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IN THE SUPREME COURT OF NEW ZEALAND SC 82/2022
I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 4

BETWEEN CLOUD OCEAN WATER LIMITED
Appellant

AND AOTEAROA WATER ACTION INCORPORATED
First Respondent

CANTERBURY REGIONAL COUNCIL
Second Respondent

SOUTHRIDGE HOLDINGS LIMITED
Third Respondent

TE NGĀI TŪĀHURIRI RŪNANGA INCORPORATED
Intervener

Hearing: 22 – 23 March 2023

Court: Winkelmann CJ
Glazebrook J
O'Regan J
Williams J
French J

Counsel: A C Limmer, J R King and S A Chidgey for the Appellant
D A C Bullock and S G T Ma Ching for the First Respondent
P A C Maw and L F de Latour for the Second Respondent
D C Caldwell and J R Pullar for the Third Respondent
J M Appleyard and R E Robilliard for the Intervener

CIVIL APPEAL

Karakia Timatanga

MS LIMMER:

Tēnā koutou e ngā Kaiwhakawā o Te Kōti Mana Nui, ko Ms Limmer tōku ingoa. Kei kōnei mātou ko Ms King, ko Mr Chidgey, hei māngai mō Cloud Ocean Water. May it please the Court, counsel's name is Ms Limmer and I appear with Ms King and Mr Chidgey for Cloud Ocean Water.

WINKELMANN CJ:

Tēnā koutou.

MR BULLOCK:

Tēnā koutou e ngā Kaiwhakawā, ko Bullock ahau. Kei kōnei māua ko Ma Ching, mō te kaiwhakahē tuatahi Aotearoa Water Action Incorporated. May it please the Court, Bullock and Ma Ching for the first respondent.

WINKELMANN CJ:

Tēnā kōrua.

MR MAW:

E te Kōti Mana Nui, ko Maw ahau. Kei kōnei māua ko Ms de Latour, mō te kaiwhakahē tuarua. May it please the Court, Maw and Ms de Latour for the second respondent, Canterbury Regional Council.

WINKELMANN CJ:

Tēnā kōrua.

MR CALDWELL:

Tēnā koutou e ngā Kaiwhakawā, counsel's name is Caldwell and with me is Mr Pullar. I appear for the third respondent, Southridge Holdings Limited.

WINKELMANN CJ:

Tēnā kōrua.

MS APPLEYARD:

E ngā Kaiwhakawā, tēnā koutou, ko Appleyard ahau. Kei kōnei māua ko Robilliard, mō Te Ngāi Tūāhuriri Rūnanga Incorporated. May it please the Court, counsel's name is Ms Appleyard. I appear with Ms Robilliard for Te Ngāi Tūāhuriri Rūnanga Incorporated.

WINKELMANN CJ:

Tēnā kōrua.

Right, so Ms Limmer. So we've read your memorandum, well, it's counsels' memorandum, I think, as to timetable, joint memorandum as to timetable.

MS LIMMER:

Yes, your Honour.

WINKELMANN CJ:

There were two things that arose. First, we thought we were surprised to see that it would take that long for the appellants to present their arguments. Even reading everything there it seems a very generous time allocation, so just want

to emphasise that the two days are there but they're not – you don't need to feel you need to expand the time to take it up, yes. So we'd expect it to be, your arguments to be completed well before 3 pm.

The second thing is that we've read your submissions very well and understand them. What we're really interested to hear you respond to is the arguments that you confront that the original rights were take and use rights and once the particular usage had ceased the process should have been started again and that it was to be, particularly in circumstances where the water was to be used for a different use with different effects and in the context of 5.9.6(2) of the LWRP [Canterbury Land and Water Regional Plan] and the limits on water use, total limit. So that's the essence of what we really want to hear you on.
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MS LIMMER:

Yes, your Honour, thank you for that direction. Yes, just regarding the memorandum and the time allocations, I was going to address you briefly on that anyway just to explain that the appellant and the third respondent have conferred. Obviously, the three consents represented by our combined cases have been dealt with in materially the same way right through the application process through to the litigation in the High Court and the Court of Appeal, so between us it is anticipated, if I do my job properly, they're just probably only me on my feet for that time allocation, and obviously myself and my friend for Southridge Holdings will be able to confer over the morning tea adjournment as well to keep a pulse on that.

WINKELMANN CJ:

Yes.

MS LIMMER:

So it's certainly not a matter of trying to –

WINKELMANN CJ:

Take up the time.

MS LIMMER:

Fill up the time, we are very conscious of and there isn't a benefit for the Court in hearing the same thing from two of us.

WINKELMANN CJ:

And the issues have narrowed a little even since you put in your written submissions, haven't they?

MS LIMMER:

Yes, quite. And that issue, I was just going to say that particular issue is a subtly different issue to the one that actually was considered both by the High Court and the Court of Appeal, so neither of those lower Courts provide any particular discussion or reasoning behind that, the proposition that it was advanced last week in the written submissions for the first respondent as well as – in fact if I might, the first respondent made their submission that there was not a separate take consent to which use could be attached.

The other factual proposition put forward was that the, sorry – was that the application was in fact for a take and use activity and again, that differs slightly from what the Court of Appeal said where it said, for example, in one of its paragraphs – here the necessary resource consent was the consent to take and use water because that is the activity that the rule contemplates.

My friend for the first respondent has countered it slightly differently by saying because that is what the application was for.

WINKELMANN CJ:

Yes.

MS LIMMER:

So there are those two differences that I was going to address at the beginning as well.

WINKELMANN CJ:

Yes. That's good.

MS LIMMER:

To respond to those if I may, I would, I do just have a few historical events I'd like to draw out of what's become quite a long chronology just to set the frame for your consideration.

The first couple of events there that in my submission are particularly important include that for Cloud Ocean – sorry, and just to be absolutely clear, Cloud Ocean has one consent. Southridge Holdings has two consents. For Cloud Ocean the first consent to take water was granted in 1986, so Cloud Ocean and its various predecessors have had the right to take water for many years now. That very first consent was amended from five days to seven days a week in 1987 and the volumes allowed by that consent have not changed since right through into the current consent which expires in April 2032. Obviously, the consent has changed because the Water and Soil Conservation Act 1967 was reappealed, we had the Resource Management Act 1991 and we have – people call them renewables, but new consenting activities in there, and then there have also been a number of transfers on the same site, so not off the site, but to different owners and occupiers of the site as they have come on in those years.

Southridge holds its two consents. The very first, the one referred to as the Three Bore Consent was granted back in 1969. The other consent for the five bores was granted first in 1990. The Five Bore Consent was renewed, replaced under the RMA in 1997 with the same volumes as there are currently, as it is currently consented to use, take and use. That consent expires also in 2032. In 2001 the 1969 Three Bore Consent was re-consented under the RMA at the same volumes it currently provides for. That consent expires 2035.

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All of the use consents we are discussing in this hearing have the same expiry date as those take and use permits and that is whether you look at the stand

alone use consents that were issued by the Council prior to the final product being the amalgamated consents. They all share the same expiry date.

There were transfers over the years in between the RMA consenting, re-consentings. It was in July 2017 when the applications to change these consents first came about and that was by way of Southridge applying to add a use to its two consents, and I refer you to the applications from Southridge in the bundle, pages 301.0027.

O'REGAN J:

Do you want to take us to those? Do you want us to look at this?

WILLIAMS J:

They're on the screen.

MS LIMMER:

I am just going to highlight for you the passages that describe what is being applied for in response to my friend's submission that it's not just what you say it is, it is what the application actually is. And you will see at the top of that page the description of the activity is to change the conditions of the three and five bore consents as they were numbered then to allow the use of water for bottling purposes. Obviously, the application itself has more information in it.

But then if I can also take you to 0030, just a few pages along. Next one. Gosh that's hard to read. Sorry, I'm struggling to see the text on there. Near the bottom of the page and under that heading RMA Schedule 4 Matters –

WILLIAMS J:

Can I ask your tech lawyer to expand that please?

MS LIMMER:

Yes, I'm struggling to read that too.

WILLIAMS J:

Thank you.

MS LIMMER:

Yes. Just onto that subparagraph (a) and the sentence starting: "The effect of the change to include commercial water bottling as a use of water", that's the only part of that sentence relevant to my submission at this point, and on page –

WILLIAMS J:

That's in the AEE?

MS LIMMER:

Yes, that's in the AEE Sir.

WINKELMANN CJ:

Which letter is that, which letter is it at? Oh, (a).

MS LIMMER:

And again in the section 42A report if you go down a little further, you will see again that the officer has used the phrase: "The effect of the change to include commercial water bottling." So in my submission –

GLAZEBROOK J:

Sorry, whereabouts are you now? The schedule –

MS LIMMER:

Sorry. Back down to yes, Ms King has highlighted it on the screen to assist to you locate the words I was just referring to, which refers again to the "change to include commercial water bottling."

WILLIAMS J:

And what's this document?

MS LIMMER:

This is the section 42A report, the officer report. So the first two documents that I took you to were in the application document and this was the next document ECan produced in respect of that. My submission being that they inform what the application actually is about regardless of what you call it. So that was in July 2 –

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GLAZEBROOK J:

And do you want to explain why you're saying that?

MS LIMMER:

Yes, Ma'am. The reason I say is that particularly in response to the first respondent's submission that the substance of the application, no matter what the applicant might call it, is in fact for a take and use.

WILLIAMS J:

Even if it says it's a, actually a change in conditions, that's – may or may not be technically correct –

MS LIMMER:

Yes.

WILLIAMS J:

– (inaudible 10:20:39) be going on?

MS LIMMER:

Yes, and to a large extent we are not apart in that. My submissions make the point that what an application is is a matter of fact. It is what it is. But, of course, it's a matter of substance, not form, and the submissions for the first respondent do assert that my submission on that would lead to the outcome where an applicant can call an application whatever it wants to avoid certain rules. What I – my submission is not that an applicant could do that; my submission is, of course, an application must be looked at in substance regardless of how it's

called, what it is called, and here, when these applications are looked at in substance, they are applications to use already allocated water, and that phrase is important, your Honours, "already allocated water", because it is the nature of a water permit. That is what makes a water permit different from other consents you might get under the RMA, for example, a land use consent. They allocate water and that allocation, until it expires, can only be interfered with in very limited circumstances.

WILLIAMS J:
Can only be?

MS LIMMER:
Interfered with in very limited circumstances. Actually these are, in fact, lapses, after whatever the lapsing period is under section 125, if it is cancelled under section 126 of the Act, if it is reviewed under section 128 it can be interfered with, it cannot be taken away and there are limits.

WILLIAMS J:
Yes, I know you know this one backwards but can you just go through those provisions again?

MS LIMMER:
Sorry, Sir.

WILLIAMS J:
And I just realised that I type like a goat types.

WINKELMANN CJ:
A goat doesn't type.

WILLIAMS J:
Exactly my point. The Chief Justice does have some subtle sensitive…

MS LIMMER:
Yes, Sir. Perhaps if I start at the beginning of that submission.

WILLIAMS J:

Just give me the three provisions you talked about.

MS LIMMER:

The three provisions are section 125…

WINKELMANN CJ:

Sorry, section?

MS LIMMER:

125 of the Resource Management Act.

GLAZEBROOK J:

And that's lapsed, is that right?

MS LIMMER:

And that provides that unless specified otherwise in the consent, the consent will lapse after five years if it's not given effect to. So if you are given an allocation but you do nothing with it, you don't exercise the permit, then it will disappear. So that is one way an allocation could be taken away before the expiry of the consent.

The second section I refer to is section 126 of the Act. That allows a consent to be cancelled by the relevant council if it has not been used for five years but upon notice of the intention to cancel. That particular section of the Act, I am not aware of it being used. It is –

WILLIAMS J:

Given 125, it doesn't need to be used, presumably, or do they sit together?

MS LIMMER:

Well, theoretically it appears that it would be able to be used once the consent has been exercised and then nothing happens for many years. There aren't any examples of it having been used.

WILLIAMS J:

So you're talking about a consent that's used and then abandoned, effectively?

MS LIMMER:

That is what section 126 appears to be dealing with.

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The third way a consent might, an allocative consent might be interfered with prior to its expiry, is via section 128 which allows an authority to review the conditions of a consent. There are limits, of course, on how far back review could go. For example, it can't render the consent a nullity. There are triggers for when a review can happen as well. It cannot just decide to wake up one day and decide it would like to go and review the consent. There needs to be a reason. Now one of those reasons could be adverse effects that have arisen that were not anticipated when the consent was granted. Another reason could be that a higher order instrument comes in. For example, an NES [National Environmental Standard] or an NPS [National Policy Statement) or a new (inaudible 10:25:38) rule in a regional plan that sets different flow or allocation regimes.

WILLIAMS J:

Is that the only way the system can deal with developing scarcity?

MS LIMMER:

That, on that consent in that manner yes, but the land and water plan also has other ways, if you like, of dealing with developing scarcity. For example, it has rules around transferring resource consents during their life and how much water must be surrendered in order to facilitate that. So that is one way that whilst that consent would be okay.

WILLIAMS J:

Ah. So transfer gets taxed?

MS LIMMER:

In some areas in Canterbury under some of the rules in the land and regional plan that we would be looking at yes it can be, yes, and in some instances, a very few, but in some instances this plan prohibits it.

WILLIAMS J:

Transfer?

MS LIMMER:

Yes. And I do talk about that in my submissions when I am comparing the regime or the transfer to the regime surrounding use only consents.

WINKELMANN CJ:

So can you just zoom back out and say what your fundamental submission is there?

MS LIMMER:

So my fundamental submission in respect of the – I started with a what the application's actually for and substance.

WINKELMANN CJ:

Yes.

MS LIMMER:

My friend's submission is that they are actually for a take and use because the original consents are for a take and use. You don't just have a take consent to attach a use onto. My submission in response to that is that, that that ignores, respectfully in my submission, the allocated nature of these resource consents. They give an allocation of water under that consent. That cannot, except in those very limited circumstances, that cannot be tampered with or effected until the expiry of those consents, and that is an important element to the appellant's case and reasoning through as to how these consents were processed because it also feeds into that very important issue of the existing environment and what effects are relevant upon consideration and issue grant of a new consent. I

wonder if it might be helpful for me to expand on that at this point actually, because the submissions –

GLAZEBROOK J:

Can you perhaps just go sort of very high level. So you say it's an allocated nature of water and that gives the right to change the use, is that –

MS LIMMER:

My submission is –

GLAZEBROOK J:

Assuming that – well, perhaps you can just explain the submission.

MS LIMMER:

Yes.

WINKELMANN CJ:

Because I must say, I wasn't exactly following you myself.

MS LIMMER:

Yes. So my submission at its simplest, perhaps, is that you have a take consent and you have a use consent. So that consent, those consents that Southridge and Cloud Ocean sought to change or perhaps better described as to obtain this, another consent to sit alongside them. Because not one consent –

GLAZEBROOK J:

Sorry. You took us to the applications to say that it was a change of condition. I thought you were taking us for a particular reason but now you're saying that it was a new use consent?

MS LIMMER:

That's how the applications were couched and they went through the Council process and were issued, finally. The ultimate product was the new use consent, so that applications made it – what the applications made clear was that they wanted to use the water taken under the existing consents. So that –

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WILLIAMS J:

So you're not pinning your colours to "nothing to see here, folks; this is just a change in condition"?

MS LIMMER:

Not a change of –

WILLIAMS J:

You are accepting that there's an argument that in substance these are fresh consents?

MS LIMMER:

So it could be, the first one is where it expresses –

WILLIAMS J:

You say it doesn't matter?

MS LIMMER:

– change of – that's right. It is what the consents were for that matters and what the consents were for at the heart of the applications was to use the water that was already allocated to be taken under the existing permits.

WILLIAMS J:

So your point is that even if with a fresh, shall we say, related consent, given the allocation, the relevant effects even in a fresh consent are more constrained. Is that the point you were making?

MS LIMMER:

No. No, I'm sorry. The point I was making is that you then proceed – when you are processing an application to add a use to an existing consent, all of the effects of adding that use are relevant under rule 5.6, which I will get to next, but not necessarily under all rules.

But you are assessing effects on the environment and in my submission the environment includes already consent effects and in this case –

GLAZEBROOK J:
It includes already consented?

MS LIMMER:
Consented effects. So activities that are already consented where those consents have been implemented, there is no dispute that these ones have been, any effect that –

WILLIAMS J:
I think that is the point you were making then. The take aspect is, and its effects are not relevant because they have already been taken into account in the pre-allocation so –

MS LIMMER:
Yes, sorry, if that – yes.

WILLIAMS J:
– so it is only the bottling bit, not the abstraction bit because you've already pocketed that.

MS LIMMER:
Yes, quite, and that is a submission also made in Southridge submissions that it doesn't really matter. In this case, we are dealing with a fully allocated catchment, not an over-allocated catchment. Doesn't matter. If we do it as a take and use, you would still be discounting all of the effects of the take anyway because they are already part of the environment and you are left assessing the difference in effects from the new use.

GLAZEBROOK J:
Even if the take or the old use would not actually be used.

MS LIMMER:

Yes.

GLAZEBROOK J:

So you say you pretend that you would use it when you're assessing the additional effects, is that…

MS LIMMER:

Yes. Well, "pretends"…

GLAZEBROOK J:

Well, it would have to be because –

MS LIMMER:

Yes.

GLAZEBROOK J:

I mean if they would be used for one purpose anyway –

O'REGAN J:

"Assume" perhaps rather than – yes.

GLAZEBROOK J:

– but are not going to be used for that, then there is an element of pretence, isn't there, in saying you assume that you would be using it for the previous purpose?

MS LIMMER:

I do have a part of my submissions that deals with exactly that issue and in Southridge there's also in fact how – what is the existing environment, what do you assume, and the approach that the Courts have taken to, the Environment Court has taken to, a situation which is the closest to this because it deals with these finite term regional council consents, is that you cannot assume that they will not be used. You cannot assume they won't survive past their expiry and you must assume that all of their effects are in the environment, and to make

them look perhaps more tangible, more easily understood, if I could just briefly explain that by way of the example that was being used there. The situation was that there was a hydrogeneration power scheme that needed to be re-consented. It had come to the end of its term. It was operating under what we call section 124, so it had expired but it had made application to renew or replace the consent in the required time, so it was allowed to continue on past its expiry date pending resolution of that consent application. The water resource that it wanted to use for that was affected by another user who had a regional council consent also and who was also operating under section 124 of the Act pending resolution of its application to replace. The Court was dealing with a few issues in respect of that in terms of which application should hit the Council hearing first and the Court decided the first application made should. That would be the power scheme's application.

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Then the Court made a finding on what do we do with the effects of the discharge related to the other application that is yet to be decided. Do we assume they carry on or do we assume that they're not there? What do we do with them?

WILLIAMS J:

In the interregnum.

MS LIMMER:

Sorry Sir?

WILLIAMS J:

In the interim, in the gap.

MS LIMMER:

During the consenting process for that first one.

WILLIAMS J:

Yes.

MS LIMMER:

The Court found that the environment that must be assessed includes that consent and everything in it for the purpose of assessing whether or not the effects of the replacement consent is acceptable. In my submission I make the point that this consent is there. It's been implemented. It can be reimplemented to its fullest extent tomorrow. It is lawful.

WILLIAMS J:

When did it stop in its original, according to its original purpose?

WINKELMANN CJ:

When did they stop using it for wool scouring or processing?

MS LIMMER:

I'm not sure I have that date to hand, but I can make enquiries.

WILLIAMS J:

Presumably a long time ago.

MS LIMMER:

If that would be useful.

WINKELMANN CJ:

Can I ask a question of process. Why did Cloud Ocean or Southridge not apply to amend the existing consents?

MS LIMMER:

So Southridge did, Ma'am.

WINKELMANN CJ:

Right. But Cloud Ocean didn't?

MS LIMMER:

Southridge did, it went first, so that was in July 2017. The first application was under section 127 of the RMA to change the consent to include the additional

use. The council decided that was not the right pathway for the substance and what was being sought and that it should get a new use under rule 5.6 instead. Cloud Ocean did not apply until November 2017, so Southridge had already been through that process so Cloud Ocean did not submit under section 127.

GLAZEBROOK J:

Is this all on the chronology because I just must admit, I'm getting lost with these dates.

MS LIMMER:

Yes.

GLAZEBROOK J:

If they're important.

MS LIMMER:

Yes.

GLAZEBROOK J:

But I suspect from what you say they're not that important.

MS LIMMER:

I don't think that –

GLAZEBROOK J:

I.e., in terms of accepting that the process has new consents and it doesn't make any difference.

MS LIMMER:

Yes. I don't think it matters. It's simply my way of explaining that the first consent to go did try under section 127.

GLAZEBROOK J:

Yes, yes I understand.

MS LIMMER:

The subsequent one did not.

GLAZEBROOK J:

Was it under 128, the new consent you said, sorry?

MS LIMMER:

The new consent –

GLAZEBROOK J:

127 was the application to amend by Southbridge, is that right?

MS LIMMER:

That's right. The next application was made as an application to use, grant water and that was under all 5.6.

GLAZEBROOK J:

Yes I understand that.

MS LIMMER:

Or rather then –

GLAZEBROOK J:

I thought you gave us a section under the RMA as well?

O'REGAN J:

Section 127.

MS LIMMER:

127 was for the change –

WINKELMANN CJ:

The original application.

GLAZEBROOK J:

For both of them?

WILLIAMS J:

It became a section 14 application.

MS LIMMER:

It did.

GLAZEBROOK J:

Okay no that's all right, that's okay, thank you.

WILLIAMS J:

So that thesis of yours that would be whatever the existing abstracted environment is, is where you start and you ignore any effects relevant to that. It gets pretty close to saying there's an existing use rights regime in the Act allocation of water, doesn't it?

MS LIMMER:

It says that for as long as – it leads to an analysis where for as long as water is allocated, which is how water on consents in Canterbury is treated –

WILLIAMS J:

But that's how the existing use rights regime works for the land and use planning? And just allow it to do that, compliant or not, because you've always done it. You don't have to worry about the effects of that because the plan doesn't control those, you've got existing use rights. What you're really saying is that the owner has existing use rights in the abstraction and in the Resource Management Act and all of the cascade of documents below it, must ignore what's going on. Which is – and the Act doesn't do that, does it? It specifically only allocates existing use rights to the land use, not the water extraction because water is so much more difficult.

1040

MS LIMMER:

So the position with the existing consents is not mentioned whether compliant or not. You have to comply with your resource consents.

WILLIAMS J:

No, I'm talking about the planning and policy documents.

MS LIMMER:

Yes, yes I take the point, yes. So that is where the review mechanism under section 128 can modify a consent that perhaps is particularly out of step with a regime that has been brought into a plan, subsequent –

WILLIAMS J:

Right, so you say that the defeasance of those banked rights can only be via those review systems?

MS LIMMER:

That's right.

WILLIAMS J:

Even if you are applying for fresh consents which you say are within the umbrella of the original right?

MS LIMMER:

Yes.

WILLIAMS J:

So that there is some – there's quite a strong property flavour to that.

MS LIMMER:

Yes. Maybe if I can answer that, also just by taking one step back. So in the, so the regional plan here, and I may just deal with this groundwater allocation zone which is the fully allocated Christchurch West-Melton Zone. In this zone water quantity is controlled. So no more water can be – no more water quantity can be given via a consent except for in a couple of particular circumstances

which are not relevant here. So the consent, the (inaudible 10:41:42) is fully-allocated. The amount of water that can be taken under all of the consents is kept a tally of and it is a –

GLAZEBROOK J:

Is what sorry? I didn't quite catch that.

MS LIMMER:

The amount of water that can be taken under each consent that allows for an allocation is kept a tally of and ECan [Environment Canterbury] assumes to get to that point of fully or over or under allocated, ECan assumes that all consented allocations are fully used. To do otherwise obviously would invite the possibility of – if ECan entered into an exercise of trying to figure out what is or isn't being used at present time or what might or might not be used in future could invite chaos and imperil the very strong directors right from the central government, national policy statements down to avoid over-allocation. And that –

WINKELMANN CJ:

Can I just ask you to explain why you say that you should treat the environmental effects of the – I mean, that's your legal basis for saying that you should treat then environmental effects of the allocation as banked, you know, off the table when you're considering what it was effectively, a change to the take and use consent.

MS LIMMER:

That is simply an application of the existing environment principle but put into the situational finite term of regional council consent. So the genesis for that is in the land use cases. The earlier decisions with the Court, evidence that they were referred to, the case of *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, the Court of Appeal case where the Court said the environment is overlayed by what is there, what is lawfully there, what could lawfully happen under planning documents, that's the permitted baseline consideration. In that case, the Court said and what could happen under

consents that are not implemented but might be implemented. So that was the first shift, if you like, towards that.

Then we had a case on –

GLAZEBROOK J:

That's when you're looking at a new consent but it slightly begs the question as to what you look at when you're changing a use in relation to an already consented activity?

MS LIMMER:

Yes, so I'm not –

GLAZEBROOK J:

And I can understand what you say, you come along and say, well, can I take and use some water, and they say well, no it's already fully allocated. I mean, that's a bad example probably but I mean say it wasn't fully allocated and you say I can take and use some water and this is going to be, you know a good use of water. They'll say but we've got to look at how the water's being used now and look at it in the total totality of the environment because we're looking at what the effects will be of that additional…

1045

MS LIMMER:

Yes.

GLAZEBROOK J:

But you're saying we actually – in fact, you're saying a bit the opposite, you ignore when you're looking at a new consent what's already there because you would just assume it's –

MS LIMMER:

Yes.

GLAZEBROOK J:

You're only looking at the incremental effect of the change of use.

MS LIMMER:

Yes. That is the ultimate –

GLAZEBROOK J:

That is the submission, isn't it?

MS LIMMER:

That's the ultimate submission, and I –

GLAZEBROOK J:

But I'm not sure the cases you were referring to, but of course you haven't taken us to them, actually support that position. That was all I was asking.

MS LIMMER:

Yes. So those alone don't – starting at how this is evolved.

GLAZEBROOK J:

All right, thank you.

MS LIMMER:

To lead to the proposition I'm making and I had got as far as the land use decision in *Hawthorn* that went so far to say even if it's not implemented at times you might take a consent into account, and following that there was a land use, there was a land use decision, *Smith v Marlborough District Council* ENC Wellington W098/06, 9 November 2006. In that case the Court considered you must assume not only that an implemented consent is part of the environment but to assume it is being used to its fullest extent, even if it is not because it is not in that case, in order to evaluate what the effects of a different or incrementally on top of use might be that was in the context of land use consent.

Then there was the Environment Court *Bay of Plenty Regional Council v Fonterra Co-Operative Group Limited* [2011] NZEnvC 73, (2011) 16 ELRNZ 338 case that I talked to you about before which was in the context of finite term consents which said that absolutely you can't speculate as to whether they might expire or whether thy might be used less, you just have to take them on face value as if they are part of the environment. In my submission that makes sense because if you don't do that then you risk underestimating cumulative effects when you are looking at a new application. If you assume that someone with the consent that allows them to do a certain activity will only maybe do a quarter of that activity, because that's all they've been doing the last couple of years, and you grant another consent to someone else on that basis, but then that person ramps up and uses the full extent of its consent you may have a problem because you haven't taken those cumulative effects into account.

WILLIAMS J:

So you could see why that would make sense for fresh applicants trying to get a piece of the pie. But did the Court mean really mean to say and therefore the existing right holders are protected? Was it really about the new consents or did these cases actually refer to the bankability, if you like, the indefeasibility of the allocated right holders.

MS LIMMER:

That's right. So the approach when a person is renewing their own consent is different. They don't get to go along and say they must assume that all of the effects of what I'm currently allowed to do are still there and then think about whether I should be able to keep doing it.

So on a renewal of your own consent, the environment is not tainted, if you like, or affected by what is in that consent, but it is –

WILLIAMS J:

So the issue in this case is whether the, an adjustment as you would call it, is on the *Fonterra* side of the fence or on the fresh applicant side of the fence.

MS LIMMER:

Yes and a principled approach as well, or just the basics if you like, approach. If the adjustment isn't made the holder of that consent, be it the holder today or another holder that has the site to site transfer but doesn't have to go through any kind of – sorry, same site transfer that doesn't need to go through any kind of approval, they can use that consent to its fullest extent at the moment at any time, and up 'til at 2032 or 2035. So all of the –

GLAZEBROOK J:

Use it for the purpose for which it was granted.

MS LIMMER:

That's right, Yes.

GLAZEBROOK J:

Even if it isn't going to use it for that purpose.

1050

MS LIMMER:

Well, that's speculation and that's certainly what the Court cautioned against in the *Fonterra* case, was speculating. We have –

GLAZEBROOK J:

Well, that's right but it's not the same applicant, is it? It's a new applicant. Or do you want to take it – I can't read this so if somebody is going to do this they'll have to put it up further – and tell us exactly what you're referring to.

WINKELMANN CJ:

And can you just contextualise us as to the facts a little bit?

GLAZEBROOK J:

Yes.

MS LIMMER:

Sorry, can you go to that?

GLAZEBROOK J:

I can read it now, thank you.

MS LIMMER:

There's a statement at the beginning. It's down just – there it is.

GLAZEBROOK J:

Who do we have running the – sorry, the name?

MS LIMMER:

Ms King.

GLAZEBROOK J:

Ms King? Sorry, Ms King, it's much nicer if we can ask you and thank you for what you're doing.

MS LIMMER:

Yes, sorry, we are learning our way around operating this.

GLAZEBROOK J:

Yes, I know. You're doing very well. And I'm very appreciative.

MS LIMMER:

So what I have in front of you, this page here I'll be, before finding suchlike from the case that I spoke about regarding the power scheme renewal –

WINKELMANN CJ:

So can you just contextualise us to the facts?

MS LIMMER:

Yes, the power scheme renewal and the renewal of the discharge consent. So you'll see the first paragraph there, what the Court was faced with here, there was an application for resource consents to replace existing consents for the Matahina Dam and Hydropower project on the Rangitaiki River, and that

application to renew was filed first. The Court found then that that application should be heard first prior to the Fonterra one.

Now just at point 2 there, it mentions section 124 of the Act. Just to help, both of those applications were made in respect of existing activities that were past their expiry dates but were allowed to be so because they had applied to replace the activities under section 124 of the Act. So that is why that reference is there.

Then number 2: "That when considering the TrustPower application," the one that – the Matahina Dam application – "the consent authority must take into account the existing resource consent granted to Fonterra for its discharge to the Rangitaiki River, as it is currently preserved…"

Paragraph 3: "That the existing environment for the purposes of that application hearing," that's the TrustPower, the Matahina Dam application, "includes resource consents and those continuing under section 124 of the Act, together with permitted activities," which is that permitted baseline, "and any granted but unimplemented consents" that are likely to be granted. That's the *Hawthorn* principle.

GLAZEBROOK J:
These are consents to somebody else though, are they? Sorry, I'm really having just a slight bit of trouble –

MS LIMMER:
Yes, they are.

GLAZEBROOK J:
So they're not the particular person's consents that you assume –

MS LIMMER:
No.

GLAZEBROOK J:

– well, which is the situation here.

MS LIMMER:

That's right, the holder of the consent here is the applicant for the additional use but in my submission that is not the same as applying for a complete renewal of a consent which is when you would not completely ignore, because there are provisions in section 104 that tell a decision-maker to consider financial investment, for example, but when a use is expired, a take and use, a use, any consent, is expired and it has to be renewed, the approach is that you don't discount the effects of that expired consent.

WILLIAMS J:

Well, that makes perfect sense, doesn't it?

MS LIMMER:

Yes, but –

GLAZEBROOK J:

I'm just not sure why you say the –

WILLIAMS J:

The question is whether we treat you as an expired consent or we treat you as something else, and that's really what the Court of Appeal dealt with and what we're having to deal with.

MS LIMMER:

My submission is "no" because the underlying consent is safe, if I can use that word, fine, can be used to its fullest extent.

GLAZEBROOK J:

I'm just not sure why *Fonterra* backs, this case backs you up though, because –

MS LIMMER:

Because that case does –

GLAZEBROOK J:

Well, really, they're saying you ignore other people's consents and assume they're being used. Do they – they're not saying they ignore the applicant's consents, do they?

MS LIMMER:

This is about consents that are live and about not speculating in terms of whether or not they might be used and to what extent –

1055

GLAZEBROOK J:

Sorry, but here we've got an applicant, in this particular case we've got an applicant with a consent who wants to change the use or apply for a new use, and you're saying that this case backs up that the applicant's existing consent is ignored, or the effects of it are ignored. I'm just saying, why does this case back it up?

MS LIMMER:

Yes.

GLAZEBROOK J:

Because it doesn't seem to be the same situation it's looking at.

MS LIMMER:

Yes.

GLAZEBROOK J:

Explain to me if I'm wrong.

WINKELMANN CJ:

Well can you just say what, can you –

GLAZEBROOK J:

It seems to say you ignore other people's consents.

WINKELMANN CJ:

Perhaps you can just state what principle you say *Fonterra* stands for that is relevant to your case?

MS LIMMER:

Yes. So the principle, and I think the excerpt Ms King has brought up here is relevant. Paragraph 50 is in front of you in respect of that case. "In respect of existing consents", so I'm starting to just power through their paragraph 50, "assumptions about the utilisation and expiry are particular dangerous. The case of *Living Earth Limited v Auckland Regional Council* & *Anor,* A126/2006 was quoted to the Court, and in that case the Court took into account that the status of the activity would change and become non-complying on a certain date…However, even there, we do not know that the Court went so far as to say that a non-complying consent would not be granted."

There is a part in here that talks about inviting speculation. Just having some issues finding it.

GLAZEBROOK J:

But in this case the existing consent won't be used will it?

FRENCH J:

It all turns on how you describe the existing consent. If it's a take and use consent then –

MS LIMMER:

Yes. Well what the consent could be and is lief to do and able to do, to take and use for the three different consents between them, for the freezing works or the wool scour operations.

FRENCH J:

But what you've submitted is that the take effects are already part of the environment.

MS LIMMER:

As are the use effects.

FRENCH J:

But if the consent, the existing consent is not two consents, but it is one consent then it's take and use consent. I just don't see how you can single out the take effects.

MS LIMMER:

No. And I wasn't suggesting that they had to be singled out. I was just saying that all of the effects of the existing consent form part of the environment because they could arise at any time. Right now, they are lawful. They have been implemented so we're not dealing with –

O'REGAN J:

But there's no freezing works anymore. There isn't a freezing works now so you can't assume it'll be used for a freezing works because there isn't one.

MS LIMMER:

There is no evidence about that in terms of whether or not that – or how that might be able to be ignited.

GLAZEBROOK J:

Well it's not going to be used – if it's used for bottling it's not going to be used for the freezing work. Isn't that the point? Whereas here, isn't *Fonterra* saying well, we can't assume – when somebody's applying for a new consent we can't assume, well, we can't assume that there won't be a freezing work in future and that that take and use won't be used for that. It doesn't say we have to assume that it will be used for that even though there's a new consent being applied for that actually negates the part of that. Because it's certainly not going to be used for a freezing work if it's being used for bottling.

MS LIMMER:

Well…

GLAZEBROOK J:

Well, I mean, I'm assuming. I suppose you could still split it. But the idea is that the same amount of water is going to be used to be bottled and therefore there won't be any left over for use to scour wool or whatever the previous freezing work used.

WINKELMANN CJ:

Your argument seems to entail you're just actually applying amend an existing take and use and therefore, although – and therefore you just, the only change is the effect, is the use not the take, so that should be banked. But you weren't allowed to amend and I'm not quite sure why you weren't allowed to apply to amend and this may be of complete irrelevance, but it would just assist me to know that because it keeps on playing on my mind.

MS LIMMER:

Yes. So –

WINKELMANN CJ:

Why were you not allowed to amend?

MS LIMMER:

The council decided that section 127 limits the ability to amend to activities that were within the scope of the existing application, and –

GLAZEBROOK J:

Do we want to have a look at 127?

WINKELMANN CJ:

Because –

MS LIMMER:

Yes.

GLAZEBROOK J:

Would it help us to do that?

MS LIMMER:

Yes.

WINKELMANN CJ:

Because that might actually tell us something about what's going on here.

WILLIAMS J:

Council basically said it's too big a difference and that's really what this case is about, is there's too big a difference to be caught.

WINKELMANN CJ:

Well in some ways, but is it a legitimate thing to sidestep section 127 by doing something which is in substance an application to amend? Because you're relying on it being an application to amend in substance, aren't you, because you're saying it's your use, your take and your use.

1100

MS LIMMER:

It's an application to be allowed to use the water taken after that permit in addition for a different use. So the stand alone use permits that resulted from the process said that the water taken under the consent number can also be used for water bottling purposes.

FRENCH J:

But it was more than a change of conditions wasn't it?

MS LIMMER:

That was an actual permit.

WINKELMANN CJ:

Because what –

FRENCH J:

Yes but your application was seeking a change of conditions but really I'm saying that changing from wool scour or the freezing works to water bottling was more than a change of conditions, it was a very different use.

MS LIMMER:

It was changing the use of water, yes. Sorry, I'm –

FRENCH J:

But it's not an amendment.

MS LIMMER:

It wasn't by amending any words –

FRENCH J:

No, but the Council wouldn't, the Council processed your application as being something different to what –

MS LIMMER:

Yes, as a new use.

FRENCH J:

Yes.

MS LIMMER:

Yes. So that's, it was –

FRENCH J:

So you're not arguing the Council was wrong to do that, or are you?

MS LIMMER:

To process as a new use, no, that's not an argument that's part of the case.

FRENCH J:

Right, okay.

MS LIMMER:

The argument is that they correct, they – so the Council considered three things. They considered whether it could be changed under section 127. Then they considered whether it ought to be a process as a take and use under rule 5.128 or a use only under rule 5.6 or not at all because it was already covered by the ambit.

WINKELMANN CJ:

Am I correct that if it had proceeded under section 127 or under a fresh application for take and use those would both have been more onerous procedural paths?

MS LIMMER:

Not quite, surprisingly. So I was going to take you to the rules actually just to look at each of them. So rule 5.128 –

WINKELMANN CJ:

Well we were just – we've got section 127 on the screen.

MS LIMMER:

Oh sorry, I'm nearly there.

WINKELMANN CJ:

So do you want to take us to that first?

MS LIMMER:

So yes. The procedural, the application type if it had gone through this section 127 path would have been fully discretionary. So that –

GLAZEBROOK J:

Sorry, can you perhaps just slow down a bit because we are, we're trying to type. I type a bit faster than my friend on my right. I'm a bit faster than the goat, yes, but it's still – if you just slow down just slightly that would be really helpful, thank you.

MS LIMMER:

So the consenting type under section 127 would be fully discretionary. That allows for all relevant effects of allowing the activity to be considered in that consenting process. Those are the –

GLAZEBROOK J:

But you say all relevant effects, but that's of the –

MS LIMMER:

On the exist – on the environment.

WINKELMANN CJ:

Which would include take and use.

GLAZEBROOK J:

That, sorry, that was the point I was going to ask you about. Or do you say you have to assume it will be taken for the previous purpose and so you're only looking at incremental effects. Sorry, I shouldn't use incremental effects because I know that has a specialist meaning, but…

MS LIMMER:

So the important elements of – in terms of the discretion it is all of the effects. It is all of the effects of the activity, so the activity is important to defining the scope of the effects that are relevant and it is all of the effects of the activity on the environment. So defining the environment is also important in understanding what effects –

WINKELMANN CJ:

Yes, can you just answer though, is the activity the take and use?

GLAZEBROOK J:

Or just the use, or just the additional use, assuming that the take will be taken anyway?

MS LIMMER:

If the application, for example, had gone down this path that was asked that the change be to incorporate a useful commercial water bottling into the consent. So to change the consent so that it's also allowed for water to be used for commercial water bottling, so the water that was allocated under that consent could be useful that as well as what it was already able to be used.

