IN THE SUPREME COURT OF NEW ZEALAND **SC 82/2022**

I TE KŌTI MANA NUI O AOTEAROA

BETWEEN	**CLOUD OCEAN WATER LIMITED**
	Appellant
AND	**AOTEAROA WATER ACTION INCORPORATED**
	First Respondent
AND	**CANTERBURY REGIONAL COUNCIL**
	Second Respondent
AND	**SOUTHRIDGE HOLDINGS LMIITED**
	Third Respondent
AND	**TE NGĀI TŪĀHURIRI RŪNANGA INCORPORATED**
	Intervener

SYNOPSIS OF LEGAL SUBMISSIONS FOR THE THIRD RESPONDENT SOUTHRIDGE HOLDINGS LIMITED

Dated: 15 March 2023

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MAY IT PLEASE THE COURT

Introduction

1. Southridge Holdings Limited (**Southridge**) is the Third Respondent on this appeal. It was formerly known as Rapaki Natural Resources Limited and is referred to as such in the High Court decision[1] and the Court of Appeal decision.[2]

2. It held consents CRC180728[3] and CRC180729[4] which authorised the use of the specified water for commercial water bottling purposes. Those consents were quashed in the Court of Appeal.

3. The Southridge and Cloud Ocean consents have essentially travelled the same procedural path and have been dealt with together throughout the litigation leading to this hearing. Differences are limited and of no particular moment to the primary question appealed by Cloud Ocean – being, whether the Regional Council can process applications for separate "use" consents.

Summary of Argument

4. Southridge adopts and endorses the Cloud Ocean Water Limited (**Cloud Ocean** or **the Appellant**) submissions.[5] Southridge will not duplicate material in either these written submissions or in oral presentation. These written submissions expand on some aspects of the argument contained in the Appellant's submissions.

5. With regard to the primary issue of whether a standalone consent for the "use" of water can be granted:

    a. Southridge respectfully concurs with the Appellant, the High Court and the Court of Appeal that Section 14 is clear and enables application for

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[1] *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625 [[101.0111]].
[2] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325 [[101.0193]].
[3] New Five Bore consent authorising use of water under CRC172245 for commercial bottling operations [[301.0009]] and [[301.0057]].
[4] New Three Bore consent authorising use of water under CRC172118 for commercial bottling operations [[301.0016]] and [[301.0058]].
[5] Synopsis of Legal Submissions for the Appellant, dated 22 February 2023.

a distinct "use" consent, both on its plain reading and in the wider context of the Resource Management Act 1991 (the **Act**); and

b. Southridge respectfully agrees with the Appellant and (implicitly) the High Court that the Canterbury Land and Water Regional Plan (**the LWRP**) does not disclose an intention to modify the effect of section 14 in the Region, such that an application for "use alone" could not be made or granted in Canterbury.[6]

6. Southridge's submissions expand on paragraph 5.b above in relation to interpretation of the LWRP and it submits:

a. The Objectives and Policies of the LWRP anticipate evolution of water use over time, as people's social and economic needs change;

b. The rules of the LWRP do not create activities – they regulate activities that come within their ambit;

c. Allowing water to be used for a new activity does not constitute further

d. The LWRP does not rely on preventing "new uses" of water to reduce the incidence and extent of over-allocation. Rather, the LWRP expressly and primarily relies upon managing the renewal and/or transfer of consents within over-allocated catchments, to achieve this.

7. Southridge further submits it is not necessary for a "take" application to be made concurrently with a "new use" application in order for Council to:

a. Impose conditions on the volume of water able to be used by the new use, as distinct from existing or other uses;

b. Consider the availability and practicality of using alternative supplies of water.

(provided there are legitimate Resource Management Act reasons for doing so).

[6] Unless specifically provided for in the handful of LWRP rules that relate to a "take or use" of water (my emphasis).

8. The effects relevant to both a notification and substantive decision are *effects on the environment*.[7] Defining the "environment" correctly is essential. In circumstances where there is an existing "take" consent:

    a. The "take" consent forms part of the environment and it must be assumed to be exercised to its fullest degree;[8]

    b. It is effects "over and above" those arising from exercise of the existing consent, that matter;

    c. If the effects of an existing, consented "take" are not acceptable the relevant resource consent can be reviewed.[9] For example, effects on other authorised takes. Neither the Act nor the LWRP rely on reconsideration of the "take" when a "change of use" is proposed, to ensure the effects of an existing take continue to be acceptable or are in conformity with new allocation regimes; and

    d. Whether the Southridge and Cloud Ocean applications were processed as separate "use" applications or had to proceed by way of new "take" and "use" applications, the outcome would have been the same:

        i. Any effects arising from the "take" would be discounted to the extent such effects are already part of the environment; and

        ii. Under Rule 5.128 only the matters of restricted discretion would be relevant. Any effects arising from the "use" that were not listed would have been statutorily barred from consideration – for example, effects on Ngāi Tahu values. The Rule 5.6 process adopted did not share these limitations.

