IN THE SUPREME COURT OF NEW ZEALAND SC 98 / 2012

BETWEEN	**THE NEW ZEALAND MAORI COUNCIL**
	First Appellant
AND	**WAIKATO RIVER AND DAMS CLAIM TRUST**
	Second Appellant
AND	**HER MAJESTY'S ATTORNEY-GENERAL**
	First Respondent
AND	**THE MINISTER OF FINANCE**
	Second Respondent
AND	**THE MINISTER FOR STATE-OWNED ENTERPRISES**
	Third Respondent

MEMORANDUM FOR APPELLANTS CONCERNING QUESTIONS IN MINUTE OF THE COURT DATED 12 FEBRUARY 2013

14 February 2013

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1. The appellants' response to the questions posed by the Court in the Minute dated 12 February 2013 is as follows.

First set of questions

> *"(a) Would the water permit transfer automatically to the transferee either by reason of s 2A of the Resource Management Act 1991 or otherwise?"*

2. The appellants submit that the answer to the question is "no" for the following reasons.

What is the effect of a resumption order?

3. Pursuant to s 27B State Owned Enterprises Act 1986 (SOE Act), it is "land or an interest in land" which is resumed by the Crown in accordance with s 27C of the SOE Act (by the Minister of Lands acquiring that land or interest in land under Part 2 of the Public Works Act 1981) and then returned to Maori.

Nature of a water permit – is it "land or an interest in land"?

4. The definition of "resource consent" in s 87(d) of the Resource Management Act 1991 (RMA) includes a consent to do something (other than in a coastal marine area) that otherwise would contravene s 14 RMA (a water permit). Section 14 imposes restrictions relating to the taking, using, damming, or diverting water.

5. Section 122(1) RMA provides that a resource consent is neither real nor personal property. Land use and subdivision consents attached to land: s 134 RMA. Water permits do not: they are personal to the holder of the permit.

6. In *Aoraki Water Trust* v *Meridian Energy Limited* [2005] 2 NZLR 268, the High Court found that the RMA's comprehensive statutory management regime for water allocation and use effectively prescribes a licensing regime and that a number of provisions in Part 6 of the Act elevate the status of a water permit from a bare licence to a licence plus a right to use the resource.

7. Accordingly, a water permit is in the nature of a licence (albeit more than a bare licence) and personal to the holder of the permit. It does not confer and interest in land.

8. Attention is drawn in passing to s 13 RMA which requires a consent to operate a dam as an activity that would otherwise be in breach of s 13. The relevant consent is a "land use consent" and not a "water permit": s 87(a) RMA. However, unlike other land use consents, one for an activity which would otherwise breach s 13 does not attach to the land: s 134(2) RMA. The analysis for the consents for activities that would otherwise breach s 13 is therefore the same as for water permits.

What would be the nature of the rights gained by the transferee upon a resumption order being made for a dam?

9. Having regard to the first reason above (para 3), the transferee would be acquiring the land on which the dam was constructed and any associated interests in land. However, the water permit is in the nature of a licence and personal to the dam operator. It is not an "interest in land" and would not be transferred by operation of the resumption order, unless the transferee was deemed to be a successor to the dam operator under s 2A RMA.

What is the meaning of "successor" under s 2A RMA?

10. Section 2A(1) RMA provides that in the Act, unless the context otherwise requires, any reference to a person, however described or

referred to (including the applicant and consent holder), includes the successor of that person.

11. Use of the term "successor" rather than "successor in title" has the effect of extending the application of s 2A RMA to those who succeed to rights other than land title, and recognises that consents, other than land use consents, do not run with the land, for example, water permits. Accordingly, the effect of s 2A RMA is that a successor to a consent holder will automatically succeed to the consent, and there will be no need for a formal transfer.

12. The question then is whether a transferee of a dam under a resumption order would be a "successor" for the purposes of the RMA.