GLAZEBROOK J:

But that your – would your submission be the same that you ignore the fact that you assume that it would be taken anyway? I.e., the full application would be taken –

WINKELMANN CJ:

If it's fully discretionary, would the consenting authority ignore the environment impact of the take if your application's just to amend the use?

MS LIMMER:

So in my submission, no. For two reasons. This section 127 does direct you to have regard to the difference and the effects.

1105

GLAZEBROOK J:

But would the difference in effect just be the different use, and you'd assume that the water was going to be taken anyway?

MS LIMMER:

Yes.

GLAZEBROOK J:

So it's the same argument that you're making for the new consent?

MS LIMMER:

Yes, yes. So the application is –

GLAZEBROOK J:

So whatever happens you ignore, you assume that it would be taken anyway and therefore you're only looking at the additional effects related to the different use?

MS LIMMER:

Yes. If this path was taken, and the reason –

GLAZEBROOK J:

Do you just look at the different use by itself? You don't compare it to the previous use or what?

MS LIMMER:

The difference in effect would invite a comparison between what could happen under that previous consented use and what might happen if the application were granted.

GLAZEBROOK J:

So you could say, well, this is better than the previous use so it should be granted clearly because the existing environment has a worse use?

MS LIMMER:

Yes. To an extent, that did form part of the decision-making for these because the activities, the uses, discharged contaminated water.

O'REGAN J:

But was it here they are asking for an additional use weren't they?

MS LIMMER:

Yes.

O'REGAN J:

So they are assuming they would still be allowed to use it for the old use, in addition?

MS LIMMER:

Yes, quite. Yes. The other, if I might, the other reason this would be different to a situation where a consent is being renewed is because there is no certainty of that consent being renewed, or no presumption either in the RMA so it really is all up for grabs. In this case, the underlying consents that are sought to have this new use sit alongside or introduce into, they are not up for grabs. So if this new use is turned down, those consents will continue to persist until their expiry dates and ECan will continue to account for them in their allocation tallies on the basis that all of that allocation is unavailable because it is able to or it is being used. It doesn't matter. When – if someone came to consent something else in that area that might have an impact on the water quality, for example, what those consents allow for in terms of any impacts on water quality would have to be taken into account whether or not they were actually producing contaminated water at that time.

So that is why I say that even though it is a change to the same person's consent, it is not the same as a renewal because those consents will carry on regardless.

WINKELMANN CJ:

So why didn't the Council allow you to use this process? It seems well set up for you.

MS LIMMER:

Yes it does. That's – that'll be why the applicant went down this path to begin with. The affidavit of –

WILLIAMS J:

It does seem, well I can say for me anyway, it does seem rather difficult that you could adopt an entirely different use and abstraction regime as a change in condition.

WINKELMANN CJ:

Yes, so does that –

WILLIAMS J:

The condition is not the activity. You're changing the activity.

WINKELMANN CJ:

So –

WILLIAMS J:

I can see why the Council sort of felt this didn't feel quite right.

MS LIMMER:

Yes.

WILLIAMS J:

Better to treat it as a fresh consent.

MS LIMMER:

Yes.

WINKELMANN CJ:

So did they put that in a letter?

MS LIMMER:

I don't recall that that decision was made in writing. I think there were emails in respect of the Cloud Ocean consent –

WINKELMANN CJ:

Okay, so the Council's approach therefore was what you were trying to do fell outside the scope of the power under section 127.

MS LIMMER:

Yes it was, and the affidavit of Dr Burge in these proceedings does set out in a couple of his paragraphs the process they went through to decide how this first application ought to be processed. Like I say, whether it should go under section 127 was part of the discussion, whether it should be a take and use under rule 5.128, whether it would be a use alone under rule 5.6, or indeed

whether anything was needed because the use specified on the consent was industrial use.

1110

Now that is the issue that went to Justice Churchman as one of the preliminary High Court decisions about well, what could you do under these consents without any changes? He decided that although the consent permission was broadly worded it was tied to what was outlined in the applications way back in history and it was industrial uses but for wool scouring purposes. So because of that, ECan put that to one side. It decided it wouldn't process under section 127. It decided it was a use only and therefore got to one, 5.6.

I don't think Ms King's brought up the options they considered, was that up a page? Yes. So at paragraph 29 of Mr Burge's affidavit which is in front of you, it just confirms there how the staff approached it. They discussed it. They discussed with internal legal counsel. They considered not processing it all on the basis the existing consent was adequate to encompass that use. They considered doing it as a change of conditions as per the 127 application made. Then they considered a new application and as part of that whether it was a new take and use application or simply a new use.

At para 30 of this affidavit, Dr Burge starts to say that: "Discussions of these sorts are common practice when the Council is presented with an application which is considered 'outside the norm' and where there is some question on how best to process the application."

FRENCH J:

And so just to reaffirm what you said to me earlier, you concede that the Council was correct to say that it fell, your application fell outside the scope of section 127?

MS LIMMER:

It's not an argument that's been advanced by any party actually in these proceedings and it's one that I – it wasn't challenged by the applicants at the time and that was back in 2017 now.

GLAZEBROOK J:

So you say it's off the table as an argument? Sorry, you accept then that it's off the table as an argument in this appeal?

MS LIMMER:

On this appeal, yes.

GLAZEBROOK J:

Yes.

MS LIMMER:

Just, if I might, just in terms of that paragraph 30, Dr Burge is not saying there that there's anything extraordinary about this. It is outside the norm in the sense that they – this is Canterbury and a great number of applications are for irrigation, agricultural purposes. The decision document or section 42A report for the Cloud Ocean consent, when that has been processed, actually records the Council has just done a similar application to change a use of a permit for commercial water bottling.

You also have evidence later down in Dr Burge's affidavit about the fact it's not unusual for the Council to process use only applications, and the first respondent has applied to adduce evidence which includes a very large table of consents that were a supply to his client from environment Canterbury in response for the LGOIMA request for all permits issued under rule 5.6 and it has a large number of permits that are use only permits as they are now being called.

So this is a pathway that ECan – this is not the first time the Council has put a consent like this in the basket of rule 5.6. What Dr Burge's affidavit tells us is

they thought very carefully about the right pathway for this, taking into account the underlying resource consent and the parameters that the Council has a few on in respect of section 127.

WILLIAMS J:

Just a quick question of detail that's been bugging me. I think I heard you say in respect of section 127 that the only relevant considerations, I reference back to section 104, were the marginal change related effects.

1115

MS LIMMER:

Yes.

WILLIAMS J:

Section 127 doesn't say that. Is this from authorities?

MS LIMMER:

So section –

WILLIAMS J:

At least I didn't think it said that, but I could be wrong.

MS LIMMER:

Section 127(3)(b) imports the resource consent sections of the RMA. They: "Apply, with all necessary modifications as if the application were an application for a resource consent." That's the application for change. "It is a discretionary activity; and the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of that respectively."

WILLIAMS J:

Right. Thank you. I should have read it more closely.

MS LIMMER:

So what I did say was that it's fully discretionary so all of the effects of the change or cancellation are relevant and that may have confused it in your mind sorry. But the only activity is the change. We started down that path talking about that consenting pathway and how it might have differed, so we have section 127. That is very clear. It's about the change and all of the effects because it's fully discretionary.

If I might take you to now rule 5.6 – sorry, 5.128 perhaps which is the other option considered by the Council but was then dismissed. So this rule is, this is the rule that the application will go down, or the path it will go down, if it were in fact a take and use application. There are four conditions that need to be met for you to come into the – under this rule. First one is that it's from a groundwater allocation zone. In this case, it is. It's the Christchurch West-Melton groundwater allocation zone, so one is down with. The second one is not applicable because it relates to surface water takes so that one does not need to affect whether this rule can or can't apply. The third condition is effectively that any take in addition to all other takes does not exceed the allocation limits for this zone.

It is this condition that the first respondent makes the argument would prohibit the appellant using this rule. However, the, and the Court of Appeal noted in this and in fact it was counsel for the first responder at that hearing which put it forward and my friend for the regional counsel has noted it in his legal submissions to this court as well, is that there are ways to have to put forward a take and use application in this particular groundwater zone because it's only fully allocated as opposed to over-allocated. That would comply with that and in essence, the option is that you have an application in for an activity that says if this is granted the amount of water taken under this consent and the existing consent will not exceed whatever the total is allowed for on the existing consent now, and that would mean that you can comply with that condition three. Or alternatively, you have a condition on the new consent that says once it is granted the other consent will be surrendered.

WINKELMANN CJ:

In other words, what you did. In other words, what you did?

MS LIMMER:

Cloud Ocean and Southridge did not do that.

WINKELMANN CJ:

But you're not exceeding the limit you say because it's within the limit of your existing take?

1120

MS LIMMER:

Yes. So that is our argument for why we obtained a consent but not an extra allocation. The use consents didn't alter the allocation status and what I'm explaining now is that the – so the submissions for the first respondent right at paragraph 4 start with the position that this has all been done to work around and find a tricky path through what would otherwise be prohibited. The submissions for both the Council and Cloud Ocean and Southridge are consistent in saying that's not what this is about, actually. It could go under rule 5.128. In an over-allocated zone that would be different. It can be met here because you are within the limit. In an over-allocated zone, if standalone uses are not available under rule 5.6, they cannot come back to rule 5.128. They would be prohibited.

O'REGAN J:

So you're saying that if you'd had to go down the route of getting a new take and use consent you would have just said: "We apply for a take and use and if we get it we'll surrender the existing, what we've got, now"?

MS LIMMER:

Could do it that way or have a concurrent volume constraint between the two consents.

FRENCH J:

Why don't you just do that then?

MS LIMMER:

So that question is asked in the first respondent's submissions and the answer is actually just a practical one. These parties had consents that were upheld right through till July last year and then –

GLAZEBROOK J:

Sorry, I don't quite understand what that answer is.

MS LIMMER:

That these parties had res– they obtained the resource consents. They were not taken away or quashed right up until the Court of Appeal's decision in July last year, and there's obviously some movement after that decision was received obtaining leave and then at a pragmatic level my client obtained a hearing date of March which actually was not long after they had got the leave and it would take some time to put a new application together, get a new application in the system. It was their choice then to continue with these proceedings.

GLAZEBROOK J:

But isn't the – doesn't the first respondent say if you had surrendered, the take would have gone to somebody else because there's a queue?

MS LIMMER:

So there's no queue and that is in the evidence of Dr Burge there. So he confirms there is no queue because you cannot take more allocation from the site, and so it is prohibited to take any more water out, therefore there are no applications sitting there waiting to be granted.

WINKELMANN CJ:

So you might get a first move or advantage if you surrendered it immediately that moment applied, but wouldn't you face competition because others would apply then too?

MS LIMMER:

But it wouldn't be a first move or advantage in the typical sense because it would be your allocation. So it wouldn't be throwing it back into the pot. The consents would speak to each other, the new consent and the old consent, and no other person would be able to do that.

So moving past –

GLAZEBROOK J:

So is the submission you'd just be granted the take and use anyway, or what's the submission?

MS LIMMER:

So I was looking through the rule, making the point that there was a difference between the parties on whether what the Council has done is a workaround prohibited activity status, and in my submission the first point is that it's not, but the second relevant point about this rule that – this rule, assuming you meet all those four conditions, provides a restricted discretionary path. So –

WILLIAMS J:

How does that affect you?

MS LIMMER:

So not all effects are relevant. If you have an application that gets processed under this rule, only the effects, only the matters that are listed from, under the heading: "The exercise of discretion is restricted to the following matters," only those matters can be taken into account.

WILLIAMS J:

Yes. What are they and how does that affect you?

MS LIMMER:

So they do not include – if we work through them perhaps, so just on the screen there, "The rate, volume and timing of the take"; "Whether the amount of water to be taken and used is reasonable for the proposed use." They have effectively calculated for irrigation use but that's the only use. "The availability and practicality of using alternative supplies"; "The maximum rate of take, including the capacity of the bore," et cetera. So one point I would make is that none of these matters of discretion would allow consideration of, for example, effects on cultural values.

1125

WINKELMANN CJ:

What values?

MS LIMMER:

Cultural values.

WINKELMANN CJ:

Cultural.

MS LIMMER:

They would not allow consideration of effects on the environment from plastic bottles, although the appellant does not accept that they would be relevant anyway, but the point being that the consideration, the matters that conditions could be imposed for, or the reasons for a decline of a restricted discretionary application, are absolutely limited to those 11 matters.

WILLIAMS J:

But they're not as beneficial to you as a pathway which would exclude all consideration of the take effect?

MS LIMMER:

So in my –

WILLIAMS J:

This doesn't seem to exclude all consideration of the effect of the take.

MS LIMMER:

So in my submission though that is regardless of which rule you go down because that is a stable, set environment, whether you're in rule 5.128 or rule 5.6.

WILLIAMS J:

Well, perhaps, but that's – what these restricted items go through is the impact on the water, right?

MS LIMMER:

Yes, they do, but they would still need to be considered against the fact that there is a consent.

WILLIAMS J:

Well, perhaps, but that might be irrelevant to the argument about it's not – it doesn't say here you should ignore all potential effects of the budget allocated to the applicant.

MS LIMMER:

So in my submission, my better way of putting it is that the environment that you would start assessing effects from is the same under the 5.6 rule, the 5.128 rule. The biggest difference, if you like, between these rules is the fact that one is constrained in terms of the matters that you can take account of whereas under 5.6 it is, like section 127, fully discretionary.

FRENCH J:

But the use impacts on the take, correct, under 5.128?

MS LIMMER:

Yes, and in my submissions I have noted that matters such as res – there's no impediment to imposing a different volume that is allowed to be used for different purposes. So, for example, you may be allowed to use a million cubic metres of water for bottling and only 50 million cubic metres of water for something else. If that were catered for by matters that you're able to have regard to, for example, if that is where reasonable use took you, there's no reason why that condition wouldn't be valid on a consent, either under this rule or rule 5.6, and I suppose the difference between these rules really is that one – and this is not the rule that the application was processed under. The rule that the application was processed under, rule 5.6, is fully discretionary and it doesn't have the – it's a general rule and so it's not specific to the situation. It is referred to, and my friend has questioned the language use, but the Resource Management Act industry, if you like, refers to the kinds of rules that 5.6 is as catch-all rules. They are rules to make sure that if there are activities that don't quite fit into any other rule of the plan, they don't escape regulation just by good luck, and that is the nature of rule 5.6, and that just says if there is an "activity that would contravene", section 14(2) is the relevant section here, and it's not catered for in any other rule, so here it's not catered for by rule 5.128 because it is not a take and use, it is a use of already taken water, then it is processed under that rule in the broader category of fully discretionary as opposed to the restricted discretion under 5.128. That is the key difference, key differences, if you like, through the three pathways: the section 127, the rule 5.128 and the rule 5.6 that the Council ended up using. This was in 2017.

WINKELMANN CJ:

It's 11.30. We'll take the morning adjournment.

WILLIAMS J:

Sorry, when we come back I want to, it's something you might think about, why do you say that list of restricted relevant factors in 5.128 excludes cultural matters? You've got 15 minutes to think about.

GLAZEBROOK J:
Because I actually did think one of them did have "cultural" in there, but…

WINKELMANN CJ:
Right, okay, take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.51 AM

MS LIMMER:
Maybe if I address your question that you left me with to consider. The one thing I do need to point out is that that is section 5.128 as at the time the Council – sorry, rule 5.128 at the time the Council was considering what to do with these applications in 2017. That has been amended through plan change 7 and the amendment is now beyond appeal and you will see it is added in restricted, is question matter 12, which says: "Any adverse effects of the use on Ngāi Tahu values or on sites of significance to Ngāi Tahu, including wāhi tapu and wāhi taonga." So there is an additional assessment matter there.

In terms of rule 5.6 that was the other consideration for the Council in 2017. All of those matters are inherent anyway because it is a fully discretionary application.

WILLIAMS J:
As to 5.6?

MS LIMMER:
Yes it is, yes. So the rule that there's the –

WILLIAMS J:
But is your argument the explicit reference to Ngāi Tahu issues means it can't be, they can't be relevant in the absence of such explicit reference? Is that what you're saying?

MS LIMMER:

Unless they were able to come under one of the other grounds, and –

WILLIAMS J:

Well that's what I'm asking you about.

MS LIMMER:

Yes, and my – there is one ground that we looked at over the morning tea, is ground g – 8 sorry: "The proximity and actual or potential adverse environmental effects of water use to any significant indigenous biodiversity and adjacent dry land habitats." That's not, if you like, as overt as the ground 12 that has gone in in recent times.

WINKELMANN CJ:

What about four? Which is simply – oh, and that's surface waters. Just, is there a general environmental consideration on one or two or three?

MS LIMMER:

To the extent –

GLAZEBROOK J:

It would be odd to exclude cultural considerations given Part 2 of the Act, wouldn't it?

WINKELMANN CJ:

Mmm, no.

GLAZEBROOK J:

I would have thought it wouldn't be allowed.

MS LIMMER:

So the law on these activities is very clear that it would need to come into one of those matters of discretion, whether it –

WINKELMANN CJ:

Can you just scroll, Ms King? Can you scroll down to the next page, thanks.

MS LIMMER:

Whether it –

GLAZEBROOK J:

But wouldn't it be ultra vires not to allow cultural consideration.

MS LIMMER:

In a restricted discretionary activity? I don't think that point has ever been considered before, and not –

WILLIAMS J:

I think it's just, isn't it inarguable that it's woven into the fabric of these provisions, the availability and practicality of using alternative supplies of water?

MS LIMMER:

Well it could well be –

WILLIAMS J:

Go somewhere else because this is too important.

MS LIMMER:

The reason that – the reason though that that, in my submission, doesn't matter so much is because that is not the rule that this application went under. It went under the rule 5.6.

1155

WILLIAMS J:

Yes, but your submission was that its cultural matters were excluded in 128.

MS LIMMER:

The difference is that there is a restricted list of values for 5.128.

WILLIAMS J:

I understand that.

MS LIMMER:

Yes, that is my submission.

WILLIAMS J:

But –

MS LIMMER:

And at that time it didn't have matter 12 that is there now.

WILLIAMS J:

Exactly, but, for example, if you look at matter 2, practical alternatives are available, how would you exclude cultural considerations in deciding what availability there is and what practicality there is?

MS LIMMER:

If there were cultural considerations that were relevant to that ground, they would have to be considered.

WILLIAMS J:

Well, it's water, so there always will be. It's water. It's not as if these issues can be put in a box and popped out when they're relevant. They're going to be relevant whenever water is at issue because water is a cultural issue, you know, for every culture, not just the Māori culture and not just Ngāi Tahi culture.

MS LIMMER:

Yes. No, and I'm thinking of how that would come through. The lens, if you like, that I'm considering your questions under is a very strict approach that the Courts have, well, the law has always taken to the operation of a restricted discretionary activity, and because this hasn't been teased out, if you like, in the context of this application because the rule was considered and put aside,

what considerations might be able to be brought through with reference to these factors hasn't been the subject of any consideration or debate.

WILLIAMS J:

Well, you know, it's essentially a quasi legality argument, for example, if the Treaty is there and section 8 then you read these as Treaty consistent or you read them as BORA consistent. You'd be required to. So the fact that they're not explicitly referred to doesn't mean that they're not going to be threaded into the weave of the words.

MS LIMMER:

And I expect it was a part of the consideration when this rule was amended through the plan change 7 process and perhaps also is reflective of the fact that the rule is only applicable for any applications that are within the allocation limits and the allocation limits, of course, are arrived at through considering a great number of values, including in particular, and the plan makes it very clear, right through its chapter 1, chapter 2, objectives and policies, the cultural values and what the allocation means for those. So you are in a territory where the rule only applies when it is working within what the plan has already sanctioned as an allocation from particular areas. So there are a large number of groundwater zones throughout Canterbury that that rule could never apply to because they are in a state of over-allocation, so that could be another reason why it is framed as that, but this was also back when the plan was first written and the plan change 7, this edit, the ground 12 into it, was in the last couple of years, I understand.

WINKELMANN CJ:

Right, so moving on.

MS LIMMER:

Ma'am, your Honours, if I may, I was going to address the Court of Appeal's considerations argument reasons –

WINKELMANN CJ:

Yes, that's right.

MS LIMMER:

– for why, despite section 14 of the RMA happily accommodating a separation of take and use and dam and discharge permits, the Court's finding that the LWRP, the land and water plan, steps away from that. The Court, in making its findings, paid particular regard to the handful of rules that touch on this matter. We've already looked at rule 5.128 and 5.6. 5.128 has an "and", take and use. There are a handful of rules that the Court of Appeal referred to that talk about take or use, and they are in the context of, for example, hydroelectricity generation or irrigation canal activities in recognition of the fact that people will take water from the canals to use for irrigation, for example, so that the scheme that gets the water into the canal may not have a use. So those rules make sense on that basis.

1200

WINKELMANN CJ:

Can you start us with section 14?

MS LIMMER:

Yes. This was a live issue in the High Court as to whether section 14 countenance, separate activities whether you could ever take or use or a dam or divert and –

WINKELMANN CJ:

Is this really what you depend upon to say it was okay to apply for a use consent?

MS LIMMER:

So in my submission the Court was correct to find that. It wasn't a matter that was advanced or argued in the Court of Appeal. It was accepted, in fact, by the first respondent in the Court of Appeal and the Court started from the point that section 14 allows the activities to be divisible if you like, regarded separately,

and then the Court turned to consider whether the land and water plan does the same. It concluded after considering the rules that it did.

WINKELMANN CJ:

But this is a very general provision. It doesn't allow it to be – it doesn't – it's not permissive of consents being dealt with in that way in the particular context, is it?

MS LIMMER:

It is a general provision, yes of course. It's in the act. The feature of section 14 of course is that what it's saying is that you can't do it unless you're permitted to do it under a plan or you have a consent under – or you have a resource consent to do so, and so the first place that you need to go if you want to do any of those activities, a take and/or a use and/or dam or and/or divert is your plan to see whether or not you are either permitted or you can apply for a consent. What the Court of Appeal has said was he looked, he surveyed the rules – the Judge, sorry, surveyed the rules and decided that you could not get a use-only consent? You could only get a take and use consent under that plan because that is what rule 5.128 said.

My argument is that that is not what the land and water plan rule 5.128 does say that, so that, the appellant is not arguing that you could put just a use application in and ask for it to go under rule 5.128. To that extent then the appellant and the Court of Appeal are together and where we part ways is in saying, and there is no other way under the land and water regional plan to get a use only consent, whereas the appellant's saying that does mean that you cannot get a consent to do one of these section 14 activities. You can get it under rule 5.6.

The appellant's argument on that surveys, in combination with Southridge, surveys the other aspects of the land and water plan. So the first submissions was that you cannot discern an intent for the entire plan from the operation of the rules that bear on this matter. That goes back to the policies and objectives in the land and water plan. Because rules are only there to serve those policies

and objectives. The whole point of being is to help create the regulatory environment that will give effect to the aspirations as they are voiced in those policies and objectives.

So the policies here include, and it is immediately accepted, that all policies and all objectives need to be read together. That is how you put a picture together of what you need to achieve at the end of the regulatory framework. And this is a plan of many, many rules. It's got general rules. It's got several subregional catchments that may or may not rely on the general rules as well we more specific rules. So it is a big document, and these objectives and these policies, so subregions also have some as well.

1205

The ones that are particularly relevant though in my submission to a finding or a conclusion that this plan turns its back on the notion of separate use consents include the objectives, objective 3.5, which says: "Land uses continue to develop and change in response to socio-economic and community demand." 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." Objective 3: "Water is available for sustainable abstraction or use to support social and economic activities and social and economic benefits are maximised…" I won't read the rest of that clause. And number 4: "Water is recognised as an enabler of the economic and social wellbeing of the region."

And then in the policy section, in my submission, the following policies are also particularly relevant to consideration of what this plan intended to happen. You have the policy 4.65: "The rate, volume and seasonal duration for which water may be taken will be reasonable for the intended use," and that goes back to one of my answers before, that there's no reason why on a use only application there cannot be a limit on how much water is allowed to be used. The second policy I refer to there, 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 allocation limit for the catchment.

In my submission the difference between, or one of the illustrations of the difference between the plan's approach to this issue of these standalone consents, sits in those policies. Rule 5.128 and the two rules that follow that increase the activity status if you cannot comply with it, are not there to give effect to all of the objectives and policies in the plan. Their job is to do some of it, and in my submission a rule like 5.6 is also there for a reason. It is to do some of it. Together they are to achieve all of the objectives and policies, but on the Court of Appeal's reasoning, in my submission, it is difficult to see how these objectives and policies could be enabled if you shut down the opportunity to use an existing allocation in a way that might better fit with the social and economic circumstances that prevail at the time they're supposed to, back when that consent was first granted.

WINKELMANN CJ:
Can you just repeat that last sentence you said?

MS LIMMER:
Sorry.

WINKELMANN CJ:
No, don't apologise. I thought it was a pivotal one for your submissions so I'm asking you to repeat it.

MS LIMMER:
Certainly. The – my submission is it is difficult to see if the land and water plan is interpreted to close down or close off, shut down, the opportunity for any separate use consents using an existing allocation to be granted, how it is going to be able to implement the policies that allow adaptation and evolution of use over time to adapt to change and social and economic circumstances. These permits can have a life of up to 35 years.

WILLIAMS J:

Ordinarily though, in land use planning anyway, it's done by making an application. If you want to change something, you make an application. Seems to work.

MS LIMMER:

Yes, and my submission is not saying there wouldn't be an application. There would be an application to use allocation for a different purpose. So it is a way of enabling the spatial and temporal sharing of water between uses and users. It is a way of land uses continuing to develop and change in response to socioeconomic and community demand. It's an evolutionary tool.

O'REGAN J:

But the rules are just about how you do it. Doesn't really matter how you do it, does it? I mean if – what's the difference between doing what happened here or doing the section 127 route or having to apply for a new take and use consent?

MS LIMMER:

Yes, and for –

O'REGAN J:

You get – all of them achieve the same result, don't they?

1210

MS LIMMER:

So for this particular zone, because it is in that fully allocated status at the moment, there is opportunity for an allocation holder to effectively swap their own water. That opportunity doesn't exist for a large amount of Canterbury because there are fully allocated zones and there can –

O'REGAN J:

Yes, but that just means somebody else uses the water. That achieves the – I mean I – what you're really saying is to achieve this you've got to allow people

to have a property right and water that they can transfer and allow for different uses for it. But you achieve the same effect by saying well if you're not going to use it, you stop, and we'll allocate it to somebody else.

MS LIMMER:

Maybe – might I give you an example of what I'm trying to describe with the overallocated situation, because it is one that's referred to in the technical advisory note, the ECan, the submissions from my friend for the Regional Council refers to as well. It's just a very simple example that a dairy farm operation may have a consent to taking this water for irrigation. They need to add the use of dairy shed wash down on that water. This is not a hypothetical scenario. It happens a lot and I'm sure my friend can confirm that.

At the moment those applications, those amendments, are processed under section 5 – rule 5.6, that you can add your use to allow for dairy shed wash down, but in the same allocation of water. If the Court, the Supreme Court upholds the Court of Appeal's decision that will not be possible in any zone that is over-allocated.

WINKELMANN CJ:

So that's at –

WILLIAMS J:

Why?

MS LIMMER:

In any zone that is over-allocated, it will not be possible to change just your use or add –

WILLIAMS J:

To change –

MS LIMMER:

Change just a use. You would need to reply for a take and use and you –

WILLIAMS J:

Well that depends on the nature of scale of the shift doesn't it, as always. That's pretty orthodox resource management procedure isn't it? I mean if it's a dairy farm and you need a wash down, that probably matches section 127.

MS LIMMER:

That may do. What I am –

WILLIAMS J:

What if it's a dairy farm and you're turning it into a subdivision?

MS LIMMER:

So my submission is based on how those kinds of applications have been processed to date. They have been issued, those use consents, just use, have been issued under rule 5.6.

WINKELMANN CJ:

Because I think there is, to me there's some – a statutory interpretation point here which is that section 127 does seem to provide the pathway, the people who make minor changes to consents to allow this evolution you're suggesting but there is a threshold point which it's something so fundamental in the change of activity that it's not appropriate to apply. Where is – what does the statutory scheme suggest the alternative approach is? Because I imagine that the respondent's case is that the alternative approach is a fresh application for consent. So can you point to me anything in the statutory scheme which suggests that what you are suggesting is the appropriate approach is contemplated in the legislation?

MS LIMMER:

Sorry Ma'am, I'm not sure I understand the question.

WINKELMANN CJ:

Well, section 127 suggests that you can amend your condition, your consents to meet the kind of scenario you're painting arguably.

MS LIMMER:

Yes.

WINKELMANN CJ:

Where there's an evolution over time. It contemplates that there is this lower threshold kind of approach that you just really take into account what's the incremental change or change caused by this evolution.

MS LIMMER:

Mhm, yes.

WINKELMANN CJ:

If you fall outside the scope of that, and the Council decides you did, what does the statute suggest is your appropriate pathway? Does it suggest your appropriate pathway is a new application for consent?

MS LIMMER:

Yes, yes it does.

WINKELMANN CJ:

But that's against you.

MS LIMMER:

That's a – those are the options that the RMA, if you are unable to change your consent, you then need to see whether or not you need a new consent. That is routine for what councils do too. When they receive an application, even if it is for section 127, they all decide themselves whether it is in fact to go down the 127 path.

WINKELMANN CJ:

Mmm.

MS LIMMER:

That is what was done here for the first application anyway.

WINKELMANN CJ:

So –

1215

MS LIMMER:

The limits of section 127 were never tested in this case.

WINKELMANN CJ:

So you say: "Well, okay, I don't have a statutory path but I have a plan, a path under the plan"? Well, which –

MS LIMMER:

The path, yes, the path has its foundations in section 14 because it starts with, well, what do I want to do, and initially the application was on the basis of what I want to do is change this permit to allow another use. The council said: "No." Oh, okay, so what do I want to do? I want to use water for commercial water bottling. How do I do that? I will go through a use. I will ask for a consent to use water under section 14, to use water for commercial bottling. There's no rule that just says this is the rule that you go under to use the water.

WINKELMANN CJ:

Well, there is kind of a law that says: "This is the process," isn't it, which is the Resource Management Act which tells you about how you go about these things, because there's an argument, isn't there, that this steps outside the statutory pathways?

MS LIMMER:

The RMA certainly says you can't do it unless you go and get that consent and when it has, your Part 6, how you go about getting a consent, but, of course, how you do that depends on the regulation. If the local regulation doesn't deal with the activity that you want to do, the RMA does provide you with section 87B. If it's an activity that's not catered for in a plan, you apply for a fully discretionary consent. Section 87B and rule 5.6 are effectively the same thing in my submission. They are the catch-all regulation to make sure that

you, just because you're not expressly catered for, you don't just get away with it, if you like. So that would be – sorry, Ma'am, I may have taken a while to get there – but that would be the other pathway in many respects. If you cannot go under section 127, if you do not have a specific rule that you are able to get consent under in the regional plan, then you end up having to get consent under section 87B because section 14 says without a consent you can't do it.

WILLIAMS J:

So the debate is not about whether it's an 87B pathway or a 5.6 pathway but what the hurdles are, and you say the hurdles are not many because you can bank the allocation, and the other side says no, you can't because this isn't close enough to the original consent and the original activity.

WINKELMANN CJ:

Well, I'm just an old-fashioned public lawyer so I'm looking at the Act. So are you saying it's a section 87B application?

MS LIMMER:

No, the application was a rule 5.6 application. My submission is that rule 5.6 is competent to do just that, to receive and grant.

WINKELMANN CJ:

And that's not ultra vires the Act?

MS LIMMER:

In my submission no. Those catch-all rules have been somewhat criticised in my friend's submissions for the first respondent. They are replete in the RMA plans. They are universally used, and in my submissions I did have reference to a part of the Act that actually allows a plan to have a rule of this nature. So there is an express –

WINKELMANN CJ:

So you do submit that the plan is allowed to diverge from the Act? You submit it in your written submissions, don't you, that the plan is allowed to diverge from the Act?

MS LIMMER:

When I was talking about section 14 I did make the submission as being accepted by the Court. So there is – a plan can modify, I'll be speaking about section 14, the effect of section 14 in some provisions, and if I might, just to explain perhaps what I was meaning there, I will use the example of section 136 and transfers because section 136 shares some characteristics with section 14. So section 136 is up there, and basically if you want to transfer the whole or any part of a water take or a water use permit to another person on another site, you need to make what is in essence a discretionary application to the Council. So in that respect, like section 14, it's saying you can't transfer a water permit to another site unless you get a consent to do so.

1220

What the land and water plan does with that is in some areas where water resources are very over-allocated, 135% over-allocation in the Selwyn-Waihora zone, and what the rules do there is they prohibit transfers in some situations. So when I say that the plan can modify the effect of the Act, that's what I am referring to.

I have provided a reference to an example. There are several rules that prohibit transfers. The rule I've referred to is 11.5.41, I think. The rule I was referring to is on the screen now, but the distinction I make is here. You have section 14 and you have section 136 and both say that you can't do certain things with water unless you go and get consent or you are permitted by the plan to do so. The plan then goes on to say in some circumstances you're not going to get consent to do, to transfer the water under section 316, so even though the Act tells you you can't do it unless you get a consent, we are telling you we're not going to give you a consent. The plan doesn't do that for use only consents.

The plan does not say we know that tells you that you can't do it unless you can get a consent and we are prohibiting the consent.

WINKELMANN CJ:

Isn't it the case the plan's not going to do that for use only consent because a use only consent would be an extremely rare consent, because most consents are take and use? Used, take and use?

MS LIMMER:

A use only would be less common than a take and use, but –

WINKELMANN CJ:

Well, rare. It would have to be something that's just occurring within the waterway and not removing it from the waterway.

MS LIMMER:

No, respectfully, the uses, the use is not confined. So permits to authorise use of water are not confined to just in-stream uses.

1223

WINKELMANN CJ:

Well what are the other kind of ones?

MS LIMMER:

Irrigation, use of irrigation. The *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, (2008) 14 ELRNZ 61 –

WINKELMANN CJ:

You still have to take it though don't you, to use it?

MS LIMMER:

Yes, yes. But a use – sorry, are you asking me about a use only application –

WINKELMANN CJ:

Yes.

MS LIMMER:

– just being for in-stream values? So this is –

WINKELMANN CJ:

Yes, because that is what you were talking about.

MS LIMMER:

Yes. The use only applications would be – some of them would use other already allocated water to do something else. The, an example might be *Central Plains* consents have been referred to in the authorities for I think most of the parties' submissions in the Court of Appeal decision. There is a separate take consent and a separate use consent for the *Central Plains* water scheme, and you will record that the Court of Appeal case back in 2001, it was about the fact that the Council had received just the take consent. So in my submissions I have termed that the precursor activity and the application was put on hold under section 91 of the Act, pending application also for that use activity. So in my submission, it would be very rare. In fact, I cannot think of an instance where someone would only get a take consent without needing a use consent and therefore allowing the counsel to assess them coherently. There is an obligation in the RMA to hear related applications together as well. Whereas when you have a use consent of already allocated water, water that has already been through the application process all within a limit, there is difference in that you may be able to either add a use on to I, for example the dairy shed wash down perhaps, or use it differently because the social and the economic considerations have moved. You're in a zone with a 135% over-allocation and its implemented. It's there. There's very little that can be done to take allocation back.

1225

So there are, my submission if you like, the nub of the submission, we're not drawing that comparison with section 14, section 136 and how the plan treats those activities as there is no clear direction anywhere in the plan that it seeks to prohibit a use only consent being granted or a use only being considered without –

WINKELMANN CJ:

I don't want to labour the point, but isn't the reverse of what you said that it's extremely rare for a take consent to be granted without use consent true that it would be very rare for a use consent to be granted without a take consent and that's why it's not prohibited? Because it's not something that people would think they would have to regulate.

MS LIMMER:

Sorry, I wasn't quite so clear. The opportunity for the need for a use only consent, the opportunity for the instance of it would be higher because it is the activity that follows.

WINKELMANN CJ:

Mmm.

MS LIMMER:

So if there is an established take and there is an established allocation there may be a natural evolution or a natural morphing of that use that gives rise to something having to be done to authorise –

WINKELMANN CJ:

But didn't *Central Plains* say that you couldn't process the take without the use?

MS LIMMER:

Yes, and in my submission that's because the take comes first. There is a submission from the first respondent that it would be unprincipled to decouple these applications because then people could avoid, like I say, for a large part of Canterbury it's prohibited to seek a take consent because their water resources is overallocated. Part of the first respondent's argument is that rule 5.6 could be used to get around that prohibited status and apply for a take only. My response to that is it's the activity that comes first and it would be very unlikely that that would be able to happen. Section 91 can protect against that and in fact *Central Plains*, the Court of Appeal *Central Plains* case is a good

example of how that might happen. Coupled with the fact there is an obligation in the Act to hear related applications together.

So what I am saying is that you would end up with your coherent whole, whereas the use would need water first to be used. So if there –

WILLIAMS J:
Generally speaking, you'd get use only where you're a taker changing something?

MS LIMMER:
It can be – yes.

WILLIAMS J:
Or where there's an existing take that you can bank and you're a new guy doing something new. Which is what you are.

MS LIMMER:
My friend for the Regional Council is probably going to be able to assist the Court a bit more because obviously they see the whole gambit of our applications. I understand some of them also arise because there is this transfer, ability to transfer water in. So some of them might transfer some of the allocations somewhere and the use consent needs to be modified.

WILLIAMS J:
So use consents, even when they run alone, they're piggybacking on a take consent?

MS LIMMER:
Yes, yes.

WILLIAMS J:
Whether either transferred or in situ.

MS LIMMER:

Yes that's true, and of course, RMA allows you to – so if you had a specified take and use permit, the RMA under section 136 allows you to deal with part of as well as the whole permit, so you can deal with part of your take. It doesn't have to be all the take. Part of a take, or all of the take and not the use.

WINKELMANN CJ:

When the original consent is granted the consenting authority takes into account the use to which it's going to be put in deciding to grant consent?

MS LIMMER:

When is, the – yes. In saying that, the very original consents here were first consented under the Water and Soil Conservation Act. There are some reports in the bundle from the re-consenting process, and yes they did consider the use to which they were going to be put.

WINKELMANN CJ:

Because it seems –

WILLIAMS J:

You'd hope so.

WINKELMANN CJ:

It seems the implication of your approach is that it kind of slices and dices the consent process in a way where you may end up in a position where – so if the consent is attached to a particular use it's decided that that's appropriate to use as water for this particular activity. Now, you're just taking the take as banked and disaggregating that and applying for a use and having it considered separately, it's an artificial slice and dice approach which doesn't seem to be contemplated by the legislative framework and the plan as set against you.

1230

MS LIMMER:

So in my, first in response that my submission will be, it is anticipated to some extent in the plan that that is the reality, and also the reality of having consents of this allocative nature and having allocation limits, within which the plan has decided that it is okay to extract water up to those limits. So in terms of that point, my submission would be the plan anticipates some movement within those limits.

WINKELMANN CJ:

Well where do you say in the plan it shows you, it contemplates consents being amended in this disaggregated way, because that's what's effectively happened. A consent has been amended through a two-stage process, hasn't it? Outside of the provisions of the Act. The consolidations effectively amended the consent.

MS LIMMER:

There's two parts to that and the other part really comes back to the how a consent is assessed – sorry, how a proposal is assessed and what the environment is that you then assess your effects on.

WINKELMANN CJ:

Yes, but what I asked you was, where in the plan do you say it contemplates the kind of thing you're discussing? You say it doesn't prohibit it, but where does it contemplate it?