9. This appeal has its genesis in a judicial review application made by AWA. The Council's decisions, both on notification and on grant, were undertaken in a proper manner and did not involve:

    a. An error of law; and/or

[7] Section 95A(8)(b); and section 104(1)(a) of the Act.
[8] *Smith v Marlborough District Council* ENC Wellington W098/06, 9 November 2006, at [12].
[9] Section 128(1)(a)(i), (b) and/or (ba) of the Act.

b. Failure to have regard to a relevant consideration; and/or

c. Having regard to an irrelevant consideration; and/or

d. Reaching a decision to which no reasonable decision-maker could have come.

Factual Narrative

10. The consents in issue have a lengthy and somewhat complex history which is addressed in some detail in the Court of Appeal decision.[10] Very much by way of summary, Primary Producers Cooperative Society Limited (**PPCS**) and subsequently Silver Fern Farms Limited operated a freezing works at Belfast. Two consents, known as the Three Bore and Five Bore Consents (**the Three and Five Bore Consents**)[11] were originally held to take and use groundwater. Both the Five Bore and Three Bore Consents were issued under the Water and Soil Conservation Act 1967. The Five Bore Consent was for a term from 2 November 1990 to 30 April 1997.[12] The Three Bore Consent was for a term from 13 March 1969 to 01 October 2001.[13]

11. Subsequently there was:

    a. a grant of new applications to PPCS to replace the Three and Five Bore Consents;[14]

    b. a transfer of the Three and Five Bore Consents from PPCS to Silver Fern Farms Limited; and

    c. a transfer of the Three Bore Consent from Silver Fern Farms Limited to Silver Fern Farms Management Limited;[15]

12. The Three (CRC163841) and Five Bore Consents (CRC971556) were ultimately transferred on 7 September 2016 by Silver Fern Farms Limited and

[10] Above n 2 [[101.0199]].
[11] NCY700281F issued to PPCS (Three Bore Consent) [[303.0001]]; and CRC900359 issued (Five Bore Consent) [[303.0002]].
[12] Permit [[303.0002]].
[13] Permit [[303.0001]].
[14] Notice of decision on CRC012609 (Three Bore Consent) [[303.0051]]; copy of CRC012609 [[301.0005]]; Notice of CRC971556 (Five Bore Consent) being granted [[303.0029]]; and copy of CRC971556 [[301.0003]].
[15] Three Bore Consent transferred from Silver Fern Farms Limited to Silver Fern Farms Management Limited and reissued as CRC163841 [[201.0016]].

Silver Fern Farms Management Limited to Southridge[16], being reissued as CRC172118 and CRC172245.

13. On 13 July 2017 Southridge applied, pursuant to s127 of the Act, to change conditions of the Three and Five Bore Consents, to allow the use of water for bottling purposes.[17] Like the application made by Cloud Ocean, the Southridge applications explained the changed use to water bottling would be more efficient and less environmentally burdensome.[18] The applications made by Southridge did not propose to change the existing volumes for the takes under the Three and Five Bore Consents.

14. Following receipt of the applications, ECan informed (by email) Rūnanga of the existence of the Southridge application and sought comments on the same.[19] No response was received by ECan from Rūnanga.[20]

15. After expiry of the "comments period" ECan proceeded to assess both applications by Southridge and ultimately determined that two new "use" consents were required under s88 of the Act, as opposed to a change of conditions under s127 of the Act.[21] ECan issued a s42A Officer Report for both applications. In both Reports, the potential adverse effects of each new use application were assessed, to determine whether notification was required.[22] As for the Cloud Ocean consents, the s42A reports recommended non-notification for both applications.[23]

16. After considering the issue of notification the s42A Officer went on to undertake the broader assessment required under section 104 of the Act. After concluding the adverse effects of the proposals would be no more than minor, and that the proposals were consistent with the relevant objectives and

[16] At the time of the transfers, Southridge was known as Rapaki Natural Resources Limited [[301.0009]] and [[301.0016]].
[17] Rapaki Application to change conditions of resource consents (to take and use groundwater) CRC172245 and CRC172118 [[301.0019]]; and Assessment of Environmental Effects in respect of application to change conditions [301.0030]].
[18] Assessment of Environmental Effects in respect of application to change conditions, at 2 [[301.0030]].
[19] Email from ECan to Ngāi Tūāhuriri Rūnanga seeking comments on the applications by 26 July 2017 [[301.0032]].
[20] Above n 1, at [274] [[101.0173]].
[21] Officer Report on CRC180729: resource consent (water permit) to use water (not issued) [[301.0044]]; and Officer Report on CRC180728: resource consent (water permit) to use water (not issued) [[301.0033]].
[22] Officer Report for Three Bore Consent, at pages 2 - 4 [[301.0045]] - [[301.047]]; and Officer Report for Five Bore Consent at pages 2 - 4 [[301.0034]] - [[301.0036]].
[23] At 156 [[301.0047]]; and at 145 [[301.0036]].

