IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-404-000524

BETWEEN	NETHERLAND HOLDINGS LIMITED Applicant
AND	RICHARD GUY MANNERING AND URSULA MARIA MANNERING Respondents

Hearing: On the papers

Appearances: H Smith for the Applicant
P Hall and A Shakespeare for the Respondents

Judgment: 26 June 2009

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was reissued by me on
30.06.09 at 4:45pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

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[1] This case concerns applications for orders of specific performance or relief against the cancellation or proposed cancellation of a farming lease. Three such applications have successively been filed in response to the Mannerings' service of notices alleging breach of the lease. Exponentially the extent of alleged breaches has grown with each successive notice. I will view those notices shortly noting the changes between them. First, there needs to be some factual context given to explain the parties' disputes.

[2] The first page of this judgment notes that it has been given upon the papers. In fact two days were set aside in the Christchurch High Court for the hearing of evidence as the Mannerings' wished two of Netherland's witnesses to be cross-examined upon their affidavits. Initially 8 October 2008 was set aside to hear the cross-examination of both witnesses. It was also anticipated that I would have time on that date to hear counsels' submissions. Regretfully on 8 October 2008 there was time only for the cross-examination of Mr R H Wobben. Accordingly a further date was set aside on 22 April 2009 for the cross-examination of Mr D F Peddie. Again it was expected there would be sufficient time thereafter to hear counsels' submissions. Unfortunately, again there was insufficient time for those submissions and accordingly I directed they be filed in accordance with a timetable.

[3] I have now received all submissions.

Background

[4] The Mannerings are the lessors and Netherland the lessee pursuant to a deed of lease dated 17 August 2005 (the lease). The lease is of the Mannerings' farm property at Eagle Hill, Oxford. The lease was for a term of ten years and two months expiring 31 January 2015. Previously the parties had been in a landlord/tenant relationship since 2001. The lease was of the whole of the farm except the homestead, woolshed, two paddocks and yards retained by the Mannerings who continued to live on the farm. At no time during the lease did the Netherland farm manager live on the site.

[5] The farm comprises 574 hectares. In the hands of the Mannerings it had been operated as a dry land sheep and beef unit. In the hands of Netherland the land use has changed dramatically. It is now an intensive dairy support unit with a carrying capacity of 9,350 stock units, or about double the previous capacity. Had it remained a dry land sheep and beef unit Netherland would have paid about $90,000 per annum in rent. Instead it pays a rental of $295,000 to reflect the change in use.

[6] Disputes between the parties surfaced about mid-2007. Both parties were alleging breaches of the lease. The dispute resolution procedure contained in the lease was invoked on 6 December 2007. The parties met on 14 December 2007. The parties agreed regarding steps to be taken to enable issues to be agreed or respective positions to be further clarified.

[7] One month later on 15 January 2008 the Mannerings issued their first notice. The notice, in the form of a solicitor's letter, stated that the Mannerings intended to exercise a right to terminate the lease, and to re-enter and take possession of the land. The breaches allege, inter alia:

a) Use of water in excess of that permitted by resource consent.

b) Failure to maintain the gallery and pumps contrary to clause 8.1 of the lease.

c) Failure to maintain a lawful offal pit that complied with the Christchurch Regional Council proposed natural resources regional plan, and in breach of clause 8.3.1 (a) of the lease and of clause 10.5 (d) of the lease.

d) Failure to observe the provisions of the lease relating to the use of the airstrip.

[8] In response the applicant filed the first of its specific performance/relief against forfeiture applications to this Court. That application challenged the validity of the Mannerings' notice. Although it was not necessary for me at that time to rule

upon that challenge – because on 30 May 2008 the Mannerings served a second notice, in my view the challenge was soundly based. A valid notice was not served pursuant to s246 of the Property Law Act 2007 because it did not adequately inform Netherland of the nature and extent of the breaches complained of; it incorrectly informed them that the breaches complained about were incapable of remedy; and it did not adequately inform Netherland of their right to apply to a Court for relief.

[9] Mr Wobben and Mr Peddie both swore affidavits in support of Netherlands' original application before this Court.

[10] After the service of the second notice on 30 May 2008, counsel agreed the Court be requested to deal with that notice in the context of the then current proceedings. A timetable for the filing of affidavit evidence was agreed and by an amended notice dated 25 July 2008 the applicant again sought an order of specific performance relief against cancellation. As in its first application Netherland asserted that if it was in breach (which it denied) which entitled the Mannerings to re-enter the lease then any such breach had been remedied or, having regard to Netherland's conduct in the circumstances of the case there was an entitlement to relief against cancellation.

[11] Mr Wobben filed a second affidavit in support of Netherland's application. Also, affidavits from Mr A K Brough and Mr J J Ryan were filed on behalf of Netherland.

[12] In a proforma notice of opposition the Mannerings claimed they had a right to re-enter and cancel because of substantial breaches of the terms and conditions of the lease.

[13] The second Property Law Act notice was annexed in Mr Wobben's second affidavit. By its form and content it is a vastly improved effort by comparison to its predecessor. It restated the four breaches referred to in the Mannerings' first notice. It added 14 claims of breaches. The alleged breaches identified were:

a) To keep the land in good repair by failing to maintain and repair fences including disconnecting power to electric fences.

b) By failing to maintain repair or replace approximately 25 gates which were bent or broken.

c) Failing to maintain tracks around the property.

d) Failing to dispose of oil drums, toxic chemical containers, water troughs, plastic and tyres.

e) Failing to reinstate the terraces where the original offal pit was situated.

f) Failing to repair, maintain and keep in good order or plant, equipment, fittings and fixtures etc. and in particular by failing to maintain and repair water pumps which needed repair at a cost of approximately $50,000.

g) Failing to carry out maintenance on the centre pivot irrigators, the cost of which was approximately $4,000.

h) Failing to top dress the soil on a regular basis and at a proper time and failing to provide proof of top dressing applied.

i) Failing to stock the land in accordance with the rules of good husbandry and by permitting stock to graze in wooded areas without approval.

j) Failing to maintain hedges, orchards and horticulture in good order and condition and by allowing several native trees to die.

k) Failing to clear the land of noxious plants including gorse and broome on the terraces.

l) Failing to maintain water reticulation by disconnecting the water supply to the Mannerings' garden.

m) By allowing beef steers to graze on the land when land use was limited to the farming of TB accredited dairy stock.

n) By using the land for an illegal purpose by failing to comply with Environment Canterbury's (Ecan) resource consent restrictions regarding water usage.

o) By not reimbursing the Mannerings' expenses incurred to remedy Netherland's breaches including water reconnection charges and for other repairs carried out.

p) By using the airstrip for grazing without the Mannerings' consent.

[14] A notice then set out the extent of works required to be undertaken to remedy the breaches. Included in those was the requirement to top dress the soil or provide written confirmation of applications of a specified nature required to have been applied within the three previous years. This and other measures were required to be undertaken within 30 days. Those other measures included treatment of the property for gorse and broome, and payment of an amount of $100,000 to the Mannerings as reasonable compensation.

[15] A raft of short affidavits have been filed on behalf of the Mannerings in support of the Mannerings' opposition to Netherland's second application. Mr D S Hunt remembers Mr Wobben and Mr Mannering agreeing to allow Mr Mannering to connect an underground pipe from the nearest pivot irrigator to Mr Mannering's garden. Mr L C Wilson a livestock representative has known Mr Mannering since 1981 and has given him advice as the farm developed. He said Mr Mannering is meticulous in any work he did. He inspected the property with Mr Mannering and with Mr R L Ingelbrecht on 10 July 2008. He was "horrified" by the deterioration. Track access was limited to four-wheel drive vehicles only. Although work was being done on the tracks it was not sufficient. Native trees were mostly destroyed,

the fencing around them being substandard or non-existent. Plugging around some of the water troughs was severe. Drains appeared blocked. He observed a mob of beef steers. He was shown a fence line that had been flattened by cows and inadequately repaired. Stock had obviously been allowed access to shelter-belts. He feared some of the native vegetation was lost forever.

[16] Mr G L Morris remembers seeing sprinklers operating on 5 December 2007 when he visited the farm. He was on that date told by Mr Mannering that the water take was under full restriction.

[17] Ms P A Monteath was told by Mr Mannering on 11 January 2008 that water restrictions were in force at the time when she saw four centre pivots running.

[18] Mr R W Loe and his wife own the next door farm. He leases two properties that, like the Mannerings' property, have access to water for irrigation from the Waimakariri River. He said that although his properties are not on the same restriction band as the Eagle Hill property, the allowable take at low river flows is very similar to that consent. Nearing the end of the season in March and April 2007 he observed irrigators being used at Eagle Hill. He said this was when the properties he leased had been turned off and full restrictions were in place. In December 2007 it occurred again. He telephoned Mr Mannering to ask why Eagle Hill was irrigating when the 'Waimak' scheme was on restriction. At Mr Mannering's invitation Mr Loe visited him on 4 December 2007. They undertook an inspection of the farm. A rota-rainer, and a pivot were running. He says for the rest of the week and the next he saw irrigators being used when restrictions were in place. He found it unbelievable that it had not been noticed by Ecan. Late on 19 January 2008 he texted Mr Mannering to advise the irrigators were still running under full restriction.

[19] Many of the matters raised by these supporting affidavits were amplified upon by Mr Mannering in his second affidavit, dated 15 August 2008. He stated that in his view the grazing of stock in areas such as the wooded area and shelter belts is contrary to the terms of the lease; that the adequate provision of electric fencing would prevent it from happening. He says the issue is one of "poor maintenance and husbandry". He believes the farm is in a significantly worse state than it was when

the lease commenced and that a significant number of native trees (up to 12) have died from stock damage while the farm has been under Netherland's care.

[20] Mr Mannering accepts that while some gorse and broome was sprayed or cleared not long after the commencement of the lease in some areas the obligation to keep the property clear of noxious weeds has not been observed. He said gorse and broome "is now a significant problem on the terraces in particular".

[21] He said Mr Wobben's disconnection of the water pipe to his garden was "spiteful". Although top dressing receipts have been provided he cannot "connect those receipts to any application of lime fertilisers on the farm required by the lease". If top dressing had occurred and appropriate fertilisers and nutrients had been applied, it would be simple enough to give evidence to prove this.

[22] Mr Mannering said the water races and culverts have never been maintained – that an effluent problem could result.