MS LIMMER:

So in my submission that is for a reading of the combined objectives and policies and I've pulled out the ones that I say are particularly pertinent to that, combined with the fact that there is no equivalent if you like to prohibition for transfers in certain areas, and bearing in mind the overriding principles in interpreting plans that they are not examples of chancery draftsmanship but they are prepared by planners firstly, but then also decision-makers, and the input is wide as publicly notified people participate and have their suggestions. So they're never quite as clear as anyone might like and it does take a wholistic

reading to try and discern, well, what did the plan think should happen or could happen or might happen.

O'REGAN J:

So what do you say about the Court of Appeal's textural analysis of the provisions that talk about take and use and others that talk about take or use? Do you just say that was missing the big picture?

MS LIMMER:

So yes I have – I might just find – so in my submission, so the Court of Appeal started at the premise that section 14 does allow for this disjunctive treatment. It then held that it does not necessarily follow from that drafting of section 14 and section 30, that the Council is able to grant a separate consent for use and a separate consent for take and that that would depend on the term of the plans. In particular here, the land and water plan.

The Court then proceeded to consider the rules 5.128, .129, .130, .121 and .122. In my submission those are the provisions that were overtly referred to in the judgement and it seems to me that is what the Court had regard to. It noted that 5.128, .129 and .130 used the phrase "take and use". Rules 5.121 and 5.122 use the phrase "take or use". They were the rules related to the hydroelectric schemes and irrigation canals and water storage facilities.
1235

The Court drew a number of conclusions based on its survey of those five rules, including that the different wording is important, must have been intended. "Where the expression used is 'take and use' the intent appears to be that the activity will involve both." Just on that, the appellant has no argument with that because it is saying that 5.128 is for a take and use. However, it's where that then goes to next. "If separate consents were possible for taking and using, the drafting could readily have left the 'use' aspect out of both rules 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." Still talking about those three rules. "We see no reason" – so this is

just my aggregation of the comments related, that: “We see no reason to conclude the difference in wording is not intended.”

And from that the Court concluded that the land and water plan creates one activity, namely the take and use of water. Here the necessary consent was, application, was to take and use water because that is the activity the rule contemplates.

Because the land and water plan provides in rule 5.128 for the taking and use of groundwater, and goes on to provide that if does not meet one of those conditions, “we do not consider it was open to the Council to consider a standalone application for consent for only one of those elements.”

O’REGAN J:

Yes, I know what the Court of Appeal judgment says. I’m just asking you what’s wrong with it?

MS LIMMER:

So pulling all of that together, my submission was that the Court looked too narrowly at the plan to arrive at a conclusion that the entire plan turns its back on the ability or the concept of a separate use consent which would use an existing allocation. My submission is that there was much more to the land and water plan than just those applied rules.

WILLIAMS J:

Isn’t it a question of degree, given your very washed-down is one example of an existing (inaudible 12:37:18) allocation, slightly different use of it, probably no problem, than some things that are so fundamental it would be inconsistent with the values of the RMA not to consider the thing wholistically?

MS LIMMER:

So another example that comes to mind from the advice like ECan has issued of the types of consents that might be the – that have been processed under rule 5.6 would be aware a site has an irrigation permit and the site is sold to a

quarrying company and they want to change the use of that permit to be able to use it for dust suppression, the water, to be able to use it for dust suppression purposes rather than irrigating farm land. That's kind of the application that would – so that is a different activity and that has been granted as a use only, so you get a permit that allows you to also use that water for dust suppression purposes from that same allocation.

FRENCH J:

So do they amalgamate the consents in the way they did in this case?

MS LIMMER:

I'm not sure I can answer that. I'm sure my friend –

O'REGAN J:

I think your junior is saying yes.

MS LIMMER:

I'm sure my friend from the Regional Council will be able to. My understanding is that that is the usual process for the Canterbury Regional Council because that makes it easier for them to administer a number of consents. So rather than having the parent consent, if you like, and the use consent sitting beside it, they put them together after they've been granted, for interests of efficiency really.

O'REGAN J:

So you're saying the Court of Appeal misconstrued the plan because they focused too much on the rules, the individual rules, and not on the overall objectives of the plan? Is that in summary what you're saying?

MS LIMMER:

Yes, yes. There's a – the survey was too narrow to truly understand the intention of the plan.

WILLIAMS J:

What then is the point of 5.128(3)?

MS LIMMER:

To prohibit new re-allocations in zones that are either at full allocation or over-allocated. So when you –

1240

WILLIAMS J:

Unless its proposed take is a replacement of lawfully established take.

MS LIMMER:

Yes. Yes, the land and water plan has different provisions if you are replacing your take. Many of the zones will have their own bespoke –

WILLIAMS J:

But why would you replace your take?

MS LIMMER:

When it expires.

WILLIAMS J:

Oh. So but that's a whole fresh application.

MS LIMMER:

Yes it is. And the reference to 124 is those consents. But like the example I was referring to at the –

WILLIAMS J:

I see.

MS LIMMER:

Yes.

WILLIAMS J:

So this is a renewal clause, is it?

MS LIMMER:

Yes, yes. It is really. Well the first half of it, yes.

WILLIAMS J:

Well it is really? Or it is.

MS LIMMER:

The first half, it is.

WILLIAMS J:

Really.

MS LIMMER:

Well it says unless the proposed take is this. So it deals with both. It deals with both replacement consents and new consents.

WILLIAMS J:

Yes, but if your new consent is a replacement of your old one, is section 124 your go to section is it?

MS LIMMER:

Section 124 allows you to continue until your new application is resolved.

WILLIAMS J:

Right. Is it not, this may be for the Council rather than you, but is it not used to adjust your consent within its envelope for some reason or other?

MS LIMMER:

The replacement process?

WILLIAMS J:

Yes.

MS LIMMER:

Yes, there are provisions in the Land and Water Regional Plan depending on which groundwater zones and what the state of allocation is, that do – that would allow, and I imagine ensure, that where there is, for example, high allocation that the consent is ranked down, if it's able to be. Those are, my friend for the Regional Council can probably provide you more detail, but certainly the plan does –

WILLIAMS J:

Is this to get greater tenure for less water for example going forward?

MS LIMMER:

The, so that the, because the region has an allocation problem looked at broadly, there are a number of provisions in it that identify how the region is looking to reduce that over-allocation in line with the national instruments that tell it it has to. One of those, one of the ways identified specifically in the plan and the objectives and policies is to manage transfers of water permits carefully, in some cases to require surrender of water and in some cases to just prohibit them outright. One of the other ways the plan identifies to reduce over-allocation is to reduce the amount of water when consents come up for renewal, replacement. Neither of which are particular terms in the Act. So it is certainly, that process of replacement is one of the opportunities for the Council to interrogate the allocation on an existing consent and change it if wanted.

WINKELMANN CJ:

Is there any, in the plan anywhere, is there any express reference to this process of changing existing consents in this way?

MS LIMMER:

Only in respect of section 124. That is expressed because that is the exception that says when you are coming up to expiry, as long as you make your application within certain timeframes you can continue to operate under your existing consent past the expiry date until your new application is granted.

WINKELMANN CJ:

Yes, no but –

MS LIMMER:

There's nothing – section 104 requires decision-makers –

WINKELMANN CJ:

Section or rule? Are we –

MS LIMMER:

Sorry, still in the Act.

WINKELMANN CJ:

Okay, section, okay.

MS LIMMER:

Section 104 requires decision-makers to have regard to investment.

WINKELMANN CJ:

I was asking you about the plan.

MS LIMMER:

Oh sorry, I thought you were talking to the –

WINKELMANN CJ:

Is there anything in the plan that expressly contemplates – you say the whole vibe of the plan is that you can effectively amend consents to allow this evolution to occur and it has to be permitted to enable, you know, the world, the economic use of land and business et cetera change over time. You say that's the vibe of the plan. Can you point to anything that shows that they contemplate that take and use consents will be amended in this process?

MS LIMMER:

Yes.

WINKELMANN CJ:

Because that's really what is occurring. You're amending your use so then you're consolidating your take and use and amending the consent.

MS LIMMER:

Yes. Yes, there are provisions. Sorry, I'm just trying to find the reference but there certainly are…

1245

O'REGAN J:

Maybe after lunch.

WINKELMANN CJ:

Well, perhaps you can come back to that after lunch.

MS LIMMER:

I've just found it. So there is the submission that – reducing abstraction volumes upon the replacement of existing consents –

WILLIAMS J:

Where is that?

MS LIMMER:

– is specifically referred to in objecting policy, policy 4.50. So that is in cases where there is an instance of over-allocation. There is a policy of reducing volumes on permits when they come up for replacement.

O'REGAN J:

If your client's application had been channelled into rule 5.128, would that have then triggered the 5.128.3 so that the allocation would have – it would have been on the basis that there was no new allocation, was that –

MS LIMMER:

Yes. So the application would have had to include a mechanism to ensure there was no new allocation and that mechanism was discussed in the Court of Appeal, yes. That's why it couldn't just be on top of.

The other policy I will refer you to is policy 11.4.25, Ms King is pulling up now. Now this relates to the transfer of resource consents which is the other way the land and water plan has identified that it will squeeze allocated water back down if it needs to do so to get into the limits, and this policy sets out they will restrict the transfer, so that certain users cannot do it at all, and that a certain amount of water that is supposed to be transferred is actually surrendered. So the submissions I make about this is that the plan has set out a very clear way – there is another policy, sorry – Ms King perhaps – policies 4.70 and 4.71, other policies that demonstrate a desire to use the transfer process as a means of getting water out of the consents. So my overall submission is that the land and water plan does not indicate any reliance on preventing use-only applications as a means of reducing over-allocation but it does indicate a very clear reliance on using the opportunity presented by replacement consent processes and applications to transfer consents as a way of bringing allocation down.

WINKELMANN CJ:

So that all fits within the statutory framework, doesn't it, that replacements, that's a new consent, transfers, that's under the statutory framework too?

MS LIMMER:

Yes, that's right. That needs a consent to be allowed to happen.

WILLIAMS J:

Let's take the pro, let's call them the pro-evolution policies that you referred to earlier as supporting the separation of use and take. The logical issue I have with that is those policies also apply to use and take. They'll apply to a consent application as much as they'll apply to your interpretation that a consent is not required, so that the Regional Council will still have to interpret a take

application, a fresh take application, in light of the pro-evolution values in Parts 3 and 4. So does that really help you?

1250

MS LIMMER:

That's right. All objectives and policies that are relevant in the application will have to be taken into account. The consideration that my submission makes is for many – there – it's prohibited to apply for the new takes. So, saying that they would be able to be considered in a new take and use application is only useful –

WILLIAMS J:

No, I'm talking about in your, in your –

MS LIMMER:

In a fully allocated zone such as the one that we are operating in, it could be done in a way that could bring us into rule 5.128 and then yes, all of those policies would be relevant, yes.

WILLIAMS J:

All of those pro-evolution –

MS LIMMER:

Yes, but they will be irrelevant to the over-allocated zones if the conclusion is that rule 5.6 cannot be used. That everything has to be combined.

WILLIAMS J:

Yes but that's – your situation is fully but not over-allocated zone.

MS LIMMER:

Yes, yes it is.

WILLIAMS J:

Would the pro-evolution policies apply to a replacement take application within the life of the existing consent? The answer to that must be yes.

MS LIMMER:

It must be yes but only insofar as you are allowed to advance, or insofar as they relate to the matters of discretion that are in that list.

WILLIAMS J:

They do, don't they?

MS LIMMER:

Just reading through them, if I might, or perhaps I can answer –

WINKELMANN CJ:

After lunch?

MS LIMMER:

After lunch.

WINKELMANN CJ:

So where are we at with your submissions?

MS LIMMER:

I am almost done, Ma'am. There are simply the, both the first respondent and intervener have also run alternative arguments that there are effects that have not been evaluated in the event that going through rule 5.6 was the correct path. The plastic bottle pollution matter and obviously the absence, the alleged absence of consideration of cultural values, so I could just briefly address –

WINKELMANN CJ:

I think you – have you addressed that? You said it's outside the relevant considerations?

MS LIMMER:

Well no, because there's the –

WINKELMANN CJ:

Oh, 5.6. Yes, 5.6.

MS LIMMER:

The application went under the fully discretionary rule. That, I don't anticipate taking long. I'll also speak to my friend for Southridge briefly if you like to see whether there is an –

WINKELMANN CJ:

Well carry on because we've still got eight minutes to go until lunch.

MS LIMMER:

Okay. Well I might then, Ma'am, start with dealing with the – sorry, I'll just take one moment to get to a different part of my submissions.

WINKELMANN CJ:

That's fine. Yes, you take a moment.

MS LIMMER:

Sorry, Ma'am, there is just one more point perhaps if we leave this topic of the consent and the question about what could be considered and opposed. The Act, of course, has section 108 and section 108 AA regarding the conditions of resource consent that are valid. The reason I mention that is because my submissions make the point that if a use created effects that needed to be managed, or that volumes ought to be imposed to manage those certain effects or ensure a reasonable and efficient take, that could be done under those provisions of the Act. I just note that section 108AA of the Act is different now, if you like, than I think when the Supreme Court last had to deal with that and it requires a direct –

WINKELMANN CJ:

I'm just finding that hard to follow because it keeps on changing the screen, but what's your point about these sections?

MS LIMMER:

Carrying on from the what is relevant and what can be looked at –

WINKELMANN CJ:

Yes, okay.

1255

MS LIMMER:

– if it's a use only application. I just point out that for a condition in a resource consent to be lawful, there's the general tests that have always been the case under section 108, and we also now have section 108AA that requires them to be connected, directly connected to an adverse effects of the activity. My point being that if the use creates effects that are adverse, it is competent for those to be dealt with in the use application process. I do note that in this process the officers in all three of the reports about these consents noted that there could be effects that arise when you might go from a non or a partially consumptive take to a fully consumptive take, but in this case, in the case of all three, it was faced with a – it was confronted with a factual situation of a fully consumptive take going to add another fully consumptive take, so there was a difference, if you like, in the level of consumption, and that was expressly considered and discussed in the decision documents.

If it pleases the Court, I'll turn briefly now to the issue of plastic bottle pollution –

WINKELMANN CJ:

Yes.

MS LIMMER:

– raised by the first respondent. The notice to support judgment on other grounds raised the issue of disposal of the plastics. I'm sure my friend will clarify but it seems that the submission is saying it's not just disposal of the plastic that's an issue.

The point for the appellant, well, submission for the appellant, is that this is an issue of national and global importance. Looking at the MFE website for this, it is noted to be one of the greatest environmental challenges facing us at the moment.

WILLIAMS J:

That submission might not help you.

MS LIMMER:

No, and it has been dealt with. I'm drawing an analogy between climate change as well which is what the *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 case – and I should have started there rather than starting where I did. The *Buller Coal* case is one where the Supreme Court was obviously confronted with the question of a pressing and global –

GLAZEBROOK J:

Well, it wasn't really, was it, because wasn't the point of *Buller Coal* the fact that there was a requirement not to consider climate change because it was supposed to be done at the national level, and the – I thought that the ratio of the decision would be – but that didn't apply to those secondary uses, but the ratio of decision would be it would be totally ridiculous if you couldn't take it into account at the primary issue of mining but you could somehow take it into account at the local level, not the national level, in respect of the other. So I'm just wondering whether some of these comments that were made in respect of that are really obiter but in the context of a decision that says you cannot look at climate change, which was accepted by the Court as applying to those secondary consents as well as the primary one.

MS LIMMER:

Yes. I think the –

GLAZEBROOK J:

It's just that I think – well, that's the question but maybe we deal with that after lunch.

MS LIMMER:

Yes.

WINKELMANN CJ:

Yes, we'll deal with that after lunch. We'll take the lunch adjournment.

GLAZEBROOK J:

Because it is in a different context. It's not saying per se those things aren't relevant. It's saying in the context of not being allowed to look at climate change.

WINKELMANN CJ:

We'll take the lunch adjournment, thank you, Madam Registrar.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Ms Limmer.

MS LIMMER:

Thank you, your Honours. So mindful of the indication you gave me this morning in terms of the matter you were most interested in, and also my time, I only have a couple of short points to make on the two additional issues about whether or not plastic pollution ought to have been considered and whether effects on cultural values were considered in the applications, but I'll start with the point about plastics.

I have made written submissions on both of these matters so I won't repeat that.

WILLIAMS J:

They're not cisterns, are they?

MS LIMMER:

Sorry, Sir?

O'REGAN J:
Bottles aren't cisterns.

WILLIAMS J:
Were you not –

MS LIMMER:
No, no, I'll stick to bottles. The additional matters to my written submissions is that my friend's approach in the first respondent's submissions has been carefully crafted to move the issue from one of solely, his words, disposal, to one connected to the creation of plastics. In my submission that really gets parties to same point anyway and I note the notice to support the Court's decision on the grounds used the word "disposal" and spoke about it.

In any event, I note paragraph 56 from the Court of Appeal decision in the *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 water bottling case and part-way down that paragraph the Court says: "The activity of water bottling takes place in a societal context where plastic bottles are pervasively used to contain a great variety of liquids with a multitude of uses, whether for consumption or in various commercial and domestic applications. They are available in the wholesale and retail market. They are manufactured in New Zealand or imported from overseas." Now the High Court and the Court of Appeal in the *Ngāti Awa* cases devoted considerable attention and discussion to this issue, including the principles from the *Buller Coal* case that the Courts saw were relevant. It would not be of any particular assistance for me to paraphrase them there because the factual circumstances of the *Ngāti Awa* case is so similar to this particular one in respect of the issue of plastic bottles.
1420

What I would add to it though because it is a matter that has come out since is that the government is actively regulating the use of plastics in this country. We now have, this has come out I believe since the Court of Appeal hearing on *Ngāti Awa*, the Waste Minimisation (Plastic and Related Products) Regulations

2022. These regulations ban some manufacture and use of plastic products and the government is consulting on the next tranche of plastic products that will be subject to regulation. So my submission there is that there is evidence of an active government legislation intervention into this issue of plastic in the environment. In my submission that is where it is apt to be dealt with, not on ad hoc resource consent applications.

I should –

WILLIAMS J:

In some ways that's a heroic submission, that is to say that plastic bottles are such a big problem our flagship environmental legislation can't control it.

MS LIMMER:

Yes.

WILLIAMS J:

That's a little bit like the arguments in *Michael John Smith v Fonterra Co-operative Group Limited & Ors* [2022] NZSC 35.

MS LIMMER:

I recall a similar argument in fact in the *Buller Coal* hearing as well and I accept the factual and the legislative framework is different but the reality is, and as the Court in *Ngāti Awa* discussed, it is a pervasive issue. Some of the problem will come before a consenting panel, some of the problem will not, and it –

WILLIAMS J:

The best point is it'll be discriminatory against applicants given that all the people in it who've been doing this other than the applicants are not going to be controlled.

MS LIMMER:

But also the cohesiveness and the effectiveness of the control if there are disparate avenues by which to exert it. Just to round that off, the need of the

High Court nor the Court of Appeal in this litigation has had to consider or has reasoned, had to consider or provide reasons in respect of this issue.

Finally, on the matter of cultural effects, the High Court in this litigation did address this matter at paragraphs 260 to 292. The Court of Appeal did not address this matter. It got as far as finding that you could not issue a separate use consent and did not go further.

I have a slight correction to make to the submissions I filed. I made the submission that the statement of claim was filed in March 2019 and the Rūnanga sought to intervene in September 2019. The statement of claim was made in March 2018 and was amended in 2019.

WINKELMANN CJ:
So what paragraph of your submissions is that?

MS LIMMER:
Paragraph 90, Ma'am.

WINKELMANN CJ:
9-0?

MS LIMMER:
Nine zero, yes.

WINKELMANN CJ:
So AWA's amended statement of claim dated –

MS LIMMER:
Yes, sorry, it's there. Footnote, yes. It was dated 3 March 2018.

WINKELMANN CJ:
The amended?

MS LIMMER:

The original statement of claim was dated 3 March 2018 and the amended statement of claim was 7 March 2019. The bundle of documents doesn't contain the original statement of claim.

1425

I have filed written submissions again and I won't repeat them. I will simply in response to my friend's submissions for the Rūnanga note that there is extensive reference to the Mahaanui Iwi Management Plan in their submissions and I just wanted to draw your attention, the Court's attention, to the fact that the RMA expressly and directly provides for the role of an iwi management plan in section 66(2A) where it requires the Regional Council in preparing or changing a regional plan, if the document is lodged with the Council, to deal with it in the manner specified, and subclause (a) of that section: "The council must take into account any relevant planning document recognised by an iwi authority." In this situation and in the chronology the Mahaanui Iwi Management Plan was lodged with council in 2013 and parts of the land and water plan began coming operative in 2015, so it was there during the formulation of the land and water plan. The RMA does not expressly refer to the Mahaanui Iwi Management plan as one of the matters that must – one of the mandatory considerations under section 104 when considering resource consents. Of course, it could fall into the section 104(1)(c) other relevant matters, but my submission there is that the RMA certainly looks to it as a policy informing document, one that helps guide it on what its policies and regulations ought to be.

WINKELMANN CJ:

So what does that mean for this case?

MS LIMMER:

For this case it means that when it is used as an informant of what a council ought to do on a resource consent application, or what it means for that resource consent application, caution must be taken to – it states policies. It states aspirations as what the Rūnanga wanted to see the policy framework in

the region look like. That's its job. It doesn't have enough specifics to easily bring it down to a factual circumstance for a consent application because it's not drafted for that. So, for example, in this case, it doesn't say anything particular about water bottling. It was drafted in 2013 and it has a concern, expresses a real concern about transferring consents about changing land use and at that time, of course, the conversion of land for farming, for dairying, was a particularly big issue, so that is not surprising there is a policy focus. That is what the policies in the Iwi Management Plan discuss. It's a –

WILLIAMS J:

Can you tell us the document number for the – do we have the Iwi Management Plan?

MS LIMMER:

We have extracts of it in the bundle.

WILLIAMS J:

Just give me the number.

MS LIMMER:

Certainly. I think it's in the authorities for the interveners.

WILLIAMS J:

So the authorities?

MS LIMMER:

Sir, I have to revert on that question. I'm not – 71 of the intervener's bundle.

WILLIAMS J:

And your submission is that there's nothing in there that's relevant?

MS LIMMER:

No, Sir, that's – my submission is that the Iwi Management Plan is drafted for its principal purpose of informing the development of policy and regulation. It sets out how the Rūnanga want the RMA to look and act in this specific area.

The resource consents bring that down to another layer of specificity and it is a matter of looking at some very far-reaching policies that don't bear exactly on any particular resource consent application. So to the extent the criticism is that policies haven't been taken into account enough, the fact is, firstly, that they were taken into account. The reporting officer did that and then the decision-maker did that as well, but these are general policies too. They don't talk about the specific activity.

WILLIAMS J:
So you are saying that there's nothing in there that's relevant?

MS LIMMER:
No, I'm not saying it's not relevant and it was considered it is relevant.

WILLIAMS J:
No, not the – I'm talking about the content of the document. Obviously, the document's relevant.

MS LIMMER:
Yes.

WILLIAMS J:
But you say there's nothing in there that informs this consent application?
1430

MS LIMMER:
My submission is that what was done was appropriate, so it was considered and the officer made a conclusion that –

WILLIAMS J:
Yes, I know you're dodging. You don't need to dodge me. I just want a straight answer. Do you say there is nothing in here that could affect, contrary to your interests, the grant of this consent?

MS LIMMER:

I think the submission is more that the policies identified in my friend's submissions do not dictate an outcome either way, but this –

WILLIAMS J:

But that's true of policies everywhere.

WINKELMANN CJ:

Can I just ask what about 1077? Page 1077. Transfer of water policies. "To oppose the transfer of unused allocations associated with a water permit to another use or user different from which it was originally allocated/permitted for."

MS LIMMER:

Yes, so that's the transfer push, Ma'am, that's been brought through to the land and water plan. So I'm assuming that was part of why the land and water plan transfer rules ended up as they were.

WILLIAMS J:

My point is policies hardly ever dictate an outcome because then they'd be rules.

MS LIMMER:

Yes.

WILLIAMS J:

And that's true in the law writ as it is with the iwi plan, but that's not going to render it irrelevant or potentially impractical. You've got, for example, recognise and provide for mauri and customary uses first of all in priorities.

MS LIMMER:

Yes, yes.

WILLIAMS J:

Are you saying that's not relevant?

MS LIMMER:

No, Sir, I'm not and that is in the land and water plan as well.

WILLIAMS J:

So what's the point in the submission, please? Because this – section 66 does do what we say it does, but then section 2 says take into account relationships with water.

MS LIMMER:

Yes, it does.

WILLIAMS J:

And about kaitiakitanga taking into account the Treaty.

MS LIMMER:

Yes.

WILLIAMS J:

And this is what Ngāi Tūāhuriri says is its relationship with water, is what the Treaty gives it, and reflects its kaitiakitanga.

MS LIMMER:

Yes.

WILLIAMS J:

So it's got to be directly relevant.

MS LIMMER:

Yes, so it is and that – in the – and I said as well that under section 141(c) it can be taken into account and in fact it was taken into account.

WILLIAMS J:

But you see, I guess the problem is that you're separating the plan from its contents. Its contents clearly speak to the relevant Part 2 matters, whether it's

called this plan or just a document done by that Māori community. It speaks to all those Part 2 issues as to the allocation and use of water.

MS LIMMER:

Yes, it does.

WILLIAMS J:

And so it must be relevant and must be potentially impactful if it says stuff that's relevant to your application.

MS LIMMER:

And the officer, yes, concluded that the application was consistent with it.

WILLIAMS J:

Right. So that's really you're saying there is no inconsistency here? That's your submission?

MS LIMMER:

Yes.

WILLIAMS J:

Okay.

MS LIMMER:

And finally, just to conclude, with reference to paragraphs 40.2 through to 40.5 of my friend's submissions and just see the – it's in the section where the comedy of errors is discussed, and (inaudible 14:34:05) the Rūnanga of the presence of these applications. I just quickly would like to take you to the emails that are being discussed in those paragraphs. So the –

WINKELMANN CJ:

Which friend's submissions?

1435

MS LIMMER:

For the Rūnanga, Ma'am, paragraph 40.2. So the first email was sent in July, and just a few features of that email because my friend is very critical of the fact of the wording used and its insufficiency to perhaps alert people to what is in fact being applied for. I just note that the recipient is Amy Beran. The email address is the generic suffix for Mahaanui Kurataiao, the company that is the professional conduit between the Rūnanga and ECan. The heading is lodgement of resource consent applications. Coupled with the words of the front water permits, there is no doubt we're talking about water. The email talks about an application in a silent file area so that is made explicit. Again, in the body of the email the words water permit appear and there is reference to what the applications say they are doing to change the conditions. To take ground water is the name of the – is the activity description of the consents, and then there is the date by which responses are needed by and a link to the applications themselves. Now, those applications were only 11 pages, not onerous for a person to read, so what the email has done has just given the facts, given the keywords, and in my submission those words would alert anyone interested.

FRENCH J:

Water bottling doesn't feature, though, or does it?

MS LIMMER:

No, it doesn't, the words "water bottling". My submission is, so the words water permit, lodgement of consent applications, silent file, and change of conditions coupled with links to applications that are only 11 pages long, is unlikely to – it will not mean someone misses out on an opportunity to understand what they are. The next –

FRENCH J:

Sorry, but water bottling would have been a red flag, wouldn't it? Because they had already expressed opposition to water bottling?

MS LIMMER:

My submission is that the words “water permit” would have been as much of a red flag, and just referring back to the Iwi Management Plan, water is just discussed in there. Water permits, and also a silent file area.

The next email discussed relates to the latter application by Cloud Ocean Water, so this was in November, and again it has the recipient, Amy Beran, the heading includes the water permit, the water permit numbers, the fact there’s a lodgement of the consent application, the fact there’s a silent file area, and again that there was an application to take – so it’s a very similar email with the links directly to the applications. Again, not long, difficult documents to penetrate or read.

There’s one other matter sandwiched in amongst those emails if you’d like, so you had the letter in May, the generic letter, to the Ngāi Tahu relationship manager at ECan expressing a general opposition to water bottling in Belfast, then the May – sorry, the July applications by Southridge, this email, and then in October, so after the email in May regarding Southridge and before the email and sender regarding Cloud Ocean, there was a letter sent from the Rūnanga, and the end of a letter – sorry, they go right to the edge, just confirms if you have any queries and would like further clarification, please don’t hesitate to contact Amy Beran at Mahaanui Kurataiao. She was, of course, the recipient of the May and the December emails advising of the Cloud Ocean and the Southridge applications.

Those are my submissions, Ma'am.

WINKELMANN CJ:

Well, thank you very much, Ms Limmer. Is it the case, therefore, that the third respondent won’t be advancing submissions?

MR CALDWELL:

Yes, it is, Ma'am. I think there is approximately a fulsome discussion, I don’t wish to duplicate, as I’ve indicated in my submissions, and indicated by

Ms Limmer, and I think that the matters that I – that the matters have been sufficiently covered, so I'm happy to rely on the written submissions and not address them further. As I say, I'm adopting the submissions of the appellant.

WINKELMANN CJ:

Thank you, Mr Caldwell.

MR CALDWELL:

Thank you.

WILLIAMS J:

Could I ask a question of Mr Caldwell? Ah, sorry, no, no, not you. I've got the wrong lawyer. You're fine.

MR CALDWELL:

All right.

WINKELMANN CJ:

Off the hook. Mr Bullock?

1440

MR BULLOCK:

It may not bode well, your Honour. Mr Ma Ching is going to hand up a road map and another document which I'll then speak to just to guide the Court as to where I intend to go.

WINKELMANN CJ:

One thing I would say for counsel generally is that it actually really helps us if there is an index at the front of your submissions.

MR BULLOCK:

I'll certainly take that on board, your Honour.

WINKELMANN CJ:

Somehow we have to get that word out. It's very helpful to have an index. That's just a generalised comment because I don't know that anybody has done it.

MR BULLOCK:

Yes. Perhaps we could add it to the rules.

WINKELMANN CJ:

Should be amended.

MR BULLOCK:

Yes. Good to know. Mr Ma Ching has handed up two documents which are hopefully being passed around. The first is a two-page road map. The second, which is a summary of responses to Southridge's written submissions and my sole purpose for preparing that document was that Southridge's submissions were filed at the same time as ours and I'm mindful the Court has not had a –

WINKELMANN CJ:

I think we're a copy short.

MR BULLOCK:

Are we short?

WINKELMANN CJ:

Have got one for the file? We'll need one for the file but you can do that later.

MR BULLOCK:

So two documents. One is a road map and one is a summary of responses to Southridge's written submissions.

THE COURT ADDRESSES MR BULLOCK – MICROPHONE (14:41:46)

MR BULLOCK:

So two documents: road map and summary of responses. The summary of responses is really just an attempt at efficiency to save me going through a point by point response to the submissions that were filed at the same time as ours and hopefully to assist the Court in that it won't have any submissions responding to Southridge's submissions due to the order of filing. I'll go to a few points there to highlight some key points but really the purpose of that document is hopefully to bring some efficiency.

In terms of the overall structure, I've set out in the road map what I think are really the key questions the Court needs to answer and what AWA's response is to those questions. I propose to work through that in a way that will hopefully touch on the discussion that has gone on this morning. The second and third parts of the road map will be dealing specifically with submissions made by Cloud Ocean and Southridge. I'm obviously mindful the Court has our written submissions and this summary I've handed up, so I'm not going to labour points that are already covered except to the extent that will assist.

Roman number (iv) in our submissions is a response to ECan's submissions on the plan and I propose that Mr Ma Ching deal with that submission, probably tomorrow in fairness to him, and then finally I'll return to deal with the plastics and effects point which is the other ground on which the Court of Appeal's decision is supported.

So AWA's submissions is that the Court of Appeal was correct in its finding that in this case the correct rule which applied was rule 5.128 and that the effect of that rule was to regulate the take and use of groundwater together as a single activity, and that here the activity, being water bottling, is an activity involving the take and use of water such that that rule applied to regulate the activity. AWA's submission is that as the Court of Appeal found, that conclusion is supported by the text of the Land and Water Regional Plan and specifically

rule 5.128, but also that importantly that is supported by the scheme, purpose, objectives and policies of the Land and Water Regional Plan.
1445

AWA's position is also that even if this was to have gone through under rule 5.6, there is a significant issue for the appellant in that the take on which it seeks to rely is a take for a different activity. It's a take to operate a wool scour, and AWA submits that there is no mechanism in the plan or in the Act to sever a take and use consent and to stitch it back together into a sort of Frankenstein hybrid of a new use and an existing take for a different purpose. So what I thought I would do to begin, and I'm mindful we haven't gone to date to the consents or to the processes for the consents being granted, where I wanted to start was what would be point 3 and 4 on my road map, which is: what was the position before the decisions at issue were made? What did Cloud Ocean and its predecessors have?

So what I would like to do is turn up the consent documents relating to the original Kaputone Wool Scour that were granted as part of the renewal back in 1996, and these are the consents that have, after several transfers, come to be what is now said to be the "take aspect". So these documents are – and sorry, I'm working off a hard copy because I'm surprisingly old-fashioned. The first document I'd like to go to is at 303.0053. In fact, it's not this one, it's a few further on, sorry. It's 303.0065, which should be a letter to the consents officer from the general manager of what was then the Kaputone Wool Scour.

So this letter is the covering letter for what is the renewal application for the Wool Scour's water permit, and I just want to start by looking at this letter because it gives some interesting context as to what the Wool Scour was thinking and what it was seeking. So the letter begins by noting that there is a current level of discharge, which I think reflects the take. They say discharge but it's both because the water's been taken and used to wash the wool and then been discharged. It's predominantly to rinse dirt from scoured wool, 30 to 40 litres per kilo. The second paragraph notes that: "With the commissioning of our new 3-metre Cardmaster Scour we are seeking to considerably lower

this consumption." So already this letter is focused on water conservation. This is the general manager saying we're applying for a new take consent but we're trying to use less water.

It goes on in the next paragraph to note the history of the Wool Scour, which had been there for 100 years, and noting that they had invested at that time, in 1996, $8.5 million in new technology such that their wool scour was one of the most environmentally clean in New Zealand. They note that the future in the industry depends on them being able to continue to use the bore they had been using for all this time.

WILLIAMS J:
Do you know when that consent was due to expire?

MR BULLOCK:
Ah…

WINKELMANN CJ:
'32 or '35.

WILLIAMS J:
The one they had at that point.

MR BULLOCK:
It was in 1997, so this was pre-emptively at the point to renew it. I don't know the exact date your Honour but it's in 1997 sometime. Really, I'm focusing on this letter because we see here already in an application for a new take and use permit, a strong focus on use, that the use here is connected with new technology designed to reduce consumption, this connection between use and take. We've got new technology we need to take less water. Now, of course, they are applying for the same amount but obviously the general manager's thought it important to tell the Council that we are trying to conserve water. We are trying to be more efficient in our water use.

WINKELMANN CJ:

It also makes something of an economic case for it, doesn't it? Which is that the industry which has been there for 100 years, its future role depends on the established bore.

MR BULLOCK:

Yes. So presumably there are people who have jobs in that factory who want their jobs to continue. There's wider social and economic benefits. Again, that is connected to the use, not the water take as such, but they're obviously interrelated because as the final paragraph alludes to, those important economic factors can't continue if the water's not there.

1450

If we turn over the page we see the application itself. So this is in, it's described as an application for a water permit to take groundwater, but we will see that use features heavily in what is being provided and what is being sought in form. So on the page 0067, the next one over, there's some boxes on the left-hand side, box 4, it's headed "Description" and it says: "A description of the activity to which this application relates," and then we see the activity is described as "scouring n2 wool second stage processors". So the activity here isn't a take and use of water. The activity is a particular form of wool scouring, and if we think what Cloud Ocean might have written in this form had they been filling it out in 1997, they would have said their activity is water bottling. They wouldn't have said the activity is taking and using water. They would have said the activity is water bottling.

So we here a true representation of the activity that is being consented. It's very specific and as Justice Churchman will come to hold, and we'll talk briefly about his decision, this is what defines the scope of the consent because this is why it's been granted.

WILLIAMS J:

How could it be otherwise in a practical sense? No one is going to apply for an abstraction right just 'cos.

MR BULLOCK:

I agree, Sir.

WILLIAMS J:

But that doesn't necessarily get you where you need to get. That doesn't necessarily tell you that they're severable, the abstraction is severable from the use or the activity.

MR BULLOCK:

Yes.

WINKELMANN CJ:

No, so we'll let him develop that argument.

MR BULLOCK:

Yes. Well, if your Honour turns the page, we see at box 8, which is – sorry, we see some earlier things. So we see descriptions of the bore, and we see the bore depth, and we see: "What will the water be used for?" tick in the box "Industrial" and that's how we get, and we'll come to look at the consents, but that's how we come to get the industrial use being used in the consent itself. So the consent says "to take water from bore for industrial use" which is what led to the Churchman J judgment, about what that means, but again we see it's not just industrial use. We see specific language here. It's wool scouring. And there we get at 10 the volumes that are proposed to be used, and consideration of environmental effects, effects on other bores and that sort of thing.

So the key point here is really at this very early stage, even just in the application form back in 1996, "use" and "take" were very much bound together.

Now moves on to the next document I would like to go to, and this is just to flag it, at 303.0074. This is another letter from the general manager of the Wool Scour. This is now in 1997. It's a covering letter that attaches a report prepared by Pattle Delamore Partners who have undertaken a pumping test on the well

to assess the features of the bore, the effect of the water being taken from it and so on. It's highly technical. We don't need to go to it. But what we see here is this is a specific focus on take. This is a question about how the bore is operating, but it's all part of the same renewal application.

We now move on to the next document which is at 303.0104. this is headed the "Investigating Officers Report". My understanding is this is what we'd now call a section 42A report. It's the Council looking at the application and making a decision, and we see in the middle of that page how the official has reduced the application. So the application is to take groundwater from bore M35/1294 at rate of 50 litres per second, maximum volume of 4320 cubic metres per day for industrial use. So that's the high-level description of the application but, of course, we've seen that the industrial use isn't carte blanche. It is specifically for this wool scouring purpose.

We turn over to the next page, 105, the top paragraph we see this report deals with a resource consent submitted by the "Kaputone Wool Scour, who wish to abstract groundwater for wool scour processes". Again, we have the abstraction and the purpose, the abstraction and the use connected in the very first sentence.

The report goes on to talk about the requirements of the RMA and the plan, effects on the environment. What I want to focus on is on page 106, there's a heading: "Proposed Regional Policy Statement". Second paragraph under that notes Policy 3, which: "Promotes the efficient use of water. In this context 'efficiency' refers to both technical efficiency (avoidance of waste) and allocative efficiency (using water where it has the greatest value)."

The report writer goes on to talk about: "Technical efficiency" being "assessed by considering the volume of the total abstraction", in connection "with the desired activity". So here we say we see the Council assessing this on the basis that there a volume of the abstraction and they assess the efficiency by looking also at the desired activity, so we see take and use considered together here. They say: "In this case, it is assumed that the applicants have applied

only for the rate and volume…necessary for the intended use." It replaces consents for the same activity. "Therefore, based on this prior use the application is believed to be an efficient use of water."

I think what we see here is the Council saying well, this wool scour's been here for 100 years. They're asking to do the same thing they've always done. We assume that they are using only the water they need and maybe the Council might have interrogated that more. They didn't. Perhaps placing some weight on the letter from the general manager saying, well, we're doing some things, we're introducing some new technology to reduce our water take. But we see here, again, the connection between the volume of water and the intended use, and that the reason why this volume of water has been allowed here is because the Council's happy with it being used for the use at the wool scour.

Then it goes on to talk about allocative efficiency in the next paragraph, and that involves: "Regarding the relative value of the water resource." It says: "Such decisions are generally only made during times of water restrictions and are difficult to assess due to their subjective nature. However, given the current knowledge of the groundwater…in this area, the proposed consent is not inconsistent with the policy" if promoting "the efficient allocative use of water." So again here, it seems the Council is content to say well, the wool scour's here, it's been operating for a long time, it's presumably important in the community and that we're satisfied that that is an efficient allocative use of the water exceeding the take. But again, here the take considerations have been directly tied to the use.

