IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY
I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal against a decision of the Environment Court at Christchurch
BETWEEN	**SIMONS PASS STATION LIMITED** a duly incorporated company having its registered office at Jackson Valentine Limited, Level 3, 258 Stuart Street, Dunedin
	Appellant
AND	**MACKENZIE DISTRICT COUNCIL** a local authority constituted under the Local Government Act 2002 having its principal office at 53 Main Street, Fairlie
	Respondent

NOTICE OF APPEAL UNDER SECTION 299 OF THE RESOURCE MANAGEMENT ACT 1991

Dated 18 April 2019

Next event date

Judicial Officer

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To: The Registrar
High Court
Christchurch

And to: Mackenzie District Council

And to: Environmental Defence Society Incorporated

TAKE NOTICE that the appellant will move the High Court at Christchurch by way of appeal against the decision of the Environment Court, Judge Borthwick, Judge Hassan and Commissioner Dunlop, on the Application by Mackenzie District Council for declarations (Decision [2019] NZEnvC 56), where the Court decided to make two of the three declarations sought by the Council.

UPON THE GROUNDS that the decision was erroneous in law.

Parts of the Decision Appealed

1. The appellant appeals against those parts of the decision that support the Environment Court's determination at [102] that after 13 April 2017 agricultural conversion by direct drilling and by irrigation were discretionary activities at Simons Pass Station pursuant to Rule 15A.3.1 of the operative Mackenzie District Plan; and therefore that the second and third declarations applied for should be made on the terms sought by the Mackenzie District Council, as follows:

    1.1 That agricultural conversion by direct drilling undertaken at Simons Pass Station following 13 April 2017 requires a discretionary activity consent pursuant to Rule 15A.3.1 [of the Mackenzie District Plan]; and

    1.2 That agricultural conversion by irrigation on Simons Pass Station requires discretionary activity consent pursuant to Rule 15A.3.1 [of the Mackenzie District Plan].

2. The Environment Court's decision to make these declarations relied on the Court's finding at [100] that the term "granted" in Rule 15A.2.1 of the Mackenzie District Plan means "grant and commenced" in the section 116 Resource Management Act 1991 sense.

3. In addition, the appellant appeals against those parts of the decision, in [36] – [38], where the Environment Court considers the *vires* of the Mackenzie District Plan rules that seek to control the use of water for irrigation, but declines to make a declaration on the *vires* of the rules.

Errors of Law

4. The Environment Court erred in law by:

   4.1 Deciding that the word "granted" in Rule 15A.2.1 of the operative Mackenzie District Plan means granted and commenced in the section 116 Resource Management Act 1991 sense; and by

   4.2 Declining to make a declaration on the *vires* of the Mackenzie District Plan rules that seek to control the use of water for irrigation.

Questions of Law to be Resolved

5. The appellant alleges that the above errors of law give rise to the following questions of law:

   5.1. Did the Environment Court err in law by deciding that the word "granted" in Rule 15A.2.1 of the operative Mackenzie District Plan means both granted and commenced in the section 116 Resource Management Act 1991 sense?

   5.2. Did the Environment Court err in law by declining to make a decision on the *vires* of the Mackenzie District Plan's rules that seek to control the use of water for irrigation?

Grounds for Appeal

Errors of Law in 4.1 Above

Background

6. The background relevant to the declaration proceedings is set out in [5] – [17] of the Environment Court's decision.

7. The second and third declarations sought by the Mackenzie District Council required the Environment Court to interpret Rule 15A.2.1 of the Mackenzie District Plan. This Rule provides for controlled activity status of pastoral intensification and agricultural conversion,[1] as follows:

> 15A.2.1 Pastoral Intensification and/or Agricultural Conversion (refer Definitions) within the Mackenzie Basin Subzone which is within an area for which a water permit to take and use water for the purpose of irrigation has been granted by Canterbury Regional Council prior to 14 November 2015 and the consent has not lapsed subject to compliance with the following standard....

8. As the Environment Court indicates in its decision, the Mackenzie District Council has not been consistent in its interpretation of the rule.[2] The Council's position in the declaration proceedings was to seek a narrow interpretation of the Rule, and the Environment Court agreed with the Council's narrow interpretation.

