IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV 2003 476 000733

BETWEEN	AORAKI WATER TRUST AND OTHERS Plaintiffs
AND	MERIDIAN ENERGY LIMITED First Defendant
AND	CANTERBURY REGIONAL COUNCIL Second Defendant
AND	THE ATTORNEY-GENERAL Third Defendant
AND	TRUSTPOWER LIMITED Fourth Defendant

Hearing: 22 and 23 September 2004

Coram: Chisholm J
Harrison J

Appearances: Philip Milne and Tiffany McNeill for Plaintiffs
Stephen Kos, Joanne Appleyard and Shona Bradley for First Defendant
Jared Ormsby for Second Defendant
Bronwyn Arthur for Third Defendant
Christian Whata for Fourth Defendant

Judgment: 30 November 2004

JUDGMENT OF CHISHOLM AND HARRISON JJ

SOLICITORS
Simpson Grierson (Wellington) for Plaintiffs
Chapman Tripp (Christchurch) for First Defendant
Wynn Williams & Co (Christchurch) for Second Defendant
Crown Law Office (Wellington) for Third Defendant
Russell McVeagh (Auckland) for Trustpower

Introduction

[1] Meridian Energy Limited uses water from three high country lakes, principally Lake Tekapo, to generate electricity at power stations in the upper and mid Waitaki basin in South Canterbury. Meridian and its predecessors have dammed, diverted and used water from the lakes pursuant to a series of statutory consents since 1929. The Canterbury Regional Council (CRC) issued the current series in 1991 for a term of 25 years.

[2] A number of other parties, including Aoraki Water Trust, wish to use the same water from Lake Tekapo for irrigation purposes in the McKenzie Basin. Some, like Aoraki, have applied to CRC for statutory permits. Meridian has adopted a consistent line in opposition. It argues that the resource is fully allocated both to it and other existing consent holders so there is no surplus available for lawful use by third parties. Thus any additional permits would derogate from, and devalue, its existing rights.

[3] Aoraki and two local authorities, Timaru District Council and MacKenzie District Council (collectively Aoraki), have applied to this Court for declarations to the effect that Meridian's consents do not operate as a legal constraint or inhibition upon CRC's statutory discretion to grant consents to others or upon the power of a new statutory body, the Waitaki Catchment Water Allocation Board, to make appropriate provision for the allocation of water in a regional plan to be developed and approved by it.

[4] The core issue of the legal status of Meridian's rights in their statutory context would normally fall for determination on a specific application to the CRC or on subsequent appeals to the Environment Court or this Court. It has already arisen on two applications which are subject to appeal to the Environment Court. However, Aoraki was not a party to those applications and the extent to which this issue will prove decisive in them is problematical. All parties to Aoraki's application

to this Court agree that immediate and authoritative guidance on the core issue is desirable, to bring finality to what some regard as an uncertain state of affairs.

[5] In this judgment we will commence by reviewing the history and current status of Meridian's consents in their statutory framework. Then we will determine the two principal issues.

Background

[6] The parties submitted a 45 page statement of agreed facts but those truly relevant to the issues fall within a small compass.

[7] Meridian owns and operates a number of power stations, dams and canals known collectively as the Waitaki Power Scheme. The Upper Waitaki Power Scheme uses the water from Lakes Tekapo, Pukaki and Ohau to generate electricity at five power stations. The water from the three lakes is then available to generate electricity at three power stations in the Mid Waitaki Power Scheme.

[8] Lake Tekapo is a glacial basin 25 kilometres long and covering an area of approximately 88 square kilometres. It is fed principally by snow and glacier ice melt through three rivers, and in turn it feeds the Waitaki River. Lake Tekapo is a natural reservoir and serves as a storage facility. Its water is further impounded by a dam across the natural outlet to the Tekapo River. Water leaves the lake through a tunnel and penstocks leading to the Tekapo A power station and from its tailrace into the Tekapo-Pukaki Canal. From there the water flows to the Tekapo B power station which discharges into Lake Pukaki.

[9] Through its predecessors Meridian holds numerous consents relating to the diversion and use of water from Lake Tekapo which originate from an Order in Council issued in 1929 pursuant to s 311 Public Works Act 1928. The order authorised the Minister of Public Works to:

> Erect, construct, provide, and use such works, appliances and conveniences, as may be necessary in connection with the utilisation of water power from the Waitaki River, and in connection therewith to raise or lower the level of

> Lakes Tekapo, Pukaki and Ohau, and to control the flow of water from same for the generation and storage of electrical energy, and with the transmission, use, supply, and sale of electrical energy when so generated.

[10] Another Order in Council issued pursuant to the same statutory authority in September 1939 expanded the Minister of Works' authority to "impound or divert…" as well as control the flow of water from the same source. A later Order in Council issued in October 1968 pursuant to s 23 Water and Soil Conservation Act 1967 declared the natural waters in and flowing from Lake Tekapo to be of national importance. An Order issued pursuant to the same authority in August 1969 granted to the Minister of Electricity "…the right to dam, use, discharge, divert and take…" water from Lake Tekapo for 21 years with successive rights of renewal for the same period "…for so long as the Minister … requires the use of the water for the generation of electricity".

[11] The first term of the rights granted in 1969 expired on 18 August 1990. Earlier that year Meridian applied to CRC for new rights pursuant to s 21(3) Water and Soil Conservation Act. Its application was extensive and emphasised that the purpose of the rights was to provide optimum use of the water to generate electricity. At that time Meridian's hydro-electric power generation facilities generated 50% of the total hydro-energy in New Zealand.

[12] On 5 February 1991 CRC granted Meridian's application including rights:

> [1] To dam the Tekapo River to control and operate Lake Tekapo between the levels of 701.80 and 710.90 metres (msl) at or about… Lake Tekapo control structure.
>
> [2] To take water up to a maximum rate of 130 cubic metres per second from Lake Tekapo at or about… Tekapo A power station.

