

CASE COMMENTARY

NEW ZEALAND – FRESHWATER ALLOCATION: PROPERTY RIGHTS, NON-DEROGATION FROM GRANT AND LEGITIMATE EXPECTATION

Trevor Daya-Winterbottom *Faculty of Law, University of Waikato*

BACKGROUND

Freshwater allocation has been a significant issue in New Zealand, particularly in the rich agricultural regions of the South Island, for over a decade, and has given rise to significant litigation before the superior courts.¹ For example, in the Canterbury region there is competition for access to freshwater between agriculture and hydro electricity generation, and between agricultural users in terms of their needs for irrigation. In part, this results from land use change, with the conversion of sheep and beef farms to dairy farms. During the period 2002–2012 dairy farming increased by 28 per cent.²

Absent any clear legal or policy direction in the framework Resource Management Act 1991 (RMA), the courts have been required to determine critical questions regarding the legal effect of resource consents and priority to scarce freshwater resources between competing applications. This situation has been hampered by slow progress in the preparation of national policy statements (NPS) by the Minister for the Environment, with the NPS regarding freshwater management only being made operative as recently as 2011.³ Similarly, progress has also been slow in terms of regional plan preparation, with ministerial intervention and special purpose legislation being required to complete the Canterbury regional plan process in a timely way.⁴

This case summary focuses on the legal issues regarding property rights, non-derogation from grant and legitimate expectation in the context of resource consents for the take and use of water arising from the recent Court of Appeal decision in *Hampton v Canterbury Regional Council*.⁵

EXISTING LAW PRIOR TO HAMPTON

The issue of freshwater allocation came sharply into focus in *Aoraki Water Trust v Meridian Energy Ltd*.⁶ The background to the case was that Meridian held resource consents relating to its hydroelectricity generation scheme that allowed it to dam the natural outflow from Lake Tekapo in the Waitaki catchment in the South Island, and to divert up to 130 m³ of water per second into a canal for generation purposes. Aoraki sought resource consent to take up to 15 m³ of water per second from the lake for irrigation purposes. It was clear that allowing Aoraki to take water from the lake would have an adverse effect on Meridian by reducing the available flow. But the law under the RMA was uncertain. Did the consents held by Meridian present an insuperable obstacle to Aoraki, as a matter of law under the RMA? To decide this question, the High Court decision in *Aoraki* considered the nature of resource consents. For example, does the grant of consent confer a privilege or a right on the consent holder?

Under the Water and Soil Conservation Act 1967 (repealed and restated by the RMA), the Town and Country Planning Appeal Board had found that the grant of a water right did not provide a guarantee for extraction of the volume of water allowed to be taken. The legal effect of granting the water right was simply to render lawful what would otherwise have been unlawful absent the grant of consent. Subsequently, in *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd*,⁷ the Court of Appeal defined water rights as 'privileges'. Based on the previous law, Aoraki contended that the legal effect of granting a water permit under the RMA simply conferred a privilege on the consent holder, and not an exclusive right that could be used to prevent other persons from taking or using freshwater from the same resource.

Meridian, on the other hand, contended that its consents were not 'privileges' or bare licences, but were 'rights' that 'could not be derogated from or diminished by issue of a further water permit to a third party'.⁸ The High Court was persuaded by the combination of property rights and public law arguments put forward by Meridian. Key matters that influenced the Court's judgment were the requirement in section 7(b) of the RMA to have regard to the efficient use and development of natural and physical resources, and the concession made by Aoraki that

1 *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC); *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZRMA 200 (CA); *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 (CA).

2 Ministry for the Environment and Statistics New Zealand, *Environment Aotearoa 2015* (Ministry for the Environment, Wellington, October 2015) www.mfe.govt.nz.

3 National Policy Statement for Freshwater Management 2011 [NPS-FM 2011]. A replacement National Policy Statement for Freshwater Management 2014 [NPS-FM 2014] took effect on 1 August 2014.