WINKELMANN CJ:

What does allocative efficiency mean in this context?

MR BULLOCK:

Well if you go back up a couple of paragraphs, your Honour, the report writer describes it as: "Using water where it has the greatest value."

WINKELMANN CJ:

Mmm.

MR BULLOCK:

This suggests the idea that the idea that a take can be – can sit in isolation from what it's being used for is wholly artificial, because here we see the take being assessed against the water – using water where it has the greatest value. So that's in the forefront of the mind of the Council in granting this take.

O'REGAN J:

I just don't see why this is inconsistent with the appellant's case, that once they change use the Council has to go through all this exercise again on what's the best use, but it doesn't necessarily mean that there's – the take and use have to always be tied together, does it?

MR BULLOCK:

In our submission it does. We'll come to look at the plan, but the issue here is that if you take the take as a given, there's no way to calibrate the take to the intended use. So it's a one-sided analysis in that sense.

WILLIAMS J:

So once you have an initial allocation necessity and efficiency is off the table?

MR BULLOCK:

It might be that by coincidence. The stars align and your use is nevertheless – sorry, the take you have is nevertheless sufficient or adequate or able to be assessed as proper form and use you want, but –

O'REGAN J:

Well the Council can say no to the change, I guess, if they think it's an inefficient use of water.

MR BULLOCK:

Yes. But they can't adjust – so it's all or nothing on that approach.

O'REGAN J:

Well maybe it is. I mean, but that's – what's wrong with that?

MR BULLOCK:

Because when we come and look at rule 5.128, we see it's not about all or nothing it's about looking at the volumes, about looking at the rate, it's looking at what is reasonable.

O'REGAN J:

Well that's if it's a take and use, and they're saying it's not.

MR BULLOCK:

Yes, and we're saying, in substance, it is a take and use. I'll come to talk about the rule we're talking –

O'REGAN J:

I know that's your argument I'm just not seeing why the fact that the Council was concerned about the use in 1996 makes any difference to that. Of course they were concerned about the use. But why does that mean that the plan has to be interpreted the way you say it does?

1500

MR BULLOCK:

Oh. We'll come to the plan. The submission here is simply that the take is not a standalone, the take is connected to the use. That's –

O'REGAN J:

Well it wasn't at the time a take and use was applied for. That's what – that's as much as you can say.

WINKELMANN CJ:

Well is your submission no higher than this, that when the consenting authority was considering this application in granting it, a very material consideration was the use to which the rule would be put.

MR BULLOCK:

In setting the take.

WINKELMANN CJ:

In setting the take.

WILLIAMS J:

I think you go further than that, that it's – aren't you really saying that it makes no sense for downstream consents within the original allocation envelope to treat those initial use issues as irrelevant.

MR BULLOCK:

Yes.

WINKELMANN CJ:

I think it'll come to that, yes.

MR BULLOCK:

Yes, I do say that too and that is in part because the take has been set according to those uses.

That's as far as that needs to go other than to say that this is the genesis of the consent that became the take component of the amalgamation. So I'll just pull that up so we know where it is.

WINKELMANN CJ:

Can I just ask you, it's not only in setting the take, isn't it also in granting the consent? Because if they're looking at allocative efficiency they make a decision that this is a good use of water. It's not just there for in setting the take.

MR BULLOCK:

Quite, and the idea here is we have a wool scour that has operated for 100 years, it presumably employs very many people, it an important part of the

economy of Canterbury, which was then based on sheep farming, and you need to clean the wool to export it. It has all of this social and economic value and that justifies why we can allocate the amount of water they are seeking to use for that purpose. Had it been for something that didn't have those values the decision of the Council may have been to allocate less water, or to not allocate water at all, and that's where we will come back to when we talk about the rule in this case.

So just for reference to see where this washes out, if we go to 301.0083. So this is the consent that was granted in 1997 and this is just a follow through of the chain if – we see it as a consent to take groundwater for industrial use. So this consent eventually gets transferred to Cloud Ocean after it purchases the wool scour land and it becomes the consent that is the take part of the amalgamation, which is at 301.0089. So this consent here, it's exactly the same, except now its Cloud Ocean Water Limited as the party to which it's been granted.

We'll come to talk about the amalgamation but before that I wanted to work through the plan which I hope will help to answer Justice O'Regan's question. So there is partly consents for now, we'll return to them. But I'd now like to turn up the Land and Water Regional Plan to – we'll come to the language of rule 5.128, 129, 130. But what I want to do is step through what the plan says it's trying to achieve. I know the Court will read it so I'm not going to do this in a laborious way. I really just want to highlight some areas that I say help us to understand what the drafters of the plan were trying to do here.

So, helpfully the plan contains what is actually a relatively lengthy introduction, headed: "Introduction, Issues, and Major Responses", which is at 30. So we see here in the first two paragraphs the scene setting for the plan which is that Canterbury has lots of fresh water and land resources. "Managing land water is complex" and interrelated, and that: "The current environment has been modified by both past and current activities, many of which cannot be easily changed or remedied without significant costs to people and communities. There are no 'quick fixes'."

So we see the scene as resources here are important but they have been used, and they've been used in ways that have created challenges, and it comes to talk about what some of those challenges are, but for present purposes they are that over and full allocation of water catchments.

At the bottom of that page the drafters go to talk about the different values associated with water, its use for the survival of all living things, customary uses, recreation, economic activities, hydro-electric electricity generation, irrigation, manufacturing industrial processes. There's all sort of uses for water. Then over to the next page, second paragraph, the drafters talk about land and water forming "a complex, interdependent environment" and that as "uses of land and water continue to… intensify, our past approaches to managing our land and water are no longer sufficient", and that "in parts of the region, fresh water and land resources no longer support the values and uses they once did."

So we see two points there. The first is, the way we've done things in the past is no longer good enough, we need to do something different. But also recognition, and I don't shy away from this, that past uses need to evolve and change, and we'll come to talk about that and how the plan does that. The important thing about evolution of uses and evolution of activities is that they take place under the colour of the issues with allocation of water. So we're not just talking about evolution. We're talking about evolution in the context of catchments that are largely, fully, or over-allocated.

Again, the next paragraph, is a note that since the RMA has come into force: "There has been significant change in the quality and availability of water resources, and many new issues have arisen." So the drafters are setting their sights on fixing problems that have come up.

A couple of important points to note in the next section: "Fresh water is a public resource or a 'commons' resource, and the allocation and management of fresh water is primarily the function of regional councils." Next paragraph: "A resource consent does not convey ownership of water to the consent holder. Rather it is a permission to take, use, dam or divert water… for the purposes,

and subject to any conditions, set out in the resource consent." So here we see the drafters saying, water permits are part of a scheme of resource management. They don't confer property rights. They're about how we manage a resource, and when we look at a resource consent we see a permission to do things according to what the resource consent says you can do, and that includes its purpose and any conditions. So again, my submission here is that we see here already take and use being inextricably linked in the way the plan was thinking about water.

It goes on at the end of the page to talk about the need to balance "certainty for consent holders" with responding to "changing conditions and catchments" and changing values of and demands for water. Then over the page, an emphasis for the need to an integrated approach, which is a common concept in resource management law in New Zealand now, and that we don't look at things in isolation. We look at things together because it's a systems-based scheme.

O'REGAN J:
Where does it talk about integrated?

MR BULLOCK:
It's at 1.2, Sir, the heading: "Land and Water Resource Management Issues – the Need for an Integrated Approach."

O'REGAN J:
I see.

MR BULLOCK:
We're going to talk about it more. But they begin by looking at competing demands for water. Again, they talk about some of the values touched on earlier. So they say there's all sorts of things water can be used for or that – and it's not just uses, there's also values attached to water. There are amenity values. There are cultural and customary values that may not involve use, they may just involve the water existing, and these all sit in tension, and part of the purpose of this plan is to figure out how to balance them.

If we go over to, not the next page, 34, we see again a heading: “Issues arising from interconnected water and land resources”, and just the note that there are: “Issues arising from the interconnectivity of water, and the use of land and water which include effects...” on the environment that may be further away that than site itself, or “cumulative effects… on the environment over space and time, including lag effects and bio-accumulation.” In particular, a reference to Canterbury’s hydrogeology meaning that surface water and ground water are connected. So what happens on the land effects what happens under it.

1510

Now move ahead to 39, Steven. Again, we have another heading: “Need for Integrated and Consistent Management of Water and Land Uses”, emphasising again the “interconnectivity… between surface water and groundwater… and between land use and water quality.” Noting: “It is essential that land and water resources and land and water use are managed in an integrated and consistent manner within a regional framework”, and that “it is no longer effective to look just at the effects of individual activities isolated from the catchments or groundwater zones within which they occur. Rather the cumulative effects of all types of activities need to be considered. Taking an integrated approach will allow competing demands to be more equitably and effectively managed, and better achieve the outcome of sustainable management of land and water.”

When we come to see what happens in rule 5.128 for regulation of take and use together as a single activity or as a single umbrella, my submission is that that is driven by this idea that to get things right in Canterbury, to fix some of the issues that have arisen with water allocation here, we need to be careful about what is being taken and for what purpose.

The next main section deals with key approaches. It talks about partnerships and stakeholders including with iwi and the key approaches for managing land before going onto the statutory planning framework, and we can skip ahead Steven to 48. It notes that one of the key approaches is by reference to the Canterbury Water Management Strategy and over on the next page for the

heading the Canterbury Water Management Strategy embodies concepts of: "Parallel processes and gifts and gains." Parallel processes being you've got to manage water and land together to achieve a range of outcomes essentially all at the same time, which makes sense, and gifts and gains which is that you have to put something back for what is taken. These are just high level concepts, and we'll see late the plan refers to these concepts as guiding what it's trying to do.

So in my submissions the idea of say gifts and gains, is a gain consistent with looking at take and use together? What is being taken, but for what purpose? What are we getting out of it?

If we go ahead now to 57, we see at the end of the first paragraph the note that the policies, objectives and rules in the plan are "consistent with the visions and principles" of the Canterbury Water Management Strategies we've just looked at. The plan sets out how objectives, policies and rules work together. That's, I suspect, well known to the Court. If we go over the page to the rules section, I just want to emphasise the description here that: "Rules determine whether a person needs to apply for a resource consent or whether the proposed activity can be undertaken without one." The note at the end of that paragraph: "An activity needs to comply with all relevant rules in the Plan, unless the rule… states otherwise."

Then the next paragraph notes the "strong relationship between the status an activity" under the plan "and the effects sought to be managed by the policies and the environmental outcomes…attained by the policies and objectives." So we see a deliberate – this I think is saying, the classification of activities is permitted discretionary and so on, is very intentional, and when we come again to 5.128 we see that 5.128 is not simply a restricted discretionary mechanism, it's also the mechanism that leads to prohibited or non-complying status depending on the conditions it sets out. So it's an important part of the classification regime for water use. Then over on the next –

WILLIAMS J:

Sorry.

MR BULLOCK:

Yes.

WILLIAMS J:

Can you say that to me again?

MR BULLOCK:

Certainly, Sir, I'm sorry, I'm going too fast.

WINKELMANN CJ:

You are going too fast for me.

WILLIAMS J:

You're going too fast for the goat anyway.

MR BULLOCK:

Classification is important and deliberate.

WILLIAMS J:

Yes I understand. Last sentence, which seemed to me to be important.

MR BULLOCK:

Yes.

1515

WINKELMANN CJ:

That's what you said about 5.128 and it needs to either…

MR BULLOCK:

Yes. 5.128 has those four conditions we looked at and we'll come back to them. Those conditions trigger, or may trigger, either 5.129, which leads to a non-complying status.

WINKELMANN CJ:

Five point what?

MR BULLOCK:

129, the next one.

WINKELMANN CJ:

Yes.

MR BULLOCK:

Or the one after that, 5.130, which triggers a prohibited status. So we've talked a lot about 5.128 as a restricted discretionary classification, but from AWA's submission it's important not only for that reason but because it's conditions are a gateway to the different statuses that come in connection with, say, a fully allocated groundwater allocation zone, which is prohibited. All of which to say is 5.128 and its related clauses are part of this scheme of using classification to manage effects, achieve the objectives and policies of the plan.

WILLIAMS J:

What's your point? Ergo 5.128's got to be the only gateway through?

MR BULLOCK:

That is deliberate, that take and use had been put together.

O'REGAN J:

Well how do you explain the other provisions that talk about take or use?

MR BULLOCK:

Because they deal with different things. So the relationship between an activity and an environment is not unique. It depends on what the activity is and what environment has been affected. So for groundwater, which is what 5.128 deals with, there's a concern that enough water needs to be left in the ground to do things like provide drinking water. It's a very important resource.

The take or use provisions, which we'll come to, are 5.121 and 5.122. They arise in the context of irrigation and hydroelectric canals up in the high country in Canterbury. For those resources, so not groundwater, for those resources the Council has decided that it's okay for someone to seek a use only consent under the classification it's been given, presumably because the Council's satisfied that a use only is both feasible, but that allowing use only reflects the values and the environment effects the Council's tried to control and address through the plan. So for example, there are a number of salmon farms in those hydroelectric canals. That doesn't require a take of water. It does require a use of the water. Council decided that that's okay, and the Council can do that and it's not – we're not here to judge that.

The key point, and this is what the Court of Appeal found Sir, is that its deliberate. The council has thought about it. It's decided sometimes we're okay with someone just using the water or just taking it. Sometimes we want those things to be dealt with together. Here what we see in 5.128 is this cascade of classifications from restricted discretionary through to non-complying through to prohibited.

The next page simply notes that limits have been incorporated and that's a response to the National Policy Statement for Freshwater Management, and the next section talks about over-allocation. Those two things are, in my submission, important because they go to the heart of some of the environmental issues the plan is trying to address, and it's the allocation limits when we get to 5.128 that trigger, the exceedance of the allocation limits that trigger the change in status from restricted discretionary to non-complying or prohibited. So the limits are important. They are an important part of the response.

The concern again, just to maybe address Justice O'Regan's concerns of why all this matters and where it fits, is that those limits are engaged by the scheme of 5.128. They aren't engaged by the scheme of the discretionary rule in 5.6. So 5.128 is a gateway by which different classifications become applied

depending on the circumstance. 5.6 just says it's discretionary, it's up to the Council.

WINKELMANN CJ:

So your submission is you can't be going through 5.6, the whole scheme drivers you through one, 5.128?

MR BULLOCK:

Yes.

WILLIAMS J:

I'm reasonably sure this issue will have arisen before in other planning contexts, in which you have a specific and then a general. What have the cases said about this issue?

MR BULLOCK:

I couldn't quote one off the top of my head, Sir, but as a matter of general law one would usually follow the specific over the general –

WILLIAMS J:

Yes –

WINKELMANN CJ:

But doesn't 5.6 itself tell us the answer?

1520

MR BULLOCK:

Well yes, it does, and your Honour is racing ahead but we can do that. It does tell us the answer because it says, and this comes through my submission, that although it seems the resource management community, to which I'm not as much a part as I should be, calls this a catch-all rule. In my submission it really, on its face, is residual because it says any activity that would contravene the provisions of the RMA, it's not recovery activity, and it is not classified by this plan, as any of the other classes of activity listed in section 87A of the RMA is

discretionary, and my submission in a nutshell is well this activity, water bottling, which is taking water out of the ground and putting it in bottles, is classified under rule 5.128 to start with, and then if one of the conditions are triggered, it's classified under one of the rules that follow on.

Just while we're here, sorry Steven , if you go back to 60, yes, there at the bottom of that page, Mr Ma Ching will deal with this in more detail, but I just wanted to flag the final section there, which talks about the future intentions of the drafters of the plan, which is at the moment there are several other plans in Canterbury which deal with largely specific rivers, or river catchments, and the note here that the intention is that they eventually will get brought into this plan, but Mr Ma Ching is going to deal with the detail of that tomorrow.

So I want to just move ahead now to the objectives. It's 77. There's a number of objectives and I'm just going to step through them, again, hopefully not in a laborious way, but just to highlight what we say about it, are important. The first thing to note –

WILLIAMS J:
Just before you jump on, I just want to look at 129 and 130.

MR BULLOCK:
Yes.

WILLIAMS J:
So can you just park this question, and comment on it later. But the question in my mind is given the injunction of taking use of these three rules.

MR BULLOCK:
Yes.

WILLIAMS J:
Is there anything in 128 which is the, clearly the governing rule overall that deals with effects other than allocation effects?

MR BULLOCK:

Yes.

WILLIAMS J:

Because that may well be relevant to whether you're right about whether there are any holes between rule 128, 129 and 130. You don't need to deal with it now, but I'm interested in that question when you come to it.

MR BULLOCK:

Yes. Well I'll come to it. I would say some, yes specifically, for example, adverse effects on the environment of water use, which is consideration 8, is explicit in that regard, but others of these are, in my submission, necessarily embodiments of both take and use considerations, but if your Honour is –

WILLIAMS J:

Okay, you come to it when you come to it.

MR BULLOCK:

I'll come to it. Turning back to section 3, which is the objectives highest order part of the plan, 3.1 and 3.2 are notable as setting out off the bat the importance of integration and integrated management. There is recognition, as we continue down, that for example land uses continue to change to meet socioeconomic and community demands. Water is essential to all life in respect of for its intrinsic values. Freshwater should be prudently managed as a shared resource with in-stream and out-stream values. 3.8 refers to the quality and quantity of water and the sustaining and safeguarding of life-supporting capacity of ecosystems, and in my submission that has a take and use flavour to it, because it's not just quantity, it's also quality. That depends on what we're doing with the water, but also the purpose, which is sustaining of life supporting capacity. The emphasis at 3.8 on making sure there's enough water available to meet community drinking water, again connection between the water resource and what we're doing with it.

3.9 is, in my submission, an important objective. "Abstracted water is shown to be necessary and reasonable for its intended use and any water that is abstracted is used efficiently." This is a key connection between take and use, and we see the same principle motivating the decision-maker back when we looked at the '96 and '97 documents for the original wool scour. We're not just concerned about abstraction, we're not just concerned about use, we're concerned about the abstraction being right for the use, and that water's used efficiently. That if we need to allocate less water to this activity, we allocate less water to it. If it's very important then we allocate more.

3.10, objective: "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…" So again here we see a specific focus on not just use in isolation or just or take in isolation, but making sure that the abstraction, well that abstractions are being used to maximise benefits.

Similarly over the page, 3.12, this is to do with setting limits, so it's not consents, but that limits are meant to reflect community outcomes for quality and quantity. Focus on drinking water, again, permeates these, and then at the bottom, 3.24, the objective: "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."

My submission here is that we read these objectives together and we see an infusing of both insuring we're managing the water we are taking, the water resource itself, but also ensuring we're getting what we need to get out of the water we are taking.

If we move over the page to the policies now, we see a similar theme. So the ground water management policy, these are strategic policies, so the very highest level, we see they're mainly focused on what we might call "take" in the sense of focusing on the way in which the resource has been managed in terms of the water that's been pulled out of it, but we also see some use features,

for example, (e), which is over the page in 4.4, which is talking about water quality and the aquifers not declining. Of course the quality of the water in the aquifers depends a lot on how we're using it. If we're putting it on farmland it runs through the ground and back into the aquifer often carrying with it the nutrients and fertiliser runoff that comes with that.

In (f) we see: "The exercise of customary uses and values is supported." So use is not left out of consideration of groundwater management, even at this policy stage, and we see again at 4.5: "Water is managed through the setting of limits to safeguard the life-supporting capacity of ecosystems… customary uses… community drinking-water supplies… as a first priority," and then also meeting "other economic activities" hydro, irrigation and so on. So we see in 4.5 again this idea that we're managing water and we're managing limits to protect the water resource but also to get the right things out of it, and there's a priority, or hierarchy of uses reflected there.

If we move on to 98 now –

WILLIAMS J:
Are you suggesting it was open to ECan to say we don't think that bottling is worth this level of abstraction, you can have half of it, or a quarter of it?

MR BULLOCK:
Yes.

WILLIAMS J:
We want to wait for something better to come along.

MR BULLOCK:
In my submission it wasn't open to ECan to do that, and that's why it's so important to go through the 5.128 gateway, because that deals with the take and use together. You're saying how much water do you need for what you're looking to do with it, and we'll come to look at it but one of those considerations,

for example, is is the amount of water reasonable for the use to which it's being put.

WILLIAMS J:

Are regional councils equipped to make those calls?

MR BULLOCK:

Well we saw earlier –

WILLIAMS J:

You said by consent as opposed to at the policy level, or the rule level. You're saying consent by consent.

MR BULLOCK:

Yes and it's obviously a question as to what level of detail one might expect of a council decision-maker making that decision, and it maybe a broad brush assessment, but we saw when we look at the original Kaputone scour consideration an explicit consideration of what they called allocated efficiency which they described as comparing the values for which the water was being used. So back in '96 and '97 the Council thought it was able to do it, and purported to do it in its consent decision there, albeit in a relatively high level way.

1530

So it may be, yes, we can't expect the Council to set up a scheme of priority, but we can expect the Council to be somewhat discerning and to do what 5.128 says, which is to look at how much water is needed for their use. That may entail some sort of value judgment, and the plan –

WILLIAMS J:

But you're talking about a controlled economy, aren't you?

MR BULLOCK:

No, Sir. The plan we've just been through and the introduction stresses there are many different values and uses associated with water and there's a need to balance them. That is part of our resource management framework.

WILLIAMS J:

The RMA's supposed to be, it was said, effects-based only and the rest of it is up to the citizen?

MR BULLOCK:

Yes, and –

WILLIAMS J:

And it was a walking away from this, I think, the sorts of ideas you're talking about?

MR BULLOCK:

No, and don't get me wrong Sir, it should be assessed for effects. So take, for example, the freezing works in this case which I'm told by those who know more about Christchurch history than me, they've employed thousands of people.

WILLIAMS J:

Mmm.

MR BULLOCK:

That's an effect under 104.

WILLIAMS J:

Yes.

MR BULLOCK:

One might compare that to a use of water, a different use of water, that is only going to employ 10 people. One might say, well, considering these effects is relevant to my decision-making, we'd rather support the activity that's going to lead to the substantial positive benefit.

WILLIAMS J:

Well the activity, it hasn't come up yet. We're going to wait – if the freezing works is going to close down, we're going to wait for a car factory.

MR BULLOCK:

Perhaps, Sir. I don't think I need to answer that question today. The answer is the Council would need to look at the things it needs – it is able to look at and required to look at under 5.128, and my submission is that it's necessary in considering, for example, the reasonableness of a take for a use, to think about what the use is, what positive effects it's generating and that might be as far as it goes. The councils do that all the time. In fact, they did it here.

WILLIAMS J:

They're required to.

MR BULLOCK:

Yes.

WILLIAMS J:

But the question in my mind, in terms of system effects, is how far that ought to go in an effects-based regime, and I'd be interested in your view, you might need to think about it overnight, as to how that line should be articulated because it could end up being very important.

MR BULLOCK:

Let me think about it Sir, but my tentative answer is to say it has to be tied to effects, and 104 gives broad, a broad scope to consider both positive and adverse effects of activities, and as we've discussed, that does happen already.

I just want to turn onto page 98, thank you Steven. We see here and over the next page, which we'll go to, you don't need to do it yet Steven, a section headed: "Abstraction of Water", and the next section is headed "Efficient Use of Water." My submission is, and we don't need to go through it in painful detail, when these provisions are taken together we see that the section of policies

dealing with abstraction of water is clearly focused on take issues, but it's infused with use concerns. Equally, when we come to look at the use section we see it's focused on use but it's also infused with take concerns. It's a matter of emphasis rather than distinction. So for example, policy 4.49 is talking about enabling of taking of water but for the purpose of community water supply.

We talked briefly this morning, my learned friend I think took the Court to 4.50, which is one of the mechanisms designed to ensure allocation limits are effective. So it says, you know, you should not allow abstraction to exceed water allocation limits and that any further allocation of water is limited to meeting community water supply and stockwater, which have always been distinct reasons to use water. The RMA treats them differently. Then (b), replacement of existing resource consents can involve a claw back of water but also consideration of significant enduring improvement in the efficiency of water use and reductions and the adverse effects, and then 3, demonstrated that the existing use of water is efficient and that the efficiency is enduring. So we see where in a policy under the heading "Abstraction of Water" a mingling of concerns relating to both take volumes but also efficiency, which goes to –

O'REGAN J:

But isn't that only relating to replacement?

MR BULLOCK:

Yes it is Sir but this is –

O'REGAN J:

I just think, you've taken us through pretty much every paragraph of the plan so far. I mean they are capable of meaning lots of things, but they don't necessarily compel us to interpret the plan in a way that you're saying we should. I just think you're just making a bit of a meal of this.

MR BULLOCK:

Well if I'm making a meal of it Sir, I'm happy to move on. I think, the purpose of the submission is simply to say that the plan says, look at my policies, look at

my objectives, that's how you work out what I'm looking to do. My submission is simply when we look at these objectives and policies together, in view of the introduction to the plan, we see an integrated and connected approach to managing the take and use of water. I'm happy to leave the submission at that point. I'm not suggesting that any of these are controlling. They are, on their face, are not.

O'REGAN J:

Well I mean just the mere fact that you've taken us to a provision which your friend took us to this morning for precisely the opposite argument, seems to me to indicate that these are pretty nebulous.

MR BULLOCK:

They are Sir, and that's why I've tried to stand back and start from the introduction as to what the drafters are telling us they're looking to do, rather than just looking at that policy in isolation. Maybe I've laboured that too much but that's what I was endeavouring –

WINKELMANN CJ:

And your fundamental point is that it's integrated, you have to consider in an integrated way the use, the allocation and the use. Take and the use.

MR BULLOCK:

Well my submission is that at nearly every point, and certainly in relation to groundwater, this plan is saying that managing the groundwater resource is as much about how much we take as it is what we do with it.

We've looked at 5.6, so I might just move ahead all the way to 5.128, which is at page 150. Perhaps actually, sorry to jump around, if we go back to 153, just because we're on the way through, those provisions just to read them, were the ones we were talking about, 5.121, 5.122, the taking or use. We see there the specific connection to the hydroelectric and irrigation canals, and the status there being a permitted activity, and I discussed earlier how the plan uses statuses deliberately as part of its management of effects, and this indicates

that the Council has formed a view that, for example, the use alone of water in a hydroelectric canal should be permitted where the conditions are met, presumably that it's comfortable that the effects are such that it can just allow people to do that. It hasn't taken that approach with groundwater, and again part of my unfortunately laborious effort of going through the plan was trying to say, well that's partly because groundwater is different, it's a different resource, it has particular challenges, and that's why the Council has chosen to take a different approach when we turn back over to 5.128.

So we see here the textual indicators of an intention to regulate these matters together, taking and use is a restricted discretionary activity, Court of Appeal looks at this, also the heading "Take and use of groundwater". We've talked about the conditions and how they trigger, if the conditions are exceeded you then jump out of 128 and move ahead to the 129 and 130, depending on which of the conditions you're in, and that changes the status from either restricted discretionary to non-complying or prohibited, and here we say that's material because in – actually I'll park that submission and come back to it in a second. Your Honour Justice Williams asked about the matters to which discretion has been restricted, and in my submission a number of these do bear directly on use, and perhaps the most important is the matter numbered 1, which is actually the second matter.

1540

Whether the amount of water to be taken is reasonable for the proposed use. So we're looking at volume and connecting it to its reasonableness for the use for which it's being put, and in my submission that's precisely what the Council did back in 1997 when it allowed the take for the wool scour. It said, we're happy that this wool scour, based on its history, based on what it does, based on its place in the community, it's reasonable for it to take the amount of water its seeking. My concern, or AWA's concern with the way that the Council approached matters here, and this is what the Court of Appeal said too, is that if you are just looking to use, the Council can't, it can ask itself the question whether the amount is reasonable, but it can't calibrate it.

WILLIAMS J:
I don't understand that sentence.

WINKELMANN CJ:
Neither do I.

MR BULLOCK:
The submission is if the Council's considering take and use together, the Council can look at the use and say how much water is needed for this use, I will give you that much water. If you're just looking at use, in absence of take, the take is fixed.

WILLIAMS J:
Well that makes sense if the take and use are discretionary for the purpose, like the wool scour is, or the freezing works. But where it's for water bottling, how do you apply any kind of formula for that question, other than having to say sorry, you can't bottle five million bottles a year, we're only going to give you two million.

MR BULLOCK:
Well here we see, and I think this will answer your question Sir, hopefully not in too round about a way. If one thinks about the wool scour, for example, the water is its means of production, it produces more wool, which is its output, the more efficiently it uses water. The more efficiently it uses water, the more wool it can put out. It has an incentive to try and achieve water efficiency. It wants to use less water, it's better for its business, and the Council might look at that and say, well, given the way those incentives align, we are comfortable allowing you some water because we know you're incentivised to use it to try and produce more wool. You've got to try and use the water to produce it.

The issue for the water bottling plant is that the water is the product, it's not the means of production, it is the product itself. There's no way, for example, the water bottling plant can conserve or more efficiently use water. Any water it doesn't use is for the water bottler leaving money in the ground. Its only

incentive is to take up to the maximum it can take. So maybe to put that slightly more reductively, for the wool scour the maximum volume in the consent is a limit that it's endeavouring to stay within, that increase its production within. For the water bottler the limiting of the take, or the abstraction, is a target, because it wants to take as much as it can because that's how it's going to make the most money, and that, for example, just an example, might be the sort of thing a council would think about it when it's saying, well, how much water should be allocated for this purpose, because –

WILLIAMS J:

Oh, so you are saying you can have two million bottles a year, no more?

MR BULLOCK:

Perhaps. Perhaps. And of course what one might think, as long as there is a market that demands bottled water, the water bottler will want to purchase as many – will want to be able to extract as much water as it can to meet that demand. For the wool scour it's ultimately constrained by how much wool is coming down off the hills that it needs to clean and export, and it wants to do that as efficiently as possible. All I'm saying is that these activities come from different starting points.

WILLIAMS J:

Yes.

MR BULLOCK:

And that may reflect how much water you want to allocate to them, and 5.128 allows the Council to do that because it links the take and use.

Now there was some discussion this morning about evolution and the fact that old activities become obsolete. We know the sheep farming industry has become much smaller than it used to be, presumably why the wool scour is no longer here, and the idea that, of course, water should be able to be put to new and better uses, it shouldn't be frozen in time. I think the suggestion was that the approach AWA is advocating for, or at least the decision of the Court of

Appeal, somehow impedes evolution. AWA's submission is that that's not the case at all. There is no reason why – if someone has a consent to operate a wool scour, which is what the consent was for here, and they no longer needed to operate the wool scour, they can surrender that water.

Having surrendered it they can then apply to take and use some of the water that has been freed up. They may be allocated some of it, they may be allocated less than they had surrendered, because an application under 5.128 puts all of that back into question. So you surrender your allocation for the wool scour, the water goes back into the pot. You want to do something else with it? You make a fresh application for what you want to do. It gets considered and how much water you need is considered afresh.

WILLIAMS J:
A fairly radical reduction on the capital value of the consent.

MR BULLOCK:
Perhaps, Sir. But this is where, the features here of the fully allocated catchment become quite significant. So the status quo in the Christchurch West-Melton ground allocation zone is fully allocated. If you want to do some water bottling there you can't. It's prohibited because 5.130 says its prohibited. If you were to do some water bottling, all things being equal, if you wanted some water to do some water bottling it couldn't be allocated because it would exceed the allocation limit.

So how do then do your water bottling? You need to somehow free up water that's already been allocated. Now, you can wait for the – and you see the wool scour sitting there. It's not being used per se. You can wait five years and the Council may give notice to cancel the consent and it may go back into the pot then and you can apply. You could wait until that consent expires and presumably it won't be renewed because no one's using the wool scour and then you can apply, or you can purchase the wool scour, you can surrender its consent, so you can bring that forward and control it, and you can make a new take and use consent for groundwater. So it's not valueless. The only

difference is you can't lock in the take that was allocated to the wool scour for the new purpose.

WILLIAMS J:

Well the structural question is whether the amount of product, as you've accurately described it, as opposed to element and production that is available to be sold, is to be set by a market in consents or by ECan?

MR BULLOCK:

Yes your Honour, and –

WILLIAMS J:

It's a basic structural question.

MR BULLOCK:

In my submission that question hits the nail on the head. My submission, or AWA's submission is this is a resource management system. It is about managing resources. It explicitly is not a property system.

WILLIAMS J:

Yes but it isn't, it's not value neutral. This is really a resource management system in a market economy.

MR BULLOCK:

This plan is the product of a local government that's gone through a participatory process. It recognises competing values and it attempts to set up a system to enable them to be both met and achieved but also balanced. In my submission, that is the best way to do it, and this is, again, why I went through the history of this plan. It's saying we have issues with how we've allocated water in the past. If we're going to do better we need to do things differently. This scheme has been set up in 5.128 to one, trigger the important allocation limits so to stop people talking water where it's going to exceed limits, so that's important, take the new water, and also to direct the Council to consider specific frameworks which we say are important.

O'REGAN J:

Are you saying the plan changed the regime, that you could have done a use only consent before this plan?

1550

MR BULLOCK:

I don't know the answer to that Sir, and I don't think that matters for the higher level point which is that this plan is about balancing uses –

O'REGAN J:

Well you said the plan was about changing a defective system.

MR BULLOCK:

Sorry. Maybe rather than changing, responding to. I'm not sure if it changed but it was designed to respond to it. Certainly, it's changed in the sense of the introduction of that groundwater allocation limits, which I say is the most important feature of 5.12A, which is you need to make sure there is water in the pot before you're allowed to have any.

O'REGAN J:

I think Ms Limmer said you could apply for a new take and use on the basis that whatever you took under the new one was then deducted from the old one, and so the total amount under both was the same as the total amount under the old one.

MR BULLOCK:

Yes, and AWA doesn't accept that submission as it was put. AWA doesn't accept that it can be done as a mechanism in the application. AWA's submission is you would need to surrender and then apply. The distinction you make –

O'REGAN J:

Or could you do it the other way round? Apply on condition that if you get it you'll surrender?

MR BULLOCK:

I would need to think about that, Sir. You would need the processing to be paused because, of course, your application would be for something that is prohibited. So you're not going to be going well off the mark, but –

O'REGAN J:

Well it'll only be prohibited if you don't surrender.

MR BULLOCK:

Right. Or someone else doesn't free up water, and this is the queue issue. So I think the question was put –

O'REGAN J:

It's quite an important point though isn't it, because you wouldn't want to surrender if this is – I mean, if this does have value you wouldn't want to surrender it without some knowledge that you're going to get a replacement for it.

MR BULLOCK:

One would think, especially in this situation.

WINKELMANN CJ:

But if you were in that scenario and someone came along with competing application for that allocation, what would happen then?

MR BULLOCK:

I believe the position is first come first served, your Honour, at least in terms of the way, the order in which the applications are processed.

WINKELMANN CJ:

So you would say that the existing consent holder who is going to change the use probably couldn't preserve, couldn't, bracket that.

MR BULLOCK:

Well there's two questions I think, your Honour. First would be whether there's anyone else in the queue. If other people have done what Justice O'Regan suggested and put in an application knowing it's not going to be granted because it can't be, in the hope that some water frees up and they are ahead in the queue, that would be a problem for me if I'm looking to surrender and make a new application.

WINKELMANN CJ:

Mmm.

MR BULLOCK:

Because someone's going to be ahead of me, and it would seem there's nothing I can do to prevent that. If there is no queue or there's no one else in the queue –

WINKELMANN CJ:

Yes, but if there was someone else in the queue and you tried to do that thing where you said I'm applying for this and if it's granted to me I'll surrender my existing then the Council might look at the other applications.

MR BULLOCK:

Yes, and this comes back to the point that these consents are property. This isn't a property rights regime. It's a resource management regime. The RMA, or, the plan doesn't care who's doing what. I mean it does to an extent and that, you know, existing consents can roll over and be renewed, but –

O'REGAN J:

Well they can be transferred too which has a sort of look and feel of a property right, doesn't it?

WILLIAMS J:

And inherited.

MR BULLOCK:

And inherited, yes.

WINKELMANN CJ:

But attached to the land?

MR BULLOCK:

But attached to the land being key. The submission is that there's nothing here that creates a presumption that if you want – if you have a consent to run a wool scour, and you want to do something different, that you should be able to do your thing because you haven't had the consent to do something else. The submission is if you have a consent for a wool scour that you don't need, you can choose to put the water back in the pot and then it's game on as to who makes an application.

WILLIAMS J:

You can sell that consent.

MR BULLOCK:

Or you could sell the consent to the person who's ahead of you in the queue and who really wants it freed up. It still has value.

WINKELMANN CJ:

But that's a different process, isn't it, transfer?

MR BULLOCK:

Oh yes, a different, that's a different question of course.

WINKELMANN CJ:

Transfer away from the land.

MR BULLOCK:

You could only transfer the consent, we would say, for the purpose that it was granted for. So you could transfer it to another wool scour. The key takeaway submission here is that AWA says the Court of Appeal's approach does not limit

evolution. In fact, it creates a more coherent means of evolution because you don't have this status quo buyer. So just because I have a consent for a wool scour, I get to chose that the next use is water bottling.

WILLIAMS J:

The allocated resource has been locked up.

MR BULLOCK:

Yes. Again, without referring again to my laborious journey through the front end of the plan, my submission is that that approach best serves meeting the different and competing values of water. Is for the water to go back into the pot for new applications to be made and assessed under the plan, taking into account the things the plan needs to be taking into account. Not coming up with a way of taking a take from a wool scour and stitching it together with a use for a water bottling plant to create a take and use for a water bottling plant, when the consent was premised on wool scour and all benefits and detriments that went with that. A much more coherent, and this is what the Court of Appeal said, a much more coherent way to do that is to say, well, you've got to find a way to get some allocation. If you can find a way to get some allocation you can make a new application for a take and use consent and it will be assessed on its merits.

Now the concern here I think for, and I think the question was put to my learned friend, why didn't Cloud Ocean just surrender its consent and apply under rule 5.128? In its submissions it says that's an easy approach it could have done. In my submission there can be only two reasons and I think the answer this morning you got was because we had won in the High Court and didn't think we needed to, which I think didn't address the question of why in the first place –

O'REGAN J:

Well it was because the Council told them to do it that way.

MR BULLOCK:

Yes, and well I think we can have some sympathy for that Sir. But parking that, I think there can only be two reasons that that approach wasn't taken. The first is that there is either someone else in the queue, and Mr Burge says he doesn't think there would be.

GLAZEBROOK J:

Which we were told there isn't, but…

MR BULLOCK:

Yes, and I think Mr Burge's language is careful. I can't quite pass whether he's saying there isn't or he doesn't think there would be because he doesn't think anyone would do it, so I'm not sure. Mr Maw may be able to confirm that.

So it may be that there is someone there, or at least there's a risk that there might be, that is seeking to be avoided. But the other reason why I suspect it was unattractive for Cloud Ocean to surrender and apply under 5.128 was that it wanted to lock in the take it had. It had the take from the wool scour. It wanted that amount of water. It didn't want to give the Council an opportunity to reinterrogate the take. If it had put the water back in the pot, even if there was no competing interest, and applied for the same amount to then be granted to it for water bottling under 5.128, the Council would have had to have worked through the matters to which its discretion was restricted, and the Council might well have concluded that that amount of water is not reasonable to be used for water bottling. A lesser amount is reasonable.

WILLIAMS J:

Oh no, no. The case of Cloud Ocean is that once a catchment is fully allocated and not over-allocated ECan's role is reduced to policing take compliance and managing the environmental effects of associated uses.

MR BULLOCK:

In my submission –

WILLIAMS J:

Make sense to you?

MR BULLOCK:

What you're –

WILLIAMS J:

Well that's the argument.