13. "Successor" is not defined in the RMA. The meaning of the term was considered by Judge Jackson in *Goldmine Action Inc* v *Otago Regional Council* EnvC C51/02 who applied the dictionary meaning of "successor" as "one who succeeds another in office, function, or position". The Judge drew a distinction between an "assign" being a person to whom is transferred a right or interest or some property (title) of another person while that person is still alive or in existence and a "successor" being a person who takes a right, interest or some property (title) of another person after that person dies or ceases to exist.

14. The discussion and decision took place in the context of examining the right of a person to be substituted as successor to another's involvement in proceedings under the RMA. However, the decision serves to highlight the distinction between successors, and assigns or transferees for the purposes of s 2A RMA.

Would the transferee be a "successor" under s 2A RMA?

15. It is submitted that in the context of the present issue, a transferee under a resumption order would not be a successor of a water permit.

16. The transferee under the resumption order would not be taking a right, interest or property by virtue of the death of a person or because an incorporated entity has ceased to exist.

17. Rather, the person to whom land or an interest in land is being returned by way of resumption order would be in the nature of a transferee. Accordingly, there would appear to be no automatic transfer of rights conferred by the water permit by way of succession under s 2A RMA.

Are there other circumstances under the RMA in which the water permit could transfer automatically?

18. Section 122 RMA provides for the automatic vesting of resource consents upon the death or bankruptcy of the consent holder, a situation which does not arise in the present case.

19. Section 136 RMA gives a holder of a water permit the ability to transfer a permit to any owner or occupier of the site in respect of which the permit is granted. Accordingly, the dam operator may agree to a transfer, but there is no automatic transfer upon change of ownership of the land to which the permit may relate. Ownership of land to which a water permit may relate is irrelevant to the question of who is the holder of the permit.

Conclusion

20. Accordingly, the water permit would not transfer automatically to the transferee upon a resumption order being made by reason of s 2A RMA or otherwise.

"(b) If not, would the Waitangi Tribunal have power to direct such transfer under s 8A(2)(a) of the Treaty of Waitangi Act 1975 (by way of fixing "terms and conditions")?"

21. The appellants submit that the answer to the question is "no" for the following reasons -

21.1 s 8A of the Treaty of Waitangi Act 1975 (TOW Act) is expressly limited in its scope to "any land or interest in land transferred to a state owned enterprise": s 8A(1)(a);

21.2 a water permit is not an interest in land and does not run with the land: ss 122,134 and 136 RMA;

21.3 nor would the Crown, for the purposes of s 2A RMA be a "successor" of the SOE with respect to the water permit, pursuant to any resumption of the land on which the dams are sited;

21.4 in circumstances where the RMA does not provide for water permits to run with the land, nor to be an interest in land, but provides for water permits to have status independent of the land to which they relate, then there will be no jurisdiction for the Waitangi Tribunal under s 8A(2)(a) to in effect recommend a transfer of water permits under the guise of a term or condition of resumption of the land to which they relate;

21.5 while s 8A(4) extends the jurisdiction of the Waitangi Tribunal to make any other recommendation under s 6(3) or (4) TOW Act, a recommendation for transfer of water permits, held separately under the RMA and not being land or an interest in land, does not sit easily within the words of s 6(3) or (4).

22. There is no doubt that it would be possible for the Waitangi Tribunal to recommend the resumption of the land. The dam would be a fixture

and would be transferred with the land. The Tribunal would not be able to take account of the existence of the dam in determining whether or not the land should be returned (s 8A(3) TOW Act). Nor would the dam owners have any right to be heard in relation to the issue (s 8C TOW Act).

23. Section 8A(2)(a) TOW Act does enable the Tribunal to make a recommendation *"on such terms and conditions as the Tribunal considers appropriate"*. However, the use of this provision to compel the transfer of a water permit under s 136 would require an extraordinarily broad interpretation of the power. Parliament cannot have intended such a power without expressly saying so, particularly where the affected third party would not even be able to make submissions in relation to the condition.

