Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

CLOUD OCEAN WATER LIMITED v AOTEAROA WATER ACTION INCORPORATED AND OTHERS

(SC 82/2022) [2023] NZSC 153

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

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 that consent. It involves interpretation of the provisions of the Canterbury Land and Water Regional Plan (the Plan). In this case the "use" aspects of the consent, originally granted to a wool scouring business, were renewed to allow a water bottling operation. The issue for this Court was whether the original "take and use" consent could be decoupled, the "take" aspect continued, and a new "use-only" consent obtained; or whether an entirely new "take-and-use" consent was required. Other issues raised, such as whether the impact of plastic bottles on the environment should have been considered in the resource consent process and whether adverse effects on cultural values and tikanga were adequately addressed did not need to be resolved in the present case.

Background

The appellant Cloud Ocean Water Ltd (Cloud Ocean) and third respondent Southridge Holdings Ltd (formerly Rapaki Natural Resources Ltd) (Southridge) acquired resource consents from other businesses for the take and use of water. They applied to the Canterbury Regional Council (the Council) to obtain new "use" consents for commercial water bottling.

The Plan governs resource consents for the use of groundwater. The Council granted use-only consents relying on rule 5.6 of the Plan, which treats as discretionary all activities not otherwise classified in the Plan. The issue that arose was whether the Plan allowed the take and use consent in question to be decoupled and a new use-only consent granted independently (in reliance on rule 5.6), or whether a completely new take and use consent was required (as set out in rule 5.128). If take and use were severable under rule 5.6, water permit holders could "bank" the take components of their permits and repurpose (through a new consent application) the use component. This would enable applicants to avoid having to justify the volume of water to be deployed in the new use. On the other hand, should rule 5.128 apply, any new use for which a consent was required would also need a take component.

Procedural history

Aotearoa Water Action Inc (AWA) commenced judicial review proceedings in the High Court, challenging the application of rule 5.6. It was unsuccessful. AWA then appealed to the Court of Appeal, which reversed the High Court decision and set aside the Council's decision.

The appeal

The Supreme Court granted leave to appeal to Cloud Ocean on the question of whether the Court of Appeal was correct to allow the appeal. In addition to the issue of the application of the rules, AWA also supported the Court of Appeal judgment on other grounds, namely 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 the Council, and the Council should have considered adverse effects on cultural values and tikanga arising from a water bottling activity.

Supreme Court decision

The Supreme Court unanimously dismissed the appeal. The Court found that ss 14 and 30 of the Resource Management Act 1991 do not require take and use to be considered conjointly in all cases, nor do they requires take and use to be considered separately where the Plan does not so prescribe. There was nothing in the Plan that suggested the drafters envisaged take and use consents would or should be divisible. In fact, this Court found that the Plan used the wording of both "take *and* use" and "take *or* use" in different places for different reasons. The distinction appeared to be carefully chosen.

While rule 5.6 filled a gap where the Plan did not classify an activity, rule 5.128 of the Plan did classify the use of water in relation to groundwater in a context where it required it to be considered as a component of an aggregated "take and use" activity.

In light of the Supreme Court's view on the first ground, the issue of environmental effects from plastic bottles did not have to be addressed. Nor was the issue of effects on cultural values and tikanga addressed in detail, but the Supreme Court did say that the failures by the Council in the process of engagement should not be repeated when the proposals are reconsidered.

Williams J wrote separately in relation to the first issue, concurring in the result. He considered that the result was controlled by the policies and objectives of the National Policy Statement on Freshwater Management and the Canterbury Regional Policy Statement. In particular the latter provided that end-use of water was relevant to how much was needed for

the purposes of any permit to take. Decoupling "take" and "use" would thus have undermined the objectives and policies of the relevant instruments.

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