IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2017-409-000254
[2018] NZHC 146

BETWEEN	RANGITIRA DEVELOPMENTS LIMITED Applicant
AND	THE ROYAL FOREST AND BIRD PROTECTION SOCIETY LIMITED Respondent
AND	BULLER DISTRICT COUNCIL Third Party

Hearing: 17 October 2017

Appearances: M R G Christensen for the Applicant
P D Anderson for the Respondent

Judgment: 14 February 2018

JUDGMENT OF NATION J

Background

[1] The applicant, Rangitira Developments Limited (Rangitira) plans to develop the Te Kuha open cast coal mine in the ranges south of the Denniston and Stockton Plateaus, southeast of Westport. It holds a mining permit granted under the Crown Minerals Act 1991 (the Crown Minerals Act).

[2] To proceed with this development, it requires a number of statutory approvals. These include a number of consents under the Resource Management Act 1991 (RMA) from the Buller District and West Coast Regional Councils.

[3] Prior to the hearing of these proceedings there had been a hearing before Commissioners as to those applications but no decision had been made. On 21 November 2017, the Commissioners released their decision[1] which was then adopted by the Council so that the necessary resource consents for the operation of the mine have been granted subject to extensive conditions. Media reports indicate it is now the subject of an appeal.

[4] An agreed statement of facts provides the context in which I must consider the legal issues raised in these proceedings.

[5] The proposed mine footprint is approximately 116 hectares with an additional nine kilometres of access road and an area of approximately 3.28 hectares for out-of-pit water treatment infrastructure.

[6] Much of the access road and mine would have to be built over land managed by the Buller District Council (the Council) under the Reserves Act 1977 (the Reserves Act) as a local purpose (water conservation) reserve. I refer to this area as "the reserve". The reserve is an area of approximately 1825 hectares. Westport obtains its water supply from the reserve. A small portion of the mine footprint area is public conservation land administered by the Department of Conservation as stewardship land under the Conservation Act 1987.

[7] Both Rangitira and the Royal Forest and Bird Protection Society Limited (the Society) refer to the quality of coal that could be extracted from the proposed area, the distinctive biological features of the area, the advice to Rangitira that the reserve includes indigenous vegetation and habitat of indigenous fauna which are significant in terms of s 6(c) RMA, and the very high natural character and visual amenity value of the site. The parties acknowledge that there are differences in their positions as to scale or significance of the proposal for scenic and landscape values and other matters.

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1 *In the matter of the RMA and in the matter of an application by Stevenson Mining Ltd for resource consents for Te Kuha Mine Project* (21 November 2017) decision of the hearing Commissioners.

[8] The parties agree that, without mitigation measures, the proposed open cast mine would have significant adverse effects on the environment. Rangitira proposes to take various measures to mitigate those effects but acknowledges that what it can do within the reserve will not fully avoid, remedy and mitigate all effects of the proposed activity on the relevant values and that there will be residual effects from the proposed activity. The parties disagree as to the extent to which the mitigation measures proposed are relevant to what has to be considered in this case.

[9] Rangitira and the Society agree the mine will have positive social and economic benefits but do not agree as to the quantum of those benefits or indeed whether they are relevant to the Council's consideration of the access arrangement application.

[10] In these proceedings, Rangitira seeks declarations as to the legal context in which its application to the Council for access over the reserve has to be considered. The need for that clarification is apparent given the background to these proceedings.

[11] On 25 March 2015, Rangitira applied to the Council for an access arrangement under s 54 Crown Minerals Act to enter and use part of the reserve for an open cast coal mine and access road. Rangitira provided a detailed report supporting its application. The Society and others presented submissions as to the application. The Society advanced interpretations of the Crown Minerals Act and the Reserves Act which differed to those from Rangitira.

[12] The Council officers prepared a report on the application for the meeting of the Council on 28 September 2016 at which the application was to be considered. Through that report, the Council was advised that Rangitira's application was under s 54(2) Crown Minerals Act and that, under s 60(2) Crown Minerals Act, the Council might have regard to such matters as it considered relevant. The Council was also advised that, because of the reserve status of the land, the applicable provisions of the Reserves Act should be considered as relevant, but that the Crown Minerals Act required the decision-maker to "have regard to" the matters it considered relevant, not to "give effect to" them.

[13] The report referred to the purposes for which the reserve was held, water conservation, and the way in which potential adverse effects of carrying out works associated with the access arrangement could impact the environment. It referred also to the way the adequacy of safeguards to avoid, remedy or mitigate those adverse effects would have to be considered when dealing with the necessary resource consent applications. The report referred to the direct net economic and other benefits which the Buller District would receive through the proposed activity, but noted they would be further addressed through the resource consent process. The report also referred to the Council's vision and mission for the Buller District.

[14] On 28 September 2016, the Council resolved to receive the report and to enter into an access arrangement with Rangitira. That agreement was to include appropriate conditions to ensure there would be no impact on the Westport water supply and anything highlighted as necessary by the resource consent process.

[15] On 13 February 2017, the Society lodged an application under the Judicature Amendment Act 1972 for judicial review of the Council's decision under the Crown Minerals Act. Among other things, the Society alleged the Council erred in its application of the Crown Minerals Act and the Reserves Act. On 12 April 2017, the Council rescinded its 28 September 2016 decision. The Society discontinued its judicial review proceedings. Rangitira's access application remains before the Council.

[16] Rangitira seeks a declaration as to the role of s 23 Reserves Act in decisions regarding access for coal mining made by administering bodies of reserves under s 60 Crown Minerals Act. It specifically seeks declarations on the following questions:

(a) Is the Council required to have regard to the Reserves Act 1977 and, in particular, s 23 of that Act?

(b) If so, can the Council, in the exercise of its discretion under s 60(2) Crown Minerals Act, weigh the matters set out in s 23 against other factors such as:

(i) The economic benefits of the proposal to its district; or

(ii) The enhancement of other natural areas (outside the application area and outside the reserve) by Rangitira which may form part of Rangitira's proposals?

(c) Alternatively, is the Council required to make its decisions under s 60 Crown Minerals Act in accordance with s 23 Reserves Act?

[17] If its primary submission as to the primacy of the Crown Minerals Act is not accepted, Rangitira seeks further declarations on how s 23 Reserves Act should be interpreted and applied. I detail those questions later in this judgment.[2]

[18] In summary, Rangitira submits it is the provisions of the Crown Minerals Act which have primacy so that there is a wide range of matters, including the social and economic benefits of its proposal, which the Council might consider relevant to its consideration of the application. It agrees the relevant provisions of the Reserves Act would be relevant to its consideration of the application.

