IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000121
[2018] NZHC 3240

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review
BETWEEN	AOTEAROA WATER ACTION INCORPORATED Applicant
AND	CANTERBURY REGIONAL COUNCIL First Respondent
	CLOUD OCEAN WATER LIMITED Second Respondent
	RAPAKI NATURAL RESOURCES LIMITED Third Respondent

Hearing:	2&3 October 2018
Counsel:	P Steven QC for Applicant L F de Latour and P Maw for First Respondent W McCartney for Second Respondent M J Wallace and J R King for Third Respondent
Judgment:	10 December 2018

JUDGMENT OF CHURCHMAN J

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[1] The Canterbury plains were formed over millennia by large braided rivers transporting gravel from the Southern Alps to the coast. The largest of such river systems are the Rangitata and Rakaia rivers to the south of Christchurch and the Waimakariri River to the north.

[2] As recently as a generation ago the supply of water through these river systems, and via the many aquifers that flow under the surface of the land seemed inexhaustible. However, the demand for water has increased dramatically and now, at times, exceeds supply. This has led to much litigation about the management of the water resource on the Canterbury Plains, and the balancing of the rights of those who wish to use that resource.

[3] Some of the competing water uses are not mutually exclusive. The use of water for hydro-electric generation does not preclude the subsequent use of the same water for irrigation or industrial purposes. Some uses are partially consumptive, such as the use of water for cleaning or cooling purposes in a meat processing plant where much of the water is returned to the river system, albeit in a changed state. Other uses, such as bottling the water for human consumption, are wholly consumptive in the sense that none of the water at all remains at the conclusion of the process to which it is subjected.

[4] The substantive proceedings in this case relate to a challenge by way of judicial review of decisions made by the first respondent to grant consents to the second and

third respondents to take and use water from an aquifer for the purposes of bottling it for commercial resale.

[5] These proceedings are of a preliminary nature and arise as a result of a pleading by the second respondent in its statement of defence that a prior consent granted to a predecessor enables it to take water for commercial bottling and that, even if the consents challenged by way of judicial review are invalid, the prior consents authorised the taking of water. The third respondent advances similar arguments.

Nature of the Court's task

[6] The Court is asked to make three separate declarations. Each of those declarations relate to a different consent originally granted to entities other than the second and third respondents, to take water. The consents held by the third respondent were transferred to it by the original holder and the consent held by the second respondent was transferred to it by an intermediary company that had acquired it from the original holder.

[7] The specific declarations sought are:

> [1] Commercial water bottling is not within the scope of resource consent CRC971084 granted to Kaputone Wool Scour (1994) Ltd (transferred to Cloud Ocean Water Ltd).
>
> [2] Commercial water bottling is not within the scope of resource consent CRC971556 granted to Primary Producers Co-Operative Society Ltd (transferred to Rapaki Natural Resource Ltd).
>
> [3] Commercial water bottling is not within the scope of resource consent CRC012609 granted to Primary Producers Co-Operative Society Ltd (transferred to Rapaki Natural Resource Ltd).

[8] All three respondents oppose the making of the declarations sought.

History

[9] The site presently occupied by the second respondent was for many years occupied by Kaputone Wool Scour Ltd who operated a wool scour there.

[10] The scouring of wool involves an extensive use of water. On a number of occasions commencing on 6 December 1985, Kaputone sought and obtained a permit to take up to 4,320m^3 per day from an identified aquifer for use in connection with the operation of the wool scour. The permit relevant to these proceedings (CRC971084) was granted on 1 May 1997 in respect of an activity described as "scouring NZ wool second stage process". It is that permit that was transferred to the second respondent.

[11] For many years, a freezing works operated on the site at Belfast that is now occupied by the third respondent. The extensive use of water was also critical to the processing of meat on the site both in relation to the cleaning of the processing areas, and the cooling of parts of the freezing works.

[12] Primary Producers Co-Operative Ltd (PPCS) held two separate permits; the first ("the five well consent") was CRC971556, and the second ("the three well consent") was CRC012609. These are the consents referred to in questions 2 and 3 in these proceedings.

[13] The three well consent was originally granted on 13 March 1969 under the then Water and Soil Conservation Act 1967, with the application stating that the permit was required for the operation of a freezing works, and processing of its products. The five well consent was granted, for similar purposes, on 5 April 1991.

[14] On 12 December 1996, PPCS applied for a replacement consent for the five well consent, with the application said to relate to "animal slaughter and meat and by-product processing".

[15] On 29 November 1997, the first respondent issued a water permit in replacement for the five well consent. This replacement consent was CRC971556, and authorised the taking of up to 14,609m^3 per day.

[16] On 24 May 2001, PPCS applied for a renewal of the three well consent with an increased daily volume of 5,760m^3 sought. The description of the activity in the Application for a resource consent was "Take water from three wells for meat processing and other purposes."

[17] The Assessment of Effects on the Environment submitted with the application described how some of the water was used for refrigerant cooling with an estimated 15,000m^3 a week of the water used for that purpose overflowing from the reservoir and into the Kaputone Stream, and the "proposed activity" being described as, "The water is for industrial use, including meat and animal waste processing". Other than refrigeration cooling, no separate industrial use was mentioned.

[18] The Assessment of Environmental Effects (AEE) also noted that water from one of the wells was supplied to "Vital Pet Food Factory" (part of the freezing works complex) for refrigeration purposes. The AEE dealt with the efficiency of use. This focused on the purpose for which the water was being used. It said that the freezing works was a prolific user of water and that the whole plant had to be washed down several times a day. It said that most of the water use was associated with the slaughter operations. The refrigeration plant use was said to be "20L/Sec total".

[19] On 30 November 2001, the three well consent (CRC012609) was granted with an expiry date of 31 August 2035. On its face, the resource consent says that it was a water permit, "to take and use ground water".

[20] This distinguished it from the consent it had replaced which had described the purpose of the taking as being "for operation of freezing works and processing of its products".