policies in the LWRP, the Officer recommended the two new "use" consents be granted.[24]

17. The Officer's recommendations were then subject to consideration by two delegated decision-makers within Council (Mr Hopwood and Dr Burge).[25] Both Mr Hopwood and Dr Burge considered the Officer Reports. Like the Reporting Officer, Mr Hopwood and Dr Burge took account of the existing Three and Five Bore consents to *take* water and determined the Southridge applications were properly characterised and assessed as *new water permits to use water (CRC180728 and CRC180729).*[26] Both Mr Hopwood and Dr Burge concluded that would be no additional effects on the aquifer or other water users given the total volume of water to be taken under the Three and Five Bore consents would remain unchanged.[27]

18. Ultimately, both Mr Hopwood and Dr Burge agreed with both Officer Reports that notification was not required. They also agreed as to the substantive recommendation and proceeded to grant the new use permits.[28] The new use permits shared a common expiry date with the existing Three and Five Bore Consents and allowed water taken under the Three and Five Consents, to be used for water bottling.[29]

19. After granting the two Use Permits, the Council amalgamated them with the existing Three and Five Bore Consents, ultimately creating the new Three and Five Bore Consents with an unchanged total combined take 7,414,420 cubic metres of water per annum, which could now be used for commercial water bottling.[30]

20. AWA then challenged, by way of judicial review, the new Three and Five Bore Consents in conjunction with its challenge to the Cloud Ocean consent.[31]

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[24] At 157 [[301.0048]]; and at 146 [[301.0037]].
[25] Decision Memo on CRC180728, CRC180729, CRC180311 and CRC180312 [[301.0053]].
[26] At page 1 [[301.0053]].
[27] At page 2 [[301.0054]].
[28] At pages 2 - 3 [301.0054]] - [[301.0055]].
[29] CRC180729 Rapaki new 'use' resource consent [[301.0058]; and CRC180728 Rapaki new 'use' resource consent [[301.0057]].
[30] Resource Consent CRC180312, being an amalgamation of CRC180729 and CRC172118 [[301.0067]]; and Resource Consent CRC180311, being an amalgamation of CRC172245 and CRC180728 [[301.0059]].
[31] Amended Statement of Claim [[101.0032]].

21. The outcomes arising from litigation to date are covered in Cloud Ocean's legal submissions at paragraphs [21] to [23] and are not canvassed any further in these submissions.

Intent of the LWRP

22. There are two interpretive issues that arise:

    a. Does the LWRP intend that all applications for a "use" be accompanied by an application to "take" water also? Thereby effectively prohibiting "use alone" activities.

    b. Does "and" in Rule 5.128 mean Rule 5.128 only applies to activities proposing both a "take and use"?

23. The Council processed the Southridge and Cloud Ocean applications as "use only" under Rule 5.6. The Council concluded Rule 5.128 did not apply because "and means and" in that Rule.

24. Southridge agrees Rule 5.6 is available *if* Rule 5.128 only captures activities proposing both a take and use. Southridge does not concede this point. It submits the "and" in Rule 5.128 does not necessarily mean it only applies to "take and use" applications.

25. However, there would be very little difference between processing a "use only" application under Rule 5.128 as compared to Rule 5.6 (which is what the Council did). The only material difference is the unfettered evaluation enabled by Rule 5.6 as compared with the limited list of matters able to be considered under Rule 5.128.

26. These submissions therefore focus on whether the LWRP discloses an intention to prevent the application for and processing of separate "use" consents, despite section 14 of the Act treating take activities separately from use activities.

<u>The Decision</u>

27. The Court of Appeal found:

a. The High Court was correct in its interpretation of s14 of the Act. In particular, the Act allows a "take" and a "use" to be dealt with separately;[32]

b. However, *... it does not necessarily follow from the drafting of ss14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take;*[33]

c. The answer to this question depends on the terms of the LWRP provisions;[34]

d. It then proceeded to consider rules 5.128, 5.129 and 5.130 as well as Rules 5.121 and 5.122;

e. The Court noted some rules in the LWRP refer to "take or use"[35] and others refer to "take and use". From that it concluded:

   i. *... the different wording is important and must have been intended;*[36]

   ii. *Where the expression used is "take and use" the intent appears to be that the activity will involve both;*[37]

   iii. *If separate consents were possible for taking and using, the drafting could readily have left the "use" aspect out of both rr 5.129 and 5.130…If the plan had contemplated separate consents for the taking and use necessary for one activity, that would surely have been the approach adopted. But it consistently treats both together;*[38]

   iv. *We see no reason to conclude that the difference in wording is not intentional;*[39]