24. Rather, the proper interpretation is that it gives the Tribunal power to transfer the memorialise property subject to limitations consistent with countervailing interests under the principles of the Treaty. Such a limitation might mirror the terms of s 18(4) of the Reserves and Other Lands Disposal Act 1956.

25. For every dam, there will be Maori who are upstream or downstream of the dams. They may be experiencing infringements of their Article 2 rights to their water resources as great as those who have a claim to the land under the dam. However, they would have no claim to the land under the dam and the Tribunal would not be able to consider any issue under s 8A TOW Act.

"(c) If the answers to questions (a) and (b) are both "no", would there be any impediment to the transferee obtaining a new water permit to operate the dam either (i) ahead of, or on, resumption taking effect or (ii) on the expiry of the existing water permit?"

Question (c)(i)

26. The answer to the question is "yes" because the grant of a new water permit would derogate from the rights under the existing water permit, as analysed below.

27. The issue of applications for water rights already allocated under existing water permits was considered by the High Court in the *Aoraki Water Trust* case.

28. Aoraki sought a declaration that water permits, held by Meridian entitling it to the full allocation of water from Lake Tekapo, did not operate as a legal constraint on the ability of the regional council to grant others consents to the same water under the RMA.

29. The Court found that Aoraki's argument overlooked the fact that a water permit confers a right to use the resource. Indeed, the fact that Meridian's consents were of considerable value was seen as explicable only on the basis that such value derives from the holder's right to use the property in accordance with its permit. It followed that granting a permit to Aoraki would reduce Meridian's ability to make full use of the water, so devaluing its grant. The Court held that *"the principle of non-derogation from grant is applicable to all legal relationships which confer a right in property"* (at [279]).

30. The Court observed that the principle of non-derogation is based on an implied obligation on a grantor not to act in such a way as to injure property rights granted by the grantor to the grantee. It considered that

Meridian must have assumed that the council would not take any steps during the term of the consents to interfere with, erode or destroy the valuable economic right which the grants had created. Granting Aoraki consent to the water *"would either frustrate or destroy the purpose for which Meridian's permits were granted"* (at [280]).

31. Accordingly, in the present case, the principle of non-derogation would operate to prevent the transferee obtaining a new water permit to operate the dam while another water permit for the same activity remains extant.

Question (c)(ii)

32. The answer to this question is a qualified "yes". Analysis of the question and formulation of the answer are not straightforward.

33. Sections 124A to 124C of the RMA accord priority over natural resources to existing consent holders. The High Court held in *Christchurch Readymix Concrete* v *Canterbury Regional Council* CIV 2011-409-001501, 13 September 2011 that *"sections 124A – 124C are statutory provisions to ameliorate a problem cause by the Court of Appeal decision in Fleetwing, by according a priority to existing consent holders"* (at [4]).

34. An exception is where the relevant plan provides expressly that ss 124A to 124C do not apply: s 124A(3) RMA.

35. Accordingly, an existing water permit holder would retain priority over a transferee if they elected to reapply for a water permit, unless the relevant plan provided expressly that ss 124A to 124C did not apply to the resource in question. However, the circumstances of the dam no longer being held by the consent holder would undoubtedly be relevant to the considerations of the decision maker when deciding whether or not to grant the application for renewal.

"(d) If the answers to questions (a) and (b) are both "no", what would be the practical value, if any, to the SOE / MOM of its existing water permit?"

36. Assuming that the land, dam and all associated infrastructure pass to the transferee, there would be little practical value to the SOE / MOM in the existing water permit. This is because the SOE / MOM would not have ownership of the property necessary to exercise the water permit.

37. However, there would be a commercial value to the SOE / MOM in the existing water permit insofar as it might seek to transfer the water permit to the transferee of the dam for consideration under s 136 RMA.

