

**BEFORE THE CANTERBURY REGIONAL COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of applications for water permits to take and use water from the Hakataramea River and its tributaries

**BY** ROBERT HAY ROBERTSON  
RPNZ PROPERTIES LIMITED  
RG AND ZL PRINGLE  
RW AND ME SUTTON  
STAR HOLDINGS LIMITED  
NJ SMALL  
HAKATARAMEA STATION (1990) LIMITED  
Applicants

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**JOINT REPLY TO MINUTE OF COMMISSIONER SKELTON DATED 22 MARCH 2010**

**Dated 16 April 2010**

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## MAY IT PLEASE THE PANEL

- 1 The Panel is in receipt of the Environmental Flow Regimes (EFRs) for the tributaries of the Hakataramea River provided by Canterbury Regional Council's Chief Executive in response to a request made in a Minute to Parties dated 18 May 2009. Because the Applicants were not aware of the content of those EFRs at the resumed hearing on 3 March 2010, the Panel has sought a response to the following matters:
  - (a) The contention made in paragraph 5 of the Minute that the EFRs contained in Appendix 1 now form part of the Rules of the Plan for the purpose of row xxii such that they must be applied unless there are good reasons for not doing so and that those reasons can be justified in terms of section 104D and Part 2 of the Act;
  - (b) The relevance of the footnote to Appendix 1 which contains reference to recommendations as to the appropriate EFRs where they have not been calculated; and
  - (c) Finally, in paragraph 6, in the case of the water harvesting proposals that seek consents on the basis of conditions that constrain abstractions when the flow in the river is above 4.5 cumecs, whether there should be a flow sharing regime to protect the tributaries whether or not the 4.5 cumecs constraint is to apply instead of the Appendix 1 EFR.
- 2 The Panel has indicated a willingness to resume the hearing upon application by the Applicants. The Applicants do not intend to request a resumption of the hearing. Although, if the Panel wishes to question Counsel or Mr Stewart on the content of this response, we can arrange a date to be available for that purpose.
- 3 It is submitted that other than the evidence contained in the attached further statement from Mr David Stewart, there is no further evidence that can usefully be brought to bear on the matters raised in the Panel's minute or the legal argument presented in this Memorandum.
- 4 For the Applicants, and to recap on the case thus far presented, the following response is given.
- 5 In its latest Minute, the Panel has referred to the evidence of Mr David Stewart dated 25 September 2008 for the reconvened hearing in October the same year. This evidence related to minimum flows that had at the time been recommended in the section 42A report for the abstraction proposed in the Hakataramea. Those are the recommendations referred to in the footnote to the Appendix 1 EFRs.

- 6 The Panel will recall that the Applicants disagreed with the flows recommended in the section 42A reports, given their questionable validity. Mr Stewart's evidence was that these EFRs would not be sufficiently reliable.
- 7 Mr Stewart explained in his evidence that the ECan hydrologists who derived the flows had also recommended against them being used because the information was unreliable.
- 8 In particular, for Station Stream, paragraph 19 of Mr Stewart's evidence of 26 September 2008 refers to (and supports) the recommendations in the report of Ms Gabites and Mr Martin that the Main Highway Bridge site should be used, until there was further information so as to enable an informed decision on the minimum flow for this tributary. That evidence was not presented to the Panel at the hearings in 2008, although it was presented to the Panel at the resumed hearing in March this year.
- 9 The supplementary statement of Mr Stewart is further to, and elaborates upon the evidence presented in March this year.

#### **Legal status of EFRs**

- 10 As to the legal issues, in our submission, there is certainly an issue with the vires of a plan provision that contemplates a rule being set by resolution of the relevant authority administering the Plan, outside of the statutory prescribed public consultative procedure, as has occurred with the adoption of the Appendix 1 EFRs. These are now *said* to be part of the Plan pursuant to Rule 2, Table 3, Row xxii.
- 11 Appendix 1 EFRs are contained in a document that is external to the Plan. However they are not within the category of materials able to be, or indeed that purports to have been, incorporated by reference into the Plan. They were promulgated by the Chief Executive Officer of the Canterbury Regional Council acting under delegated authority without any formal submission process.
- 12 Accordingly, the Appendix 1 EFRs can be challenged on account of their validity because of the fact that:
- (a) The EFRs purport to have the status of a rule (and thus the force of a regulation) in respect to matters upon which there has been no public consultation;
  - (b) The EFRs are contained within the Appendix 1 document, being a document that is not readily accessible by those who are bound by it,
  - (c) The EFRs have not been the subject of public notice as to their existence and/or availability; and

(d) Row xxii purports to delegate to a third party powers to alter a plan thereby avoiding the notification provisions of the RMA.

