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 ONE LIMITED, WOLDWIDE TWO LIMITED,
Applicants

LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANTS AS TO SPECIFIC LEGAL QUESTIONS

Duncan Cotterill
Solicitor acting: J M van der Wal
PO Box 5, Christchurch 8140

Phone +64 3 379 2430
Fax +64 3 379 7097
hans.vanderwal@duncancotterill.com

DOES THE REFERENCE IN PSWLP RULE 20 TO "COWS" MEAN ALL COWS OR JUST MILKING COWS?

1 The approach to interpretation of plans is set out in the 22 August letter. The plain and ordinary wording, purpose and text and arrangement play a role.

2 The critical clause is "the dairy platform had a dairy effluent discharge permit on 3 June 2016 that specified a maximum number of cows", which appears in Rule 20(a)(ii)(2). It does not define "cows", which on that clause alone, could mean simply any type of cows.

3 However, as is clear from s5 Interpretation Act, purpose and context are important as well. As the Court in *Powell v Dunedin CC* [2004] 3 NZLR 721; (2004) 11 ELRNZ 144; [2005] NZRMA 174 (CA) found: "*Chambers J determined that the term "residential accommodation" was ambiguous but said that, quite apart from that ambiguity, it would make 20 no sense to interpret the term "residential accommodation" divorced from its immediate context, particularly the objectives and policies of the Marina zone."*

4 Clause 29(a)(ii) only applies if there is a dairy platform on the landholding. Also relevant is that an alternative to Clause (2) is Clause (1), which requires that "the dairy platform has a maximum of 20 cows". Clause (2) refers to a dairy effluent discharge permit with a specified maximum number of cows. Importantly, Clause (iii), which also forms part of Rule 20, places limits on intensive winter grazing, which has not limits on total cow numbers, but only on mob sizes. It uses a different term, namely "cattle".

5 The term "cows" is used only specifically in connection with the particular farming activity that is a "dairy platform". That term is defined at p 108 of the PSWLP as "An area of a landholding where dairy cows being milked on a daily basis are kept during the milking season". It makes clear that anything other than dairy cows being milked on a daily basis is not part of the land use being controlled by this particular clause. It is significant that although dairy cows are involved in "intensive winter grazing", the term then used is "cattle", which includes more than just a "milking cow".

6 If this context is not sufficient, the purpose of the provision, which it is established law is found in the policies and objectives of the plan (see for example *Brownlee v CCC,* at paragraph [25] onwards), leaves little doubt that only milking cows during the milking season is used. It must be common ground that Rule 20(a) is a key method whereby policies 5, 10 and 16 are

given effect. Those policies all contain the clause "generally not granting resource consents for additional/new dairy farming of cows". Helpfully, at p108 the PSWLP defines the clause "Dairy farming of cows" as "The farming, including grazing, of milking cows on land during the milking season".

7 It is therefore patently clear from the purpose and the context that only cows that were actually being milked was intended.

8 Avoiding an absurd consequence is also a reason that can add weight to favouring a particular interpretation. In the current situation, if "cow" is given its literal meaning, it would denote a female bovine. That would mean that if a dairy farmer happened to have beef cattle on the same "landholding", only the female cattle would be caught, but not the male cattle. There is no water quality-related reason to differentiate between the genders of non-lactating cattle, as their effects on water quality are not dependent on their gender.

9 The key issue is obviously that lactating cows produce considerably more faecal matter and urine. For this reason they are the target of this rule.

10 The linking to dairy effluent discharges permit numbers also strengthens the inference that lactating cows were the intended target of the rule. Every single farm with lactating cows will generate point source effluent from the dairy shed and cannot avoid that. In contrast, cattle do not need to be wintered in a location where they create a point source discharge, but can be wintered outside.

11 In dairy farming terms and for the purposes of the PSWLP non-lactating cattle are not being used for dairy farming or part of the "dairy platform" land use. Non-lactating cattle, be they beef cattle of either gender, R2 cows or cows being wintered are not cows being used for dairy farming as intended by the applicable policies and the target of Rule 20(a)(ii).

WHAT IS REQUIRED FOR A LAND USE CONSENT FOR FARMING ACTIVITIES TO BE EXERCISED? THIS INCLUDES THE SUB-ISSUE OF: CAN A RESOURCE CONSENT BE SURRENDERED BY VIRTUE OF THE ACTION OF A CONSENT HOLDER OR DOES IT REQUIRE A FORMAL SURRENDER AND ACCEPTANCE UNDER RMA S138?