[23] He rejects claims against him of breach of quiet enjoyment. He responds:

> "When our relationship was good, I used to wander the farm on occasions. Only as I noticed things were not as they should be and were deteriorating did my inspections become more frequent. I have never carried a notebook. I took steps I deemed necessary to protect the farm, by doing things such a shifting cattle out of trees, reconnecting electric fences and taking action when I saw that the pumps were flooding. Had I not, I believe the damage would have been far more severe."

[24] Although acknowledging some minor improvements had been made since the service of the first notice, Mr Mannering considers those superficial and cosmetic only.

[25] I shall deal with the differences of view of the parties' respective experts concerning issues related to the extraction of water from the Waimakariri River and the operation of pumps in connection therewith, in due course. Otherwise, the matters raised by deponents in support of the Mannerings was responded to in a third affidavit from Mr Wobben, in second affidavits from Mr Ryan and Mr Peddie and in an affidavit from Mr I R Stubbs a fertiliser contractor. Likewise, I shall review

matters raised by those affidavits on behalf of Netherland, in my concluding assessment of the evidence.

[26] On 13 November 2008, and after 8 October when I was to have heard cross-examination of two witnesses followed by counsels' submissions, the Mannerings' served a third Property Law Act notice. That notice referred to five alleged breaches namely:

1. To keep the ditches, drains and water-courses clean per clause 8.6.1 of the lease;

2. To "address noxious weeds" namely gorse on the terrace areas pursuant to clause 8.8.1;

3. To fence all native vegetation in order to protect it from stock pursuant to clause 8.7.1;

4. To trim and maintain hedges particularly at the river flat, terraces, deer paddocks, etc. and near the airstrip per clause 8.7; and

5. Use only those areas on the farm entitled to be used.

[27] It seems to me that of those five, those numbered 2, 3 and 4 are all matters which were subject of the respondents' second notice. Those numbered 1 and 5 appear to be new.

[28] Following discussion with counsel **I directed** the issues raised by the third notice be heard along with the issues raised by its two predecessors.

[29] Mr Wobben filed a fourth affidavit and Mr Ryan a third affidavit in support of Netherland's application for specific performance/relief against cancellation in connection with the Mannerings' third notice.

[30] The Mannerings' opposition to Netherland's third application is supported by an affidavit from Mr Mannering (his fourth), a second affidavit from Mr Ingelbrecht and first affidavits from Mr M C Hide and Mr C M Staples.

[31] In his affidavit Mr Mannering states that more than half of the ditches, drains and watercourses have not been cleared in the last three years. Clearance is needed to ensure free water flow. He does not accept Mr Wobben's claim that "drainage areas are generally cleared in the autumn and otherwise as required". Mr Mannering also states:

a) The failure to clear gorse from the terraces has been an ongoing issue. Otherwise, the irrigators do not have a clear path to roll properly and therefore risk damage.

b) Methods employed to protect native legislation have been ineffective. On occasions he has observed evidence of fresh damage to trees.

c) A significant amount of hedging has not been trimmed. What trimming has been done has been inadequate.

d) Netherland have been dumping hedge trimmings in the forestry area which is not permitted. The disposal of hedge trimmings is a problem for Netherland to plan for and manage.

e) Mr Mannering's walks over the farm are for recreational purposes only. Although he has taken note of issues observed on his walks he denies interfering with Netherland's use of the land. He has a practice of looking at the gallery from time to time in particular because Mr Wobben had informed him that it had not worked properly. When he observes irrigators are off he will shut the doors to the pump shed beside the gallery to keep out vermin and birds. He does this only incidentally and not in any breach of Netherland's right of quiet enjoyment.

f) He reviewed the rent for the period commencing 1 February 2009 because it had not increased on 1 February 2007 – the date for rent review. He did not thereby intend to affirm the lease as being on foot, nor did he intend to waive his right to seek termination of the lease.

[32] Mr Hide is a senior environmental protection officer employed by the Canterbury Regional Council (CRC). He said the issue of resource consents to abstract water usually have a condition requiring reduction or cessation of abstraction during times of low river flow. The CRC's minimum flow service provides information to consent holders and informs of any restrictions imposed. The failure to comply "is likely to be a contravention of s14 of the Resource Management Act 1991". He said the information can be accessed via a website or phone line "and any restrictions that are imposed apply from midnight to midnight". He said details of any restrictions to be imposed for the following day are posted on the minimum flow website as 'Tomorrow's Restrictions'. This information becomes available between 4:00pm and 9:00pm the night before the restriction is imposed. He added "the minimum flow system will post the restriction automatically at 9:00pm based on the data available in the event that staff have not been able to attend to review of the data prior to this". At midnight 'Tomorrow's Restrictions' becomes 'Today's Restrictions'. At the request of the Mannerings' solicitors he provided details of restrictions that applied between 2 January 2008 and 29 February 2008.

[33] Mr Staples is the manager of a tree trimming business in the Canterbury area. His company trimmed trees at Eagle Hill farm for many years both before and after Netherland took their lease. He does much of the trimming himself. He attended in October 2008 and returned in December 2008 to trim trees he had missed earlier. Prior to that occasion he had not trimmed the trees for approximately two years. By his observation 90 percent of the trees had never been trimmed, 5 percent may have been trimmed in the previous two years and 5 percent had definitely been trimmed in the previous two years.

[34] In October Mr Staples trimmed both sides of most trees on the farm. He estimates about 85 to 90 percent of them. He did tops on about 25 percent of total trees. He said the trees he did not trim he was directed by Netherland not to trim.

[35] The evidence presented on behalf of the Mannerings on this occasion was responded to by a fifth affidavit from Mr Wobben and a fourth affidavit from Mr Ryan. I will deal with the evidence of Mr Ryan later.

[36] Mr Wobben said Netherland cleared all ditches and drains in September 2005. A number again were cleared in December 2008. Ongoing maintenance had taken place in between times. He said he had overlooked the requirement for Netherland to clean out and open all ditches and drains at least once a year. He incorrectly assumed that he needed only ensure that they remained clear and unobstructed. The issue had not been drawn to his attention prior to the issue of the Property Law Act notices. He said thereafter he would ensure ditches and drains are cleaned and opened at least once a year, even if it was not needed. Although he had not done that in 2006 and 2007, he regularly monitored the ditches and drains to ensure they were clear and unobstructed. Mr Wobben was not given any advice of Mr Ingelbrecht's presence on the farm or notice of the inspection.

[37] Shortly prior to the Court fixture on 22 April 2009 further affidavits from Mr Mannering and Mr Loe were filed. Mr Loe reports driving down Waimakariri gorge past Eagle Hill on 19 March 2009. He saw a centre pivot operating with all sprinklers going. He believed that the allowable take of water for the day was 7 percent. He said "as a farmer who abides by my obligations to observe water restrictions, it is frustrating to see farmers obviously breaching those restrictions and continuously getting away with it, and gaining an unfair advantage over the rest of the community".

[38] On the morning of Saturday, 31 January 2009 Mr Mannering noticed the centre pivot irrigators running when there was a total ban on water takes from the river. He believed they had been running all night. He checked the flow meter that morning and noted a total take of 1,200,520 litres for that day.

[39] On 19 March 2009, he like Mr Loe, observed a centre pivot running. He was aware that the allowable take of water for that day was 7 percent. That pivot uses 38.4 litres per second or about three times the permitted 7 percent allowed. He believed Netherland was desperate to irrigate newly drilled paddocks so that winter-feed would strike.

[40] Mr Mannering recalls talking to Ms Peddie on three occasions. On the first on 7 December 2008 and not long after the irrigation pumps had been reinstalled after a very expensive overhaul he noticed the irrigators were running only intermittently. A day earlier he "had seen employees of Netherland… tinkering with the newly installed pumps". He asked Ms Peddie to stop anyone tampering with the pumps because they were still under guarantee following repair. He said he made the request in a pleasant manner but she responded that she did not have to talk to him. The second time he talked to her was on 10 March 2009 when the centre pivot irrigator had been moved to the middle of the airstrip and left there. When he brought the matter up with Mr Wobben he was told to shift it himself. He is concerned because the airstrip becomes unusable to him if the irrigator is turned off because the "elevated flashing navigation light will not work".

[41] Later he saw Ms Peddie sitting in her truck as he drove into the yard. He stopped and asked her to move the irrigator from the airstrip. Her reply was the same as given to him previously.

[42] The third time he talked to Ms Peddie was on 19 March 2009 – the same day Mr Mannering and Mr Loe both observed the centre pivot irrigating in excess of the 7 percent permitted. On this occasion he noted Ms Peddie dismantling a post and wire fence so that wire could be used to create an electric barrier for cattle. He was "frustrated at the destruction of an existing fence". He asked Ms Peddie "again in a pleasant manner" to return the sheep fence to the condition it was in at the commencement of the lease.

[43] Concerning Mr Wobben's claim that the pumps are regularly oiled and serviced, he was dismayed to read in an invoice that on 19 February 2007 and 6 March 2007 there was "suspect lack of grease" and "needs further attention".

[44] Mr Mannering says he believes the total cost to him to repair the obvious deficiencies in the maintenance of the farm will be $315,943.79 plus GST.

[45] Since the evidence hearing on 22 April 2009 the Court has received affidavits from Ms Peddie and Mr Veendrick on behalf of Netherland.

[46] Regarding Mr Mannering's reference to two breaches of water restrictions Ms Peddie advises she was on instruction to check water restrictions the day before they applied. She was told to use Ecan's telephone line or its website. She has not used the telephone line. She only has a mobile phone and reception in that area is bad. As there is no computer on the farm she has no access to a computer during the day. When she returns home from work each night she checks to see what restrictions are in place. She notes occasions when even at 10:30pm, no data was posted. Therefore it is her practice to check the website each morning before she leaves for work. She notes relevant details in her diary.

[47] On Saturday, 31 January 2009 She checked the website before leaving for work. It showed that full restrictions were in place. On arriving at work at about 7:00am she immediately turned off all the irrigation.

[48] On 19 March 2009 she noted a 7 percent allocation. She had been operating the irrigators at 20 percent on 18 March 2009. She turned the irrigators off when she arrived at work at about 7:00am.

[49] I will deal with Mr Veendrick's evidence later. His evidence and that also of Mr Ryan and Mr Brough on behalf of Netherland and Mr Ingelbrecht and Mr McIndoe on behalf of the Mannerings is or is in the nature of expert evidence, as opposed to the anecdotal evidence otherwise provided on behalf of the parties.

