Court of Appeal decision has potentially major implications for changes to water use authorised by existing water consents in Canterbury

UPDATE: The Supreme Court granted leave to appeal the Court of Appeal's decision on Thursday 17 November. The hearing is set down for the week of 20 March 2023, when the Supreme Court is sitting in Christchurch.

Given that many streams and rivers and most of the groundwater in Canterbury is either fully or over allocated, water allocation is a significant issue for the region. Read on for our analysis of a recent Court of Appeal decision which has potentially major implications for existing water consents in Canterbury, where a change in use is proposed, and across New Zealand.

In the recently released Court of Appeal decision *Aotearoa Water Action Inc v Canterbury Regional Council [2022] NZCA 325,* consents granted by the Regional Council (allowing up to 8.8 billion litres of water to be used for water bottling purposes) have been set aside. This decision will likely affect any existing water consents sought to be used for a different purpose than consented, and may also have ramifications in other regions across the country.

Background

Consents had historically been granted by the Regional Council to "take and use" water for the purposes of a freezing works and a wool scour respectively. Those consents were later transferred to Rapaki Natural Resources Ltd and Cloud Ocean Water Ltd. Both companies subsequently applied for (and were granted) new consents to "use" (for a different purpose) the water able to be taken under the existing "take" consents.

Once the new "use" consents were granted, the Regional Council amalgamated those consents with the historical "take" consents. The Court described this as an *"administrative process"* in order to demonstrate that the companies had consents to both "take and use" water for bottling purposes. This included the issuing of new consent numbers. Interestingly, the Court of Appeal described this process as a "legitimate administrative step" despite the Regional Council acknowledging that such a process has no statutory basis in the Resource Management Act 1991 (*RMA*).

As acknowledged in the Canterbury Land and Water Regional Plan (*LWRP*), most rivers and streams in Canterbury are at or near full allocation for reliable 'run-of-river' takes. Similarly, many groundwater allocation zones in the region are at or over allocation limits for abstraction. The approach taken by the Regional Council, in processing an application for a "use" only, effectively enabled the water bottling companies to sidestep the relevant rule in the LWRP which makes new

applications to “take and use” water in fully-allocated groundwater allocation zones (including the applicable to the subject site of the consents) a prohibited activity.

The Court of Appeal’s main focus was on whether the granting the consents to “use” water for water bottling, without granting new consents to “take” the water, was lawful. Essentially, the question before the Court was whether a consent to “use” water under s14 of the RMA can be sought and granted without an associated application to “take” water for the same use. The case for Aotearoa Water Action Incorporated was that applications for “take” and “use” must be considered together.

The Court found that there is no reason based on the wording of s14, to treat a “take” as necessarily combined with “use”, any more than there is to treat “take” as being necessarily linked to the other activities provided for in the provision such as “dam” or “divert”. However, whether a Council can grant a separate consent for a “use” and a separate consent for a “take”, will depend on the terms of the relevant regional plan.

The Court closely considered the relevant rules of the LWRP, noting that that Plan refers variously to “taking or use” and “taking and use”, with this difference in wording being considered by the Court to be important and clearly intended.

As the relevant rule that applied to the companies’ consent applications referred to the “taking and use” of groundwater, the Court held that the LWRP contemplated that it be regarded as one activity. This meant the Council could not lawfully grant a resource consent to “use” water separately to the authorisation to take water. The Court stated that if both elements were to be considered separately, it is difficult to see how the plan can be administered in a way that preserves its integrity.

The Court’s decision is of some significance in Canterbury, given the questions that now arise (particularly for consent holders who have been granted new “use” consents on the basis rejected by the Court). We anticipate that the Regional Council may seek to enable separate “use” consents from “take” consents by way of a change to the LWRP, and that other regional councils or unitary authorities around the country will also now be closely scrutinising the wording of their Plan rules. As examples, the Wellington Regional Freshwater Plan appears to generally use the terminology “take or use” in relation to water, suggesting the granting of “use” consents separately from “take” consents may be lawful there. The Auckland Regional Plan, in contrast, appears to treat the taking and using of water as a single activity.

Cloud Ocean Water has sought leave to appeal the decision to the Supreme Court. The Regional Council has decided not to appeal the decision. Whether or not leave will be granted by the Supreme Court should be known later this year.

If you would like specific advice on the implications of the Court of Appeal’s decision and how it might affect any consents you currently hold (or might wish to acquire), please contact Monique Thomas.

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