These rights were issued subject to 22 conditions (only some attached to each right). All imposed obligations upon Meridian as grantee. On 15 April 1991 CRC issued non-statutory certificates setting out the terms of Meridian's rights. As from 1 October 1991 s 386(1) Resource Management Act 1991 (all subsequent statutory references are to that enactment unless otherwise specified) deemed those rights to be permits granted under that statute on the same conditions as had been imposed by CRC.

[13] In March 2003 Aoraki lodged an application with CRC to divert and take from Lake Tekapo up to 9,072,000 cubic metres of water per week at a maximum rate of 15 cubic metres per second. The purpose of the proposed diversion and taking was farm irrigation. CRC notified Aoraki's application but it was later called in by the Minister (s 140). It was re-notified on 6 December 2003.

[14] In the meantime, on 31 March 2003 Meridian had applied to the Environment Court for declarations (s 311) about the extent of its rights under its resource consents to take and use surface waters from Lake Tekapo and other storage areas. In a decision delivered on 12 September 2003 the Court declared that:

> 1. 1. Meridian's existing water permit number CRC 905302 from the [CRC] entitles it to take surface water all year round from Lake Tekapo until 30 April 2025:
>
> a(a)at a maximum rate of take of 130 cumeces (cubic metres per second);
>
> (b) for a maximum number of hours per day of 24;
>
> (c). at a maximum daily quantity of 11.232 x 106 cubic metres per day;
>
> (d) for a maximum operating period of 7 days per week for 12 months per year–
>
> providing Meridian complies with the following conditions:
>
> (1) the grantee shall exercise this right in conjunction with all other rights which the grantee holds in connection with the generation of electricity within the Waitaki river system, in such a manner as to minimise, as far as practicable, any adverse effects on the exercise of the rights on the Waitaki river system;
>
> (2) the grantee shall measure and record the rate at which water is taken/discharged/diverted at a frequency not less than every 30 minutes, to the satisfaction of [CRC] and the records supplied to [CRC] annually;
>
> (3) from 1 October to the following 31 March:
>
> (i) if the level of Lake Tekapo falls below 704.1, the grantee shall not take water from Lake Tekapo unless Huntly and New Plymouth power stations are being used to the fullest possible extent;
>
> (ii) the grantee shall restore the level of Lake Tekapo to above 704.1111 as soon as practicable and shall advise

> [CRC] weekly of strategies adopted until the lake level is restored to above 704.1;
>
> (iii) the grantee shall provide evidence of compliance with (i) to [CRC].

[15] There is one additional critical fact. Mr Stephen Kos, Meridian's counsel, submitted that the relevant resource – all the water in Lake Tekapo – is fully allocated to Meridian and other existing small users for the purpose of satisfying their consents. As noted, Meridian's permit entitles it to take surface water at a maximum rate of 130 cumecs. The natural mean flow from Lake Tekapo is only 82 cumecs. Thus Meridian uses or is entitled to use more water than currently flows naturally into and out of the lake. In other words, the lake currently provides less water than Meridian requires to satisfy its permit. In reply Aoraki's counsel, Mr Philip Milne, accepted that Meridian's consents entitle it to draw off more water than enters the lake. In effect he conceded that all the subject water is already physically assigned to Meridian and other lawful users.

[16] Trustpower, a separate company, operates 18 hydro-electric schemes in various regions throughout New Zealand. The company has been given party status in this proceeding because of its interest in the underlying issue. The Attorney General has similar status. We have been considerably assisted by submissions made by their respective counsel, Mr Christian Whata and Ms Bronwyn Arthur.

[17] Finally, it is necessary to make brief reference to the Resource Management (Waitaki Catchment) Amendment Act 2004 (the Waitaki Act) which came into force on 6 September. The purpose of this Act is to require the allocation of water in the Waitaki catchment on a basis consistent with the purpose and principles of the Resource Management Act 1991. To that end the Waitaki Act provides for the establishment of a board which is to develop and approve a regional plan for the allocation of water in the Waitaki catchment. The Waitaki Act does not, however, provide any direct guidance as to the status or effect of existing water permits in the context of the regional plan.

Aoraki's application

[18] In December 2003 Aoraki filed its application for declaratory relief. That was followed by numerous interlocutory steps including an unsuccessful application by Meridian to strike out the proceeding. It is well settled that declaratory relief is available only where the material facts are not in contest. Nevertheless the parties have filed numerous affidavits traversing a wide range of disputed material; little of which has any direct bearing on the question or questions which might be the subject of a declaratory judgment.

[19] On 18 August 2004 Aoraki filed a second amended statement of claim totalling 61 paragraphs and seeking six different declarations. However, it failed to clearly articulate a justiciable "…question as to the construction or validity of [a] statute… or instrument…" (s 3, Declaratory Judgments Act 1908). In the absence of any such question the Court has no jurisdiction to make a declaratory order. It is unnecessary for us to say anything more about the terms of the six declarations proposed by Aoraki except to observe that they were untenable.

[20] Mr Milne's lengthy synopsis of over 100 pages filed in support of Aoraki's application did formulate two questions for determination. But again they failed to clearly identify the particular provision or provisions of the Resource Management Act or relevant instruments which gave rise to questions of construction or validity requiring declarations. At the hearing Mr Milne re-formulated the relief sought by Aoraki in these terms:

> [1] A declaration that [Aoraki's] water permits do not limit [CRC's] powers and discretions under ss 104 to 104D Resource Management Act 1991 to grant water permits to any other person to take, divert and or/use the waters of Lake Tekapo notwithstanding that the grant of such consents reduces the amount of water available to [Meridian] to store in the lake and use at its generation stations.
>
> [2] A declaration that [Meridian's] water permits do not limit the powers and discretions of the Waitaki Water Allocation Board under ss 6, 7, 13, 17, 18 and 19 Resource Management (Waitaki Catchment) Amendment Act 2004 to make provision for the taking, diversion and use of the waters of

> Lake Tekapo by persons other than [Meridian] notwithstanding that such allocation may reduce the amount of water available to [Meridian] at its generation stations.