[19] The Society submits that Rangitira's application is an application under the Reserves Act. Accordingly, the application could be granted only if the outcome is consistent with what they say is an obligation on the Council to manage and protect the scenic, biological and natural features present on the reserve to the extent compatible with the principal or primary purpose of the reserve.

The relevant provisions of the Crown Minerals Act and the Reserves Act

[20] The purpose of the Crown Minerals Act is "to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand".[3] The Crown Minerals Act reserves to the Crown rights in respect of various minerals. All gold, silver, petroleum and uranium found naturally in land is considered property of the Crown, wherever located.[4] References to "minerals" in the Act include "all metallic minerals, non-metallic minerals, fuel minerals, precious stones, industrial

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2 See paras [87]-[124] below.
3 Crown Minerals Act 1991, s 1A(1).
4 Crown Minerals Act 1991, s 10.

rocks and building stones …".[5] "Fuel minerals" are defined to include coal.[6] The Crown Minerals Act requires and recognises that access arrangements will have to be agreed to in writing between the permit holder and each owner and occupier of the land or as determined by an arbitrator in accordance with the Act.[7]

[21] No person may mine coal without a mining permit granted under the Act.[8] A mining permit, however, does not confer the permit holder the right to access any land.[9] The holder of a permit may only mine in land to which the permit relates in accordance with an access arrangement agreed in writing between the permit holder and each owner and occupier of the land.[10]

[22] Section 60 Crown Minerals Act states:

> **60 Grant of right of access by access arrangement**
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> (1) An access arrangement in relation to land may make provision for or with respect to the following matters:
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> (a) the periods during which the permit holder is to be permitted access to the land:
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> (b) the parts of the land on or in which the permit holder may explore, prospect, or mine and the means by which the permit holder may gain access to those parts of the land:
>
> (c) the kinds of prospecting, exploration, or mining operations that may be carried out on or in the land:
>
> (d) the conditions to be observed by the permit holder in prospecting, exploring, or mining on or in the land:
>
> (e) the things which the permit holder needs to do in order to protect the environment while having access to the land and prospecting, exploring, or mining on or in the land:
>
> (f) the compensation to be paid to any owner or occupier of the land as a consequence of the permit holder prospecting, exploring, or mining on or in the land:

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5 Crown Minerals Act 1991, s 2 definition of "mineral".
6 Crown Minerals Act 1991, s 2 definition of "fuel minerals".
7 Crown Minerals Act 1991, s 54(2).
8 Crown Minerals Act 1991, s 8.
9 Crown Minerals Act 1991, s 47.
10 Crown Minerals Act 1991, s 54.

(g) the manner of resolving any dispute arising in connection with the arrangement:

(h) the manner of varying the arrangement:

(i) such other matters as the parties to the arrangement may agree to include in the arrangement.

(2) In considering whether to agree to an access arrangement, an owner or occupier of land (other than Crown land) may have regard to such matters as he or she considers relevant.

[23] Section 61 Crown Minerals Act provides for the granting of access arrangements over Crown land. It will be relevant to the access which Rangitira will require over that part of the Department of Conservation land on which the open cast mine is to be established. These proceedings do not relate to the decision which will have to be made by the Minister of Conservation with regard to Rangitira's proposal to develop part of the open cast mine on Crown conservation land.

[24] The Reserves Act states:

23 Local purpose reserves

(1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as local purpose reserves for the purpose of providing and retaining areas for such local purpose or purposes as are specified in any classification of the reserve.

(2) It is hereby further declared that, having regard to the specific local purpose for which the reserve has been classified, every local purpose reserve shall be so administered and maintained under the appropriate provisions of this Act that—

(a) where scenic, historic, archaeological, biological, or natural features are present on the reserve, those features shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:

provided that nothing in this paragraph shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:

provided also that nothing in this paragraph shall authorise the doing of anything with respect to any esplanade reserve created under section 167 of the Land Act 1948, or section 190(3) or Part 25 of the Municipal Corporations Act 1954 or Part 2 of the

Counties Amendment Act 1961 and existing at the commencement of this Act, or any local purpose reserve for esplanade purposes created under the said Part 25 or Part 2 or under Part 20 of the Local Government Amendment Act 1978 or under Part 10 of the Resource Management Act 1991 after the commencement of this Act, that would impede the right of the public freely to pass and repass over the reserve on foot, unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve:

(b) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.

40 Functions of administering body

(1) The administering body shall be charged with the duty of administering, managing, and controlling the reserve under its control and management in accordance with the appropriate provisions of this Act and in terms of its appointment and the means at its disposal, so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified.

[25] Reprinted as at 19 April 2017, s 109 Reserves Act states:

Mining

109 Application of Mining Act 1971 and Coal-mines Act 1925 to reserves

(1) Nothing in this Act shall in any way restrict the operation of any of the provisions of the Mining Act 1971 with respect to dealings under that Act with reserves.

(2) Notwithstanding anything to the contrary in this Act or any other Act, the Governor-General may from time to time, by Order in Council, declare to be subject to the Coal-mines Act 1925 or to any specified provisions of that Act, as if it were Crown land as defined by that Act, any reserve within the meaning of this Act consisting of land vested in the Crown or alienated from the Crown as a reserve which contains coal:

provided that every grant of a coal mining right over any such land so declared to be subject to the Coal-mines Act 1925 or to any specified provisions thereof shall be subject to the consent of the Minister, who may refuse his or her consent or grant it unconditionally or on such conditions as he or she thinks fit to impose:

provided also that in the case of a scenic reserve this subsection shall be read subject to the Coal-mines Act 1925.

(3) No coal mining right under the Coal-mines Act 1925 may be granted over any reserve for soil conservation or river control or other like purposes except with the prior consent in writing of the Minister for the Environment.

Rangitira's submission as to the ranking between the Crown Minerals Act and the Reserves Act

[26] Rangitira submits that, as a result of legislative changes, s 109 Reserves Act should be applied as if the words "Crown Minerals Act 1991" had been substituted for the references to the Mining Act 1971 and the Coal-mines Act 1925.

[27] Rangitira submits that, applying s 109(1) Reserves Act on an application for access for mining over a reserve, the Crown Minerals Act is to be the governing statute. The application is thus made under s 54 of the Crown Minerals Act 1991 and is to be considered in accordance with the provisions of s 60, particularly s 60(2), so that the Council "may have regard to such matters as [it] considers relevant".