4 Ministry for the Environment *Investigation of the performance of Environment Canterbury under the Resource Management Act & Local Government Act* (Ministry for the Environment, Wellington, February 2010); Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010; Maree Baker 'A watershed moment in Canterbury for water management in New Zealand' (August 2010) *Resource Management Journal* 20.

5 [2015] NZCA 509 (2 November 2015).

6 [2005] 2 NZLR 268 (HC).

7 [1985] 2 NZLR 94 (CA).

8 Trevor Robinson 'What's in an allocation?' (March 2005) *Resource Management Journal* 21, 22.

allowing it to take water from the lake would 'devalue' Meridian's interest in the water. The Court held that:⁹

In our judgment, granting a water permit for a particular volume of water over a specified period of time commits the consent authority to that grant in the sense that it is not entitled to deliberately erode the grant unless it is acting pursuant to specific statutory powers. The relevant factors applying in this public law context are similar to those underlying non-derogation of grant. In situations where the consent authority's commitment represents a *full allocation of the resource* . . . the grantee . . . must reasonably expect to proceed with planning and investment on the basis that the consent authority will honour its commitment. Indeed, refusal to recognize that expectation would seriously undermine public confidence in the integrity of water permits. (emphasis added)

PROPERTY RIGHTS FOLLOWING HAMPTON

The Court of Appeal decision in *Hampton*¹⁰ concerned the judicial review of the grant of resource consent for the take and use of water in the Chertsey groundwater zone in the Canterbury region of the South Island.

Previously, a series of resource consents had been granted to Simon Hampton for the purpose of irrigating farms owned by Simon Hampton and his cousin Robert Hampton. Notwithstanding the purpose of the consents, Simon Hampton was the sole consent holder under the RMA. The water volume allocated for the farm owned by Simon Hampton (427,000 m³) had been transferred to the owners of other land in the same catchment, but following a disagreement between the cousins the water volume allocated for irrigating the farm owned by Robert Hampton (350,000 m³) remained unused. As a result, Robert Hampton applied for the grant of a separate resource to take and use the same water volume for the purpose of irrigating his farm.

In response, Simon Hampton commenced judicial review proceedings. He contended that the grant of consent for the same water volume to Robert Hampton (350,000 m³) would affect his rights to change the consent conditions either to allow this water volume to be used for the purposes of irrigating his own farm, or to transfer any unused water to other landowners in the same catchment. He asserted that this would result in a financial loss of up to \$560,000. In his view, his cousin should either pay the market price to access the water or do without. Effectively, Simon Hampton relied on the *Aoraki* decision.

The independent commissioner who made the delegated decision for the regional council was not persuaded by this argument. He found that the grant of consent would not reduce the water volume available for irrigating Simon Hampton's farm, because the grant of consent to Robert Hampton effectively represented a 're-allocation' of the water (350,000 m³) already allocated for irrigating his land. On review, the High Court was not persuaded that the grant of consent to Robert Hampton would derogate from the consent held by Simon Hampton, because:¹¹

- The consent granted to Robert Hampton expressly recognised the prior consents granted to Simon Hampton, and included a condition that prevented the water volume (350,000 m³) from being used by Robert Hampton in the event that Simon Hampton was able

to use that water volume pursuant to his consent at any time in the future (if allowed via the change of consent conditions).

- The condition included on the grant of the consent held by Simon Hampton, that specified that the disputed water volume (350,000 m³) could only be used for the purposes of irrigating Robert Hampton's farm, had been included at the request of Simon Hampton.
- Whilst the Court acknowledged that Simon Hampton could apply to the regional council for the change of consent conditions under section 127 of the RMA to enable him to use this water volume, it noted that his application for change of the conditions had been placed on hold by the regional council at his request.