Although Meridian initially challenged the Court's jurisdiction to make declarations under the Declaratory Judgments Act, that challenge was not pursued when the matter came before us.

First Declaration

[21] We find it convenient to divide this issue into two parts. In the first part we examine the legal nature and effect of the water permits issued by CRC to Meridian. The second part considers whether any provision of the Resource Management Act empowers the regional council to grant water permits to others in situations where the water resource is already fully allocated to existing holders.

(a) Nature and effect of water permits

(i) Submissions

[22] In summary Mr Milne submitted that:

a) Permits to take, divert or use water generally do not provide the holder with an implied right to a priority to waters from the same source or upstream. Instead they provide the holder with no more than a privilege and permission to take, divert and use such water as is available at the relevant take, diversion or use point. Any rights inherent in the permits are necessarily subject to natural events and the effect of any later grant of permits to others. While the permits will authorise the holder to use such water as arrives at its control and intake structures, they give no right to demand or expect that the amount of water available at those locations will not be diminished by the later grant of permits to others;

b) Parliament would have made appropriate legislative provision if it had intended that an existing water permit could preclude or limit later grants for the same resource; indeed, express provision preserving existing resource consents is made in s 217 with reference to water conservation orders which indicates that Parliament did not intend to preserve existing consents from challenge by later applicants; and it is no accident that resource consents to take, use, dam and divert water are now called water permits, not water rights. A water permit grants permission to do what would otherwise be unlawful and therefore confers a privilege with an associate right not to be prosecuted provided that the terms and conditions of the consent are met. The distinction between the concepts of a right and a permit lies at the heart of this case;

c) A water permit is not a property right because, although it carries a valuable economic right, it is not freely transferable, does not usually give an exclusive right to the water specified in the permit, and cannot guarantee its availability. Its economic value and limited transferability does not thereby convert the permit into a property right because, as noted, the effect of a grant to take natural water is to make lawful what would otherwise be unlawful. In this context s 122, which declares that a resource consent is neither real nor personal property except in limited circumstances, is relevant;

d) There is no scope to apply the principle of non-derogation of rights in the context of the Resource Management Act; it should not be recognised in public law, but should instead be limited to the relationship of landlord and tenant. In particular he argued that granting a resource consent is not akin to entering into a contractual relationship; a water permit is not in the nature of a property right in the sense that it does not provide for exclusivity; there is nothing in the consents themselves to support the principle; and a consent authority cannot fetter its discretion to consider future applications for consent but must consider all such applications on their merits

[23] In opposition Mr Kos submitted that:

a) Meridian's consents entitle it to dam, divert, store, take, use and discharge all water flowing from Lake Tekapo to a point of discharge below the Waitaki Dam. They enable it to exercise control over waters in the Waitaki Catchment by damming its four rivers to impound and control waters to provide storage; diverting waters in the rivers into the canal system; taking and using water from lakes and canals for electricity generation; and discharging the water back into the scheme's storage lakes, canals and rivers through spillways. In reliance upon these permits, Meridian is able to operate the Waitaki Power Scheme, supplying about 21% of New Zealand's energy requirements;

b) The permits convey rights, and are not mere provisional grants capable of diminution by new grants to others. They constitute a legal determination and, critically, confer an allocation of a resource; the permits allocate to Meridian all of the water which flows in the relevant lakes, canals and rivers of the Waitaki river system. The allocation is complete because mean inflows into Lake Tekapo are less than the volumes of water which Meridian is entitled to use. CRC cannot derogate from or diminish its grant by issuing a further water permit to a third party;

c) Meridian has a legitimate expectation that its consents will not be eroded by the grant of later resource consents. He based this proposition on three factors: Meridian's resource consents fully allocate the waters of the Upper Waitaki to it; resource consents are a "right", not a "privilege", and the grantor cannot act inconsistently with the grant; and there were no reservations (express or implied) when the resource consents were granted. Mr Kos also noted that later applications for resource consents have been declined on the basis that the water in the Upper Waitaki catchment has been

allocated to Meridian and others and CRC is not entitled to grant later consents that would undermine Meridian's consents.

[24] In answer to this last submission Mr Milne maintained that there is no room for substantive expectations in the case of resource consents; that in any event the concept should be limited to procedural expectations; and that an expectation as to a substantive outcome would fetter a consent authority's statutory functions, duties and discretions and would generally cut across the statutory scheme. He denied that CRC intended to fully allocate the waters of Lake Tekapo to Meridian or that the consents give rise to any rights to the water. Mr Milne also submitted that Meridian had not applied for, nor been granted, exclusive use of the water and that even if there could be a substantive expectation, it must be based on something express, not the failure to express something.

[25] Also in opposition to Aoraki's application Mr Whata submitted that:

a) The successive effect of the Water and Soil Conservation Act and the Resource Management Act is to supplant the common law. Parliament has allowed the Crown or regional authorities acting pursuant to delegated powers to grant water permits giving rise to preferential rights to the water subject to the permit. It constitutes an entitlement of a new kind created as part of a system for conserving a limited public resource. At minimum it connotes an exemption from regulation by regional councils, provides immunity from prosecution, and authorises the holder of the water permit to undertake the activity authorised by the permit;

b) The grant of a permit fundamentally alters the nature of the legal relationship between the consent authority and permit holder. As the grant is a legal determination or legislative acknowledgement that the taking of water for the stated purpose achieves sustainable management, it has these consequences: (1) the consent authority is functus officio in relation to its determination; (2) the permit enables the water related activity to occur; and (3) the permit holder is

> immune from enforcement procedures relating to the permitted activity. Any subsequent grant to another party to take water upstream which reduces the amount of water available to an existing permit holder interferes with these legal rights and obligations. A decision to make a subsequent grant revisits and impinges upon the earlier determination or acknowledgement as to sustainable management of resources, may disenable the scheme, and may negate, wholly or in part, the immunity afforded by the earlier grant.