[28] I did not have the benefit of submissions for Rangitira as to how earlier legislation might have enabled the Crown to grant coal mining rights over the reserve or whether and how s 22(2) of the Interpretation Act 1999 or the earlier s 21 Acts Interpretation Act 1925 were relevant or were to be applied. I was referred to the Court of Appeal's discussion as to the principle of implied repeal in *Stewart v Grey County Council*[11] and Heron J's reference to those statements in the High Court in *Spectrum Resources Ltd v Minister of Conservation*.[12] Mr Christensen also referred to relevant parts of s 5 of the Reserves Act which provided for certain restrictions on the operation of that Act:

5 Restricting application of this Act

(1) This Act does not apply to any land that is subject to the Forests Act 1949.

(2) Except as otherwise specially provided herein, this Act in its application to any reserve shall be read subject to—

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11 *Stewart v Grey County Council* [1978] 2 NZLR 577.
12 *Spectrum Resources Ltd v Minister of Conservation* [1989] 3 NZLR 351.

(a) any Act (whether passed before or after the commencement of this Act) or any Provincial Ordinance in force at the commencement of this Act making any special provision with respect to that reserve, whether by direct reference thereto or by reason of the reserve being vested in any particular local authority, board, or trustees, or in any local authority of a particular class, or by reason of the reserve being one of any particular class, or authorising the setting apart of any reserve for any purpose:

(b) the provisions of any will, deed, or other instrument creating the trusts upon which the reserve is held.

The Society's submission as to the ranking between the Crown Minerals Act and the Reserves Act

[29] For the Society, Mr Anderson argues that s 109 Reserves Act has not been amended in the way Rangitira submits. The Society acknowledges s 22(2) Interpretation Act 1999 sets out the statutory presumption that reference to an enactment that has been repealed is taken to be a reference to the enactment that replaces it. However, it submits that s 22(2) does not permit the substitution sought by Rangitira because to apply it would be to broaden the application of s 109(1) to coal mining which was beyond the ambit of the Mining Act 1971. The Society argues this would not have been Parliament's intention. Mr Anderson argued that to adopt Rangitira's interpretation would be to render ss 109(2) and 109(3) meaningless "as those provisions enable areas excluded from the Coal-mines Act 1925 to be brought within its scope, whereas no areas are excluded from the scope of the CMA".

[30] The Society argues that, while s 109(1) provides that the Reserves Act would not restrict the operation of the Mining Act 1971, this approach was not replicated with respect to coal mining. It argues that, through ss 109(2) and (3), the reserves Act provided for certain land to be made subject to the Coal-mines Act 1925 through an Order in Council but did not restrict the operation of the Reserves Act with respect to that Act.

[31] The Society argues that there is an inconsistency between the statutes and the Court should thus adopt a construction which would enable both statutes to be applied as the Court had done in *National Beekeepers' Association v Chief Executive of the*

Ministry of Agriculture and Forestry.[13] It argues this could be achieved through holding that any mining on the reserve must be in accordance with the requirements of s 23 Reserves Act. It would be only if it met those requirements that a council should then consider other relevant matters under s 60 Crown Minerals Act.

Discussion as to issues over the ranking between the Crown Minerals Act and the Reserves Act

[32] In essence, the Society submits that, if the Reserves Act is interpreted and applied in the way Rangitira submits would be appropriate, this would leave the reserve subject to the potential for coal mining under the provisions of the Crown Minerals Act without an Order in Council in a way that had not previously existed. The Society argues this could not have been Parliament's intention.

[33] In dealing with this submission, I have had to consider not just the relevant provisions of the Reserves Act and the Crown Minerals Act but also the way in which the status of the reserve was affected by earlier legislation relating to it.

[34] The explanatory note to the Reserves Bill, at the time of its introduction, confirmed that s 109, then cl 108, was not intended to change the legal landscape. It provided that: "[*c*]*lause 108* re-enacts the existing provisions as to the application to reserves of the Mining Act 1971 and the Coal-mines Act 1925.

[35] What eventually became the Crown Minerals Act was introduced into the House by the Right Honourable Geoffrey Palmer as part of the Resource Management Bill.[14] In introducing it, he said:[15]

> Under the Bill there are three distinct elements in the assessment of mining proposals: first, the granting of mineral rights; second, the consideration of the impact on the community and the environment; and, third, the impact on affected landowners … Central government will retain the responsibility for allocating mineral and energy resources. Minerals management programmes drawn up by the Minister of Energy will form the basis for those allocations.

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13 *National Beekeepers' Association v The Chief Executive Officer of the Ministry of Agriculture and Forestry* [2007] NZCA 556.

14 Its contents were later separated into what became the Crown Minerals Act 1991 and the Resource Management Act 1991.

15 (5 December 1989) 503 NZPD 14168.

[36] In 1991, at the third reading of the Crown Minerals Bill, the Honourable John Luxton, then Minister of Energy, referred to the proposed legislation:[16]

> The Bill is the first major change in mining legislation since the Mining Act 1971. Over the years mining legislation has evolved from an initial approach of licencing wasteland for miners … In the past conservation in mining districts has been left basically to the good sense of the Minister of Mines and the former Mines Department. One might now say that mining in conservation areas is left to the good sense of the Minister of Conservation …

[37] With the Crown Minerals Amendment Act 2013, the legislation provided for the Minister of Energy and Resources to also be involved in decisions that had to be made with regard to access arrangements under the Act over public conservation land.

[38] The Mining Act 1971 did not apply to coal.[17] Section 26 said that, notwithstanding anything to the contrary in any other Act, certain land would be open for mining. The land covered by this included national parks within the meaning of the National Parks Act 1952[18], public reserves[19], State forest land[20], land held or acquired under the Public Works Act 1928 for a Government work.[21] Through an Order in Council, the provisions of s 26 could be applied to any specified land or class of land.[22]

[39] The definition of "public reserve" in the Mining Act 1971, as initially enacted, was the same as that provided for in the Reserves and Domains Act 1953. That Act in turn preserved in the definition of "public reserve" all land which would have come within that definition under the Public Reserves, Domains and National Parks Act 1928. When the Reserves Act came into effect and repealed the Reserves and Domains Act 1953, references to "public reserve" in enactments like the Mining Act 1971 were deemed to be references to "reserves" as defined in the Reserves Act.[23] Section 2 of the Reserves Act included in the definition of "reserve" or "public reserve":

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16 (4 July 1991) 516 NZPD 3041.
17 Mining Act 1971, s 2(a).
18 Mining Act 1971, s 26(2)(a).
19 Mining Act 1971, s 26(2)(b).
20 Mining Act 1971, s 26(2)(c).
21 Mining Act 1971, s 26(2)(e).
22 Mining Act 1971, s 26(3).
23 Reserves Act 1977, s 124(1)(b).