Any arguments about derogation from the consent held by Simon Hampton were therefore found to be premature, and the High Court dismissed the application for judicial review.¹²

Court of Appeal decision

The judicial review then came before the Court of Appeal. The Court noted that in order for Simon Hampton to take and use the disputed water volume (350,000 m³) he would need to obtain further consents under sections 127 and 136 of the RMA. In particular, the Court observed that any applications for the change of consent conditions or for the transfer of the water to other persons in the same catchment would require a full assessment of any environmental effects (including any effects on established activities), and would also need to comply with any relevant regional plan provisions.¹³ Given the discretionary nature of these consent processes it could not therefore be 'assumed' that 'consent would inevitably' be granted.¹⁴ As a result, the Court considered that it was 'unrealistic' for Simon Hampton to rely on the doctrine of legitimate expectation.¹⁵

The Court then turned to consider the principle of non-derogation from grant. It noted that the High Court in *Aoraki* found that the grant of unlimited permits would not be consistent with the comprehensive licensing system established by the RMA, that the 'first in time' rule under existing case law conferred substantive priority for the successful applicant to use the resource, that the legal nature of the right conferred by the resource consent was 'analogous to a licence coupled with . . . a profit à prendre', and that the principle of non-derogation against grant applied to 'all legal relationships which confer a right in property'.¹⁶

However, the Court found the previous reasoning in *Aoraki* regarding the legal nature of the consent to take and use water and the application of the non-derogation from grant principle 'problematic' in a resource management context. In particular, the Court observed that at common law there was no property right regarding water, that statutory rights to control water have been limited (inter alia) to the right to take and use water which 'falls short of providing . . . a property right' and that section

¹² *ibid* [58].

¹³ *ibid* [84]–[85].

¹⁴ *ibid* [86].

¹⁵ *ibid* [87].

¹⁶ *ibid* [92]–[97]; *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA), which applied the 'first in time' rule to processing competing resource consents applications for the same resource.

⁹ *Aoraki* (n 6) at [41].

¹⁰ [2015] NZCA 509.

¹¹ *ibid* [49]–[61].

122 of the RMA expressly provides that a resource consent 'is neither real nor personal property'. As a result, the Court found that the RMA regime conferred only limited 'property-like rights' on consent holders – for example, the ability to register a resource consent under the Protection of Personal and Property Rights Act 1988, to grant a charge over a consent and to transfer the consent to other persons 'in certain circumstances'.¹⁷

Overall, the Court found that the RMA 'did not seek to create a world in which consents could be freely traded', that the 'market value of a water permit must reflect . . . the restrictions upon alienation'¹⁸ and that the regional council was not obliged under the RMA to 'protect the economic interests' of consent holders.¹⁹ Whilst departing from *Aoraki* in these respects, the Court was careful to emphasise that the 'first in time' principle provided ample justification (in substantive terms) to refuse the grant of subsequent resource consent applications where the resource in question has been 'fully allocated', and that it did 'not suggest the wrong result was reached' in that case.²⁰ As a result, the Court held that resource consent granted to Robert Hampton was appropriately granted and would not result in any 'further depletion' in the Chertsey groundwater allocation zone.

Supreme Court decision

Subsequently, Simon Hampton sought leave to appeal the Court of Appeal decision to the Supreme Court.²¹ In particular, he wished to dispute the findings of the Court of Appeal that the grant of resource consent to Robert Hampton did not cause 'any detriment', and that the grant of the original resource consent did not confer a 'property' right. Specifically, Simon Hampton took issue with the reasons given by the Court of Appeal regarding its criticism of the *Aoraki* decision.²² However, the Supreme Court did not consider that this issue was a matter of public importance as the Court of Appeal had clearly stated that it agreed with the outcome in *Aoraki*.²³

We do not see this issue as justifying the grant of leave. There is room for debate about the justification for the criticisms of the *Aoraki* decision in the Court of Appeal's judgment in this case, but, as those criticisms do not undermine the *Aoraki* decision itself, we do not consider that a matter of general importance is raised by this ground.

