

Water Rights and the Supreme Court's Decision

The Supreme Court's decision in *Hampton*¹ is the latest in a lengthy series of litigation concerning the Hamptons and the important issue of what rights in a resource are granted by the issuing of a resource consent. In a decision dated 3 May 2016, the Supreme Court dismissed an application for leave to appeal by Simon Hampton to have a judicial review of the Canterbury Regional Council's decision to grant a water permit to Simon's cousin and neighbour Robert Hampton. The Supreme Court has declined to clarify the legal meaning of the Court of Appeal's earlier criticism of the leading case of *Aoraki*² concerning the principle of non-derogation from grant. While the outcome of *Aoraki* is supported by the Court of Appeal, the legal reasoning is questioned, but not resolved. The Supreme Court notes that there is room for argument on this point, but has determined that resolving the point is not a matter of general importance.

The inference is that the High Court in *Aoraki* was wrong in law by using the non-derogation from grant concept as it created a de facto property right in a resource via the grant of a resource consent, and this is contrary to the express words of the Resource Management Act. Instead, the inference is that the same outcome (i.e. the protection of a consent holder's entitlement to the use of a resource pursuant to the terms of a resource consent) can be grounded simply on the terms of the consent itself and the principle that once a resource has been allocated under a consent it cannot be reallocated to another party.

A summary of the somewhat complicated facts in *Hampton* is as follows. Simon and his cousin Robert Hampton ("Robert") owned adjoining farms in Barrhill between Rakaia and Methven on the Canterbury Plains. Simon obtained a water permit to take water to irrigate both his own land and also Robert's land. However the cousins could not agree on suitable terms for irrigating Robert's land and the water was not used. Later Simon sought to transfer part of his water permit to another site in the same groundwater zone and Robert tried to prevent this³. The transfer was ultimately granted on the basis that the remaining water could only be used to irrigate Robert's property and a condition, agreed to by Simon, was inserted to this effect. Robert subsequently applied for his own water permit in November 2010, and in March 2011 Simon applied to change the condition which referred to irrigating Robert's land. Soon afterwards Simon requested that his application be put on hold. Because water in the area was already over allocated, Robert could not obtain a consent for additional water. Instead the Council granted Robert a water permit to take water to the extent that Simon's water permit was not being used to irrigate Robert's land. Simon initiated a judicial review of the Council's decision to grant Robert's consent. This application failed⁴. Simon then appealed to the Court of Appeal alleging that this was a derogation of his property right as when Robert exercised his consent it would limit the amount of water that he could take or transfer to a third party. This appeal was dismissed⁵ and Simon applied to the Supreme Court for leave to appeal.⁶

One of Simon's arguments before the Supreme Court was that the Court of Appeal erred in finding that Robert's grant of consent did not derogate from Simon's rights. In coming to this

¹ *Hampton v Canterbury Regional Council* [2016] NZSC 50

² *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC)

³ *Hampton v Hampton* [2010] NZRMA 412.

⁴ *Hampton v Canterbury Regional Council* [2013] NZHC 2433

⁵ *Hampton v Canterbury Regional Council* [2015] NZCA 509

⁶ Note that after the HC decision but before the CA decision, Simon's application to change the condition in his consent was granted, on restricted terms: *Hampton v Canterbury Regional Council* [2016] NZSC 50 at [4].

conclusion the Court of Appeal held that Simon's resource consent did not grant him a right to take and use property.

The Court of Appeal said that because the water could only be used to irrigate Robert's land, Simon had not suffered any detriment in the grant of Robert's own consent, it was merely the potential to charge Robert that had been lost.

The Court of Appeal then went on to discuss the High Court's decision in *Aoraki*⁷ and said at paragraph 99:

We consider the analogy the Court drew to profits à prendre and its reliance on non-derogation from grant are problematic. They apparently rest on the Court's view that once a water permit is granted it creates a right to property. We do not agree that is the case. The right is simply the right to carry out the activity under the Act; in this case the right to take and use water. These are rights necessary to overcome the restriction in s 14(2) of the Act, which would otherwise apply:

The Court of Appeal in *Hampton* also emphasised that section 122(1) of the Act states that a resource consent is neither real nor personal property and this means that a consent holder does not benefit from all rights a property interest may incur, and the consent holder can only enjoy those incidents of property that the Act itself confers⁸. The Court of Appeal suggests that the High Court in *Aoraki* did not need to rely on the concept of non-derogation of right in order to reach the decision it did. The Court of Appeal concludes at paragraph 108:

As the Court in Aoraki recognised, where the consents already held by Meridian (and some others) meant that the available resource was fully allocated, there was sufficient authority in the statutory regime and the principles set out in Fleetwing to reject Aoraki's proposition that there was nothing to prevent the issue of further consents. Although we have departed from the High Court's reasoning insofar as it rested on the concept of non-derogation from a grant and an analogy of profits à prendre, we do not suggest the wrong result was reached.

Simon sought to dispute the Court's reasoning, stating that the Council did not challenge the *Aoraki* decision "and it is now a matter of general or public importance to determine whether the reasoning in *Aoraki* was correct" (Supreme Court decision at paragraph 6). The Supreme Court went on to say at paragraph 7:

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 judgment 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.

A further matter raised in applying for leave was that given the Court of Appeal's findings that there was no detriment to Simon in granting the consent to Robert, the Court had not made a determination on the priority of resource consent applications. The Court of Appeal noted the difficulty that can arise where there are competing applications for the same resource and referred to those cases discussing priority beginning with *Fleetwing v Marlborough District Council*⁹, *Central Plains Water Trust v Ngai Tahu Properties Limited*¹⁰ and *Central Plains Trust v Synlait Limited*¹¹. The Court of Appeal considered that the present case could be

⁷ *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC)

⁸ *Hampton v Canterbury Regional Council* [2015] NZCA 509 at [105]

⁹ [1997] 3 NZLR 257 (CA).

¹⁰ [2008] NZSC 71.

¹¹ [2009] NZCA 609.

distinguished from *Fleetwing* on the facts¹². Simon argued that this calls into question the *Fleetwing* principle. Unlike the previous issue, the Supreme Court accepted that this is an issue of general or public importance, however it considered that the facts of this case meant the *Fleetwing* principle did not apply. For example, Simon had lodged his application after Robert's, he had no ability to use the water allocation and had himself placed the application on hold for a number of years.¹³

Further claims of a legitimate expectation that his right to use the water would not be interfered with, and a legitimate expectation that his application for a change to the conditions of his consent would be granted were dismissed.

Case note prepared by [Stephen Christensen](#) and [Pip Walker](#).

¹² *Hampton v Canterbury Regional Council* [2015] NZCA 509 at [111].

¹³ *Hampton v Canterbury Regional Council* [2016] NZSC 50 at [8].