BEFORE THE HEARING PANEL OF SOUTHLAND REGIONAL COUNCIL

In the matter of sections 88 to 115 of the Resource Management Act 1991

And

In the matter Applications for resource consents by:

WOLDWIDE FOUR LIMITED, WOLDWIDE FIVE LIMITED,
Applicants

Next event date

OPENING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANTS
2019

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INTRODUCTION

1 This hearing is to determine two separate applications by two separate persons, being Woldwide Four Ltd (WW4) and Woldwide Five Ltd (WW5) to undertake activities that would, if not expressly allowed by a resource consent, contravene:

1.1 Section 9(2), namely to use land in a manner that contravenes a rule in a regional plan, by using land identified in their respective applications for a farming activity and/or for the construction and use of wintering barns and effluent storage facilities, in a manner that is classified as a discretionary activity by the applicable regional plans;

1.2 Section 14(2)(a), namely to take and use water at identified locations for the purposes of dairy shed and stock water supply;

1.3 Section 15(1)(b), namely to discharge a contaminant, namely dairy effluent, to land specified in their respective applications, in a manner where that contaminant or any other contaminant emanating as a result of natural processes from it may enter water.

2 Each of these persons owns and operates a dairy platform. There are two dairy platforms before the Panel in this hearing. The applications are required in order to allow the applicants to operate in a manner that increases efficiencies and production, while reducing overall nutrient loss and other contaminants that can result in adverse effects associated with the operation of the platforms.

3 Each platform operator either owns or leases the land it uses for the farming, effluent storage and wintering barn land use activities requiring consent, and the land on which it wishes to discharge effluent and take and use water. The applicants make no secret that there are connections between these persons. Specifically, they share common directors and shareholders. As indicated, there is an arrangement whereby another land owner can discharge slurry from the Applicants' land on its land in reliance on their consents. The applicants have also entered into arrangements for wintering of stock with another person that has a similar connection with these applicants.

4 The Applicants can show that each will be able to ensure a net overall reduction in contaminant loss and associated adverse effects for their specific properties, while at the same time improving efficiencies and profitability.

5 This gives effect to the purposes of the Resource Management Act (the Act) and is consistent with the policy framework through which those purposes are required to be given effect. The connections between these various persons have made it easier to facilitate these outcomes, in the same way as neighbours, friends or relatives can share connections that facilitate such co-operation to achieve such outcomes.

6 This is the second in a series of two hearings, the first of which will have taken place earlier in the same week. It was by different persons, to undertake different activities at different locations from the current two applicants' proposal. Separate sets of evidence have been filed for each hearing and these submissions are also separately filed for the current hearing. It should be noted that evidence placed before the first hearing is therefore not necessarily properly before the current hearing. They remain separate hearings for separate applications by separate persons.

7 Notwithstanding this, it is clear that much of the content of the evidence and the s42A reports for both hearings is identical. It has therefore been accepted that it would be appropriate to have witnesses whose evidence does not fundamentally differ for both hearings appear only at the first. However, it is important that the Panel notes that the part of these witnesses' evidence that relates to the current hearing is not properly before that first hearing. The remaining witnesses will have their evidence taken as read and will only focus on the differences in relation to these particular applications.

8 A similar approach is taken in these submissions, which rely extensively on the legal submissions for the applicants in the first hearing (WW1&2 Legal Submissions), which are appended. A similar heading structure will be followed with comments inserted where additional or different matters arise, which are then addressed.

9 The s42A report has recommended that all consents sought be refused. It is submitted that the recommendations are based on findings that in turn are based on fundamental errors of law and fact. Without those errors the findings and the recommendation are not available.

10 Essentially, the s42A report has failed to confine the assessment to what is properly before the consent authority as the “applications” and “proposal”. The S42A report appears to require the applicants to provide an impracticable level of certainty not required by law. It has failed to assess the effects of the proposal on “the environment”, by focusing on a “baseline” approach prescribed by a rule provision that is subject to appeal and not applicable to the applications, rather than an overall assessment of the effects of granting the applications against those of refusing them.