[50] While the evidence of Mr Ryan and Mr Ingelbrecht focuses on farm management and practice, the evidence of Mr McIndoe and Mr Brough deals with the design and functioning of the gallery system through which water is extracted from the Waimakariri River before being pumped by pipe to the irrigation facilities.

Evidence of farming practices

[51] Mr Ingelbrecht is a farm management consultant and registered valuer. As well as visiting the farm on 10 July 2008 he also visited on 12 August 2008. He noticed no improvement on that subsequent visit. In July he noticed six or seven electric fences that were not live. He said it was bad farming practice to disconnect permanent electric fences because they are easily broken by cattle and were ineffective. He saw a number of gates probably 20 or 30 which were damaged, a number of them had been discarded in trees and around the paddocks. His understanding of lease obligations is that permission is required to remove gates. Although some repair to gates and fences was observed, he considered it to be superficial. In his view the tracks were "quite poor" and only "superficial" maintenance had been done. In his view a good farm track would also allow vehicle access in an ordinary family car. In his view up to two-thirds of the tracks he saw were not up to that standard. He remembers seeing some rubbish including toxic containers and carcasses in holes on the terraces during his visits.

[52] Concerning the hedges, he said it is usual and good farming practice to trim one side of the hedges at least every two years, and the tops every year. Although some dairy farmers may keep bull beef calves the presence of steers is not necessary to a dairy operation. He saw no evidence of spraying for gorse on the open terraces. In his view there were a number breaches of the lease.

[53] Mr Ingelbrecht inspected the ditches, drains and watercourses on 24 December 2008. In his view they have not been kept clear as is appropriate pursuant to good farm management techniques. He does not accept that wet areas of the lower terraces close to the Waimakariri River are a consequence of very wet winter conditions. Certainly, there was much higher than average rainfall experienced in July, August and September 2008 but the main problem relating to ditches and drains is that they have not been properly cleaned and as a consequence pastures have not grown nor performed as should be expected. He said it is normal practice to clean drains in autumn but from his observation he does not think this occurred.

[54] Mr Ingelbrecht observed "the gorse on many of the terrace areas in places must have expanded in the past three or four years".

[55] He observed a number of native trees that while still present and healthy on the lower flats, have declined since his previous inspection. He noticed clear evidence of recent damage to those.

[56] He said there was little evidence of recent side trimming or topping of shelterbelts. Also he noticed shelter trees growing through wire fences and making contact with electric fencing wires thereby reducing their effectiveness.

[57] Mr Ryan too is a registered valuer and registered farm consultant. He holds a diploma in agriculture and a diploma of valuation and farm management from Lincoln University. He has been a registered valuer since 1978 and an associate of the New Zealand Institute of Valuers since 1983. He had extensive experience before setting up a practise on his own account in 1983. He has been involved in valuation and consultancy work throughout much of the South Island.

[58] At the request of Netherland he was asked to give an opinion on the condition of the farm and to consider and advise on a number of the alleged breaches. Initially he prepared two reports one dated 5 June 2008 and the other 24 July 2008. The first dealt with offal pit disposal methods. Noting that all properties needed a dead carcass disposal system he reported that apart from the pit volume of the original but now discontinued disposal site, he could find no fault with the systems then currently being employed. His second report dealt with a variety of other matters raised by the Mannerings' Property Law Act notice.

Fencing and gates

[59] He found the fences well maintained with no broken wires. He said the method of preventing livestock grazing the wooded area should by way of electric fence. When he inspected he periodically tested the electric fence which was working satisfactorily and adequate for controlling grazing of dairy cattle. Elsewhere it was less than satisfactory but only with regard to the gate post

structures as installed by (he was informed) the landlord. On balance the gates on the property were all in good working order.

Water supply

[60] He reported all troughs on the property were well maintained and have a shingle apron around them to ensure that livestock did not cause ruts and pasture damage in the immediate vicinity. One trough was overflowing due to a faulty ball cock. He understands that was repaired following his inspection.

Weed Control

[61] He said weed control on the property was relatively complex bearing in mind that farm terrace faces in that locality were particularly prone to gorse infestation. He said the gorse was well controlled close to the headquarters area along the terraces and faces and he noted significant progress had been made on the flats adjoining the river. He understood that since the inception of the lease 12 hectares of gorse had been cleared adjoining the river and a further 6 six hectares had been cleared elsewhere. Mr Ryan understood that those activities and the expense of them appeared to be beyond the scope of normal maintenance expenditure.

Tracks

[62] He considered the ones he travelled on throughout the property were in very sound order for that time of the year. He was aware large volumes of silage had been transported over them for winter feeding of livestock, often by large tractors with heavy multiple axle trailers. All the tracks he drove on had been gravelled and graded except for one leading down below the terrace.

Hedges

[63] None had recently been trimmed. He said it was local district practice to trim planted shelterbelts either on an annual or biennial basis.

Irrigation and pumps

[64] He noted two of those pumps had been removed for maintenance. He said control of cattle around the base plate of a pivot irrigator should have been a post and railing fence with electric outriggers. He said this would have comprised part of the lessor original capital expense.

Native trees

[65] He observed these growing on the lower river terrace. Some had been fenced and were in sound repair. Kowhai trees claimed to be dead were in fact recovering from hard grazing and others were rejuvenating by suckers from the root base. He noted browsing damage but could not identify the timeframe during which such may have occurred as he was unaware of their condition at the start of the lease.

Beef cattle

[66] He observed a mob of 40-50 beef cattle. The bulk being dairy beef progeny. Referring to clause 19.1 of the lease which refers to "farming of TB accredited dairy stock", he noted it is normal for dairy farmers to have a small group of pure beef bred animals on the property for their own consumption purposes. He said if the steers had been sired by beef bred bulls but with the progeny of the dairy herd then they are classified as dairy stock because dairy stock does not necessarily mean milking stock. Mr Ryan's second affidavit attaches his report of 8 September 2008 following his visit on that day. In part it updates and in part it adds to matters covered by his previous reports.

Top dressing

[67] Mr Ryan notes there is a clause of the lease stating that annual maintenance fertiliser is to include 150 tonnes of super phosphate and 350 tonnes of lime. He said it was his understanding that the phosphate had been applied annually, although it was exceeded in some years by as much as 100 tonnes and in other years as much as 800 tonnes of chicken litter was also applied. It is his further understanding that soil pH levels were now uniformly above the level of six to the extent that only small amounts of lime should be applied annually, if at all. He said that since Netherland

had occupied the property in 2001 its use had changed dramatically from a dry land sheep and beef unit to an intensive dairy support unit. He added "with the above mentioned fertiliser programme, the re-grassing and supplementary feed cropping programme and the installation of irrigation, it would be not unreasonable to suggest that during the period of the lease the carrying capacity has increased very substantially, possibly as much as double the original level.

Fencing

[68] Although on an earlier visit the electric fences tested at between 3000 volts and 4800 volts there were then a large number of break fences and large areas of kale which placed a heavy demand on the strength of the current running through the electric fence unit. When he re-tested those fences he found the voltage to be between 5800 volts and 7400 volts. He said he believed the difference to be the fact that the break fences were no longer shorting out on the kale crop and that fences with that degree of electricity charge would be very stock proof for most if not all beef animals that encounter them.

Trees

[69] Mr Ryan observed one cabbage tree and six Kowhais which were dead. Of the six Kowhais he believed two were regenerating already. He also observed some well-fenced and protected areas on the property including an area previously grazed by stock but which now contain regenerating areas of Kowhai, cabbage tree and flax.

Gates

[70] Mr Ryan noted the lessor's claim of 20-30 damaged gates on the property on 12 August 2008. Mr Ryan observed five bent gates around the deeryards. He was lead to believe those were caused by the previous deer farming operation. Also he observed three gates only on the property which he would consider to be bent. Even the worst of those was swinging effectively. He did not believe it to be a liability. He said however that the light cyclone gates used on the property were not suited for cattle farming. He observed some bent gates in a yard near the implement shed. He

understood those had been replaced on the property by stronger structures. In his view the gates and fencing he observed was more than satisfactory to ensure that stock be controlled at all times.

Tracks

[71] Following his research of rainfall records he found the rainfall received on the property for the months of June, July and August to be the highest rainfall for this three-month period for at least the last 20 years. In fact there is only one other year which comes within 100 millimetres of the rainfall received in 2008. He observed that with the property no longer being a sheep farm but an intensive dairy support unit, large volumes of winter feed needs to be carted along those tracks by heavy machinery. Such a change of use in the winter with that level of rainfall would suggest that it would be impractical to drive an ordinary family car along the tracks in winter months.

Troughs

[72] All troughs observed by him were of a satisfactory nature, were operating effectively and most if not all had a gravel apron around them.

Terraces

[73] During his inspection he observed no major rubbish on the terraces although he did sight some old netting and rusty drums which appeared to have been there for many years. The terraces continued to be an issue for gorse regeneration. Mr Ryan also noticed mature gorse and broome on the deer farm area retained by the landlord for his own use. He noted that 18 hectares of gorse had been cleared and was now in permanent pasture thereby improving the property from its original condition.

General

[74] He believed the development programme carried out on the farm had been extremely comprehensive to the extent that it now has a further potential beyond that of a dairy support unit.

[75] Mr Ryan's third affidavit concerns his visit to the property on 2 December 2008 following the issue of the third Property Law Act notice. Addressing allegations of breach raised by that third notice he reports:

Keeping ditches drains and watercourses clear – clause 8.6.1 of the lease

[76] Mr Ryan noted there were two areas where movement of water was involved, firstly in the formed drains and secondly in the paddock areas where water courses were observed. He said the ditches and drains connect springs and seepage at the foot of the terrace on the bottom flat and convey water along a drain back to the river. It is in that part of the property that the tenant has fenced out the drain and cultivated areas of native trees. Mr Ryan said this has provided a more than useful habitat for bird life in the area. Apart from areas which were recently cleaned, the stretch of drain was quite deeply excavated indicating it forms a very permanent channel and there is no chance of it overflowing onto the surrounding lands. He said it was normal practice to clean drains in the Autumn; that none of the treatment of drains is a disadvantage to the pastures for production and that much of the drain management had been focussed on cultivating native shrubs and bird life which is gradually building up in the property. He believed the current treatment of the ditches and drains complied with the lease.