9. The issue for this appeal is whether the Environment Court was correct that the term "granted" in Rule 15A.2.1 in fact refers to a water permit that has been granted and also commenced in the section 116 Resource Management Act 1991 sense,[3] or whether it is sufficient that the water permit had been granted and not lapsed.

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[1] The Mackenzie District Plan defines pastoral intensification and agricultural conversion as follows:
Pastoral intensification: means subdivisional fencing and/or topdressing and oversowing.
Agricultural conversion: means direct drilling or cultivation (by ploughing, discing or otherwise) or irrigation.

[2] [15]

[3] Section 116 Resource Management Act 1991 relevantly provides, for the purposes of these proceedings, that every resource consent that has been granted commences when the Environment Court determines all appeals concerning the consent, or all appellants withdraw their appeals.

10. This decision affects the appellant because the Canterbury Regional Council granted water permits for the take and use of water for the purpose of irrigation on Simons Pass Station prior to 14 November 2015. However, these water permits did not commence in the section 116 Resource Management Act sense until after 14 November 2015 (when appeals to the Environment Court in relation to the water permits were resolved by consent).

11. The appellant says that in reaching its decision that the term "granted" means grant and commenced, the Environment Court:

    11.1. Failed to appropriately consider and give effect to the purpose of the rule;

    11.2. Failed to appropriately take into account the context of the Rule and its place within the suite of rules in the Mackenzie District Plan which control farming activities;

    11.3. Placed too much weight on whether the interpretation of "granted" achieved the purpose of Plan Change 13 (**PC13**) to *"provide greater protection of the landscape values"* of the Mackenzie Basin; and the purpose of Part 2 of the Resource Management Act, rather than considering whether the complete suite of rules achieved this purpose;

    11.4. Proceeded on the incorrect basis that the Rule was only intended to apply where water permit holders had existing use rights to carry on pastoral intensification prior to PC13(293V)[4] being notified;

    11.5. Gave insufficient weight to the section 32 Resource Management Act report prepared by Mackenzie District Council and the discussion in the report regarding the intent and purpose of the Rule;

    11.6. Wrongly disregarded relevant case law which has clearly established that "grant" has a different meaning to "commence" in a Resource Management context;

    11.7. Favoured an altered interpretation of the plain meaning of the Rule, via the extended definition of the term "granted", in circumstances where there was no evidence to support this;

[4] PC13(293V) is the Environment Court's abbreviation for the amendments to PC13 of the Mackenzie District Plan, notified by the Council on 15 November 2015 at the direction of the Environment Court pursuant to section 293 Resource Management Act 1991.

11.8. Relied on the incorrect view that the outcome of this interpretation was a "fair" outcome for Simons Pass Station.

The Purpose and Context of the Rule

"Purpose"

12. The purpose of Rule 15A.2.1 is explained in the Mackenzie District Council's post-consultation report on PC13 filed with the Environment Court in May 2016 during the PC13 proceedings. In this document it is stated that:

> After consideration of all these matters the Council has come to the position that pastoral intensification should be subject to assessment through a resource consent process throughout the Basin other than...in areas where Environment Canterbury has granted a water permit to take and use water for the purpose of irrigation prior to the notification of this section 293 package, such consent has not lapsed and the landscape effects of irrigated pasture were addressed through the regional consenting process. In this way the Council is recognising that landowners have spent considerable time and money obtaining consent to irrigate and that in many cases consideration of landscape impacts has been taken into account in granting these consents. It would be unfair then for the District Plan to prevent these consents being implemented on the basis of impacts on the landscape.

13. The specified purpose of the Rule was therefore to provide a specific exception from the requirement to obtain discretionary land use consent for a category of landowners who had *"spent considerable time and money obtaining consent to irrigate"* and where *"consideration of landscape impacts has been taken into account"* in the regional council consent process.

14. This purpose is also stated in the Objective and Policy that the Rule implements. Objective 3B(3)(b) provides for the identification of areas where pastoral intensification and agricultural conversion may be enabled. The Objective states:

> (3) Subject to objective 3B(1) above and to rural objectives 1, 2 and 4:...