11 It has incorrectly excluded effects of intensive winter grazing from the existing environment based on a minor temporary contravention of a permitted activity. It has allowed potential enforcement issues to cloud the assessment of the proposals. It has improperly rejected modelling information that will be demonstrated to be an entirely suitable means of discharging the Applicants’ burden to show that the effects of allowing the activities are more likely than not to meet the applicable objectives and policy and Part 2 itself. These errors are compounded by a series of further technical and legal errors.

12 The Panel’s task is primarily an exercise of the Council’s statutory discretion under s104, which is not capable of being amended by a regional plan, let alone a proposed regional rule that remains subject to appeal. When the discretion imposed by the statute is properly exercised, without the legal and factual errors arising in the s42A report, subject to the correct standard of proof, then the appropriate decision will be to grant the consents sought, subject to the additional mitigation proffered through the Applicants’ evidence and subject to appropriate conditions. That is because that the evidence will show that it is more likely than not that such a decision better gives effect to the overall applicable policy hierarchy and purposes of the Act, than the s42A report’s recommendation.

13 The factual errors will be addressed in the Applicants’ evidence, which will consist of:

13.1 Factual evidence as to the basis, form and reason for the applications, provided by Mr De Wolde (supported by Mrs De Wolde), who are directors of the Applicants authorised to give evidence for the Applicants;

13.2 Expert nutrient loss modelling evidence by Mr Mark Crawford;

13.3 Additional expert nutrient loss modelling evidence by Mr Cain Duncan;

13.4 Expert evidence on soil sampling and effluent pond testing by Mr John Scandrett;

13.5 Expert soils and further expert nutrient modelling evidence by Dr Anthony Roberts;

13.6 Expert water quality evidence and overall planning evidence by Dr Michael Freeman;

14 These submissions adopt and rely on paragraphs 12 – 14 inclusive of the WW1&2 opening submissions for the remainder this introduction.

PRELIMINARY LEGAL ISSUES ARISING FROM THE S42A REPORT

Incorrect Fundamental Approach

15 The fundamental approach of the s42A report for the current hearing is sufficiently similar to that of the WW1&2 hearing that all the observations and submissions made under this heading at paragraphs 15 – 22 inclusive of the WW1&2 Legal Submissions are adopted and relied on for the current hearings as well. For the sake of brevity, wherever that is the case under headings below, for the same reasons, that will be denoted by the words "See WW&2 Legal Submissions paragraphs….." followed by the paragraph relevant numbers.

Correct Basis

16 See WW&2 Legal Submissions paragraphs 23 and 24 inclusive.

What is the Activity?

17 See WW&2 Legal Submissions paragraphs 25 – 28 inclusive.

18 The same types of errors identified in paragraphs WW&2 Legal Submissions paragraphs 29 – 33 inclusive are again made in the s42A report for the current applications, with some subtle distinctions, which do not alter the overall impact or conclusion.

19 What will be demonstrated by the evidence of Mr (and Mrs) De Wolde is that:

19.1 The “persons” who undertake land uses on the land other than the dairy platforms of WW4 and WW5 are not Woldwide Four Ltd or Woldwide Five Ltd, but other “persons”, such as Woldwide Runoff Ltd. , Those other persons all undertake land uses that do not contravene s9(2), because they do not contravene Rule 20. That includes activities such a cut and carry operations and providing wintering services to other persons, including WW1 and WW2. Contrary to the s42A report, neither of these other persons has lodged an application for land use consent;

19.2 The Applicants do not propose to undertake any land use that would contravene Rule 20 without a land use consent, on land other than their own dairy platforms;

19.3 The only reason land owned by one of these other persons (Woldwide Runoff Ltd) was included in the land use applications was because the processing officer, relying on what will be demonstrated to be an incorrect interpretation of Rule 20, stated that processing could not continue unless those blocks were included in the land use[1]. It was included by WW4&5, not by any other “person”. None of these other persons have lodged any of the applications before this particular hearing.

20 Paragraphs 35 and 36 of the WW&2 Legal Submissions are less applicable to the current matter.

Interpretation of Landholding

21 As the panel directed in its minute of 23 September 2019, the issue of the correct interpretation of the term “landholding” is to be dealt with only once. That direction was accepted on the clarification that that did not have any consequences for the separateness of the current hearing or its findings.

