cloud Ocean Water Ltd v Aotearoa Water Action Inc* [2022] NZSC 133 (Glazebrook, O'Regan and Ellen France JJ). The approved question was whether the Court of Appeal was correct to allow Aotearoa Water Action Inc's appeal to that Court.

Detailed history of the case

[14] The Court of Appeal set out in detail the background to:[10]

(a) the grant of, and renewal of, take and use consents to Kaputone and Silver Fern respectively;

(b) the transfer of the consents to Cloud Ocean and Southridge respectively;

(c) the process adopted by ECan leading to the grant to Cloud Ocean and Southridge of consents expanding the permitted use of the water that Cloud Ocean and Southridge could take under their respective consents to include water bottling; and

(d) the administrative process adopted by ECan to amalgamate the take consents with the new use consents to constitute a combined take and use consent.

[15] We adopt that account, but do not repeat it.

Respective positions of Cloud Ocean and Southridge

[16] For ease of reference, we will refer to the position of Cloud Ocean from now on in these reasons, not of Southridge. That is because this is Cloud Ocean's appeal and there is no material difference between its position and that of Southridge. So, unless otherwise indicated, what we say about Cloud Ocean's position also applies to Southridge. For ease of reference, we also refer to "an application" and "a consent", despite there being more than one of each.

Consent for use-only

[17] The only aspect of the process which needs to be explained in more detail is the decision of ECan to address Cloud Ocean's application on the basis that it was an

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[10] CA judgment, above n 7, at [10]–[71].

application for use-only of groundwater, not an application to take and use groundwater. In essence, the application proceeded on the basis that the allocation of water to Kaputone in the original take and use consent locked in the "take" aspect, so that the consideration of Cloud Ocean's application was confined to use. That led the decision-maker at ECan to proceed on the basis that the relevant rule in the LWRP applicable to the application was r 5.6. We will discuss this in more detail later,[11] but for present purposes r 5.6 can be described as a rule dealing with applications relating to an activity that is not otherwise classified and that treats such an activity as a discretionary activity.

The essential issue: was a combined take and use consent required?

[18] AWA argued (and the Court of Appeal accepted) that ECan should have treated the application as an application for take and use of groundwater and dealt with it under the specific rule relating to the taking and use of groundwater, r 5.128,[12] rather than under r 5.6.[13] Rule 5.128 treats the taking and use of groundwater as a restricted discretionary activity, providing certain conditions are met. Cloud Ocean argue ECan was correct to treat the application as a use-only application and to deal with it under r 5.6.

[19] This difference of view frames the essential decision before this Court in the appeal. As noted earlier, AWA also raised the issues referred to above, at [12].

Court of Appeal decision

[20] The decision of the Court of Appeal on the essential issue appears in its judgment at [110]–[132]. In short, the Court found that ECan did not have the ability to grant a resource consent limited to the use of water for bottling purposes separately from the authorisation to take the water that was to be used for that purpose.[14] That meant that ECan should have processed the Cloud Ocean application under r 5.128 of the LWRP, not r 5.6. Accordingly, the consent granted to Cloud Ocean was not

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11 See below at [37]–[38].
12 Outlined in full below at [39].
13 Outlined in full below at [37].
14 CA judgment, above n 7, at [132].

lawfully granted and the subsequent consent which amalgamated the use consent with the existing take consent was consequentially unlawful.[15]

[21] We do not propose to summarise the Court of Appeal's reasoning here but will address the relevant aspects of its reasoning as we assess the submissions made by the parties in this Court.

The relevant RMA provisions

[22] The issues on this appeal must be addressed by reference to the provisions of the RMA, which provides the statutory framework for the regulation of the take and use of water. Before we address the parties' arguments, therefore, we set out the relevant provisions.

[23] Section 14 of the RMA deals with restrictions relating to water (including, but not limited to, groundwater). The relevant provisions in this section in a case involving groundwater are subs (2) and (3) which provide:

> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
>
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of a person's animals for drinking water,—

[15] At [132].

and the taking or use does not, or is not likely to, have an adverse effect on the environment; or

(c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

(d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) the water is required to be taken or used for emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017.

[24] The significant aspect of these provisions is the fact that there are repeated references to "take" and "use" in a context where it is clear they are seen as separate, particularly because of the use of the term "or", rather than "and", wherever the two terms are referred to. It was this feature of s 14 that appeared to found the decision by officers of ECan that a new use of water could be considered independently from the take of water, provided the relevant considerations set out in the RMA were addressed. The ECan officers treated the existing take component of the application as forming part of the existing environment against which the new use application made by Cloud Ocean would be assessed.

[25] Also relevant is s 30 of the RMA, which sets out the functions of regional councils (including ECan) under the RMA. The relevant portions of s 30 provide:

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

…

(e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) the setting of any maximum or minimum levels or flows of water:

(ii) the control of the range, or rate of change, of levels or flows of water:

(iii) the control of the taking or use of geothermal energy:

…

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

…

[26] Section 30(4) amplifies s 30(1)(fa). It says a rule made by a regional council to allocate a resource may allocate it in any way, subject to some qualifications.

[27] Again, it is notable that para (fa) (but not para (e)) refers to taking or using water disjunctively rather than conjunctively. It is para (fa) that has greater relevance to the rules in the LWRP.

Lower Courts' decisions on RMA provisions

[28] The High Court Judge said there was nothing on the face of both ss 14 and 30 of the RMA that suggested that a consent could not be granted for either take or use separately.[16] He considered that the judgment of the Court of Appeal in *Central Plains Water Trust v Ngai Tahu Properties Ltd* supported the proposition that separate applications could be made for take and use of water.[17]

[29] The High Court Judge therefore concluded ECan was not in error in processing the application for approval of a change in the use of water from an already consented take.[18] The High Court Judge's interpretation of ss 14 and 30 was not challenged by AWA in the Court of Appeal.[19] However, in that Court, AWA's counsel argued that the

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16 HC judgment, above n 6, at [104].
17 At [111] referring to *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200.
18 HC judgment, above n 6, at [133].
19 CA judgment, above n 7, at [104].

distinct disjunctive reference to take or use in s 14 did not compel the conclusion that the Cloud Ocean application was correctly considered in isolation from the original take consent, given the specific purpose for which the original take was permitted.

