

*Richard Gardner*  
**EVIDENCE** *Federated Farmers*  
**TOPIC** CIMO PC131/PC18  
**SUB#** 015  
**DATE** 14/6/2016

**BEFORE THE ENVIRONMENT COURT**

ORIGINAL

Decision No. C 45/2008

**IN THE MATTER** of the Resource Management Act 1991 (the Act)

**AND**

**IN THE MATTER** of appeals under Variation 2 to the Banks Peninsula Proposed District Plan under Clause 14 of the First Schedule of the Act

**BETWEEN**

E M BRIGGS  
(ENV C 196/05)

D W COLLINS  
(ENV C 167/05)

CANTERBURY REGIONAL COUNCIL  
(ENV C 193/05)

FRIENDS OF BANKS PENINSULA  
INCORPORATED  
(ENV C 173/05)

SUMMIT ROAD SOCIETY  
INCORPORATED  
(ENV C 207/05)

DIRECTOR-GENERAL OF  
CONSERVATION  
(ENV C 197/05)

ROYAL FOREST AND BIRD  
PROTECTION SOCIETY INCORPORATED  
(ENV C 198/05)



NEW ZEALAND INSTITUTE OF  
FORESTRY (CANTERBURY BRANCH)  
AND OTHERS

(ENV C 201/2005)

FEDERATED FARMERS OF NEW  
ZEALAND INCORPORATED

(ENV C 187/05)

A B NEWPORT AND ORS

(ENV C 176/05)

I D AND P J RICHARDSON

(ENV C 177/05)

A CRAW

(ENV C 178/05)

C J AND J M CHAMBERLAIN

(ENV C 179/05)

E J C AITKEN

(ENV C 181/05)

G P J DE LATOUR

(ENV C 182/05)

D P DE PASS

(ENV C 183/05)

A R DALGLISH

(ENV C 184/05)

D C CARTER

(ENV C 185/05)

R E AND M F MILLAR

(ENV C 186/05)



I D AND A M S CAMPBELL  
(ENV C 189/05)

K M AND F M STAPYLTON-SMITH  
(ENV C 194/05)

CHRISTCHURCH CITY COUNCIL  
(ENV C 203/05)

TRANSIT NEW ZEALAND  
(ENV C 209/05)

ZIAS INVESTMENTS LIMITED  
(ENV C 204/05)

ROBINSONS BAY TRUST AND  
PACIFIC INVESTMENT TRUST  
(ENV C 191/05)

Appellants

AND

CHRISTCHURCH CITY COUNCIL  
(formerly BANKS PENINSULA  
DISTRICT COUNCIL)

Respondent

Hearing: at Christchurch on 28 January – 1, 4, 5, 7, 8, 11-13 February 2008  
Site visit 18 February 2008

Court: Environment Judge J A Smith  
Environment Commissioner A J Sutherland  
Environment Commissioner C E Manning

Appearances: Mr G V Taylor and Ms S Schlaepfer for E M Briggs and D W Collins  
Ms A M Douglas and Mr P A C Maw for Canterbury Regional  
Council (**the Regional Council**)  
Ms J Cook for Friends of Banks Peninsula Incorporated (**Friends of  
Banks Peninsula**)  
Mr J Goodrich for Summit Road Society Incorporated (**Summit Road  
Society**)  
Mr A F J Gallen and Ms S K Voldseth for Federated Farmers of



New Zealand Incorporated, I D & P J Richardson, A Crow, C J and J M Chamberlain, E J C Aitken, G P J De Latour, D P De Pass, A R Dalglish, D C Carter (collectively referred to as **Federated Farmers or the farming interests**)  
 Ms J Borthwick for Zias Investments Limited (**Zias**)  
 Mr G Cleary for Robinsons Bay Trust and Pacific Investment Trust (**Pacific Investments**)  
 Mr C J Todd for Royal Forest and Bird Protection Society Incorporated (**Forest and Bird**) (signatory to mediated agreement, will abide decision of the Court, granted leave to withdraw)  
 Mr C S Fowler by memorandum for New Zealand Institute of Forestry (Canterbury Branch) and Others (**Institute of Forestry**)  
 Mr P N Rutledge for Director General of Conservation (**the DOC**) (signatory to mediated agreement, will abide decision of the Court, granted leave to withdraw)  
 Ms A C Dewar for Lyttelton Port Company Limited (**Port of Lyttelton**) (section 274 party)  
 Ms L L Sewell for Orion New Zealand Limited (section 274 party on ENV C 187/05)  
 Ms H Broughton for herself (section 274 party on ENV C 196/05)  
 Ms M Stapylton-Smith for herself  
 No appearance for Transit New Zealand Ltd (struck out)  
 No appearance for R E and M F Millar (struck out)  
 No appearance for R Columbus (struck out)  
 Mr C O Carranceja and Ms A Ray for the Christchurch City Council (**the City**)

