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## Different kinds of argument for applying property law to resource consents

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### Introduction

Two recent Court of Appeal cases present an opportunity for making progress in unravelling some of the puzzles about the extent to which the holder of a Resource Management Act resource consent, such as a water permit, holds property rights. These problems are not unique to the RMA or to

New Zealand, and everywhere they involve a difficult interweaving of private law and public law. There is no generally accepted body of law for ascertaining whether the attributes of property ownership attach to permits granted under statutes: B Barton, "Property Rights Created under Statute in Common Law Legal Systems" in A McHarg and others (eds) *Property and the Law in Energy and Natural*

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*Resources* (Oxford University Press, Oxford, 2010) 80–99. But a useful distinction can be drawn between two different purposes to which property arguments can be put, and it provides a basis on which to reconcile two recent cases, *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, and *Greenshell New Zealand Ltd (in rec) v Kennedy Bay Mussel Co (NZ) Ltd* [2015] NZCA 374, [2016] 2 NZLR 44.

### ***Hampton v Canterbury Regional Council***

*Hampton v Canterbury Regional Council* concerned a water permit obtained by Simon Hampton in 2005 for irrigation. In his assessment of effects on the environment, he explained that he needed water for his land and for the adjoining farm of his cousin Robert. However, the two cousins disputed the basis on which that water could be used on Robert's land. Robert faced the problem of not being able simply to apply for more water because the aquifer water was soon fully allocated. In the time that he was grappling with this problem, Simon was making efforts to transfer the permit or some of the water to another person, at another place. These efforts resulted in legal action, primarily *Hampton v Hampton*, HC Christchurch CIV-2008-409-2394, 9 March 2009, and *Hampton v Hampton* [2010] NZEnvC 9.

The present proceedings concerned a solution to Robert's problem that was originally suggested by the Environment Court, and then accepted by the regional council. It took the form of a permit, granted to Robert in 2011, to take water to the extent that Simon's right to use water to irrigate Robert's land was not being exercised. Simon attacked this deft solution by seeking judicial review. The substance of his complaint was that the permit interfered with his water permit rights, because if Robert got water under it, then he could not take or transfer so much (at [67]). Simon argued that it was a derogation from his grant. He was unsuccessful with this argument in the High Court. The Court of Appeal affirmed the High Court decision and found against Simon: it was inconsistent of him first to apply to irrigate his and Robert's land and then to ask for a variation so it could be applied to his and a different owner's land. It was conceptually wrong for Simon to say that Robert's 2011 consent took away rights from him, or to say that he had a right to transfer his permit or get its terms modified. Simon could not say that the grant of Robert's consent affected him, or that it defeated any right he had legitimately arising under the Act. That he could not charge Robert for water was not an issue of resource management significance or concern (see [77], [80], and [110]).

Simon relied on *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC), and in particular its use of property law and the principle of non-derogation from a grant, but the Court held that he could not succeed. Robert's consent was not a derogation from Simon's consent because Simon's water could only be used to irrigate Robert's land. This was enough to distinguish the case from *Aoraki*, but the Court went on to describe *Aoraki's* analogy with profits à prendre and its reliance on non-derogation as "problematic". The Court rightly observed that RMA water permits do not create rights to property; rather, they give rights to carry out activity under the Act. The Crown does not have property in natural water, even though rights to water are vested in it. *Aoraki* could not say that the water permit allowed the holder to remove property. The Court equally disapproved of *Aoraki's* reliance on the principle of non-derogation from a grant as a principle common to all relationships that confer a right in property.

Quite properly the Court of Appeal drew attention to s 122 of the RMA and its declaration that rights under resource consents are neither real nor personal property. *Aoraki* had hardly considered s 122 at all. The Court of Appeal emphasised that the section excludes what the law might otherwise imply, namely liberty of use, the right to exclude others, the power to alienate, and the immunity from expropriation. Certainly, the Act goes on to confer property-like rights (transfer and grant of a charge), and to require the consent to be treated as property for certain specific purposes (on death, company liquidation, and the like). But the legislature's purpose was plainly "to allow a holder only those incidents of property that the Act itself confers, and then subject to the Act's conditions" (at [105]). The grant of these incidents of property recognised the advantages of private ordering. Transferability might have its benefits, but Parliament did not try to create a world in which consents can be freely traded independently of the site for which they were granted. Transferability is to be evaluated against the public law criteria of the Act, not in protection of the economic interests of the consent holder.