[30] The Court of Appeal upheld the High Court's interpretation of the provisions. It referred to the disjunctive use of take or use in s 14(2) and (3) and in s 30(1)(e) of the RMA,[20] but did not see this as necessarily leading to a conclusion that ECan was able to grant a separate consent for a use and a separate consent for a take; that was a matter that depended on the terms of the relevant plan (in this case the LWRP).[21]

Concession relating to RMA provisions

[31] In its submissions in this Court, AWA also accepted that s 14 of the RMA permits regional councils to regulate the "take" and the "use" of water separately. However, it argued that the Court of Appeal was correct that there was nothing in s 14 that compelled this. Rather, regional councils were permitted to regulate the "take and use" of water together as a single activity. Whether they do or do not do this depends on the terms of the relevant plan.

Conclusion on RMA provisions

[32] In light of the concession on this point we proceed on the basis that ss 14 and 30 of the RMA do not require that the take and use of groundwater be considered only as a single package, but those sections do not require that they always be considered separately either.

[33] However, it seems to us this begs the real issue that arises in this appeal. The question should not be whether the RMA contemplates the possibility of use-only applications but whether, in circumstances such as the present case, it contemplates disaggregation of existing take and use consents into component parts. In the absence of extensive argument on the point (and given that, on our approach, the point is not decisive) it is not appropriate for us to do more than signal our concern that the analysis of the RMA provisions in the lower Courts may have been too narrowly focused.

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20 At [110]–[112].
21 At [113].

[34] Our concern is that the effective disaggregation that took place in this case allowed Cloud Ocean to essentially "bank" the allocation of groundwater under the take aspect of the take and use consent it acquired. This "take bank" could be seen as an assertion of a property right in the water to which the take consent applies, subject only to the need to obtain consent from ECan as to the use to which the water was to be put. This seems to us to be at odds with the effects-focus of the RMA. We do not therefore see r 5.128, as interpreted by the Court of Appeal, as necessarily a modification of what the RMA permits, as the Court of Appeal considered it was.[22]

Two other RMA provisions

[35] Before leaving our discussion of the RMA, we record two further points:

(a) Section 136 provides for the transfer of water permits. As noted earlier, the transfers in this case were permitted under s 136(2)(a), which permits the transfer of a water permit of the kind in issue in this case to any owner or occupier of the site in respect of which the permit was granted. The transfer to Cloud Ocean was made in conjunction with the transfer of the relevant land to Cloud Ocean.

(b) Section 127 provides that the holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of a consent in certain circumstances. Counsel for Cloud Ocean, Ms Limmer, said Southridge initially applied under this provision for its proposed change of use but ECan required it to seek a new, use-only permit. It was not suggested that ECan was wrong to do so.

The LWRP—the relevant rules

[36] In the context of the present appeal, the key rules in the LWRP are rr 5.6 and 5.128.

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22 At [113]–[118].

Rule 5.6

[37] As mentioned earlier, r 5.6 is a residual or catch-all rule, dealing with activities that are not otherwise covered in specific rules in the LWRP. It appears in Section 5 of the LWRP, headed "Region-wide Rules", under the heading "General Rules". It provides as follows:[23]

> 5.6 Any activity that—
>
> (a) would contravene sections 13(1), 14(2), s14(3) or s15(1) of the RMA; and
>
> (b) is not a recovery activity; and
>
> (c) is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA
>
> — is a discretionary activity.

[38] ECan decided this rule applied in the present case because Cloud Ocean's use-only application was seeking consent for an activity that contravened s 14(2)(a) of the RMA (because it involved a use of water other than open coastal water) and that activity was not classified by the LWRP.

Rule 5.128

[39] On the other hand, r 5.128 is a specific rule dealing with the taking and use of groundwater. It also appears in Section 5 of the LWRP, under the activity heading "Take and Use Groundwater". It provides as follows:

> 5.128 The taking and use of groundwater is a restricted discretionary activity, provided the following conditions are met:
>
> 1. The take is from within a Groundwater Allocation Zone on the Planning Maps; and
>
> 2. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, for stream depleting groundwater takes, the take, in addition to all existing consented surface water takes, does not result in any exceedance of any environmental flow and allocation limits set in Sections 6 to

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[23] Environment Canterbury *Canterbury Land and Water Regional Plan* (1 September 2015) as at 1 February 2019 [LWRP].

15 for that surface waterbody in accordance with Schedule 9; and

3. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, the seasonal or annual volume of the groundwater take, in addition to all existing consented takes, as determined by the method in Schedule 13 does not exceed the groundwater allocation limits for the relevant Groundwater Allocation Zone in Sections 6 to 15; and

4. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the bore interference effects on any groundwater abstraction other than an abstraction by or on behalf of the applicant are acceptable, as determined in accordance with Schedule 12.

The exercise of discretion is restricted to the following matters:

1A. The rate, volume and timing of the take; and

1. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the CRC will consider the matters set out in Schedule 10; and

2. The availability and practicality of using alternative supplies of water; and

3. The maximum rate of take, including the capacity of the bore or bore field to achieve that rate, and the rate required to service any irrigation system; and

4. The actual or potential adverse environmental effects on surface water resources if the groundwater take is within a surface water catchment where the surface water allocation limit, as set out in Sections 6 to 15 is fully or over allocated; and

5. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the actual or potential adverse environmental effects the take has on any other authorised takes, including interference effects as set out in Schedule 12; and

6. For stream depleting groundwater takes, the matters of discretion under Rule 5.123; and

7. Whether salt-water intrusion into the aquifer or landward movement of the salt water/fresh water interface is prevented; and

8. The proximity and actual or potential adverse environmental effects of water use to any significant indigenous biodiversity and adjacent dryland habitats; and

9. The protection of groundwater sources, including the prevention of backflow of water or contaminants; and

10. Where the proposed take is the replacement of a lawfully established take affected by the provisions of Section 124-124C of the RMA and is from an over-allocated groundwater allocation zone, the reduction in the rate of take and volume limits to enable reduction of the over-allocation; and

11. Where the water is being used for irrigation, the preparation and implementation of a Farm Environment Plan in accordance with Schedule 7 that demonstrates that the water is being used efficiently.

