Simpson Grierson

FYI

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RESOURCE MANAGEMENT

PAKI (NO 2) – THE SUPREME COURT RULES ON RIVERBED OWNERSHIP

The Supreme Court's recent decision in *Paki v Attorney-General (No 2)* leaves the law on riverbed ownership uncertain, and is likely to lead to further litigation and political lobbying.[1]

The decision casts real doubt on whether the beds of rivers that are culturally important to Maori are included within adjoining riparian titles. It may lead to further claims to unextinguished customary title in riverbeds, and poses challenges for riparian owners who might wish to contest such claims.

Uncertainty about ownership of riverbeds is in turn likely to raise questions about the ownership and allocation of freshwater resources. The case may have significant implications for processes under the Resource Management Act 1991, including who is appropriately identified as an affected person for resource consent applications.

Further, although the Supreme Court rejected the appellants' arguments that the Crown owed a fiduciary duty in relation to its nineteenth century purchase of particular Maori land, the Court left open the question of whether such a duty could be found in future cases. However, this note focusses on the question of riverbed title.

BACKGROUND

The case concerned the Pouakani block, which abutted a section of the Waikato River near Mangakino. In the 1880s and 1890s the Native Land Court issued titles to several riparian subdivisions of Pouakani. By 1901, the Crown had acquired all but one of the riparian blocks from the Maori owners.

The appellants sought a declaration that the riverbed land was held on constructive trust for their benefit. Two hydro-electricity dams operated by Mighty River Power (Whakamaru and Maraetai) now stand on this part of the river, and the strip of riverbed at issue is now within Lakes Whakamaru and Maraetai.

The appellants were the descendants of the vendors. The appellants claimed that the Crown had been under a fiduciary obligation to explain to the vendors that title to riparian land was presumed to include the river to the mid-point under English law.

1 *Paki (No 2) v Attorney-General* [2014] NZSC 118. Prior to joining Simpson Grierson, Damen Ward worked for the Crown Law Office. He was one of the counsel for the Crown in the *Paki* litigation.

The fiduciary obligation was said to arise from the Treaty of Waitangi, from the Crown-indigenous relationship more generally, and from the imbalance of power between vendor and purchaser. It was alleged that the Crown failed to explain the presumption and the riverbed was therefore held on constructive trust for the benefit of the descendants of the vendors.

Both the Crown and the appellants accepted that the mid-point presumption applied to title issued by the Native Land Court, based on a 1962 Court of Appeal decision, *Re the Bed of the Wanganui River*.[2] While the application of the presumption to general land is well established, its application to Maori land has been strongly criticised by the Waitangi Tribunal.

MID-POINT PRESUMPTION MAY DEPEND ON ASSESSMENT OF LOCAL MAORI CUSTOM

In a previous decision on part of the *Paki* litigation the Supreme Court had said it would be "wrong" for it to question the application of the presumption given that the parties did not do so. However, ultimately the Court found that, in the absence of any contested argument on whether the presumption applied here, it was not prepared to accept that the Crown had acquired the riverbed when it acquired the riparian land.

The Court did not accept that *Re the Bed of the Wanganui River* determined that the mid-point presumption applied to all Maori freehold land. None of the judges felt it appropriate to rely on the case for such a proposition, or for any finding about "universal" Maori custom, in the absence of detailed or contested argument before the Court. The Chief Justice discussed the background to the case at some length, and concluded that it should not be followed.

However, apart from Elias CJ, the Court left open the authority of the *Wanganui River* case for future litigation that was directly on point.[3]

While each judge took a slightly different approach, the Court signalled its view that whether the mid-point presumption applies may depend on "the custom of the particular region involved" and on the "consistency with the understanding and intentions of Maori; only if the attendant facts and custom are consistent with its application can it apply".

However, as noted, because the majority avoided coming to a final view on whether the presumption applied, such issues will need to be considered further in future cases.

In relation to the Pouakani claim, each of the judges considered that if custom accorded with the presumption, the owners must have realised the riverbed was within the title.[5] If custom was inconsistent with the presumption, then the presumption would not have applied and the riverbed was not within the title. Either way, no question of a breach of a fiduciary duty needed to be addressed. Further, there was little evidence that the Native Land Court had specifically considered the riverbed when awarding title to the riparian land.

IMPLICATIONS - FERTILE GROUND FOR DISPUTE?

Paki (No 2) indicates that whether riparian titles can be presumed to extend into the riverbed may now depend on the particular circumstances of each transaction or title investigation, and the customary law of the particular iwi or hapu concerned. In some circumstances it might be inferred that the riverbed was intended to be included, but specific inquiry into local custom may still be required.[6] In our view, the Supreme Court's decision in *Paki (No 2)* may have the effect of being an invitation to litigate (or even re-litigate) title to riverbeds, with considerable flow-on consequences for water-related issues.

Requiring an inquiry into the customary law of local hapu at the time of the initial conversion of customary title into a statutory or Crown-derived title may pose challenges for any modern litigant wanting to rely on the presumption, particularly given that Native Land Court records are often very sparse, and may provide little indication either way of whether the status of the riverbed was directly considered.

Regional historical variation may also be significant. While many of the land titles in the North Island are derived from Native Land Court title investigations and orders (as in Pouakani), other districts were subject to confiscation. The confiscation districts may include riverbeds within their boundaries. In other areas, such as parts of the South Island, the boundaries of early "direct" purchases of customary title were so large that they may have included the beds of significant rivers.

This generates a degree of uncertainty about title to riverbeds. It is possible on the approach suggested by the Court that some riverbeds, particularly of rivers of cultural or economic significance to Maori, may be presumed to remain in customary title. If a riverbed remained customary property the Maori Land Court would have jurisdiction to determine ownership and (potentially) convert that title into Maori freehold title.

2 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).
3 Elias CJ at [24] to [27]; William Young J at [233] to [243]; McGrath J at [175] to [181]; Glazebrook J at [317] to [319].
4 Glazebrook J at [318]; McGrath J at [179].
5 Elias CJ at [15]; McGrath at [179] to [181]; William Young J at [236]; Glazebrook J at [320] to [321].
6 Elias CJ at [22]: "*While in the case of small watercourses such instances of exclusion of separate customary interest [in the riverbeds] might be irresistible or not contested, no such assumption applied [in relation to the Native Land Court] in the case of significant bodies of water of significance to Maori*".

Where a section of a river is navigable, the Crown may have secured title under s 14 of the Coal Mines Act Amendment Act 1903. However, given the approach in *Paki* future litigants may dispute whether the particular words in s 14 are sufficient to extinguish customary title.

Reliance on Public Works Act takings to secure title may not be sufficient. Many takings may only refer to the riparian land, because the drafters presumed the mid-point presumption applied. Again, a close consideration of specific circumstances may be necessary to show an intention to secure the riverbed.

We also foresee considerable scope for debate and uncertainty relating to freshwater matters under the Resource Management Act 1991. Uncertainty about ownership of riverbeds is in turn likely to provide a platform for disputes about a range of matters including ownership and allocation of freshwater resources and who is appropriately identified as an affected person for resource consent applications. Indeed, there is the potential for challenges as to whether regional councils have the jurisdiction to manage freshwater resources.

The implications of *Paki (No 2)* are therefore very significant and may pose a considerable challenge to the incoming government. The decision may also provide an impetus for the Waitangi Tribunal to proceed to the next stage of its inquiry into Maori claims to freshwater.

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