Date of Decision: 24 April 2008

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**DECISION OF THE ENVIRONMENT COURT**

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- A: The Outstanding Natural Landscapes, Coastal Natural Character Landscapes and Rural Amenity Landscapes (including main ridgelines) as set out in evidence of A Rackham and Y Pflüger are confirmed subject to minor amendment to CNCL on the Zias property.
- B: Plan provisions as indicated in annexure "1:D" subject to the amendment outlined in this decision are confirmed.
- C: The appeals are resolved accordingly. The respondent Council is directed to prepare changes in accordance with decision.



*The scope of submissions, and the role and admissibility of expert evidence before the Court*

[217] Jurisdictional issues were raised at an early stage after appeals were filed and pre-hearing conferences held and remained a significant issue. Given the strong views of the parties and the costs to all parties of the process to date, we concluded we should firstly address matters on the merits before considering jurisdictional matters. Nevertheless, we acknowledge the challenges to the position of the Regional Council and the evidence of Ms Lucas. Also raised was whether Ms Briggs and Mr Collins could properly appear before the Court as experts given that they are appellants. We now deal with these issues.

[218] As discussed, the appeals of the Regional Council did not address either the delineation of ONL or CNCL. Their appeal related to methods and rules and was adequately addressed in terms of the mediated settlement. This gives rise to the question as to what role Ms Lucas was fulfilling in preparing and presenting her evidence to this Court. Ms Lucas did not feel that she was constrained by the appeal of the Regional Council and prepared her evidence on a wider basis as to what she considered the appropriate ONL and CNCL were without regard to jurisdictional issues before this Court. The statement of issues of the Regional Council filed in October 2007 made it clear that it was the position of the lines which was in dispute. However Ms Lucas justified many of her opinions on the basis that the RAL rules were not sufficient to address issues arising in those areas.

[219] It transpired that Ms Lucas had been briefed originally for the Regional Council at the stage of the submissions and decision by Council. She had advanced evidence, we gather, similar to that produced to this Court. After appeal Ms Lucas was aware of the Court process and was in fact retained by the Christchurch City Council to give them advice on the tenderers for the Landscape Study. She advised the City Council and, we understand, recommended the appointment of Boffa Miskell based upon the methodology proposed in their tender. Subsequently, throughout the process, she advised the City Council and made various comments both to the City Council and Boffa Miskell in respect of the proposed Landscape Study. In her own words Ms Lucas accepts that the majority of her recommendations to the City were adopted.



[235] Annexed as “4” is Ms Lucas’ ONL/CNCL map produced at the hearing. It is clear that many CNCL areas go beyond 300 metres and are therefore outside the Forest and Bird appeal. To the extent that Ms Lucas’ ONLs overlap CNCLs this could only be to the extent identified in annexure “5” [Ms Briggs’ LPA map] shown as LPAs. In short:

- (a) there is no appeal pursued in respect of CPA areas;
- (b) Ms Lucas’ evidence referring to ONL can only support 1997 LPAs;
- (c) in relation to coastal areas the CNCL can only add areas to the first ridge or 300 metres of MHWS whichever is lesser, relying on Forest and Bird’s appeal.

[236] It was clearly open to Ms Briggs to pursue the LPAs as per the 1997 Notified Plan, and her evidence supported that position before the Court. To the extent that Ms Lucas supported such a position, her suggested ONLs appear to include all the areas identified by Ms Briggs and therefore could be said to be generally supportive of that position. Given our conclusion on the merits of that argument, we have concluded that the Boffa Miskell position is to be preferred. We therefore also accept the Boffa Miskell position that there are certain areas identified in their Landscape Study which were outside the terms of the appeals before the Court, including Ms Briggs’, and therefore which the Court has no jurisdiction to grant generally. No evidence produced contradicted that position.

*Admissibility of expert evidence of Ms Briggs and Mr Collins*

[237] The issue in regard to Ms Briggs and Mr Collins is a more fundamental issue encapsulated by the maxim *Nemo in sua causa aequus*. Loosely it means *nobody is a fair judge in their own cause*.

[238] The obligation of an expert witness is to give independent evidence and Ms Briggs and Mr Collins were giving evidence in support of their own appeals. We accept either could give general evidence as lay witnesses. Mr Taylor for his part



accepted that even if these witnesses were accepted as expert witnesses, giving evidence in their own cases would go to the question of the weight to be given to their evidence.