[32] Above n 2, at [110] - [112] [[101.0227]].
[33] At [113] [[101.0227]].
[34] At [113] [[101.0227]].
[35] Rr 5.121 and 5.122 relating to the taking or use of water from irrigation or hydroelectric canals or water storage facilities [[304.0153]]; Above n 2, at [122] [[101.0230]].
[36] Above n 2, at [122] [[101.0230]].
[37] At [113] [[101.0227]].
[38] At [121] [[101.0229]].
[39] At [122] [[101.0230]].

f. The Court also placed considerable weight on one of the listed matters over which discretion – under Rule 5.128 – is reserved:[40]

> *…Significantly…[matters of discretion] include:*
>
> 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 [Council] will consider that matters set out in Schedule 10…*

> *[118] We consider this creates a direct linkage between take and use. The amount of the take has to be assessed to see whether it is reasonable for the proposed use … If the take is treated as an activity separate to the use, it is unclear how the reasonableness criterion could be applied… That is a consequence of separating out the take and use components of the proposed activity. In our view that subverts the evident intent of r 5.128 read as a whole.*

g. Ultimately, the Court concluded:

> *[128] … Here, for the reasons we have given, the LWRP creates one activity, namely the taking and use of water…*
>
> *[129] … Here, the necessary resource consent was a consent to take and use water, because that is the activity that the rule contemplates. We do not consider it can be legitimate to proceed on the basis that the plan contemplated stand-alone take and use consents given the drafting of the relevant rules.*
>
> *[130] … the application was … considered by the Council under … the "catch-all" r 5.6 … We consider that was a wrong approach in the present context. Because the LWRP provides in r 5.128 for the taking and use of groundwater … and goes on to provide that [if] it does not meet one of more of the conditions [it] is either non-complying (r 5.129) or prohibited (r 5.130), we do not consider it was open to the Council to consider a stand-alone application for consent for only of those elements. …*

[40] At [117] and [118] [[101.0228]] – [[101.0229]].

> *[131] … under the Council's reasoning it would be said that because the LWRP deals only with take and use together, an application for consent restricted to a take only would be a discretionary activity … This approach simply does not work given the pattern of drafting adopted in the LWRP, which plainly contemplates both take and use being considered together.*
>
> *[132] … the Council did not have the ability to grant a resource consent limited to the use of the water for bottling purposes separately to the authorisation to take the water to be used for that purpose. Under the LWRP it was necessary to consider both the take and use together…*

Argument

Approach to interpretation of RMA planning instruments

28. The Courts – particularly the Environment Court - are regularly called upon to interpret planning instruments formulated under the Act. The approach to this task is well-developed and the legal principles to be applied are well settled. It is submitted the principles of most relevance to these proceedings are:

    a. A plan developed under the Act is a form of secondary legislation such that the Legislation Act 2019 applies;[41]

    b. The meaning of a provision in a plan must be ascertained from its text and in the light of its purpose and its context;[42]

    c. The broader objectives, policies and rules in a plan should be used in ascertaining the meaning or intent of a provision;[43]

    d. Higher order Resource Management Act instruments can also bear relevance, such as Regional Policy Statements;[44]

[41] Section 68(2) of the Act; and *Auckland Council v Teddy and Friends Ltd* [2022] NZEnvC 128, at [11].
[42] Legislation Act 2019, Section 10; *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767, at [22]; and *Auckland Council v Teddy and Friends Ltd* [2022] NZEnvC 128, at [26] and [27].
[43] *Powell v Dunedin City Council* (Court of Appeal) (2005) 11 ERLNZ 144, at [35].
[44] *Auckland Council v Budden and ors* [2017] NZEnvC 209, at [37]; and *JJ Ltd v Dunedin City Council* [2021] NZEnvC 7, at [39] and [40].

e. The purpose and scheme of the Act can also be useful in interpreting subordinate planning instruments;[45]

f. Other relevant factors include:

1. The desirability of an interpretation which avoids absurdity or anomalous outcomes;[46]

2. The desirability of an interpretation which is likely to be consistent with the expectation of property owners;[47] and

3. Practicality of administration by council officers.[48]

The LWRP anticipates "use only" applications

29. In concluding the LWRP does not allow "use only" applications to be made and processed, the Court of Appeal discussed and analysed Rules 5.128, 129, 130, 121 and 122. From this it construed a plan-wide intention to *not* allow the grant of separate use permits, despite:

a. s14 of the Act allowing otherwise;

b. the absence of any express or direct indication of such an intention in the LWRP;

c. judicial acceptance that planning instruments *do not necessarily aspire to finished Chancery draftsmanship* and should be interpreted in that light;[49] and

d. Rule 5.6 unambiguously catering for the "use" applications.