12 While there is no shortage of authority on how a consent is given effect, it is all in the context of the lapsing of consents under s125, which determines

that a consent will lapse unless it is given effect within the specified period (with a default period of 5 years). There is no prohibition against holding multiple consents that authorise the same activity. The court in *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 held that there was no legal impediment to an application being made for resource consent when another consent was already in existence in relation to the same activity or use (see paras [235], [236]). This followed the decision of Sutton v Moule 2 (1992) NZRMA 41 (CA). Because that can lead to issues, the consent condition requiring the surrender of a previous consent before being able to rely on the new consent has become standard practice for many councils, including the SRC.

13 Section 125 confirms that a consent that has been given effect will not lapse, however s126(1) confirms that a consent that has not been exercised for five years can be cancelled by the consent authority. As a result, it is clear that a consent that has been given effect and will not lapse, may then subsequently not be exercised. On this basis it is submitted that even if the 2017 consent had been given effect, it does not necessarily follow that it the consent holder will continue to "exercise" that consent. Under *Hawthorn* only existing consents reasonably likely to be exercised form part of the existing environment. It seems that if the 2011 consent still exists and it provides a more generous allowance, it is more likely to be relied on.

14 That makes the question as to whether it does still exist of considerable importance and potentially renders the question as to whether it was given effect of academic importance, although it still addressed below for completeness.

15 It is common ground that no notice of surrender has been signed or presented by the consent holder. It is on this basis that the implicit surrender issue has arisen. Section 138 is very clear on its wording; two events have to occur before a consent can be surrendered:

15.1 The consent holder must give written notice to the consent authority of the surrender (s138(1)); and

15.2 The consent holder must receive a notice of acceptance of surrender from the consent authority.

16 There is no authority for the proposition that a consent can be surrendered by implication. It is submitted that this is for good reason, because the statutory provisions expressly exclude that. While some room for filling in gaps is left in statutory interpretation, the interpretation must still be something that can still be accommodated by the wording of the enactment. In this case that is not possible.

17 The court in **Ministers for Canterbury Earthquake Recovery v Ace Developments Ltd** [2015] NZHC 1027 referred to Pearce and Geddes in Statutory Interpretation in Australia

> *"All Words have Meaning and Effect"*
>
> *As a general principle, the courts have pointed out that they are not at liberty to consider any word or sentence as superfluous or insignificant. All words must prima facie be given some meaning and effect*: This statement made by the courts in ***Commonwealth v Baume***(1905) 2 CLR 405 at 414 per Griffith CJ[1]was also referred to in approval by the court in *Ace Developments Ltd.*
>
> *"I summarise these authorities by acknowledging the importance of recognising that all words used by Parliament should have effect unless that leads to a conclusion which does not make sense."*

18 To similar effect was the observation of Thomas J **in *R v Pora*** [2001] 2 NZLR 37 (CA*)* in relation to the Criminal Justice Act 1985, that;

> At [133] "*Furthermore, to permit s 4(2) to predominate would be to rob s 2(4) of any meaning at all contrary to the basic premise of statutory interpretation that* ***the Courts must seek to give effect to every word of an enactment.'***[2]

19 It is accepted that one should not "do violence to the text"[1]. It is submitted that to find that a resource consent can be surrendered by anything other than a notice of surrender and receipt of a confirmation of acceptance of surrender does violence to the text of s138.

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[1] Wiles v Brant Homes Ltd [2013] NZHC 3246

20 The Statute does allow for some implied actions, but those are expressly provided for. An example is s3A, where it makes it very explicit that permission to rely on another's consent can be given implicitly. It is submitted that in view of this, the fact that s138 includes no such wording, confirms that it was the legislator's intent not to provide for anything other than the express and written surrender is the only manner in which a surrender is possible.

21 There is one case that might be of some limited assistance, namely *Pelorus Wildlife Sanctuaries Ltd v Marlborough DC* [2012] NZEnvC. It simply confirms that motives are irrelevant and that the surrender is effected by the written mechanism specified by s138.

22 The 2011 consent therefore remains existent and is likely to be relied on if the current suite of consents is not granted.

23 Subject to this, the other part of this question is addressed, even though it is not determinative. As indicated, the s125 authority must be applied with caution, as it is for another purpose, namely determining whether a consent has lapsed. In this case, the purpose is different; it seems to be to prevent a consent holder from relying on both consents at the same time.

24 The critical issue is that the condition says that the 2011 consent must be surrendered before the new consent is given effect. Under *Gillies Waiheke* it is clear that an activity that occurs other than in compliance with its resource consent conditions is not authorised by that consent. As a matter of law then, it was simply not possible to rely on the new consent until the old consent had been surrendered.

