

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

UNDER the Resource Management Act 1991

IN THE MATTER of appeals under Clause 14 of the First
Schedule of the Act

BETWEEN TRANSPower NEW ZEALAND LIMITED
(ENV-2018-CHC-26)

FONterra CO-OPERATIVE GROUP
(ENV-2018-CHC-27)

HORTICULTURE NEW ZEALAND
(ENV-2018-CHC-28)

ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)

WILKINS FARMING CO
(ENV-2018-CHC-30)

**APPLICATION TO STAY PART OF PROCEEDING PENDING DETERMINATION
OF APPEAL IN THE HIGH COURT**

30 August 2023

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GORE DISTRICT COUNCIL,
SOUTHLAND DISTRICT COUNCIL &
INVERCARGILL DISTRICT COUNCIL
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF
CONSERVATION
(ENV-2018-CHC-36)

SOUTHLAND FISH AND GAME
COUNCIL (ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED
(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW
ZEALAND
(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POUHERE
TAONGA
(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED
(ENV-2018-CHC-42)

THE TERRACES LIMITED
(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED
(ENV-2018-CHC-44)

ROBERT GRANT
(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LIMITED,
KODANSHA TREEFARM NEW ZEALAND

LIMITED, SOUTHLAND PLANTATION
FOREST COMPANY OF NEW ZEALAND
(ENV-2018-CHC-46)

TE RUNANGA O NGAI TAHU,
HOKONUI RUNAKA, WAIHOPAI
RUNAKA, TE RUNANGA O AWARUA &
TE RUNANGA O ORAKA APARIMA
(ENV-2018-CHC-47)

PETER CHARTRES
(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED
(ENV-2018-CHC-49)

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND
(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

To The Registrar of the Environment Court

And to The Appellants

And to The section 274 parties

Application to stay proceeding

1. Southland Fish and Game Council (“Fish & Game”) and the Royal Forest and Bird Protection Society of New Zealand Inc (“Forest & Bird”) (together “Applicants”) apply for a partial stay of these proceedings pending the determination of their appeal to the High Court against the Eighth Interim Decision of the Environment Court.¹
2. This application is made pursuant to sections 269 and 272 of the Resource Management Act 1991 (RMA) and rule 18.10 of the District Court Rules 2014.
3. The application relates to appeals on Rule 78 of the proposed Southland Water and Land Plan (pSWLP). The High Court appeal relates to paragraphs [74] to [120] of the Environment Court’s decision, excluding those parts of [114] to [120] in which the Court finds that there should be amendments to Appendix N and the directions in [120] that there should be amendments to Appendix N. This application similarly excludes the Court’s findings that there should be amendments to Appendix N and directions in [120] that there should be amendments to Appendix N.

The Court’s powers

4. The Court’s powers to stay a proceeding derive from sections 269 and 272 of the RMA, and rule 18.10 of the District Court Rules 2014. The

¹ *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 158

Court summarised its powers in the case of *Selwyn Quarries Limited v Canterbury Regional Council*, as follows:²

Section 272 of the Act provides that the Environment Court shall hear and determine all proceedings as soon as practical after the date on which the proceedings are lodged unless, in the particular circumstances of the case, it is not appropriate to do so. That provides the court with the flexibility it needs to manage its case (pursuant to s 269) and recognises that it may be appropriate to stay or adjourn a proceeding for a variety of reasons.

Through s 278 of the Act, the Environment Court has the powers of a District Court which enables it to utilise the District Court Rules. Rule 18.10 District Court Rules 2014 allows the court, pending the determination of an appeal, to stay a proceeding subject to any conditions it thinks just.

Legal principles with respect to applications to stay proceedings

5. The over-arching principle applying to any application for the adjournment (or stay) of a proceeding must be the interests of justice overall.³ In determining whether to grant a stay, the Court must weigh a range of factors to determine the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal succeeds.⁴
6. The relevant principles for consideration in an application for stay pending appeal were set out by the High Court in *Bergman v Bergman* and have since been applied by the Environment Court:⁵

(a) Whether the appeal may be rendered nugatory by the lack of a stay;

² *Selwyn Quarries Limited v Canterbury Regional Council* [2018] NZEnvC 194 at [9]-[10].

³ *Director-General of Conservation v Waikato Regional Council* A232/02 at [16]. See also *Selwyn Quarries Limited v Canterbury Regional Council* [2018] NZEnvC 194 at [11], and *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 196 at [11], citing the original stay decision in *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 110.

⁴ *Duncan v Osborne Building Limited* (1992) 6 PRNZ 85 (CA) at 5. See also *Te Rununga o Ngati Awa v Bay of Plenty Regional Council* [2020] NZEnvC 52 at [24] and *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2021] NZHC 201 at [18].