[77] Regarding water courses which have arisen in paddocks as a result of the then recent wet winter conditions Mr Ryan noted those with springs and soak holes appear through gravel under the river flats which can often surface at unexpected places and run a stream of water through a natural channel or across a paddock. In his opinion a tenant is not obliged to maintain, correct or direct the flow of water from those sources. In summary he believed the tenants actions with regard to the drains comply with the lease.

Noxious weeds

[78] Mr Ryan noted that clause 8.8.1 of the lease provided "so long as the lessee does not permit noxious weeds, rabbit and vermin to increase beyond their level at the commencement of the date then the lessee shall have complied with the lessee's

obligations…" Mr Ryan said he believed the tenant has complied with the terms of the lease with regard to control of noxious weeds.

Fencing of native vegetation

[79] He noted several Kowhai trees in the grazing paddocks. He said it was farm practice when stock are grazing those paddocks to erect electric fences around them to prevent any rubbing.

Trimming hedges

[80] Upon his inspection he considered all hedges to have been trimmed to a satisfactory level. He said mature trees require very little to no trimming. He observed some young shelter plantings had been trimmed for the first time and another shelterbelt near the river had also been topped. He said he believed the tenant to have contributed more than his share to tree maintenance. Whilst some trimmings were left were they fell, elsewhere trimmings were picked up and placed in heaps in the shelterbelts in order to allow the trimmings to rot away. In his view the forest areas were actually part of the lease to Netherland. Therefore the area into which the pine trimmings had been placed is not under the control of the landlord.

[81] Mr Ryan's fourth affidavit refers to his inspection on 16 February 2009 to report on the then most recent claims of Mr Mannering and Mr Ingelbrecht. He referred to Mr Ingelbrecht's comment that when the lower terraces were inspected in December 2008 they were still wet and that was not a consequence of the very wet winter conditions. Mr Ryan notes that Mr Ingelbrecht failed to add that the area in question had been frequently irrigated by an efficient system. He noted Mr Ingelbrecht's description did not include "mud", "pugging" and "ponding". Mr Ryan disagrees that the water surfacing in the middle of the paddock was fed from water levels of a nearby drain. As he observed, for water to pass through shingle onto a pasture surface requires head pressure from higher altitude. For the drain to function the normal drain water level has to be lower than paddock surface level whereby head pressure to the paddock is not possible.

Noxious weeds and gorse

[82] Contrary to Mr Mannering's assertion that no effort has been made to clear the gorse on the terraces since the commencement of the lease, Mr Ryan observed that since the start of the lease the area of gorse was reduced by some 18 hectares. Clause 8.8.1 of the lease clearly conceded there was a presence of gorse on the property at the inception of the lease and the requirement was to ensure that the acknowledged area was kept in check. During Mr Ryan's latest inspection he said it was obvious the tenant had done an excellent job of gorse control on the lower terrace where it had been sprayed back from track fringes and boundary fences and on the side of drains and plantations. Elsewhere gorse was not impeding the pivot irrigator at any stage. He said gorse was maintained in line with the terms of the lease. As to Mr Ingelbrecht's statement that there was no evidence of dead gorse plants around the edges of the terraced areas, Mr Ryan responded that it was obvious Mr Ingelbrecht did not inspect the gorse on the bottom terrace or the eastern and western ends of the middle terrace.

Native vegetation

[83] Mr Ryan's inspection revealed that growing within the fenced areas surrounding all native trees was grass to the seed head stage indicating it had neither been the subject of animal browsing or heavy grazing as had been claimed. The farm practice of placing temporary electric fences around all native trees had been most successful. There was no evidence of fresh damage to the trees or of ringbarking.

Hedges

[84] The trimming undertaken in late 2008 was "along similar lines to district practice". Mr Ryan believed this has preserved the integrity of the hedges and shelterbelts. In conclusion he notes that the tenant has exceeded its documented obligations with regard to maintenance of trees and hedges.

General

[85] He said that during his inspection of the entire property it was obvious that the pastures, livestock and general maintenance was being conducted at a very satisfactory level and although the irrigation water had not been available for some 16 days, there was an excellent feed source on the property both in terms of quality and quantity.

Performance of gallery and the pumps

[86] Mr Brough was engaged by Netherland to review a report by Mr McIndoe obtained by the Mannerings. He visited the site of the gallery on 30 May 2008. He commented that Mr McIndoe's report provided a generally accurate description of the water intake system. He noted that the system comprised a large trench that had been excavated out to an active braid of the Waimakariri River and divided into three "ponds" by the construction of gravel bunds, although the "ponds" are connected by pipes that allow water to pass through them. He referred to the fact that Mr McIndoe's report noted that at the pump shed end of the third pond, approximately five metres of gravel (boulders) formed a nature screen filter between the third pond and the pump shed.

[87] Mr Brough noted his understanding that both parties agreed that the pumps had been damaged by excessive quantities of silt entrained in the water. The questions for consideration were:

1. What is the likely cause of the silt that has entered the pumps?

2. Can the pumps be repaired or replaced so that they can reach a state where they are classified as being in good repair and condition?

[88] Mr Brough assumes the purpose of dividing the trench into three ponds was to try and lessen the movement of silt down the trench towards the pumps. He considered that would only likely be partly effective because of the pipes through which the water moved from one pond to another. He said that water would carry with it some of the high silt load that occurs during times of high flow in the river.

Therefore a balance needed to be struck between allowing enough water to reach the pumps so that they can deliver the water at a rate of 180L/s, but slowed the velocity of the water down sufficiently so that the silt settles out in the trench and does not reach the pumps.

[89] Mr Brough did not have sufficient information to determine whether or not the current design of the gallery could yield 180L/s. He expected that the modifications made to provide a surface water connection would improve the yield but would also allow more turbid water to reach the well pumps.

[90] Mr Brough referred to Mr McIndoe's suggestion that the cause of the silt that damaged the pumps was due to pumping water at times of low water levels. Mr Brough commented that if that really was the cause of the problem then he would consider that to be a design fault of the gallery as the levels of the pumps and the pipe inflows should be able to be placed so as to minimise the risk of that situation occurring.

[91] In Mr Brough's opinion it was far more likely that the cause of excessive silt in the pump water was primarily due to the natural suspended solids present in the river. In his judgment the risk of silt-laden water reaching the pumps is far greater under high flow conditions than under low flow conditions. He adopts Mr Wobben's claim that the whole area around the ponds is inundated with water with higher river flows when significant amounts of silts may be deposited in the ponds and around the pumps. Further and given Mr McIndoe's acknowledgement that sufficient silt could fill the pond to require maintenance, Mr Brough is surprised Mr McIndoe does not consider that the silted times of high flow could be the cause of silt reaching the pumps.

[92] Mr Brough does not believe a long trench directly connected to the river is the best option to achieve maximum flow with minimum turbility issues. He prefers the use of buried mesh drums along a river stop bank feeding water into a buffering pond from which pumping would occur. That would eliminate the direct surface water connection to the river and potentially allow a larger silting pond rather than a long channel.

[93] Mr Brough stated that the pumps on the farm "have undoubtedly been impacted" by the silts in the water. This would result in the wear on the impellers and seals. In his opinion that wear will continue due to the design of the intake resulting in potentially significant costs to the tenant over the duration of the lease.

[94] Mr Brough concludes:

a) The pumps are not attaining their peak-pumping rate because of the wear on the pumps caused by pumping silty water.

b) The main cause for silty water is due to an intake system that is open to the river which has naturally high concentrations of suspended solids in the water at times of moderate to high flows.

c) Mr McIndoe's report that silt has been drawn into the pumps primarily due to pumping at times of low river flow is unlikely to be correct.

d) The pumps can be repaired to restore their original level of performance however due to the design of the gallery and the risk of high silt occurring, any pump maintenance works will only have a short-term benefit.

[95] Mr McIndoe has filed an affidavit in order to address Mr Brough's opinions and conclusions. Like Mr Brough Mr McIndoe is an experienced soil and water engineer. He noted that the original design of the gallery was not related to the pumps but rather about how water could be taken from the river given the geological situation.

[96] Based on what he saw the gallery could easily supply 180L/s when the river is flowing above its minimum flow. The reasons for connecting to the river was to ensure this could happen. Only if the level of the river was very low would he expect less than 180L/s to be provided.

[97] Mr McIndoe said that if the pumps were not achieving 180L/s it was because they were worn, although he had not had the opportunity to carryout a detailed hydraulic analysis to determine that.

[98] He said the fine suspended sediment in the river cannot be avoided and is a normal part of a river irrigation scheme. If the water level in the ponds was maintained at the correct level then flow velocities in the gallery would be low and coarse materials such as sand and silt would settle out to the bottom of the gallery if the water was dirty. When water level in the gallery was low then water flows would increase velocity. The increased velocity across silt that has settled in the bottom disturbs that silt, causing it to be sucked into the pumps. Therefore he says that pumping at times of low flow or in times of flood exposed the pumps to a greater risk of damage from silt. He said if the river was in flood and dirty, a higher silt loading would pass through the pumps than normal. He opined that silt would only go into the pumps if the pumps were being operated at the time. Therefore it would be good practice to refrain from operating pumps at those times.

[99] He believed that the method of gallery design adopted by Mr Mannering was appropriate given the geographical characteristics of the area. He doubted the effectiveness of the mesh drum method referred to by Mr Brough.

[100] He concluded:

a) Pumps that pump river water will always be affected to a greater or lesser degree by silt.

b) Regular maintenance of pumps is always required.

c) The pumping pressures are high on the Mannering scheme which accelerates wear to the pump irrespective of water quality.

d) With good maintenance, the pumps will operate correctly.

e) It is good practice to turn pumps off during floods and not to operate them in river flows so low that the gallery does not have the correct

water level in it – which is most likely to occur when river takes are on restrictions.

Water extraction from Waimakariri River

[101] Mr Veendrick is an environment scientist of Christchurch. He has provided an affidavit on behalf of Netherland. He has worked as a hydrologist in the Netherlands where he specialised in surface-ground water interaction projects. Currently he is employed as an environmental scientist with Pattle Delamore Partners Limited, an environmental consulting firm specialising in ground water and water resources, where he has worked on the assessment and management of surface water, and ground water resources, irrigation demand and storage assessments and storm water treatment and disposal in Canterbury, Otago and Marlborough.

