www.al.nz | lawyers@al.nz

5 December 2023

anderson lloyd.

Supreme Court has the final say on water bottling appeals

The Supreme Court has upheld the Court of Appeal's decision relating to water bottling consents. This has implications for water rights in Canterbury until future regional planning processes provide for potential change.

Background

The Supreme Court has released its Decision[1] on 20 November 2023, upholding the Court of Appeal's ruling[2] that the Canterbury Regional Council (**ECan**) decisions to approve a change in the consented use of water to enable water bottling (without consideration of the 'taking' of water at the same time) was unlawful.

Our previous Article on the Court of Appeal's decision summarises the relevant background to the appeals and the key findings, including:

- The case involved consents issued by ECan to two entities who had sought to change the use of existing water consents from industrial purposes to be used for water bottling.
- The issuing of consents by ECan led to public opposition, including judicial review proceedings initiated by Aoteaora Water Action Inc (**AWA**). The High Court initially considered the ECan decisions were not unlawful,[3] however the Court of Appeal disagreed.
- The Court of Appeal considered that the Canterbury Land and Water Regional Plan (**CLWRP**) made specific distinction between 'take or use' and 'take and use' of water, as those phrases appeared differently throughout the plan. As ECan had not considered the authorisation to take water as well as the change of use, the consents were held not to have been lawfully granted.

The effect of the Supreme Court decision for Canterbury water users, is that take and use of groundwater cannot be separated into distinct activities and must be assessed together. Therefore, there is no ability to transfer or change use of an existing water consent for a different use without also effectively reapplying for the consented take (for the new use) at the same time.

Implications from the Supreme Court decision:

- The Court focussed on the narrow issue of interpretation of the rules of the CLWRP. While it considered the RMA conceptually allows for the disaggregation of take and use of water, it focussed on the CLWRP's departure from this by considering the rules, policies, and objectives of the plan, in context.
- The Court saw the proposition that the take aspect of a consent could be banked and used for a different use, as problematic.
- The fact that a take application requires a use to be identified, and for the effects of the take and use to be assessed together, provides some support for the view that assessing use only, is less than optimal.
- The fact that some rules referred to "taking *or* use", in contrast to the references to "taking *and* use" supports the proposition that the different phrasing in the CLWRP was carefully chosen and deliberate, and contemplated consideration of take and use together. The Court dismissed submissions from ECan to the effect that such drafting "should not be afforded particular significance".
- The taking of groundwater under rules which reference "take and use" requires consideration of both components in an aggregated way.
- The minority judgement by Williams J agrees with the majority, but takes a broader contextual

[1] *Cloud Ocean Water Limited v Aotearoa Water Action Inc and others* [2023] NZSC 153

[2] *Aotearoa Water Action Inc. v Canterbury Regional Council* [2022] NZCA 325

[3] *Aotearoa Water Action Inc. v Canterbury Regional Council* [2020] NZHC 1625

This publication is intended only to provide a summary of the subject covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this document without first obtaining specific professional advice. If you require any advice or further information on the subject matter of this article, please contact the partner/solicitor in the firm who normally advises you.

Supreme Court has the final say on water bottling appeals

approach to interpretation of the rules in the CLWRP, by way of referring back to the National Policy Statement Freshwater Management 2020 (NPSFM). His Honour's interpretation of methods in the NPSFM includes a "need to achieve allocative efficiency by granting an amount of water for abstraction that is reasonable for the intended use" (para 97). And that the NPSFM binds the question of water use with required volume, hence "pre-existing take permits cannot be banked and repurposed, and authority for new uses cannot be decoupled from abstraction" (para 99).

Want to know more?

The Supreme Court decision is evidence of how the drafting of planning instruments is critical to land and water rights. Specifically for Canterbury, ECan is required to notify a plan change to its regional plan no later than 31 December 2024, in order to implement the National Objectives Framework (**NOF**) and the NPSFM. The process will be publicly notified, allowing for public input before decisions are made on the new plan, and may provide an opportunity to reconsider the drafting of 'take and/ or use' provisions. If you have any questions about the implications of the Supreme Court decision on your current water rights or future objectives, or want information about future planning processes, please contact our specialist environment planning and natural resources team.

This publication is intended only to provide a summary of the subject covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this document without first obtaining specific professional advice. If you require any advice or further information on the subject matter of this article, please contact the partner/solicitor in the firm who normally advises you.