MR BULLOCK:

What you're saying makes sense to me Sir, but the –

WILLIAMS J:

Hang on there. You're saying the flip side is that that is something that ECan, that ECan is not so reduced, that ECan is a continuing allocator.

MR BULLOCK:

Yes, and that's what the plan says, Sir.

WILLIAMS J:

Right, so –

MR BULLOCK:

The plan doesn't reduce ECan's role. The plan says if someone wants to take and use groundwater they apply under 5.128 and ECan does the things under 5.128.

WILLIAMS J:

So you would say there's no, there should be no market in allocation consents. That's ECan's job. A hybrid might be that ECan is a re-consenter of take and use consents but is required to apply appropriate respects to the existing allocation. Not necessarily indefeasible respect, but appropriate respect in terms of the policies so that you have working market with appropriate controls.

MR BULLOCK:

Two responses Sir and I see we're coming up to four so I'll limit it to that. The first is that perhaps, but that's not what the plan says, that the plan does respect people who want to roll over at a continuing activity, so the wool scour who wants to continue wool scouring there is some respect given to that.

WILLIAMS J:

Yes.

MR BULLOCK:

But there's nothing in the plan to suggest –

WILLIAMS J:

No, well we're talking about basically economic and commercial evolution.

MR BULLOCK:

Yes, and in my submissions there's nothing in the plan to suggest that because you once had a wool scour you should get first dibs on now doing whatever else you want to do with it. Nothing in the plan to suggest that. Second point is that there probably will still be a market for resource consents for the very reason I stated earlier which is if you have a fully allocated catchment the only way you can do something else is by freeing up water. So you'll still have an incentive to buy the wool scour, the shut down wool scour, to surrender its consent, to free up the water, to let you make a proper application to 5.128.

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WILLIAMS J:

As long as you're somewhere near the front of the queue.

MR BULLOCK:

Yes.

O'REGAN J:

Also as long as you're not in an area where it's over-allocated.

MR BULLOCK:

Of course, yes. But that would be a pathology in and of itself Sir. If over-allocation could be perpetuated by these Frankenstein consents, whether the whole goal of this plan is to wind it back, and that's what the NPS freshwater management says. So again the Court of Appeal's approach allows that to happen because it requires it to be put back into the pot. If it's still over-allocated at that point, then you can't do it.

O'REGAN J:

All I'm saying is that would suggests there wouldn't be a market for the resource consent.

MR BULLOCK:

Oh, sure for that resource consent, no one would want that I suspect, yes, no. I see we've reached 4 o'clock.

WINKELMANN CJ:

Yes, we'll take the adjournment. How much longer do you think you'll be Mr Bullock.

MR BULLOCK:

I think I'm nearly done on the plan. There's a couple of points I want to highlight that arose out of this morning, I've got about four points, otherwise I know you've got my submission and you have my note on Southridge.

WINKELMANN CJ:

So we've dealt with three and we've dealt with…

MR BULLOCK:

I think we've dealt with most of my first point. I haven't dealt with amalgamation, so maybe I'll pick up at seven and just talk briefly about that.

WINKELMANN CJ:

Well, when we look at AWA's argument, what numbers have we dealt with on that?

MR BULLOCK:

I think we've dealt with 1, 2, 3, 4. Five, we've just been talking about five. Six, we've just been talking about six, including the LWRP and we've talked a bit about seven, but I just do want to talk about amalgamation so I'll pick it up there. But I suspect that what are points 8 and 9 – sorry, points 9 and 10, I can deal with relatively briefly, and largely reduce that to talking about that as it came up in the course of argument this morning, because I know you've got my submissions.

WINKELMANN CJ:

So in terms of the timetable, you're down for an hour and a half tomorrow, but you don't think you'll need an hour and a half tomorrow?

MR BULLOCK:

I would be surprised if I needed an hour and a half tomorrow your Honour.

WINKELMANN CJ:

Be good if you didn't.

O'REGAN J:

So would we.

MR BULLOCK:

Good, I don't think I will.

WINKELMANN CJ:

We'll retire.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON THURSDAY 23 MARCH 2023 AT 10.03 AM

WINKELMANN CJ:

Mr Bullock, Mōrena.

MR BULLOCK:

Good morning. This morning I plan to cover – we covered a lot of ground yesterday so I plan to cover six further points relating to the plan. Mr Ma Ching will then briefly address the Court on ECan's submissions. I will then return to briefly address the issue of plastics and effects. The hope, your Honour, is to finish well before the break.

The first point I wish to address specifically is, it comes out of a discussion that the Court had with both my learned friend and me yesterday relating to the issue of how, or the mechanism by which someone comes through the rule 5.128 pathway where the catchment or the groundwater allocation zone is fully-allocated. You will recall there was some discussion as to whether the mechanism might be a surrender followed by an application, whether it might be someone applying to put themselves in the queue, whether it might be someone applying on a conditional basis that if their consent is granted they will then surrender their existing allocation.

I've reflected on this overnight and there is actually a clear answer to that question in the Act, and that's section 87A(6), which is up on the screen hopefully. That provides that if an activity is prohibited by a plan then "no application for a resource consent may be made". So to the extent the groundwater allocation zone is allocated, is fully-allocated or over-allocated, and that triggers prohibited status under rule 5.130, that means no one can apply for a further take or use consent. It's prohibited. So there can't be a queue because an application's prohibited and it can't be that someone puts forward a conditional application where they say well, if I get my new use, take and use, I'll surrender my old one. They have to surrender the old one first and then apply.

In a temporal sense, that may happen almost immediately. It probably would. What this suggests is that here the answer to the question of well, why didn't Cloud Ocean just do that, must be that Cloud Ocean was concerned not to be in a position where its take was going to be reassessed, because had it surrendered and gone back through the 5.128 pathway the take for the new activity, being the water bottling, would have been assessed under the restricted discretionary matters in rule 5.128 and Cloud Ocean may have got the amount it was seeking, it may have got more, it may have got none at all. So its take was at risk. Whereas by taking this approach where it says it can bank its existing take and seek a use only consent under rule 5.6, it's able to isolate its take from reassessment through the regulatory mechanisms and then rules, and that's why we say that's artificial and inconsistent with what the plan is trying to achieve.

GLAZEBROOK J:

What do you say then? Do you say because this is a totally different use it couldn't be an amendment because we were discussing yesterday matters that if you, if they – well, I can't remember what the example was, but say you had a consent for irrigating your farm and what you want to do is to pop up a greenhouse and irrigate in that as well, and there's an issue as to whether it's included but it's nevertheless in the same category, do you say that you can apply for an amendment in those circumstances or what?

MR BULLOCK:

So, helpfully, that was going to be my second point, was to look at the 127 cancel and change condition rule which is what your Honour's describing. Obviously noting the concession that was made yesterday, that point's not being advanced but it has been the subject of lots of interest. The first proposition is in this case –

WINKELMANN CJ:

We're putting section 127 up?

MR BULLOCK:

Certainly, yes. I'll keep talking while Mr –

GLAZEBROOK J:

It's really because obviously this would mean that just about everybody if they needed to change anything would be putting their whole take at risk.

MR BULLOCK:

So I'll come to that specific example, your Honour. I think that the short answer to your Honour's specific question is, well, it would depend on the scope of the existing consent. So –

GLAZEBROOK J:

Well no, obviously if it's within the scope of the consent, which has been held not to be here, then there's no question about that because it's just within the scope.

MR BULLOCK:

So that's –

GLAZEBROOK J:

But I'm positing a question where it's not within the scope but within the broad category of what you might be doing.

MR BULLOCK:

Which is potentially a scope question.

WILLIAMS J:

The answer is (inaudible 10:09:14)

GLAZEBROOK J:

Well possibly but let's assume it's not a scope question.

MR BULLOCK:

Yes, I know, understood, understood.

GLAZEBROOK J:

What I'm asking you is this absolutely all-or-nothing? Every time you go outside the scope do you have to put your whole take at risk?

MR BULLOCK:

So what the RMA authorities say on this is that if what you are doing is something that changes the scale, intensity or character of your activity then you can't use section 127. The best and most recent statement for this is actually in the Court of Appeal's decision in the *Ngāti Awa* case, the other plastic bottling case which is in the bundle, at paragraphs 186 and 187. We don't need to turn them up but I'll just tell you what they say, which is that section 127 was not intended to authorise an application for resource consent for new activities. They said that in the case of either change or cancellation of a condition the activity that continues would need to be the same activity for which the consent was originally granted.

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And the Court of Appeal there said, we do not consider that Parliament intended section127 to be used to authorise a completely new activity under the guise of changing the conditions to which the original activity was subject. So in short the question would be, is the original activity still continuing. I think that would be the answer to your Honour's question.

WILLIAMS J:

So can you give me the paragraph (inaudible 10:10:39)

MR BULLOCK:

Paragraph 186 and 187. The other answer in the present case is to say, well, what were the conditions of the original consent, and were there conditions there that could be changed or cancelled to allow water bottling to happen, and in my submission there was not because what was really happening here was –

GLAZEBROOK J:

Well that's already been conceded in this case. I was asking in a hypothetical.

MR BULLOCK:

So my answer is, it depends on whether the same activity is continuing or not.

WILLIAMS J:

Well that's shorthand for it's out of scope. Section 127 only applies to in scope changes.

MR BULLOCK:

That's how I read the Court of Appeal Sir, and –

WILLIAMS J:

Well it's obvious, it seems to me, otherwise you need a new consent.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

And yesterday I put to Ms Limmer it seemed to me that what had happened was that there was an amendment to the consent through the process that was followed by the consenting authority.

MR BULLOCK:

In substance, yes, because – and I'll come to this, but – or maybe reflect on it now –

WILLIAMS J:

One thing, sorry, one thing that pops out of that is what kind of activity. Is the activity take, or is the activity bottle, and that's about the separation between take and use.

MR BULLOCK:

Correct, and that again helpfully is my third point, which is that what we have here is, well the appellant is seeking to substitute one activity for an entirely different one. So the first activity, I would say, is wool scouring, and for wool scouring, for that activity, a take and use consent was needed, because the

water was needed to be taken and it was needed to be used. A consent was given to take and use water to operate the wool scour, to allow that, to permit that activity. The second activity is water bottling, that also needs a take and use consent, for the purpose of water bottling, and the short point that the Court of Appeal found, and that AWA submits is correct, is that there is no such take and use consent. If there was to be one it needs to go through rule 5.128 because that is what regulates take and use, and that rule 5.6 would not apply on those terms because take and use is already classified through 5.128. So we say here really there is a fundamental change in activity.

WINKELMANN CJ:

And you would say they couldn't have brought that rule 5.128, they couldn't have succeeded in that application until they surrendered the earlier consent because of section 87A?

MR BULLOCK:

Correct.

WILLIAMS J:

Although that could occur simultaneously.

MR BULLOCK:

Effectively simultaneously.

WILLIAMS J:

Would have to, to make the system work. So are you advocating a zero sum game every time? There is no respect at any level accorded to the pre-existing right to take?

MR BULLOCK:

Except to the extent that is recognised in the plan. So for renewals of the same activity, there may be some preference.

WILLIAMS J:

Well, they're easy, let's put them to one side, talking only about changes. No respect for the existing envelope held by the right-holder?

MR BULLOCK:

Because this is not a property regime, it is a rentals management regime.

WINKELMANN CJ:

How does it compare to renewals, because renewals seem to include an element of respect.

MR BULLOCK:

Yes and I don't have the provisions in front of me your Honour, but there are a range of provisions which I can look at that deal with renewals in a somewhat different way, and of course there is the ability, which was discussed yesterday, for example, renewals to continue while the applications are being considered – sorry, the activity to continue under section 124 while new applications are being considered.

GLAZEBROOK J:

It doesn't seem that sensible to me because you could have people say, well okay I'll continue with my very, very wasteful use of water because otherwise I have to give it up all together, rather than change it to a better use of water.

MR BULLOCK:

And that maybe a perfectly fair policy position, your Honour, but that ultimately is a matter for the plan, and how the plan has decided to regulate those things.

GLAZEBROOK J:

Sorry?

MR BULLOCK:

That's ultimately a matter for the plan and how the plan has decided to regulate things through its rules.

WILLIAMS J:

The argument against you with the environment, is the environment, including any compromises within it. That's true in land use planning as well as in water rights. When you are deciding whether to grant consent for, let's say a restaurant, it would be relevant that prior to that in that building was an activity whose intensity of scale was similar to a restaurant, albeit an entirely different use, it would be mad not to consider that.

MR BULLOCK:

Yes, and your Honour –

WILLIAMS J:

So why wouldn't, why then wouldn't you consider, at some level, the pre-existing allocation in relation to the consent?

MR BULLOCK:

This was to be my fifth point but I'll move to it now, Sir.

WINKELMANN CJ:

Well I mean, you take us through it in the order you think would best help us through the issues, Mr Bullock.

MR BULLOCK:

No, no, I think this is helpful.

WINKELMANN CJ:

As opposed to the order that you're being pushed into by all of us.

MR BULLOCK:

No, no, no, I'm perfectly happy to address this now and it's helpful because it's an important point. At least, it is an important point raised by my learned friend's submissions.

We submit it's rather a red herring on a proper application or reading of the plan as the Court of Appeal did. So the first point I wish to make on this was that a very similar argument was advanced in front of Justice Churchman at the preliminary hearing on scope where it was put that, well, there's going to be no change in effects here and that's what really matters to scope, and his Honour Justice Churchman referred to the authorities, in particular an Environment court decision called *Manners-Wood v Queenstown Lakes District Council NZEnvC Wellington* W077/07, 12 September 2007 which held that a consent cannot be used for a fundamentally different purpose even if the effects of the different purpose are the same.

WILLIAMS J:
Say that again sorry?

WINKELMANN CJ:
What case?

MR BULLOCK:
It's called *Manners-Wood*.

WINKELMANN CJ:
Ladders?

MR BULLOCK:
Manners-Wood v QLDC. But there's a section in Churchman J's judgment, I think it's around paragraph 116, which says "a consent cannot be used for a fundamentally different purpose even if the effects of the different purpose are the same". So in that case there was a helicopter pad which had been consented to use for helicopter flights to take passengers to and from a rafting adventure sport activity. The question was, could that be expanded to have other tourism uses? Take people on scenic helicopter flights. The proposition was put, well, if there's going to be the same number of helicopter flights it doesn't really matter. The decision said well no, that's a different activity.

WILLIAMS J:

But that's a different point. That's whether you get in under the envelope of the existing consent. I'm talking about a new consent. I'm sure Justice Churchman would not have said that the fact that there's already an activity with similar intensity taking place at the site is entirely irrelevant to the new consent.

MR BULLOCK:

Understood, Sir. Well the point –

WILLIAMS J:

Well that's the point of my question to you.

MR BULLOCK:

Understood, understood. The first answer to your specific question, Sir, is because the existing take and use consent will effectively need to be surrendered to overcome the prohibited status generated by 5.128, for the purposes of the restricted discretionary matters in 5.128, the wool scour cannot be part of the environment because the only way in, practically, is to have given up the wool scour.

WILLIAMS J:

That doesn't necessarily mean you imagine it didn't exist beforehand or that that is irrelevant to the new consent. Obviously not controlling, we're talking about relevance, not decisiveness.

MR BULLOCK:

Well the simpler submission is, Sir, at that point having surrendered it, it is out of the environment and you –

WINKELMANN CJ:

Well that's your – your point on this is that answers Ms Limmer's point that it's a kind of a, that when in measuring the effects, you can't say oh it's less bad than the wool scour because the wool scour consent's out of the picture.

MR BULLOCK:

Yes. But, Sir, if I was pushed on the point the submission would be that it is a fiction and a pretence to say that we must proceed on the basis that once a consent is implemented the activity that forms – the activity it permits forms part of the environment for the length of the consent or the duration of the consent. 1020

WILLIAMS J:

Yes. I think we're talking at slightly different angles. Ms Limmer's argument was really you ignore any effects of the pre-existing take because that is the environment, you're stuck with it, that's why you're only worried about use, not take, right. My question to you is, is the pre-existing take right not decisive or for the purposes of use irrelevant – ah, for the purposes of use to be excluded, but just relevant to be taken into account?

MR BULLOCK:

It might be part of the evidential picture, Sir, but it's not, in my submission, controlling.

WILLIAMS J:

That's where I'm trying to get you to. Do you agree?

MR BULLOCK:

If that answers your question, then yes. Nevertheless to make sure I have responded to what I understood Ms Limmer's submission to be, I understood her submission to be that the, we proceed on the assumption that the wool scour is continuing, and this may only be true if we're in 5.6 territory, because for the reasons I've stated it shouldn't arise under 5.128.

The submission for AWA is, well, we shouldn't ignore the reality here, which is that the wool scour is not operational, it has been closed down. It's consent has been sold to someone who wants to use it for a different purpose, wants to establish a different purpose on the site. They've invested in infrastructure on the site, which is inconsistent with the wool scour, and there is no real prospect

that it's going to be re-established, and I understood my learned friend to rely on *Hawthorn* but that case addressed rather a different issue, which was whether an unimplemented consent should be considered as part of the environment, and the Court there held, well, if it's likely that it will be implemented in the future, then it should be.

But here we've got a different situation which is we have a historical activity which has been consented, which we all know is not going to continue, and in a case, and I'll give you the citation for it because I don't think it's in the bundle, it's *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239, and the quote I'm going to read comes from paragraph 85, it's a decision of Justice Fogarty in the High Court. He says that: "The RMA as a whole, calls for a 'real word' approach to analysis, without artificial assumptions," and without "… creating an artificial future environment." And in my submission that really must be the guiding answer is, which is we know the wool scour isn't continuing. So the effects of the wool scour can't be banned in such a way that we just say, well, because the water bottling plans to take the same amount of water, there's nothing to be seen here.

The other important point in that regard, and this is really a sort of separate issue in the way the Council approach the 5.6 analysis here, albeit again we say we don't get there because I have to go through 5.128. Which is that if the appellant were right, that the wool scour forms part of the existing environment for the purpose of considering the effects of the take, then it must also be true that it forms part of the existing environment as to positive effects, and my understanding is, for example, the freezing works here employed thousands of people so we can't – if we are considering these consents as part of the existing environment, it has to be both as to the effects of the take, effects on the environment in both an adverse sense and a positive sense. But, again, we say we don't get there because we say this has to go through 5.128, and then you're just into the restricted discretionary matters there.

WINKELMANN CJ:

And then I think you were going to take – so you said that was, you were being taken forward to point 4, but you were going to respond to the issue I raised with you, which was about whether this was an effect – an amendment to the plan, an amendment to this consent but outside section 127.

MR BULLOCK:

Well I don't think there' s mechanism to amend the consent outside section 127, your Honour. Section –

WINKELMANN CJ:

No, I had said to Ms Limmer yesterday that this is what had been done, but without a statutory pathway.

MR BULLOCK:

Well I think, in effect, yes, I think that's the best I can say. But what I was going to say, and this might help to elucidate the answer your Honour, where I was going to go was to say, well, if we stand back and look at what's happened here, there's been a severance, an attempt to sever the original take and use consent for the wool scour, and there's no power in the Act, or in the plan, to sever a consent, and of course we would say even if there was, Justice Churchman's judgment says, well the take is still limited to the scope of the original consent, so it's still limited to the wool scour, so that doesn't get the appellant very far.

Then there's been an attempt to stitch together this existing take component from the original wool scour consent with a new consent to use water for water bottling, in order to effectively create a take and use consent for water bottling, without applying the rule that deals with take and use. So the submission there is there's no power to amalgamate in the Court or in the rules, and the Council acknowledges there's no power to amalgamate. To the extent that amalgamation might be justified, this is what the Court of Appeal said, amalgamation might be okay if it's merely administrative, and the way I think of that is imagine one prints out one consent, prints out another consent, puts them in the same manila folder and puts them in the filing drawer together, that

might be okay. But as soon as there is some substantive interaction through amalgamation, that must be unlawful because there is no power to do it, and here a substantive amalgamation is key to what the appellant achieves because it relies on the amalgamation having the substantive effect of transforming the take component, which was limited in scope to operating a wool scour, into a take which can also be used for the water bottling part. So the amalgamation here is necessarily substantive because you are taking a take for a wool scour, a use for water bottling, and the amalgamation purports to spit out a take and use consent for water bottling, and we say that is necessarily a substantive, and that's not permitted by the RMA or the plan.

I wanted to make one, this is what would have been my fourth point. One further observation on the scheme of the plan, and it's my last one. But I think it's an important orientating proposition, which is that the land and water reach of a plan implements the Canterbury Regional Policy Statement, which is a higher order instrument. Policy 7.3.4 of the regional policy statement requires ECan to establish and implement groundwater allocation regimes for all groundwater resources in the region, with a specific focus on catchments that are fully allocated, nearly fully-allocated, or over-allocated, and the plan has done this, and we haven't really gone to them, but in section 6 through – or chapters 6 through 15B of the plan, the whole back end, the Council, ECan has gone ahead and implemented what it's required to do under the regional policy statement, and that includes various regimes for specific catchments related to environmental flows, groundwater allocation limits, and some specific bespoke mechanisms for particular catchments that sort of take a similar form for rule 5.128. the short point being that the Court of Appeal's concern, which was that an approach that allows take and use to be dealt with separately under rule 5.6, undermines the integrity of the Act, because it allows, for example, take to be sought separately under rule 5.6 in a way that means the important allocation limits are not needed to be applied and the effect of those allocation limits, which is to transform something into prohibited status, wouldn't bite. The point is there is a carefully crafted –

GLAZEBROOK J:

Isn't the argument rather, at least as I understand it, I don't think that the Council says that you can have a take under rule 5.6, but does suggest that it would be very difficult for them if they can't have a use looked at in relation to an existing take under 5.6, and I assume at some stage you're going to deal with that.

MR BULLOCK:

The answer I think your Honour is that there seems to be no reason why, on the face of the approach adopted by the Council here, one could not seek a take consent alone under rule 5.6 because –

GLAZEBROOK J:

Well that might be the case but there's a possibility that you say, well, once you have the take you can apply under 5.6 separately for the change of use, and you have to deal with that argument, and you don't deal with it by saying something that didn't happen here.

MR BULLOCK:

Well the issue there, your Honour, is that the take –

GLAZEBROOK J:

And anyway they couldn't do a take because it's fully allocated so that's not going to apply.

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MR BULLOCK:

Well no, your Honour, because there's no mechanism to deal with that situation so the take alone – there's nothing to generate a take alone scenario.

GLAZEBROOK J:

There's nothing what, sorry?

MR BULLOCK:

There's nothing in the plan that would generate a take alone scenario except for the rules that allow for it specifically by regulating take or use. This situation wouldn't arise because one cannot simply apply for a take because the –

GLAZEBROOK J:

I think we're at cross-purposes again. You have to say why you can't use 5.64, a use and a change of use, and is the only answer because 128 has to have them together despite the fact that the – you accept, I think, that the Act allows them to be looked at separately?

MR BULLOCK:

The Act allows them to be looked at separately but allows councils to choose how to implement that and how to regulate those matters. The –

GLAZEBROOK J:

So there's nothing in the Act that would stop them being dealt with separately?

MR BULLOCK:

Correct, but the plan then implements the Act.

GLAZEBROOK J:

You say the plan does it because what? It has to be under rule 128 and they have to be combined and that's your only answer to the fact that you can't do a use only?

MR BULLOCK:

It's one answer. The other answer, your Honour, is that for example where you are dealing with an existing take. So let's say you can sever out the take from the original wool scour consent. We say that take is limited in scope to operate in the wool scour and we say that can't be changed by a separate use application.

WILLIAMS J:

But that combines take and use by sleight of hand.

MR BULLOCK:

Well you can't take groundwater without using it, or you can't use groundwater without taking it.

WILLIAMS J:

Exactly. So you can't apply, as I said the other day, just 'cos. You've got to have a reason to do it and doing it, that's the use.

MR BULLOCK:

Yes, and that's why it has been regulated in that way.

WILLIAMS J:

Otherwise you get applicants just banking takes and then selling them off.

MR BULLOCK:

Yes.

GLAZEBROOK J:

So your answer to the Council is they've just been doing it wrong and all of those consents they've issued are invalid.

MR BULLOCK:

Yes. That would be the answer.

GLAZEBROOK J:

Is that sensible?

MR BULLOCK:

Well the Council could –

GLAZEBROOK J:

Because imagine a situation where you've got a use that they are using it for. They want to change it to a better use and you – and they would continue using it for the inefficient use if they don't get the other one, but they can't – under this, your scenario, they can't risk surrendering in case they either get gazumped on the next bit of it or alternatively it isn't granted.

MR BULLOCK:

I would say that –

GLAZEBROOK J:

They have to have given it up before they do any of that.

MR BULLOCK:

I would say that is the consequence of a system of resource management rather than a system of property, because why should it –

GLAZEBROOK J:

Well it's not real – I mean, yes it is, but you can nevertheless transfer these things.

MR BULLOCK:

Yes, but the transferral doesn't transform the consent. So it would still be limited to its original scope. The –

GLAZEBROOK J:

It's just becoming a less and less attractive argument, I have to put to you, at least as far as I'm concerned.

WILLIAMS J:

Isn't the answer that any prior allocation on the facts will be relevant, just not decisive?

MR BULLOCK:

It would be part of the picture because that prior allocation would have been granted by the Council on an assessment of what it was at the time it was granted.

WILLIAMS J:

That's right. But, and you would say, of diminishing relevance in this case because this consent take has been moribund for a very long time.

MR BULLOCK:

Yes.

WILLIAMS J:

But that's a factual question not a legal question.

MR BULLOCK:

It doesn't support what we say is the artificial approach of using the old – it doesn't change our point on the pathway, Sir, which is that we say what is happening here is a new activity, water bottling which needs a take and use consent for that purpose, and that requires us to go through 5.128.

WILLIAMS J:

5.128 would make these factors relevant too, would it not?

MR BULLOCK:

Conceivably.

WILLIAMS J:

Well, the reasonableness is the –

MR BULLOCK:

That may be part of the evidential picture when one is assessing reasonableness under all the other restricted discretionary matters.

WILLIAMS J:

So is that factor 8? Discretionary factor 8?

MR BULLOCK:

Ah…

WILLIAMS J:

Reasonableness of the use or the –

MR BULLOCK:

It's 2, Sir, I think – 1, but yes, yes.

WINKELMANN CJ:

But fundamentally, quite apart from the property issue, you say that section 5, rule 5.128 is the clear rule to use when you wish to make an application for a new activity, and proceeding in the way that the applicants have, the appellants have, has effectively allowed the sidestepping of the statutory scheme which only allows minor variations to consents, *Ngāti Awa*, and the rules and the plan.

MR BULLOCK:

Yes. The last thing I would say on that in answer to her Honour Justice Glazebrook's question is that if the situation really is that there are practical issues in both directions, whichever way the Court decides this, the answer is the Council can look to amend the plan to be clearer or to be more specific. Of course it can.

GLAZEBROOK J:

Well the only thing it could do was to say you can have separate take and use, is that right? But that would be odd as well because usually – well, taking is probably using anyway, whatever you're doing.

MR BULLOCK:

Groundwater, yes I think.

WINKELMANN CJ:

How do you – how would you articulate the practical problem created by the approach, which you are defending, of the Court of Appeal?

MR BULLOCK:

Well I don't see that there is a practical problem with the approach in the Court of Appeal because the approach in the Court of Appeal requires someone who has an exist – a consent for an existing activity to surrender it and to have their application for take and use for a new activity to be decided through the lens of the rule that governs take and use. I say that is what a resource management scheme is designed to achieve, and that's why I went somewhat laboriously through the background to the plan which is, the goal here is to look at how we're using our water, how much, for what purpose and the approach of the Court of Appeal achieves that.

The only other point I wanted to raise before Mr Ma Ching addresses you, subject to any further questions, is that there was a submission yesterday and it's in my learned friend's written submissions to the effect that section 91 of the Act creates an obligation to hear related applications together and simply the submission is, it does not. All section 91 –

GLAZEBROOK J:

Section 91 creates, sorry?

MR BULLOCK:

Sorry, your Honour?

WINKELMANN CJ:

Can you repeat your sentence, Mr Bullock?

MR BULLOCK:

Oh, certainly. The submission was made yesterday that section 91 creates an obligation to hear related applications together. On its face, section 91 only creates a discretion for councils to hold the processing of one application

pending the making of another. So it doesn't create an obligation. It's a discretion to put one application on hold. It doesn't create a requirement or even the power to have them heard together. That's all I intended to say on the plan, your Honour.

GLAZEBROOK J:
Can I just come back to –

MR BULLOCK:
Yes.

GLAZEBROOK J:
They can amend the plan to do what? To have a rule that allows separate take and separate use applications? Which then what – because you'd have to get rid – if you were going to – I'm just working out what would happen in a case that you do that here.

MR BULLOCK:
Yes.

GLAZEBROOK J:
If you have it separate, because you'd have to get rid of the wool scouring because you couldn't possibly leave a use, and take and use, that has take for wool scouring, could you?

MR BULLOCK:
Yes. What –

WINKELMANN CJ:
I think, Mr Bullock, your answer earlier was that you'd amend the plan to allow weight to be given to the fact that there was an existing consent.

MR BULLOCK:
Well that may be the case as his Honour Justice Williams said, but I think perhaps your Honour is right. I think maybe the answer is you could not,

because as you say you couldn't overcome the issue, that's the scope of the original consent, would be limiting regardless. Because as Justice Churchman said, that's ultimately a jurisdictional issue.

GLAZEBROOK J:

So what you're really saying is that despite section 14 which allows them to be looked at separately, in fact they can't in a fully-allocated world be looked at separately…

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MR BULLOCK:

Because the Council has decided.

GLAZEBROOK J:

So the plan's not going to be able to solve this problem that people want to change uses and sometimes it's a really good idea they do change uses. I'm not suggesting it's a really good idea in this case or not, I'm not making any comment on that.

MR BULLOCK:

Mmm.

GLAZEBROOK J:

But say it was, it would be a really good idea to get rid of an existing wool scouring and to do something like irrigating a field.

MR BULLOCK:

The answer, I think the best answer I can give to that your Honour is, well, the way you do that is to put the water back in the pot to apply again and if it's a really good idea you'll get the water.

GLAZEBROOK J:

Well you may not because someone may gazump you or –

MR BULLOCK:

I think –

GLAZEBROOK J:

They – they may decide they're going to reduce the water allocation, which they are able to do, because there's just too much.

MR BULLOCK:

I think on the gazump thing that practically is not a problem because you can immediately, literally immediately apply and you'll be there in first in time and we've talked about why there can't be someone else ahead of the queue.

WINKELMANN CJ:

Mr Bullock, just before you sit down, can I ask you one question? Taking you back to this point that's been made repeatedly that section 14 contemplates taking and use being dealt with separately. That just seems to me to be a lot to build on section 14 when I look at it. Because it's just a standard statutory provision and it doesn't seem to me to be contemplating take and use being dealt with separately. It's just a list.

MR BULLOCK:

The Court of Appeal deals with this in some detail, your Honour. I won't go through it but the short point is, section 14 leaves open these things being dealt with separately but it doesn't prevent councils dealing with them together, it's up to the Councils and their rules to decide –

WINKELMANN CJ:

It doesn't prevent it but it doesn't exactly contemplate it, does it? It's just a provision.

MR BULLOCK:

It simply says if you want to do these things then they're prohibited unless you, unless they're permitted by a plan and regular resource consent.

WINKELMANN CJ:

Mmm.

MR BULLOCK:

How the Council choses to do that is for the Council and I don't think there's been any real dispute in this case that the way the Council's decided to do it in 5.128 is lawful.

If there's no further questions I'll let Mr Ma Ching address you briefly and I'll return to some final thoughts on plastics.

WINKELMANN CJ:

Mr Ma Ching.

MR MA CHING:

Tēnā koutou katoa. I'd like to address just briefly the Council's submissions from paragraph 70 of its synopsis which deal with the other water plans. As the Council's rightly pointed out there are –

WINKELMANN CJ:

Your microphone seems to be along – with your – yes.

MR MA CHING:

Apologies, yes. As the Council's pointed out there are six other water management plans that coexist with the LWRP. They primarily relate to rivers and its interest here is ensuring that there's some consistency across its framework.

The council submits at paragraph 22 its synopsis that the interactions with those plans and the LWRP might tell us something about the issues in this case, or in its language: "The intention that can or should be read into the specific wording used." I'd like to address that just at a high level first and then –

GLAZEBROOK J:

I'm just having a bit of trouble hearing. I think it's –

MR MA CHING:

Sorry, can you hear me now if I lean forward a bit? Yes.

WINKELMANN CJ:

You might just have to move over a tiny bit, Mr Ma Ching, I think.

MR MA CHING:

Is this better here?

WINKELMANN CJ:

Yes I think it is better.

MR MA CHING:

Sorry.

WINKELMANN CJ:

The microphones aren't perhaps as – don't pick up as much as you'd like them to, and speak up a bit, I think.

MR MA CHING:

Yes, thank you. So at a higher level AWA does not agree that the river plans are something that should be driving the interpretation of the LWRP. The LWRP was a region wide specific policy intended to confront some of the challenges that Canterbury has been facing with its water allocation and management. It was in part an attempt to get away from the past and to refine the approach, so the historical plans, for example, the Opihi River Plan that was made in 2000 or the Waimakariri River Plan from 2011 might not tell us anything in particular about the language used.

WILLIAMS J:

The council's submission (inaudible 10:44:24) that those pre-existing plans were specifically provided in the LWRP to override the LWRP.

MR MA CHING:

Yes, that's right, and as I understand –

WILLIAMS J:

You disagree with that?

MR MA CHING:

No, that's not in contention, your Honour.

WILLIAMS J:

Okay.

MR MA CHING:

With the, as we can see on the screen here, there is a transitional provision that does preserve those other plans. They are, and essentially the plan says specifically provides, prevails over general, so where there are rules in the river plans that cover the same subject matter as the LWRP the continue.

WILLIAMS J:

So what was your point there?

MR MA CHING:

There was some suggestion in the Council's submission that the language in the LWRP might be informed by the existence of the other plans.

WILLIAMS J:

Oh I see.

MR MA CHING:

And really the point is that those are historical, we've moved on.

WINKELMANN CJ:

Which are historical?

MR MA CHING:

The river plans. The six other river plans. So I'd like to just take you quickly to this provision in clause 2.8 of the LWRP because I think it's important to understand that context. It says here: "In the future this Plan will manage all land and water activities (that can be controlled by a regional council) in the Canterbury Region. At the time of notifying this Plan there are a number of separate regional plans that control specific aspects of land and water separately. These plans continue to operate separately from this Plan until they are reviewed, or a catchment specific collaborative process is undertaken to review limits. At that point they are to be incorporated into this Plan."

So standing back and looking at that these historical plans eventually are to be brought under the umbrella of the LWRP and in my submission we can't take too much from them in terms of what the language of the LWRP means.

The council goes on its submissions to raise two specific submissions about, firstly, the Waimakariri plan and secondly, the Hurunui plan, and I'd like to just address those briefly.

WINKELMANN CJ:

Where are you in the written submissions Mr Ma Ching?

MR MA CHING:

Of the Council?

WINKELMANN CJ:

Of yours? Or are you just picking up, there's nothing in the –

MR MA CHING:

I'm just picking up from the Council's written submissions, so if you wanted a reference to what the Council…

WINKELMANN CJ:

Council, yes, that would be useful.

MR MA CHING:

That's paragraphs 25 to 29. Have you got that reference there, at paragraph 25?

WINKELMANN CJ:

Yes.

MR MA CHING:

Yes, so we can see from the Council's submission it starts talking about the Waimakariri plan, and the issue its pointing out there is that that plan historically drafted included rules as to the take of service water from rivers, or the Waimakariri River, but didn't actually include any use rules other than use in stream. As I understand that was something that was managed under the Canterbury Natural Resources Plan, which was the predecessor to the LWRP. The LWRP has replaced that, and there's now interpretation issues for the Council as to what the rule should now be where water's been taken from the surface of a river and if there's an application for use, where does it go.

The council has volunteered some outcomes at paragraph 29 of the submission, the first one being option (a), which is a hybrid of first considering the take under the 130 plan, and then considering the use under the equivalent of rule 5.128 in the LWRP. The second interpretation, option (b), that you consider the take under the Waimakariri plan, and then the use under rule 5.6, or the general rule.

In my submission that's not really a question that's caused by this case. It's a question that was something the Council needed to confront when the LWRP was introduced, because that gap would've existed when the LWRP came into effect. It maybe that the Court's decision on this might –

WINKELMANN CJ:

Sorry, can you just repeat that submission?

MR MA CHING:

My submission was that the question of which rule applies was one that came up when the LWRP was introduced and replaced the Canterbury Natural Resources Plan.

WINKELMANN CJ:

And what does that mean?

MR MA CHING:

In effect it's something that the Council should have already considered and it's not squarely an issue in this case on appeal, really because we're dealing with provisions of the LWRP, rather than a hybrid of the two.

WINKELMANN CJ:

Okay, so are you saying they're retrofitting something here because that's not what they did at the time?

MR MA CHING:

I think they have to, in my submission, because there simply is no rule. In the river plan it deals with use. They're forced into that situation because of the way the framework has been drafted in the replacement of the plans.

WILLIAMS J:

I think they're advancing the argument to suggest that the Court of Appeal's inseparable conjoining taking use is not actually what's going on in this regulatory regime, at least in some areas. Your argument is, well that may or may not be so, but it doesn't apply in this area.

MR MA CHING:

It's not a question that we need to grapple with today Sir.

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GLAZEBROOK J:

No, but that's not why they're putting it up. They saying this interpretation is going to cause problems in other areas, and you either have to say it's not, or too bad, or – and I don't understand what you are saying.

MR MA CHING:

What I'm saying is that firstly, it's an issue that council should have grappled with already. Secondly –

GLAZEBROOK J:

Well they think they have because they think they can disaggregate so…

MR MA CHING:

Yes, we'll come to that, but the Council has made some submissions about what the interpretation outcomes might be at 29 (a) and (b), and in my submission those are both consistent with the Court of Appeal's reasoning.

GLAZEBROOK J:

They're what sorry?

MR MA CHING:

Both of those outcomes are consistent and could live alongside the Court of Appeal's outcome. So in the first case, if it were that the use was considered under the equivalent of rule 5.128, well that's consistent with the Court of Appeal, and in the second situation, if it does fall to rule 5.6 well that might just be a consequence of the separate structure that used to exist for the river plans.

O'REGAN J:

It's not that surprising if it's consistent with the Court of Appeal decision, is it, because isn't it prompted by the Court of Appeal decision? Aren't they saying this is our solution to the problem created by the Court of Appeal decision?

MR MA CHING:

Well it might, Sir, help if we go to the technical advice that the Council has prepared following the Court of Appeal's decision, because it does talk about the historical approach as well as the current approach.

GLAZEBROOK J:

Well I'm not sure rule 5.6 is the least bit consistent with the Court of Appeal decision. Do you say (b) is consistent with the Court of Appeal decision?

MR MA CHING:

Well what I'm saying is that if rule 5.6 in respect of the Waimakariri River, may well be the right answer if the Council has formed a view that –

GLAZEBROOK J:

But I can't see how that can be the case because your argument is, and the Court of Appeal's decision says you can only look at it under 128, so I can't see how what 5.6 comes in just because of the Waimakariri River.

MR MA CHING:

Well I would agree with you insofar as it may be more consistent to read it with the, to take their interpretation of option (a), because that does preserve the intentions behind the LWRP.

GLAZEBROOK J:

But then that does aggregate use and take which you say can't happen.

MR MA CHING:

Well the reality is that the one Waimakariri plan does only have a take rule and it doesn't have a use rule, so they are confronted with a situation where they do have to consider things under separate rules in that scenario. Their option (a) seems to be a –

WINKELMANN CJ:

We're really finding it hard to follow you here Mr Ma Ching. I think we're finding it hard to follow you. Perhaps regroup and come again?