[102] Mr Veendrick has reviewed the terms of the Eagle Hill partnership resource consent No. CRC 020436.2. That consent permits the taking and use of water from the Waimakariri River. Mr Veendrick has also reviewed a printout of the database from Environment Canterbury showing the actual restrictions in place from 30 January 2009 to 20 March 2009. He has also seen notes and diary entries retained by Netherland during the same period. He was aware of the disagreement between Netherland and the Mannerings relating to extraction and use rates on the farm.

[103] His brief was to interpret the terms of the water restrictions posted by Ecan on its website, by reference to the terms of the resource consent.

[104] He said Netherland sought clarification from Ecan regarding when its posted restrictions came into effect. By letter dated 14 March 2009 Mr Hide of Ecan stated:

> "Irrigation restrictions are updated daily on the irrigation restriction website and phone line and <u>restrictions apply from midnight to midnight</u>." (Emphasis added.)

Mr Hide also stated:

> "If a waterway is placed on full restriction and a consent holder who was affected by that restriction continues to abstract water after midnight, they will in breach of section 14 (1)(a) of the Resource Management Act 1991 if they continue to abstract water after midnight."

[105] As Mr Veendrick observed this letter states Ecan's view on the time when restrictions come in effect. Mr Veendrick observed that the resource consent determines the maximum rate in which water can be taken from the river at the property. The maximum rate is based on the flow of the river at the Old Highway Bridge as estimated by the Canterbury Regional Council. He notes, with regard to the period when restrictions apply condition 1 of the resource consent states:

> "Whenever the flow in the Waimakariri River, is estimated by the Canterbury Regional Council from measurements at the Old Highway Bridge, at or about map reference NZMS 260 M35:818-547, for any period ending at noon is:…; then the rate of abstraction, during the next 24 hours shall not exceed 180 litres per second, …, the maximum rate of take during the next 24 hours shall be equal to the rate shown on the vertical axis on the attached graph…" (emphasis added).

[106] Mr Veendrick observed that condition 1 of the consent states that the restrictions commence on noon from the following day, not from midnight on the date by which they are posted.

[107] Although there is reserved, by condition 9 of the consent, the right of Ecan to review restrictions, Mr Veendrick is aware of no evidence that has been done. It is his opinion that therefore the current consent conditions determine when restrictions apply.

[108] Mr Veendrick then reviewed the evidence given by Mr Mannering suggesting that the centre pivot irrigators were running on the morning of Saturday, 31 January 2009 when there was a total ban on water takes from the river. Mr Mannering said he believed the irrigators had been running all night and when he checked the flow meter he observed a total use of 1200.52m^3. Mr Veendrick's own checks noted that on 29 January 2009 water users were advised of a 55 percent allocation for the following day. For the Eagle Hill farm consent this represented an allocation of 99 litres/second for the 24-hour period from noon 30 January to noon 31 January 2009. He noted that all pumps were turned off at 7:00am on 31 January 2009 because the pump meter registers the flow at the end of the day. The recorded flow by Mr Mannering on 31 January 2009 represents a pumping period of seven hours. The total volume recorded on 31 January 2009 therefore equates to a flow rate of 47.63 litres/second which is well below the 55 percent restriction (99 litres/second). He

concluded therefore that according to condition 1 Netherland had not been pumping in breach of the resource consent on 31 January 2009.

[109] Mr Veendrick undertook a similar analysis in connection with Mr Mannering's evidence that on 19 March 2009 he observed a centre pivot running when he was aware that the allowable take of water for that day was 7 percent. It will be recalled that Mr Mannering said that that pivot used 38.4 litres/second whereas a 7 percent permitted flow would provide for 12.6 litres only. On that basis Mr Mannering concluded Netherland was pumping in breach of the consent.

[110] Using information concerning when the pivot was turned off on 19 March 2009, and having regard to the period restriction running from noon to noon, Mr Veendrick concluded had not been pumping in breach of the resource consent on the morning of 19 March 2009.

[111] In summary regarding Mr Mannering's claims of breaches of consent being based on a situation where the water flow advice from the Canterbury Regional Council is immediately imposed on the consent holder, he said:

> "Whilst that might seem a reasonable approach it is not what the consent says. In my opinion the wording of the consent conditions is confusing and the offset between the Canterbury Regional Council view when restrictions apply (from midnight to midnight) and the consent conditions from noon to noon is not helpful. So I can understand how some confusion could arise. However in my view a correct interpretation of the consent conditions is that no breach of the consent has occurred."

[112] His report concludes:

> "Based on the information provided to me Netherland Holdings have not been pumping in breach of the resource consent on the 31 January 2009 and 19 March 2009."

Cross-examination evidence of Mr Wobben and Mr Peddie

[113] At the request of Mr Hall Mr Wobben and Mr Peddie were cross-examined upon their affidavits.

Mr Wobben

[114] In response to Mr Hall's questions Mr Wobben acknowledged his familiarity with the terms of restrictions upon the right to take water from the river. He agreed the information was accessed by website and by telephone. He agreed that after the December 14 meeting of the parties, instruction was given to Netherland staff about how to access the Ecan information. Before then Mr Wobben acknowledged on two occasions irrigating when restrictions were in force. He said in answer that on those occasions there was no information regarding restrictions on the website. It was something he said that occurred when he was on holiday.

[115] Mr Wobben acknowledged an event on 30 December 2005 when Mr Mannering drew his attention to concerns regarding breach of water restrictions. Mr Wobben acknowledged his concerns and the breach which occurred. He recalls explaining that the irrigators are not always turned off promptly because Netherland had no one living on the farm. He denied however breaches occurring since the meeting of the parties on 14 December 2007. As to a claim that a breach occurred on 19 January 2008 Mr Wobben could not comment because he was overseas at the time. He denies any allegation of continuing breaches in January 2008.

[116] Concerning the pumping system Mr Wobben denied refusing to pay for maintenance to pumps and said Netherland had paid $15,000 over the previous 2 – 3 years but acknowledged concerns relating to the gallery pumps did not relate to maintenance because it was a breakdown caused by the pumping abrasive materials.

[117] Mr Wobben denied that the abrasive materials were entering into the pumping system because of the operation of the system when water was low and when silt was sucked into the system thereby causing the damage.

[118] Mr Hall asked Mr Wobben whether because the pumping system was operated at a time when full restrictions or substantial restrictions were in place that there was then likelihood that more silt material would be sucked into the system. Mr Wobben disagreed. He said it was because it doesn't make any difference whether it was high or low in the gallery, the silt was there all the time. Mr Wobben disagreed with Mr McIndoe's opinion on the matter.

[119] Having regard to the general obligation in the lease conditions to effect repair and to maintain and keep in order and condition all the irrigation equipment Mr Wobben stated that in his opinion that did not require repair of machinery which broke down due to reasons beyond his control. In brief he considered the gallery system inadequate to prevent the silting up of water abstracted from the river.

[120] Responding to Mr Hall's suggestions that Netherland had failed to carry out its obligation to annually fully maintain equipment in accordance with manufacturer's instructions, Mr Wobben said that obligation was met, that the equipment had been serviced every year by an accredited company, that the pumps had been maintained and had been greased and checked and seals were replaced when they were leaking.

[121] Concerning an incident occurring on 28 January 2008 when a pump seal broke and water gushed from the leak, Mr Wobben denied this would have occurred when the pumps were running. He said the pumps were not running on that day nor in the two days prior when a total extraction restriction was in place.

[122] Mr Wobben deposed that the irrigation pumps were not activated on 28 January 2008 because they were switched off at the towers on that day because no irrigation was going on.

[123] Concerning the erection of a single wire electric fence across the airstrip Mr Wobben advised he was aware Mr Peddie had done that but it was done without his knowledge. It was he said a single incident.

[124] Concerning the native trees Mr Wobben denied that those were in fine and healthy condition at the commencement of Netherland's lease. He acknowledged that the lease provisions required the native vegetation to be protected from stock. He said two or three only had been damaged since they were fenced off; that all were fenced off three years prior; that since one or two of the fences had broken. Of photographs depicting those trees, Mr Wobben said some were in the same state as when Netherland took over the lease and some of the trees were regenerating.

[125] Regarding the complaint of noxious weeds, Mr Wobben said that when Netherland took over the lease there had been no gorse control or very little of it. Since then he said at least 60 percent of the gorse had been cleared. He said they concentrated on areas important to them, areas they were able to make productive, and they cleared all the gorse and broome in the paddocks along the fence lines, which were the first priority. Concerning the terrace he said those were always covered in gorse and it is still the same. Regarding a face area between the terraces Mr Wobben said it is incorrect there has been no control of noxious weed infestation. Nor does he agree that in some areas of the farm the fences had been overgrown by vegetation. What is depicted in some photographs was the presence of dead gorse which would, when it became necessary, later be removed. The photographs depicted fences which were overgrown with gorse at the commencement of the lease.

[126] Mr Wobben denied Mr Mannering's claims that the fences, gates, tracks and drains have all fallen into a state of disrepair through lack of maintenance. He said the fences on the farm are in a better state than seven years previously; that Netherland has re-fenced 80 percent of the farm after the irrigation was put in, that three photographs showing a fence in disrepair were all photographs of the same fence and not different fences as Mr Mannering's evidence seems to infer.

[127] Regarding the delay in trimming hedges in November 2006 Mr Staples said that the hedge trimmers had been booked in since the previous June. He said hedge trimming is done on a biannual basis and has been since the lease was taken over. He denied that 90 percent of the trees and hedges had not been trimmed until the day before that date on which he was being cross-examined by Mr Hall.

[128] Regarding claims Netherland had not applied the minimum amount of fertiliser required annually Mr Wobben said he applied more then the minimum of super phosphate. He had not been putting much lime on during the previous two years because the soil did not require it and because Ravensdown (suppliers of fertiliser) recommended not to put it on. Likewise concerning the lease obligation to apply a minimum quantity of selenium and cobalt prills. Mr Wobben said that

obligation was met because he applied a product which was active for two years and therefore annual applications were not necessary.

[129] Mr Wobben denied that the farm tracks were in bad condition in the winter of 2008 nor that there was a failure to maintain them to a reasonable level. He said they had applied shingle and hard coarse before the winter and during the winter and they spent over $15,000 on track maintenance. He said the tracks were muddy because they had had the wettest winter on record and because they do a lot of travel by tractor during the winter the tracks tend to get cut up. He said photographs of Mr Mannering intending to show the contrary amounted to presentation of false evidence to the Court – because they had 200mm of rain just prior to the photographs being taken. He said it could be from any farm in Canterbury.