(a) any land which immediately before the commencement of this Act was a public reserve within the meaning of the Reserves and Domains Act 1953:

…

(g) any land which immediately before the commencement of this Act was a domain or public domain within the meaning of the Reserves and Domains Act 1953:

[40] The Council officer's report, included in the common bundle of documents, referred to the area as having been made a reserve for "water-conservation purposes" on 10 August 1951 and, on 31 October 1951, this reserve being vested in the Council for water-conservation purposes under s 9 Public Reserves, Domains, and National Parks Act 1928.

[41] The Mining Act 1971 enabled the Minister, through Order in Council, to constitute any portion of New Zealand to be a mining district.[24] Subject to the limitations and provisions in the Mining Act, it also declared all Crown lands within any mining district to be open for mining. It also declared that lands held as public reserves would also be open for mining in a similar way.[25] The Act set out a scheme and the terms on which, under the control of the Minister, mining rights could be granted in respect of all land that was open for mining.[26]

[42] Through s 109(1), the Reserves Act thus recognised that the Mining Act 1971 would have primacy with regard to the right to mine for minerals other than coal over the reserve.

[43] The reserve was made a reserve for water conservation purposes on 10 August 1951, by notice in the New Zealand Gazette under s 167 of the Land Act 1948. That gazetting of the land as a reserve was noted as being:[27]

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24 Mining Act 1971, s 8(a).
25 Mining Act 1971, s 26(2)(b).
26 Mining Act 1971, ss 35, 36, and 69.
27 "Land Reserved in Nelson Land District" (16 August 1051) 67 *New Zealand Gazette* 1173 at 1185.

> … subject to the reservations and conditions imposed by section 59 of the Land Act, 1948, and subject also to the reservations imposed by section 8 of the Coal Mines Amendment Act 1950.

[44] On 31 October 1951, the reserve was "vested in the Mayor, Councillors and Burgesses of the Borough of Westport, in trust, for water-conservation purposes", under section 9 of the Public Reserves, Domains, and National Parks Act 1928. This was also noted to be subject to the reservations and conditions under section 59 of the Land Act 1948 and the reservations under section 8 of the Coal Mines Amendment Act 1950.

[45] Section 59 Land Act 1948 reserved to the Crown all minerals, including coal, in land sold or otherwise disposed of by the Crown under that Act.

[46] Section 8 Coal Mines Amendment Act 1950 stated:

> All alienations of land from the Crown, whether by way of sale or lease or otherwise, made on or after the first day of April, nineteen hundred and forty-nine (whether before or after the passing of this Act), shall be deemed to be made subject to the reservation of all coal existing on or under the surface of the land, and subject to the reservation of the power to grant coal mining rights over the land under Part I of the principal Act.

[47] The principal Act was the Coal-mines Act 1925. Section 8 thus reserved to the Crown the power to grant coal mining rights over land alienated by the Crown after 1 April 1949.

[48] Through s 13, Parliament also enabled private land to be taken under the Public Works Act for the purpose of working any mine, subject to the payment of proper costs and charges.[28]

[49] The Coal-mines Act 1925 empowered a warden, appointed for any mining district, to grant certain coal mining rights. The Commissioner of Crown Lands had the right to grant specified coal mining rights within any portion of a land district outside the mining district.[29]

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[28] Coal Mines Amendment Act 1950, s 13.
[29] Coal-mines Act 1925, s 3.

[50] Subject to the provisions of the Coal-mines Act 1925 and if this was not inconsistent with other rights in respect of such lands, coal mining rights could be granted over various specified classes of land. These included:

(a) Crown lands;

(b) Other lands over which the power to grant such rights is vested in or is reserved to the Crown under any statutory or other authority;[30]

(c) Land comprised in any education reserve or education endowment;

(d) Land comprised in any kauri-gum reserve under the Kauri-gum Industry Act, 1908;

(e) Land comprised in any scenic reserve under the Scenery Preservation Act, 1908;

(f) Land comprised in any State forest under the Forests Act, 1921-22; and

(g) Land comprised in the areas described in the First, Second, and Third Schedules to the Westland and Nelson Coal Fields Administration Act, 1877.[31]

[51] Though not referred to in the agreed facts or mentioned in submissions, it appears that the proposed location of the mine footprint sits within the land designated in the third schedule of the Westland and Nelson Coalfields Administration Act.

[52] The Coal-mines Act 1925 permitted the warden within a mining district and the Commissioner of Crown Lands within any portion of a land district outside the mining district, with the consent of the Minister of Mines, to grant rights over land, such as access rights, to enable the mine to operate. Compensation for the creation of such rights was to be available in terms of the Public Works Act 1908.[32]

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30 Coal-mines Act 1925, s 4(1).
31 Coal-mines Act 1925, s 24(1).
32 Coal-mines Act 1925, s 30.

[53] Although the Coal-mines Act 1925 did not expressly refer to the right to grant coal mining rights over land vested in a Council as a reserve for water conservation purposes, I consider that, through s 59 Land Act 1948 and through s 8 of the Coal Mines Amendment Act 1950, and probably through s 4(g) Coal-mines Act 1925, Parliament had provided for the Crown to retain all rights to coal and the power to grant coal mining rights over the whole or parts of the reserve. Section 25 Coal-mines Act 1925 acknowledged the power of the warden within a mining district and the Commissioner of Crown Lands to grant coal mining rights over the reserve as land to which the power to grant such rights was vested in the Crown under "any statutory … authority".

[54] When the Reserves Act 1977 was enacted, Parliament had thus already reserved to the Crown the power to grant coal mining rights over the reserve. Section 5(2) Reserves Act expressly stated that the Reserves Act was to be subject to any Act passed either before or the commencement of the Reserves Act which made any special provision with respect to that reserve.[33]

[55] Section 109(2) expressly permitted the Governor-General, by Order in Council, to make any reserve subject to the provisions of the Coal-mines Act 1925. Through s 8 of the Coal Mines Amendment Act 1950 and s 4 Coal-mines Act 1925, Parliament had already recognised the Crown's right to allocate mining rights over land such as the reserve. As was apparent from the explanatory note to the Reserves Bill when it was introduced, the Reserves Act was not intended to change the existing application to reserves of the Mining Act 1971 and the Coal-mines Act 1925.

[56] I thus consider that, through s 5(2), Parliament recognised that the Reserves Act was subject to the provisions of the Coal-mines Act 1925. Consistent with the purpose of the Reserves Act and s 5 Reserves Act, s 109(2) of the Reserves Act had to be interpreted and applied as making express provision for the Crown through an Order in Council to make any reserve subject to the right to the Crown to grant coal mining rights under the Coal-mines Act 1925 if and to the extent those rights did not already exist.

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[33] Reserves Act 1977, s 5(2)(a).

[57] I thus do not accept the submission made for the Society that, through ss 109(2) and (3), Parliament had intended and provided for reserves to be subject to the Crown's right to grant coal mining rights over such land only if an Order in Council was made with regard to that reserve.

