

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2023-409-24
[2023] NZHC 686**

UNDER the Resource Management Act 1991
IN THE MATTER of appeals under s 299 of the Act
BETWEEN FEDERATED FARMERS SOUTHLAND
INCORPORATED
Appellant
AND SOUTHLAND REGIONAL COUNCIL
Respondent
AND SOUTHLAND FISH AND GAME
COUNCIL
Interested Party

(continued over)

Counsel: B S Carruthers KC and M T N Campbell for Appellant in -24
proceeding; s 301 parties in -44 and -25 proceedings
D J Minhinnick and P G Senior for Appellant in -25 proceeding;
s 301 parties in -24 and -44 proceedings
P A C Maw and I F Edwards for Appellant in -44 proceeding and
Respondent in -24 and -25 proceedings
S R Gepp for s 301 parties (Forest and Bird and Fish and Game)
in all proceedings
M Exton for s 301 party (Ballance) in all proceedings
M R G Christensen for s 301 party (Ravensdown) in all
proceedings

Judgment: 30 March 2023

JUDGMENT OF OSBORNE J

BALLANCE AGRI-NUTRIENTS
Interested Party

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Interested Party

FEDERATED FARMERS SOUTHLAND
INCORPORATED
Interested Party

RAVENSDOWN LIMITED
Interested Party

FONTERRA LIMITED
Interested Party

DAIRYNZ LIMITED
Interested Party

CIV-2023-409-25

BETWEEN

FONTERRA LIMITED
Appellant

DAIRYNZ LIMITED
Appellant

AND

SOUTHLAND REGIONAL COUNCIL
Respondent

SOUTHLAND FISH AND GAME
COUNCIL
Interested Party

BALLANCE AGRI-NUTRIENTS
LIMITED
Interested Party

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Interested Party

FEDERATED FARMERS SOUTHLAND
INCORPORATED
Interested Party

RAVENSDOWN LIMITED
Interested Party

CIV-2023-409-44

BETWEEN

SOUTHLAND REGIONAL COUNCIL
Appellant

AND

SOUTHLAND FISH AND GAME
COUNCIL
Interested Party

BALLANCE AGRI-NUTRIENTS
LIMITED
Interested Party

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Interested Party

FEDERATED FARMERS SOUTHLAND
INCORPORATED
Interested Party

RAVENSDOWN LIMITED
Interested Party

FONTERRA LIMITED
Interested Party

DAIRYNZ LIMITED
Interested Party

Introduction

[1] Southland Fish and Game Council (Fish & Game) and the Royal Forest and Bird Protection Society of New Zealand (Forest & Bird) have applied for an order that the following three appeals be allocated a priority fixture: CIV-2023-409-24 (Federated Farmers Southland's Appeal), CIV-2023-409-25 (Fonterra and DairyNZ's Appeal) and CIV-2023-409-044 (Southland Regional Council's Appeal).

Background

[2] All appeals relate to the decision of the Environment Court in *Aratiatia Livestock Limited & Ors v Southland Regional Council (Aratiatia)*.¹ The decision concerned the proposed Southland Water and Land Plan (PSWLP), a regional plan that manages land use and freshwater in Southland.

[3] There was representation from farming, agribusiness, government, runanga, conservation groups and the electricity sector across the decision process.

[4] The fifth interim decision of the Environment Court appears to acknowledge that Southland's waterways are below national bottom lines or below the minimum acceptable state and that the discharge of contaminants incidental to farming is resulting in significant adverse effects on aquatic life.²

[5] The Environment Court went on to state:³

[6] The regulation of farming activities having disproportionately greater adverse effect on water quality is confirmed; namely intensive winter grazing, pasture-based wintering and sacrifice paddocks

[7] It is beyond the scope of the proposed plan to establish limits on resource use to achieve target attribute states or to support other environmental outcomes. Moreover, the plan's rules do not manage the potential for farming activities to intensify, including intensive winter grazing and pasture-based wintering. Consequently, a reduction in nitrogen leachate is unlikely. That said, the rules and methods may reduce the incidence of contaminant losses to surface water run-off (including phosphorus, sediments and potentially microbial contaminants).

¹ *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2022] NZEnvC 265 [*Aratiatia*].

² At [4] and [5].

³ At [6] and [7].

[6] The Environment Court issued a preliminary view in its fifth interim decision that s 70 Resource Management Act 1991 (RMA) did now allow it to approve Rule 24 of the PSWLP (r 24) which would permit the discharge of contaminants incidental to farming activities.⁴

[7] Rule 24 is contentious. The Environment Court made findings on some issues relevant to r 24. The Court directed that any party wishing to argue in support of the proposition that future discharges of contaminants are unlikely to cause a significant adverse effect on aquatic life is to propose timetable directions for the filing of supplementary evidence.⁵ Accordingly, regardless of what happens in the High Court, there is a process still to occur in the Environment Court.

[8] The Southland Regional Council has applied for a stay of the Environment Court decision as it relates to r 24. If a stay is granted, the process yet to take place in the Environment Court will not occur until the High Court appeals are determined. Any changes to r 24 will not take effect until after the Environment Court's decision and this too may be subject to further appeals.