[21] It also distinguished it from the five well consent (CRC971556) which said that the permit to take ground water was "for industrial use" and from the resource consent issued to Kaputone (CRC971084) which said it was a water permit "to take ground water … for industrial use".

[22] The three well consent was transferred to the third respondent on 3 September 2016, and the five well consent transferred to the third respondent on 16 September 2016.

[23] The Kaputone consent was transferred to Canterbury Land Resources Ltd on 7 April 2017 and from them to the second respondent on 1 August 2017.

Broad legal issue

[24] The core issue in this preliminary case is the extent to which the Court is entitled to have regard to extrinsic evidence to ascertain the scope of the three resource consents in respect of which the declarations are sought. This involves a consideration of whether or not the approach is different if the purpose for which the consent was granted is ambiguous on the face of the consent. This latter issue also raises the question of the meaning of the words "industrial use", and whether or not the bottling of water for export falls within the definition of industrial use thereby prohibiting the Court from enquiring into what sort of industrial use was applied for.

The applications

[25] Each of the applications was accompanied by the documentation required under the RMA.

[26] One of the RMA documents applicable to all three applications was the (then proposed) Regional Policy Statement (RPS). That included, in Policy 3, a policy to "Promote efficiency in the use of water". Each application was assessed against that policy. The investigating officer's report prepared in relation to CRC900359 noted:

> There are two primary aspects of efficiency with respect to water:
>
> (a) Technical efficiency (avoidance of waste), and
>
> (b) Allocative efficiency (using water where it has the greatest value).

[27] That report went on to say:

> With respect to Allocative efficiency, given the absence of rules and plans or guidelines, it is assumed that the quantities sought by (sic) in each application represents the actual and reasonable needs of the applicant. This assumption is arguably strengthened by the fact all applications are replacement applications and therefore have been exercised for many years.

[28] In determining that the criteria in the RPS were satisfied, the report relied heavily on the fact that what was sought was a consent in relation to the operation of a freezing works for the same volume of water that had historically been required for the freezing works. It said:

> It is concluded therefore that, with respect to the efficient use of ground water, it is appropriate to grant replacement applications with the pumping rates and volumes which have been applied for, i.e., the same rates and volumes of water as granted previously.

[29] Although the application had been clear that the particular type of industrial activity that the water was intended to be taken and used for was meat processing, the resource consent did not use that term but the generic one of "industrial use".

[30] The application in respect of consent CRC012609 also contained an investigating officer's report. It noted that, just as had been the case in relation to the prior consent, "Water is used for cooling and industrial processing of animal products".

[31] On the topic of efficiency of use, this report noted that:

> ... the ratio of actual to consented water use for PPCS was in the order of 28%, below the local average of 37% for large users.

[32] The report concluded that the inefficient use was an adverse effect of the activity on surrounding ground water users in that potential users are denied this resource. For that reason, a water audit condition was imposed on the consent. This audit condition specified:[1]

> An investigation of the efficiency of water use arising from the exercise of this consent over a period of one year commencing 1 June 2002, shall be carried out. The consent holder shall provide a copy of the investigation results to Environment Canterbury by 1st September 2003.
>
> The investigation shall: monitor total water use and total production; identify the types of use; measure the proportion of water in each type of use; identify those areas where there is potential to reduce water consumption and the means of achieving the reduction.

[33] This condition is only explicable on the basis that the Canterbury Regional Council (CRC) thought that the type of use which had been specified in the application was a matter of importance.

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1 Common bundle of documents, Tab 9.

[34] It is also clear that the purpose of the audit condition was not just to monitor the total volume of water that was the subject of the consent but also to monitor "... total production; identify the types of use; measure the proportion of water in each type of use; identify those areas where there is potential to reduce water consumption and the means of achieving the reduction."

[35] No separate allocative efficiency assessment appears to have been undertaken. The fact that the consent related to a renewal of a long established existing activity may have been relevant in this regard.

[36] The application for the consent relating to the wool scour, specifically described the activity to which the application related as "scouring New Zealand wool second stage processes". A covering letter said that the 4,000 m^3 per day sought, "... is used predominantly to rinse dirt from scoured wool (30-40 litres per kilo)."

[37] As required, an assessment of environmental effects report was submitted in support of the application. That report said that the water that was the subject of the application was "... used to provide water for wool scour processes on a property in Belfast."

[38] What is established by the above facts is that each of the resource consent applications specified the nature of the activity in respect of which the water sought to be taken was intended to be used. The specified uses were for those associated with a freezing works (CRC971556 and CRC012609) or a wool scour (CRC971084).

[39] The analysis of the "efficiency" criteria under the RPS was undertaken in relation to the specific stated purposes set out in each resource consent application and its accompanying documentation.

Applicant's submissions

[40] Ms Steven QC, for the applicant, submits that the consents are only able to be used for the purposes identified in each of the original applications, namely:

(a) for the third respondent's five well consent "animal slaughter and meat and by-product processing";

(b) for the three well consent "meat and animal waste processing"; and

(c) for the second respondent's consent purposes associated with wool scouring.

[41] Ms Steven submitted that the take of the water and its intended end use were inextricably linked. She noted that none of the applications for the three consents sought to take water for the purposes of bottling for export, or for an unspecified range of industrial activities.

[42] Ms Steven also developed an argument based on the fact that the original consents were all granted under the Water and Soil Conservation Act 1967 (WSCA), and s 21(3) of that Act prevented the taking of natural water for export from New Zealand without the prior written consent of the relevant Minister. She acknowledged that the Resource Management Act (RMA) contained no such statutory constraint but submitted that:

> ... it can be expected that any application made under the RMA for replacement of a consent granted under the former WSCA would *expressly* state that this was an intended use of the water as it would entail a material change of use of the water able to be taken.