[58] The Coal-mines Act 1925 was repealed by the Coal Mines Act 1979.[34] That latter Act was:

> An Act to consolidate and amend the law relating to coal prospecting and mining and to regulate the coal mining industry to ensure the proper and efficient development and use of New Zealand's coal resources.

[59] Section 20 stated:

> Subject to this Act and notwithstanding anything in any other Act, the Minister [of Energy] may, in his discretion and subject to such conditions as he thinks fit to specify, grant to any person a coal mining right over any land whatsoever.

[60] Section 26 recognised that coal mining rights could not be granted over land other than Crown land without the consent of the landowner and the owner of the coal, if there was such an owner.[35] But, through s 27, the Act provided a framework within which the Minister could ensure arrangements could be made for access or otherwise to enable coal to be mined in situations where the Crown owned the coal under the surface of the land but not the surface of the land or rights associated with that.

[61] The Coal Mines Act 1979 took effect on 1 October 1979. Pursuant to ss 41 and 56, it expressly repealed the Coal-mines Act 1925. At that time, s 21 Acts Interpretation Act 1924 stated:

> (1) In every unrepealed Act in which reference is made to any repealed Act such reference shall be construed as referring to any subsequent enactment passed in substitution for such repealed Act, unless it is otherwise manifested by the context.
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> (2) All the provisions of such subsequent enactment, and of any enactment amending the same, shall, as regards any subsequent transaction, matter, or thing, be deemed to have been applied, incorporated, or referred to in the unrepealed Act.

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34 Coal Mines Act 1975, s 268(2).
35 Sections 26(1)(a) and (c).

[62] In *Stewart v Grey County Council*, Richardson J, for the Court of Appeal, discussed the rules of statutory interpretation which could assist in resolving apparent conflicts or inconsistencies between the provisions of different statutes which can inevitably arise "in the complex legislative processes of a modern society".[36] One of those principles was the principle of implied repeal. Richardson J referred to that, as expressed in *36 Halsbury's Laws of England*, as follows:[37]

> To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case.

[63] Heron J, in the High Court, referred to and relied on those statements in *Spectrum Resources Ltd v Clark*.[38]

[64] Applying both s 21 Acts Interpretation Act 1924 and the principle of implied repeal, as discussed by the Court of Appeal in *Stewart*, I am satisfied that, if ss 109(2) and (3) of the Reserves Act had limited the Crown's right to grant mining rights over reserves in the way contended for by the Society, those restrictions were removed by the Coal Mines Act 1979 which gave the Minister the right to grant coal mining rights over "any land whatsoever".[39]

[65] That, in broad summary, was the legislative background against which the Crown Minerals Act was enacted in 1991.

[66] As Mr Anderson, for the Society, acknowledged and as Justice Panckhurst put it in *Powelliphanta Augustus Inc v Solid Energy New Zealand Limited*,[40] the Crown Minerals Act, along with the Resource Management Act 1991, rewrote the law with respect to mining in New Zealand.

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36 *Stewart v Grey County Council*, above n 11.
37 *36 Halsbury's Laws of England*, (3rd ed) para 712.
38 *Spectrum Resources Ltd v Minister of Conservation*, above n 12.
39 Coal Mines Act 1979, s 20.
40 *Powelliphanta Augustus Inc v Solid Energy New Zealand Limited* [2007] 13 ELRNZ 200.

[67] The purpose of the Crown Minerals Act "is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand".[41] The Crown Minerals Act authorises the Minister responsible for the administration of the Act to issue permits for the prospecting, exploration for or mining of minerals as defined in the Act. As previously explained, that definition includes coal.[42] Subject to the ability for a permit holder to enter onto the subject land for certain minimum impact activity, the Act says the granting of a permit does not confer on the permit holder a right of access to any land.[43]

[68] The Crown Minerals Act came to into force on 1 October 1991.

[69] The Crown Minerals Act repealed significant portions of the Coal Mines Act 1979.[44] This included Parts III and IV of that Act, which provisions governed the terms by which coal mining and prospecting rights and licences were granted and exercised, as well as the establishment of state coal mines. The Crown Minerals Act also changed the provisions relating to how access to the licence-holder over land was acquired.

[70] As the LexisNexis editors' note, in relation to s 109, the Mining Act 1971 and Coal Mines Act 1979 were repealed on 1 April 1993 by s 62(1) of the Health and Safety in Employment Act 1992. The editors' note that mining rights under Part 1 of the Crown Minerals Act 1991 corresponded to the coal mining rights which were provided for under the Coal Mines Act 1979. The principle of implied repeal, as referred to by Richardson J in the Court of Appeal in *Stewart*, would also have applied once the Crown Minerals Act came into effect. With regard to the allocation of the right to mine for minerals, including coal, and the way in which those rights could be granted and exercised, the Crown Minerals Act is an Act which provides for the particular in the way the Reserves Act does not. Because of that, if and to the extent the Reserves Act did limit the right to mine for coal over the reserve, those restrictions were repealed by relevant provisions of the Crown Minerals Act.

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41 Crown Minerals Act 1991, s 1A(1).

42 Crown Minerals Act 1991, s 25(1) – the Minister may grant a permit in respect of "minerals in land", which includes fuel minerals and thereby includes coal.

43 Crown Minerals Act 1991, s 47.

44 Crown Minerals Act 1991, s 120 and Sch 1. Together, they provided for the repeal of ss 4-7, 20-121A, 200-209, 261, 264, and 266(b)-(m) and (o)-(q) of the Coal Mines Act 1979.

[71] Section 22 Interpretation Act 1999 states:

> **22 References to repealed enactment**
>
> (1) The repeal of an enactment does not affect an enactment in which the repealed enactment is applied, incorporated, or referred to.
>
> (2) A reference in an enactment to a repealed enactment is a reference to an enactment that, with or without modification, replaces, or that corresponds to, the enactment repealed.
>
> (3) Subsection (1) is subject to subsection (2).

[72] Under s 29, reference in an enactment to repeal, "in relation to an enactment, includes expiry, revocation, and replacement" of that enactment.[45]

[73] With the formal repeal of the Mining Act 1971, the Coal-mines Act 1925 and then the Coal Mines Act 1979, references in s 109 Reserves Act to the Mining Act 1971 and the Coal-mines Act 1925 are to be read as references to the legislation that replaced the enactments repealed.