13 That said, it is questionable whether the rules are an instance of 'flagrant invalidity' as contemplated by *Burr v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) and further elaborated upon by Justice Elias in *Murray v Whakatane District Council* [1999] 3 NZLR 276 at page 320:

It is settled law that every unlawful administrative act, except perhaps in extreme cases of clear usurpation of power, is operative until set aside by a Court.

14 Unless the Panel is willing to sever the relevant rules, the EFRs have to be *treated* as valid rules.

#### **Severance on grounds of invalidity**

15 There is authority for the application of the doctrine of severance of invalid provisions of a plan, in the cases of *A R and M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362 (HC); and *Titterton v Dunedin City Council* [1994] NZRMA 395. In *Titterton* there were found to be deficiencies in respect of the definition of 'independent economic farm unit' in the relevant plan. In that case, the Tribunal held that what is or is not an independent economic farm unit clearly depends on several factors which involve value judgments.

16 The rule that incorporated this definition was found to be invalid because it was too uncertain. The Tribunal made a ruling that the rule upon which this definition was based was invalid so the tests for land use and subdivision based on that definition are no longer effective. A further instance of invalidity on account of uncertainty leading to severance of a rule occurred in *Boanas v Oliver, C72/94*.

17 There are also authorities involving rules where issues of invalidity arose in circumstances that are more closely analogous to the situation we are here dealing with. The first is *Telecom New Zealand Limited v Christchurch City Council* C093/02. That case involved a reference pertaining to rules which incorporated a reference to a New Zealand standard on radio frequency. The words proposed to be included were "*Standard 6609; 1990 (or any replacement New Zealand Standard)*".

18 The Court concluded that the Plan could not include a provision with a Standard and then state in brackets "or any replacement New Zealand Standard". It held that that would be to delegate to a third party powers to alter a plan thereby avoiding the notification provisions of the RMA. It held that the words in brackets "or any replacement New Zealand Standard" were ultra vires. The Court declined to amend the plan in the manner sought by Telecom, given the context in that case did not involve questions of severing words from an operative plan.

- 19 The second case is *Remarkables Park Limited and others v Queenstown Lakes District Council*, C161/2003. That case contained a record of a procedural decision on financial contributions in the Queenstown Lakes District Council's proposed plan. It pertained to rules relating to financial contributions where in the substantive decision the issue had been whether (amongst other things) QLDC could impose financial contributions for purposes other than mitigating adverse effects of the subdivision.
- 20 A preliminary jurisdictional issue had arisen. The issue there had to do with the fact that the document that contained the calculations of the financial contribution was not contained within the district plan, rather the calculations were to be carried out in accordance with a policy document referred to in the rules (described by the Court as the calculation documents) which could be changed by a council from time to time whenever it revised its estimates of its future capital expenditure, following a consultative process albeit under the Local Government Act 2002. The Court emphasised the need for certainty in the case of the rules. It expressed concern that the rules were not certain if they existed in a document outside of the plan that could be changed at any time. At paragraph 23 it held:
- Since a person can, in effect,[[fn24, section 338 of the RMA in combination with sections 9, 11, 12, 13, 14 and 15 of the Act.] be prosecuted for not complying with the rule, it is important that a rule should not be able to be set or changed without the notification and participatory processes of the RMA being followed.
- 21 The Court held that such rule was invalid citing with approval the *Telecom New Zealand* case.<sup>1</sup>
- 22 These cases are particularly instructive of the issues here because the EFRs could be altered by resolution of the CEO of the Council at any time.
- 23 As to the Panel's powers of severance, it is clear from the *Titterton* and *McLeod Holdings* cases at least, that a distinction is drawn between provisions that are "trivial or at least unimportant", and those which are "fundamental". The test to emerge from these authorities is that a provision may be severed where the severance does not affect the meaning of the rest of the rule, or where severance would not produce a substantially different provision.
- 24 In this case, it is submitted that the Panel would be entitled to come to the conclusion that the EFRs contained in Appendix 1 document should not form part of the plan on account of invalidity.
- 25 Moreover, for the same reasons, it would be open to the Panel to conclude that the words of the rule contained in Table 3, Row xxii should also be severed, in the result that the appropriate EFR to apply is to be determined by the Panel on the evidence.
- 26 All other rows in Table 3 would remain intact, unaffected by that severance.

