IN THE SUPREME COURT OF NEW ZEALAND

SC 128/2015
[2016] NZSC 50

BETWEEN	SIMON JOHN MOFFATT HAMPTON Applicant
AND	CANTERBURY REGIONAL COUNCIL (ENVIRONMENT CANTERBURY) Respondent

Court: Elias CJ and O'Regan J

Counsel: I G Hunt for Applicant
P J Shamy for Respondent

Judgment: 3 May 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondent.

REASONS

[1] This is an application for leave to appeal against a decision by the Court of Appeal[1] in which that Court dismissed an appeal against a decision of the High Court dismissing an application by the applicant, Simon Hampton (Simon) for judicial review of a decision of the Canterbury Regional Council (the Council).[2] The Council's decision was a decision to grant a resource consent to Simon's cousin and neighbour, Robert Hampton (Robert) to use water which was already allocated to Simon, although Simon was not in a position to use the water at the time. Simon is

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1 *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, (2015) 18 ELRNZ 825 (Wild, Miller and Cooper JJ) [*Hampton* (CA)].

2 *Hampton v Canterbury Regional Council (Environment Canterbury)* [2013] NZHC 2433 (Gendall J) [*Hampton* (HC)].

seeking a declaration that the resource consent should not have been granted to Robert.

Facts

[2] The dispute has a complex history. In 2005 Simon obtained a resource consent for the purposes of taking underground water to use for irrigation. This was for use on both Simon and Robert's properties, which are adjacent to one another. In 2008, after Simon and Robert could not agree as to the use of the water, Simon applied for a transfer of the water allocation to another farm. Robert commenced legal proceedings, seeking a declaration that he had part ownership of the resource consent.

[3] In 2010, Simon obtained a transfer of part of the water allocation, on the condition that the remaining water allocation could only be used on Robert's property. Due to the dispute between the cousins, Simon could not access or use this water in any capacity. Around the same time, Robert's application for a declaration of ownership of the resource consent failed in the Environment Court.[3] However, the Judge offered a solution that Robert could apply for a resource consent to use whatever water in the allocation was unused by Simon.[4] Such a consent would, in effect, allow Robert to use the water that was only allowed to be used on his property.

[4] Robert made an application for a resource consent in these terms in late 2010. In March 2011 Simon made an application for a change of condition to his resource consent substituting Robert's land for that of Simon's land and the land of another neighbour. Soon afterwards Simon requested that this application be placed on hold. In August 2011, Robert's application was granted. Simon initiated judicial review proceedings, seeking a declaration that Robert's consent should not have been granted and an award of damages. In 2014, after the High Court decision on judicial review but before the Court of Appeal decision, Simon's application to change the condition was granted. However, it was granted on restricted terms, partially due to the existence of Robert's resource consent.

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3 *Hampton v Hampton* [2010] NZEnvC 9, [2010] NZRMA 412.
4 At [17].

Issues

[5] Simon seeks leave to appeal largely on the basis that his application for a variation to a condition of his consent should have been given priority over Robert's fresh application for a resource consent. Related to this ground are arguments that the Court of Appeal erred in finding that the granting of consent to Robert did not derogate from Simon's rights in the water allocation and that granting Robert's consent did not breach Simon's legitimate expectations.

[6] The Court of Appeal's analysis largely turned on the finding that the granting of a resource consent to Robert did not cause Simon any detriment. In order to come to this finding, the Court held that Simon's resource consent did not grant him a right to take and use "property". The Court expressed some criticism of aspects of the analysis in *Aoraki Water Trust v Meridian Energy Ltd*.[5] However, the Court was clear in stating that it agreed with the outcome in *Aoraki*.[6] The applicant wishes to dispute this reasoning, stating that the Council did not challenge the decision in *Aoraki* and that it is now a matter of general or public importance to determine whether the reasoning in *Aoraki* was correct.

[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.

[8] Given the Court of Appeal's finding that there was no detriment to Simon caused by the granting of the resource consent to Robert, the Court did not see the need to determine issues of priority in applications for resource consent applications.[7] On appeal, Simon wishes to raise a number of reasons why his application for a change in a condition to his consent should have received priority over Robert's application for resource consent. He argues that this case calls into question the accuracy of the principle that, where there are competing applications

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5 *Hampton* (CA), above n 1, at [89]–[110]; *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC).

6 *Hampton* (CA), above n 1, at [108].

7 At [111]–[112].

for use of the same resource, the first application in time should receive priority (known as the *Fleetwing* principle).[8] On appeal, Simon 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.

[9] 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.[9] 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.

[10] Simon also wishes to argue that he had a legitimate expectation that his right to use the water to which his resource consent related would not be interfered with by granting the right to use that water to someone else. Simon also wishes to argue that he had a legitimate expectation that his application for a change to the conditions of his consent would be granted. We do not consider that either of these points is arguable and do not therefore consider it would be in the interests of justice to grant leave in respect of them.

[11] The application for leave to appeal is dismissed.

[12] Costs of $2,500 are awarded to the Council.

Solicitors:
Young Hunter, Christchurch for Applicant

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8 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA).
9 *Ngai Tahu Property Limited v Central Plains Water Trust* [2008] NZSC 49.