A Green Equity by Professor John Morton

FOREST AND BIRD has set its course ... "from 1990 onwards ... towards a sustainable future." If all humanity could become as sensible as the Berliners, and we left behind our paranoia about armaments, we could muster the will and resources to repair our planet. It could still be done: and beside it, no other task ultimately matters.

From now on, it will be ecology that must set the ground rules of our economics. Sustainability requires this; and so it must be that through the 1990s all our politics must be green.

The great sustainable that we live by, with all our vaunted growth economy, is the green molecule of chlorophyll and the energy it captures from the sun. Sustainability hangs for the future on the way we look after the earth's green cover.

All our land law will need to develop this recognition. But alongside law there will be the code of "equity" that since medieval times has intervened into English law, to mitigate its harshness, and the selfishness of individuals. It is equity that takes account of conscience, and of obligations beyond ourselves.

At the earliest times a robber chief could have grabbed land and held it by main force. But from the dawn of the English law we inherit, there has been a civil code, where a person has behaved conscionably, to respect another's title to land. For centuries the ordinary title has been a "fee simple", a holding from the Crown that I could do what I liked with (so it was assumed), from the centre of the earth up to the vault of heaven!

Or not quite. In the days before I was allowed to make a "will of lands", I owed a duty to my heir-at-law (generally the eldest son) who would one day possess the land. During my life, he could bring an action to restrain me, if he saw me "wasting" or spoiling the land, as by clear-felling the trees, draining the waters, or – in our modern notion – "re-contouring."

Soon, in historic time, equity was to invent the notion of the "trust". Though in law I might seem to hold the fee simple, I really held the land for the benefit of others: infants, children unborn, or a charity. Equity would see that I didn't use it for my own enrichment, and would hold me to my obligation towards the beneficiaries.

As more centuries passed, it became common to borrow money on the security of land. Still today there is an arrangement in law by which the money-lender (mortgagee) takes my title deeds. But his power over the land is limited. As long as I hold the option to pay the money back, I have – as it is said – "an equity of redemption".

In our own lifetime we've seen the growth of town and country planning, based on the doctrine that a whole community has an interest in what I am allowed to do with my land. And so do future generations unborn.

Thus, the owner of private beech forests in Nelson is not to get away with the statement: "This is a good piece of dirt, but it will never be profitable until I can get the trees off it". Planning exists indeed to mark out the things an individual owner (during a life-tenure so much shorter than the life of trees) cannot safely be allowed to do.

We hold or occupy land, in effect, with an "equity" to consider the interests of others. English "town" planning began in the early 1900s, with the laudable aim to restrain ugly ribbon development. With World War II it increasingly became "country" planning. There were County Agricultural Committees, to ensure that valuable farm land was kept husbanded and properly productive.

Today, and really for the first time, land use planning is looking to obligations not just to other human beings, but to the biosphere itself, whose rules we're inescapably bound by. Our own brief fee simple is far shorter than the life of the soil or a forest, even a single tree. There must be an equity to sustain the land, so the people of the future may inherit it, unspoiled and still productive. Or where communities are fragile, scarce or unique, not in the economic sense productive, the conservation need may entail total preservation.

The land use – whether predominant or conditional – that I am to be allowed, must henceforward be set out, for each region or catchment, in a land use plan, prepared with the best ecologic and economic foresight.

It won't be good enough – in the current parlance – to "put more market into planning", to let the polluter or the exploiter pay for the damage done, at a price some of the big operators might not find prohibitive. This is the narrow vision of the common law: that everything has its price and the appropriate remedy is "damages". Equity would in contrast hold some things beyond price, and would intervene to stop the damage being done. Among the remedies would be injunctions, to prevent some things, even to compel others.

There have been some judicial pointers to the way a "green equity" might be shaping up. Those owners that wanted to drain the Whangamarino wetlands were first, by Barker J., found entitled to compensation when this environment was protected under the soil and water code. The Court of Appeal (by the judgement of Cooke, P.) overturned this, and found the owners had been deprived not of a right but of a "privilege" to which they were not, by any exercise of ownership, indefeasibly entitled.

The best, most far-seeing contribution the resource management reform could make, would be a declaration that any title to land – freehold or leasehold – is to be held subject to an equity for its sustainability. And where – with public consensus and by proper authority – measures are imposed to protect the environment, no right of compensation will arise, if these should curtail the owner's opportunity of maximum profitability.

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