[40] As is apparent from the list of matters in respect of which discretion is restricted, some of these matters relate to the taking of water,[24] some relate to the use of water,[25] and some to both take and use.[26]

[41] AWA's position, upheld by the Court of Appeal, was that Cloud Ocean's application should have been treated as a take and use application to which this rule applies.

[42] Rules 5.129 and 5.130 are closely inter-related with r 5.128. They provide:

5.129 The taking and use of groundwater that does not meet one or more of conditions 1 or 4 in rule 5.128 is a non-complying activity.

5.130 The taking and use of groundwater that does not meet one or more of conditions 2 or 3 in rule 5.128 is a prohibited activity.

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24 Items 1A, 3, 4, 5, 7 and 10.

25 Items 1, 2, 8 and 11.

26 Items 6 and 9. Since Cloud Ocean's application was processed, a new item 12 has been added by a Plan Change. This deals with adverse effects of the use of water on Ngāi Tahu values or sites of significance to Ngāi Tahu.

[43] Two other rules require mention because, in contrast to rr 5.128, 5.129 and 5.130, they refer to the taking *or* use of water. Both deal with water in irrigation or hydroelectric canals or water storage facilities. They are rr 5.121 and 5.122:

> 5.121 The taking or use of water from irrigation or hydroelectric canals or water storage facilities is a permitted activity, provided the following conditions are met:
>
> 1. For the taking of water from a water storage facility, the storage facility is not within the bed of a river; and
>
> 2. The site owner or occupier has a written agreement with the owner or manager of the irrigation or hydroelectric canal or water storage facility to take water from the artificial watercourse or water storage facility.
>
> 5.122 The taking or use of water from irrigation or hydroelectric canals or water storage facilities that does not meet one or more of the conditions in Rule 5.121 is a discretionary activity.

[44] There are other rules that refer to "take or use"[27] and others that refer to variations of "take and use".[28] But none is relevant to the present facts, apart from the fact that they provide some support for the Court of Appeal's view that the drafters of the LWRP chose carefully between "take or use" and "take and use".[29]

Introduction to the LWRP

[45] The introduction in Section 1 of the LWRP says the purpose of the LWRP is "to identify the resource management outcomes or goals (objectives in this plan) for managing land and water resources in Canterbury to achieve the purpose of the [RMA]".[30] It records that fresh water is a "commons" resource and that "[a] resource consent does not convey ownership of water to the consent holder".[31]

How the LWRP works

[46] Section 2 describes how the LWRP works. As required by s 67(1) of the RMA, the LWRP states objectives, policies to implement the objectives, and rules to

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27 Rules 5.133 and 5.134.
28 Rules 5.62, 5.111–5.118, 5.123–5.125, 5.125C–5.127, 5.131–5.132, and 5.133 (which uses both "take and use" and "take or use").
29 CA judgment, above n 7, at [122]. ECan disputed that in this Court: see below at [73].
30 LWRP, above n 23, at 1.1.
31 At 1.1.2.

implement the policies. Clause 2.1 says the objectives in Section 3 "identify the resource management outcomes or goals for … water resources in Canterbury region". Clause 2.2 says the policies in Section 4 of the LWRP implement the objectives, as required under s 67(1)(b) of the RMA. Clause 2.3 says the rules in Section 5 implement the policies, as required under s 67(1)(c) of the RMA. All parties agreed that assistance in the interpretation of the rules can be derived from the objectives and policies, though they differed in relation to how this could be done.

Objectives

[47] Section 3 sets out the objectives of the LWRP. The introduction to the section makes it clear that the objectives "must be read in their entirety and considered together". However, counsel identified different objectives which they said were relevant to the interpretation of the rules. We deal with those submissions later.[32]

Policies

[48] Similarly, the parties identified certain policies appearing in Section 4 of the LWRP as relevant to the exercise of interpreting the rules in Section 5. Again, we address these later.[33]

Interpretation of the rules

Does r 5.128 determine what activity can be applied for?

[49] Ms Limmer said the approach taken by ECan was to consider the nature of the application made by Cloud Ocean. If it had been an application to take and use water, r 5.128 would have applied. But because it was an application relating only to use, and there was no specific rule in the LWRP addressing a use-only application, ECan correctly processed the application under r 5.6. She said it was an error to see r 5.128 as effectively determining what kind of activity is being applied for, as the Court of Appeal had done. She said this was giving rules a function and role inconsistent with both the RMA and case law: it was clear from the cases relating to the formulation of planning instruments that rules do not drive policies or objectives;

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32 See below at [60]–[67].
33 See below at [60]–[67].

if they did so, it would be "a case of the tail wagging the dog".[34] This was supported by counsel for Southridge, Mr Caldwell.

[50] That submission starts from an assumption that the take and use consent acquired by Cloud Ocean was able to be disaggregated into separate take and use components. As already indicated, it is not clear to us that is so. But we will address the other arguments made in support of the appeal before reverting to this issue.

Was express wording required to modify the approach permitted by s 14(3)?

[51] Ms Limmer said it could be expected that, if the LWRP was intended to modify the approach permitted by s 14 of the RMA—which treats take and use as separate activities—it would have said so explicitly. She pointed to the example of r 11.5.41 of the LWRP, which prohibits the transfer of water permits in some circumstances, despite s 136 of the RMA giving a discretionary status to such applications.

[52] We do not see the fact that there is an explicit provision dealing with the transfer of water permits in r 11.5.41 as having any great significance. It could equally be argued that if it were intended that applications for take-only, use-only or take and use were all to be permitted, this could also have been addressed specifically.

Does the LWRP provide that take and use must be considered together?