30. In terms of the intent of the LWRP, it is submitted:

a. Rules are a means of implementing objectives and policies.[50] They do not have an intent of their own. The aspirations and intentions they are to assist with achieving, are set out in the higher order provisions;

[45] At [37]; and at [39] and [40].
[46] *Nanden v Wellington City Council* [2000] NZRMA 562 (HC); and *Auckland Council v Teddy and Friends Ltd [2022] NZEnvC 128,* at [13].
[47] At [13].
[48] At [13].
[49] *Sandstad v Cheyne Developments Ltd CA20/86*, (1986) 11 NZTPA 250, at 13.
[50] Section 67(1)(c) of the Act; and recognised in the LWRP, section 2.3, page 36 [[304.0058]].

b. The Objectives in the LWRP *identify the resource management outcomes or goals for land and water resources in the Canterbury Region, to achieve the purpose of the RMA.* They *form a comprehensive suite of outcomes to be implemented by the policies, rules and other methods;*[51]

c. The Policies of the LWRP *implement the Plan's objectives, as required under section 67(1)(b) of the RMA;*[52]

d. Accordingly, the Objectives and Policies of the LWRP provide important context to both Rule 5.128 and Rule 5.6. They are essential considerations in discerning purpose and intent; and

e. The Objectives and Policies identify and recognise that adaptation of uses over time and the ability to do so (within allocation limits) can be advantageous to the social and economic wellbeing of the Region:

    i. To this end, relevant Objectives include:

        1. *Land uses continue to develop and change in response to socio-economic and community demand.*[53]

        2. *Abstracted water is shown to be necessary and reasonable for its intended use and any water that is abstracted is used efficiently.*[54]

        3. *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* (emphasis added).[55]

        4. *Water is recognised as an enabler of the economic and social wellbeing of the region.*[56]

    ii. Under the heading *Efficient Use of Water* relevant Policies include:

        1. *The rate, volume and seasonal duration for which water may be taken will be reasonable for the intended use.*[57]

[51] LWRP, section 2.1, page 35 [[304.0057]].
[52] LWRP, section 2.2, page 35 [[304.0057]].
[53] LWRP, Objective 3.5 [[304.0077]].
[54] LWRP, Objective 3.9 [[304.0077]].
[55] LWRP, Objective 3.10 [[304.0077]].
[56] LWRP, Objective 3.11 [[304.0077]].
[57] LWRP, Policy 4.65 [[304.0101]].

2. *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 groundwater allocation limit for that catchment.*[58]

31. To the extent the Court of Appeal ascribes an intent to Rule 5.128 being, to ensure integrated and holistic decision-making through "take and use" applications being applied for and considered at the same time - it is submitted:

    a. The desirability of integrated decision-making has been part of the ethos of the Act since its inception.[59] However, this is a general principle subject to bespoke and case-by-case application;[60]

    b. The Act provides a mechanism (by way of a discretion under section 91) to ensure different applications and activities are dealt with together, whenever that is appropriate;

    c. The Court of Appeal's reasoning on this matter might go toward the invocation of section 91 on applications under Rule 5.6 – especially to only "take" water. However, that is quite different from finding an intention that a separate "use" consent cannot be sought or processed; and

    d. The "new use" consents have the same expiry date as the existing "take" consents. At that time, the "take" and "use" consents will procedurally merge and have to proceed through the "renewal" process together; and

    e. Rules do not have intentions – their role is to bring about what is intended by the Objectives and Policies. In addition, Rule 5.128 cannot "speak" for the whole of the LWRP. It is a very small component of a very large Plan.

[58] LWRP, Policy 4.67 [[304.0101]].
[59] *Affco New Zealand Ltd v Far North District Council* [1994] NZRMA 224, and *Zwart v Gisborne District Council* [2014] NZEnvC 96, at [19].
[60] Above n 1, at [112] to [114] [[101.0024]] – [[101.0025]].

Rules do not create activities

32. Related to Southridge's submissions as to the specific and limited role of rules in a plan, it is respectfully submitted Rule 5.128 cannot *create* an activity.[61] A rule cannot dictate the terms of an application. Rules regulate activities – they do not define them.

33. Even if Rule 5.128 only deals with combined "take and use" applications, that is not the say all applications have to come within that Rule. At most, in the present situation, it means Rule 5.128 does not apply. That is the conclusion the Council came to.

34. The Court of Appeal does not explain why Rule 5.6 – which otherwise captures the proposed activity – is not applicable.