(ii) Decision

[26] Mr Milne's argument has some attraction at a narrow conceptual level. While he did not articulate it in these terms, his proposition is essentially that a water permit is a bare licence in that it does not pass an interest or transfer property in anything but only authorises the holder to act in a way which would otherwise be unlawful, by expressly allowing it to take, use or divert water (s 14). On analysis a permit has some similarities with a bare licence (see *Hinde McMorland & Sim: Land Law in New Zealand*, paras 7.001-7.004) and Mr Milne's consistent characterisation of it as a privilege ties in with that analysis. In particular, a consent itself is neither real nor personal property (s 122) and therefore does not confer upon the holder any rights of ownership in the resource which remain with the Crown (s 354). And a permit does not of itself guarantee the water's availability.

[27] In this context Mr Milne placed considerable reliance on a decision of the Town and Country Planning Appeal Board in *Stanley v South Canterbury Catchment Board* (1971) 4 NZTPA 63 to support a proposition that the consent authority is under an obligation to take into account the reasonable needs of competing users of a resource. On analysis the decision does not assist Aoraki's case. The appeal was concerned with a water right under the Water and Soil Conservation Act 1967 and the facts were very different from these. At one stage the Board raised the question of whether a grantee has any priority over those who may later apply for rights to take water from points above or below its point of intake (67). The Board held that the grantee "… has no guarantee of or priority for the quantity of water specified in

his permit …" and "… must accept the possibility that the source of water … may be diminished …" by the demands of others lawfully entitled to use the water (68). However, apart from identifying a form of priority from a "practical point of view", the decision does not address the threshold question under consideration here of whether a consent authority has power under the Resource Management Act to grant a permit to use a resource which is already fully allocated by an existing grant.

[28] In our view Mr Milne's approach is wrong for a number of reasons. First, it ignores the statutory nature, purpose and effect of granting a water permit. We believe four features of the Resource Management Act are of particular importance in this case: (1) the sustainable management concept underpinning the Act which revolves around the *management* of resources as opposed to leaving their fate to chance (s 5); (2) the obligation on a consent authority to have particular regard to the efficient use of resources (s 7(b)), again highlighting the management aspect and the need for complete allocation in some cases; (3) the authority's related obligation to control the taking, use, damming and diversion of water (s 30(1)); and (4) the requirement that, except in the situations specified (s 14(3)(b)-(e)), water can only be taken, used, dammed or diverted if that activity is expressly allowed by a rule in a regional plan or by a resource consent (s 14(1) and (3)(a)). A consent authority exercises its statutory function of regulating or managing the allocation or use of a resource through its power to grant permits (s 104-104D). In summary, subject to very limited exceptions, Parliament has introduced a comprehensive statutory management regime for water allocation and use.

[29] We agree with Mr Whata that in these circumstances the Act effectively prescribes a licensing system, analogous to that described by Mason CJ, Deane and Gaudron JJ in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325 in these terms:

> Its [a statutory licensing system] basis lies in environmental and conservational considerations which require that exploitation, particularly commercial exploitation, of limited public natural resources be carefully monitored and legislatively curtailed if their existence is to be preserved. Under that licensing system, the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries. What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licenses. The right of commercial exploitation of

> a public resource for personal profit has become a privilege confined to those who hold commercial licenses. This privilege can be compared to a profit à prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognise that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.

[30] If taken to its logical conclusion, Mr Milne's argument would negate both the purpose and effect of this statutory resource licensing system. A consent authority could lawfully grant an unlimited number of permits for the same water even though that resource had already been exclusively or fully allocated in the physical sense. Existing and new permit holders would then have to compete among themselves to satisfy their demands. There would be no enforceable order of preference or priority, given Mr Milne's rejection of a first come, first served system. Also, a consent authority would be powerless to harmonise the first grant with later grants; upon granting a permit an authority becomes functus officio and is unable to revisit its terms unless expressly allowed by statute. In our view this chaotic situation would be the antithesis of the management regime contemplated by the Act and of the consent authority's express obligation to control the taking, use, damming and diversion of water. Also we agree with Mr Kos that over allocation of a water resource would be equally foreign to Part II of the statutory regime.

[31] Secondly, Aoraki's proposition is contrary to authority. In *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 the Court of Appeal considered the legal test for determining priorities for hearing competing appeals (and a fortiori competing applications for resource consent) under the Resource Management Act where two companies had applied separately to the Marlborough District Council for a coastal permit to establish a mussel farm on the same area of seabed at Port Underwood. In delivering the judgment of the Court, Richardson P proceeded on the underlying premise that (261 (9-11)):

> In detail the applications were not identical, **but they applied to essentially the same area of water and the grant of one necessarily excludes the other.**
>
> [Our emphasis]

After reviewing the statutory provisions, the President identified five alternative approaches available to a consent authority in accordance with Parliament's intention for "… regulating competing applications for scarce resources" (256 (12-20)) and concluded that the legislature had adopted "a first come, first served basis". Later he stated that (267 (28-30)):

> Where there are competing applications in respect of the same resource before the Council, the Council must recognise the priority in time.

We do not consider that the Court's underlying premise would have been any different if it had been considering competing claims for use of the same water flowing out of a lake instead of competing claims for use of the same area of seabed and water above. In both situations the grant of one necessarily excludes the other. Consequently, the first enjoys an exclusive right to the resource.