[53] The Court of Appeal, having accepted ss 14 and 30 of the RMA allowed a consent authority to grant separate consents for the take of water and for the use of water, observed that this did not necessarily mean the LWRP allowed this. But it said where the plan refers to "taking and use", it must mean both of these combined, not each separately.[35]

[54] Ms Limmer accepted that observation was correct as far as it went. But she argued the fact r 5.128 deals with activities involving both take and use did not mean it applied where the application related to use-only. And, she argued, r 5.6 was an

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34 *Tussock Rise Ltd v Queenstown Lakes District Council* [2019] NZEnvC 111, [2019] NZRMA 509 at [44].

35 CA judgment, above n 7, at [113].

appropriate rule to address a use-only application. In fact, because it is fully discretionary, it is a higher hurdle to surmount than r 5.128.

[55] The Court of Appeal also expressed concern that segregating use from the existing take meant that existing volumes of take are a given, which it saw as subverting the intent of r 5.128.[36] Ms Limmer argued the fact that ECan treated the existing take aspect of the consent as forming part of the environment upon which the effects of the use application were to be assessed simply reflected that there was an existing, implemented consent to take the water relied on in Cloud Ocean's application.

[56] Again, that assumes the take component of the original take and use consent is severable. The consent granted to Kaputone was a consent to take water and use it for a specific industrial use, that is, the wool scour. That involved using the water and then discharging it (the discharged water contained some contaminants related to the wool scour activities). That is different in character from a use involving bottling and selling the water, with no discharge back into the environment.

[57] In granting the original consent to Kaputone, the decision-maker would have proceeded on the basis that the use of the water for the wool scour was a use of the water that justified the consent to take it for that use. We see the proposition that the "take" aspect can be effectively banked and used to found a different use application as problematic. The fact that r 5.128 addresses take and use of water in a way that contemplates only the consideration of take and use together indicates against it.

[58] While r 5.6 fills a gap where the LWRP does not classify an activity, the LWRP *does* classify the use activity in relation to groundwater, but in a context where it requires it to be considered as a component of a aggregated "take and use" activity.[37] It does not provide for the possibility of a consent to take and use water for an activity that has been discontinued to morph into a consent to take for an as yet unspecified use, pending an application for a new use for the water taken.

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36 At [118].

37 The use of "is" in r 5.128 supports the view that "take and use" is a single activity, not two separate activities.

[59] Ms Limmer argued there was no impediment to ECan considering a use-only application and assessing its impact on the environment. Treating the existing take as fully consumed for the purpose of this assessment is orthodox, she argued. We do not see that as advancing Cloud Ocean's case, however. It simply says an effective consideration of a use-only application could be made. But it begs the question as to whether the LWRP permits this.

Relevance of objectives and policies to interpretation of the rules

[60] Ms Limmer said objectives 3.5 and 3.10–3.11 of the LWRP and policies 4.65 and 4.67 indicated the intention to allow people to deal with use permits, so that the community could adapt to changing economic and social instances over time. Those provisions read as follows:

> Section 3 Objectives
>
> …
>
> 3.5 Land uses continue to develop and change in response to socio-economic and community demand.
>
> …
>
> 3.10 Water is available for sustainable abstraction or use to support social and economic activities and social and economic benefits are maximised by the efficient storage, distribution and use of the water made available within the allocation limits or management regimes which are set in this Plan.
>
> 3.11 Water is recognised as an enabler of the economic and social wellbeing of the region.
>
> …
>
> Section 4 Policies
>
> …
>
> *Efficient Use of Water*
>
> ...
>
> 4.65 The rate, volume and seasonal duration for which water may be taken will be reasonable for the intended use.
>
> …

4.67 Enable the spatial and temporal sharing of allocated water between uses and users, subject to the existing consent holders retaining priority access to the water during the remaining currency of those consents, and provided that the rate of taking or volume of water consented for abstraction from a catchment does not exceed the environmental flow and water allocation limit for surface water or stream depleting groundwater, or the groundwater allocation limit for that catchment.

[61] Ms Limmer said these provisions demonstrated that the rules in the LWRP should be interpreted flexibly. In particular, she argued r 5.128 would not give effect to these objectives and policies if interpreted as excluding the possibility of a use-only application by the holder of an existing take and use consent. She said that would particularly be so where the water subject to the consent was over-allocated and a new take and use consent may not then be possible (given the terms of r 5.130). We accept that those objectives and policies indicate an intention to allow for adaptation to changing circumstances. But none of the provisions is of such clarity as to compel the interpretation Ms Limmer contends for.

[62] Counsel for AWA, Mr Bullock, supported the Court of Appeal's approach. He argued that objectives 3.1–3.2, 3.8–3.10, 3.12 and 3.24 and policies 4.4(e)–4.4(f), 4.5 and 4.50 all supported the approach taken by the Court of Appeal. We set these out below, apart from objective 3.10, which is quoted above at [60]:

Section 3 Objectives

…

3.1 Land and water are managed as integrated natural resources to recognise and enable Ngāi Tahu culture, traditions, customary uses and relationships with land and water.

3.2 Water management applies the ethic of ki uta ki tai – from the mountains to the sea – and land and water are managed as integrated natural resources recognising the connectivity between surface water and groundwater, and between fresh water, land and the coast.

…

3.8 The quality and quantity of water in fresh water bodies and their catchments is managed to safeguard the life-supporting capacity of ecosystems and ecosystem processes, including ensuring sufficient flow and quality of water to support the habitat and feeding, breeding, migratory and other behavioural requirements of indigenous species, nesting birds and, where appropriate, trout and salmon.

…

3.9 Abstracted water is shown to be necessary and reasonable for its intended use and any water that is abstracted is used efficiently.

…

3.12 When setting and managing within limits, regard is had to community outcomes for water quality and quantity.

…

3.24 All activities operate at good environmental practice or better to optimise efficient resource use and protect the region's fresh water resources from quality and quantity degradation.

…

Section 4 Policies

…

4.4 Groundwater is managed so that:

…

(e) overall water quality in aquifers does not decline; and

(f) the exercise of customary uses and values is supported.