Allowing a "new use" does not constitute further allocation

35. At paragraph [120] the Court of Appeal posed the question – if a "use only" activity could be entertained, why not a "take only" application? There are two primary responses to this:

    a. A new use, in respect of water that can be lawfully obtained via an existing abstraction consent does not constitute further allocation of water. It enables adaptation and evolution of the use of already-allocated water, but it does not comprise further allocation. As such, a "use alone" consent is not capable of causing or exacerbating over-allocation; and

    b. A "new use" application can be made in respect of water that is already allocated by way of a "take" consent. Conversely, in almost all instances a "new take" proposal will also require a "new use" proposal. This makes any "take only" application a prime candidate for suspension of processing pending a "use" application being made, in accordance with section 91 of the Act. Eventually, then, the Council would be in possession of an application to "take and use" and Rules like 5.128 will then apply.

[61] Above n 2, at [128] [[101.0232]].

Is over-allocation intended to be reduced by prevention of "Use only" applications?

36. The Objectives and Policies of the LWRP identify that over-allocation is primarily intended to be addressed by:

    a. Reducing abstraction volumes upon the replacement of existing consents;[62] and/or

    b. By either:

        i. Prohibiting the transfer of resource consents;[63] or

        ii. Requiring the surrender of some allocation when a transfer occurs.[64]

37. The LWRP does not indicate a reliance on preventing "use only" applications as a method to reduce or limit the use of already-allocated water. To the contrary, it expressly recognises the benefits of adapting water use practises to enhance the social and economic wellbeing of its people.

The environment against which effects are assessed

38. The Act requires an assessment of *effects on the environment* for both notification and substantive decisions. In turn, this requires a decision-maker to determine what "the environment" is for any given application. This is distinct from the exercise required by s104(2), as regards a permitted baseline.

39. Actual and potential effects on the environment are relevant to whether consent should be granted at all and, if granted, whether and what conditions might and could be lawfully imposed.

<u>The Decision</u>

40. The Court of Appeal expressed concern certain matters could not lawfully be considered or controlled if a "use only" consent application was considered. In particular, the Court was concerned that:

[62] LWRP, Policy 4.50, page 76 [[304.0098]].
[63] LWRP, Policy 11.4.25, page 243 [[305.0051]]; and Rule 11.5.41, page 258 [[305.0066]].
[64] LWRP, Policies 4.70 and 4.71, page 80 [[304.0102]].

iii. *.. it is unclear how the amount of water bottled could be controlled. We say that because on the approach of the Council, Rapaki and Cloud Ocean the consented volumes of the take are a given. This is a consequence of separating out the take and use components of the proposed activity;*[65]

iv. The discretionary matter of the *availability and practicality of using alternative supplies of water … cannot be genuinely considered if the water take is not before the Council when considering the "use" component of the application: it would necessarily be an irrelevant consideration, because the application can say that it already has a consented supply*;[66]

v. *… the maximum rate of take and potential adverse effects on other authorised takes would also be otiose where there is reliance on a pre-existing use* [sic][67] *consent;*[68]

vi. *We do not think it is a satisfactory answer to say that these matters must be assumed to be satisfactory because there is an existing consent. In our view the intent of the rule is that all relevant matters will be able to be considered in relation to the application for consent* [sic][69] *and use;*[70]

The Law

41. The High Court thoroughly traversed the arguments as to whether the existing take permit should be considered part of the environment for the purposes of both the notification and substantive decisions.[71]

42. Whilst a decision-maker has discretion about applying the permitted baseline, no such discretion is available in respect of implemented resource consents.[72] It must assume implemented consents are being exercised to their fullest

[65] Above n 2, at [118] [[101.0228]] – [[101.0229]].
[66] At [119] [[101.0229]].
[67] It appears this should read "take".
[68] Above n 2, at [119] [[101.0229]].
[69] It appears this should re ad "take".
[70] Above n 2, at [119] [[101.0229]].
[71] Above n 1, at [188] to [228] [[101.0155]] – [[101.0164]].
[72] Above n 8, at [12].

extent, even if they are currently dormant.[73] When a consent is put into effect it becomes a physical reality as well as a legal right.[74]

43. While finite term consents (such as water permits issued by a regional council) might not comprise part of the environment when their "renewal" is being considered, they form part of the environment when other applications for consent are considered.[75]

44. When considering effects on an environment affected by existing, implemented consents, it is only the effects beyond those that would otherwise arise that are relevant.[76]

45. A consent authority's powers to impose conditions are contained principally in Sections 108 and 108AA of the Act. Having regard to these sections and relevant common law, permissible conditions are ones that:

    a. Are imposed for a Resource Management Act purpose;[77]

    b. Fairly and reasonably relate to the proposal being consented;[78]

    c. Are not unreasonable;[79] and

    d. Are agreed to by the applicant for consent;[80] or

    e. Are directly connected to an adverse effect of the proposed activity;[81] or

    f. Are directly connected to an applicable rule or National Environmental Standard;[82] or

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[73] At [12].
[74] Above n 1, at [224], citing *Katz v Auckland City Council* (1987) 12 NZTPA 211 (PT) [[101.0163]].