*Aoraki's* venture into property law has therefore been brought to an end. Neither *Aoraki* nor *Southern Alps Air Ltd v Queenstown Lakes District Council* [2008] NZRMA 47 (HC) should be followed as to non-derogation. The correct path of analysis is to stick more closely to the statute. The Court of Appeal points out (at [108]) that in *Aoraki* there was sufficient authority in the statutory regime and the principles set out in *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA)

to reject the proposition that there was nothing to prevent the issue of further consents. One can put it in administrative law terms, that the avoidance of erosion of other resource consents was a relevant and necessary consideration, and in statutory interpretation terms, that Parliament did not intend a consent authority to undermine existing consents.

While it is true that *Aoraki* did not necessarily reach the wrong result, one remembers that property law was right at its centre. When I wrote on *Aoraki* in 2009, I criticised it for error in confusing property as rights over a thing with the thing itself (the water in the lake), in misstating the vesting of rights to water by the Water and Soil Conservation Act 1967, and in declaring that the principle of non-derogation governs all relationships (Barry Barton “The Nature of Resource Consents: Statutory Permits or Property Rights” paper presented to New Zealand Law Society Environmental Law: National Issues Intensive Conference, July 2009, 51; I disclose that the Court of Appeal mentioned this article). The Court corrected these errors.

More generally, the Court of Appeal in *Hampton* pulls our focus back onto the legislation and what Parliament intended, in s 122 in particular. It made sure that regional councils are not hampered by restrictions that cannot be found in the Act. We must ascertain the meaning of legislation from its words and purpose. This does not always require strict literalism, as a case like *Armstrong v Public Trust* [2007] 2 NZLR 859 (HC) demonstrates; but it does mean that we should not disregard s 122 as *Aoraki* did, and as some commentary in the field tends to do. Careful legal analysis and accurate statutory interpretation are essential.

## Two categories of issue

Looking at the cases, one sees two quite different kinds of purpose in resorting to property law. The first is to ascertain the rights under a resource consent, usually, in an effort to expand those rights. Often the expansion is at the cost of other resource users, and invariably it attempts to constrain the discretion of the public agency – the regional council – to manage the resource and the environment generally. It therefore affects decisions about environmental management. In that, it is very likely to depart from the intentions of the Act and to produce legally indefensible results. *Hampton v Canterbury Regional Council* here is an example. Another example, in commentary, is that tradeability and transferability of consents can be enhanced by reference to property rights. The Land and Water

Forum has been calling for improvements here since 2010, but there is nothing on the subject (or on s 122) in the Resource Legislation Amendment Bill introduced on 26 November 2015. However, we cannot introduce trading simply by talking up property rights, as the Court in *Hampton* noted. Until the law is changed the courts are bound by s 136.

The second purpose for using property law concepts is to resolve competing claims to a resource consent. In my respectful opinion, the Court of Appeal in *Hampton* was right to refer (at [106]) to the advantages of private ordering. These advantages lie in bringing about the resolution of disputes *inter partes*. It is natural to turn to property law to resolve such questions; it has its own rational internal coherence that allows a court to do justice between parties. The disputes of this kind that parties bring usually have no environmental management dimension to them. The RMA usually gives no guidance to their resolution. But the courts must still resolve them.

*Armstrong v Public Trust* is a clear example. A father and son were recorded as holders of a coastal permit for a whitebait stand; the father died; the Public Trust maintained that his estate was entitled to a one-half share in the permit; but the Court held that the son was the sole holder by reason of a joint tenancy right of survivorship. There was no reason to think that Parliament in s 122 meant that the common law of joint tenancies should not apply. That seems quite reasonable; if Parliament did not provide for this matter, the Court still had to decide the dispute, and it had to find a basis in legal principle to do so. There was no issue of sustainable management of natural and physical resources at all. A case like this shows that private law has a place, even if it stretches s 122.