In relation to the question of priority between the subsequent applications made by Robert and Simon Hampton, the Supreme Court noted that for Simon Hampton to succeed on this point he: '. . . would have to argue that his application should receive priority despite the fact that he lodged the application after Robert, had no ability to use the water allocation at the time the application was made and voluntarily placed the application on hold for several years'.²⁴

Whilst the Supreme Court accepted that the *Fleetwing* approach to priority had not been fully considered by the Court, it found that the 'first in time' principle was not

'directly' engaged in *Hampton* and thus declined to grant leave for appeal based on this ground.²⁵

This Court granted leave in an earlier case that placed in issue the *Fleetwing* principle, but that case settled before the substantive appeal had been determined. We accept that this is an issue of general or public importance. But we do not see the facts of the present case as directly engaging the *Fleetwing* principle and for that reason we do not consider that granting leave for the purpose of allowing that issue to be argued would be in the interests of justice in this case.

Finally, the Supreme Court was not persuaded that legitimate expectation was 'arguable' in the context of *Hampton*, either in relation to the grant of the subsequent consent to Robert Hampton or in relation to Simon Hampton's ability to change the conditions of the original consent.²⁶ As a result, leave to appeal was dismissed.

COMMENTARY AND CONCLUSIONS

Successive New Zealand governments have struggled to establish a coherent legal regime under the RMA for managing freshwater. Despite an ongoing debate facilitated by the non-statutory Land and Water Forum since 2009, recurring issues regarding priority to freshwater allocation continue to persist. The situation has not been improved by NPS-FM 2014 owing to the long time-period set for compliance (31 December 2025), and the need for the NPS to be transposed by changes to all regional plans.

Whilst the Supreme Court did not need to engage with property rights, non-derogation from grant or priority for the allocation of scarce resources raised by the appeal in *Hampton*, arguably leaving these issues for determination on a subsequent occasion is unlikely to add clarity to the current state of the law. For example, it is clear from both the approved grounds for appeal and the interim judgment in *Ngai Tahu*,²⁷ that the Supreme Court is dissatisfied with the substantive effect of the *Fleetwing* priority principle and that it favours a principled exercise of discretion as opposed to what was described by Joseph Sax as a procedural 'traffic' rule.²⁸ Similarly, Hammond J observed in *Ngai Tahu* at the Court of Appeal stage that there was no 'fundamental' reason why substantive priority should be decided by applying a procedural rule.²⁹

Finally, Sax also noted the 'paradox' that while freshwater cannot, owing to its physical characteristics be owned, irrigators and other water users 'need property-like entitlements' in freshwater in order to provide for their economic and social well-being.³⁰ It appears that the Supreme Court was not entirely convinced by the criticisms levelled at *Aoraki* by the Court of Appeal in *Hampton*. The failure to grapple with these issues is a missed opportunity to nudge informed debate about them 'in the court of public opinion, or in Parliament'.³¹ Ultimately, substantive statutory reform will be required.

25 *ibid* at [9]; *Ngai Tahu Property Ltd v Central Plains Water Trust* [2008] NZSC 49; *Ngai Tahu Property Ltd v Central Plains Water Trust & Another* [2009] NZSC 24.

26 *Simon John Moffatt Hampton v Canterbury Regional Council* [2016] NZSC 50, [10].

27 *Ngai Tahu* [2008] (n 25); *Ngai Tahu* [2009] (n 25) at [1].

28 Joseph L Sax 'Our precious water resources: learning from the past, securing the future' (2009) *Resource Management Theory & Practice* 30, 41.

29 *Ngai Tahu* (n 1) at [97].

30 Sax (n 28) 30.

31 *Taylor v Attorney-General* [2015] NZHC 1706 at [71] (Heath J).

17 *Hampton* (n 5) at [105]; RMA ss 122(2)(c), 122(3), 136.

18 *Hampton* (n 5) at [106].

19 *ibid* [107].

20 *ibid* [108].

21 *Simon John Moffatt Hampton v Canterbury Regional Council* [2016] NZSC 50.

22 *ibid* [6].

23 *ibid* [7].

24 *ibid* [8].