[75] *Bay of Plenty Regional Council v Fonterra Co-Operative Group Limited* [2011] NZEnvC 73, (2011) 16 ELRNZ 338; and *Contact Energy Ltd v Waikato Regional Council* ENC Auckland A004/00 (2000), (2000) 6 ELRNZ 1.

[76] *Colley v Auckland Council* [2021] NZHC 2365, at [90].
[77] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] NZLR 149, at [61].
[78] At [61].
[79] At [61].
[80] Section 108AA(1)(a) of the Act.
[81] Section 108AA(1)(b)(i) of the Act.
[82] Section 108AA(1)(b)(ii) of the Act.

g. Relate to administrative matters *…essential for the efficient implementation* of the consent.[83]

Argument

46. Assessing the environment as already affected by the existing take consents is consistent with the allocative nature of the permits. They are "counted" in the allocation calculations as if they were being used to their maximum extent. It is therefore logical any effects are assessed on the same basis. *To apply any other approach would leave a council with an impossible task in terms of managing the water resource and assessing the effects of new applications.*[84]

47. Once implemented a consent is valid for the duration of its term and can be exercised to its fullest permission. The effect of an implemented consent can only be altered in prescribed and limited circumstances.[85] In the present circumstances, the take consent has a finite term and the "new use" consent shares that term. Consequently, the take will always form part of the environment in which the new use is exercised.

48. The Court of Appeal considered Council lacked the ability to control the amount of water used and that this was a *consequence of separating out the take and use components of the activity.* Southridge submits:

    a. If there is an actual or potential adverse effect[86] that would arise from unreasonable or inefficient use of the water, a condition of consent could readily be imposed.[87] There is no reason why a consent might not allow different volumes of water to be used for different activities, if assessments of reasonable use produce different results.

    b. The LWRP only provides a "calculator" for reasonable use in respect of irrigation. For other uses requiring consent, it will be determined on a case-by-case basis. Relevant in this situation was the observation in all

[83] Section 108AA(1)(c) of the Act.
[84] Above n 1, at [201] [[101.0158]].
[85] Namely, cancellation under section 126 of the Act or review under section 128 of the Act.
[86] Section 3 of the Act.
[87] *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130, at [69]-[70].

three s42A Reports that both the existing use and proposed new use were "fully consumptive".[88]

c. Whether a use is reasonable or not could be impacted by the availability of other sources of water. This consideration is likely more relevant in an over-allocated catchment where the LWRP looks to encourage reduction of over-allocation. On a fully discretionary application under Rule 5.6, there is no reason why this could not be considered in the processing of an application that will entail the use of water, especially from an over-allocated aquifer.

d. If certain effects cannot be considered or addressed by conditions, it will be because they cannot meet the requirements of s108AA, including that they are not effects of the "use". In which case, they may be effects of the "take". But even if a "take and use" application were before the Council, those effects would be discounted in light of the extant and implemented take consent, which forms part of the environment against which effects are assessed; and

e. In any event, any lack of ability to assess or control certain matters is a consequence of the existing take consent being part of the relevant environment, rather than a consequence of processing a stand-alone "use" application.

49. Matters such as effects on other abstractors and effects of the rate of take are relevant to, and appropriately addressed in, a take consent. In the event processing of a "new use" consent highlights concerns with effects arising from an existing take, the Act provides a means of addressing such effects via the review mechanism of section 128.

50. In substance and because the existing take forms part of the environment, I submit the outcome would be no different whether the application was processed under Rule 5.8 or 5.128. Both consenting pathways involve discounting the effects of the take on the basis it is already implemented and

[88] Officer Report on Cloud Ocean consent application, at page 4 [[301.0132]]; Officer Report on Three Bore consent application, at page 2 [[301.0045]]; and Officer Report on Five Bore consent application, at page 2 [[301.0034]].

assumed to affect the relevant environment to the maximum extent of its permission.

51. It is submitted this is subtly different from assuming the effects of the take are *satisfactory*[89]. Rather, it is an assessment of fact, not judgment. Even if it were accepted an application for "take and use" had to be filed, Rule 5.128 could not bring about the kind of assessment preferred by the Court of Appeal - namely, *…that all relevant matters will be able to be considered in relation to the application for consent* [sic][90] *and use*[91] - because only effects beyond those already part of the environment are apt to be considered.

52. Provided neither Southridge nor Cloud Ocean proposed to change the "take" component of the activity, the effects of taking would be no different and the Council would end up evaluating what, if any, differences are brought about by changing the use of water. As it transpired, that is precisely what Council did.

Effects assessment

53. Before the High Court and the Court of Appeal AWA argued (as an alternative ground) the Council had processed the applications incorrectly. The Runanga joined this argument from the perspective of cultural effects.