Also in this second category are cases where vendors are slow to convey water rights, such as *Ferguson v Canterbury Regional Council* EnvC Christchurch, C101/08, 5 September 2008. More purely proprietary are the cases where there is no *lis* or bond of contract or trust between the plaintiff and defendant, such as *Main Farm Ltd (in rec) v Otago Regional Council* HC Dunedin CIV-2010-412-385, 21 November 2011, noted by Vanessa Hamm and Bridget Bailey “Resource consent – Property in all but name’ RMJ (April 2014) at 17. The High Court found that a party held the legal title to a water right on trust and ordered him to transfer it to the person entitled. But the point was scarcely argued, and not too much should be made of the one decision.

A more significant case of competing claims to a resource consent is *Greenshell New Zealand Ltd (in*

*rec) v Kennedy Bay Mussel Co (NZ) Ltd* [2015] NZCA 374, noted by Vanessa Hamm and Bridget Bailey “Nature of a Resource Consent –the debate continues” RMJ (November 2015), at 31. In brief, it concerned the availability of relief against the forfeiture of a lease and a sub-licence of a coastal permit. Relief, which is always discretionary, was refused mainly because it would treat the fact of a company receivership as inconsequential and would do nothing to remedy the breach that it represented (at [74]). But the Court also decided that the case concerned proprietary or possessory interests, making the doctrine of relief against forfeiture available. Its key finding was that the coastal permits involved possessory interests and granted the holder limited rights to occupy the coastal marine area, and that coastal possessory rights were transferred by the lease and sub-licence to Greenshell (at [52] and [55]). It relied on *Armstrong v Public Trust* and *Aoraki Water Trust*.

### **Reconciling Hampton and Greenshell**

*Hampton v Canterbury Regional Council*, also decided by the Court of Appeal, eleven weeks later, did not mention the favourable reference to *Aoraki Water Trust* in *Greenshell New Zealand Ltd*. Only Miller J was common to the two divisions of the Court. (He dissented in *Greenshell* but not on this aspect.) *Greenshell* has been given leave to appeal to the Supreme Court: [2015] NZSC 180. How can the two cases be read together?

One point of distinction is that *Greenshell* concerned coastal permits with their specific occupancy and possessory features (notwithstanding the declaration in the Marine and Coastal Area (Takutai Moana) Act 2011 that no one owns the common marine and coastal area). In *Hampton* and other water permit cases, it is less easy to find proprietary characteristics. We have noted that an argument that a water permit is a kind of profit à prendre runs into the conceptual problem that the water is not actually owned by the Crown.

More effective as a point of distinction, in my view, reconciling the two cases, is that they involve the two different purposes of using property law described above. *Hampton v Canterbury Regional Council* was an effort to expand the plaintiff’s rights, by arguing that they were a form of property from which the grantor could not derogate, putting constraints on the regional council. It was therefore a line of argument from property that would affect the sustainable management of natural and physical resources under the legislation. In contrast, *Greenshell New Zealand Ltd (in rec) v Kennedy Bay Mussel Co (NZ) Ltd* did not raise questions about the grant or withholding of resource consents, or sustainable management by the regional council. Its question was whether company receivers could obtain reinstatement of a lease and sub-licence of a resource consent. It concerned doing justice between parties in a dispute which the Act was not intended to resolve, and it had no effect on the work of public agencies in administering the Act.

The point of distinction is therefore that property law concepts may legitimately be relied on where the issue is one of resolution of competing claims to a resource consent, but not where the issue is one of ascertaining or delimiting the extent of rights under a resource consent. Under this distinction, both *Hampton v Canterbury Regional Council* and *Greenshell New Zealand Ltd (in rec) v Kennedy Bay Mussel Co (NZ) Ltd* are correctly decided. This distinction between different kinds of property argument will not resolve all questions about the nature of resource consents, but it may prove helpful in addressing a number of them.

#### *Afterword*

*The Supreme Court has refused leave to appeal from the Court of Appeal’s decision in Hampton: Hampton v Canterbury Regional Council* [2016] NZSC 50. The Court did not think that a matter of general importance was raised by debate about criticisms of the *Aoraki* judgment, as the decision itself was not disputed. Further, the present case did not directly engage the *Fleetwing* principle ■