4.5 Water is managed through the setting of limits to safeguard the life-supporting capacity of ecosystems, support customary uses, and provide for community drinking-water supplies and stock water, as a first priority and to meet the needs of people and communities for water for irrigation, hydro-electricity generation and other economic activities and to maintain river flows and lake levels needed for recreational activities, as a second priority.

…

4.50 Where the rate of take or volume of water consented for abstraction from a catchment exceeds the environmental flow and water allocation limit for surface water or stream depleting groundwater, or the groundwater allocation limit for that catchment, any further allocation of water is limited to:

(a) any abstraction necessary to meet community water supply and stockwater requirements; and

(b) the replacement of existing resource consents provided that:

(i) reduction in over-allocation is enabled through the replacement resource consent being for no more than 90% of the previously consented rate of take and annual or seasonal volume unless there is a method and defined timeframe to phase out over-allocation

set out in the relevant sub-region Section of this Plan; and

(ii) there are significant and enduring improvements in the efficiency of water use and reductions in any adverse effects; or

(iii) it is demonstrated that the existing use of water is efficient and that the efficiency is enduring.

[63] Mr Bullock emphasised the fact that objectives 3.1–3.2 speak of integrated management of land and water. He said this suggested that take and use of water should be dealt with together. We do not agree; how the water consents process is managed is a different issue from how land and water use is integrated. Mr Bullock said objectives 3.9–3.10 and 3.24 speak of efficiency in the use of water resource which, he argued, is better achieved by considering all issues relating to the taking and use of water together. We agree, but it is not clear to us that allowing separate consideration of take and use necessarily compromises those objectives.

[64] In relation to policies, Mr Bullock argued that requiring joint consideration of take and use better reflected policies 4.4(e)–4.4(f) and 4.5 relating to the way groundwater is managed under the LWRP. Again, we do not see the alternative of management in a way that allows separate take and use consents as necessarily inconsistent with those policies.

[65] Mr Bullock also referred us to policy 4.50. He said it reflected a concern about both volume of water taken and the efficiency with which it is used. On the other hand, Ms Limmer said policy 4.50 supported Cloud Ocean's position because it showed how the LWRP deals with overallocated catchments (through reductions on renewal of consents), which demonstrated there was no need to restrict changes of use of existing takes. We do not think there is any assistance to be gained from consideration of this policy in dealing with the issue before us.

[66] Mr Caldwell referred to objectives 3.5 and 3.10–3.11, as Ms Limmer did. He also relied on objective 3.9, as Mr Bullock did, albeit arguing it had the opposite effect to that suggested by Mr Bullock. He also referred to policies 4.65 and 4.67, as Ms Limmer did. He again submitted that the former supported the opposite interpretation of rr 5.6 and 5.128 to that advanced by Mr Bullock. This further

illustrates the difficulty in deriving guidance in the interpretation of the rules from the objectives and policies in this case.

[67] In summary, we do not consider that the objectives and policies highlighted by counsel provide much assistance in the resolution of the interpretive issue before us. The approach adopted by ECan and that adopted by the Court of Appeal are both amenable to an argument that they give effect to particular objectives and policies while also being inconsistent with others.

If use-only applications are permitted, does that mean take-only applications are too?

[68] In its judgment, the Court of Appeal said ECan was in error in determining that, in the absence of a specific provision dealing with a use-only application, the catch-all r 5.6 should apply. The Court asked rhetorically, if ECan could apply r 5.6 in respect of a use-only consent, why would it not do so for a take-only consent?[38] Ms Limmer argued that this was not, in practice, a problem because, in a case where there was no existing take consent, ECan would likely defer consideration of the take-only application until it had before it a use application, at which point r 5.6 would become irrelevant and r 5.128 would apply. She said this was permitted under s 91 of the RMA and illustrated by the decision of the Court of Appeal in *Central Plains Water Trust v Ngai Tahu Properties Ltd*.[39] Mr Caldwell also argued that a new take proposal will inevitably require a new use proposal, so the conundrum identified by the Court of Appeal would not arise in practice.

[69] We do not think these practical considerations provide a complete answer to the Court of Appeal's concern. The fact that a take application requires a use to be identified and for the effects of the take and use to be assessed together provides some support for the view that assessing use-only, without having the ability to assess take as well, is less than optimal. That in turn supports the view that r 5.128 is intended to apply when a new use is proposed for water allocated under a previously issued take and use consent. There is nothing in the LWRP that suggests the plan's drafters envisaged that take and use consents would be divisible into separate "take" and "use"

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38 CA judgment, above n 7, at [130].

39 *Central Plains Water Trust v Ngai Tahu Properties Ltd*, above n 17.

components. It would be odd, for example, if the holder of a take and use consent could apply to take water from a different groundwater source, while keeping the use aspect of its consent, thereby limiting the consent authority's consideration of the application to issues relating to the take but not the use.

Impact of rr 5.129–5.130

[70] Rules 5.129–5.130 deal with situations that arise where conditions of r 5.128 cannot be met. In the case of r 5.129, it makes the taking and use of groundwater a non-complying activity, and in the case of r 5.130 it makes the taking and use of groundwater a prohibited activity. So, for example, if the groundwater allocation limits have been exceeded by the allocations made under previously issued consents, taking and use of groundwater is a prohibited activity (that is, an activity for which consent cannot be granted). Thus, r 5.128 not only regulates take and use as a restricted discretionary activity, its application can also make take and use a non-complying activity or a prohibited activity.[40]

[71] While rr 5.121–5.122 refer to "taking or use", they do so in a context where it can be contemplated that use of water could occur without taking it. Rules 5.121–5.122 relate to irrigation and hydroelectric canals (that is, not to groundwater, as rr 5.128–5.130 do). In those environments, it is possible an applicant will seek to use water without taking it (Mr Bullock gave as an example a salmon farm in a hydroelectric canal), which these rules would permit.

[72] Mr Bullock argued these factors reinforce the Court of Appeal's conclusion that the use of "take and use" and "take or use" in the LWRP was carefully chosen and deliberate. We agree.