[130] Mr Wobben denied that some 20 gates ended up in an extremely damaged state. Rather he said most of the gates had been removed off the farm when the farm was converted to dairy grazing because they were no longer needed. He said some of the gates shown in the photographs had since been repaired. Some photographs showed gates that were not on the farm at all but rather in the area utilised by Mr Mannering.

[131] Mr Wobben said that although he assisted physically and with advice in the construction of the irrigation gallery it was Mr Mannering who extended the gallery out to the river "in which way he exposed it to the river". In the result he said a large amount of silt was deposited in the gallery. Mr Wobben deposed that the deterioration in the landlord tenant relationship began in about February 2007 – around about the time of the rental review. Each side had obtained a valuation. They could not agree and "since then things have gone sour, he has been picking on me since then little things, things that have been the same since 7 years, the farm is the same as 7 years ago, we operate the farm still in the same way. Since then he has just been picking on us about little things going around with a camera taking photographs of everything, spying on us and what we are doing with binoculars. Two or three times a week – going around the farm to find anything wrong on the farm."

[132] Acknowledging Mr Mannering's right to conduct an inspection Mr Wobben said that he should do it with his permission and if he thought things were not right then he could notify him and he would rectify it.

[133] Mr Peddie was cross-examined upon his affidavit on 22 April 2009.

[134] In his affidavit Mr Peddie gave evidence that the Ecan website indicated restrictions applied for 24 hours from midnight. Since, and having read the consent now he believes that water restrictions came into force from noon the following day. He has become aware of the difference since his employment as Netherland's manager ended on 30 May 2008. At the meeting on 14 December he had been informed that restrictions were to apply from midnight following their being posted on the Ecan website. He believed restrictions applied from midnight because that was what he was informed. Mr Wobben gave him instructions to ensure that the restrictions were strictly adhered to after midnight according to the information on the website.

[135] Concerning Mr Mannering's complaints about an electric wire across the runway, Mr Peddie said it was not positioned as Mr Mannering described. Rather, it was near the western end where there was a 5-meter high hedge at the end of the runway. He said he was aware permission was needed to place the wire on the airstrip. Regarding Mr Mannering's evidence of a ball of no.8 wire on the airstrip Mr Peddie said he did not know where that came from and that Netherland had not done any fencing with No.8 wire in the airstrip; that the only fencing that was done with No.8 wire was undertaken by Mr Mannering. The particular wire in question was left at the northeastern end of the airstrip having been placed there by him and not by Mr Peddie.

[136] Mr Peddie was aware of Mr Mannering's claim that animals not from the Eagle Hill farm had been dumped into the offal pit as was toxic rubbish from old oil drums and plastic containers. He said if there was such then it had been put into the offal pit prior to his beginning employment in October 2005. Regarding a photograph showing a deer and a lamb in the offal pit he acknowledged placing them there. The deer had come from the farm but the lamb came from the roadside where

it had been run over. He has since become aware that only livestock from the farm can be disposed of in the offal pit at the farm.

[137] Concerning the farm diary he kept he stated that each day he would record details of restrictions posted on the Ecan website. He said there were occasions when the information containing restriction details was not posted before 9:00pm. He accessed the website at night when he returned home, there being no facility on the farm to access the website. He used his diary by writing at the end of the day for which restrictions were to apply, detail of restrictions applying for that day. The information written was obtained between 4:00pm and 9:00pm the previous evening. He could not explain why he did not enter the restrictions applying for the day of 11 January 2008. On another occasion he entered an allocation percentage figure when he should have entered a restriction percentage figure in his diary. In any event he denies deliberately using more water than he knew was permitted at any time. That said and somewhat contradictorily he acknowledged having given evidence of shock and horror when saying he became aware of having irrigated on the 11 January 2008 when full restrictions applied.

[138] He said that on 12 January 2008 when he got to the farm at about 7:00am he turned all irrigators off believing the restrictions then applied. In that belief he accepted Mr Hall's suggestion that he should have gone to the farm before midnight to turn the irrigators off.

[139] In other respects and concerning other occasions Mr Peddie acknowledged turning off the irrigators in the morning of a day when Ecan's website indicated restrictions were in place, when, as he then believed it, those irrigators should have been turned off from midnight the night before.

[140] When referred to the evidence of Mr Loe that the irrigators were going on 19 January Mr Peddie said he did not agree with that claim for his diary indicated full restrictions applied and the reason he recalled that was that they were going to spray insecticide and pesticide on the Kale paddocks on that day.

[141] When asked to comment Mr Peddie said that the Mannerings didn't physically interfere with his farming operations. Often when he was working on the bottom flats he would look up and see the Mannering vehicle on the top of the terrace watching. On one occasion he recalls binoculars being used. He said it was "extremely unsettling".

[142] Concerning the incident on 28 January when a seal had blown and a large amount of water escaped, Mr Peddie said that as a result of a telephone call from Mr Wobben he had gone to the pump shed to shut down the motors. But, he said for that and the two previous days the irrigation pivots at the base of each tower were closed. The escape of water was not due to a failure to turn off the pumps at the pumpshed. He was critical of the fact that Mr Mannering and another had observed the escape of water and had walked away from that scene knowing the value of the equipment installed there. By contrast when he received Mr Wobben's phone call he immediately went to the pump shed as fast as he could, stepped in and pushed the stop button. He acknowledged risking his life to push that button.

The notices

[143] On 7 December 2007the parties met, pursuant to the dispute resolution clause in the lease. On 15 January 2008 the Mannerings served the first notice on the applicant which mentioned four breaches. On 30 May 2008 a second notice was served which restated the four breaches, and mentioned 14 others. On 13 November 2008 the Mannerings served a third notice which referred to five new breaches.

The issues

[144] They are:

1. Whether Netherland committed breaches of its lease dated 17 August 2005.

2. Whether by its notices the Mannerings gave Netherland a sufficient opportunity to remedy its breaches.

3. Whether, if there have been breaches, Netherland has acted responsibly to address those.

4. Whether in all the circumstances if there has been a breach of lease, it is appropriate to grant relief against forfeiture.

[145] Section 243(1) of the Property Law Act 2007 (the Act) provides that a lease may be cancelled only in accordance with section 244 – 252 of the Act. Section 246 of the Act sets out the notice that must be given by a lessor seeking to cancel a lease. The purpose of a notice regime is to prevent landlords behaving in an arbitrary manner to deprive a tenant of the benefit of a lease without warning.

[146] The Mannerings' first notice was clearly defective. It did not comply with s246 because it did not adequately inform Netherland of the nature and extent of the breaches; of the right to apply for relief and the advisability of seeking legal advice; and it incorrectly stated the breaches were incapable of remedy. Nevertheless those deficiencies were mostly corrected by the Mannerings' second notice.

[147] The purpose of the Act is to ensure that if breaches are not remedied within a reasonable timeframe then a right to cancellation may arise. The first notice identified four "serious" issues and in addition a number of less "serious". Foremost of the "serious" issues is a claim of using water in excess of that permitted by the farm's resource consent.

[148] The second "serious" issue claimed a failure to maintain the water extraction gallery (the gallery) and pumps to the standard they were at prior to the commencement of the lease. The third "serious" breach alleged a failure to maintain a lawful offal pit. The fourth "serious" breach alleged a failure to obtain landlord's consent to graze the airstrip.

[149] In respect of each of these "serious" breaches the Mannerings' assert they are irremediable i.e. incapable of remedy or rectification and in the circumstances cancellation of breach is appropriate. It is claimed the even if the breaches could be

remedied then in fact they must be remedied to the extent that the farm is restored to the position it was prior to the breach.

[150] The Mannerings' assert that relief against forfeiture is inappropriate because:

a) The breach was advertent or deliberate;

b) It involved an illegal use.

c) Netherland had not made good the breach and is unable or unwilling to fulfil its obligations in the future.

d) The circumstances of the breach have grave consequences.

e) Lasting damage has been caused to the Mannerings.

f) The case demonstrates not a single breach but an accumulation of them, each unremedied for a significant period after notice of those was brought to Netherland's attention. In the submission of Mr Hall for the Mannerings "the litany of breaches" go to:

(a) The lessee's attitude to its obligations;

(b) The relationship between the parties;

(c) The lessor's need to protect their investment;

(d) The gravity of the situation necessitating cancellation".

[151] It is in this context the less "serious" breaches serve to add to but also exemplify Netherland's failings. Those less serious breaches include:

a) Not maintaining and repairing fences, and disconnecting power to the electric fences.

b) Failing to maintain, repair or replace approximately 28 gates around the property.

c) Failing to maintain tracks including resurface and grading of same.

d) Failing to dispose of oil drums, toxic chemical containers, water troughs and plastic and tyres from around the property.

e) Failing to carryout maintenance on the centre pivot irrigators.

f) Failing to provide proof of the application of fertiliser as required.

g) Failing to prevent stock from grazing in wooded areas or to obtain landlord's approval for doing so.

h) Failure to keep native bush in good order and condition.

i) Failure to keep hedges properly maintained and trimmed.

j) Felling trees without landlord's approval.

k) Failing to control noxious plants.

l) Disconnecting the Mannerings' water supply to its garden.

m) Allowing beef steers to graze on the land.

[152] It appears the Mannerings' accept that individually the less "serious" breaches would unlikely dissuade a Court from granting relief against forfeiture.

[153] In their first notice the Mannerings' claimed the "serious" breaches were irremediable as time, circumstances and subsequent notices have shown. The Mannerings have continued to assert their case in reliance upon the first mentioned of those "serious" breaches i.e. unlawful extraction of water for irrigation. Whilst maintaining a claim that Netherland's water extraction practices have been

responsible for damage caused to pumps, it is clear the parties' respective experts cannot agree upon that claim.

[154] The significance of the offal pit "serious" issue changed emphasis with the issue of the Mannerings' second notice – no doubt as a consequence of the creation of a second offal pit. The second notice claims a failure to reinstate the terraces where the original offal pit was situated.

[155] Although the fourth "serious" issue relating to unauthorised use of the airstrip is repeated by the second notice Mr Mannering's evidence in support of the second notice does not add to that offered in support of the first notice which focussed upon a single occasion of breach.

[156] Although the second notice does not marginalise "serious" issues from others the overall thrust of the evidence emphasises the actual and potential damage caused by the alleged illegal extraction of water, and the cost of damage to pumps caused by Netherland's extraction practices. Otherwise it is in the accumulation of all claims of breaches which, the Mannerings' say, justifies their claim for cancellation of the lease.