(b) to manage pastoral intensification and agricultural conversion throughout the Mackenzie Basin and to identify areas where they may be enabled (such as Farm Base Areas);...

15. The Environment Court's assessment of Objective 3B(3)(b) in the decision subject to this appeal that *"activities that comprise pastoral intensification' and the new 'agricultural conversion', are no longer enabled, but managed (3B(3)(b))"*[5] is therefore incorrect. This assessment overlooks the part of the Objective that provides for the identification of areas where pastoral intensification and agricultural conversion may be enabled.

16. This flows through to the implementing Policy 3B13(3), which can only be a reference to the controlled activity rule and which states:

> Enabling pastoral intensification (subject to any further conditions necessary to avoid, remedy or mitigate adverse effects on the characteristics and/or values in Objective 3B(1)(a) to (f)) in specific areas where water permits for irrigation activities have been approved before 14 November 2015.

17. The fact that only pastoral intensification, not agricultural conversion, is identified in the Policy must be a drafting error caused by the splitting of "pastoral intensification" into "pastoral intensification" and "agricultural conversion" in the Eleventh Decision on PC13.[6] That is clear because agricultural conversion appears in both the relevant Objective and the implementing rule (15A.2.1).

"Context"

18. Rule 15A.2.1 sits within the wider context of many rules in the operative Plan that regulate farming activities and practices in the Rural Zone. Some of these rules pre-dated PC13, while others were introduced with the comprehensive changes implemented through the PC13 process carried out pursuant to section 293 Resource Management Act. These rules provide protections for areas containing significant natural values; prefer development in defined Farm Base Areas; and

[5] [87]
[6] *Federated Farmers v Mackenzie District Council* [2017] NZEnvC 53.

control farming related activities including vegetation clearance, earthworks and tracking, new buildings and the location of irrigators and fencing.

19. Proposed Plan Change 18 (**PC18**) to the Mackenzie District Plan was also notified in December 2017, and inserted new Section 19 – 'Indigenous Biodiversity' into the Plan. This section has a stated focus "... *on managing Indigenous Biodiversity*". This change had been foreshadowed in the PC13 process.

20. Under PC18 revised rules (having immediate legal effect upon notification[7]) controlling indigenous vegetation clearance are included in new Section 19 of the Mackenzie District Plan, and the existing indigenous vegetation clearance rules in Section 7 – Rural are to be deleted.[8] PC18 is not yet operative.

21. The Environment Court has, in the decision subject to this appeal, taken an interpretation of Rule 15A.2.1 that it says accords with the purpose of PC13 to provide greater protection of the landscape values of the Mackenzie Basin.

22. However, the specific purpose of Rule 15A.2.1, in the context of Section 7 of the Mackenzie District Plan, and all of the new objectives, policies and rules introduced by PC13, was to set out an exception from the requirement for discretionary land use consent for existing regional council water permit holders who had applied for water permits prior to the new PC13 rules being notified and, following a lengthy and costly hearing process, had also been granted consent by Canterbury Regional Council.

23. Rule 15A.2.1 itself includes relevant activity standards that respond to the purpose of PC 13, to the extent that is possible while at the same time providing the specified exception.

24. The Council and the Environment Court in its Eleventh PC13 Decision, were satisfied that it was appropriate, in the scheme of the higher order Objectives of the Mackenzie District Plan, and Part 2 of the Resource Management Act, to

[7] *Re Mackenzie District Council* [2017] NZEnvC 202

[8] With the exception of the Rules applying to permitted vegetation clearance in riparian areas, which are retained in Chapter 7.

provide an exception for the requirement of discretionary land use consent for existing regional council water permit holders, subject to the activity standards introduced into Rule 15A.2.1 by the Environment Court in its Eleventh Decision on PC13.

25. It is achieving the purpose of the Rule of providing an exception for regional council water permit holders that should have been the primary focus of the Court's interpretation exercise. However, instead the Court decided on a narrow interpretation which excludes a relevant category of water permit holders from being within the ambit of the Rule.

Does the Rule Only Apply to Water Permit Holders with Existing Use Rights for Pastoral Intensification?