The Law

54. The principles on a judicial review have been clearly identified in a number of cases. In *Ennor v Auckland Council*[92] Whata J stated:

> *It is necessary to reiterate that judicial review is not an opportunity to revisit the merits of a decision made by the Council to proceed on a non-notified basis or to grant a consent. As Harrison J stated in Auckland Regional Council:*
>
> *The High Court does not exercise an appellate function on review. It is the decision-making process followed by the consent authority*

[89] As discussed above n 2, at [119] [[101.0229]].
[90] It appears this should read "take".
[91] Above n 2, at [119] [[101.0229]].
[92] *Ennor v Auckland Council* [2018] NZHC 2598.

> *and its lawfulness, not the decision itself which is under consideration.*
>
> *[31] Thus, an applicant on review must identify an error of law, failure to have regard to a relevant consideration, regard to an irrelevancy or procedural unfairness …*

55. As to relevant and irrelevant considerations:[93]

> *[i]t is only when a statute expressly or impliedly identifies considerations required to be taken into account that an exercise of statutory discretion may be set aside for failure to have regard to relevant considerations. It is not enough that the consideration is one that could properly be taken into account or that many people, including the Court, would have taken into account.*

56. A council's decisions are not amenable to review on the basis they were meritoriously wrong.[94]

57. Unreasonableness for the purposes of judicial review has a high threshold. In the Resource Management Act context, this has been equated with a decision "outside the limits of reason".[95]

Argument

58. The High Court thoroughly assessed the "classic" judicial review considerations at paragraphs [229] to [259] and, with a focus on cultural effects, at paragraphs to [260] to [292]. His Honour concluded:

> *[302] The Council appropriately considered all relevant matters and did not have regard to any irrelevant matter when deciding whether notification of the applications was required and in granting consent for the changed use.*
>
> *[303] There was no error in the way the Council considered and dealt with the interests of tangata whenua, namesly the Ngāai Tūuāahuriri Rūunanga's interest in the issues that Council had to consider. Had there*

[93] Above n 1, at [246] [[101.0167]].
[94] Above n 1, at [281] [[101.0175]].
[95] *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453, at [188]-[191], citing *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA), at 131.

been an error in this regard, that would not have been grounds for the Court to review the Council's decision given Ngāai Tūuāahuriri Rūunanga's was not a party to these proceedings and had significantly delayed seeking to be heard in them.

[304] There was no reviewable error in the way the Council dealt with the resource consent applications. The Groups application for relief under the Judicia Review Procedure Act 2016 and its application for the specific declaration set out in its statement of claim are denied.

59. The Court of Appeal did not engage in or disturb these conclusions, as it did not proceed to consider matters beyond deciding the Council could not issue stand-alone use consents.

60. It is submitted the Council's decisions, both on notification and on grant, were undertaken in a proper manner; none of the categories of error identified by Whata J occurred. If the Court accepts the principled focus of the submissions, that is on the ability to separately grant a use consent, the High Court's decision should be reinstated.

I certify that the Third Respondent's submissions are suitable for publication and do not contain any information that is suppressed.

Dated: 15 March 2023

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D C Caldwell

Counsel for the third respondent

List of Authorities

Legislation

1 Resource Management Act 1991

Cases

2 *Affco New Zealand Ltd v Far North District Council* [1994] NZRMA 224.

3 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, (2020) 21 ELRNZ 911.

4 *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, (2022) 24 ELRNZ 30.

5 *Auckland Council v Budden and ors* [2017] NZEnvC 209.

6 *Auckland Council v Teddy and Friends Ltd* [2022] NZEnvC 128.

7 *Bay of Plenty Regional Council v Fonterra Co-Operative Group Limited* [2011] NZEnvC 73, (2011) 16 ELRNZ 338.

8 *Contact Energy Ltd v Waikato Regional Council* ENC Auckland A004/00 (2000), (2000) 6 ELRNZ 1.

9 *Colley v Auckland Council* [2021] NZHC 2365.

10 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

11 *Ennor v Auckland Council* [2018] NZHC 2598.

12 *JJ Ltd v Dunedin City Council* [2021] NZEnvC 7.

13 *Katz v Auckland City Council* (1987) 12 NZTPA 211 (PT).

14 *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130.

15 *Mills v Far North District Council* [2018] NZHC 2082, (2018) 20 ELRNZ 453.

16 *Nanden v Wellington City Council* [2000] NZRMA 562 (HC).

17 *Powell v Dunedin City Council* (Court of Appeal) (2005) 11 ERLNZ 144.

18 *Sandstad v Cheyne Developments Ltd* CA20/86, (1986) 11 NZTPA 250.

19 *Smith v Marlborough District Council* ENC Wellington W098/06, 9 November 2006.

20 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] NZLR 149.

21 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA).

22 *Zwart v Gisborne District Council* [2014] NZEnvC 96.

Legislative material

23 Operative Canterbury Land & Water Regional Plan.