[43] This argument can be disposed of shortly. While the three original consents may all have been granted under the WSCA, each of the three consents in issue was granted under the RMA. Although they replaced the earlier consents, they were not in any sense "derivatives" of them. They were fresh consents, albeit consents issued to the same entities and for the same purposes as the consents which they replaced. They are to be assessed solely in relation to the provisions of the RMA in place at the time they were issued.[2]

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[2] See *Koha Trust Holdings Limited v Marlborough District Council* [2016] NZEnvC 152 at [59] and *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 at [66].

[44] Ms Steven urged the Court to look at the original applications and the supporting material filed with them. She submitted that underlying each of the applications was an assumption that, at the time of the application, what was sought related to the then "actual and reasonable needs" of the applicant. She argued that if the particular purpose identified by each applicant for the taking of the water (the operation of a freezing works and a wool scour respectively) was not relevant, then the applicant would not have been required to specify it. She also submitted that unless the specified use was relevant, the Council would not be able to assess whether the volume of water applied for was appropriate and whether it was an efficient use of the resource.

[45] Ms Steven referred to the fact that an Investigating Officer engaged by the Council prepared a Report (IO Report) which referenced Policy 6 of the Proposed Regional Policy Statement and analysed actual and reasonable water needs.

[46] In response to an argument by the respondents that the water permits in question did not include conditions which expressly referred back to the application and its supporting documents, Ms Steven submitted that s 14 water permits issued by the first respondent did not normally include conditions which incorporated reference to the application but she said that absence of such a condition did not lead to the result that the original application was irrelevant when interpreting the scope of the permit.

[47] Ms Steven noted that, historically, the issue of the scope of the resource consent had generally arisen in two separate circumstances:

(a) where a question had arisen as to the permissible scope of amendments able to be made to an application after notification; and

(b) after a resource consent had been granted where the question had arisen as to the scope of activities authorised by the terms of that resource sent.

[48] She referred to the early significant decision of *Darroch v Whangarei District Council*[3] (which was an example of a question arising as to permissible scope of

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3 *Darroch v Whangarei District Council* A18/93.

amendments able to be made after notification rather than a consideration of the scope of activities authorised by the consent) but referred to the fact that the Planning Tribunal had been willing to refer to the original application to assist in establishing scope saying:[4]

> We hold that it is the original application and any documents incorporated in it by reference which defines the scope of the consent authority's jurisdiction. In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However, they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required.

[49] Ms Steven submitted that the reference in the passage quoted to documents "incorporated by reference" was a reference to documents that should be treated as forming part of the original application, as opposed to being incorporated into the consent (by conditions) as the scope issue had arisen before the consent was granted.

[50] Ms Steven also relied on the important Environment Court decision of *Clevedon*.[5] This case, which has been widely followed and cited, was the first Environment Court decision to categorise the scope issue, in this context, as a jurisdictional rather than a purely evidential issue.

[51] The *Clevedon* decision had rejected the "no extrinsic evidence" rule in the context of ascertaining the scope of a resource consent. Previously the Courts had been reluctant to refer to background documents unless they were expressly referred to in a condition of the consent, an example of this approach is *Attorney-General Ex Rel Hing & Ors v Codner & Ors*[6] which had relied on the House of Lords' decision in *Slough Estates Ltd v Slough Borough Council*.[7]

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4 At p 27.

5 *Clevedon Protection Society Inc v Warren Fowler Ltd and Manukau City Council* C43/97 2 NZED 354, ELRNZ 169.

6 *Attorney-General Ex Rel Hing & Ors v Codner & Ors* [1973] 1 NZLR 545.

7 *Slough Estates Ltd v Slough Borough Council (No 2)* [1971] AC 958.

[52] Ms Steven drew the Court's attention to the reasoning in the *Clevedon* decision as to why the Court had moved on from the *Codner* line of authority and set out the following passage from *Clevedon*.[8]

> It is because there is a jurisdictional issue involved that we believe the *Codner* line of cases has to be read carefully. A resource consent has to look back at the application documents because the consent cannot go beyond those documents which set the initial framework and the limits beyond which the notification and consent cannot go.
>
> Decisions which state that consents must be interpreted on their face and without reference to the application documents are, in effect, following a "no extrinsic evidence" rule that is more appropriate in contract or other private law situations (e.g. wills). We believe these decisions have been stated too widely, and that an error has crept in by approaching the issue as evidential rather than jurisdictional.

I accept that statement of principle.

Respondents' submissions

[53] The first respondent (CRC) acknowledged that Council officers had initially considered that water bottling was not within the scope of consent CRC971084 (the wool scour consent transferred to Cloud Ocean Water Ltd) but submitted that the view of the officers did not bind the Council in any way. I accept that the officers' views are not binding on the Council.[9] They are simply one piece of evidence that may be taken into account in attempting to answer the questions posed in the declaration.

[54] In relation to the argument advanced by the applicant that, as a matter of jurisdiction, the Council could not grant a consent greater than had been applied for, the Council submitted:

> While it is clear that the scope of an activity cannot be extended (i.e. by granting more water than what was applied for), there remains some uncertainty regarding the extent to which the useful purpose for which water is taken is strictly constrained by original application documents associated with the resource consent.

[55] Counsel for the CRC submitted that the Court had to determine three questions:

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8 Above n 5 at p 18.

9 See *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416.

(a) What is the activity authorised by the water permits, and what is the relevance of the use of water to the activity?

(b) To what extent did the application documents further qualify the use for which a water take is described as being for, in circumstances where the water permits:

(i) do not contain "in general accordance with" conditions; and

(ii) are unambiguous in their wording?

(c) Does industrial use include commercial water bottling?

[56] The CRC's submission that the permits are "unambiguous" on their face, is unsustainable in relation to the three well consent (CRC012609). On its face, all that that consent says is that the permit is "to take and use ground water". There is no indication at all as to the purpose for which the use is authorised.