25 The land use consent states that it must be exercised together with the discharge permit. Again, it could not be exercised unless the discharge permit was exercised.

26 Nothing was done that would have contravened s9(2), but for the consent. Put differently, the land use consent was not relied on to authorise the land uses. It could not have been, because a key condition was not complied with. If the wording of the land use consent is considered, that becomes obvious.

27 Condition 2 of the land use consent states that:

This consent shall be exercised in conjunction with Discharge Permit AUTH-20171278-01, Water Permit AUTH-20171278-02, or any subsequent permits.

28 There is no such thing as "technical non-compliance". *Gillies* does not recognise it. It is simple; the discharge permit could not be lawfully exercised because the 2011 permit had not been surrendered. The land use consent could not be lawfully exercised. The s42A report on the one hand argues that all intensive winter grazing on a particular block must be excluded because on one particular day there was a contravention of a setback requirement, but then argues that the land use consent is included even though there is a clear breach of a condition thereof and of the associated discharge, which clearly states they could not be relied on at all.

29 Despite the caution urged against relying on s125 authority, *Goldfinch v ACC* [1997] NZRMA 117 does provide some assistance. At p15 the Court observes*: The answers to whether a consent has been given effect to must, in my view, be one of degree and will vary from case to case depending on the facts found by the Tribunal and the answers to questions such as, 'What is the nature of the work authorised by the consent', 'What in fact has been done', 'Why has it not been completed'. 'Why has it been discontinued', 'Was this discontinuation voluntary and justified'?"*

30 The obvious reason here is that the discontinuation was because it was realised that there was a fundamental problem with the way the consents had been granted. While this is a factual issue, it is relevant; not only was the wrong mitigation weighed and then relied on for the grant, there were actual factual errors in the processing as well, which mean that what was considered and granted was not what had been sought. *Gillies* is authority for the proposition that a consent cannot grant more than what was sought. In effect that is what the 2017 suite of consents did.

CAN THE HOLDER OF A CONSENT FOR WHICH S127 RMA CHANGE HAS BEEN GRANTED CHOOSE NOT TO RELY ON THAT CHANGE?

31 Section 127 makes it clear that a change application is to be processed as if it is a resource consent and that ss88-121 apply with the necessary modifications.

32 It is accepted that none of those sections deal with giving effect to the change, which only arises in s125. Likewise, cancellation under s126 and

surrender under s138 also appear not to be included. It is submitted that this is not a deliberate exclusion, but rather a failure to contemplate that a situation might arise whereby a change need not be given effect.

33 Holding that it was deliberate leads to absurd consequences, which should be avoided. As is the case here, s127 changes may well be applied for as a suite of consents enabling a proposal to occur. That was the case with the change to the WW3 consent. It was sought in anticipation of the grant of new consents for WW1 and 2. It cannot be that if it is not yet possible to implement the new consents, that they are not exercised and therefore sit in abeyance, but the s127 change is automatically in place even though nothing has been done in reliance on it. In fact, there may be factual circumstances that may not make its exercise possible.

34 To prevent these anomalies it should be treated the same as the other types of resource consent conditions.

35 Even if this interpretation is not available, it is not necessarily a "knockout blow", as there is still some ability to look at a "baseline" that includes some unlawful activities: *McGrade v Christchurch CC* [2010] NZEnvC 172. Ultimately, this all arises from the significant errors made in processing the 2017 consents. These raise issues of fairness, which as the Court in *Anzani Investments Ltd v North Shore CC* A124/01 found can be taken into account. As the Court found there, *"In short, the history of the application is unusual, such that we consider this to be a case where factors exist going to basic fairness and equity - factors which we consider relevant and reasonably necessary to take account of in determining the appeal pursuant to s.104(1)(i) of the Act"*.

36 Irrespective, these are fairly exceptional circumstances, which has consequences for the word "generally".

CONCLUSION

37 Ultimately it is submitted that the legal questions must be answered in a way that will leave open only the following conclusions:

37.1 The term "cow" in rule 20(a) is intended to mean a lactating dairy cow that is part of a dairy platform as defined;

37.2 The sludge that was modelled for the Horner Block was not applied in reliance on any of the 2017 consents and should be taken into account as modelled;

37.3 The 2011 consents have not been implicitly surrendered, as they cannot be. They still exist and if the current suite of consents is not granted, they and Rule 20(a) are likely to be relied on in the manner modelled by the Applicants.