The Appeals

Federated Farmers Southland's Appeal

[9] Federated Farmers Southland Inc appeals all aspects of the decision related to the interpretation of s 70 RMA and its application to r 24 of the PSWLP. It also appeals the factual findings that water quality attributes are below the national bottom line and that incidental discharges from farming activities on land are the likely cause of water quality falling below said standards.

[10] Federated Farmers Southland submits the following errors of law were made by the Environment Court:

- (a) finding at [259] that section 70 applies to diffuse discharges from farming activities;

⁴ *Aratiatia*, above n 1, at [8].

⁵ At [279] and [280]

(b) finding at [266] and [278] that:

(i) water quality attributes that are below the national bottom line or minimum acceptable state are causing significant adverse effects on aquatic life;

(ii) the significant adverse effects on aquatic life are likely the result of contaminant discharges from land-based farming activities.

(c) defining its role at [267]–[274] as including the approval of the uncontested parts of r 24.

[11] Federated Farmers Southland submits the questions of law to be decided are:

Does s 70 apply to all incidental discharges from land-based farming activities?

Was there evidence before the Court that significant adverse effects on aquatic life are inevitable when a water quality attribute is below a national bottom line or minimum acceptable state set out in the National Policy Statement Freshwater Management 2020?

Was there evidence before the Court that the incidental discharges from farming activities on land are causing significant adverse effects on aquatic life?

Do the appeals seeking to introduce a new permitted activity standard to r 24 provide scope to amend the existing permitted activity standard in r 24?

[12] Federated Farmers Southland asks, if the appeal is allowed, that the matter be referred back to the Environment Court.

Fonterra & DairyNZ Appeal

[13] Fonterra Ltd and DairyNZ Ltd expressly disavow the assertions made in Forest & Bird and Fish & Game’s memorandum in support of the application for priority hearing (below at [20]), but do not oppose it and do not wish to be heard.

[14] Fonterra and DairyNZ appeal against the Environment Court finding that the Court lacked jurisdiction to include permitted activity r 24 in the PSWLP due to the operation of s 70 RMA. They submit three errors of law were made by the Environment Court as follows:

(a) finding at [251] that Southland Regional Council, or the Environment Court on appeal, before inserting Rule 24 into the Southland Water and Land Plan, could not have been satisfied of the effects on the environment as a result of activities permitted to occur under Rule 24;

- (b) finding at [259] that the purpose of section 70 of the Act applies to both point source discharges and diffuse discharges;
- (c) finding at [271] that jurisdiction to include Rule 24 was not established

[15] This raises the following questions of law:

- (a) Does s 70 RMA apply to all discharges?
- (b) Regarding s 70, does the Environment Court have the jurisdiction to confirm permitted activity r 24?
- (c) Do the appeals seeking to introduce a new permitted activity standard to r 24 provide some scope to amend the balance of r 24?

[16] DairyNZ and Fonterra ask, if the appeal is allowed, that the matter be referred back to the Environment Court.

Southland Regional Council's Appeal

[17] Southland Regional Council appeals against the Environment Court's interpretation of s 70 RMA. The following are said to be errors of law in the Environment Court's judgment:

- (a) It applied the wrong legal test when concluding that it did not have jurisdiction to include r 24 in the PSWLP on the basis of s 70 of the RMA (First Error of Law);
- (b) It failed to take into account the fact that any incidental discharges resulting in significant adverse effects on aquatic life would not be permitted by r 24(a) and would instead require resource consent under r 24(b) (Second Error of Law); and
- (c) Its interpretation of s 70 RMA was based on an evident logical fallacy because it was not required to further satisfy itself as to significant adverse effects on aquatic life given that r 24(a) did not permit those same effects (Third Error of Law).

[18] Counsel submits the said errors of law give rise to three key questions of law:

(a) Whether the Environment Court applied the wrong legal test when it concluded that s 70 RMA provided a jurisdictional bar to the inclusion of r 24 in the PSWLP?

(b) Whether the Environment Court failed to take into account a relevant consideration, being that any incidental discharges resulting in significant adverse effects on aquatic life would not be permitted by r 24(a), when finding that s 70 RMA provided a jurisdictional bar to the inclusion of r 24 in the PSWLP?

(c) Whether the Environment Court's interpretation of s 70 RMA was based on an evident logical fallacy because it was not required to further satisfy itself as to significant adverse effects on aquatic life given that r 24(a) did not permit those same effects?

[19] Southland Regional Council asks, if the appeal is allowed, that the matter be remitted back to the Environment Court.

Grounds of application for priority fixture

[20] Fish & Game and Forest & Bird set out their grounds for a priority fixture in a joint memorandum.