[32] Apart from Richardson P's express recognition of the point in *Fleetwing*, we agree with Mr Kos that the Court of Appeal's adoption of the first come, first served approach where there is competition for the same resource would be pointless unless it meant that the first permit in time of grant also had priority in terms of the right to use the resource. This conclusion is reinforced by the President's observation in *Fleetwing* that, if another applicant applies for a similar resource consent while the first application remains undecided, the consent authority is not justified in comparing one against the other and failing to give a timely decision on the first on its merits and without regard to the other (264).

[33] The underlying premise adopted by the Court of Appeal in *Fleetwing* is reflected in a separate line of authority cited by Mr Whata. The Courts have not allowed statutory authorities to exercise a statutory power in a manner which might interfere with a validly granted right of exclusivity. In *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 2 All ER 277 (applied in *ABC Containerline NV v New Zealand Wool Board* [1980] 1 NZLR 372, Davison CJ at 383; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia* (1997) 139 CLR 54 per Barwick CJ at 61) Pennycuick VC held that where a local authority has exercised a power in such a manner as to create a right expressed in a statutory contract extending over a term of years, the existence of that right pro tanto excludes

the exercise of other statutory powers relating to the same subject matter (282). In *The City of Camberwell v Camberwell Shopping Centre Pty* [1994] 1 VR 163 the Court of Appeal of Victoria confirmed this principle on the basis that it did not constitute a self-imposed contractual fetter on the future exercise of a statutory power so long as the contract was itself lawful and authorised. The fact that it necessarily excludes the exercise of a statutory power on a later occasion is merely consequential.

[34] Third, Part VI codifies the constituent elements of a resource consent, covering its nature, duration, expiry, review and transfer. A number of specific provisions, which Mr Milne omitted from his review, elevate the status of a water permit from something in the nature of a bare licence to a licence plus a right to use the subject resource. In that sense it has similarities with a profit ā prendre (*Hinde, McMorland & Sim*, para 6.054). Four features are particularly relevant: (1) a permit is for the fixed term (not exceeding 35 years) specified in the permit or five years if no period is specified, subject to limited rights of revocation (which we shall discuss later); (2) a permit specifically allows the holder to remove property, in this case water, for its own purposes subject to express conditions, even though the resource is owned by the Crown; (3) the consent authority "grants" a permit (ss 104–104D), a grant being a term commonly employed to describe a right created by the Crown (*Jowitts Dictionary of English Law*, 2nd ed., Vol.1, 870); and (4) a permit is assignable with the interest to which it is coupled, namely ownership or occupation of the site for which the permit is granted (s 136).

[35] While permits are not themselves either real or personal property, what is determinative in our view is that, when granting the consents, CRC created the right in Meridian to take, use or divert property, being surface water in Lake Tekapo, for a defined term at maximum rates and quantities and for maximum periods. Mr Milne's concession that Meridian's consents are of considerable economic value is explicable only on the basis of a recognition that such value derives from the holder's rights to use the property in accordance with its permits. It follows that, on the basis of current flows, granting a permit to Aoraki to use the same water would inevitably reduce Meridian's ability to generate electricity, thereby devaluing its grant.

[36] The principle of non-derogation from grant is applicable to all legal relationships which confer a right in property. Common law principles apply to the express provisions of a statute unless Parliament has clearly indicated a contrary intention (*R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 per Lord Browne-Wilkinson at 573-574). The maxim prevents one party from taking any steps, unless expressly authorised by the relevant instrument (whether statutory or contractual), to interfere with, diminish or derogate from the other's entitlement. Traditionally the principle applies to sales of land or leases but it governs all relationships. As Blanchard J observed in *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) at para [24]:

> … no one who has granted another a right of property, whether by sale, lease or otherwise, may thereafter do or permit something which is inconsistent with the grant and substantially interferes with the right of property which has been granted.

[37] In *Mt Cook National Park Board v Mt Cook Motels Ltd* [1972] NZLR 481 the Court of Appeal applied the principle of non-derogation of grant where a licensing fee imposed pursuant to a statutory bylaw was arguably so excessive that it frustrated the related lease. North P held that the maxim "applies to all grants" (488) on the premise that the grantor may not frustrate the purpose which the parties shared when they entered into the relationship; it is a question of common intention, implied from the relevant circumstances, with emphasis upon what was then within the grantor's power to fulfil. Woodhouse J also emphasised the purpose of the parties' relationship, and the prohibition against allowing the grantor to act inconsistently with what it had given. The doctrine is based not upon an implication of reasonable dealing but an implied obligation on the grantor not to act in such a way as to injure property rights granted by him to the grantee (496).

[38] The purpose of these grants was to secure to Meridian the right to use all the available water within Lake Tekapo up to fixed maximum rates and quantities to generate hydro-electricity. In 1991 the parties must have contemplated that (1) the state of affairs underlying the grants – namely, the availability of whatever water was in the lake to satisfy Meridian's agreed requirements – would continue for the duration of the term of 35 years and (2) it would remain within CRC's legal power to make those waters available subject to events of nature. The parties must have

assumed also that, unless expressly authorised by statute, CRC would not take any steps during the term of the permits that might interfere with, erode or destroy the valuable economic right which the grants had created and upon which both were entitled to rely. Each would have structured its operations on the common assumption that the other would honour the terms of the grants. By granting applications by Aoraki and others to use the same resource, CRC would either frustrate or destroy the purpose for which Meridian's permits were granted.

[39] Fourth, we believe that the doctrine of legitimate expectation supports our analysis to this point. While that doctrine is now well established, its boundaries are not particularly well defined. Judicial opinion is divided about whether it is confined to procedural outcomes or whether it is also available to enforce substantive benefits. This issue was considered in depth in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 with the English Court of Appeal concluding that the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits. The Court accepted that the substantive legitimate expectation under consideration had been frustrated and that there had been an abuse of power.