[57] The written submissions of counsel for the CRC state:

> Even considering the application documents, the Court should be cautious in defining the scope of the activity by reference to the literal description of the application documents, as opposed to a more general "industrial" use.

[58] Implicit in that submission is the concept that as long as the purpose for which the water is used could broadly be described as "industrial", it does not matter at all whether the industrial activity bears any resemblance to the specific type of industrial activity that was specified by the applicant as being the purpose for which the water permit was sought.

[59] Such an interpretation would mean that the level of detail required by the CRC in the documentation supporting the application and, in particular, the assessment of "effects" discussed above, was irrelevant. I would be reluctant to come to a conclusion that the information sought by the CRC, provided by the applicant, and analysed by the CRC's officers in processing the application was, in effect, meaningless.

[60] The RMA[10] requires a council to keep a record of a wide-ranging number of documents pertaining to the resource consent proceedings. These documents must be kept and made available for public inspection.[11]

[61] To the extent that the documents that the council is required to keep and make available for public inspection include information about the purpose for which the water is proposed to be used, if the details of the purpose (beyond a broad description of the proposed activity as something like "industrial" were irrelevant, then it is hard to see the justification for the retention of such documents and their availability for a public inspection.

[62] The CRC's submissions distinguished a water permit from a resource consent and emphasised the facts that water permits do not run with the land, are personal to the consent holder and can only be granted for a maximum of 35 years.[12]

[63] They also noted that the RMA[13] provides for a limited right of transfer of a water permit, including to a new owner or occupier of the site in respect of which the permit has been granted.

[64] The written submissions for the CRC also challenged the submissions for the applicant in relation to the meaning of a "use" of water in s 14(2) RMA. "No person may take, use, dam, or divert any (water) …".

[65] The applicant had relied on the decision in *P&E v CRC*[14] for the proposition that a use of water in s 14 was confined to in-water-body uses such as hydro-electricity generation. The applicant had argued that this interpretation had some potential significance in relation to the substantive proceedings in this case on the basis that the applicant had only ever sought to "take" water rather than use it.

[66] The applicant had submitted that, in respect of the three well consent CRC012609, PPCS had only ever sought a s 14 "take" consent and that the original

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10 Sections 35(5)(g), (g)(b), and (g)(c) RMA.
11 Section 35(3)(a) and (b) RMA.
12 Sections 136 and 123(d) RMA.
13 Section 136(2) RMA.
14 *P&E v CRC* [2015] NZEnvC 106.

application had contained detail as to the intended "end use" of the water sought to be taken (meat processing).

[67] Ms Steven had submitted that if this end use was properly to be regarded as a "use" in a s 14 context, the terms of the water permit would have needed to have stated what the authorised use was, otherwise the "use" authorisation was meaningless.

[68] The CRC conceded that it would not usually be open to an applicant for a resource consent to apply for a water permit to take water with no proposed purpose or use and acknowledged that the need for both the "take" and "use" of water to be authorised in terms of s 14.[15]

[69] The submissions acknowledged that the Court, in this case, did not need to consider the necessity for a separate take and use permits as the answer to this question did not go to the declaration sought by the applicant, but acknowledged its significance to the substantive proceedings.

[70] Although counsel acknowledged that the RMA was an effects-based statute, he submitted that, when considering an application to take (and use) water, it is not within the Court's or Council's jurisdiction to consider the merits and priorities of any one parties use of the water over another, relying on cases such as *Fleetwing Farms v Marlborough District Council*[16] for the proposition that the RMA regulates the allocation of water on a "first in, first served" basis.

[71] In response to the argument that the processing of an application for a water permit involved a consideration of concepts of "efficiency", Ms de Latour for the CRC submitted that:

> ... from an allocative efficiency perspective, the take, rather than its purpose is relevant. In relation to technical efficiency this is more relevant in the context of water permit to take and use water for irrigation, rather than in the context of a fully consumptive industrial use.

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15 See cases such as *Re Barrhill Chertsey Irrigation Ltd* EnvC Christchurch C119/09, 31 October 2008 at [13]-[14]; and *Central Plains Water Trust v Ngai Tahu Properties Ltd* (2008) 14 ELRNZ 61, [2008] NZRMA 200 (CA).

16 *Fleetwing Farms v Marlborough District Council* [1997] 3 NZLR 257 (CA).

[72] Once again, it is difficult to reconcile this submission with the information sought by the Council in relation to such applications and, in relation to CRC012609, the assessment in the IO Report of the relatively low rate of efficiency of the water resource and the consequent imposition of a water audit condition.

[73] As set out above,[17] the audit condition was not directed at the effect of the take on the aquifer but on the efficiency of the use to which the applicant put the resource once it had been "taken". To that extent, the use of the water is clearly relevant.

[74] The CRC relied on an observation made in the Court of Appeal decision in *Body Corporate 97010 v Auckland City Council* where the Court of Appeal said:[18]

> It is preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation. An activity may have been approved at a relatively high level of generality which, subject to stipulated conditions, may be capable of being conducted in different ways.

The CRC advanced an argument that as there were no conditions in any of the permits specifying the use to which water was required to be put, the industrial use for which the consent was granted appears to be an activity that was "approved at a relatively high-level of generality" and could be conducted in different ways.

[75] Once again, this argument assumes that, provided an activity can be broadly classified as industrial, the specific purpose specified in the application for the consent and the assessment of the application against that stated purpose, are irrelevant.

[76] The Court of Appeal's decision in that case is distinguishable from the present situation on its facts. A consent had been granted for the use of a defined space (a building envelope) for residential occupation in separate units or apartments. The Court noted that:[19]

> The exact shape and dimension of the units in which that activity could be carried on, including their number, was delimited by the conditions attaching to the approval of the activity. A change, for example, in the number of

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17 At [32].
18 *Body Corporate 97010 v Auckland City Council* [2000] 6 ELRNZ 303 at [46].
19 At [48].