MR MA CHING:

Yes, thank you your Honour. Perhaps if –

GLAZEBROOK J:

I think I just did follow but I didn't agree with it, but I did follow it, the last one, but perhaps try again. Maybe I didn't understand.

MR MA CHING:

Thank you your Honour. Maybe it would be helpful if I could go to the Council's technical advice note, which discusses this. So this is page 201.091 of the bundle, and under the heading "Waimakariri River Regional Plan, Opihi Regional Plan" this is describing the issue that the Council is faced with and as it says the Waimakariri River plan only includes rules relating to take and use. These uses, the uses prior to the LWRP were managed under a separate rule for use of water in the natural, resources regional plan.

GLAZEBROOK J:

Sorry, the screen is jumping. I'm having a bit of trouble seeing it.

WINKELMANN CJ:

Who's driving it? Are you driving it as well?

MR MA CHING:

Sorry, I'm driving.

GLAZEBROOK J:

It's not easy.

MR MA CHING:

So as we can see there, they've identified the issue which is that they have only a rule dealing with take, not of use, and there's a question that once the LWRP is introduced and replaces the natural resource plan, what do they do.

WINKELMANN CJ:

This is an argument, is your argument that this was always a problem for them? The Court of Appeal judgment hasn't created it but there's a consistent part, way of dealing with it, or way which is consistent with the Court of Appeal?
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MR MA CHING:

That's exactly right. It's an issue that came up when the LWRP was introduced. It's not an issue that's created by the Court of Appeal's decision. Both of the outcomes they've suggested are ways through it. It's really a matter for the Council to determine what they should be doing there first.

WINKELMANN CJ:

That's where you lose Justice Glazebrook and me, I think, because isn't one of the ways they've suggested through it not consistent with the Court of Appeal's judgment, which is (b).

GLAZEBROOK J:

I think he ditched it, the (b), after I asked.

WINKELMANN CJ:

Oh okay, so 29(a), so only 29(a)?

MR MA CHING:

Yes. So I would agree that the Court of Appeal's reasoning would support the option (a) much more than option (b), yes.

GLAZEBROOK J:

Although of course it's not really, even (a) isn't consistent because it is dealing with use separately from take, which the Court of Appeal said you can't do.

MR MA CHING:

Yes. It's an unusual quirk of the way that the plans are structured because they're trying to preserve part of the river plan, which only deals with the take, that's right, and just –

GLAZEBROOK J:

Which is why I said I understood but didn't agree.

MR MA CHING:

Yes. I'd just like to make the point –

GLAZEBROOK J:

It's certainly more consistent than (b), I accept.

MR MA CHING:

Yes, that's right, and I just make one final observation on this document, which is that in this paragraph the Council's taken the position that the factual situation's different to this case and therefore it's approach shouldn't be affected by the outcome.

GLAZEBROOK J:

Which document are we looking at here? Because for my notes and for the record, I'm not sure I've caught up what it was.

WILLIAMS J:

It's the technical advice note.

MR MA CHING:

This is the technical advice note that's been prepared by the Regional Council, yes.

GLAZEBROOK J:
Okay, thank you, thank you.

WILLIAMS J:
Post the CA decision they issued it.

GLAZEBROOK J:
Yes, I knew that I just didn't know what we were looking at and I just wasn't sure it was on the record.

WINKELMANN CJ:
Right.

MR MA CHING:
So those are the only observations I really had on the Council submission, unless there are any questions.

WINKELMANN CJ:
Wonderful, okay. So that just, sometimes it's helpful, Mr Ma Ching, if you just zoom back out a bit and contextualise to the Court where exactly you are in an argument, what the big picture of the argument you're making is, before you delve down into the detail.

MR MA CHING:
Into the weeds, yes. Thank you, your Honour, I appreciate that.

WINKELMANN CJ:
But we got there.

MR BULLOCK:
So I'll just briefly address the Court on the alternative ground, which is the plastics issue. This issue only arises if the Court were to allow the appeal on the pathway issue and find that it was fine to go down this use only 5.6 pathway.

The argument here is that the Council was wrong to find that it could not and should not consider the effects of plastic pollution generated by plastic bottles created through the water bottling in its assessment of effects of allowing that activity under section 104(1)(a) of the RMA. The short point is that all plastic ever made will end up in the environment. It will either be put in landfill, it will be burned or it will otherwise end up in the environment. The effects of those methods of disposal may be different but all do have some effect because plastics break down into particles and fibres over time.

Section 104(1)(a) of the RMA requires consideration of the effects on the environment of allowing an activity, and in our written submissions you'll see we have submitted the word "allowing" there we say carries some meaning. We've also pointed to the broad language used in section 104(1)(a) which refers to any actual or potential effects. The broad definition of effect in section 3, which includes future effects, includes cumulative effects, and the definition of an environment in section 2 which is also very broad and which contains no obviously geographic limitations.

Finally, we refer to part 2 because section 104(1)(a) directs us to part 2, and we've noted the purpose of the Act in section 5 and the matters required to be considered under section 7, which we say point in the direction of an effect like plastic pollution here being a relevant consideration.

O'REGAN J:

Do we know for sure that they're going to put in plastic bottles or not? Glass ones?

1100

MR BULLOCK:

I don't think we have specific evidence on that in a proper sense, and I would say that's because the Council didn't ask the question, but I don't think it's disputed. At least you'll see in our submissions, your Honour, we put in a link to the Cloud Ocean website, which says it puts them in plastic bottles, so I don't think there's a serious dispute there.

WILLIAMS J:

That would generally be a land use planning issue rather than a water issue. What's the state of the land use – do they need a consent to do this, a land use consent for this?

MR BULLOCK:

Someone else other than me will know that Sir. I think they may already have it, I don't know. But here we say it's actually better considered in the water context because of the nature –

WILLIAMS J:

Well we do need to know whether it was considered in the land use consent or whether it's got existing use rights or –

GLAZEBROOK J:

I thought they said there was no need for a consent for the bottling itself, I thought that was one of the arguments against you.

MR BULLOCK:

That may be right. I'll check and confirm.

GLAZEBROOK J:

I mean I didn't look into that, it was just – I thought it was one of the arguments against it being taken into account.

MR BULLOCK:

I think that may be right your Honour. But in any event we would say it's better connected to water here where, as discussed earlier, the water is the product here. It's the water that drives the generation of the plastic more than the land use. This isn't a plastic bottle making factory, it's a water bottling factory, so it's inextricably linked to the water use.

WINKELMANN CJ:

So if you – I hate hypotheticals but is there another hypothetical industry we can dream up which has these broader societal adverse effects which uses water? I think there are many probably, so for instance coal works, no, we won't got into climate change.

MR BULLOCK:

Don't go there your Honour.

WINKELMANN CJ:

No, don't go there.

MR BULLOCK:

Well perhaps, my reference is Coca Cola, but that might be rather the same point. Maybe lead paint. Water-based lead paint. You need to take some water out, you put it into whatever the concoction is to make the lead paint, and you put it in a, probably a metal pottle, but you still have an effect, which is you're putting lead paint out into the environment and you're using water to do it. You can't create the effect on the environment being the problems we have with raw paint, without using the water. So we say the connection is there.

WINKELMANN CJ:

It sounds unattractive because it sounds like something that the government should be regulating.

MR BULLOCK:

Perhaps your Honour, and I guess I've talked about this recently, these things aren't mutually exclusive, and I'll come to talk about *West Coast ENT*, but her Honour Justice Glazebrook I think yesterday put to my friend whether really the ratio of West Coast ENT was the fact that section 104E prohibited consideration of final effects, and in my submission that's right, and that was an indication of national regulation. Parliament had said because we want to deal with this at a national level, we are going to put a provision in the statute that says you cannot consider this thing. There is nothing like that here, and I would

say the reason why Parliament had to do it is because otherwise it would've come under the Act, albeit we can talk about what the *West Coast ENT* says about that.

Before I get to *West Coast ENT*, I do want to emphasise that if we're right that the effect of the inevitable disposable plastic is a consideration under section 104E, although the use of water, it is a consideration only. There is, in my submission, a little bit of alarmism in Dr Burge's reasoning when he says in his consent decision why he doesn't think this could be taken into account and he says, well, if it could be taken into account we would never be able to grant permits for things that involve plastic packaging. The submission here is that it would be a consideration, like any other effect. It may have more or less weight in the circumstances, but it goes into the mix, and importantly it maybe something that leads the Council to consider whether there is a condition it might impose to address this issue.

So it's not a determinative point, we're not saying water bottling in plastic bottles can't happen because plastics are taken into account. We're saying it's a matter that is relevant to the decision and to the conditions that might be imposed.

In terms of *West Coast ENT* I've made the point, which I think is really the key one, which is I think the ratio of that case can properly be confined to the effect of section 104E, which prohibited the consideration on discharge permits of the effects of discharges and climate change and the decision of the Court that there shouldn't be a back door to that through other consenting processes. There is dicta in the judgment, however, that talks about issues of tangibility, directness, remoteness. To the extent that it was a dicta it has proved relatively influential in that that dicta has, for example, in the *Ngāti Awa* case been seen as rather controlling of what is in effect and what isn't. It may be that those concepts are helpful in deciding whether something is an effect of allowing an activity but in my submission they shouldn't form separate tests because that's to gloss the otherwise broad language used by Parliament. They may assist the decision-maker but they aren't controlling.

GLAZEBROOK J:

You mean the concepts discussed in *Buller Coal*, controlling that they may be a useful concept for – sorry, I – is that the submission?

MR BULLOCK:

You have it precisely, your Honour. The submission that I would make in line with Chief Justice Elias' reasoning in that decision is, well the task for the Council is to do what the Act says which is to access the effects on the environment of allowing the activity. That's the task. We shouldn't gloss that. We shouldn't gloss the definition, defined terms. But of course, we still do need to work out what the effects are. So these concepts may be relevant but they aren't controlling.

Really, in that sense, what we see in *West Coast ENT* was a difficult case that was decided in a particular way but in my submission it has perhaps been taken too far in the cases that have followed and relying on, it's what could be seen as a narrow reading of section 104(1)(a). In my submission the reasoning of her Honour the Chief Justice Elias is the reasoning to be preferred, because it does preserve the integrity of what Parliament has written in the Act itself.

You have my written submissions on the *Ngāti Awa* case which is a similar case in that it involves a water bottler and part of the case involves the question of are the effects of the plastic bottles produced there are part of the effects, or one of the effects, that needs to be considered, and –

GLAZEBROOK J:

What paragraph is this?

MR BULLOCK:

So in my submissions your Honour it starts at 107.

GLAZEBROOK J:

Thank you.

MR BULLOCK:

The Court there identified five challenges, I think it called them, to a view that plastics were taken into account, and I've addressed them in turn and I can touch on them briefly. But the fundamental problem we say with the Court of Appeal's approach there was that it focused on the method of disposal of plastic, as if there was a method of disposal that existed for plastic that does not have effects on the environment, and of course recycling may delay those effects but all plastic has a finite commercial lifetime. It will eventually end up as waste.

So we say the issue isn't so much a question of what happens at the very end of the chain, we say the question is that the effects arise inevitably at the point the plastic is generated and distributed because it's going to end up inevitably in the environment. There's actually good reason to think that at the production stage, if we're looking at the fence at the top of the cliff rather than the ambulance at the bottom, there may be things, I say may, be things that the Council can do in a consenting process to say well, do we have to use plastic? Can we revisit the issue of whether we have to use plastic in some years when new technologies may have developed? It may be relevant to how much water is used because we don't want to be putting this much plastic out into the environment. There's all manner of ways it could come into the mix and it's difficult to see why it is such a challenging issue when in this case of course, the Council was content in its decisions to take into account matters which are, in my submission, arguably more remote or intangible, indirect.

For example, in the Southridge consents the Council took into account additional jobs, it may be relatively direct, but also the fact that the bottling plant may support infrastructure development for a proposed inland port for the Auckland Port company. So we have a situation where here the Council took into account the benefits of the bottles being created and shipped to market in the form that they might create enough demand for an inland port in Canterbury. They might, they might not, we don't know if that will happen. But the Council said but it's too remote and too difficult for us to take into account the fact that those same bottles will inevitably end up in the environment one day.

1110

My submission is it would be remarkable if the consideration of effects would allow the use of thing – allow consideration of the benefits associated with creating and transporting these bottles to market but not the inevitable adverse effects on the environment.

FRENCH J:
We don't actually have any evidence about all of this, do we?

MR BULLOCK:
No we don't, your Honour, and my observation on that end as well we don't, in large part because the Council decided it couldn't consider this. It was open to the applicant to provide some evidence on this. It was open to the Council to ask for some evidence but no one has. So, AWA cannot expect, and does not expect, this Court to make a determination of what would happen if plastic, disposable plastic pollution was considered. The outcome would be that the matter is remitted to the Council to redo the consenting process lawfully in a way that takes into account the effects of plastic and that may require the consent applicant to put some evidence forward to the Council to its satisfaction or for the Council to request it. So I completely accept, your Honour, we can't go there today.

FRENCH J:
But in order to agree with your interpretation of effects we need to be satisfied with what you're saying about the plastic, right?

MR BULLOCK:
Yes. In my submission your Honour, and this is the best I can do I think, is to say that judicial notice can be taken of it, just as judicial notice can be taken of the broad effects of climate change. In a particular case we might need to have a climate scientist come and tell us about some details, but suffice to say I think it's beyond dispute that the broad nature of climate change can just be seen as

a matter of judicial notice. In my submission the fact that plastic will inevitably end up as waste it just follows in the matter of logical necessity.

I have, and this is not to say its evidence but really just to assist the Court by way of context, included an article which is referenced in the footnotes which has the helpful title of something like the "fate of all plastics ever made" and it's the first study which says well, where does plastic end up? It says, well, it ends up in three places. It ends up being used while it has a use for life, it ends up in landfill, it ends up in – being burned, or it ends up otherwise in the environment and that is it. It may be recycled, that may delay the process, but those are the only things that can happen with plastic; it's used, it's burned, it's landfill, it's otherwise in the environment.

So the submission for AWA is that properly read, section 104(1)(a) is broadly cast, it's defined terms are broadly cast. *West Coast ENT* should be read as confined to the particular issue in that case which was dealing with section 104(e) and that here, the Council was required to consider the fact that this project was going to introduce large amounts of plastic into the environment. We can't say what the Council would have decided had it considered that because we don't know, that's a matter for the Council, but the submission for AWA is that it fails on the primary appeal, the appeal should nevertheless be allowed on this ground, the section 5.6 decision remitted to the Council to be decided on the basis that plastic is taken into account, and also that the section 95 decision, the notification decision, be reassessed on the same basis because it was excluded from that as well.

That's all I have to say unless there's any further questions.

WINKELMANN CJ:
Thank you, Mr Bullock.

MS APPLEYARD:

We might just have to do some logistical rearrangement to work the ClickShare, if you just give me a minute. I have got a road map which I'll hand up shortly, but with the –

WINKELMANN CJ:

How long you tell you, how long do you see yourself being?

MS APPLEYARD:

Well at the moment I'm guessing, it depends how quickly we go through it. Probably an hour?

WINKELMANN CJ:

Right, well we're hopeful, definitely no more than an hour.

MS APPLEYARD:

Yes. There were a couple of matters that arose in the questioning of my friend Mr Bullock and with the leave of the Court I might indicate the two topics I might be able to be helpful on and see if you want to hear me on those. Just if I can indicate, I commenced practice in 1991 and a mentor at the time, the now Justice Wylie, said to me: "Here's a new piece of legislation, the Resource Management Act. I think you could get to grips with that." He then gave me my first job which was the re-consenting of two meat works in their take and use and in particular their discharge to the Waimakariri River. I've consented the take and use and I think the discharge I've consented three times now. So I do have a little bit of background in relation – and I've also acted for Kaputone, so I do have a little bit of background in relation to these particular consents. The question that I thought I might be –

WILLIAMS J:

You just have to be careful we don't have to swear you in.

MS APPLEYARD:

I promise I won't go there. The question I was going to help you with, your Honour, was the one about the relevance of prior consents, and your words, Sir, as I recall were that they are not decisive but they're relevant, and I would agree wholeheartedly with that. As the counsel acting for the applicant, originally the Canterbury Frozen Meat Company through to PPCS to Silver Fern Farms, every time I re-consent these applications for take, use and in particular, discharge, I am relying on an evidential leg up, if you like, that there's been a pre-existing consent, consent's been exercised and hopefully I'm able to go on and say and there hasn't been any adverse effect provided we've done everything correct.

So if what you are saying Sir, I would agree wholeheartedly, is that hopefully the pre-existing consent will give you a strong evidential basis on which to bring evidence saying these adverse effects are occurring, they haven't created any unacceptable outcome in the environment and that's a strong evidential leg up. It is highly relevant that there has been a prior consent, and the effects that have flowed out of the exercise for that, but that's about as far as it goes. It's not decisive. So I would agree with you.

I spend my life battling for new applicants that want to change their activity, and one example I've got at the moment is a developer who has an industrial development. He's wanting to change that to residential. He is going to surrender his existing consent but he wants to rely on the fact that the traffic generation will be less, so he's wanting to evidentially bank, if you like, the acceptableness of that effect.

WILLIAMS J:

In the water taking?

MS APPLEYARD:

Yes. So in the context of the water take, I would agree with Ms Limmer that she's got an evidential leg up, if you like. She might be able to say that taking this amount of water hasn't caused the aquifer to deplete, hasn't caused the

Kaputone Stream to run dry, but that's about it. It doesn't tell us anything about the comparative social benefits, the comparative economic benefits, whether the cultural effects are different. So I think she's got an evidential leg up. The aquifer didn't run dry, the Kaputone Stream didn't run dry, but that would be the limit of –

WILLIAMS J:

But the take is still in play, you say?

MS APPLEYARD:

The take is –

WILLIAMS J:

I think there are –

MS APPLEYARD:

The effects, sorry, the effects of the exercise of the take are relevant evidentially is what I would say. The fact there has been a prior exercise of that consent which has had an effect on the effect and say those effects, adverse effects were acceptable, evidentially is about as far as she can go.

WILLIAMS J:

Right, but the prior proposition, which I think was her stronger one, position she pushed most strongly, is the take itself is off the table for argument. You're not advancing that.

MS APPLEYARD:

No I'm not.

WILLIAMS J:

You're saying it's on the table for argument.

MS APPLEYARD:

Yes.

WILLIAMS J:

But you've got, you're a metre –

MS APPLEYARD:

You've got a bit of a leg up.

WILLIAMS J:

– ahead of the rest of the race.

MS APPLEYARD:

Yes, you've got a leg up in a few areas. Not on social effects, economic effects or cultural effects, but you can show that physically there hasn't been effect on the – and just on that, I just would –

WINKELMANN CJ:

So, and you can't say, and look we're not going to be discharging stuff back in so we're better.

MS APPLEYARD:

Now well I'm going to come to that shortly.

WINKELMANN CJ:

Okay.

MS APPLEYARD:

Because those are my next two points. So the first is on the evidential – the evidence about the effects of the take. Got a little bit careful about that, and that does come to the history of this consent. This consent is a consent to cover the meat works operation at the peak of the seasons.

WILLIAMS J:

Ah.

MS APPLEYARD:

So it's expressed to – so that is not what they take 24/7, 365 days of the year. In the application, I can take you to it if it's helpful, there's a couple of paragraphs in there, which you can just go down a wee bit, Rachel.

WINKELMANN CJ:

This is the one you were talking about, the meat works one as opposed to wool scouring?

MS APPLEYARD:

Yes so this is the meat works one. If you go down, Rachel, slightly, so if you look at 16.6, this is part of the application that, I think it was probably PPCS the, the volume of water applied for is the maximum pumpable take required for peak processing conditions. Typical usage is about 65% of this, and of course sometimes during the year there will be no take at all because the season's off. 1120

So these consents would be probably more sophisticatedly drafted these days, so we do have a paper consent that says you can take X, but in reality that is not what the environment would have been experiencing evidentially through the term of this consent.

WILLIAMS J:

Do you say that would be relevant to a downstream applicant seeking to stay inside that envelope?

MS APPLEYARD:

Yes, yes it would, because – the other thing is we've talked about these take and use consents and this is an issue that is near and dear to my heart and is really important to my client. These consents were not only about the take and use for processing of meat works, wool scouring, there's also a fellmongery as well, they discharged out of a common pipeline into the Waimakariri River. The take and use, the use for processing was in the mind certainly of my clients bound up with the discharge. In this particular case, my clients Tūāhuriri, and

I'm going to put it as benefit were getting the benefit of the water back within their takiwā. Yes it was polluted but in their terms they could still exercise kaitiakitanga over it and in their words, they would be able to nurse it back to health. So there is a link between the take and the discharge which has been decoupled in this process as well, and there's a link between the amount of water that needed to be taken and the amount of water which was discharged, because to some extent the amount of water needed to be taken was bound up in dilution and what needed to come out as an acceptable environmental outcome at the other end. So it was not just what was needed for the processing, it was needed to create an environmental outcome that was acceptable in terms of the discharge.

So one matter that we have taken objection to is the statement in the officer's report is an assumption that taking the discharge out of the river, or it's now to see, is a positive effect. That is not seen as a positive effect, certainly for the clients that I represent. They would rather have it back, and they have actively through the renewals of the consents exercised kaitiakitanga by putting very stringent conditions on the treatment of the water during the processing so that what ultimately discharged was being improved and improved at the same time as driving efficiency in the amount of water that was being taken at the front end.

So I don't know if any of that is helpful. There was one other question that I might be able to help –

WILLIAMS J:

Can I just pick up on the initial point you were making, was the nature of the factual use by the meat works the fellmongery or the scour –

MS APPLEYARD:

Yes, yes.

WILLIAMS J:

– a matter considered in terms of the reasonableness of the use and need?

MS APPLEYARD:

Absolutely. So the –

WILLIAMS J:

I'm talking about in this consent.

MS APPLEYARD:

Oh in this consent? No, no. In the one that was granted – yes, no.

WILLIAMS J:

Yes, okay.

MS APPLEYARD:

Well not as far as I'm aware. So the other question that I might be able to assist the Court with is this question of, I think it was your Honour Justice Glazebrook asked the question about replacement consents. The short answer that is section 124 keeps your place in the queue and allows you to keep operating while your application for a renewal, we call it a renewal or a replacement, consent is considered, but it is a new application for a new consent. All you get is the evidential leg up that I talked to you about before and there have been case law about the factors that get taken into account. It says if you've been a good consent holder and you haven't been a non-compliance and you haven't had any effects on the environment you've got a better chance of getting renewed. But that is by no means a shoe in.

Taking Silver Fern Farms as a client I act for, I'm in the middle of a battle at the moment for renewal of their discharge at Pareora, and you know, it's nail-biting as to whether they're going to mean – I mean realistically they're not going to not get granted, but the conditions on those consents could be so onerous to make it uneconomic.

So there is no leg up other than evidentially in terms of a renewal although the Courts have indicated there are factors you take into account, such as compliance history.

WILLIAMS J:

It's a sort of different situation because your standard 35-year consent, that's the extent of your right and to the extent that there is an indefeasible expectation you might say that's all it is.

MS APPLEYARD:

Yes.

WILLIAMS J:

After that, science, need and so on come back into the equation. This situation is where you're inside that envelope. Do you have to re-argue the things that would normally be argued on renewal or do you get a free ride?

MS APPLEYARD:

Yes, well, I don't think you get the free ride, and it comes back to the bucket of things that were taken into account in granting the take in the first place. You can't just bank the adverse effects and say they're no different but we'll ignore the fact that we're not employing 3,000 people, only employing 280, and that culturally we don't have a discharge, we don't – the discharge had an augmentation of the Kaputone screen with it. We don't have that augmentation happening. We don't have the discharge back to the Waimakariri so we get the quantity back. Okay, we might not get the quality back but we can nurse the river back to health or the ocean where it goes. So you can't sort of bank part of it, if you like, bank part of the effects and ignore the positive effects which were taken into account at the time and weighed in the balance for the original decision-maker to decide: are we prepared to allow this adverse effect of the take, balancing it against it against these other positive things? You can't have one end of the equation and not the other re-looked at. That's the simple way we look at it.

WILLIAMS J:

Well, in those days many of the people working in the peak season at the freezing works would have been from Ngāi Tūāhuriri.

MS APPLEYARD:

Well, it's actually interesting because the consent application I just took you through did have the consent of Tūāhuriri and through my years of doing these renewals of consent I'm now – I'm not on the other side. I'd say I'm on the same side. But it's through that, partially through that relationship and how I have seen those meat-works companies and Tūāhuriri operate together in collaboration that I'm here, not on the other side, I would say. So there were huge economic and social benefits but given the location of the two freezing works, they were at Belfast and Canterbury, one was sheep, one was beef, primarily the employment pool was from the local area and the local area, as we know, is a stronghold and we have Tūāhuriri, the marae there, and there was economic and social benefits bound up with cultural benefits.

I could give you a few anecdotes but I would probably take up too much time before I –

WILLIAMS J:

We really would have to swear you in then.

MS APPLEYARD:

Yes, yes.

WILLIAMS J:

Can you tell me about the land use status of this use and what –

MS APPLEYARD:

Someone else could probably answer. It's city council consents that are needed, not regional council consents, and then –

WILLIAMS J:

But consents were needed?

MS APPLEYARD:

Consents were needed for the factory, and that, look, I don't know the details of it but that would have been traffic generation. I don't –

WILLIAMS J:

The bottle, the bottling factory?

MS APPLEYARD:

Earthworks. There might have been some original council ones. Mr Maw will be able to…

WILLIAMS J:

All right, that's fine.

MS APPLEYARD:

But there were, definitely there were district council consents needed and maybe some regional ones as well, so…

WILLIAMS J:

Was the bottle issue raised in…

MS APPLEYARD:

Not as far as I'm aware. The issues were noise, traffic, or those sort of effects, as far as I'm aware, and I'm only going by what I read in the newspaper, so…

WILLIAMS J:

All right. Oh, okay.

GLAZEBROOK J:

Can I just – what I was concerned about with Mr Bullock, which is really not related to what you take into account when you make one of these applications, but his submission was that you had to give up your take which, even though it's not a property right people will have paid a lot of money for it, and that is the right to take that, admittedly for a purpose that's no longer there, but one would

not – but that mightn't be the case because in another situation it may be that you would just continue using the water for that purpose.

MS APPLEYARD:

As the successors to the Canterbury Frozen Meat Company did to PPCS, to Silver Fern Farms, some of those have name changes, but as they did…

GLAZEBROOK J:

So my concern was that you wouldn't want to give that up and then take your chances on the new consent that you mightn't get, and it also didn't seem very sensible because your new use might be very much better than your existing use.

MS APPLEYARD:

Yes, and that's – yes, so I think –

GLAZEBROOK J:

But do you agree that you can't –

MS APPLEYARD:

Yes, what I would be doing I can imagine myself standing at the offices of the Regional Council handing over my surrender and handing over my application for a new consent, but obviously then you're into the type of exercise that any applicant goes through, you're first in the queue, and yes, you could get cut back. We've now got Ngāi Tahu values in the rule. Issues that will be looked at are the rate efficiency so –

GLAZEBROOK J:

No, but the concern is that if you didn't get it you'd just carry on with your previous use. On that scenario, you can't.

MS APPLEYARD:

You've surrendered it.

GLAZEBROOK J:

So do you agree you can't put in a conditional?

MS APPLEYARD:

I agree. You can't put in a conditional.

WINKELMANN CJ:

In the real world that's probably not going to be a problem very much because you're not going to go back to wool scouring, for instance, in this situation.

GLAZEBROOK J:

Well, no, but there could be other issues that – there are other things. Well, in fact that's probably happened over the life of the…

WINKELMANN CJ:

Yes. Anyway.

MS APPLEYARD:

It's half past 11 and I was going to hand up my road map. Is it best if I do that and then do you want a break?

WILLIAMS J:

We haven't even got to the road map yet.

MS APPLEYARD:

That was me getting…

O'REGAN J:

And it's morning tea now too.

WINKELMANN CJ:

We're going to take morning tea, but you've got about 45 minutes left, I think.

MS APPLEYARD:

Thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MS APPLEYARD:

Now you should have been handed up a road map and I am very conscious I've got 45 minutes, so feel free to signal –

WINKELMANN CJ:

At the most.

MS APPLEYARD:

Yes, thank you. So I've said in the introduction that I certainly understand that the cultural significance of the water in question here, as set out in my legal submissions 9 through 12, isn't in dispute and neither is the relevance of tikanga given its incorporation into particular parts of the RMA. What I was wanting to take the Court through was the expectations and obligations as to how tikanga will be exercised in a Ngāi Tūāhuriri context. To do that I'm going to refer to a few key documents.

Firstly, the RMA itself. Secondly, a document I haven't listed in my first bullet point, the Tuia partnership document which was a partnership entered into between the Regional Council and Rūnanga.

WINKELMANN CJ:

What's that document number?

1150

MS APPLEYARD:

It is down a little bit further than my heading "High-level documents".

WINKELMANN CJ:

Mhm.

MS APPLEYARD:

It's the intervener's bundle tab 72. That's a document, a partnership document. The next one I want to take you to is the Canterbury Regional Policy Statement and the third is the Iwi Management Plan, and then having taken you to those documents and described how tikanga is intended to be exercised I'm then going to look at the process of these applications and how the processing of these applications and the decisions on them measure up against those documents and also how the High Court dealt with it. So that's it in a nutshell, was to take you through the documents to describe how tikanga will be exercised, look at how these were processed and then look at how the High Court dealt with it, if that's a helpful way of going about it.

So the high level documents that I was going to start with obviously is the RMA, and I won't take you to that, but the best summary I found for section 67(a) and 8 is actually in the *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 where Justice Whata at paragraphs 37 through 42 has helpfully taken us through section 6(e). He's taken us through section 7, the other matters which obviously has a reference to kaitiakitanga being a matter to have particular regard to. Paragraph 40, which includes the definition of "kaitiakitanga" which includes the reference to the "exercise of guardianship by tangata whenua if an area in accordance with tikanga Māori". Also, obviously section 8. So I don't think any of that's going to be in dispute. In that same decision at paragraph –

WILLIAMS J:

Except perhaps to the extent that they are relevant under 5.128.

MS APPLEYARD:

Yes.

WILLIAMS J:

But you'll come to that, no doubt?

MS APPLEYARD:

Yes. So then we come to *Ngāti Maru Trust*. I've just referred you through to paragraph 64 where Justice Whata there was saying that Parliament clearly anticipated that regional management decision-makers, i.e. regional councils, could grasp these concepts and apply them in accordance with Tikanga. Also a helpful reference in *Ellis v King* [2022] NZSC 114 where the Court there said in the particular case of the RMA that was a statute that imposed tikanga obligations on non-Māori and that would effect applicants for resource consents.

So the obligations sit with Tūāhuriri itself, the Regional Council in its processing and decision-making but also the applicant and the way in which it put the application together and the information that was included in that application.

So turning to the first of the documents that I consider is helpful to the Court in understanding how tikanga is exercised in the Tūāhuriri context, the first is the Tuia partnership document. Now, this is not the partnership agreement itself but it is a document published by Environment Canterbury and Ngāi Tahu which sets out that they have entered into a relationship agreement signed in 2012 to make a "new era of collaboration". Rachel's just brought up the first two paragraphs there that says they've signed a relationship agreement known as Tuia which means working arm in arm. It's a new era of collaboration to the "management of natural resources" and that the signing of the agreement was intended to formalise this new relationship, new collaborative relationship.

I'll just get you to go over to 1089. There is a reference in this document which talks about, a little bit further up, that as part of the Tuia programme Environment Canterbury has appointed David Perenara-O'Connell as a programme manager for the Ngāi Tahu relationship. Now, the importance of that is he is the person to whom Koral Gallagher send the email indicating that Tūāhuriri were opposed to water bottling in Belfast and giving the reasons why. A little bit further down the document he is quoted as saying, in the paragraph that starts: "David says there has been a natural acceptance of Ngāi Tahu values and aspirations within the organisation", the organisation being the

Regional Council, and if we just go up to the top, one of those is the concept of "for us and our children after us", and that is a phrase that Koral Gallagher uses in her email to him when she says this is one of the reasons why Tūāhuriri have an objection to water being sold at Belfast. So she uses that particular phrase in her email.

The second document that I wanted to take you to is the Canterbury Regional Policy Statement and this is the superior document in the hierarchy of legislation to the LWRP and this is dated 2023, and it has a section titled "Ngāi Tahu and the Management of Natural Resources" which is a wealth of information for decision-makers, applicants, and I won't take you through this in detail but there are some indications through here as to how tikanga will be exercised, in particular at 2.2.1 where you have there, for the purposes of this document, in the Ngāi Tūāhuriri context, what tikanga means, and if you look down at the third paragraph there's an example there of how tikanga would be exercised in our local context and one of those is the context of meeting face-to-face, dealing with each other face-to-face rather than, for example, over email, and talks about consultation on some natural resource management issues, those face-to-face meetings being appropriate tikanga.

So that's just one example of how tikanga might be exercised in a local context.

If we go down a little bit further, section 2.2.4 has the definition of kaitiakitanga and there's a nice phrase, fourth paragraph down, that the definition given in the RMA is only a starting point for Ngāi Tahu, and they see it as a much wider cultural concept than pure guardianship, and further down, the next paragraph, the words: "To Ngāi Tahu, kaitiakitanga is not a passive custodianship, nor is it simply the exercise of traditional property rights, but entails an active exercise of responsibility in a manner beneficial to the resource," and there are lots of examples of the ways in which Ngāi Tahu carry out that active exercise of responsibility in the local context.

2.2.5 is the definition of "rangatiratanga" and one of the interesting points about that is the last sentence which is an example of one way in which rangatiratanga

is expressed and that is by active involvement by Ngāi Tahu or tangata whenua in resource management decision-making processes. So obviously the words there I'm highlighting are the words "active involvement".

There's a section on wāhi tapu, and this is relevant in that the particular take in these particular cases were in areas where Ngāi Tahu had signalled they were silent file areas and there are some particular words in here around what an applicant or what a decision-maker does if they find themselves wanting to carry out an activity in an area which is subject to silent file and the words here that I'm wanting to particularly highlight: "As the knowledge of specific sites may not be known to Ngāi Tahu as a whole, it is always important to consult with papatipu rūnanga to ensure that wāhi tapu sites are protected." So there's an indication of an expectation that there will be a consultation with the relevant rūnanga or your find yourself in one of these silent file areas.

I'm nearly there on this. I know it's a bit of a gallop.

1200

Chapter 4, which is how the RPS provides for Ngāi Tahu and their relationship with resources, and there is particular reference to the importance of kaitiakitanga – and if you go down a little bit, Rachel – in section 4.3 there's a heading: "Tools and Processes to Sustain Good Working Relationships", and there are some helpful tools and processes that are set out to recognise and provide for the section 6(e), 7(a) and section 8 matters, and in particular I'm referring to the sentence, paragraph which starts: "In demonstrating its commitment to develop and maintain good working relationships," what the Regional Council will do will take into account and where possible, give effect to, the principles in the RMA, will act with the purpose and principles of the RMA. Would act in good faith. It will "through developed processes and procedures" that are developed locally, "actively accommodate and engage Ngāi Tahu tikanga in good environmental governance decisions." It will recognise individual papatipu rūnanga within their rohe and provide for wider involvement in the management of…" those resources. It will "foster a principle of partnership on an ongoing basis and remedy issues that may arise between

the Council and Ngāi Tahu." One thing I would say is the Courts are not the places to do that. And it will "monitor the effectiveness and efficiency of the outcomes and actions within this." So there's some –

WILLIAMS J:

Can you just give me the chapter number? Section 4.3, right?

MS APPLEYARD:

Yes. Now I'm down at 4.3 which is the, under the heading that "The Canterbury Regional Council will" so these are all the things that they will do, and I draw your particular attention to 4.3.2. This is what the Regional Council will do. "Use and take into account iwi management plans as a primary tool to assist in the identification of issues. To provide the Council with "cultural context and understanding of values underpinning the relationships", not only with Ngāi Tahu, but with the papatipu rūnanga and the environment. It will "understand, acknowledge and account for the importance of local knowledge and guidance…" at the "…rūnanga level." It will identify areas of importance, and that will include those silent file areas.

Five is particularly important, it will "assist in the determination of the nature and extent of consultation that may be required over particular activities or places of importance." And I will come back to that because the application form that the applicants filled out here had some specific sections in them directing them to the desirability of consulting with rūnanga, particularly when they find themselves in the silent file area. And it will, the Iwi Management Plan will assist decision-makers, such as those on resource consent applications, to make informed decisions on matters of policy.

The last, sorry two more I wanted to refer you to here. 4.3.7, to be determined on a case-by-case basis, I accept that, but at 4.3.7 the Regional Council should "seek a cultural impact assessment or cultural value assessment… where an application is likely to impact on a significant resource management issue for Ngāi Tahu." Again, the reference to the importance of iwi management plans being as a tool to guide consideration of circumstances where there might be a

need for that cultural impact assessment, or value assessment, as part of assessing environmental effects.

The last one, Rachel, if you can take me down to 4.4, this sets out the reasons why we do all these things, and the reason why we do all these things is "to maintain good working relationships", and it says "the tools and processes outlined above build on existing relationships" and it sets out the reasons why we're implementing these tools and processes, and it's to ensure that resource management issues of relevance to Ngāi Tahu as tāngata whenua are identified. It's: "To assist in the identification of effects and recognition of Part 2." It's: "To help local authorities and Ngāi Tahu as tāngata whenua to give effect to a principle of partnership." Its: "To result in mutual environmental benefits." It's: "To enable the exploration of opportunities for Ngāi Tahu to be actively involved in the exercise of kaitiakitanga…" Also at six, which seems to run into five, it's: "To recognise the fundamental need for effective communication and collaboration…" while we're trying to manage these important resources.

So that was a bit of a gallop, I'm sorry, but that was my attempt to point you to the documents where we have some signal of what is expected around the exercise of tikanga in this particular context that we're dealing with here.

So unless you had any questions on that, the next document I was going to take you to, which is, you can see from what I've just taken you through, is the Iwi Management Plan and the importance of that in decision-making and, in particular, in relation to resource consent applications. So I might just pause there, take a breath and see if there's any questions to that point on the RPS and the Tuia partnership before we deal with the Iwi Management Plan. No? Right, I'll take that as a signal to carry on.

WINKELMANN CJ:

Yes.

MS APPLEYARD:

Ms Robilliard is going to deal with the Iwi Management Plan.

WINKELMANN CJ:

So where are we at? So we're at –

MS APPLEYARD:

So in my road map we're at –

WINKELMANN CJ:

Towards the end of 2 on your road map?

MS APPLEYARD:

Yes, we're on page 2, a third of the way down, Mahaanui Iwi Management Plan 2013.

WINKELMANN CJ:

Can you just give us, before you sit down, can you just give us a direction of – I mean you've taken us to all this material but what are you saying about all of this?

MS APPLEYARD:

I'm saying that when I take you to what actually happened in this consenting process none of those expectations that were set out in these documents about how you go about applying for a resource consent and processing and deciding on a resource consent, that there's a chasm between the expectations of how the Regional Council and applicants will behave and what actually happened in this case.

WINKELMANN CJ:

This is all setting up 3?

MS APPLEYARD:

This is all setting up 3.

WINKELMANN CJ:

Go ahead. Ms Robilliard?

MS ROBILLIARD:

Tēnā koutou. So we've heard both yesterday and from Ms Appleyard about the importance of the Iwi Management Plan as in expression of rangatiratanga and kaitiakitanga and the Regional Policy Statement has obviously made some statements about the relevance of the Iwi Management Plan, not just in plan making processes but in terms of active involvement in resource management processes, and our friend for the appellant made some submissions yesterday about that relevance and what the plan is for. Included in our bundle of authorities is the section that we considered most relevant of the 2013 Mahaanui Iwi Management Plan but the plan does, in its introduction, also make some statements about what it considers its purposes is, so if I may I thought it might be helpful to take the Court to that, and so up on the screen is an electronic copy of the Iwi Management Plan and we can provide a link to this page.