ECan's submissions

[73] Mr Maw argued that references to "take and use" and "take or use" in provisions of the LWRP should not be afforded particular significance. He said the drafting was not as considered as the Court of Appeal thought. In particular, he noted

[40] It was not suggested that the groundwater allocation limits were exceeded in this case.

r 5.133 included both phrases and that policy 4.23B and r 5.115—which is the rule implementing policy 4.23B—use the phrases inconsistently. We do not see any reason to read "take and use" as meaning "take or use" or vice versa. There is nothing to indicate they were used interchangeably between that policy and rule.

[74] Mr Maw referred us to a Technical Advice Note issued by ECan after the Court of Appeal judgment was delivered.[41] This highlights issues that could arise and proposes solutions to them. It addresses what would happen if the holder of a take and use consent wished to change use in a situation where the water resource is over-allocated or fully allocated. It noted that for groundwater, such a situation would mean r 5.130 would apply, making a new take a prohibited activity. The solution is for the take and use consent to be surrendered and a new take and use consent to be sought. That appears to be an appropriate way of avoiding the application of r 5.130. At the hearing, another potential course of action was proposed: applying for a new take and use consent (without surrendering the old take and use consent) on the basis that the total take under the old and new take and use consents would not exceed the amount permitted under the old consent. That appears also to be a way of avoiding the application of r 5.130, but we do not express a concluded view on it in the absence of having heard full argument on it.

[75] Mr Maw said the Court of Appeal's interpretation provides some challenges in relation to the interaction between the LWRP and other regional plans relating to water in Canterbury. Some of these issues are referred to in the Technical Advice Note. Mr Maw was not asking us to resolve these issues (and we obviously could not provide advice of that kind). Rather he was submitting that they indicated the Court of Appeal decision was wrong; though, in view of ECan's neutral position, he did not say so in as many words. We do not see these issues as significant factors in resolving the narrow issue of interpretation of the LWRP that we are required to address.

[76] Mr Maw also drew our attention to a practical example that could arise where the holder of a take and use consent to take water for use in irrigation wishes to change the use to allow for the use of the water for washing down a dairy shed as well as

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[41] Environment Canterbury *Technical Advice Note: Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents* (19 August 2022).

irrigation. The practical problem is amplified if the water is fully allocated or over-allocated. He noted the decision of the Court of Appeal in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (*Ngāti Awa*) took a strict approach to the scope of the power under s 127 of the RMA to change a condition of a consent, which may preclude its application in such a situation.[42] As this Court has granted leave to appeal against that decision,[43] we make no comment on this, other than noting that a change of that kind is a world away from a change from using water in a wool scouring operation to water bottling.

Summary

[77] In summary:

(a) In the absence of contrary argument, we proceed on the basis that ss 14 and 30 of the RMA do not require that take and use of groundwater be considered only in a single package. However, there is nothing in the RMA requiring take and use to be considered separately, and the absence of a specific provision in the LWRP requiring take and use to be considered together is not significant.

(b) Rule 5.6 applies when the LWRP does not classify an activity. But the LWRP does classify the use of water in a context where it requires it to be considered as a component of an aggregated take and use activity, under r 5.128.

(c) The objectives and policies of the LWRP do not provide significant assistance in the resolution of the interpretations of rr 5.6 and 5.128 of the LWRP.

(d) There is nothing in the LWRP that suggests the drafters envisaged that take and use consents would be divisible into separate "take" and "use" consents.

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42 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, [2023] NZRMA 280.

43 *Sustainable Otakiri Inc v Whakatāne District Council* [2023] NZSC 35.

(e) The fact that rr 5.121–5.122 refer to "taking or use", in contrast to the references to "taking and use" in rr 5.128–5.130 supports the proposition that the use of "take and use" and "take or use" in the LWRP was carefully chosen and deliberate.

(f) The practical issues highlighted in the Technical Advice Note are not of such significance as to suggest that the interpretation of the LWRP by the Court of Appeal was in error.

Conclusion

[78] We have reached the same conclusion on the interpretation of the LWRP as that of the Court of Appeal. This ground of appeal therefore fails.

Should the potential environmental impact of plastic bottles be considered?

[79] AWA supported the Court of Appeal decision on the ground that the effects on the environment of the plastic bottles produced as a result of the proposed water bottling operation should have been considered by ECan. AWA argued that ss 95A and 104(1)(a) of the RMA require a consent authority considering whether to notify an application to take and use water for a commercial bottling operation, involving the sale of water in plastic bottles (and whether to grant consent), to consider such effects as would arise from the water bottling activity being permitted. However, its argument was made on the basis that it required consideration only if this Court allowed the appeal and reversed the Court of Appeal decision. As we have not done so, the argument does not need to be addressed.

[80] In any event, this would not be a good case for us to address the issue because it has not been considered in the Court of Appeal[44] and considered only in passing in the High Court.[45] As just noted, this Court has granted leave to appeal against the Court of Appeal's decision in *Ngāti Awa*, where arguments about the effects on the environment of plastic bottles will be advanced. We will await that case to address the issue.

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44 CA judgment, above n 7, at [134].
45 HC judgment, above n 6, at [252].

Did ECan consider adverse effects on cultural values and tikanga?

[81] AWA also supported the Court of Appeal judgment on the ground that ECan should have considered adverse effects on cultural values and tikanga arising from a water bottling activity. AWA says these effects should have been considered by ECan before it decided not to notify the Cloud Ocean application. That submission was supported by the Rūnanga, and its counsel (Ms Appleyard and Ms Robilliard) had the carriage of this argument at the hearing.

[82] As the consenting process will need to begin again as a result of this Court upholding the Court of Appeal decision, it is not necessary for us to address this issue in detail. For the renewed process, the Rūnanga will no doubt be properly informed and able to take part. It was clear that ECan failed to follow agreed processes with the Rūnanga when the Cloud Ocean and Southridge consents (and the decisions as to whether they should be notified) were under consideration. This meant ECan's consideration of issues of relevance to the Rūnanga in making the non-notification decisions and granting the consents was cursory or non-existent.