[74] As Mr Anderson acknowledged, in *Reay v Minister of Conservation* the Court of Appeal held that s 22(2) provides a presumption that a reference to a repealed enactment is taken to be a reference to the enactment that replaces it. He also acknowledged the Court had taken a liberal approach to the application of s 22 with the primary purpose to ensure that the intention of Parliament was met. In *R v Montalk*, the Court of Appeal referred to the importance of construing legislation in a way consistent with, and not destructive, of the overall scheme where possible.[46]

[75] For reasons already explained, I do not accept the Society's submission that the Crown Minerals Act opened up Council reserve land for coal mining in ways that had not existed previously. It is consistent with the scheme of the Crown Minerals Act that applications for access over reserve land to mine for coal, under a coal mining permit granted by the Minister of Energy, should be made under the provisions of the Crown Minerals Act rather than the Reserves Act.

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45 Interpretation Act, s 29.

46 *R v Montalk*, CA157/03 7/3/05, 7 March 2005 at [17].

[76] I thus accept the submission made for Rangitira that s 109 Reserves Act is a ranking provision which explains how the Court should deal with any conflict between s 23 Reserves Act and s 60(2) Crown Minerals Act.[47]

[77] I accept the submission for Rangitira that, in considering the access application, the Council should have regard to the objectives of the Reserves Act and both the specific (water conservation) and general (s 23) purposes of the reserve as relevant under s 60(2) Crown Minerals Act. However, in the end, it is for the Council to weigh the various matters to which it has regard as it sees fit.

[78] I also accept that, applying the Crown Minerals Act in this way is consistent with the way that Act takes precedence over the Conservation Act 1987 in relation to Crown land. Section 61(2) Crown Minerals Act sets out the matters to which regard must be had in relation to an access arrangement application over Crown land. Those matters in relation to Crown land include the objectives of any Act under which the land is administered and any purpose for which the land is held by the Crown. It is apparent from s 61(2) Crown Minerals Act that, while the application is to be considered with regard to the Conservation Act, it is not to be subject to the provisions of that Act. In considering an access application for access over conservation land, s 61(2)(e) states the Minister must also have regard to such other matters as the Minister considers are relevant.

[79] The Society also submitted the interpretation contended for by Rangitira was untenable because it would mean there would be no constraints on the owner of non-Crown land as to the matters it might have regard to in considering an access application. They argue Rangitira's interpretation would permit an owner or occupier of land to grant access without regard to any obligations it might have as to the basis on which it owned the land, perhaps through legislation such as the Reserves Act, Queen Elizabeth II National Trust Act 1977, The Incorporated Societies' Act 1908 or a trust deed where the land was owned under a trust.

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47 Burrows and Carter "Statute Law in New Zealand", pages 486-487.

[80] I do not accept that this would be the consequence of the Court adopting the interpretation contended for by Rangitira. Rangitira accepts that the owner of the relevant land, in this case the Council, would still have to make its decision on the access application under the normal constraints of administrative law. The decision maker would still have to consider all relevant matters, one of which could be the terms it had acquired ownership or occupation rights in respect of the land. Rangitira accepts that, in this instance, the Council should have regard to the purposes of this reserve. Indeed, Rangitira accepts that, although it is the provisions of the Crown Minerals Act which it says governs the Council's decision, the objectives of the Reserves Act, including the specific matters under s 23, would still be relevant considerations under s 60(2) Crown Minerals Act.

[81] I reject the submission for the Society that, applying s 109 Reserves Act and holding that the Reserves Act is subject to the provisions of the Crown Minerals Act, gives the Council an "unfettered discretion" in allowing owners or occupiers to act contrary to other legal obligations or that it would necessarily permit the Council to grant an access arrangement that undermined the reserves primary purpose of providing Westport's water supply.

[82] For these reasons, I consider that, when the Council considers Rangitira's application for access to the proposed mine to enter and use part of the reserve for an open cast coal mine and an access road to that mine, it is the Crown Minerals Act which will have primacy but that the provisions of the Reserves Act will, subject to the Crown Minerals Act, be a relevant consideration.

[83] In the *National Beekeepers' Association of New Zealand v The Chief Executive of the Ministry of Agriculture and Forestry*, the Courts were concerned with a decision of the Director General of MAF lifting a prohibition against the importation of honey and other bee products from Australia.[48] He did this under provisions of the Biosecurity Act 1993. The Association pleaded this decision was unlawful without an approval under the Hazardous Substances and New Organisms Act 1996 (HSNO).

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[48] *National Beekeepers' Association v Chief Executive Officer of the Ministry of Agriculture and Forestry*, above n 13.

[84] After a careful review of the background to and specific provisions of both pieces of legislation, the Court of Appeal concluded that honey or other bee products from Australia could not be imported without biosecurity clearance under the Biosecurity Act 1993 and an approval granted for new organisms under the HSNO. I do not however accept that this case illustrates that, where there is an apparent inconsistency between statutes, the Courts will try and find a construction that allows both the statutes to live together. The Court found that, in s 28(1) Biosecurity Act 1993, there was a prohibition against the giving of a biosecurity clearance for goods that contained a new organism, as determined by the Environment Risk Management Authority under the HSNO. The Court concluded that its interpretation was supported by the plain wording of relevant provisions of both acts as well as their broader analysis of the legislation.

[85] I do not accept *National Beekeepers' Association of NZ* is authority for the proposition that the Court should endeavour to adopt an interpretation of both the Reserves Act and the Crown Minerals Act that would require the Council to give equal effect to both the Reserves Act and the Crown Minerals Act, as was contended for by the Society. In contrast to the situation in *National Beekeepers' Association*, it is clear from the terms of both Acts here that, as concerns an application for access for coal mining, the Crown Minerals Act is to rank ahead of the Reserves Act.

Answers to questions as to relationship between the Crown Minerals Act and the Reserves Act

[86] I accordingly answer the questions on which Rangitira seek declarations as follows:

(a) Is the Council required to have regard to the Reserves Act 1977 and, in particular, s 23 of that Act?

Answer: The Council should have regard to the Reserves Act 1977 and, in particular, s 23 of that Act, as relevant considerations under s 60(2) Crown Minerals Act.

(b) If so, can the Council, in exercise of its discretion under s 60(2) Crown Minerals Act weigh the matters set out in s 23 against other factors such as:

(i) The economic benefits of the proposal to its district; or

(ii) The enhancement of other natural areas (outside the application area and outside the reserve) by Rangitira which may form part of Rangitira's proposals?

Answer: Yes.

(c) Alternatively, is the Council required to make its decision under s 60 Crown Minerals Act in accordance with s 23 Reserves Act?

Answer: No. While it may have regard to matters referred to in s 23, it is not required to give effect to them.