Second set of questions

"Assuming that a resumption order was made in respect of one or more, but not all, of the dams" -

"(a) [what] would happen to the existing water permits?"

38. Nothing would happen to the existing water permits themselves.

39. Mighty River Power Limited (MRP) would be entitled to continue to exercise the existing permits in respect of the dams over which it retained ownership.

40. MRP could elect to transfer those parts of the water permits related to the transferee's dams to the transferee under s 136(2) of the RMA. MRP could also elect to surrender those parts of the existing water permits under s 138 of the RMA.

"(b) [what] rights, if any, would the transferee have to operate the dam or dams?" and

41. The transferee would have no rights to operate the dams unless MRP transferred the necessary parts of the water permits or surrendered them.

42. Where the water permits were surrendered, the transferee would have to lodge resource consent applications with the relevant consent authority for the water permits necessary to operate the transferred dams.

"(c) what would be the practical ability of the transferee to obtain such rights?"

43. The transferee could only obtain rights to operate the dams, if MRP transferred the necessary water permits or surrendered them.

Summary of appellants' position

44. Resumption rights are of doubtful value to Maori as the law stands, if the MRP shareholding changes as proposed. This is because, if resumption is available, as it may be for some dams, each dam can only be operated with the aid of a water permit which is held presently by MRP who realistically would only transfer it for very high value.

45. Further, when the permit period ends, it is inevitable that MRP would apply for and obtain priority under the RMA (ss 124A to 124C and particularly, s 124B). In the result, it would re-secure its water permit rights for a further period of time.

46. If MRP refused to transfer the water permit and any negotiations around cost of access for dam use failed, then the dam could not operate and significant power failure would result for the upper North Island. This

result potentially would be multiplied by as many dams as are affected by resumption.

47. If MRP's shareholding is held in the present SOE structure, then even with the possibility of resumption orders being made, claimants can negotiate with the Crown the basis for allowing the dams to operate (and with the Crown being mindful of the strategic importance of the asset operating to guarantee an Auckland power supply).

48. If Treaty breaches resulted in a resumption order and the Crown shareholding remained as it is, then Maori could expect a negotiation on an equal footing with its treaty partner to determine a commercial basis for allowing the dams to be operated by the relevant power companies. Terms for the sale of shares would need to bound into that commercial arrangement.

49. The key to a negotiated outcome is that if resumption is not effective and might result in a failure of security of supply in the absence of the Crown being the sole shareholder, then (even if it could, bearing in mind that an MOM would be in place) the Waitangi Tribunal would be very reluctant to make an order which would result in a potential disruption to supply. If the resumption order is made now while the dams are fully Crown owned then the Waitangi Tribunal can make a resumption order in the full knowledge that the Crown has the power to negotiate to ensure security of supply which for once puts Maori in a genuinely balanced bargaining position.

50. If the Waitangi Tribunal decided by a small margin that resumption should not be ordered, what then? Resumption cannot be seen as some automatic solution in the face of a treaty breach. If resumption is not ordered, but nonetheless some compensatory regime is recommended, then as matters stand, the dams are still available to contribute to that process by virtue of their income stream. The contribution may be less than the value of full resumption, but could be

made viable in negotiation because of the income stream from the dams.

51. Counsel has been instructed that six dams owned by MRP have had resumption rights over them removed because of land settlements.

52. The dams involved are Whakamaru, Maraetai 1 and Maraetai 2, Atiamuri, Ohaakuri and Aratiatia.

53. Whakamaru, Maraetai 1 and Maraetai 2 were the subject of the Pouakani Claims Settlement Act 2000. Atiamuri, Ohaakuri and Aratiatia were the subject of the Affiliate Arawa Iwi and Hapu Claims Settlement Act 2008.

54. In each case, the right to claim over the river has been preserved.

Dated this 14th day of February 2013

C R Carruthers, QC
Counsel for the appellants

To: The Registrar of the Supreme Court

And to: The Respondents and their solicitors