So the Mahaanui Iwi Management Plan provides a statement of Ngāi Tahu objectives, issues and policies for natural resource and environmental management in the takiwā. The plan is a tool for tangata whenua to express kaitiakitanga by effectively and proactively applying Ngāi Tahu values and policies to a natural resource and environmental management and to protect taonga and the relationship of tangata whenua to these by ensuring that the management of land and water resources achieves meaningful cultural and environmental outcomes, and so while the plan is first and foremost a planning document to assist Papatipu Rūnanga to participate effectively in natural resource and environmental management in the takiwā, a fundamental objective of the plan is to also enable external agencies to understand issues of significance to tangata whenua and how those issues can be resolved in a manner consistent with cultural values and interests.

So if we turn now to chapter 5.3 of the Iwi Management Plan – just while we do that, to explain, this Iwi Management Plan, it's a 2013 iwi management plan so

it follows along from the Te Rūnanga o Ngāi Tahu Freshwater Policy Statement of 1999 and also Te Whakatau Kaupapa – Ngāi Tahu Resource Management Strategy for the Canterbury Region which –

WINKELMANN CJ:

I think you might have to zoom in there.

MS ROBILLIARD:

So those documents remain taonga and valuable sources of information on values and history but the Iwi Management Plan is – the Mahaanui Iwi Management Plan is commonly treated as the most up-to-date statement of Ngāi Tahu values in the area of the plan, and this is particularly relevant in this context because, as Ms Appleyard will address you on shortly, none of these consent applications were limited or publicly notified under the provisions of the RMA.

1210

So the reliance on the Iwi Management Plan in the Cloud Ocean applications in particular was the flowing through of the kaitiakitanga expressed in this Iwi Management Plan because there was no direct opportunity, apart from the emails that Ms Appleyard will also address, for Ngāi Tūāhuriri to express their rangatiratanga and kaitiakitanga in these consenting processes.

So turning now to just a few of the objectives and policies that we consider are particularly relevant, and we are in the right place. Number (1) there, and we do apologise for the highlighting in this document.

WINKELMANN CJ:

No, that helps.

MS ROBILLIARD:

So: "Water management effectively provides for the taonga status of water, the Treaty partner status of Ngāi Tahu, the importance of water to cultural well-being, and the specific rights and interests of tāngata whenua in water."

Then we see in (3) picking up some of the themes from the land and water regional plan that my friend took the Court through yesterday, that "water and land are managed as interrelated resources embracing the practice of Ki Uta Ki Tai…" also reflected in that Tuia partnership that Ms Appleyard recently took us to, "which recognises the connection between land, groundwater, surface water and coastal waters."

If we go to page 1061 and policy WM1.3: "Papatipu Rūnanga may have their own policy positions on the commercial use and ownership of water…" That policy seems particularly significant given my friend's submission yesterday that this Iwi Management Plan does not deal with water bottling. It would seem on a plain reading of this policy that the commercial use and ownership of water directly relates to the activity of water bottling.

GLAZEBROOK J:

Sorry, can you just point me to exactly where you say we're looking at.

WILLIAMS J:

It's the last yellow one.

GLAZEBROOK J:

The last yellow one, so WM1.3 is it?

MS ROBILLIARD:

That's correct. Then in WM1.4 a policy: "To require that local authorities… recognise… the relationship of tāngata whenua to freshwater is longstanding; (b) The relationship of tāngata whenua to freshwater is fundamental to Ngāi Tahu culture and cultural well-being; (c) Tāngata whenua rights and responsibilities associated with freshwater are intergenerational."

If we got to WM2, which is on the same page, there's a number of policies here which all relate to this issue, that there was a need to change the way that water is valued in the takiwā of this plan, and so policy WM2.2: "To require that water

is recognised as essential to all life and is respected for its taonga value ahead of all other values."

WM2.3: "To require that decision making is based on inter-generational interests and outcomes, *mō tātou, ā, mō kā uri ā muri ake nei.* For us and our children after us, as reflected in the Tuia partnership and the email from Ms Gallagher to Mr Perenara-O'Connell at the Council.

WM2.4: "To continue to assert that the responsibility to protect and enhance mauri is collective, and is held by all those who benefit from the use of water; and that the right to take and use water is premised on the responsibility to safeguard and enhance the mauri of the water."

And you'll notice as we go through this document, that there's a consistent reflection of this take and use of water, rather than dealing with the two activities conjunctively, and perhaps to pause there and say as reflected in our legal submissions, our submission is that tikanga in this case is informative of both process outcomes, what was the most appropriate process to use in order to process these consents for a new use of water, and also in terms of the substantive outcomes, informing what effects on tikanga and on cultural values there would be both from the process taken and from the outcome of the bottling of water.

WINKELMANN CJ:

Well this might be a question for Ms Appleyard, but do you say that those process requirements override the process as set out in the plan? You might want your leader to answer this at stage 3.

MS ROBILLIARD:

I will do that, thank you.

WINKELMANN CJ:

But whilst I'm interrupting you, I'm just looking at the time and thinking this is very helpful but there's only 15 minutes of your 45 minutes left. So, yes.

MS ROBILLIARD:

Certainly. In that case I'll skip right to the last policy that I wanted to mention which did come up yesterday and that's issue WM11 and it's on page 1077. The issue is described that: "The ability to transfer water permits and treat water as a tradeable commodity is inconsistent with tangata whenua perspectives on how to achieve the sustainable management of water."

WINKELMANN CJ:

What one is that one?

MS ROBILLIARD:

That is issue WM11. It's just under, sits just under the heading.

WINKELMANN CJ:

Right.

MS ROBILLIARD:

So it explains what the policies in this section – what is the issue that the policies in this section are aiming to address.

I'd just like to note, two policies we consider are particularly relevant there, WM11.1, to require that, and I'm skipping now to the bottom of WM11.1: "When land is sold the new owner must reapply for consent to take water if there is a proposed change to land use." Then the last policy, WM11.3: "To oppose the transfer of unused allocations associated with a water permit to another use or user different from that which is was originally allocated/permitted for. Unused water must remain in the river" in a freshwater, in a surface water context, "and a new permit should be required for any new land use."

Just to finish this section off, so Ms Appleyard is planning to take the Court through a couple of the decision documents and we note that the Iwi Management Plan was not considered in the Southridge applications or decision. It was considered in the Cloud Ocean officer's report where the officer found that the applications were consistent with the Mahaanui, the relevant

provisions of the Mahaanui Iwi Management Plan. We say that on a plain reading of these policies in the Iwi Management Plan the applications are clearly not consistent on a number of levels.

Secondly, our friends for the appellants rely on the High Court's findings in relation to cultural issues. In the High Court in the judgment, which I have open in a tab 101.0111 at paragraph 288, found having reviewed the policies of the Iwi Management Plan but not having heard from counsel in relation to those that there was nothing in the plan that indicated that Ngāi Tūāhuriri would have a cultural interest in the end use that might be made of water from an aquifer and one of the policies that I jumped over, policy WM3.1 is from the Ngāi Tahu Freshwater Policy Statement, that's on page 1072, and it notes a priority for the use of water. One particular item of interest to the Southridge consents is number 2, WM3.1, so a few pages up from 072. Apologies.

Yes, yes that's right. It's not highlighted but it's the first policy there, and just to note that following the first priority being the mauri of freshwater resources being protected and sustained, the second priority is that: "Water is equitably allocated for the sustainable production of food." Of course, the Southridge consents relate to a meat work so relate to the sustainable production of food. Then the last priority is that: "Water is equitably allocated for other abstractive uses." So if there's no questions on those submissions I'll hand back to Ms Appleyard.

1220

WINKELMANN CJ:

Thank you.

WILLIAMS J:

Sorry. Is there anything in the plan about "take and removal" as oppose to "take and return"?

WINKELMANN CJ:

In the Management Plan.

MS ROBILLIARD:

I think the answer to that is one of the first policies I took the Court to, WM1.3, that the Papatipu Rūnanga may have their own policy positions on the commercial use and ownership of water. On the basis that that would presumably often relate to removal – actually there's two points. I think that that's one. That policy recognises that issues such as water bottling from a tikanga context are complex and may be highly variable across the values held by different Ngāi Tahu marae, so on that basis it's not necessarily possible to have a specific policy addressing water bottling across all of the mana whenua that are covered by this Iwi Management Plan, and there is a section of the plan which is on page – this one's on page 1072, issue WM8, and there's a policy WM8.9 which is talking about controls on land use to protect water quantity, and also WM8.10, talk about not necessarily the taking and removal of water but just the importance of requiring controls on activities associated with high water demand and also supporting a requirement for water permit applicants to demonstrate the need for the quantity of water for the proposed take.

WILLIAMS J:

Thanks for that. One more question. What area is covered by the Mahaanui plan?

MS ROBILLIARD:

So there is a map in the front end of the plan that I won't bring up now but it is Te Tai o Mahaanui, so the six Papatipu Rūnanga start with Ngāi Tūāhuriri in the north and Te Taumutu Rūnanga in the south. So from memory the Hurunui River to the Hakatere River in the south.

WILLIAMS J:

Thank you.

MS APPLEYARD:

Thank you, now I'm going to do a gallop through how that all lines up with what actually happened in this case and probably picking up on the last point. We know what Tūāhuriri think about commercial water bottling because the first

document I wanted to take you to was Koral Gallagher's email to David Perenara-O'Connell setting out their opposition to water bottling at Belfast and giving reasons. I don't seem to have any ClickShare but we probably don't need to get the document up.

So we do know what that particular rūnanga's view was and this is important when we come later to the email that was sent to Amy Beran. There was an argument over whether that was received or not but that is sent to a general Ngāi Tahu address. It was not sent to Koral Gallagher and it was not sent to Tūāhuriri. So that's a distinction that I wanted the Court to note, that here we have an invitation, we have her contact details, we have the specific position of this particular rūnanga and this was not the person who was contacted about these applications.

And now I want to take you through, starting with the applicant and what the applicant did and I'll just use one example. I'll use the Rapaki example and bring up the application that it made to Environment Canterbury. So first off and, as we know, the form is incorrect, but let's look at this from Tūāhuriri's perspective. If it clicks through the hyperlink in the email it's looking for something that was described on the front page of the email and on the top of this document as a change or cancellation of a condition, and to a recipient of a document like that, who's well seasoned in resource management, that's something that isn't a change in scale, intensity or character. So that's tweaking with the edges. That's not something that signals we've got something major and new here. That's a change in character, intensity or scale.

Second, if we could go through to section 3.1, and just a shout out here to Environment Canterbury, this form here is – the blank form – is an exercise in collaboration and partnership. The form is designed to collect the type of information, particularly about Ngāi Tahu values, that a decision-maker would need to take into account. So the blank form itself was set up to make the process work. Now let's look what happens here. We have the section 3 under the heading "Legal and planning measures" and what's the applicant here asked to do, they're asked to provide an assessment against a number of

documents which are the ones, if you go up Rachel, that we have, some of the ones we've looked at, and in particular an applicant's asked to analyse their proposal against the Canterbury Regional Policy Statement, and that's all the sections I took you to previously, relating to tikanga and the Iwi Management Plan, and we have a "see attached" there, and as we'll come to shortly when we come to the attachment, there is no analysis of the Canterbury Regional Policy Statement or the Iwi Management Plan.

We then go down to the next questions, and here are the important principles. The applicant is being directed to look at whether the activity takes into account matters of national importance, section 6, section 6(e). No box is ticked. The next one, section 7, let's look at whether section 7(a), kaitiakitanga is taken into account. Box isn't ticked. The third one, which is pretty obvious, Treaty of Waitangi, section 8, does your proposed activity take into account the principles of the Treaty. Box isn't ticked. Then if we can go over to the next bit, and this asks you at section 4 to do an assessment of actual potential effects of the proposal on the environment. We see the words there "see attached" at the bottom of that section, and I'll take you to the attachment shortly, and there is no assessment of effects. I'll take you to that part.

Then, most importantly, and this is the shout out to Environment Canterbury, we have a form which is specifically directed to Ngāi Tahu and Ngāi Tahu values and to guide applicants in how they might carry out their tikanga obligations. Applicants are told how important this is. They're guided, in the middle of that section, to a booklet that is titled "Ngāi Tahu in the Resource Consent Process" and how applicants can engage with Ngāi Tahu. Then we have a question: "Have you consulted with the Papatipu Rūnanga and/or Te Rūnanga o Ngāi Tahu." No box is ticked. Then there's a note: "Ngāi Tahu as an iwi, and specifically Papatipu Rūnanga representing mana whenua… where effects on cultural values are minor or more than minor… Environment Canterbury MUST notify…" so there's an encouragement there to consult because you might find yourself being notified if you haven't got the written approval of Papatipu Rūnanga. So applicants are directed to consider

consultation before lodging their application as one of the best ways of identifying adverse effects.

If you go over the next page we get to a tick box, “5.1 Consultation details… have you consulted with the iwi?” That box is actually ticked “No.” If we go down a bit further to the checklist, there is a checklist that directs applicants to assist them with filling out the form, and right at the bottom there’s an encouragement to consider consulting with local rūnanga if the activity occurs within a silent file area, which it did. The tick box isn't checked, and I don’t know what the applicant had in mind when dealing with that section of the form.

Then if we look at the attachment, which is the application for resource consent, in two parts of the form we were directed to this part of the application to find the assessment of the Canterbury Regional Policy Statement and the Iwi Management Plan, and also to find the assessment of effects. If we go down the document we’ll see an assessment against part 2. No mention of section 6(c). No mentioned of section 7(a) and no mention of section 8. We do have an assessment against the land and water regional plan, but nothing against the RPS, and we don’t have the assessment against the Iwi Management Plan. That is where the document stops, and so I can't find the assessment of effects.

So then we look at the application being received by ECan and being sent to Papatipu Rūnanga in accordance with those expectations and obligations that I took you to previously. 301.0032. This is the email we looked at yesterday, and it’s come up sideways.

1230

So first off looking at the title for that document. It’s not to anyone. So assertions have been made that it was sent to Amy Beran. It’s not sent to her. It’s blind copied to her, and it’s not sent to Papatipu Rūnanga. It’s not sent to Tūāhuriri. It’s sent to Amy Beran who is not affiliated with Tūāhuriri. She works for MKT [Mahaanui Kurataiao]. So let’s just assume that Amy Beran receives this as a blind copy of a document sent to who I’m not sure, and it’s

telling her that there is a consent which is to change conditions, and as I said before, that sends a signal to anybody involved in RMA practice that that's something within scope, it's no change in scale, intensity or character. No mention of water bottling, and she's given a week, I think, is it about a week, and if she clicks on the link it takes her through to a document. I think she has to get through about nine pages before there's any mention of water bottling.

Then let's got to the section 42A report where the Council officer gets to give his recommendation. So he's got this application in front of him. If we go to his assessment of Part 2, his assessment of Part 2 a bit like the applicant's. Section 6(e)'s not mentioned. Section 7(a)'s not mentioned. Section 8's not mentioned and he agrees with the applicant's assessment. He does do an assessment against the Land and Water Regional Plan but I don't think there's an assessment against the Canterbury Regional Policy Statement. He then does do an assessment of environmental – sorry, there's no mention of the RPS. There's no mention of the Iwi Management Plan. Then his effects assessment, which is effectively set out here. There is no consideration of the matters set out in the RPS or the Iwi Management Plan.

If you can go down to the summary – sorry, if you go through this section here we look at (f): "No person will be affected by the change of conditions." Doesn't seem to be any consideration of the fact that it's not a change of conditions. No mention of Ngāi Tahu though there is recognition that no consultation has been undertaken, and if you go down to Schedule 4(d): "The change of conditions will not result in any effect on," and that includes cultural values, he agrees with that, but there has been no analysis against the Iwi Management Plan. That might have given a few pointers, and if you go down to the ultimate conclusion, this is how we conclude that overall when we weigh everything in the balance that that is an appropriate use. This is because there's no additional negative effects, including cultural negative effects, but we've got all these positives. So we've got this high-level water use efficiency. I don't know how that's analysed. There's an improvement in environmental impact as polluted water will no longer be discharged, and as I indicated before, certainly from Tūāhuriri's perspective they'd rather have it back polluted and they can

nurse it back to health and disappear from the takiwā altogether. There's the creation of jobs which I find fascinating because is that a comparison with the jobs that were created under the previous take consent, the thousands of people at the meat-works, or is that a comparison with the current situation where we have no jobs because the consent isn't being exercised, and we've got some investment in the Christchurch economy but, as my friend said before, that seems to be around the positive effects that might arise from exporting, bottling and maybe we might get a new inland port, but the evidence for that is certainly not clear on the documents we have in front of us.

So I say that all of that is not a process that is consistent with the types of exercise of tikanga we saw in the documents. It doesn't involve face-to-face discussion. It doesn't involve keeping details up-to-date. It doesn't involve correspondence being sent to the right recipient. It doesn't involve taking into account relevant documents, such as an iwi management plan, to gain an understanding of cultural values. In my view it's inconsistent with concepts of partnership, good faith and genuine consultation. How am I going for time?

WINKELMANN CJ:

Well, you passed it.

MS APPLEYARD:

My last section was just going to be to look at how the High Court dealt with this, it was just to take you to a couple of paragraphs but I'm happy to leave that to you.

WINKELMANN CJ:

Yes. As an intervener you say that you accept that you, that what you have to say has to fall within the claim –

MS APPLEYARD:

Yes, yes.

WINKELMANN CJ:

As formulated by the respondent AWA.

MS APPLEYARD:

Yes.

WINKELMANN CJ:

You say it does fall within the claim?

MS APPLEYARD:

Yes.

WINKELMANN CJ:

And has been argued throughout?

MS APPLEYARD:

Yes. I might just raise one matter. In the High Court we, the High Court in paragraph 260 says that the intervener was granted leave to file the affidavit of Dr Tauranga, which is correct, and then there's quite an analysis of Dr Tau's affidavit and why the Court can't see how there is any adverse cultural effects arising. In fact, and I can only explain it by perhaps the lapse of time between when the hearing occurred, we went into lockdown in between and then the judgment, I was also given leave to file legal submissions, which I did. They are not mentioned anywhere in the decision and so I can only assume that they were overlooked. I was not allowed to speak on the day but I was granted leave to file legal submissions and there is no mention of them anywhere, just this analysis of Dr Tau's affidavit.

So I just wanted the Court to be aware of that when it's looking at the decision and thinking well is this all new what Ms Appleyard's saying to us now, it wasn't. It was what I said in the time in writing. I'm just not sure why there was no reference to that document at all in his Honour's judgment. The only last point I'd make about the –

WILLIAMS J:

Can you just tell me quickly where in the judgment the Tau affidavit was addressed?

MS APPLEYARD:

Yes, so paragraph 260 –

WILLIAMS J:

Thank you.

MS APPLEYARD:

– is the paragraph which, 260. 260, so in the judgment: "I have leave for the Rūnanga to intervene… and put before the Court an affidavit", so what's missing from there is "and legal submissions".

WILLIAMS J:

Yes, it's all right.

MS APPLEYARD:

Then the following paragraphs are all an analysis of that affidavit but there's no reference to the legal submissions at all, so it's just the Court's interpretation of Dr Tau's affidavit.

The other point I would make is this affidavit was filed to support the intervener application so it was not intended to be the substantive argument on why resource consent should be issued or not, it was just to get us into the proceedings. So that's the other lens that you need to look at this through.

I draw your attention to 261 where Dr Tau there is setting out: "Water is a taonga and its loss from the environment…through bottling is not only a significant adverse cultural effect but directly offends our tino rangatiratanga interest in water." His Honour goes on to say I can't see anywhere that there's any adverse cultural effect has been articulated. So, and you've got the affidavit yourself.

The only one last point I make is that in paragraph 291, and this is my very last point, his Honour says – sorry, at 290, if you just go up, is his paragraph where he says: "I can't find anywhere in Dr Tau's affidavit based on the information, sorry, that there has been adverse culture effects. He also says there's no "effected protected customary rights group". That's a MACA Act issue. He seems to have confused that with an RMA cultural effects issue. But in 29, which is something that has caused some offence, is that he refers to the decision reached in *Ngāti Awa* where the Environment Court heard evidence on "tikanga effects of commercial extraction of water from aquifers for bottling and export". He records that: "The environment court there decided that, after hearing contested expert evidence, that the commercial bottling of water was not culturally offensive to the local iwi."

The paragraph's then left there and I'm not sure whether the implication we take from that is that from the evidence on that case his Honour's decided that water bottling's not culturally offensive to all iwi, but my answer to that would be the cases are pretty clear that tikanga must always be assessed with reference to mana whenua. In evidential findings in another context they're not to be taken as the position of, certainly of Tūāhuriri.

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WINKELMANN CJ:

Thank you. Mr Maw?

MR MAW:

Tēnā koutou. There are four topics on which I intend to address the Court, and those topics are framed up in response to the questions that have been put to various counsel through the course of this hearing. But before I do that I wanted to take a moment just to note the position of the Regional Council in the context of this appeal. The council is abiding the decision of the Court but the Council, as regulator, has a keen interest on the interpretation of its planning documents, and where I'm able to assist in exploring and deepening that understanding of

the planning documents, I'm happy to assist the Court in terms of answering questions.

So in terms of the four topics that I may be able to assist on, those topics are, in the first instance, the fundamental question before this Court. Secondly, I want to address some provisions in the RMA that, in my submission, are relevant, they haven't yet been drawn to the Court's attention. Third, I have some submissions to make in relation to the scheme of the land and water regional plan to ensure that that scheme is fully understood and before the Court. Then finally in relation to the record with respect to these applications, I have submissions to make in relation to what was and wasn't considered. All of those submissions I make through the lens of the Council being agnostic as to what the end outcome is with respect to these consents before the Court.

WILLIAMS J:

Why then the last point?

MR MAW:

There is, in my submission, a need to make sure that the record of what has happened has been drawn to the Court's attention. For example, submissions have been advanced in relation to amalgamation. I was minded to simply draw the Court's attention to the parts of the affidavit from the Council witness that addressed that issue.

WILLIAMS J:

So this, too, is procedural rather than contesting factual findings?

MR MAW:

Correct.

WILLIAMS J:

Thank you.

MR MAW:

So starting with the fundamental question that is before the Court, I've being reflecting a little bit on that and it strikes me that there is some debate as to whether the activity at question here is an activity to use water already allocated, which is the case being advanced by the appellant, or whether, indeed, the activity is to take and use water, and that distinction between what is the activity then is informed by the analysis that's been undertaken with respect to both the Act and the provisions of the LWRP, and in my submission framing the fundamental question in that way is certainly helpful in terms of understanding the scheme of the Act and the scheme of the plan.

WINKELMANN CJ:

Can I just ask you to frame it again because I had a technical glitch with my computer.

MR MAW:

Sure. So the question that I have posed is, is the activity to use water already allocated, or is the activity to take and use water.

WILLIAMS J:

Does that boil down to scope? Or do you say there's something else?

MR MAW:

In my submission it doesn't boil down to scope because the Council in this context had a separate use application in front of it, which had the potential to expand the scope of the use of the water that was taken under the take part of the permit. Now, in terms of whether it is, indeed, a scope issue or not, we'll come back to the Court's finding as to whether or not we're dealing here with a take and use unseverable, or whether an additional use can be added to an existing permit.

GLAZEBROOK J:

Does it matter how it's framed if the question is whether the existing allocation is evidential only or taken as read and it's only the additional effects, because

you could frame it either way and say when you're asking to look at an additional use you have to – well, the fact that there's a take already allocated does not mean that you just take that as read and look at additional.

MR MAW:

Yes, it may inform how the question is framed in terms of where the Court lands in response to that question, and it probably goes – it goes to both elements or both ways in which I have certainly posed the question and is perhaps relevant ultimately in this context to the question of relief in terms of whether a different outcome would have been reached. Now I don't intend to advance any submissions on that but nonetheless that's where I see the relevance of how the underlying consents are to be conceptualised in the context of this matter.

WINKELMANN CJ:

I'm not understanding why you say this is a helpful formulation of the fundamental issue. It's just yet in a formulation, but – and it seems a very factual kind of a formulation so why do you say it's a helpful formulation?

MR MAW:

In my submission it's a helpful formulation because it drives back to the scheme of the RMA that sets out the types of things that can be done with water, and in that context I have in mind section 14, to "take, use, dam, or divert", and it's relevant to the scheme of the LWRP in terms of how it deals with those particular activities and either they can be dealt – either they must be dealt with together under the plan or they can be dealt with separately, and in my submission that goes then to how you frame the question. What the actual activity is here is then relevant.

WILLIAMS J:

So maybe the proposition is is the activity to use water already allocated in a different way, or differently, or to take and use water?

MR MAW:

Again I'd…

WILLIAMS J:

Because the different way is the key issue, is it not?

MR MAW:

Correct. The focus is on the different and in this context the new use.

WINKELMANN CJ:

Well, when I look at that fundamental issue within the construct of the Resource Management Act I could reformulate it as is it an application to amend an existing consent or is it a fresh application? Is that – would you accept that reformulation or would you say that doesn't reformulate it appropriately?

MR MAW:

In my submission it doesn't reformulate it appropriately if "take" and "use" are two separate things on which one can apply for and be granted a consent. I will come back to section 127 when I deal with the consents at issue but nonetheless in my submission, given that we're not dealing with a change of use here, it's, certainly in my mind, challenging to frame the fundamental question on that basis.

GLAZEBROOK J:

What do you mean we're not dealing with a change of use? I thought that's the very thing we were dealing with.

MR MAW:

Sorry. We're not dealing with the change of conditions.

GLAZEBROOK J:

Change of conditions. That's true. So I wanted to move on to the scheme of the RMA itself and the starting point in the context of that scheme is, in my submission, section 5 which we haven't had up on the screen yet but we'll – oh, we don't have the click-share working. This could prove challenging.

WINKELMANN CJ:

Is it in anyone's authorities because we're confident to get to that.

MR MAW:

I can give you the document reference perhaps. It's at authority 16 if that works with the numbering.

WINKELMANN CJ:

Whose authorities?

MR MAW:

The intervener's.

GLAZEBROOK J:

Not on mine but…

WINKELMANN CJ:

No, I didn't see it in the intervener's.

MS DE LATOUR:

We can see the appellant's…

MR MAW:

It's in the –

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GLAZEBROOK J:

My computer keeps telling me it doesn't have any data or something, so I'm not having much luck on any of them.

WILLIAMS J:

Oh, really?

WINKELMANN CJ:

When I look at the intervener's 60 –

O'REGAN J:

No, I haven't got it either.

WINKELMANN CJ:

Tab 69 of the intervener's doesn't have section 5 of the Resource Management Act.

O'REGAN J:

It's a very short section.

MR MAW:

That's unhelpful for my – here we go. Thank you to somebody who's opened that. Thank you, Ms King. In terms of section 5, the point I wanted to draw attention to there, and there was a question yesterday in relation to whether the RMA is really an effects-based statute, and Justice Williams put that proposition to my friend for the first respondent, and I thought if I could –

WILLIAMS J:

Did you call your friend the first respondent?

MR MAW:

The first respondent. Oh, I shouldn't go there. So in terms of section 5, as I read section 5 it's about sustainable management which has an enabling thread to it but enabling within limits, so while sustaining, safeguarding and avoiding. That's how I see the purpose of the Act. It's not simply an effects-based management regime. It is sustainable management with an enabling construct to it within limits, and the focus on limits here, in my submission, is relevant to this application where you're dealing with a situation with a groundwater allocation zone within limits, not over-allocated.

WILLIAMS J:

But it was what this did that the Water and Soil Conservation Act didn't do, nor the Town and Country Planning Act, was to explicitly say focus on effects, under

section 104, by reference to the plan, whichever kind of consent it was, et cetera. None of that was in the older legislation.

MR MAW:

No, so insofar as the legislation has evolved with a far greater focus on effects, I accept the Resource Management Act does indeed do that, but it's not an exclusive focus on effects is the underlying point.

The next section that I wanted to take you to is section 30 of the Act and I'll see if we can find that. I'm told it's at bundle of authorities number 8, if that makes sense, Ms King. Now section 30 sets out the functions of the Regional Council and in particular I want to draw the Court's attention to subsection (4) which provides the Council the function of – it's a rather long section of functions, it's fair to say – subsection (4) enters into the fray of, or gives the Council the opportunity to allocate natural resources, including allocating water. Now the purpose of bringing reference to this section is to highlight the allocative nature of the permits that are issued and also to draw the Court's attention to the provision that enables a council to allocate within its plan resources for particular uses but also to highlight at subsection (4)(a) that a rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to that consent, which again goes to the bundle of rights or the authorisation, that is a permit, in this context a water permit.

WILLIAMS J:

What are you saying is the impact of that?

MR MAW:

It speaks to, in my submission, the rights that flow from having been granted a permit, that those rights exist for the term of that permit and those rights can't be interfered with in this context through a rule in a plan, and my friend for the appellant highlighted the other situations where the Council did have some limited powers to change or cancel a condition.

WILLIAMS J:

It says the rule may not allocate. It doesn't say the Council may not. There's no rule allocating anything here.

WINKELMANN CJ:

What do you say it means? Because it seems, could be said to be against your point because it would suggest that you can't allocate a resource that's already been allocated, and this is what's been said against you, that you've allocated a resource that's already been allocated – a use that's already been allocated.

GLAZEBROOK J:

It might just mean you can't allocate it to something else other than what it's already been allocated for.

MR MAW:

Yes.

WILLIAMS J:

But it says a rule can't do that.

GLAZEBROOK J:

Yes, their rule can't override a consent.

WILLIAMS J:

It doesn't say the consent can't do that.

MR MAW:

Correct.

GLAZEBROOK J:

So the argument is the rule can't override the consent?

MR MAW:

Yes, so a rule –

GLAZEBROOK J:

Because the consent is the consent.

MR MAW:

Yes. A rule in a regional council can't promulgate a regional plan with a rule in it that seeks to take water from one consent holder and allocate it to another consent holder during the term of that consent.

WILLIAMS J:

Yes, you're not suggesting 5.128 does that?

MR MAW:

No, I'm not suggesting that.

WILLIAMS J:

No.

MR MAW:

No. So the point of highlighting this is to highlight the allocative nature of the Council's function when it comes, in this context for a water permit, and noting that there is reference to the term of the permit, the existing term of a consent.

The next matter I wanted to touch on in the context of this scheme of the RMA is this question around priority of access to the resource in question. Absent a plan taking an alternative approach, the Act works in a way where allocation occurs on a first in, first served basis. This goes to the question that was put about whether the Council could carry out a comparative merits-based assessment of an application that is lodged against some future perhaps unknown application. That is not the scheme of the Act as it is currently framed and the LWRP does not seek to invite the Council to undertake that type of assessment in the context of a within-limits consideration of an application for a water permit.

The scheme of the plan does go so far as to draw a distinction between community uses and non-consumptive uses to which a limit has not been ascribed but with respect to all other uses a limit has been ascribed, but the plan itself is not to describe and does not require the Council to carry out that comparative merits-based assessment.

WILLIAMS J:
It could have, but doesn't?

MR MAW:
It would be very difficult for a council to do that absent clear direction in terms of policies and objectives in the plan that provide some clue as to what an outcome might be.

WILLIAMS J:
Sure.

MR MAW:
And when you look at the list of matters to which discretion is restricted in 5.128, those factors do not expressly refer to that comparative assessment in terms of the utility of water use, for one use, vis-à-vis another.

WILLIAMS J:
They're largely allocational.

MR MAW:
They are allocational.

WILLIAMS J:
Not entirely, but largely.

MR MAW:
Largely.

GLAZEBROOK J:

They're allocational but not on a comparative basis?

MR MAW:

Not on a comparative basis. The final point just in relation to the scheme of the Act perhaps if we take the lunch –

GLAZEBROOK J:

Did you give us the section number you were referring to them?

MR MAW:

In terms of priority?

GLAZEBROOK J:

Yes.

MR MAW:

There isn't a section in the Act that squarely deals with priority. The concept of first in, first served has developed through case law.

GLAZEBROOK J:

That's what I thought, but I thought you said it was the scheme of the Act, but it's case law you're…

MR MAW:

Case law, yes, and *Fleetwing* [*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257], from recollection, is the leading authority on that proposition.

WINKELMANN CJ:

Which case?

MR MAW:

Fleetwing. I'll perhaps give you the full citation after the lunch adjournment. Ms Appleyard also tells me *Aoraki* in relation to water as well.

The final submission in relation to the scheme of the Act relates to the transfer provisions in the Act. The Act deals with water permits and discharge permits differently to land use permits. Land use permits run with the land automatically, whereas a water use permit does not run with the land.

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An application for transfer, either same-site to same-site for a new owner or site-to-site is required with respect to water permits. In contrast, a land use permits runs with the land and automatically transfers to the new owner of land. Sections 134, 136 and 137 of the RMA set out those different transfer mechanisms.

The point of highlighting the transfer section in the context of water is that section 136 prescribes two options in terms of how an allocation might be transferred. One is a same-site to same-site which is what happened here, and in the context of a same-site to same-site transfer the Council simply operates as a post book. It has no ability to consider or reassess the consent. It simply updates its record upon application.

In contrast, when a water permit is transferred elsewhere within the catchment, that permit can be, or the effects of using a permit or exercising a permit elsewhere, can and are assessed by the Council.

The purpose of highlighting section 136 again is to conceptualise the allocative nature of water permits relevant to the situation here in terms of the distinction being drawn between an allocation and the use of an allocation.

Now we've stepped past –

GLAZEBROOK J:

Does that draw a distinction between the use and the allocation, because if you're transferring on the same site one assumes you just continue using that for the purposes for which it was granted, so because take and use are

together, that doesn't imply that you can change the use separately from the take, does it?

MR MAW:

It doesn't answer –

GLAZEBROOK J:

In fact, if anything, it says the opposite, ie, the scheme of section 136 and 7, you can carry on doing what it was done for and transfer it but you can't transfer it somewhere else without it being reassessed.

MR MAW:

Yes, I accept that and the point perhaps that I'm highlighting here is that when you transfer a water permit to a new site, the use necessarily is different. It may be the same broad category of activity but it's not the same use taking place on the same site.

GLAZEBROOK J:

But that's against the idea that it's a separate – that you don't take into account the take and use together, isn't it? Well…

MR MAW:

It may be. I mean I draw the Court's attention to 136 in the context of how water permits are treated under the Act.

GLAZEBROOK J:

Thank you.

WINKELMANN CJ:

Now we're going to have to break for lunch. I'm just going to ask Ms Limmer, in reply, how long do you think you'll be?

MS LIMMER:

Maybe half an hour, Ma'am.

WINKELMANN CJ:

All right, and it may be too soon for you to say, Mr Bullock, do you anticipate exercising the contemplated right of reply following the Council?

MR BULLOCK:

We had only reserved that because the Council's neutrality was relatively fresh. So far I don't anticipate needing to if Mr Maw continues on the same…

WINKELMANN CJ:

Right, okay, and Mr Maw, how much longer do you think you'll be?

MR MAW:

A little more. Half an hour perhaps, half an hour, 40 minutes.

WINKELMANN CJ:

Half an hour. That's all I'm going to allow you.

O'REGAN J:

We liked your first bit better than your second.

MS APPLEYARD:

Ma'am, I think – just following on from Mr Bullock, I think the memo that has been filed also reserves our –

WINKELMANN CJ:

Oh, yes.

MS APPLEYARD:

In case anything arises. Nothing has arisen so far, so…

WINKELMANN CJ:

Right, okay. Good. Let's hope it doesn't then. We'll take the adjournment.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.28 PM

WINKELMANN CJ:
Our apologies for the delay.

MR MAW:
I was going to move on next to the submissions in relation to the scheme of the Land and Water Regional Plan. I tend to refer to that as the LWRP, so apologies if my use of the acronyms causes trouble but that's what I mean when I talk about the LWRP as much out of habit.

The submission I want to make first is that the Court will need to take some care in terms of distilling an intention out of the use of the word "and" in rule 5.128, that these are the balance of the plan. The submission I make is that when other provisions of the plan are considered, it becomes perhaps apparent that the care of the drafting may not be quite so precise as the Court of Appeal may have considered. Now it may well be that the Court reaches that intention here but there are three or so provisions I wish to highlight in relation to the use of "and" or "or", the first of which occurs in policy 4.23B. I am grateful for Ms King who can drive the system. You will see –

WILLIAMS J:
4.23 big B? Right, thank you.

MR MAW:
Capital B. You will see here a policy in relation to community drinking water supply and the policy is couched in language of "take or use water for community drinking-water supply", so there we have a "take or use". Now when we look at –

WINKELMANN CJ:
"Use" I think.

MR MAW:

"Use", "take or use". When we look at the rule that implements this policy, which is rule 5.115, the rule is using language "take and use", and so there's an inconsistency between the rule and the policy in terms of the policy that this rule is seeking to implement.

WILLIAMS J:

There's lots of authority for the proposition that you don't apply the austerity of tabulated legalism when reading these plans, but then the use of the "and" as having a significance is consistent with the more wholistic approach of the RMA, is it not?

MR MAW:

Yes, the scheme, or if the RMA itself used language of "take and use" conjunctively then perhaps I could accept that submission, but the Act itself does not refer to take and use together throughout the scheme of the –

WILLIAMS J:

No, I'm not talking about the use of take and use. I'm talking about the way in which that Act applies to uses within the environment, uses in the non-technical term there. Stuff being done in the environment. It doesn't like siloing if it can help it.

MR MAW:

I accept that proposition through the lens of the Act striving to achieve integrated management of natural and physical resources.

WILLIAMS J:

Doesn't the "and" get you there better?

MR MAW:

Not necessarily, if the Act works in a way that recognises the use of an existing allocation of water as amounting to a sustainable use of a natural resource, and perhaps to put some context around that submission, here, if the allocation

which is currently recorded in the consents is unable to be repurposed and the Council hasn't exercised any of its rights in terms of seeking to cancel that permit, the resources aren't available for use elsewhere and where a resource is within limits, so I say "within limits" in contrast to where you've got over-allocation occurring, a within-limits use of an allocated resource strikes me as being consistent with the purpose of the act which is enabling and within limits.

WINKELMANN CJ:

So in your conception the plan allows, where there is a consent for a take and use, and it's not being used, the plan allows the reallocation of a use without a fresh application?

MR MAW:

Yes, and that had been the argument that had been put forward by the Council and is reflected in the decision-making record of the Council. In terms of the plan enabling that, a question was put to, I think it was my friend, Mr Bullock, in relation to, well, where does the plan actually contemplate that occurring, and the closest that I can find in terms of a clue to that is policy 4.67, and there we see a policy that reflects, or "enables 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 so when I read that policy I see that as envisaging a repurposing of an existing allocation but priority to that allocation remaining with the consent holder for the term of that consent.

WINKELMANN CJ:

But isn't that dealing with a situation where you've got two consents and the two consents are re-allocating between themselves but they're not exceeding the limit so it's not really anything close to it?

MR MAW:

That's now how I've read that policy.

WINKELMANN CJ:

So you said where council hasn't taken steps to revoke the consent as unused, isn't the power of council to do that, doesn't it really close out any gap in the overall scheme? Because if it is, if there is a concern that it's unused resource someone can point that out and invite the Council to revoke it and then that could be allotted afresh.

MR MAW:

Potentially. My friend for the appellant submitted that there'd been no situations where that has occurred and perhaps if the concern is that if the applicants got wind of a council starting to look at its power of cancellation consents might be exercised at least once in every five-year period. The section 126 I think it is requires a consent not be used for a five year period, and again –

WILLIAMS J:

So what it does is require the Council to actively manage the allocation instead of moving away from allocation in a fully allocated catchment and become only a manager of use. There's some doubt in my mind as to whether that's what the RMA had intended anyway.