⁵ *Bergman v Bergman* [2014] NZHC 1567 at [9]; see also *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 196 at [11], citing the original stay decision in *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 110.

- (b) The bona fides of the applicant as to the prosecution of the appeal;
- (c) Whether the successful party will be injuriously affected by the stay;
- (d) The effect on third parties;
- (e) The novelty and importance of questions involved;
- (f) The public interest in the proceeding; and
- (g) The overall balance of convenience.

7. The apparent strength of the appeal now appears also to be generally recognised as an additional factor.⁶ The Environment Court in *St John's College Trust Board Progressive Enterprises Limited v Auckland Council* noted that the wise use of parties' and the Court's resources should also be considered in relation to an application to stay proceedings:⁷

[28] Progressive submitted that there is a presumption in the Act against delay. I do not agree. The critical question is whether there is unreasonable delay. In some cases awaiting the outcome of another court's decision will amount to delay that is unreasonable, but in others it will not. Financial factors are one aspect to be considered, but overall the wise use of the parties and the Court resources must be taken into account in deciding whether or not a delay is such that it becomes unreasonable. I accept that speedy resolution is a goal, but I agree that it should be afforded no additional priority over saving expense or indeed the appropriate allocation of the court's resources. It is all a question of balancing these factors in the context of the particular case before the Court.

8. The principles cited above were applied in the Environment Court's decision on an unopposed stay application by Southland Regional Council, staying appeals on Rule 24 of the pSWLP.⁸

Grounds for Stay Application

9. The application for stay is made on the overall grounds that the interests of justice support a stay in circumstances where:

⁶ *Bergman v Bergman* at [10]

⁷ *St John's College Trust Board Progressive Enterprises Limited v Auckland Council* [2011] NZEnvC 70

⁸ *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 3

- a. The High Court appeal concerns (inter alia) the scope of appeals on, and vires of, Rule 78 and 78A.
- b. If the appeal is successful, the Environment Court will be required to reconsider the 8th Interim Decision insofar as it relates to Rule 78 and Rule 78A, and any subsequent decision(s) made on those rules are also likely to be affected by the outcome of the appeal.
- c. Southland Regional Council has disputed scope for Rule 78A. The Applicants consider the Environment Court is *functus officio* with respect to its findings that:
 - i. There is scope for a bespoke rule that creates a limited consent regime (at [100]).
 - ii. Rule 78A will apply to local authorities only (at [106]).

Accordingly, it considers that the High Court is the appropriate forum for the issue of scope for Rule 78A (and Rule 78) to be determined.

- d. The interconnectedness of the Court's decisions on Rule 78 and Rule 78A means that it is appropriate for issues of scope and vires to be determined with respect to both rules, and makes it inefficient to continue with consideration of Rule 78A in the Environment Court.
- e. The appeal does not affect the Environment Court's decision that there should be amendments to Appendix N and the associated directions in [120] that there should be amendments to Appendix N. Accordingly, the Court can proceed to make a final decision on Appendix N and it can be

made operative, and this is not affected by the stay application.

10. The following additional and following grounds apply (with reference to the *Bergman v Bergman* considerations):

- a. The Applicants are bona fide in their prosecution of the appeal. The appeal has been the subject of careful consideration in light of the Applicants' desire that the pSWLP is made operative as soon as possible. The appeal will be prosecuted by the Applicants as quickly as the High Court's resources allow (consideration (b)). The appeal does not affect the Court's ability to continue to a final decision on Appendix N.
- b. There will be an effect on third parties when the pSWLP provisions relating to activities in modified watercourses are made operative. Effects on third parties are minimised by achieving certainty as to the regulatory framework, rather than proceeding to finalise provisions which may subsequently require amendment as a result of the appeal (consideration (d)).
- c. The appeal raises important questions. The management of activities in modified watercourses engages matters of national importance, and their reconciliation with objectives of drainage maintenance, that are of significant concern to the Applicants and others (consideration (e)). For the same reasons there is significant public interest in the proceeding (consideration (f)).

11. Accordingly, the overall balance of convenience favours granting the stay.

Position of other parties

12. The Applicants requested that any party opposing the stay application advise it of this by Monday 28 August 2023. The only responses received were from counsel for the Council and the Director-General of Conservation, both of which advised that they do not oppose the application.

Hearing

13. On the basis of its understanding that no party opposes the application, the Applicants do not seek a hearing and request that the application is determined on the papers.

14. Should any party subsequently file a Notice of Opposition, the Applicants will seek to be heard.



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Sally Gepp / Shoshona Galbreath
Counsel for Southland Fish and Game Council
and the Royal Forest and Bird Protection Society of New Zealand Inc

Date: 30 August 2023