[157] As previously noted the third notice focussed upon the consequences of alleged failures in farming practices i.e. to keep ditches, drains etc. clear, to "address" noxious weeds, to fence native vegetation, to trim and maintain hedges, and to use only those areas of the farm permitted.

[158] The Mannerings' case is that breaches are ongoing and that, as the third notice demonstrates, claims by Netherlands of compliance and good practice may accordingly be discredited.

[159] Counsel have addressed in length the nature of the claimed breaches and the consequences that flow from the finding of breach. Each accepts that (generally) positive covenants are those that can be remedied whilst negative covenants are those usually remedied by cessation and compensation. Whether a breach is one or the other often depends on whether it is, in all the circumstances, remediable. If

remediable then a reasonable time for its performance is allowed. Even a negative covenant can be capable of remedy provided any prohibited activity is terminated and compensation for damage caused is paid. The critical issue is whether the harm done to the landlord by the breach is capable of being retrieved, whether practically or by compensation. In some cases it will be enough if the tenant ceases to act in the manner complained of and provides an undertaking against any further breach: *Expert Clothing Service and Sales Limited v Hillgate House Limited* [1986] CH 340.

[160] Usually an illegal breach is incapable of remedy unless compensation provides adequate relief.

[161] Counsel accept the Court has a wide discretion which may include submission to a program to remedy default. As both counsel observe the Court must undertake a balancing exercise: The nature/gravity of the breach against the consequences if relief is not granted. Relief is normally granted to one who has made good the breach and is able and willing to fulfil his obligations in the future, but relief will not readily be granted where the breaches are wilful*: Studio X Limited v Mobil Oil (NZ) Limited* [1996] 2 NZLR 697.

[162] It will be apparent from my review of the various affidavits filed for each side that there is little the parties can agree upon. Some summary of that disagreement is necessary to support the Court's conclusions in the outcome. This is Netherland's application and it has a responsibility of proving a sufficient case for relief. I will review what I shall describe as the anecdotal evidence of the parties who report on what it is they saw. Then I will assess that by reference to the evidence of experts who have undertaken their inspections with a view to commenting on agricultural practices because it is by reference to the customs of agriculture prevailing in the district concerned that the lease should be interpreted when assessing whether there has been a relevant breach. Finally, I shall address the evidence relating to water extraction methods and claims of illegal extraction.

Anecdotal evidence of breaches

[163] One could perceive from the review of the evidence that there is little about Netherland's farming practices that the Mannerings do not take exception to. In fact apart from the evidence of the Mannerings' neighbours tending to support his account the essence of farming practice analysis is provided in the reports of Mr Ingelbrecht and Mr Ryan. Except for two reasons I will defer entirely to my assessment of the evidence of those two persons about farming practices. One exception concerns observations that the Court is able to make regarding Mr Mannering's evidence. The second exception concerns the Court's assessment of the oral evidence give by Mr Wobben and Mr Peddie. I will deal with those exceptions now.

Mr Mannering's affidavit evidence

[164] Mr Mannering has a right of access to the farm for recreational purposes. He is also bound by a covenant to permit Netherland peaceful occupation of the leased property. It is quite clear from the volume of evidence and the regularity of Mr Mannering's excursions over the farm that his reasons were motivated more for the purpose of gathering evidence in support of his claims, than for recreation. Indeed it is noted in paragraph 23 his "inspections" became more frequent as he noticed a "deterioration" when "things were not as they should be".

[165] Mr Mannering referred to occasions when he stopped to give the farm manager advice concerning aspects of farm practice (shortly after pumps had been overhauled; and when he was concerned about the positioning of an irrigator at the airstrip). He believes his requests were made in a pleasant manner.

[166] The Court did not have the benefit of hearing from Mr Mannering and must therefore be wary of drawing unreasonable inferences on the basis of analysis of affidavit evidence. But, it seems clear Mr Mannering's perceived concerns drove him and motivated him to collect evidence in his cause of bringing the farming lease to an end. This is apparent from the gallery of photographs produced as evidence. Mr Wobben's evidence in cross-examination that some of these photographs were merely different aspects of the same scene, was unchallenged. Likewise in view of the Court's assessment of the evidence of Mr Wobben and Mr Peddie, it considers

their observations (as recorded in paragraphs 105 and 115 herein) as accurate assessments.

Court's impression of evidence of Mr Wobben and Mr Peddie

[167] It was my firm view of these two persons that their evidence was given honestly, was reliable, clear and accurate. Their evidence was given in a consistent and a moderate way. They did not seek to evade propositions that might on the strength of questions put to them, have seemed uncomfortable. They were fair, reasonable and convincing witnesses.

[168] Mr Wobben acknowledged that at first blush the case presented and supported by photographs of muddy tracks and surface water during July and August 2008, provided a bleak picture. But, it was he who identified that some of the photographs were merely the same scene being photographed from a different angle. He roundly rejected claims of poor farming practice in my view. He did so skilfully and honestly when dealing with Mr Hall's questions.

[169] Likewise of Mr Peddie it might be said that honest men can sometimes be mistaken. There is no question but that he attended to his duties as best he could. The Court accepts his claim that he had never deliberately extracted more water from the river than he believed was lawfully allowed.

[170] In summary claims of flagrant or wilful breach are without foundation. Therefore have there been breaches of farming practices and if so how should the Court deal with them. It is with respect to these questions that the evidence of Mr Ingelbrecht and Mr Ryan needs to be considered.

Expert evidence concerning farming practices

[171] Mr Ingelbrecht's first two visits were on 10 July and 12 August 2008. He commented upon the practice of disconnecting electric fences. He saw damaged gates and expressed his understanding of lease obligations regarding a requirement to remove those. He considered some repairs undertaken to have been superficial.

He commented on the quality of the tracks and said a good farm track would allow vehicle access in an ordinary family car. He refers to seeing some rubbish about. He commented upon hedge trimming practices. He said the keeping of bull calves was not necessary to a dairy operation. He saw no spraying of gorse on the open terraces. He considered there were a number of breaches of the lease. Mr Ingelbrecht visited again on 24 December 2008. He inspected ditches, drains and watercourses and said he did not accept wet areas were a consequence of wet winter conditions. The problem he said was a lack of proper cleaning of ditches and drains. He considered that the drains in question had not been cleaned in autumn as was usual practice. He noticed evidence of recent damage to native trees. He made a comment regarding gorse on the terrace areas. He said there was little evidence of recent side trimming or topping of shelterbelts.

[172] Mr Ingelbrecht's evidence is significant for what it does not say. He does not say why in his observation of gorse on the terrace areas "must have expanded" in the previous three or four years. He does not provide detail of his observations of the decline in the health of the native trees. His observation of there being (as at 24 December 2008) little evidence of side trimming or topping of shelterbelts needs to be assessed by reference to the evidence of Mr Staples who said in October 2008 he trimmed both sides of most trees on the farm – he estimated about 85 – 90 percent of them. Also he did tops on about 25 percent of all trees.

[173] Mr Ingelbrecht asserts breaches of lease without referring to relevant clauses. It is surprising his first affidavit made no reference at all to the very heavy rainfall occurring around the time of his first two visits to the farm, particularly concerning his comments about the state of farm tracks.

[174] The approach taken by Mr Ryan in his reports is, by contrast, thoroughly comprehensive and where relevant indexed by reference to clauses of the lease. Concerning Mr Mannering's claim to have control over wooded areas Mr Ryan notes in fact those areas are by the lease controlled by Netherland. Save for those matters relating to water extraction methods and practices Mr Ryan's reports provide a systematic assessment of each of the claims of farming malpractice. Except where minor exceptions are noted he roundly supports Netherland's claims of consistent

and appropriate use of farm management practices. He has qualified his conclusions by reference to relevant data including rainfall records.

[175] In overview he provides perspective to understanding the difference of farming needs and practices of an intensive dairy support unit by comparison to a dry land, sheep and beef unit.

[176] In summary of the evidence of Mr Ingelbrecht and Mr Ryan the Court unhesitating accepts that there are no breaches of lease relating to farming practice matters but if there were then such are of a minor nature so as not to involve any consequence for Netherland.

Expert evidence concerning functioning of gallery

[177] In significant respects the conclusions of Mr McIndoe and Brough are opposed. Mr McIndoe says the silting is caused by water extraction when the river is at low levels. Mr Brough says the pumps are at greater risk when water is extracted at times of high river flow e.g. in flood. There appears no reason to prefer the conclusions of one over the other. However, to the extent that the Mannerings' claim Netherlands has committed a "serious" breach of its lease because of its failure to property maintain the water pumps it cannot be said there is evidence of wilful or flagrant neglect. Mr Wobben's evidence was that he services the pumps regularly. Mr Mannering's evidence to the contrary seems to focus on the occasion when he advised Ms Peddie of a need to take care when he perceived Netherland's employees were " tinkering" with the pumps. Concerning the incident when the seal broke and water gushed on 28 January, the acceptable evidence is that the pumps were not on or functioning when this event occurred. The incident cannot accordingly be linked to neglect or practice standards. In short the pumps suffered a mechanical breakdown due to breakage of a seal.

[178] Notwithstanding the Court's inability to reconcile the opposing reports of Messrs McIndoe and Brough, the Court on the evidence available to it does conclude there is nothing in the evidence concerning care and maintenance of the pumps for which a breach of lease can be ascribed.

Water extraction practices

[179] Until Mr Peddie was cross-examined on 22 April 2009 all parties were of the understanding that water extraction restrictions, when imposed, applied for a 24-hour period beginning midnight following posting of the notice of restriction. That is what Ecan says (through Mr Hide). That was part of the outcome of the parties meeting on 14 December 2006 because of the practices Netherland then installed in order to observe compliance. It did mean that the farm manager or other employee for the time being responsible for altering extraction input need be prepared, as late as 9:00pm in the evening to receive Ecan's restriction notices by accessing its website at that time, and then, proceeding from home, back to the farm in order to make the appropriate adjustments prior to midnight when the restrictions began.

[180] Notwithstanding the considerable burden that such a practice might entail, it was one around which Netherland instituted management practices.

[181] Mr Mannering's affidavit evidence gave instances of water use during days when total restrictions had been imposed. Evidence was given on behalf of Netherland acknowledging turning off sprinklers after arriving at the farm for work in the morning after restrictions had been posted on Ecan's website. Mr Loe supports Mr Mannering's evidence on two occasions.