[40] That decision was considered by Randerson J in *New Zealand Association for Migration and Investments Incorporated v Attorney General* (High Court, Auckland Registry, M1700/02, 16 May 2003). He accepted [145] that there was authority for the proposition that, in some circumstances, substantive benefits may be recognised, although the Courts normally stop short of granting relief in terms of a substantive outcome. We also note that in *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 at 525 the Privy Council observed:

> The assurance once given creates the expectation, or to use the current parlance the "legitimate expectation", that the Crown would act in accordance with the assurance, and if, for no satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review.

The assurance referred to was an assurance by the Cabinet about access to broadcasting transmission and production facilities, access to Maori archival material, various payments, and the establishment of a funding agency. In other

words, the Privy Council was clearly contemplating, and accepting, a substantive legitimate expectation.

[41] 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 the principle against non-derogation of grant. In situations where the consent authority's commitment represents a full allocation of the resource to the grantee (subject, of course, to the events of nature), the latter must reasonably expect to proceed with planning and investment on the basis that the consent authority will honour its commitment. Indeed, refusal to recognise that expectation would seriously undermine public confidence in the integrity of water permits. In this case Meridian has made major investments on the strength of its permits. This reliance, coupled with the potential for detriment if the grant is not honoured, strengthens Meridian's argument that its legitimate expectation should be recognised.

[42] Despite Mr Milne's arguments to the contrary we have not been persuaded that there are any compelling reasons for withholding recognition of a legitimate expectation in the context under consideration. To the contrary, rather than fettering functions or duties resting on the consent authority, we believe that holding the consent authority to the terms of its grant promotes the scheme of the Act.

[43] Before completing this section of our judgment we need to consider another issue. Mr Milne submitted that the express protection of existing resource consents under s 217 in situations where a water conservation order has been made coupled with the absence of any corresponding protection for existing consents in other situations indicates a clear statutory intention not to protect existing resource consents in those other situations. Section 217 relevantly provides:

> **217 Effect of water conservation order** (1) No water conservation order shall affect or restrict any resource consent granted or any lawful use established in respect of the water body before the order is made.

> (2) Where a water conservation order is operative, the relevant consent authority –
>
> (a) Shall not grant a water permit … if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the order:
>
> (b) Shall not grant a water permit … unless the grant of any such permit … is such that the provisions of the water conservation order can remain without change or variation:
>
> (c) Shall, in granting any water permit … ensure that the provisions of the water conservation order are maintained.

Mr Milne noted that whereas the water conservation order provisions apply "notwithstanding anything to the contrary in Part II" (s 199), the discretion to grant consents under s 104 is subject to Part II. This led him to conclude that Parliament must have considered that Part II, along with the discretion under s 104 to consider any other "relevant matters", was capable of addressing any effects of the new grant on existing consent holders.

[44] We believe that it is important to keep s 217 in context. It is part of Part IX of the Act which provides a special code for water conservation orders. Whereas Part II is pivotal in all other respects, that is not so for water conservation orders because a different statutory purpose prevails:

> **199 Purpose of water conservation orders** – (1) Notwithstanding anything to the contrary in Part II, the purpose of a water conservation order is to recognise and sustain –
>
> (a) Outstanding amenity or intrinsic values which are afforded by waters in their nature state:
>
> (b) Where the waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding ….

This purpose gives primacy to conservation values. As explained by DAR Williams QC in *Environmental and Resource Management Law in New Zealand* (2nd ed.) at 7.84, had the legislature not approached the matter in this way the degree of protection available to wild and scenic rivers could well have been

reduced because it would have been necessary to undertake a wider balancing in terms of Part II of the Act.

[45] By definition (s 200) a water conservation order imposes restrictions or prohibitions on the regional council's function of controlling the damming, diversion and use of water (s 30(1)). Without s 217 there would be a clash between water conservation orders and existing permits authorising uses that were not compatible with the underlying conservation values protected by the order. Parliament's solution was to make provision for existing permits and other lawfully established uses to continue. This is a special mechanism in a particular context. We do not accept that it provides an authentic springboard for the much wider proposition advanced by Mr Milne.

[46] In summary, in a case where a resource is already fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource unless specifically empowered by the Resource Management Act for the reasons that:

a) The subsequent grant would negate or frustrate both the purpose and effect of the provisions designed to ensure the effective allocation of resources, because the authority would over-allocate the resource and be powerless to manage, control and enforce an order of preference or priority between competing permit holders;

b) Our Court of Appeal has identified the principle of first come, first served as Parliament's guide to an authority's regulation of competing applications for scarce resources, by holding that the grant of a consent to one party necessarily excludes the other. Other Courts have applied the related principle that statutory authorities are unable to exercise a statutory power in a manner which might interfere with a validly granted right of exclusivity;

c) A subsequent grant to another party would have the effect of derogating from the authority's original grant because it would

interfere with, erode, or destroy the holder's right to use the property which is the subject of the consent;

d) Analogously, an original permit holder enjoys a legitimate expectation that a public authority will not deliberately erode a grant during its term by granting a permit to another party.

b) Resource Management Act provisions

[47] The second and consequential question flowing from this conclusion is whether any of the provisions of the Resource Management Act expressly empower CRC to grant water permits to others where the resource is already fully allocated to an existing holder. We reject Mr Milne's submission that the question should be framed on the basis that the consent authority should be able to grant permits unless the Act expressly prohibits that step.

[48] Mr Milne's written synopsis advanced argument on a broad front. Although he referred extensively to the provisions of the Resource Management Act, he did not develop a submission to establish that any one or more of them had the effect contended in his amended declaration. In oral argument he identified s 104 as the first and critical step. That provision materially states:

> (1) When considering an application for a resource consent and any submissions received, the consent authority **must**, subject to Part II, **have regard to -**
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of –
>
> (i) a national policy statement;
>
> (ii) a New Zealand coastal policy statement;
>
> (iii) a regional policy statement or proposed regional policy statement;
>
> (iv) a plan or proposed plan; and
>
> (c) **Any other matter the Consent Authority considers relevant and reasonably necessary to determine the applications**. [Our emphasis]

[49] In opening oral argument Mr Milne accepted that on an application by Aoraki for a water permit for Lake Tekapo CRC would have to take account of the existence of the terms of Meridian's permits if it considered them relevant and reasonably necessary to determine Aoraki's application. He submitted, however, that CRC would not be in breach of its statutory powers if it granted an application by Aoraki which had the effect of devaluing Aoraki's consents but may be in breach if its decision had the effect of rendering those permits nugatory. He said that it came down to a question of fact and degree about the extent to which the consent authority could exercise its powers in these circumstances. We do not regard that as a helpful approach when attempting to identify and determine a discrete question under the Declaratory Judgments Act.