[83] Counsel referred us to extracts from several planning documents recording the interest of Ngāi Tahu and its Papatipu Rūnanga in natural resources and ECan's acknowledgment of this and its willingness to engage on these issues. These included:

(a) the Canterbury Regional Policy Statement, Chapter 2 "Issues of Resource Management Significance to Ngāi Tahu" and Chapter 4 "Provision for Ngāi Tahu and their Relationship with Resources";[46]

(b) the Mahaanui Iwi Management Plan 2013, issued by six Papatipu Rūnanga, which, among other things, records the objective that water management provides for the taonga status of water and specific rights and interests of tāngata whenua in water;[47] and

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[46] Environment Canterbury *Canterbury Regional Policy Statement 2013* (July 2021).

[47] Ngāi Tūāhuriri Rūnanga and others *Mahaanui Iwi Management Plan 2013* (Mahaanui Kurataiao Ltd, February 2013) at 75.

(c) "Tuia – standing together shoulder to shoulder", a document issued in 2016 recording the terms of a relationship between ECan and Ngā Papatipu Rūnanga of Ngāi Tahu for a joint work programme known as Tuia.[48] The relationship agreement was signed by the parties in 2012. This relationship was said the mark a new era of collaboration between the parties and a new approach to the management of natural resources.

[84] Due to process failures that led to a lack of effective communication with the Rūnanga, the objectives of these instruments were not met in this case. Mr Maw said at the hearing of the appeal that ECan acknowledged it could have done a better job in relation to how cultural effects were considered.

[85] Ms Appleyard also outlined failures in ECan's assessment of effects to address cultural and tikanga issues. As the consenting process has now failed for other reasons, we do not need to go into these failures. But there was validity in her criticisms of the process of engagement with the Rūnanga and these failures should not be repeated when Cloud Ocean's or Southridge's proposals are reconsidered.

Result

[86] The appeal is dismissed.

Costs

[87] Neither ECan nor the Rūnanga sought costs. As each took a neutral position, neither should be liable for costs either. AWA is entitled to costs. We direct that Cloud Ocean pay costs to AWA of $35,000 plus usual disbursements. We make no costs order in favour of or against Southridge.

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[48] Environment Canterbury and Te Rūnanga o Ngāi Tahu *Tuia – standing shoulder to shoulder* (February 2016).

WILLIAMS J

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Introduction

[88] I agree with the result reached by the majority in their reasons which I have had the benefit of reading in draft. I also agree with their approach to the second and third issues: the relevance of the fact that the appellant's operation will involve the sale of plastic bottles and to the effects of the operation on Ngāi Tahu cultural values and tikanga. I make no further comment on those matters.

[89] I do however wish to comment separately on whether it is possible under Section 5 of the Canterbury Land and Water Regional Plan (LWRP) to apply for a water use permit without applying at the same time for an abstraction permit. While the first respondent did not argue the case along the lines I now set out, this approach supports the reasoning of the majority.

A purposive approach to interpreting "taking and use" under r 5.128

[90] When interpreting rules promulgated under a complex statute like the Resource Management Act 1991 (RMA), a purposive construction of potentially ambiguous words and phrases is required.[49] The starting point in this case is s 14. It uses the verbs "take", "use", "dam" and "divert" to describe the actions in relation to water that may be the subject of a water permit. These are all legacy terms drawn (subject to some re-arrangement) from s 21 of the Water and Soil Conservation

[49] Legislation Act 2019, s 10.

Act 1967.[50] Since each of taking, damming, and diverting is also a use of water, close syntactic analysis of the way these verbs are arranged in s 14 will not assist in determining whether, under r 5.128 of the LWRP, a permit to use water can be obtained without reference to the prior taking of it.

The cascade

[91] Rule 5.128 is the penultimate step in a descending hierarchy of regulatory decision-making—the last being the decision under s 104 of the RMA on the water permit application itself. In *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* and *Port Otago Ltd v Environmental Defence Society Inc* we described the hierarchy of instruments that culminates in a permitting decision as a "cascade".[51] Each step has a calibrated relationship with those before and after it, meaning the degree of inter-level control and influence varies depending on where in the cascade the objective, policy, rule or decision is situated. In this case r 5.128 must "give effect" to two policy statements: the National Policy Statement on Freshwater Management (NPS-FM) and the Canterbury Regional Policy Statement (Canterbury RPS).[52] The NPS-FM must state objectives and policies for matters of national significance relevant to achieving the purpose of the RMA.[53] The Canterbury RPS must, in turn, state objectives in relation to the significant regional resource management issues, and policies and methods proposed to achieve the outcomes sought.[54] It too, must give effect to the NPS-FM.[55]

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50 Section 21 of the Water and Soil Conservation Act 1967 relevantly provided:

> (1) Except as expressly authorised by or under this Act or any other Act, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water, is hereby vested in the Crown subject to the provisions of this Act:
>
> …
>
> (3) Any Regional Water Board may, on application to it in accordance with the provisions of this Act and any regulations made thereunder, and on payment of the prescribed fee, grant to the applicant on such terms as it may specify the right within the region of the Board to dam any river or stream or to divert or take natural water or to discharge natural water or waste into any natural water or to use natural water:
>
> …

51 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [30]; and *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] NZRMA 422 at [85].

52 See Resource Management Act 1991, s 67(3)(a) and (c).

53 Section 45A(1).

54 Section 62(1)(a) and (c)–(e).

55 Section 62(3).

[92] The LWRP (in which r 5.128 is situated) must state its own regional objectives and policies and may contain rules to "achieve" those objectives and policies.[56] All of which, as noted, must give effect to the objectives and policies of the NPS-FM and Canterbury RPS. The participatory, multi-layered processes that produce these instruments is intended to produce fully-integrated sustainable management of New Zealand's natural and physical resources in accordance with the RMA's purpose.[57]

This case

[93] The NPS-FM became operative in 2011.[58] It was superseded by the NPS-FM 2014 and then by the NPS-FM 2020.[59] But the 2011 statement is nonetheless the relevant document for these purposes because it was the one the Hearing Commissioners relied upon in drafting the LWRP.[60]

[94] Relevant to interpreting r 5.128 are the following NPS-FM 2011 objectives and policies:

(a) Objective B2: "To avoid any further over-allocation of fresh water and phase out existing over-allocation."