[182] By Mr Mannering's account there were numerous breaches including the two occasions in January and March 2009 respectively, which Mr Veendrick addressed in his report. I infer from the evidence for Netherland that there is an acknowledgement of breach on two occasions only post 14 December 2006.

[183] The availability of water for irrigation purposes provides, as it were, the lifeblood of a dairy support unit operation. Mr Mannering's history was with dry stock farming. I infer so to is Mr Loe's farming experience. The requirements for irrigation for a dry stock operation is, and again I infer, much less. Perceptions of unlawful use understandably affect other farmers. Mr Loe said as much.

[184] Even if I was satisfied breaches had occurred in the circumstances I have just described, I would conclude such were neither wilful nor flagrant. Mr Peddie did his best to comply with what he perceived were his obligations. He made daily diary notes of restrictions applying although by his own account he accepts in hindsight there were deficiencies in his bookkeeping methods. It does not affect my overall impression of him as an honest and reliable witness.

[185] There is another reason for considering any breaches would not warrant the outcome the Mannerings' seek. That other reason is contained in the affidavit of Mr Veendrik. That evidence reported his calculations of water extraction rates during periods when restrictions were in force, when his calculations were made upon his interpretation of the requirements of the resource consent and in particular because it provides for a right to extract water over periods of 24-hours beginning on noon one day and ending on noon the other.

[186] Mr Hall has endeavoured to undermine the value of Mr Veendrik's evidence on the basis that he is not an expert in interpretation of the Resource Management Act or consents thereunder. He suggests Mr Veendrik is "torturing" the words used in their meanings. Mr Hall submits the noon to noon submission is "an ex post facto attempt to deny/excuse the clear breaches of the consent on the 31 January and on 19 March 2009".

[187] Mr Hall also submits that Mr Veendrik is in error when he deposes that on the two days in question any abstraction was not over the limit of the applicable restriction because such opinion is based on three wrong assumptions, namely:

a) The restrictions only applied from midday on the days in question;

b) The flow rates details provided on behalf of Netherland are correct;

c) An unfounded belief that the flow rate should be averaged out over a 24-hour midday to midday period, when the consent and the restrictions applied to flow rates not total usage over any 24-hour period.

[188] As I earlier observed all parties initially proceeded on the basis of an understanding that restrictions applied from midnight to midnight following the posting of an appropriate notice on Ecan's website. Mr Veendrik has made his conclusions based upon his interpretation of the licence which provides a right to extract during a 24-hour period beginning on noon on any day. Save to accept that Mr Veendrik is not qualified to interpret the legal implications of the terms of a resource consent, I am certain that his interpretation of the relevant resource consent is correct insofar as it applies to the right to extract water over a 24-hour period beginning at midday in any day.

[189] It is correct there is no issue as to whether the flow rates recorded for the different types of irrigators used on the farm were accurate. There is no evidence to suggest the contrary.

[190] The Mannerings appear to be claiming that Ecan's notice of restrictions amounts to being a direction issued pursuant to s329 RMA. If so then that suggestion is incorrect. Condition 1 of the resource consent provides an exemption from the prohibition in s14(1)(a) against taking water when the flow as estimated by the Regional Council is below a certain level. If water is taken in contravention of that condition then there is a breach of s14.

[191] The purpose of posting the information on Ecan's website is to enable a consent holder to ascertain when the flows that render the take outside the scope of the condition, and thus the permission, occur.

[192] I accept the submission of Ms Smith that the prohibitions contained separately in s14 and s329 are separate and unrelated. It is clear from s329 that it is for the Regional Council to consider if there is a serious temporary shortage of water requiring appropriate direction. This power is to be contrasted with that in s322 RMA which empowers an enforcement officer of a local authority to issue an abatement notice. Such a person is not expressly delegated with the powers of the Regional Council in situations where there is a serious temporary shortage of water.

[193] There is no evidence in this case of a decision being made by the Regional Council leading to the requirements of the notices issued daily on behalf of Ecan. Rather all that had occurred was that a council officer had posted estimated flow rates on a website to enable consent holders to ascertain how to comply with their consent conditions thereby avoiding contravening s14. Therefore those notices were not water shortage directions pursuant to s329 and could not lead to a contravention of a water shortage direction. Further and I accept the website did not direct any consent holder to cease taking water after midnight. The website simply advised what "tomorrow's flow and tomorrow's restrictions" will be noting only that "the flow and restriction information in these columns will become today's flows and today's restrictions at midnight…"

[194] I think Ms Smith is correct in her submission that there is no "direction" that the restrictions take effect at midnight. Eagle Hill's consent providing for restrictions to apply for the 24-hour period from midday makes practical sense for farmers who would otherwise be required to switch over irrigators at midnight.

[195] Regardless, I am satisfied that Mr Hall's claims of contradictory and untrue evidence from Mr Peddie of the claim of multiple offences under the RMA are wrong. He says prosecution could still follow because the breaches in January and March this year are not time barred. Regardless no notice of prosecution has been given. I shall be surprised if it was. However, if such did occur it would allow the Court an occasion to consider the juxtaposition of resource consent terms and rights given by the RMA. It would also give the Court an opportunity to consider the reasonableness of Ecan's position that it can as late as 9:00pm in an evening require the imposition of restrictions and all that entails, during the three hours thereafter.

[196] A matter of curiosity to the Court is the fact that it appears to be Mr Mannering who is providing Ecan with information identifying breaches when it is he and his wife who are the owners of the consent and most likely therefore to suffer most if the consent was withdrawn or cancelled. On the other hand, it may be an indication of the extent to which the Mannerings are prepared to go to cancel the Netherland lease.

General

[197] In conclusion and concerning the Mannerings' raft of alleged breaches their complaints, and the Court's responses are:

Offal pit

[198] The Mannerings claim that the offal pit was in breach previously of Regional Authority rules and if the Regional Authority was not previously aware of it then it could bring a prosecution within six months of learning of a breach. The claim is referenced to two or three animals one of which was a lamb killed on the roadside adjoining the farm. Another concerned an animal from the Mannerings' own stock. It was claimed there were two deer in the pit, but the photographic evidence is less than clear to support this.

[199] It is curious this submission is maintained because the allegation of a failure to maintain a lawful offal pit was not pursued in the Mannerings' second notice. Rather by that second notice the breach alleged is of a failure to reinstate the terraces where the offal pit was to their former state. Not until Mr Hall's final submissions was any concern raised about the breach of animal matter or the disposal of animals from the farm to old offal pits.

Beef steers

[200] The Mannerings say they are not dairy stock. They rely upon Mr Ingelbrecht's view of the matter. Mr Ryan's view is to the contrary. I have identified in other respects why his view is to be preferred. Agricultural custom provides that it is normal for farmers to have a small group of beef animals on the property for their own consumption purposes. Also it is clear that the term "dairy stock" does not mean milking stock.

Top dressing

[201] The Mannerings say that minimum top dressing quantities have not been maintained and no one gave evidence to confirm Mr Wobben's claims that the intent

and purpose of that obligation had been met. The fact is there is not evidence of breaches, just supposition made from a claim that insufficient information has been provided. Mr Wobben gave evidence of consultation and appropriate application. Mr Ryan provides supporting evidence. Mr Stubbs gave evidence that approximately 30-40 percent more fertiliser in total was applied than was prescribed. There is no evidence that any absence of top dressing will result in long term damage to the land. To the contrary, the evidence suggests that nutrients being supplied is in fact increasing the fertility of the land.

Water pumps

[202] The Mannerings claim Mr McIndoe's report conclusively answers Mr Brough's case. It does not do that, for the reasons I have previously explained. Netherland has not refused to reimburse the costs incurred for maintenance. Rather their case is that the cause of silting needs to be determined. If it is a gallery design issue then Netherlands can rely on the fair wear and tear exclusion in clause 8.1.2 of their lease. If on the other hand it is determined that it is a tenant maintenance issue then Netherland has accepted responsibility for the cost of replacement and/or reconditioning. There is a lack of evidence to show any connection between that obligation and systemic failures emanating from the extraction system installed by the Mannerings.

Airstrip breaches

[203] Mr Hall submits an issue of credibility arises concerning unlawful use of the airstrip. Reference is made to two occasions in September and October 2007. One of those concerned the presence of a ball of no.8 wire. The acceptable evidence of Mr Peddie was he was not responsible. He said Mr Mannering had put it there. Mr Hall submits the Court can disregard Mr Peddie's explanation because Netherland did not cross-examine Mr Mannering upon his claims. Mr Hall forgets there is no obligation to cross-examine deponents in cases such as this. I have already indicated my regard for Mr Peddie as a witness. It is hard to see why the Mannerings consider the events in September and October 2007 provide an "ongoing" safety issue.

Noxious plants clearance

[204] Contrary to Mr Hall's submission the photographic evidence of gorse on the irrigated tracks is not conclusive evidence of infestation since the lease commenced. There is no evidence of changes since the lease commenced save for the considerable clearing work claimed by Netherland, and not disputed by Mannerings, having been done.

General

[205] The current state of disagreement between the parties is unsatisfactory. It seems the parties' relationship has deteriorated since an attempt to review the rent in 2007. That notwithstanding and in spite of three attempts by the Mannerings to bring the lease to an end they have quite recently given notice of an increase in rental. Whilst issues of waiver and estoppel may arise because of this, I accept in all the circumstances of this case it cannot be considered that the Mannerings have acquiesced in the alleged breaches in such a way that it would be unconscionable for them to be allowed to proceed with their claim of cancellation.

[206] In the outcome the Mannerings' claims of breaches have sometimes focussed on the trivial or insignificant. In respect of those "serious" matters there is in the end nothing of substance. Minor infractions do not provide an appropriate basis for any direction at all from this Court save but to grant the various applications for relief against forfeiture.

[207] There is evidence of breaches by Mr Mannering of his covenant to observe Netherland's right of quiet enjoyment. However the competing rights of inspection, and recreational use, would make it impractical if not near impossible to make any order requiring the Mannerings to perform their obligations.

Judgment

[208] The applications for relief against forfeiture of lease **are granted**.

[209] **I direct** costs be fixed on a **category 2(b)** basis to be paid to the applicant. If counsel cannot agree over costs then the respondents' are to file a memorandum within two weeks of receiving a copy of that filed on behalf of the applicant.

Associate Judge Christiansen