MR MAW:

I mean that may be the case. There is an administrative challenge for the Council in terms of understanding or having knowledge of permits that are being exercised or not. Nonetheless, the power does exist in the legislation.

The final provision that I draw to the Court's attention in relation perhaps to inconsistent use of and/or is rule 5.133. This is the rule that deals with the transfer of water permits and then that rule it uses the phrase "take and use" on the second line, and then it uses "take or use" top of the page there. So there's an inconsistency within a provision itself.

I don't intend to advance the consequence of that submission any further but I simply highlight that the drafting of this plan doesn't necessarily reflect the drafting of a, a Chancery drafter in terms of how it has been constructed.

I wanted to touch on next the idea that there might be a queue for water. This topic was developed a little during the course of the hearing and I agree with the submissions made that there cannot be a queue for would be applicants where the resource is fully-allocated, or indeed over-allocated. There is simply not resource available to apply for a vis-à-vis rule 5.128.

However, I take a different view in relation to whether the holder of the water permit could apply to change or seek a new use or possibly even a new take and use, and that if an application was framed with either a non-concurrent use condition or a condition requiring surrender of the underlying permit then that application could be advanced because no fresh allocation would be being sought and thus the allocation would not exceed the limits as set out in the plan. That is the basis on which the Council has previously considered applications and there are a number of consents that have been processed with what I described as non-concurrent use conditions on them, so if you're exercising consent, new consent (b), you can't exercise old consent (a) at the same time, such as the overall limits within a zone aren't exceeded.

An example of a non-concurrent use condition can be found in the case of *Hampton v Hampton* which is a Court of Appeal case. That's not in the bundle of authorities but there is an example where the Court of Appeal was considering a permit that had that type of condition on it.

WILLIAMS J:

What's the statutory basis for that? Is there a particular statutory basis beyond consent?

1440

MR MAW:

No. There's nothing in the RMA. To me it comes back to the framing of the plan and how the limits are articulated in the plan and perhaps particularly how the entry condition into the rule is articulated, and by that I mean the condition that describes how the limits need to be complied with.

The final point I wish to address in relation to the planning scheme is the point highlighted in the written submissions that were filed in relation to the interrelationship between the LWRP and some of the other regional plans. The Waimakariri Regional Plan was one whereby an issue does indeed arise, vis-à-vis the reasoning of the Court of Appeal. My friend this morning took the Court to paragraph I think it was 29 of my written submissions in terms of the two options available to the Council, neither of which from the Council's perspective are satisfactory. The issue being that the Waimakariri plan deals with take but use is dealt with under the LWRP and the difficulty is, is that on the Court of Appeal's reasoning you can't deal with the use under 5.6 but you can't also deal with it under 5.128 because 5.128 requires take and use to be advanced together and considered under that rule.

Now the reason why the Council highlights that issue is not to say which is the right option of interpretation but to flag an issue of practical application with respect to the Court of Appeal's reasoning and any further clarity that can be provided by this court in relation to that interpretation challenge would be greatly and happily received by the Council.

WILLIAMS J:

What do you suggest?

MR MAW:

In terms of the scheme of the Land and Water Regional Plan and its interaction with the Waimakariri plan, I see it more consistent that rule 5.6 is used in that situation because there, there isn't another rule in the LWRP that deals with take and use of water from the Waimakariri River zone with area covered by that plan. That, from an interpretation perspective, depending on how that's couched, may or may not influence the end outcome for how this permit is to be treated where there isn't the interaction of plans, but nonetheless that is an issue causing the Council some challenge at present.

I want to move next to the, another practical challenge that the Council is confronted with in relation to the inability to add a new use to an existing allocation, and the example that's been discussed during the course of this hearing is the example of adding a dairy shed wash down use to an existing water permit. Now, there are some challenges and the Council's been confronted with some challenges in that regard because the underlying permits tend to be permits for irrigation. When you look at the scope of the underlying irrigation permit, the effects of using water for dairy shed wash down have not been considered and are considered to be in a different class of use in terms of the purpose to which water might be being put to, and that's raising the very practical difficulty of being able to add an additional use in circumstances where water is either fully-allocated within a zone or even over-allocated.

Section 127, for the reasons my friend this morning outlined, is read with respect to the scope of the underlying permits, and the Court of Appeal's decision in *Ngāti Awa* have confirmed what I describe as a stripped application of section 127. So here there is a practical challenge that the Council is faced with in terms of how to regularise activities that have over time morphed from pasture-based irrigation to capture other activities such as dairy shed wash down, and then the same –

WILLIAMS J:
But that require a discharge.

MR MAW:
A discharge in addition would likely be required for that.

WILLIAMS J:
Well, then why is that a problem because all of the issues that are relevant in terms of the wider scope of the use could be covered in the discharge application?

MR MAW:

The difficulty is that there is an inability to apply for the take and use because there's no allocation available.

GLAZEBROOK J:

So what you want to do is use the existing take to do both activities –

MR MAW:

Yes.

GLAZEBROOK J:

– and without an ability, as I'm understanding you, without an ability to just apply for the additional use to be added to it? It becomes quite complicated.

MR MAW:

It does.

WILLIAMS J:

I'm not so sure if the – if you're irrigating for dairying or you're – firstly, if you're irrigating for dairying, then there's a really good argument you're in scope. If you're irrigating for crops and you've changed the dairying, maybe there's an issue. But is that usually the scenario?

MR MAW:

A mixture of those scenarios. A number of the permits are what I'll describe as older permits with relatively few, if any, conditions and were applied for in relatively short order with what I'll describe as a non-comprehensive assessment of effects. More recent applications are far more detailed, confirming precisely where the water will be used, through which irrigators, pattern of irrigation on a property, and simply not anticipating use of water for that alternative or supplementary dairy shed wash down use. So there's a range but ultimately it'll come back to the underlying application.

WILLIAMS J:

Well, it just seems to me that these are best seen as scope issues. The wash down is a world away from shifting from wool scouring to selling water.

MR MAW:

I accept there's a spectrum on which these types of uses differ from the underlying permit. The other practical example that the Council's been confronted with is the conversion of an irrigation permit to use for dust suppression within a quarry. So a new quarry's opened up on existing farmland, unable to change or add a supplementary use to that type of a permit, and here quarrying is quite a different activity to irrigated pasture farming, for example, and so –

WILLIAMS J:

Yes. So it does give you pause to think, doesn't it? I can see why that's a difficult issue for you to deal with.

MR MAW:

It is and again those, ultimately in the fullness of time, those issues can be considered when the regional plan is reviewed and the next iteration comes forth, but in the interim these are some of the practical challenges that the Council is facing at present and in terms –

WINKELMANN CJ:

Well, it might be a plan change if it's needed to assist, mightn't it?

MR MAW:

It may be and again the Council's interest in this proceeding is getting clarity and certainty about how the plan ought to be interpreted now and that will inform what steps, if any, the Council needs to take next.

I want to shift to the final topic now and I'll do so briefly, and that relates to what has actually happened in the context of these applications. There was some discussion yesterday about whether the Council in not being able to assess a

take application in the context of the bottling plant was unable to assess the allocative efficiency of the use of that water. The submission I make is that the Council could, and indeed did, assess allocative efficiency when it was considering the Cloud Ocean application.

WINKELMANN CJ:
So we're onto the fourth point now?

MR MAW:
Onto the fourth point, yes. So in my submission allocative efficiency goes to the use and was available for assessment and was indeed assessed.
1450

The relevant reference, and I don't need to take the Court to it, but it's in the Cloud Ocean, both section 42A report and decision report, there's a paragraph on allocative efficiency. So in my submission that was able to be considered by the Council. It raises, in my mind, an interesting question about what the effects –

GLAZEBROOK J:
Well, are you sure you don't need to take us to it?

MR MAW:
I can do. So document 301.0129, and paragraph 33.

WILLIAMS J:
This is (inaudible 14:50:41)

MR MAW:
Yes. You see in the, approximately the middle of the paragraph.

GLAZEBROOK J:
Well it's really just saying because you've already got the take and you're not using anymore then that's fine.

MR MAW:

That –

GLAZEBROOK J:

So why is that considering allocative efficiency?

MR MAW:

Well on the face of the document allocative efficiency has been considered, and my submission is, and whether it's been –

GLAZEBROOK J:

But if that wasn't the right way to consider it, then – I mean, if you couldn't take the take as already allocated and therefore you don't need to consider it, then you haven't considered allocative efficiency, have you?

MR MAW:

The submission I'd make, and that may well be the case in relation to the assessment here, the submission I'd make is that allocative efficiency could be considered in relation to the use of water. I see that as an effect going to the use, not necessarily the take or the underlying take itself.

GLAZEBROOK J:

Well if there is some different pattern of use, you mean?

MR MAW:

Yes, and again, conditions could be imposed on a use permit to control those types of effect. The underlying issue here is what is an effect of the take versus what was an effect or is an effect of the use and where does one draw that line, and that has certainly exercised some thinking time. But conceptually when I think about the use, the concerns that have been expressed in this case all appear to go to the use of water itself. The concerns have been about the effect of the use of taking water out of a catchment, for example, or the effect of the use for water bottling. Those effects all go to the use and my submission is that

under a rule 5.6 assessment as a fully discretionary activity, all of those types of effects could be assessed.

WILLIAMS J:

So the conjunctive between take and use is a red herring?

MR MAW:

It could well be. When I think about the effects of a take in contrast to the effects of a use, I tend to conceptualise the take and its effects being the effects of the well drawdown, so the interference between different bores. I think about the effect of depleting an aquifer beyond limits. Those are the types of effects going to the take itself, so when you've got an existing bore that has established a pattern of take and acceptable well interference effects, everything else in my submission could be picked up when you are considering the use itself, particularly as a fully discretionary activity.

WILLIAMS J:

So are you saying that in fact a 5.6 pathway is more consistent with AWA's case than a 5.128 pathway?

MR MAW:

Yes, in short, because all effects could be considered, whereas 5.128 as a restricted discretionary activity narrows down a range of factors that could be considered.

WILLIAMS J:

And you say could conceivably exclude too many of the AWA factors?
1455

MR MAW:

Quite possibly, and I haven't done a recent analysis of 5.128, but nonetheless that is a restricted discretionary rule versus fully discretionary, so something has been restricted within that rule compared to what could be assessed as a fully discretionary activity.

I want to touch next very briefly on the assessment of cultural effects in the applications. The council acknowledges that that could have done a better job in relation to how cultural effects were considered. All I can say and the evidence given by Dr Burge is that the Council followed the protocol that it had in place at the time in terms of the contact that was made with the Rūnanga. As we often learn looking back at these types of events, protocols do evolve and protocols have indeed involved in this space. The final –

WILLIAMS J:

What about the Ngāi Tahu representative on the Council? The liaison person on the Council, why wasn't he involved?

MR MAW:

Just to make sure I've understood the question, why was he not involved in the processing of the consents? So the role that Mr Perenara-O'Connell fulfils is not within the consent section. The council employs something in the order of 600 staff and so the evidence before the Court in this case is that whilst the letter was indeed received by Mr Perenara-O'Connell, that letter did not make its way through to the consents team. Now, that's simply what the record shows here. In hindsight, it's clear that that message could and should have made its way though to the consent section, but the reality here is that it didn't make its way through. The consents team is processing thousands of consent applications in any given year and simply put, Mr Perenara-O'Connell was not in the consents team, so that letter didn't make its way through.

The final matter that I wish to touch on is the question of amalgamation. I accept that the amalgamation of consents is not undertaken pursuant to a clear statutory power. The amalgamation was done for administrative ease and the reasons for that are set out in Dr Burge's affidavit which is document 201.0037 at paragraph, from paragraph 44.

I don't intend to traverse the detail but I'll make the same point that I made in the Court of Appeal: should the amalgamation be found to be an unlawful

exercise of the power then what's left is the underlying permits which are the take and use and the stand alone use to be operated concurrently with the existing take and use. So in my submission nothing falls on necessarily the amalgamation, but nonetheless the reasons for why the counsel followed that process are set out in Dr Burge's affidavit.

Now that was all I intended to cover. Ms de Latour appears able to respond to any questions that the Court may have in relation to plastic bottles and the consideration of plastic bottles if the Court would be assisted by submissions on that topic. Alternatively, if there are no questions, those are my submissions.

WILLIAMS J:

The land use consents?

1500

MR MAW:

Yes, so the land use consents with respect to the plant I have no direct knowledge of whether the plant itself needed to get land use permits from the city council. My knowledge is gained from just a background understanding and my recollection is that a land use permit was required for breach of traffic and noise rules in the district plan and that triggered the need for a land use consent from the Christchurch City Council. In relation to the Regional Council –

WILLIAMS J:

Which was obtained?

MR MAW:

I understand so.

WILLIAMS J:

Right. So factories are permitted act – are discretionary controlled activities, or something there?

MR MAW:

My – I expect it will be an industrial zone in that location and these types of industrial activities are permitted activities in the zone. The only other land use permit that was required from the Regional Council was a consent to disturb earth because there was some contaminated land that was to be disturbed when one of the bores was deepened, and that was a process that followed a consenting track after these use permits were granted.

WILLIAMS J:

So the bottles wouldn't have been relevant themselves?

MR MAW:

In that context –

WILLIAMS J:

In either of those two contexts.

MR MAW:

Neither of those contexts.

WINKELMANN CJ:

Thank you. Now, Ms Limmer I think? What's the proposed order? Was it going to be any reply – just trying to find it. It was proposed, wasn't it, that if Mr Bullock or Ms Appleyard wanted to say anything they would say it before you.

MS LIMMER:

Yes it was, Ma'am.

WINKELMANN CJ:

Mr Bullock?

MR BULLOCK:

Just one very, very brief remark your Honour which was that AWA, for reasons set out in our submissions, doesn't accept that rule 5.6 covers the field in terms of what's required to be considered under rule 5.128, and that there are matters

where use will bear on take in a way that makes sense to be considered under rule 5.128 together. For example, issues of well interference or –

GLAZEBROOK J:

Sorry, can you just slow down a bit?

MR BULLOCK:

Sorry.

GLAZEBROOK J:

Because I've totally lost you.

MR BULLOCK:

Sorry. The submission was just made that issue – everything under rule 1.2 – 5.128 can be considered under rule 5.6 in the absence of take being put into issue. AWA doesn't accept that for reasons set out in our submissions. One example only would be, for example –

WILLIAMS J:

In the absence of take what?

MR BULLOCK:

So my understanding was that the submission just made was that –

WINKELMANN CJ:

Use applications.

MR BULLOCK:

A use alone application could consider everything that needs to be considered because it's fully discretionary, so we lose nothing by going down a use only route.

GLAZEBROOK J:

Was it supposed that – with greater number of factors that can be taken into account than under rule 1.128, I think was the submission.

MR BULLOCK:

That was the submission, I believe. My submission is simply that AWA doesn't accept that. It says that there are matters under rule 5.128 where take and use naturally intermingle. An example of that may be bore interference or well interference where the nature of the use may directly impact on the way in which the bore interacts with other bores. So for example, a use that involves a continuous 24/7 take may have a different impact on other bores compared to say a peak, a take that has peaks and troughs.

WILLIAMS J:

But that's a take impact, not a use impact.

MR BULLOCK:

But they're connected Sir and that's why we say they're best treated together under rule 5.128.

WILLIAMS J:

Well the advantage to you under 5.128 is that if it's not, if it doesn't get in under there it doesn't get in.

MR BULLOCK:

That too, Sir.

WILLIAMS J:

That's your strategic advantage. On the other hand, under 5.6 all of these issues you struggle to squeeze into 128 walk in the door under 5.6.

MR BULLOCK:

They ought to, Sir, although if one compares the approach of the Council (inaudible 15:04:28) section 42A report and its decision, we see for example consideration of reasonableness of the take for the use. It's not there explicitly.

WILLIAMS J:

No, no but that's a matter of how it was applied.

MR BULLOCK:

Perhaps. AWA's position is it's best to do it the way the plan says but I won't take that any further.

MS APPLEYARD:

I just have one point to make in relation to assessment of cultural effects. It would be apparently from my submissions that my client regards the tikanga obligations on the Regional Council as having continued during these proceedings, and we'd just like to thank the Regional Council for its neutrality and the acknowledgement I've heard today that they could have done a better job in the processing of these application. We had not heard that in the High Court and we had not heard that in the Court of Appeal as they defended the process they'd followed, so I'd just like to acknowledge counsel's comments and they will be heard by my client, thank you.

1505

WILLIAMS J:

Another shout out.

MS APPLEYARD:

Mmm.

MS LIMMER:

Yes, your Honours, I just have a few topics that I've grouped some submissions under. The first one is the largest one, in my submission, and this is the question of whether or not when you have a take and use from the outset whether it is okay to detach them at some point in the process and then add a use that runs alongside that take. My friend for the first respondent took you right back to the very first application for the Kaputone Wool Scour to show that they were interdependent activities at the time that application went through. My first submission in response to that is there is no magic to that. That is entirely what you would expect when you receive a take application. It's not an unusual or peculiar characteristic here. As Justice Williams put it, I probably don't need to take this point too far, you can't just get a take because. You get

a take for a reason. What the plan policies acknowledge, objectives and policies that I spoke to yesterday, is that that reason can change over time, so the reason you needed something on day 1 may not be the same reason you might need it in year 32.

The next point then is that the RMA, so the top of the hierarchy if you like that we are dealing with in this system of resource consents, allows separate components of water permits to be dealt with even in circumstances like this where they were married as a take and use in the first application, and I'd like to go back to section 136 that my friend for the Council had up before you before, but I'd like to draw your attention please to (2): "A holder of a water permit", a take permit, a use permit, a discharge permit, divert permit, they're all water permits under the Act, "granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit." So the permit does not always have to live together under the transfer provisions of the Resource Management Act.

WINKELMANN CJ:
Well, that doesn't necessarily follow, because couldn't you transfer part of your right to take and use water?

MS LIMMER:
Yes you can transfer part of –

WINKELMANN CJ:
Because it would be very strange if you transferred the use right, because as you say, what use would a take right be?

MS LIMMER:
Yes, yes and so –

WINKELMANN CJ:
Or a use right, or a take right without the use right, so.

MS LIMMER:

So you can transfer part of a permit. So if you have a take and use permit you can transfer the take element of the permit or –

WINKELMANN CJ:

But you're not listening to me.

MS LIMMER:

Sorry, Ma'am.

WINKELMANN CJ:

Doesn't this look like, in that context, it could possibly just be contemplating that you transfer half of your right to the volume of water to take and use it rather than the whole of it?

MS LIMMER:

Yes it does, a part of a part.

WINKELMANN CJ:

It would be strange, as you just said, to transfer just the take because what could, you know, what use would the use right be to you if you didn't have a take, and vice versa?

MS LIMMER:

So the person that receives the transferred portion of allocated water on another site, so the subclause (b) scenario, may already have their own use. It may be that they are looking for a more reliable source of water so they could have their own groundwater to take for example, it's at a reliability that is less than what they desired and so they could take some more allocation to help themselves in that respect.

WINKELMANN CJ:

So this is a pathway you could have followed?

1510

MS LIMMER:

This – so if I may take you through what I was trying build up to, if you like, is to deal first – or to use section 136 as an example of how the plan deals with these permits and how it may be disaggregated under that section, and then consider how the plan does it, and before I move to the land and wood plan itself I do have a case, and in fact my friend from the Council just referred to it as well. It's not in the bundle, *Hampton v Canterbury Regional Council* [[2015] NZCA 509]. It's a Court of Appeal case. I have copies here and I wonder if we might hand them up to the Court as –

WINKELMANN CJ:

I thought Mr Maw said it was in the bundle.

MS LIMMER:

I think he said it wasn't in the bundle Ma'am. I have the copies here anyway for my own submissions, so if it will assist I wonder if we could hand those up.

WINKELMANN CJ:

Yes, thanks.

MS LIMMER:

Just while that's being done, perhaps if I discuss the context of the case so you'll understand why I'm referring to it. This case involved a take and use permit obtained by – the Court refers to the people involved by their first names because they share a surname, so there are two brothers, Simon and Robert, and they live –

WILLIAMS J:

Simon and?

MS LIMMER:

Simon and Robert.

WILLIAMS J:
Robert.

MS LIMMER:
They have adjacent farms and they obtained, or Simon obtained a water permit to take water on his property that would be used to irrigate land on both his property and Robert's property. So Robert's property did not have a take on it at that point in time, and as the water in the area, as the Court recalls at paragraph 3, was already over-allocated, so Robert could not simply get a consent to take additional water. Part of the context, also, this is a few years ago when the first application went through. At paragraph 7 they refer to the evidence of the regional planner in the hearing, and they describe his evidence as addressing the "rapidly emerging issue of the over-allocation of groundwater resources in the region by creating groundwater allocation zones." So this is quite a few years ago now, but it is dealing with that issue of over-allocation that really picked up pace when that first natural resources plan was notified in 2004.

Over on the next page at paragraph 13, a couple of sentences from the bottom the Court notes: "The lack of available water for allocation resulted in applicants seeking to utilise the provisions of s 136 of the Resource Management Act 1991 (the Act), pursuant to which holders of water permits may transfer the whole or any part of the holder's interest in a water permit."

Down at paragraph 15 "Mr Deavoll…" the Council planner, "acknowledged that quite independently of the Council and any controls it purported to exercise, a market developed in which water was effectively traded. A person could buy or lease a water allocation which was the subject of an existing permit. Since no new water was involved in such a transaction, not issue of increased over-allocation of the groundwater resource arose. It is clear that in catchments where there is an over-allocation, the scarcity of the resource has made a water permit valuable." And that goes towards the point that was discussed by the Court yesterday, this valuable, value of a water permit. The particular one there back when this was decided was given a value of 350 to $360,000.

WILLIAMS J:

How much for water?

MS LIMMER:

The amount of water that was in dispute was about 350,000 cubic meters.

WILLIAMS J:

Per year?

MS LIMMER:

Yes Sir. That was the residual amount. So initially, at paragraph 23 the Court explains it, initially the applicant Simon got consent to take and use 777,000-odd cubic metres per year of water, and that was the amount required to irrigate both his farm and Robert's farm. Simon then wanted to sell his allocation of water, or sell some water, approximately 400,000-odd cubic metres, and he did that by way of transfer. So he transferred part of the allocated water of the farm. The problem for him arose when in doing that the Council said, well you are going to have to keep the rest to be exclusively used on Robert's land, because that's why we gave you that much water, rather than being able to sell your allocation and then take all of the use and limit it to your land as well. So this is how the dispute arose and what Robert –

WILLIAMS J:

So is that around a dollar a cubic metre?

MS LIMMER:

It probably is then, Sir. This is in 2015. It does talk about the emerging trade. There are, as the Court probably knows, there are companies that broker these deals, if you like. There's water trading.

What happened in 2011 is that Robert put his own application in. The brothers were – or cousins, I think they may have been actually – were unable to reach agreement on how the water would get from Simon's to Robert's, so he put his own application in, even though it was an over-allocated zone, and to get

around the difficulty with getting new water, if you turn to paragraph 40 and the end of that paragraph you'll see the Court's observation there: "The application was presented as representing a 're-allocation'," precisely the words that were just used, "of Robert's portion of the water already 'allocated' under" the original consent that was obtained. "On this basis it was said the proposal was not for a new groundwater take."

WINKELMANN CJ:

Is that because in the early paragraphs they say the Council had treated the water allocation as applying to both Simon and Robert's land?

MS LIMMER:

Yes.

WILLIAMS J:

And it did in fact?

MS LIMMER:

Yes. Yes, and it made sure that through Simon choosing to transfer a portion of that allocation onto a different site that Robert didn't lose the ability to use the remaining allocation on his site because they wouldn't have got that much if Robert's site hadn't been there. The problem is that Robert couldn't get the water from Simon's site to his site because of a disagreement.

WILLIAMS J:

Simon wasn't Robert's keeper?

MS LIMMER:

Yes, quite. Further down in the judgment on that same page at paragraph 45 what the Court sets out, or quotes rather, is the condition that Robert offered in his 2011 consent application to enable the Council to get to the view that this was not a new allocation of groundwater being sought because he couldn't have applied for more groundwater. So his application had to find a way to get in there without getting new groundwater because it would have been

prohibited, just like the situation here in the fully allocated zones if you were trying to go over the limit or the over-allocated zones. So this scenario, this condition set out in paragraph 45, is precisely the kind of condition that I was talking about, and my friend for the Council I think was talking about, when we talk about a non-concurrent use condition. Maybe I'll just give you a minute to read that.

WILLIAMS J:
55?

MS LIMMER:
45, Sir. Sorry, it's on the screen in front of you as well.

WINKELMANN CJ:
All right. Well, we might have to just give Mr Bullock a chance to reply to this. This is a new authority that no one's referred to us and I'm not – have you only just found it?

GLAZEBROOK J:
It was mentioned by the Council though, *Hampton*.

WINKELMANN CJ:
I know but if he'd only just become aware of it, Ms Limmer.

MS LIMMER:
I looked at it this morning in response to the discussions yesterday.

WINKELMANN CJ:
Right, so you weren't aware of it when you made your submissions?

MS LIMMER:
Yes. For the points –

WILLIAMS J:
You weren't aware of its relevance, until it became relevant?

MS LIMMER:

That's more the point. I am aware of the case and it only became apparent to me that it perhaps held useful information after the submissions that were made yesterday, and so I had a look at this morning while the submissions were ongoing as well.

WINKELMANN CJ:

That's fine. That's absolutely fine. Anything else, Ms Limmer?

MS LIMMER:

So that's the example. I'm sorry, my computer shut down. Then yes, the – yesterday's discussion about the nature of a resource management right as compared to a property right and again this morning there was discussion between counsel for the first respondent and the Court on that point and paragraphs 105 and 106 of this decision actually speak to that directly. They speak to the *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC) decision which was also mentioned yesterday and this morning because this decision came after that High Court decision. It accepted part of it and it rejected the part regarding it being like a profit à prendre or the non –

1520

WILLIAMS J:

Being like a profit à prendre?

MS LIMMER:

Yes, yes. So that was the find, that was what the Court had said in *Aoraki.* The Court of Appeal here said we don't go quite that far whilst we agree with many of the characterisations that were put on a consent. So paragraphs 105 and 106 deal with that.

WINKELMANN CJ:

Yes, we'll look at those.

MS LIMMER:

So if I can move on perhaps then to the plan itself. So I say that the Act does evidence this anticipation of consents at some stage in their life perhaps being pulled apart, if you like. The plan in my submission does as well. I took you yesterday through some of the objectives and policies that I say anticipate this evolution of use, and in the submissions I heard from my friend for AWA it seems there is an acceptance that there is a policy thread that allows for, accommodates and even embraces an evolution of use. So the social and economic, the consents can maintain pace with the social and economic conditions.

There is in the bundle the policies 4.70 and 4.71 that relate directly to the transfer of permits, carrying on from the theme of section 136, my friend for the Council took you to rule 5.133. That is the rule that implements these two policies and you will note that the wording in these two policies shares, like the rule, a mix up if you like of take and use and take or use. So in policy 4.7, take and use permits, they seek to achieve outcomes –

WINKELMANN CJ:

Aren't you just repeating your submissions from earlier?

MS LIMMER:

I'm not sure I spoke to that. I was just adding this to the rule 5 –

WINKELMANN CJ:

But you're meant to just be replying to new material.

MS LIMMER:

Yes.

WINKELMANN CJ:

I mean, and this is repeating what we've heard just from the Council too. Do we need to go through it?

GLAZEBROOK J:
She's referring to the policy that was the backup of the rule, that's all.

WINKELMANN CJ:
Oh okay, all right.

MS LIMMER:
Yes. Some –

GLAZEBROOK J:
So just telling us where it was, yes.

MS LIMMER:
My friend took you to rule 5.133 and my submission is it generated from these policies that share the wording.

WINKELMANN CJ:
Okay.

MS LIMMER:
The interchangeability if you like of the phrases take and use or to take or use throughout those two policies so I don't know then if you want me to point out where they are. Policy 4.71 contains both phrases within it, like rule 5.133 does.

Secondly, in rules, sorry rule 11.5.41 also shares if you like that confusion, it may not be the right word but it shares the characteristic it has, the phrase take or use, but then the policy 11.4.25 has the phrase take and use.

WILLIAMS J:
What do you say to Ms Appleyard's argument that coupled or decoupled, you get a leg up but not a free ride?

MS LIMMER:
Yes, so that –

WILLIAMS J:

What do you say to that?

MS LIMMER:

That actually is my next argument.

WILLIAMS J:

Okay. But that seems to me to be the crucial point.

WINKELMANN CJ:

All right, well yes, move onto that one.

MS LIMMER:

My next point, yes. Which my next point was going to be that conditions about that you could impose the conditions on a – which is a related point. Yes. So I've assumed that the respect for the existing take topic, Sir, it has been discussed.

WINKELMANN CJ:

Yes.

MS LIMMER:

The appellant's primary argument on that point is that the existing take is part of the environment, therefore it's not a matter of how much of it's taken into account. It's an application of the principles about the existing environment and it's, it is there, and the effects that you –

WINKELMANN CJ:

We've got that argument.

MS LIMMER:

Yes, you, so –

WINKELMANN CJ:

Ms Appleyard said, put a contrary point. So is there anything you wanted to say about the contrary point?

MS LIMMER:

So the –

WINKELMANN CJ:

Or just stand on your existing argument.

MS LIMMER:

Yes, no, I have here that my submission departs from the leg up argument and is just one of the fact that the underlying consents are there because they will remain there whether this is granted or turned down, they are part of it, and the only additional response to my friend's submission is that in the context of this plan schedule 13 tells you how the allocations are accounted for by the Regional Council for applying this plan, and it doesn't have any allowances for guessing the level of use that might be undertaken, it just says, if there's a commercial and industrial use it can be used all the year round and you times the weekly amount by 52 and that's what you put in your allocation tally. So schedule 13 of the plan doesn't allow people to figure out how much of the use is being used.

WILLIAMS J:

Doesn't allow you to do that and when?

MS LIMMER:

When it is working out the allocation status of a particular zone. So when the Council comes to – because the Council will set its limits and then it will –

WILLIAMS J:

So it has to calculate the size of the bucket by reference to the size of the consent, the consent it takes?

MS LIMMER:

Yes it does.

WILLIAMS J:

It doesn't tell you about the approach it should take to a change use consent.

MS LIMMER:

In terms of what has been allocated that –

WILLIAMS J:

Why?

MS LIMMER:

because –

WILLIAMS J:

Because one is about overall planning for the aquifer, or whatever it is, and the other's about a particular consent.

MS LIMMER:

Yes so that is – going back to the fundamental difference of the submissions I made yesterday in terms of the environment encompassing the entire permission, and my friend's submission that it might help but it – you could vary the extent to which –

WILLIAMS J:

That's right, it's a factor but it's not a basis for ignoring the entire issue she says.

MS LIMMER:

Yes. In my submission it simply –

WILLIAMS J:

It is, it is a basis for ignoring the entire issue, in fact you're required to, and you point to schedule 13 as your – as an indicator that that's the intention of the plan, I'm just testing you.

MS LIMMER:

Schedule 13, but schedule 10 also because there was the information provided to the Bench about the fact the wool scour consent was made originally in the context of not all the water is needed all the time, and my submission is that the plan fully understands that and expects that, and in schedule 10, in fact for an irrigation permit you get enough water to get you through the season for nine years out of 10, so some years you'll have much more than you need, some years you won't have enough. So water –

WILLIAMS J:

Of course, yes, but the question is what happens when the use changes?

MS LIMMER:

So my submission –

WILLIAMS J:

What are you taking into account? Is it still –

MS LIMMER:

My submission remains that you have to assume all of the allocation is being used.

WILLIAMS J:

For myself I think you need a really compelling argument to get there because relevant but not controlling gives more discretion in a difficult scientifically, and in policy terms, allocation equation. Wouldn't you want that if you could get it?

MS LIMMER:

So my, perhaps I can go to my other response to that point though, which more comes down to what you can assess and what you can condition in terms of the volume of the water that you're allowed to use, because I think perhaps that's more closely related to the point you are making. So if this is about the could you put the same conditions on the use under 5.128, if it were a take and use, as you could under the use, under 5.6, but particularly responding to the

reasonable use aspects, and my friend yesterday used the words you could, council could, council can ask if the use is reasonable, but without the take permit cannot calibrate it. My submission in response to that is whether a use is reasonable is directly related to the use, and it can be dealt with on the use alone. It's the use and it's an effect of the use as to whether it's reasonable, and the policy that tells us that a use has to be reasonable sits under the heading "efficient use of water". So I say that is entirely up for grabs to the same extent that it could be looked at, and conditions in place, under 5.128, it could be done to 5.6 –

WILLIAMS J:
Well then aren't you agreeing with Ms Appleyard?

MS LIMMER:
Sir, I think –

WILLIAMS J:
It is a leg up, not a free ride.

MS LIMMER:
In terms of the reasonableness of the use, yes.

WILLIAMS J:
Right, so does it matter whether you've got a "take or use" consent or a "take and use" consent, because what and how you used the take in the past is going to be relevant.
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MS LIMMER:
Yes, Sir, in that respect, yes.

WILLIAMS J:
What are we doing here?

MS LIMMER:

There are elements of the take that are – in terms of taking the full allocation and in terms of – my friend just mentioned four interference effects. They are directly related to the actual take. They are a mechanical physical relation to the take.

WILLIAMS J:

But are you constraining it to that, not to the wider issues?

MS LIMMER:

So the use – so what I am saying – that's right. So a use-only application would be in respect of that reasonableness. You'd be able to – if, for example, you had evidence before you that the existing use, if you like, only used so much water and you were in the over-allocated zone and you were looking at the reasonableness of a new use that's going to use a whole lot more water, there's probably a very good chance that in fact that won't be given to that use because of all the policies and regulations around how you deal with applications in over-allocated zones. That would all be able to come into the assessment of reasonableness of the use, that is under 5.6.

WINKELMANN CJ:

Okay, can we – is your next point your last point?

MS LIMMER:

The next point…

WILLIAMS J:

Well, it's all – it's under 128 as well. 128 uses the phrase "reasonableness".

MS LIMMER:

Yes, exactly.

WILLIAMS J:

So it doesn't matter.

MS LIMMER:

And that was the phrase the Court was taken to yesterday by my friend with the submission that you could look at it but couldn't calibrate it without the take. The –

WILLIAMS J:

So does that mean – this is important, I think – does that mean that you accept that an allocated take is not indefeasible necessarily in a use application?

MS LIMMER:

Yes.

WILLIAMS J:

Can you just give me the indicators of defeasibility, the factors upon which you could reduce, limit or even decline the consent?

MS LIMMER:

If the use was not reasonable, if the use had adverse effects that were not acceptable on the environment, you could turn the application down. You couldn't take away the underlying take and use consent or the one that's already in the environment, but you could decline the new application.

WILLIAMS J:

And "reasonableness" includes cultural factors?

MS LIMMER:

"Reasonableness" is undefined in the regional plan. There's no guidance, if you like, in the LWRP, but a fully –

WILLIAMS J:

You're not as far apart from one another as I had thought you were.

MS LIMMER:

But a fully discretionary application would allow for anything that is an effect of the take to be considered –

WILLIAMS J:

Well, but 128's words –

WINKELMANN CJ:

So the plastic bottles.

WILLIAMS J:

The words in 128 are big enough for it to be –

GLAZEBROOK J:

They say too remote.

WILLIAMS J:

So even in a restricted discretionary application. You've just said that.

MS LIMMER:

Perhaps, Sir. The point that I was making the submission toward was that you don't need the take aspect of the application to go in –

WILLIAMS J:

Yes, well, I suspect –

MS LIMMER:

– and there are some zone – I say that only because there are some zones in which you can't put forward the take application, so –

WILLIAMS J:

Yes. So it won't matter because it will always be a live issue to be considered.

MS LIMMER:

Yes. Yes –

WILLIAMS J:

Is that a shift in your position?

MS LIMMER:

No, Sir, it's not. We've always had the position that cultural effects were relevant.

WILLIAMS J:

No, I'm not – I'm talking about more – cultural effects, of course, but more broadly reasonableness of a use –

MS LIMMER:

Reasonable of use – absolutely.

WILLIAMS J:

– allows you to reconsider the appropriateness of the allocation itself.

MS LIMMER:

For that use.

WILLIAMS J:

For that use, yes.

MS LIMMER:

So you could put a number on that use that that use is able to access and that number could be littler than the number on the existing permit.

WILLIAMS J:

Right, so it's possible for the Regional Council here to say reasonable use for bottling is a third of that?

MS LIMMER:

Yes, it is, and in fact in the *Hampton* case it does that too in a different context. It puts different numbers against different uses.

WILLIAMS J:

Then I'm sorry because I completely misunderstood what your argument was yesterday.

WINKELMANN CJ:

All right. Can we move on to the – because you're fast running out of time.

MS LIMMER:

Yes.

WINKELMANN CJ:

We all are.

MS LIMMER:

Ma'am, I think that actually covers most of – well, everything I need to address.

WINKELMANN CJ:

Thanks very much, Ms Limmer. Mr Bullock, did you want to say anything about, or Ms Appleyard, did you want to say anything about the *Hampton* case?

MR BULLOCK:

I haven't had the chance to read it, your Honour, so I don't think I can say anything sensible. Ms Appleyard may be able to. Otherwise –

WINKELMANN CJ:

I think you mean that in a kind way.

MR BULLOCK:

I meant it very much in that I know she will, but perhaps I could have a page or two pages to send you on Monday once I've had a chance to read it, otherwise there's nothing I can add at the moment.

WINKELMANN CJ:

Yes, okay, we'll allow that.

MS APPLEYARD:

I think probably I'm better to assist with one page then trying to do it on the hoof.

WINKELMANN CJ:

Okay, well perhaps it can be the joint –

MS APPLEYARD:

It's been a while since I've read it.

WINKELMANN CJ:

The joint reply, yes. All right, well thank you counsel for your submissions. We'll take some time to consider them. Yes, before we go, and also, costs. Does anyone want to make submissions on costs?

MR BULLOCK:

I think we had asked to be heard on a public interest basis your Honour but that might be best done after a decision. We signalled that in our submissions.

WINKELMANN CJ:

Yes. We'd rather deal with costs now. So the issue of costs, what's your position of costs Ms Limmer?

MS LIMMER:

Yes Ma'am. The appellant seeks costs.

WINKELMANN CJ:

And opposes public interest?

MS LIMMER:

Yes, yes Ma'am.

WINKELMANN CJ:

Is that addressed in your submissions?

MS LIMMER:

It is in the leave to appeal document, not my submissions.

WINKELMANN CJ:

Well that's helpful to know that, and you just rely on those?

MS LIMMER:

Yes, Ma'am.

WINKELMANN CJ:

Okay, thank you. Mr Bullock, you rely on your written submission?

MR BULLOCK:

I just rely on my written submissions your Honour and also the affidavit of Niki Gladding who's a client represented. Gives some background to who AWA is and why they're here which may assist on the public in that context.

MS APPLEYARD:

I think given I'm an intervener, we're an intervener, I think I'd be skating on thin ice to be seeking costs, but on the same basis I wouldn't be expecting costs to be awarded against us either.

WINKELMANN CJ:

Now, Mr Maw?

MR MAW:

Same position for the Council, your Honour. The council's taken a neutral position, a role of assisting the Court and doesn't seek costs against any party. Likewise, to seek to resist any applications made against it.

WINKELMANN CJ:

All right. Were we to close with a karakia? Ms Robilliard.

Karakia Whakamutunga – Rachel Robilliard

WINKELMANN CJ:

Right, well as I was about to say before, thank you counsel for your submissions. It's a strangely elusive case and –

WILLIAMS J:

Like water.

WINKELMANN CJ:

Yes, it runs through your fingers like water, and we will take some time to consider our decision. We will now retire.

COURT ADJOURNS: 3.38 PM