[50] Mr Milne continued this theme in his written reply. He affirmatively identified s 104 as the source of CRC's powers to grant a permit which might erode the value of an existing permit. He submitted that it expressly empowers an authority to grant a consent whether or not it erodes the value of existing consents, providing that it is not contrary to Part II.

[51] However, s 104(1) only identifies the factors to which the consent authority must have regard when considering an application. On a plain reading it does not empower the consent authority to grant a consent to Aoraki in circumstances where the resource is already fully allocated to an existing consent holder. To the extent that Mr Milne's test of fact and degree has any application, once the consent authority is satisfied as a matter of fact that Lake Tekapo's water is fully allocated to Meridian, this conclusion will be determinative against a grant in a third party's favour in terms of s 104(1)(c) unless power exists elsewhere. As earlier noted, we agree with Mr Kos that over allocation of a resource would be inconsistent with the principles set out in Part II, to which s 104(1) is expressly subject.

[52] Statutory provisions which might arguably empower CRC to derogate from its grant or grants in Meridian's favour were identified. We agree with Messrs Kos and Whata and Ms Arthur that where Parliament has conferred power on a consent authority to interfere with an existing grant, it has acted expressly and for very limited purposes. Among those provisions are: the power to include in a regional

plan a rule relating to maximum or minimal levels of flows or rates of use of water even though it may affect the exercise of existing consents (s 68(7)); a power to review conditions of a resource consent when a regional plan setting rules relating to maximum or minimal levels or flows or rates of use of water or minimum standards of water quality has been made operative and, in the regional council's opinion, it is appropriate to review the permit conditions in order to enable the levels, flows, rates or standards set by the rule to be met (s 128(1)(b)); a power to change or cancel a resource consent if, in the Environment Court's opinion, information made available to the consent authority by the applicant contains inaccuracies which materially influenced the decision to grant the consent (s 314(1)(f)); and a power to apportion water where a regional council considers that there is a serious temporary shortage in its region or any part of its region (s 329(1)).

[53] Of these provisions, s 128 is potentially of the most assistance to Aoraki's argument. However, that section and the following related provisions were enacted to govern a clearly defined set of circumstances. They are triggered by a consent authority's opinion that the conditions of the permit should be reviewed in order to enable standards set by a rule in a regional council to be met. The statute has created a discrete procedure to deal with such an application.

[54] We accept Mr Milne's point that conditions are defined as including terms, standards, restrictions and prohibitions in resource consents. But it is unnecessary in the context of the first declaration for us to decide whether or not s 128 gives CRC jurisdiction on review to make a decision which might affect the viability of Meridian's consents. At the risk of stating the obvious, s 128 is concerned with a very different situation from the one under consideration. It is sufficient to record that s 128 and following do not bear upon the situation under review as it stands at the moment, and could not discretely empower CRC to grant a permit to Aoraki or any other party.

[55] It follows in our judgment that there is nothing in ss 104-104D or elsewhere in the Act that would authorise CRC to grant Aoraki or any other party a water permit for Lake Tekapo if the grant would have the effect of reducing the amount of water available to satisfy the terms of Meridian's consents. Expressed in another

way, while, as Mr Kos accepted, the consent authority has power to receive, process and consider an application from Aoraki, it would be acting unlawfully if it granted Aoraki's application in circumstances where the resource was already fully allocated to Meridian's permits and a new permit would have the effect of diminishing or derogating from the existing consents. Accordingly, we must dismiss Aoraki's first application for a declaration.

Second Declaration

[56] Our consideration of Aoraki's second proposed declaration will fall within a relatively narrow compass given our findings about the legal nature and effect of Meridian's water permits. The sole issue is whether or not ss 6, 7, 13, 17, 18 and 19 of the Waitaki Act authorise the Waitaki Water Allocation Board (the board) to make provision for Aoraki and others to take, divert and use the waters of Lake Tekapo notwithstanding that it may reduce the amount of water available to satisfy Meridian's consents.

[57] We acknowledge the assistance given by Ms Arthur in dealing with this question. All parties appear to agree on the background to the Waitaki Act. As Ms Arthur observed, it was:

> … designed to provide for a process specifically to determine the use of the water in the Waitaki catchment. It enabled the creation of an independent statutory board to develop and approve a water allocation framework… It was intended to allow the many applications for water use in the catchment to be considered together and on their merits.

When the Bill was introduced to Parliament the numerous pending applications included a major application by Meridian for a project known as "Project Acqua". That project was later abandoned.

[58] Currently there is no regional plan for the allocation of water in the Waitaki Catchment nor any minimum flow regime. The stated purpose of the Act (s 3) is:

> … to require the allocation of water in the Waitaki catchment on a basis consistent with the purpose and principles of the [Resource Management Act] ….

The board, whose function is to develop and approve a regional plan within 12 months of appointment (s 6), has now been established with the usual full rights, powers and privileges (s 7).