> apartments is therefore merely a change to the conditions, so long as those apartments are to be constructed within the same overall space or envelope as was delineated by the original building plans.

[77] The Court went on to say:

> This did not of course mean that the applicant was free to seek under that section any necessary approval to re-position the building on the site or to change its use to something other than residential apartments. That would have involved a change in the activity ... within the building envelope changes could be made to the features and dimensions of the building and its component parts – apartments, parking spaces and common areas – including the creation of separate structures (if indeed the twin towers are to be viewed as such).

[78] It goes much further than the Court of Appeal did in *Body Corporate 97010 v Auckland City Council* to suggest that approval at a "relatively high level of generality" (in this case approval to take water for industrial use) authorises the taking of water for any activity that could conceivably be described as "industrial" and is completely unrelated to the activity specifically nominated by the applicant at the time of lodging the application. The water audit conditions attaching to CRC012609 would be rendered meaningless if, immediately after the issue of the consent to take water, ownership of the site and consent was transferred to a party who proposed to use the water for an entirely different purpose.

[79] The CRC correctly submitted that in this case there were no conditions specifying the use to which the water that was the subject of the three consents could be put. However, that cannot mean that the use of the water did not matter. A council does not have jurisdiction to grant a consent for more than was applied for. Therefore, in establishing that a consent fell within jurisdiction, it is necessary to analyse exactly what the application was for.

[80] In *Re Barrhill Chertsey Irrigation Ltd*,[20] the Environment Court was dealing with an application for a declaration in relation to the scope of a suite of consents that permitted RDRML to take water from the Rangitata River and use that water for the purposes of supplying water for stock, irrigation and electricity generation. RDRML had been exercising its consents for some 50 years. A new entrant, Barrhill Chertsey,

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20 *Re Barrhill Chertsey Irrigation Ltd* EnvC Christchurch C119/09, 31 October 2008.

wished to combine the existing RDRML water distribution infrastructure and construct new elements to it. This would have enabled expansion of the infrastructure, a greater area to be covered and would rationalise distribution of water between the two schemes.

[81] There was doubt as to whether the water that was the subject of the RDRML consents could be used for similar purposes as part of the Barrhill Chertsey scheme, or whether it would be necessary for the consents to be formally varied.

[82] The Court framed the issue in *Barrhill Chertsey* as being:[21]

> ... the extent to which a resource consent is conditioned by the application and supporting documentation filed beyond the expressed conditions included within the consent.

[83] Although there was some overlap between the areas covered by the two different sets of consents, each set of consents authorised the supply of water to different irrigation systems. The proposal would also allow new areas to be serviced.

[84] The RDRML consents served total farming area of approximately 64,000 hectares. The judgment records:[22]

> The conditions of consent essentially limited the control to a maximum take for use for irrigation and stock water purposes and to generate electricity at Montalto and Highbank Power Stations. No other particular conditions were set. Both the conditions for the Rangitata and South Ashburton Rivers were expressed for the same general purpose with the exclusion of a reference to the Montalto Power Station in the South Ashburton River case.
>
> The key question therefore is the extent to which the application and the assessment of effects limits the broad words of the consent and requires the water to be only used for the three schemes identified and in respect of the power stations with the minor additional cases we have already noted.

[85] The Barrhill Chertsey consents provided for the taking of water for the purpose of irrigating up to 40,000 hectares and electricity generation. The consent did not specify the area or areas within which water irrigation might occur.

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21 At [13].
22 At [30]-[31].

[86] The Court was of the view that in general terms, the information as to ways in which the water was to be used was not necessarily intended to restrict the scope of the application. Insofar as the RDRML consent was concerned, they held that it was clear that individual irrigators within the area may change or new areas may be added, and that surplus water might be utilised for electricity generation. They were also of the view that there was no basis upon which it could have been assumed that Highbank Power Station would not be upgraded or replaced. They found that the areas for water application were not regarded by the commissioners as being particularly critical.

[87] Given these findings of fact, it is unsurprising that they concluded that what was proposed by way intermingling of the waters taken pursuant to each set of consents, was contemplated at the time of the grant of those consents.

[88] Having found that minor variations to the areas to be covered and the manner in which electricity was generated were within the scope of the original consents, the Court made it clear that the result would be different if there was a significant difference between the consents originally applied for and what was now proposed. The Court said:[23]

> We do agree however that a distribution out of the area bounded by State Highway One, Rakaia and Rangitata rivers, may have changed the very nature of the application.

[89] Immediately after this, the Court said:[24]

> To cite an extreme example, the bottling and sale overseas of that water would clearly be outside the terms of the RDRML consent.

[90] This conclusion clearly indicates that the Court regarded the particular use to which the water would be put was relevant and that the Court was entitled to have regard to the nature of the purpose specified in the documentation accompanying the application. It is instructive that the Court saw the bottling and sale overseas of water as an "extreme example" of the use of water, and one that was well beyond the more traditional types of irrigation and power generation uses which had been the purposes specified in the applications for the resource consents under consideration.

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23 At [40].
24 At [41].

[91] The Court clearly thought that, in such a situation, the purpose for which water permits had originally been granted *would* be relevant in circumstances where what was proposed clearly fell outside the parameters of the original purpose for which consents were granted.

[92] The Environment Court went on to frame the test as being:[25]

> ... what an ordinary member of the public would understand of the consents granted to Barrhill Chertsey and RDRML. In particular, the question which arises in this case is whether the reference to irrigation waters is conditioned either by total area or location.

[93] After noting that the Barrhill Chertsey consents did not have particular infrastructure referred to on the face of the consent, the Court said:[26]

> In this case the location of the 40,000 hectares and electricity generation are not so clear. They must be supplied by the water take but reference to extrinsic documents is necessary to clarify their meaning. We have concluded that no reasonable person would conclude that this would permit irrigation outside the region, i.e. shipping the water to another country for irrigation.