Questions as to the interpretation of s 23 Reserves Act

[87] The fourth question in Rangitira's statement of claim comprises a number of questions as to how s 23 Reserves Act is to be interpreted and applied. Rangitira said it did not require answers to these questions if the Court held that, under s 60(2) Crown Minerals Act, the Council could grant an access arrangement over the reserve even where to do so might not be administering the reserve in accordance with s 23. That is the conclusion I have reached. It is therefore not necessary for me to answer these further questions but I nevertheless address them in case it is held that I have been wrong in the conclusions I have reached thus far.

First further question - Does "protection" require absolute protection of each area of the reserve or consideration of the impact of the works and enhancement measures throughout the reserve?

[88] Rangitira's first further question was:

> … does "protection" in s 23(2)(a) mean absolute protection of the application area or the Reserve in its current state or does "protection" include enhancement of parts of the Reserve by Rangitira to offset or compensate for the impact of any areas of the Reserve which would not be protected by undertaking Rangitira's project?

[89] In relation to this question, I accept that the obligation under s 23(2)(a) of the Reserves Act is not for a Council to provide for the "protection" of the reserve in its present state.

[90] Section 23(2)(a) Reserves Act uses the word "protection" rather than "preservation". Neither word is defined in the Reserves Act. Both words are however defined in the Conservation Act. Through counsel, both Rangitira and the Society submitted that the definition of "protection" from the Conservation Act 1987 should be applied.

[91] "Protection" is defined in the Conservation Act:

> **protection**, in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—
>
> (a) its restoration to some former state; and
>
> (b) its augmentation, enhancement, or expansion.

[92] "Preservation" is defined in the Conservation Act:

> **preservation**, in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values.

[93] I accept that both those definitions contemplate that protection and preservation can be achieved even if some parts of the reserve are negatively affected by an activity which is permitted by the Council.

[94] That interpretation is consistent with the general purpose of the Reserves Act as set out in s 3. The Act, subject to the control of the Minister of Conservation, is to be administered by the Department of Conservation for the purpose of providing for preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing wildlife, indigenous flora or fauna, environmental and landscape amenity or natural and biological features or value,[49] and ensuring, as far as possible, the survival of all indigenous flora and fauna in their natural communities

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[49] S 3(1)(a).

and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape.[50]

[95] Section 23(2) Reserves Act requires every local purpose reserve to be administered and maintained so that, where scenic biological or natural features are present on the reserve, those features shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve[51] and to maintain the reserve's value as a soil, water and forest conservation area, but again to the extent compatible with the purpose of the reserve. The gazetted purpose of this reserve is for water conservation.

[96] "Features" is not defined in the Reserves Act. I accept the submission for Rangitira that "features" cannot mean individual trees or plant or individuals of particular species (for example, individual kiwi or individual lizards). Rather, "features" in s 23(2)(a) refers to areas of specific types of indigenous vegetation and habitats of indigenous species. As set out in the agreed statement of facts, the features present on the reserve include areas of coal measures vegetation and habitats for birds, lizards and invertebrates. It is agreed those features are present on the proposed footprint, more widely throughout the reserve and on contiguous conservation land outside the reserve. Under s 23(2)(a), it is those features within the reserve which are to be protected.

[97] Applying, as it is agreed I should, the definition of protection in the Conservation Act, "protection" can include "enhancement". Rangitira propose a range of measures within the reserve, including pest control, aimed at enhancing the reserve's value or features. Rangitira submits they should be considered as measures which protect the features of the reserve because of their potential to restore and enhance those features overall and that they are therefore matters to which regard can be had under s 60(2).

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50 Section 3(1)(b).
51 Section 23(2)(a).

[98] Rangitira also submits that, because the features of the reserve which have to be protected are also present on contiguous conservation land outside the reserve, measures which Rangitira propose to take to protect those features outside the reserve can properly be weighed in the balance by the Council in considering the access application.

[99] The Society submits that, under s 23, the focus is on ensuring that the resources within the reserve are protected. It says the resources of the reserve will not be protected by allowing mining to occur on parts of the reserve, while another part of it is enhanced. The Society submits that, consistent with the Supreme Court's judgment in *Hawke's Bay Regional Investment Company Limited v Royal Forest and Bird Protection Society of New Zealand Incorporation*, it would strain the meaning of "protect" to allow an open cast mine to proceed because some enhancement measures are taken elsewhere, either within the reserve or outside it.[52]

[100] The Society accepts that it will be for the Council to decide the extent to which the open cast mine will have significant adverse effects on the terrestrial ecology. It submits that the Council should not be permitted to take into account potential proposed enhancement measures proposed by Rangitira either within or outside the reserve in deciding if and to what extent granting the access application would protect the features of the reserve which, under s 23, the Council is obliged to protect.

[101] The Society relied heavily on the judgment in *Hawke's Bay Regional Investment Company Limited*. In that situation, the Minister of Conservation had approved the revocation of the specially protected status of part of the Ruahine Forest Park in Hawke's Bay to permit an area of land, known as the Smedley Block, to be formally added to the Ruahine Forest Park in exchange for land that would have been inundated as part of the Ruataniwha water storage scheme. It was argued that revocation of part of the specially protected status of part of the Ruahine Forest Park could be seen as achieving protection because, through the substitution of Smedley land, there would be a net enhancement to the conservation value of the park. The Supreme Court rejected that argument, holding that it would strain the scheme of s

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[52] *Hawke's Bay Regional Investment Company Limited v Royal Forest and Bird Protection Society of New Zealand Incorporation* [2017] NZSC 106.

19(1) Conservation Act to hold that the obligation to protect the natural and historic resources of the conservation park could be achieved through permitting revocation of the status of protected land in order to dispose of it to obtain a gain for the park to which it belongs.[53]

[102] The Court also held that the power to revoke the conservation status of the land under s 18(7) permitted the Minister to do so only where the intrinsic conservation values of the land no longer warranted such protection. The revocation could not be lawful on the basis there would be a net benefit to general conservation ends from the proposed exchange.

[103] The Court said:

> [108] In any case, although "protection" is defined to include "augmentation, enhancement, or expansion", that is "in relation to a resource". It strains the scheme of s 19(1) to treat the obligation to manage the park to protect "*its* natural and historic resources" as permitting revocation of the status of protected land in order to dispose of it to obtain a gain for the park to which it belongs. Protection of the resources in the subject land and not augmentation of the park as a whole is required in the management of the land under ss 19(1) and 18(5). As the Court of Appeal majority pointed out, a revocation decision under s 18(7) is necessarily specific to protected land which is the subject of the revocation.

[104] The Supreme Court's judgment in *Hawkes Bay Regional Investment Company Ltd* is not determinative of how I should answer the question posed by Rangitira in its statement of claim. Rangitira's application is for access over part of the reserve to operate the mine for long as it is needed and permitted. It is not an application to revoke the reserve status of that land.