(b) Objective B3: "To improve and maximise the efficient allocation and efficient use of water."

(c) Policies B2, B3 and B4, which direct regional councils to amend their plans to provide for the efficient allocation of fresh water, including introducing controls in relation to transfers of take permits.

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56 See ss 67(1)(a)–(c) and 68(1).

57 Section 5.

58 *National Policy Statement: Freshwater Management 2011* (12 May 2011).

59 *National Policy Statement for Freshwater Management 2014* (4 July 2014). Amendments to the Policy Statement took effect on 7 September 2017. That was then superseded by: Ministry for the Environment | Manatū Mō Te Taiao *National Policy Statement for Freshwater Management 2020* (3 August 2020); the latest amendments to the Policy Statement took effect on 23 February 2023.

60 See *Report and Recommendations of the Hearing Commissioners Adopted by Council as its Decision on 5 December 2013*. The Commissioners comprised retired Principal Environment Judge David Sheppard, Ngāi Tahu kaumatua Edward Ellison, and environmental consultant Rob van Voorthuysen.

(d) Objective C1, which emphasises the need to improve integrated management of fresh water and the use and development of land on a catchment and ecosystem basis.

(e) Policy C1, which directs regional councils to adopt integrated sustainable management of fresh water to avoid, remedy or mitigate adverse effects, including cumulative effects.

[95] The Canterbury RPS tracks these objectives and policies. Relevantly, objective 7.2.2 provides:[61]

> Abstraction of water and the development of water infrastructure in the region occurs in parallel with:
>
> (1) improvements in the efficiency with which water is allocated for abstraction, the way it is abstracted and conveyed, and its application or use;
>
> …

[96] Policy 7.3.8 implements objective 7.2.2. It provides:[62]

> To improve efficiency in the allocation *and use* of fresh water by:
>
> (1) ensuring the infrastructure used to reticulate and apply water is highly efficient relative to the nature of the activity, *for any new take or use of water*;
>
> (2) ensuring the infrastructure used to reticulate and apply water is increasingly efficient (where not already highly efficient) for existing takes and uses of water, having regard to:
>
> (a) *the nature of the activity*;
>
> …
>
> (3) ensuring the quantities of water allocated, as part of a water allocation regime *or by grant of water permit, are no more than are necessary for the proposed use* for all activities, including urban uses and municipal supplies;
>
> …

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61 Environment Canterbury *Canterbury Regional Policy Statement 2013* (15 January 2013).
62 Emphasis added.

[97] Methods for implementing policy 7.3.8 are said to include limiting the amount of water allocated to that which is demonstrated to be reasonable for the proposed activity. According to the accompanying commentary, the principal reasons for the policy and method include the need to achieve allocative efficiency by granting an amount of water for abstraction that is reasonable for the intended use.

[98] These objectives, policies and methods were carried through to the LWRP at:[63]

(a) Objective 3.9: "Abstracted water is shown to be *necessary and reasonable for its intended use* and any water that is abstracted is used efficiently."

(b) Objective 3.10: "Water is available for sustainable abstraction *or use* to support social and economic activities and social and economic benefits are maximised by the efficient storage, distribution *and use of the water* made available within the allocation limits or management regimes which are set in this Plan."

(c) Policy 4.65: "The rate, volume and seasonal duration for which water may be taken *will be reasonable for the intended use*."

(d) Policy 4.67: "Enable the spatial and temporal sharing of allocated water between uses and users, *subject to the existing consent holders retaining priority access to the water during the remaining currency of those consents*, and provided that the rate of taking or volume of water consented for abstraction from a catchment does not exceed the environmental flow and water allocation limit for surface water or stream depleting groundwater, or the groundwater allocation limit for that catchment."

[99] The foregoing suggests that water use is closely bound up with the question of required volume. That is why pre-existing take permits cannot be banked and repurposed, and authority for new uses cannot be decoupled from abstraction.

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63 Emphasis added.

Canterbury RPS policy 7.3.8(3), and LWRP objective 3.9 and policy 4.65 in particular, are clear on this. They appear to drive restricted discretionary factor (1) of r 5.128: "Whether the amount of water to be taken and used is reasonable for the proposed use."

[100] This means that when a water permit is sought for a new use, applicants with pre-existing take permits will still be required to justify the amount they wish to take by reference to the proposed use. The mechanism is that applications for use permits must also include an application to take. This integrated methodology is mandated by Canterbury RPS policy 7.3.8(3), which directs the Council in its guise as rule-maker, to avoid two problems: inefficient catchment-wide over-allocation and over-allocation to individual uses. The retention through LWRP policy 4.67 of "priority access" for existing permit holders is not inconsistent with this mechanism. It protects the permit holder's position in the queue but does not guarantee any particular volume.[64] That question can only be resolved once the use is explained.

[101] That said, Cloud Ocean Water Ltd (Cloud Ocean) is right that treating the application as requiring a fully discretionary activity consent per r 5.6 (instead of applying r 5.128 where discretion is restricted) would technically broaden the Council's discretion, but that is really beside the point. This because it would allow Cloud Ocean to avoid squaring up to the reasonable needs assessment that r 5.128 is designed to require. It might be said that such a requirement could be implied under r 5.6, but that is clearly not the intention of the objectives and policies. In fact, applying a purposive approach, it would not have mattered if r 5.128 had referred instead to "take *or* use". A fresh take and use application would be required with any new use, not because of the *and/or* question, but because the relevant objectives and policies provide that this is how the risks of inefficient use and overallocation are best mitigated.

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64 This despite Ms Limmer's submission that the LWRP does not establish a queue.

Conclusion

[102] I too would therefore dismiss Cloud Ocean's appeal with costs to Aotearoa Water Action Inc.

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