[21] The memorandum invokes especially r 7.13 High Court Rules 2016, which provides:

Registrar's functions in relation to hearing dates

- (1) After a Judge has allocated a hearing or trial date for a proceeding under rule 7.6(1) or (2), the Registrar must promptly—
 - (a) record the proceeding in the list kept under rule 7.12(a); and
 - (b) record the hearing date and the close of pleadings date in that list; and
 - (c) give written confirmation of both dates to all parties to the proceeding.
- (2) The performance of the Registrar's functions under this rule is subject to any direction by a Judge.

[22] Counsel invokes as the relevant principles to be applied in considering applications for priority fixtures those set out in *Gavin v Powell*:⁶

- (a) the overriding objectives of the High Court Rules 2016 are to secure the just, speedy and inexpensive determination of proceedings;
- (b) under r 7.13 of the High Court Rules, a Judge may give a direction allocating a hearing date for a proceeding;
- (c) the court has a broad discretion to allocate a priority fixture if it is satisfied that it is just in all the circumstances to do so;
- (d) the court will not grant a priority fixture unless the applicant presents strong evidence justifying such an order;
- (e) the factors that may justify the granting of a priority fixture must be exceptional, going beyond the usual hardship experienced by a litigant, include compassionate grounds, impending financial disaster, health problems, and the public interest or the interests of children;
- (f) the granting of a priority fixture will inevitably disadvantage other litigants by delaying the disposition of proceedings which were filed earlier and are ahead in the queue. The court's responsibility is to allocate precious hearing time in a manner that is fair and just for all litigants; and
- (g) the lack of preparedness of the matter for trial is a significant factor in the court declining an application for a priority fixture.

Analysis

[23] The public interest factor present weighs in favour of granting a priority hearing. The number of appearances and the interests represented by those appearing indicates the significance of the appeal to a variety of sectors, organisations, and entities. The PSWLP, by its nature, is of major consequence for Southland. It is in the interests of justice that such an influential document be finalised as quickly as is justly possible.

[24] The nature of the case justifies the case having priority even if there is some incremental disadvantage to other litigants.

[25] This is not a situation of proceedings which require a lengthy trial — the court time required to be allocated here (three days) is relatively contained.

⁶ *Gavin v Powell* [2020] NZHC 1224 at [25].

[26] The Forest & Bird and Fish & Game case for priority here may be summarised as an assertion that, considering the state of water in Southland, it is in the public interest for the case to be heard promptly: the Environment Court will then be enabled to issue its findings on r 24 and the Southland Regional Council may then implement the rule in light of those findings.

[27] Fish & Game have confirmed the matter is ready to progress to a hearing, with only filing and service of a common bundle, parties' legal submissions and a joint bundle of authorities to follow. Accordingly, issues of the preparedness factor identified in *Gavin* (above at [23](g)) do not arise.

[28] The application will be granted.

Direction

[29] I direct:

- (a) these three proceedings are to be allocated a combined priority fixture;
- (b) the appeals will be heard together on the first available date *after 5 June 2023* that the Deputy Registrar is able to allocate in consultation with counsel, *but in any event commencing no later than 30 October 2023*;
- (c) the time for the hearing is estimated to be *three days*;
- (d) the appeals are categorised as a category 2 proceeding for the purposes of r 14.3;
- (e) the appeals are to proceed as determined by r 20.8(1);
- (f) by consent, the appellants are excused from providing security;
- (g) no further points on appeal are required to be filed by the appellant;

- (h) no significant issues arise in terms of clause 7, Schedule 6;
- (i) the appellants must file and serve, not later than **20 working days** after the conference, a joint common bundle of paginated and indexed copies of all relevant documents, including, if applicable,—
 - (i) the reasons for the decision; and
 - (ii) the sealed order or judgment appealed from; and
 - (iii) the pleadings; and
 - (iv) the statements of evidence or affidavits; and
 - (v) the exhibits; and
 - (vi) the notes of evidence, to the extent that they are relevant to the issues on appeal; and
 - (vii) any other documents, if possible in date sequence.
- (j) if a party insists on including a document in the common bundle even though another party objects to its inclusion on the ground that it is unnecessary or irrelevant, the objection must be recorded for the purpose of any award of costs relating to the inclusion of the document;
- (k) the appellants must file and serve, not later than **25 working days** after the conference a joint chronology and the appellants' submissions;
- (l) the appellant's submissions must be not more than 30 pages in length, unless a Judge permits an extension, and use 1.5 line spacing, and must contain—
 - (i) references to any specific passages in the evidence that the appellant will refer to at the hearing; and

- (ii) a list of the names and correct citations of any authorities mentioned.
- (m) the respondent must file and serve, not later than **30 working days** after the conference,—
 - (i) submissions that meet the requirements set out in clause 11; and
 - (ii) if the respondent disagrees with the appellant’s chronology, a separate chronology noting areas of disagreement.
- (n) the appellants must prepare a joint bundle of any authorities referred to in the appellants’ submissions provided in accordance with clauses 10 and 11 that the appellants or the respondent consider ought to be produced to the court. The bundle is to be produced at least **five working days** before the appeal is heard; and
- (o) as the appeals are to be heard by a single Judge, one copy of each document must be filed.

Osborne J

Solicitors:

Federated Farmers of NZ

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