[94] The counsel for the applicant in the present case had relied on the High Court decision in *Red Hill Properties Ltd v Papakura District Council*[27] for the proposition that express reference to the application in the consent itself is an unnecessary precondition before the Court can refer to the application as an aide to its interpretation.

[95] In response to this submission, counsel for CRC acknowledged that the High Court in *Red Hill Properties Ltd v Papakura District Council* had considered that a more flexible approach to the use of extrinsic material than that of the Court in *Attorney-General v Codner*[28] was appropriate.

[96] Counsel in their submissions set out some passages from the decision in *Red Hill Properties Ltd v Papakura District Council* where the High Court said:

> [42] It seems to me also that the changes to law and practice which have followed the passing of the Resource Management Act have invited a

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25 At [53].
26 At [58].
27 *Red Hill Properties Ltd v Papakura District Council* [2000] 6 ELRNZ 157.
28 Above n 6.

> somewhat more flexible approach to the interpretation of resource consents. The statutory regime requires specific information to be included in the application (s 88) and makes provision for additional information to be provided if required by the consent authority (s 92). That information must be made available for public inspection before any hearing (s 92(3)(b)). I agree with the view expressed in the ***Clevedon Protection Society*** case that any documents so produced may be referred to in construing the terms of a resource consent whether or not they are expressly referred to in the consent itself.
>
> [43] I do not see this somewhat more expansive approach as undermining the concerns which informed the statements of principle in *Codner* and *Slough Estates*. The Court there were concerned that reference to extrinsic evidence not expressly referred to in the consent could prejudice a subsequent purchaser of the land, the subject of the consent. They would be unable to rely on the words of the consent itself with the risk that the consent could mean one thing in the hands of the original owner and something different in the hands of the subsequent purchaser.
>
> [44] Under the Act, a land use consent and subdivision consent attaches to the land and may be transferred unless the consent provides otherwise (s 34). However, given the formal requirements associated with an application for consent imposed by the Act, it is hard to see how any prejudice to a subsequent purchaser could arise as a result of reference to information disclosed pursuant to statutory obligations and as part of the formal application process. Such information will be part of the public record and, if not expressly referred to in the consent, incorporated by necessary implication.

[97] Ms de Latour submitted that the general statements of principle set out in these three paragraphs were distinguishable on the basis that the case concerned the interpretation of a condition which was ambiguous and which expressly referred to other material. She submitted:

> Where a resource consent contains no reference to application materials and is unambiguous on its face, there is no alert to the reader that the consent might be for something other than what it is expressly stated as being for.

[98] In relation to the present case, I do not accept that proposition. Here, the assignees of the consents did not need "alerting". They were well aware that the purpose for which they intended to use the sites and related consents was very different to the purposes for which the sites had previously been used (for a wool scour and freezing works respectively). They would also have had the opportunity to search the Council records had they wished to do so to clarify the purpose for which the consents to take water had been granted. If they had spoken to the Council officers at the time, they would presumably have also learned that they were then of the view that a fresh consent was necessary in order to authorise their proposed use of the water.

[99] The CRC also sought to distinguish the decision in *Gillies Waiheke Ltd v Auckland City Council*[29] on the basis that, in that case, a condition of the consent clearly incorporated by reference, plans that had been submitted with the application. On the facts of that case, that is correct. However, that decision does not derogate from the more general observations in *Red Hill Properties Ltd v Papakura District Council.*

[100] The CRC also placed considerable emphasis on the decision of the Privy Council in *Opua Ferries Ltd v Fullers Bay of Islands Ltd.*[30] However, that case was not an RMA case. It was a case relating to the nature and extent of a licence held by the respondent in terms of its registration under the Transport Services Licensing Act 1989. The particular issue was whether the effect of registration was to permit the respondent to operate a ferry service with two vessels or with one vessel only.

[101] The Privy Council rejected an approach that required reference to material submitted when the licence was first applied for. However, the case appeared to turn on the fact that the licence in question was a public licence and the public were entitled to rely on the register. The situation is different in the context of a consent issued under the RMA by virtue of s 35 RMA which specifies the documents that are required to be kept and made available for public inspection by a consent authority.

[102] There is one New Zealand case which has squarely addressed the question of whether material submitted with the original application can be referred to in interpreting the scope of the consent in a situation where the consent is not ambiguous on its face, and there is no reference to the original application in the consent or in conditions imposed in relation to the consent. This is the case of *Manners-Wood v Queenstown Lakes District Council.*[31]

[103] The *Manners-Wood v Queenstown Lakes District Council* proceedings involved an application for a series of declarations as to the scope of a resource

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29 *Gillies Waiheke Ltd v Auckland City Council* HC Auckland A131/02, A132/02, A133/02, 20 December 2002.

30 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740 (PC).

31 *Manners-Wood v Queenstown Lakes District Council* NZEnvC Wellington W077/07, 12 September 2007.

consent. The resource consent was not ambiguous on its face and did not incorporate reference to any of the documents submitted in support of the application, either in the decision itself or in any condition. To that extent, it is on all fours with the two of the three consents involved in the present case that are not ambiguous on their face. The consents had been sought:[32]

> ... to operate a helipad to load and offload Danes' Clients participating in rafting trips at its new Arthurs Point Base facility.

[104] An accompanying letter also referred to loading and offloading of rafting clients.

[105] The consent order ultimately issued contained language which that was different to what had been in the application and covering letter. It referred to "Use of the helipad is limited to flights incidental to tourism business carried on at the site."[33]

[106] The original applicant subsequently sold its business including the property from which the resource consent was operated.

[107] The decision notes:[34]

> The range of activities currently being serviced by the helicopter operation far exceeds that of the rafting business which was the basis of (the applicant's original evidence).

[108] The argument of the operator at the time of the Environment Court hearing was that the business being undertaken on the site was "tourism business", that the helicopter operation was part of or incidental to that business, and that therefore the then current helicopter operations were authorised.