[239] Having regard to the significant costs involved in these proceedings, we would have considered it important for both of these appellants to consider retaining independent experts. Mr Collins for his part acknowledges that he would not accept a role as a Commissioner in relation to these issues for Banks Peninsula given his appeal. It is difficult to see the distinction between that and acting as an expert witness for himself.

[240] We note that Ms Briggs is currently an employee of the Christchurch City Council in the role of principal advisor: natural environment. Essentially she has had to maintain a Chinese wall in her employment given that the City Council amalgamated with Banks Peninsula District Council in 2006 after these appeals were filed.

[241] Both Ms Briggs and Mr Collins acknowledged that they were foundation members of the Lyttelton Harbour Landscape Protection Association Incorporated, although both have since resigned. The objectives of the Association are telling:

- 2.1 *To promote the preservation and protection of the outstanding landscapes of the Lyttelton Harbour basin, particularly the coastal environment, headlands, ridges and outstanding natural features that form part of the Lyttelton Harbour basin landscape;*
- 2.2 *To advocate for the Lyttelton Harbour basin landscape;*
- ...
- 2.4 *To participate in statutory and non-statutory consultation processes to advance the preservation and protection of the outstanding landscapes of the Lyttelton Harbour basin including, but not limited to, the filing of submissions and appeals (where appropriate) under the Resource Management Act 1991 in respect of:*
  - (a) *district plan and regional plan review processes including variations and plan change applications regarding the same; and*
  - (b) *not relevant.*



[242] As Mr Carranceja for the City noted, the preservation and protection of outstanding landscapes in the objectives of the Association are not subject to the Part 2 limitations relating to inappropriate development. The advocacy role is one which is particularly noted as being inappropriate for expert witnesses given Clause 2 of the Code:

2. *An expert witness is not an advocate for the party who engages the witness.*

[243] In this regard we have carefully considered Ms Briggs' and Mr Collins' evidence. We conclude that they have prepared their evidence keeping in mind that they are parties giving evidence in their own cause. We do not consider that they have done anything untoward in the preparation of their evidence. We suspect, although we do not know, that their evidence would have been similar if given for a third party with which they had no involvement.

[244] We note in particular in relation to Mr Collins' evidence that there are a number of methods he has discussed which would result in better drafted provisions and that some of Ms Briggs' comments are repeated by one or more of the other expert witnesses.

[245] However, our conclusion is that the privilege afforded an expert witness to give opinion evidence is one of some importance. We recognise that many lay witnesses before the Environment Court give opinion evidence on a range of matters and that this tension is often recognised by the Court in the weight it attributes to a particular witness's evidence.

[246] The Court has reached the view that it needs to draw a line in the sand on this issue given the tendency of lay witnesses to give opinion evidence and experts to give evidence in their own cause from time to time. We consider that it is inappropriate as a matter of principle for expert witnesses to give evidence as experts in their own case. At the very least it will mean that little weight should be given to their evidence where there is a conflict with other witnesses. It also impacts upon the administration of justice because if some parties are allowed to give opinion evidence in their own cause,





they may be seen as getting preferential treatment before the Court compared with other parties.

[247] We accept that the issue has been left unresolved in the past although the purpose of the Practice Note as it relates to expert witnesses clearly seeks in part to address this type of issue.

[248] Overall the evidence of Ms Briggs in particular raises the broader issue in respect of expert witnesses before this Court who may give evidence criticising another witness's evidence, yet fail to undertake any analysis as is required under the Act and Practice Note in respect of their own opinions.

[249] This is the case with Ms Lucas' evidence and also with Ms Briggs. Little weight can be given to such expert evidence. In the circumstances of this case we have decided the case on its merits, although we note for the future that the issue of admissibility of expert evidence when given in its own cause or beyond the scope of appeal could properly be raised as a preliminary issue. In this case evidence given beyond the scope of the hearing may be relevant to issues of costs.

### *Section 293*

[250] It was suggested that section 293 could be utilised to achieve either the results suggested by Ms Lucas (although outside jurisdiction) or that sought by Boffa Miskell (although outside jurisdiction). We recognise that there is a direct connection between what is *on* a variation and alive in terms of the proceedings on appeal and the scope of the Court's jurisdiction under section 293. Whilst we recognise that section 293 does give power to grant relief beyond the scope of the appeal, we acknowledge that these cases also make it clear that the Court must consider that a reasonable case has been presented and opportunity has been given to interested parties to consider the proposed change.

[251] We have carefully considered the wording of section 293 and consider that little weight has been given in this case to the commencing words of *section 293(2)*. Although, of course, the criteria have been changed as a result of the 2003 Amendment,