26. The Environment Court's decision subject to this appeal states that the intention of the rule was to protect water permit holders who had already commenced land use intensification activities prior to the date of notification of PC13(293V), in reliance on their water permits – noting also that Simons Pass Station was not in this category.[9]

27. However, neither the rule as notified, nor the operative rule, were intended to apply only to those station holders who had commenced land intensification activities prior to the date of notification of PC13(293V), in reliance on their water permits. That is clear from the use of the words *"the consent has not lapsed"* in both the notified and operative versions of the rule.

28. Furthermore, information prepared by the Council supporting both the notified and post consultation versions of the PC13 rules developed under the section 293 package is clear that the relevant Policy and Rule are intended to apply to unimplemented water permits (provided they had not lapsed). For example, in the Council report accompanying the notified package, the discussion of Policy 3B13 states:

[9] Refer to paragraphs [94], [97] and [98].

> ...the exemption from pastoral intensification control for land which has an irrigation consent (whether implemented or not) and for Farm Base Areas also needs to be recognised in the policy [emphasis added].

29. There is no discussion at all in the section 32 analysis of whether, if existing use rights are held, the rule is effective or efficient. In fact, if existing use rights are held, the consent holder could not be required, as a matter of law, to pursue a controlled activity consent.

30. The Court's conclusion that the notified rule was only intended to apply to water permit holders who had existing use rights is wrong, and underpins its conclusion on the interpretation of the operative rule.

31. The Environment Court concludes in the decision subject to this appeal that the Court's powers in the Eleventh Decision on PC13 were limited in scope, and so the operative controlled activity rule could not apply to a wider class of persons than those captured by the notified permitted activity rule – which appears to be a comment that the operative rule must also apply only to those water permit holders with existing use rights.[10]

32. However, despite this view, the Court went on to define the operative rule as requiring a water permit that had been granted and commenced in a section 116 sense, not that the water permit had been implemented. A consent may commence under section 116, but never be implemented and so not attract existing use rights, so the Court's own interpretation does not give effect to what it stated was the purpose of the Rule.

Grant vs Commence

33. Case law has established that the date of grant of a consent and the date of commencement are separate dates for resource management purposes.

34. The authority of *Sir Henry Kelliher Trust v The Manukau City Council*[11] is a case of particular relevance to this issue. The Court in that case considered the distinction

[10] [99]
[11] A118/2006

between the date of a 'grant of consent' versus the date of commencement. The factual context in which that issue arose had also involved a first instance decision being appealed to the Environment Court.

35. The Court held that a consent is granted when the Council makes a decision to approve the original application at first instance. Even though the consent is subject to the statutory rights of appeal before it can commence, the Court held that there is a clear distinction in the legislation between a 'grant of consent' and the date of 'commencement'.

36. By reading the words *"and commenced in the s 116 RMA sense"* into the definition of granted, the Environment Court has effectively replaced one resource management concept with another in Rule 15A.2.1. If the resource consent must have commenced in order for the Rule to apply, then the word "granted" essentially becomes a nullity in the Rule.

37. The Environment Court says in its declaration decision that there is no indication that the Court, in its Eleventh Decision on PC13, contemplated a rule that included water permits, the decision to grant which had been appealed to the Environment Court. However, had the Court intended, by its Eleventh Decision on PC13, to exclude this category of water permits, it could have done so simply by exchanging the word granted for commenced, but although this issue was raised for the Court's attention by submitters, no such amendment was made. The Court was evidently satisfied that the term "granted" rather than "commenced" achieved the appropriate outcome.

<u>The Outcome for Simons Pass Station Limited</u>

38. The Environment Court considers that there is no unfairness in interpreting "grant" in the way determined, "fairness" having been a significant reason for the inclusion of the Rule in the Plan. The Court considers that Simons Pass is, as a result of the decision, in the same position as many other persons who applied for water permits after the notification of PC13(293V).[12]

[12] [101]

39. The Environment Court is incorrect in this conclusion as that is precisely the unfairness that the Rule was intending to avoid. Simons Pass did not apply for its water permits after the notification of PC13(293V). Unlike new applicants for consent, at the date of notification Simons Pass had been through a lengthy, costly and comprehensive consenting process. That process had already resulted in the grant of a water permit. It was permit holders in this position that the Rule was intended to protect, in contrast to those who applied for a regional council consent after notification of PC13(293V).