[109] Such an argument is similar to the argument advanced by the respondent in the present case that the activity was approved at a high level of a generality and the current activity fell within the general purpose albeit being different to what was specified in the original application and its supporting documentation.

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32 At [5].
33 At [11].
34 At [17].

[110] The Environment Court followed the approach that had been taken in *Clevedon Protection Society Inc v Warren Fowler Ltd and Manukau City Council*[35] that the interpretation of the limits of a resource consent is a jurisdiction issue, rather than just an evidential one.

[111] The Environment Court rejected the arguments that were advanced by the respondents to the effect that evidence given in support of an application may not be looked at to determine the meaning of the resource consent actually granted. The Court said:[36]

> In our view, the ambit of the application is crystal clear. It seeks consent to operate a helipad for a very limited purpose, more particularly, the loading and offloading of Danes' Clients who were participating in rafting trips.

[112] The Court noted that information formally provided as part of the resource consent process (whether as part of the application documents or in response to requests for further information) may form part of the application and may limit or qualify the application in some way but cannot enlarge the application and then said:[37]

> There is nothing in those documents which gives any indication that the helipad for which consent was sought was for the purposes of servicing a wider range of activities than Danes' rafting operation …
>
> In interpreting consent RMA250/92, we had looked back at the application documents because those documents set the boundaries of the consent which could be granted. In this case, the application was for a helipad to be used for the limited purpose identified and that is all that either of the Council or the Planning Tribunal had jurisdiction to approve.

[113] The respondent in *Manners-Wood* had argued, relying on the case of *Parnell Residents' Society Inc v Edinburgh Institute Ltd and Auckland City Council*[38] that meant that an activity authorised by a consent could be permitted to develop somewhat over time.

[114] In response to this, the Court said:[39]

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35 Above n 5.
36 At [24].
37 At [25].
38 *Parnell Residents' Society Inc v Edinburgh Institute Ltd and Auckland City Council* AO19/2005.
39 Above n 31 at [30].

> We disagree. The Court in the *Parnell Residents' Society* case went on to state *But a change in the activity of such a degree that it is fundamentally different from what was first agreed to or mean that the consent is no longer valid.* In our view, that is what has happened in this case. Although we accept that the effects of an individual helicopter landing and take-off at the site will be the same whether or not that helicopter is taking passengers on a rafting expedition, a jet boat trip or some other tourism experience that is not the issue.

[115] This latter observation is relevant to the ground upon which Ms de Latour sought to distinguish the *Manners-Wood* case. In her written submissions, she said:

> A greater range of helicopter operations would have a significantly different effect than the application had contemplated in terms of noise and amenity. However, the situation at hand here is quite different. As the bounds of the activity in terms of the water taken (and as expressed in the consent conditions) is not in contention.

[116] This submission is unsustainable in light of the Environment Court's express finding in *Manners-Wood* that the effects of the individual helicopter landings and take-off would be the same irrespective of the purpose for which the helicopter journeys were being made.

[117] Ms de Latour also referred to the decision of the Environment Court in *Simon's Hill Station Ltd v Canterbury Regional Council.*[40] She submitted that:

> ... to the extent that the application documents were relevant, the Court did not apply a strict reading to the activity as described in the application forms and material in determining the scope of the water permit.

[118] This submission does not seem to accurately capture the facts of that case. The Environment Court was required to address a dispute over the breadth of farming activities for which a water permit could be relied upon for the supply of irrigation water. The particular issue was whether the taking and use of water for the purposes of supporting a dairy farm operation or a combined sheep and dairy farm operation, were all activities within the scope of the original applications as publicly notified.

[119] The decision turned very much on the facts of the case. The decision records that the original application was for the activity of taking and using water "for spray irrigation of pasture and crops, for stock water and domestic use ...". Under the

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40 *Simon's Hill Station Ltd v Canterbury Regional Council* [2013] NZEnvC 62.

heading *Description of Proposed Activity* in the Assessment of Environmental Effects, the description of the activity was expanded to read:[41]

> To grow pasture and crops for livestock farming, the applicant proposes to develop and irrigate 2,400 ha within the shaded irrigated area located north-east of the Pukaki River as shown in Appendix A.

[120] The documents further explain that the proposed land uses for the irrigation water included:[42]

> The initial plan is to graze sheep and beef cattle as a fattening unit with the possibility of other stock types introduced at a later date …

[121] The Environment Court specifically acknowledged:[43]

> A number of cases have affirmed the principle that the end-use of a resource consent is relevant when considering the effects of the activity on the environment.

[122] Ultimately, the Court held that the use of the land for the grazing of dairy stock or a mixed dairying and other farm operation fell within the documents supplied with the application which had not sought to limit the concept of "livestock farming" to any particular sought of livestock.

[123] It is therefore not correct to submit that the Court did not apply a strict reading of the activity as set out in the application and supporting material. It found, on the facts, that the purpose of irrigating land to grow pasture and crops for livestock farming did not exclude dairy cows.

[124] There is nothing in the *Simon's Hill Ltd* that qualifies or limits what the Environment Court had said in *Manners-Wood* and indeed, the Court specifically states:[44]

> A consent which purports to grant more than what is sought in the application is ultra-vires to that extent: *Manners-Wood v Queenstown Lakes District Council*. (citation omitted).

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41 At [14].
42 At [15].
43 At [23].
44 Above n 40 at [20].

[125] The Court also said the next paragraph:[45]

> When considering what was sought, it is the substance or gist of the application that counts. Regard must be had to the circumstances that existed at the time the application was made and relevant also is the basis that the application was received and dealt with by the consent authority: *Sutton v Moule*. (footnote omitted)

[126] Applying that approach to the present case, the "substance or gist" of the relevant applications were to take water for the purpose of the needs of a freezing works and a wool scour.

