

In the matter of the Resource Management Act 1991

And

In the matter of a joint application CRCO21091 by the Ashburton Community Water Trust and Central Plains Water Trust to take water from the Rakaia River

And applications to Environment Canterbury by the Ashburton Community Water Trust to use water from the Rakaia River and all associated consents required for the construction and operation of a hydro-electric power scheme

And an application to the Ashburton District Council for the works associated with, and the operation of a utility, namely construction of intake, settling pond, first canal with hydro generation facilities installed within the canal, second canal, storage pond, and hydro-generation power station and returning of the water to the Rakaia River

SUBMISSIONS ON BEHALF OF SYNLAIT LIMITED

17 September 2008

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Introduction

1. Synlait is a substantial independent dairy farming and dairy processing group. Synlait operates dairy farms and a milk processing plant in the area to the north and south of the Rakaia River, both within and downstream of the Central Plains Water area and in the Ashburton area.
2. Synlait owns its own farms, co-ventures or manages others, and has supply and other agreements with additional farms. Synlait irrigates extensively on its own and managed farms, principally from groundwater and in some cases, races.
3. Synlait lodged written submissions in opposition to the applications made by Ashburton Community Water Trust (ACWT). These written submissions still stand, however, Synlait does not wish to expand upon those any further today, other than to record that the issues with respect to the scope of these applications is a fundamental issue to be addressed by the Commissioners. Instead, Synlait intends to respond to the matters raised by Counsel for ACWT with respect to Synlait in her Second Summary of Submissions on behalf of ACWT.

Relevant Synlait Consents

4. The Canterbury Regional Council granted Synlait consent under CRC062685 to take 6 m³/s of water from the Rakaia River consisting of water unallocated to existing consent users in Bands 2 and 3. The grant of this consent is under appeal, however, it is likely that appeal will not be heard until priority matters have been resolved.
5. Synlait also has an application pending to take 6 m³/s of Band 5 water from the Rakaia River under Application CRC054384. This application is yet to be heard by the regional council.

6. The above consent and application have been the subject of the declaration proceedings with respect to priority discussed in more detail below.

Agreement between Synlait, Dairy Holdings and Barrhill Chertsey Irrigation

7. The Submissions of Counsel for ACWT refer to clause 8 of a Heads of Agreement between Dairy Holdings, Barrhill Chertsey Irrigation (BCI) and Synlait (the agreement). Counsel also commented that given the position of Synlait, Synlait would have some difficulties if it was to oppose the ACWT applications this week.
8. Synlait does not see the relevance of any commercial agreement between the parties that does not directly concern ACWT. Also, there are a number of consents referred to in the agreement but the joint take application by Central Plains Water Trust (CPW) and ACWT is not one of them. Synlait sees no impediment to Synlait making submissions on the joint application or any other consents sought in conjunction with that joint take application.
9. Under the agreement there are reciprocal obligations on all parties to ensure nothing is done to adversely affect any consent held by, or application for consent made by, Dairy Holdings or Synlait to take or use any water from the Rakaia.
10. The agreement does not prevent Synlait from opposing ACWT's applications for the following reasons:
 - 10.1 The BCI take CRC990088 is already granted for the full 17 cumecs that ACWT relies on and Synlait is not doing anything to affect BCI's consent.
 - 10.2 The ability of ACWT to use the water under the BCI consent is not affected;
 - 10.3 The EAL application is not affected; and
 - 10.4 At the time of entering into the agreement, Synlait's submissions in opposition to both the joint CPW/ACWT application and ACWT's applications were already filed. The agreement does not seek to fetter those submissions in any way.

Declaration Proceedings

11. Counsel for ACWT maintains that the Environment Court declared that Synlait could not access the water in Bands 2 and 3. She further maintains this aspect was not reversed on appeal, nor has leave been granted for this issue to proceed to the Court of Appeal.
12. Synlait does not agree with ACWT's interpretation of the Declaration made by the Environment Court and submit that the hurdle needed to get over priority and banding issues is higher than ACWT suggests.
13. The declaration proceedings filed by CPW only sought declarations that the joint CPW/ACWT application, CRC021091 to take water from the Rakaia River has priority over the two Synlait consent and Synlait application (CRC052033 and CRC06285).
14. No declaration was sought asking the Environment Court to determine whether the application for unallocated Band 2 and 3 water could be made or whether such water was available. The sole issue was priority.
15. The Environment Court¹ concluded at that the Band 2 and 3 application was no more than a further application for allocation from the Rakaia River.
16. The Court then went on to make declarations in favour of the joint application by CPW/ACWT (CRC021091) over both the Synlait consent and the Synlait application (CRC054384 and CRC062685).
17. The Court then went on to say that there may be some advantage to parties in obtaining a declaration in relation to the Band 2 and 3 consent declaring it as an application for water from the Rakaia River rather than a particular band. The Court then issued timetabling directions for the filing of any further declarations.
18. Despite the invitation by the Court to file for determination on whether the Band 2 and 3 application is simply an application for allocation

¹ *Central Plains Water Trust v Synlait Investments Limited* Decision C45/2007, Environment Court, 27 April 2007 at para [94].

from the Rakaia River, no parties responded to that invitation and no declaration has been made.

19. The submissions and evidence prepared by all the parties focused purely on priority issues. Synlait submits the conclusion reached on the Band 2 and 3 application does not form part of the ratio of the decision or part of the declarations made by the Court.

Priority

20. The decision of the High Court² sets aside the declarations made by the Environment Court giving Synlait priority over the joint CPW/ACWT application.
21. Both CPW and ACWT have appealed the decision of the High Court to the Court of Appeal, however, this appeal is unlikely to be heard before March next year.
22. Therefore, the current position is that Synlait has priority over ACWT. No stay of those proceedings has ever been applied for or granted by the Court. It is submitted that the Commissioners, when considering these applications, must take into account the priority currently held by Synlait. The present applications are therefore to be considered in the context of the existing Synlait consents and the pending and prior application.

Dated 17 September 2008

Pauline (Polly) Leeming
Solicitor for Synlait Limited

² *Synlait Limited v Central Plains Water Trust* High Court, Christchurch CIV-2007-409- 1157, 11 March 2008