Errors of Law in 4.2 Above

40. The appellant raised the issue, by way of legal submission to the Environment Court, of whether the rules in the Mackenzie District Plan regulating the use of water for irrigation of pasture are within the Mackenzie District Council's statutory functions.

41. The activity of irrigation is currently a regulated activity under the operative Plan, being one of the activities included in the definition of "agricultural conversion". All of the rules in the Plan regulating the activity of agricultural conversion thereby apply to the activity of irrigation.

42. The Environment Court has an inherent power to make a declaration despite there being no formal application, and it would accordingly have been open to the Court to make a declaration that the Council's rules regulating the use of water for irrigation are *ultra vires* the Mackenzie District Council's functions under section 31 Resource Management Act 1991.

43. The Environment Court declined to make this declaration for the reasons explained in [38]. The Environment Court considered that the argument had *"little attraction insofar as its focus is on a single element, namely the irrigation component of 'agricultural conversion'"*. The Court was also concerned that the relevant rules affect the interests of persons who were not parties to the proceedings; and that if other district councils had similar rules controlling irrigation, the matter could be one of regional or potentially national importance.

44. None of these matters were relevant considerations regarding the issue of the *vires* of the rules. Either the Mackenzie District Council's statutory functions extend to regulating the use of water for irrigation of pasture or they do not. If this is not a district council function, then Rule 15A.3.1 is *ultra vires* to the extent it seeks to control the activity of irrigation.

45. The third declaration sought by the Mackenzie District Council (that agricultural conversion by irrigation on Simons Pass Station requires discretionary activity consent pursuant to Rule 15A.3.1), accordingly required the Court to consider the *vires* of the rule in question and it should have done so before making a decision on the third declaration.

46. The appellant says that the use of water to irrigate pasture is not a use of land that comes within the Mackenzie District Council's section 31(1)(a) rule making functions and so the rules controlling irrigation, via its inclusion in the definition of agricultural conversion, are *ultra vires* to that extent.

The Appellant seeks the following relief:

47. That the decision by the Environment Court to make the second and third declarations sought by the Mackenzie District Council is quashed.

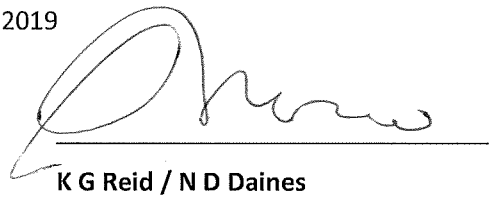
48. That the High Court makes an alternative declaration that pastoral intensification and agricultural conversion carried out on Simons Pass Station after 13 April 2017 are controlled activities under Rule 15A.2.1 of the operative Mackenzie District Plan when they are carried out within the areas for which water permits CRC082311 and CRC082304 (now CRC17620 and CRC176714) were granted by Canterbury Regional Council authorising the take and use of water for the purpose of irrigation, those consents having been granted prior to 14 November 2015 and not having lapsed.

49. That the High Court finds that the rules in the Mackenzie District Plan that seek to control the activity of irrigation are *ultra vires* the Mackenzie District Council's section 31(1)(a) rule making functions; and must be struck from the Mackenzie

District Plan by removal of the words "or irrigation" from the definition of "agricultural conversion".

50. The costs of this appeal.

Dated this 18th day of April 2019



K G Reid / N D Daines

Counsel for Simons Pass Station Limited

This Notice of Appeal is filed by **DAVID WILDING**, Solicitor for the Appellant of the firm Wilding Law.

The address for service of the appellant is at the offices of Wilding Law, 356 Memorial Avenue, Christchurch 8053.

Documents for service on the appellant may be:

(a) Left at the address for service
(b) Posted to the solicitor at PO Box 29473, Christchurch
(c) Transmitted to the Solicitor by fax to (03) 358 9985
(d) Emailed to the solicitor at david.wilding@wildinglaw.co.nz.