[127] To use the language of the Environment Court in *Barhill Chertsey*, [46] an ordinary member of the public reviewing the relevant applications for consent would not have concluded that the water to be extracted would not be used for the purposes of cleaning and refrigeration in the case of the freezing works and scouring wool in the case of the wool scour, but bottling water for human consumption to be exported overseas.

[128] As a matter of jurisdiction, the purpose specified in the application defines the scope of the application and the CRC had no jurisdiction to grant more than what was applied for.

[129] I endorse the approach taken in *Manners-Wood*.[47] Even in cases where there is no ambiguity of the face of the consent, in ascertaining the scope of the consent, the Court is entitled to have regard to the purpose of the application as specified in the original application and supporting material.

[130] This case does not fall within the line of cases relating to public registers or certificates of title which adopt a different approach to the use of such extrinsic material.[48]

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45 At [21].
46 Above n 20 at [53].
47 Above n 31.
48 Above n 30; *Green Growth No 2 Ltd v Queen Elizabeth II National Trust* [2018] NZSC 75.

Industrial use

[131] Counsel for the second and third respondents both specifically endorsed and adopted the submissions of counsel for the first respondent on the issues discussed above. However, both made submissions on the issue of whether bottling water for overseas sale could be said to be an "industrial use".

[132] Because of the findings that I have come to in relation to the ability of the Court to consider the application and supporting material in relation to all three of the consents, it is not necessary to come to a view on whether or not the bottling of water for export could be said to be an "industrial use". However, in case the matter proceeds further, I will address that issue.

[133] All of the respondents approached the interpretation of the concept of "industrial use" in a similar fashion. The CRC submissions referred to s 5 of the Interpretation Act 1999 and the obligation to obtain the meaning of the word from the text and in the light of its purpose, and submitted that words should be given their plain ordinary meaning unless this is clearly contrary the purpose or otherwise would produce injustice, absurdity, anomaly or contradiction.

[134] It was accepted that the RMA did not define the concept of "industrial use".

[135] The Oxford Dictionary (both the Concise Oxford Dictionary[49] and the New Zealand Oxford Dictionary[50]) were referred to along with Blacks Law Dictionary[51].

[136] The Concise Oxford Dictionary was said to define industrial as meaning "Of, used in, or characterised by industry" and industry was defined as "Economic activity concerned with the processing of raw materials and manufacture of goods in factories".

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49 Concise Oxford English Dictionary (12th ed, Oxford University Press, New York, 2011).
50 New Zealand Oxford Dictionary, Oxford University Press 2005.
51 Blacks Law Dictionary, Thomson Reuters, 2014.

[137] It was submitted that water bottling falls within this definition as it requires packaging of products and the processing of raw materials (being the water extracted).

[138] Mr McCartney, for the second respondent, set out the definition of the word "commercial" taken from Blacks Law Dictionary and the New Zealand Oxford Dictionary. He submitted that the word commercial includes matters of business, trade, or an undertaking for profit. He submitted that word industrial includes large scale manufacturing or production of goods.

[139] He then submitted that not all commercial undertakings would be industrial giving as examples banking and insurance activities but said that all industrial undertakings are commercial. He said that an industrial undertaking is in trade and done for profit, and is simply one type of commercial undertaking.

[140] He submitted that the applicant seemed to concede that the activities in question were industrial in character relying on a statement at [9] of the applicant's written submissions that:

> The immediate question arises as to whether CRC971084 and CRC971556 are able to be exercised to authorise the taking of water for *any* industrial use, (say) commercial water bottling?

[141] While this is not an express concession that water bottling is an industrial activity, this issue was not addressed elsewhere in Ms Steven's written or oral submissions so, while she might not have formally conceded the point, it was not vigorously contested.

[142] All the respondents referred to the decision of the Environment Court in the case of *Hexton Residents Society Inc v Gisborne District Council*. Although the question of whether or not the bottling of water from the spring was an industrial activity was not the focus of the hearing, the Court described the proposed bottling plant as a "proposed industrial use of the site".[52]

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52 *Hexton Residents Society Inc v Gisborne District Council* EC Wellington W104/06, 26 November 2006 at [41].

[143] Given the absence of any definition of the concept of industrial use in either the RMA or any of the applicable CRC documentation, I accept that a water bottling plant could be said to be an industrial activity (as opposed to say a residential or agricultural activity). However, this finding does not alter the fact that the bottling of water for export is a very different sort of activity from operating a freezing works or wool scour.

[144] Neither does it alter the finding that no ordinary member of the public, familiar with the material filed in support of the application would reasonably conclude that the consent authorised the bottling of water for export.

Conclusion

[145] For the reasons set out above, in determining the scope of the consent the Court is entitled to consider the purpose for which water was to be used, even when the consent on its face, was not ambiguous and did not refer back to the application or supporting documentation.

[146] The earlier cases limiting the use of extrinsic material, are no longer good law and the more recent cases such as *Clevedon*, *Red Hills Properties Ltd*, and *Manners-Wood* set out the correct approach.

[147] The three well consent is ambiguous on its face, and the only way of ascertaining the scope of the consent is to look at the application and supporting documentation.

Answers to questions

[148] The questions posed for consideration are answered as follows:

(a) Commercial water bottling is not within the scope of resource consent CRC971084 granted to Kaputone Wool Scour (1994) Ltd (transferred to Cloud Ocean Water Ltd).

(b) Commercial water bottling is not within the scope of resource consent CRC971556 granted to Primary Producers Co-operative Society Ltd (transferred to Rapaki Natural Resource Ltd).

(c) Commercial water bottling is not within the scope of resource consent CRC012609 granted to Primary Producers Co-operative Society Ltd (transferred to Rapaki Natural Resource Ltd).

Costs

[149] The applicant, having been successful in this application for judicial review, is entitled to costs. I invite the parties to agree costs but failing agreement, direct that the applicant's costs submissions (not exceeding 10 pages), are to be filed within 14 days of the date of this decision, and the respondents to have 14 days to reply.

Churchman J

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