22 Nevertheless the key argument as to the interpretation is the same one and for that reason, paragraphs 37 – 45 inclusive of the WW1&2 Legal Submissions are adopted and relied on in full. However, there are some subtle indifferences in the factual matrix on which the argument relies in paragraphs 46 – 51 inclusive of the WW&2 Legal Submissions. Those

[1] The questionable exercise of the s88(3) power involved is examined separately under Procedural Irregularities” below.

paragraphs are therefore included below and reworded to identify the appropriate applicants.

23 Both applicants each meet the definition of "person", each being "a corporation sole". Although the definition also provides for "a body of persons" to be regarded as a "person", the Court of Appeal in *Cometa United Corp v Canterbury RC* [2007] NZRMA 266 (HC) requires a significant level of proof of the "body of persons" being a single person. The evidence of Mrs De Wolde will demonstrate that the applicants are persons in their own right and that there is not the type of constitution and set of rules that *Cometa* requires in order to demonstrate that there is another "person", of which these two persons make a part.

24 Importantly, there are only two persons who have lodged applications. They are Woldwide Four Ltd and Woldwide Five Ltd. The best evidence the Panel has before it is the applications and evidence submitted by those persons. It excludes the possibility of any other "person" having sought consent, unless the applicants had been misleading. It is submitted that the Panel would require very strong evidence to show this was the case. This is particularly so because of the fact that any consents gained as a result of misleading information would be of very little value, given the effects of *Gillies* and s128(1)(c).

25 Most importantly, there is no evidence to demonstrate that either of these applicants seeks to undertake a land use outside of their own dairy platforms that would contravene Rule 20 in the absence of a resource consent. It is an offence under s338(1)(a) to contravene s9(2). The evidence required to establish that either Woldwide Four Ltd or Woldwide Five Ltd is itself intending to undertake land uses that would contravene Rule 20 and thus s9(2) on any of the other land referred to as part of the same "landholding" by the s42A report is simply not there.

26 The evidence of Mrs De Wolde specifically demonstrates that other persons (including Woldwide One Ltd, Woldwide Two Ltd, and Woldwide Three Ltd) are persons using those other pieces of land and intending to do so. They do so for land uses that either do not contravene Rule 20 or are expressly allowed by a land use consent.

27 For the remainder of this heading, see Paragraphs 52 & 53 of the WW1&2 Legal Submissions.

What are the effects of allowing the activity?

28 See WW&2 Legal Submissions paragraphs 54 – 58.

Intensive winter grazing set back issue

29 At paragraph 4.1.7 the s42A report endeavours to rely on an alleged contravention of Rule 20(a)(4) PSWLP and Rule 17 of the operative Regional Water Plan to exclude all the intensive winter grazing related nutrient loss from the baseline. That is based entirely on the observation of one particular day in June 2019. However, the observation misses the key point of *Hawthorn*, which is that the existing environment must include permitted activities that are available.

30 Mr De Wolde's evidence will demonstrate that there is now full compliance and has been since the very day that the issue was pointed out. This is also a rule that only came into effect from 1 May 2019. To suggest that therefore none of the nutrient loss associated with that land use can be taken into account is simply wrong as a matter of law. The point is that if the resource consents sought are not granted, then the applicant will rely on this permitted activity rule, which it can lawfully do as long as it maintains the five metre buffer required (and meets the other permitted activity requirements), which the evidence provided by Mr De Wolde demonstrates will be achieved.

31 The 22 August 2019 letter for the Applicants **attached** to the WW1&2 Legal Submissions warns against using a consenting process as an enforcement tool. As the authority it cites makes clear, the consent processing and enforcement functions are separate and one must not usurp the other. The question is not "what has the applicant done in the past?", but "what is it likely that the applicants can and will lawfully do if the consents are not granted?". Given the assumptions that should be made that the consent authority will enforce its plan provisions[2] and the evidence as to compliance that will be given by Mr De Wolde, it is certainly more likely than not that the "existing environment" nutrient losses modelled for IWG will result if these consents are not granted.

Section 108

32 See WW&2 Legal Submissions Paragraphs 59 – 61

[2] In accordance with s84(2) RMA

REMAINDER OF WW1&2 LEGAL SUBMISSIONS – PARAGRAPHS 59 – 112 INCLUSIVE

33 See WW&2 Legal Submissions paragraphs 59-112 inclusive.

Dated 25 September 2019

J M van der Wal
Solicitor for the Applicants