[59] In carrying out its function the board (s 13):

> … must include objectives, policies, and methods (including rules, if appropriate) in the regional plan, to provide for—
>
> (a) water that is or may be taken from, or used in, the Waitaki catchment in accordance with section 14(3)(b) and (e) of the principal Act; and
>
> (b) water to sustain the intrinsic values and amenity values that the Board identifies and determines should be sustained in the Waitaki River and associated beds, banks, margins, tributaries, islands, lakes, wetlands, and aquifers; and
>
> (c) the allocation of water to activities, as appropriate; and
>
> (d) the management of allocated water, including methods that provide for dealing with periods of time or seasons when the level or flow of water is low.

The board is bound to develop and approve a regional plan in accordance with the Waitaki Act and for those purposes has the same powers as a regional council under the principal Act in relation to regional plans (s 17). The Resource Management Act, including the provisions of Part II, applies with necessary modifications to the development and approval of a regional plan by the board just as if it was one developed by a regional council (s 18).

[60] While Aoraki's underlying position seems to be that it does not need to place any great reliance on the provisions of the Waitaki Act because Parliament clearly intended that existing principles under the Resource Management Act would continue to apply, Mr Milne nevertheless advanced a twofold submission. First, by rejecting a proposed amendment to the Bill that would have protected allocations already made to Meridian and other existing consent holders, Parliament declined to accord any special priority or status to Meridian's consents or to any other existing consents. Second, by declining to restrict the operation of the Waitaki Act to the catchment downstream of Meridian's facilities, Parliament accepted there is still water to be allocated upstream of the Waitaki dam and left the board to determine

competing claims on their merits and in accordance with the purpose and principles of the principal Act.

[61] With reference to the first submission, we note that when moving that the Bill be read for the second time the Honourable Marion Hobbs, Minister for the Environment, said (25 March 2004; 616 NZPD 12006):

> I would like to comment on the effect of this legislation on existing consents and respond to concerns that have been expressed about this. Nothing in this Bill is intended to alter the rights of existing consent holders to operate their existing consents. The Water Allocation Framework once operative is simply a regional plan and as such is forward looking. In allocating water under the Framework the Board must consider any de facto allocation created by existing consents, but is not bound by that de facto allocation and may allocate water to whatever uses it considers most beneficial. However, as with the development of any other regional plan where the water may be currently allocated by consents, the allocation will not be able to override existing consents and so will not have effect until those consents expire, except through any review of consent conditions. Any such review is conducted under the existing provisions of the RMA and is a review of conditions for environmental matters only. If necessary I will consider introducing SOPs in the committee stage to clarify this.

We agree with Mr Milne that Parliament was not intending to accord priority to consents held by Meridian or by anyone else. However, nor was it intending to influence the determination of future applications. When passing the Waitaki Act, Parliament was effectively taking a neutral stance on the priority issue.

[62] Our response to Mr Milne's second argument is along similar lines. By declining to restrict the Waitaki Act to the lower catchment we do not think that Parliament was signalling that Meridian and other existing holders did not enjoy priority at law or that they were unable to establish priority as a matter of fact. Even if the waters of the Upper Waitaki Catchment are currently fully allocated to Meridian and other existing consent holders, the board can still perform a useful function with reference to that catchment. As earlier mentioned, s 3 specifies that the purpose of the Waitaki Act is to require the allocation of water in the Waitaki catchment on a basis consistent with the purpose and principles of the Resource Management Act. Thus the crucial issue is whether the purpose and principles of the principal Act authorise the promulgation of a regional plan overriding the allocation of water under a permit.

[63] The starting point is s 14 which embodies the underlying principle for the allocation of water. It provides that no person may take, use, dam or divert water (other than open coastal water) unless (s 14(3)):

> (a) The taking, use, damming, or diversion is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent; or …

Within this narrow context, authorisations by way of a rule in a regional plan and by way of a resource consent are on an equal footing. But there are two important exceptions.

[64] A regional council is empowered to include rules in a regional plan which prohibit, regulate or allow activities and (s 68)7)):

> Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, … the plan may state –
>
> (a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and
>
> (b) That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

The board is specifically authorised to exercise this power as if it were a regional council (s 18(3)). The matters that can be provided for in the plan to be prepared by the board are wide enough to include rules falling within s 68(7) (s 13).

[65] This power must be read in conjunction with the power of a regional council to review existing resource consents under s 128–132. The council has power to serve notice on a consent holder of its intention to review the conditions of a resource consent (s 128(1)):

> (b) In the case of water, … when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, … and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, … set by the rule to be met …

The Act describes the contents of the notice of review (s 129); the requirements as to public notification, submissions and hearing (s 130); the matters to be considered in

the review (s 131); and the scope of the consent authority's decision (s 132). Depending on the contents of the plan prepared by the board, these powers will be available to CRC once the plan has been approved and handed over.

[66] Beyond those specific provisions we have not been able to identify anything in either the Waitaki Act or the Resource Management Act that would support the general proposition implicit in the second declaration sought by Aoraki. Accordingly, its application is refused.

Costs

[67] Costs must follow the event. Meridian, CRC and the Attorney-General are all entitled to costs. However, Trustpower was joined as a defendant on its own application in the face of Aoraki's opposition. It must bear its own costs.

[68] We trust that counsel are able to agree on costs without further involving the Court. If it is of any assistance, we record our view that costs would normally be fixed according to category 2B. However, Aoraki's submissions were extraordinarily lengthy and suffered from a lack of focus and structured analysis, and few of the authorities cited were in point. We are satisfied that the costs of this proceeding have been unnecessarily and significantly increased by the way in which Aoraki presented its case.

[69] Aoraki's proceeding should have been commenced with a succinct statement of claim incorporating discretely framed and arguable questions for determination. The ultimate questions did not emerge until the hearing, and then only through an unsatisfactory process. However, we note that Meridian compounded costs in this respect by itself filing a number of irrelevant affidavits and challenging the Court's jurisdiction to grant declaratory relief up until commencement of the substantive hearing.

[70] If counsel are unable to agree, we will consider memoranda to be filed by the defendants no later than 1 February 2005, with Aoraki's memorandum in answer to be filed by 15 February 2005.