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<sup>1</sup> Supra

- 27 That of course would lead to the consequence that, there being no specified EFR, an application could not be said to be non-complying on the basis that the proposal contemplates a departure from the specified rule. That could only be rectified if the Council promotes a change to its plan to insert the EFRs, following the public participatory process.
- 28 The Applicants have proceeded on the basis that the applications do trigger non-complying activity consent. However they wish to have their concerns with the rules placed on the record. It is anticipated that the Panel may not be inclined to make a finding as to the invalidity of these rules. If that is so, further on we make further submissions as to how the Panel should nevertheless consider the applications in light of the concerns raised with the relevant rules.
- 29 At this juncture, it is relevant to note that the recommended EFRs contained in the section 42A report of Ms Claire Penman that are *not* included in Appendix 1 do not give rise to the same issues. Ms Penman's recommendations in respect to the EFRs that ought to be applied are merely the views of an expert witness. As such, Ms Penman's evidence is to be considered alongside other competing evidence presented to the Panel, including that of Mr Stewart who challenges the appropriateness of adopting these recommended EFRs.
- 30 In light of the conflicting evidence pertaining to the EFRs that ought to apply, in this instance, the Panel will have to make a decision as to which evidence is to be preferred, in the usual way.
- 31 The Panel will of course be familiar with the gateway tests in section 104D. The gateway tests are *not* expressed in terms that require an applicant to establish good reasons for departing from the Plan provisions, as suggested in the Minute.
- 32 If one of the threshold tests is met, the Panel has a discretion as to whether consent should be granted or not. In the exercise of the discretion, it will be appropriate to consider the weight to be given to the relevant rules, pursuant to section 104(1)(b)(v). In this context, the Panel will have cause to consider the reasons/grounds being promoted by the Applicants for departing from the Plan.
- 33 The Applicants have already presented their case as to the application of the threshold tests. Without repeating the same, it is sufficient to say at this point, that their case is that each of the gateway tests is able to be met. That being accepted by the Panel, it is submitted for the Applicants that the Appendix 1 EFRs together with the recommended EFRs that are *not* included in Appendix 1, should all be treated with some considerable circumspection in the exercise of the Panel's overall discretion.
- 34 In respect to the Appendix 1 EFRs, it is submitted that the unusual circumstances in which these EFRs came to be included in the Plan is relevant to the weight ultimately to be afforded to these rules in the Panel's consideration of the non-complying activity

applications. The EFRs for the Lower Waitaki (at least) have not been exposed to any level of scrutiny as would have occurred had they been open for submission when the plan was first formulated. Nor have they been subjected to any informal scrutiny as occurred with the Upper Waitaki EFRs.

- 35 Moreover, the circumstances pertaining to the EFRs for the Hakataramea catchment are unusual and able to be distinguished from the circumstances pertaining to other EFRs in Table 3, and perhaps, for the Upper Waitaki as well, because of the 'non-participatory' process by which they came to be included in the Plan.
- 36 In this regard I draw particular attention to the further statement of evidence of Mr Stewart as to his involvement in the process that lead to the adoption of the EFRs for the Upper Waitaki catchment. In particular, I submit that it is highly relevant that in respect of the EFRs pertaining to the Upper Waitaki streams that come under Row xxii, they can be said to represent the consensus view of relevant affected parties and are perhaps deserving of greater weight. The same cannot be said of the EFRs for the Hakataramea tributaries that are included in the Appendix 1 document. In my submission, Mr Stewart's evidence provides good reasons not to apply these EFRs.
- 37 In this case, it is submitted that the evidence of Mr Stewart supports the contention that the relevant rules are *not* the best means for implementing relevant policies and objectives of the Plan. The evidence already before you supports that submission. Mr Stewart's supplementary statement adds further weight to that contention. Accordingly, if the Panel is able to conclude that there *is* a discretion to grant consent, it is submitted that consent to depart from the rules could be granted without jeopardising the coherence of the Plan.

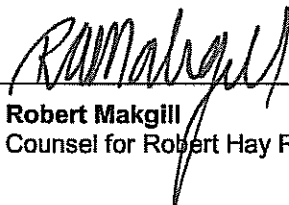
### **Water Sharing**

- 38 The final point to make is to emphasise the Applicants' case that non-complying activity consent is sought in respect to all aspects of the relevant EFRs in Row xxii of Table 3, including the water sharing regime. This is *not* because the Applicants are not proposing to water share; rather, as Mr Stewart explains in his further statement, it is because of the practical and virtually insurmountable difficulties in monitoring the actual flow in the streams from which the flows are to be taken.

Dated this 16<sup>th</sup> day of April 2010.



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