[105] Section 23(2)(a) however requires the relevant features "present on the reserve" to be managed and protected. Section 23(2)(b) requires the value of "the reserve" as a soil, water and forest conservation area to be maintained. I consider it would strain the meaning of s 23 to say that managing and protecting the relevant features of the reserve, but on areas outside the reserve, could be weighed in the balance in considering the extent to which permitting Rangitira access would protect those features within the reserve, as required by s 23(2)(a).

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53 Para [108].

[106] However, Mr Christensen, for Rangitira, submitted that they were matters to which regard could be had under s 60(2) Crown Minerals Act 1991. He did not provide reasons as to why the protection of the relevant features on land outside the reserve, if relevant in terms of s 60(2) Crown Minerals Act, could be considered as relevant if a decision as to access has to be made in accordance with s 23 Reserves Act. The Crown Minerals Act 1991 permits Rangitira to make an application for an access arrangement over the reserve. Pursuant to s 60(2), in considering whether to agree to the proposed access arrangement, the Council may have regard to such matters as it considers relevant.

[107] If the situation is to be considered on the basis that the Reserves Act is not subject to the Crown Minerals Act, then the application for access would also involve the Council having to make a decision under s 23 Reserves Act. In making its decision under s 23, the Council would be required to protect the relevant features of the reserve within the reserve in terms of ss 23(2)(a) and (b).[54]

[108] For the reasons I have already discussed, I have held that the Reserves Act is subject to the more particular relevant provisions of the Crown Minerals Act. If, however, I have been incorrect in reaching that conclusion, in dealing with the application for access with its regard to responsibility under the Reserves Act, the Council would have to do so in terms of their obligations under s 23. I accept the submission for the Society that it would only be if the Council grants consent for access, as allowed for by s 23, that it could then consider the application for access with regard to all relevant matters in terms of s 60(2) Crown Minerals Act.

[109] I accept however that it is the features of the reserve, in a general sense, as submitted by Rangitira, which have to be protected.

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[54] I accept that the extent to which Rangitira will, outside the reserve, protect features that are of significance within the reserve, might well be relevant if the application for access is being considered primarily as an application under s 54(2) Crown Minerals Act. That may be relevant even if what it proposes to do outside the reserve will not impact on those features within the reserve. In the same way, what Rangitira is proposing to do outside the reserve to protect areas outside the reserve as a soil, water and forest conservation area could also be relevant in terms of s 60(2) Crown Minerals Act. In this part of the judgment, I am however answering the questions on the basis the application for access has to be treated as an application under the Reserves Act and the Council would have to meet its obligations under s 23.

[110] My answer to the first question under this section, were it to be necessary, would be:

> Protection in s 23(2)(a) does not meant absolute protection of the reserve in its current state. Protection could include enhancement of parts of the reserve by Rangitira to offset or compensate for the impact on any areas of the reserve which would not be protected by Rangitira undertaking its proposed works.

Second further question - Can the Council, in terms of s 23, take into account mitigation measures which Rangitira might take outside the reserve?

[111] The next question in the statement of claim is:

> … in relation to the management and protection of the scenic, biological and natural features (features) within the Reserve, as referred to in s 23(2)(a):
>
> 1. is the Council limited to considering management and protection of features within the boundaries of the Reserve or can it consider the management and protection of features in areas beyond the boundaries of the Reserve?

[112] Because s 23(2) requires the reserve to be administered and protected so as to protect the natural features present on the reserve, I do not accept that the Council would be entitled to take the view that the features in the reserve would, as a matter of law, be protected through protection of the same features but outside the reserve. Nevertheless, I accept that it is possible that measures to be taken by Rangitira outside the reserve may be relevant in deciding if the associated features within the reserve are going to be protected overall through the granting of the access application on terms requiring Rangitira to take certain measures outside the reserve. It may be that the steps which Rangitira are proposing to take outside the reserve, for example with regard to protecting the habitat for specific forest bird species or other fauna, will assist in preserving the habitat for such species within the reserve and the preservation and management of wildlife and biological features within the reserve, and the survival of all indigenous species of flora and fauna within the reserve. Whether the enhancement measures proposed in this regard are sufficiently connected to the effects to be relevant and whether the enhancement measures will result in habitats being protected overall within the reserve would be factual matters for the Council to consider under s 23.

[113] The answer to this question is thus:

> The Council is not limited to considering management and protection of features within the boundaries of the reserve. It can consider the management and protection of those features in areas beyond the boundaries of the reserve in dealing with the application, insofar as they are relevant to the protection of such features within the reserve.

Third further question - Can the Council consider the net overall effect of Rangitira's proposals on the reserve or must it require the Council to protect each relevant feature of the reserve?

[114] The next question is:

> in relation to the management and protection of the scenic, biological and natural features (features) within the Reserve, as referred to in s 23(2)(a):
>
> 2. can the Council take an approach to the protection and management of those features by balancing the positive and negative effects on those features from Rangitira's proposals, or is the Council required to manage and protect each individual scenic, biological and natural feature?

[115] Rangitira submits that, in applying s 23(2)(a) Reserves Act, the Council must reach a decision as to the access application on a reasonable basis, with due regard to all relevant matters and avoiding matters which should be irrelevant. It submits the Council would have to consider the extent to which the works associated with the grant of the access application will have an adverse effect on the features of the reserve which have to be preserved, and the extent to which those effects are to be mitigated by the measures which Rangitira is proposing to take to mitigate those adverse effects. It is however the adverse effects within the reserve and what can be achieved through the mitigation measures on those features within the reserve which have to be considered. The Council's decision in this regard should be as to the *overall* effect which the proposed works and mitigation and enhancement measures are going to have.

[116] I do not accept the submission that an assessment of the effects and protection measures on the reserve overall would be inconsistent with the Supreme Court's statement in *Hawkes Bay Regional Investment Company* that "protection of the resources in the subject land and not augmentation of the park as a whole is required

in the management of the land under ss 19(1) and 18(5) of the Conservation Act". As both the Supreme Court and the majority of the Court of Appeal stated, that case was concerned with the lawfulness of a decision to revoke the status of a particular area of land.

[117] Here, under s 23, it is the effect of the access proposal on relevant features of the whole of the reserve which would have to be considered in dealing with the access application.

[118] My answer to this question, had it been necessary, would thus have been:

> The Council can balance the positive and negative effects of the proposal on each of the relevant features and come to an overall decision on whether the features are protected as a whole.

Fourth further question – Can the Council weigh in the balance gains that might be made in protecting relevant environmental features outside the reserve in assessing the overall net impact of the proposal on features within the reserve?

[119] The next question requiring an answer would have been:

> … in relation to maintaining the value of the reserve as a soil, water and forest conservation area, as referred to in s 23(2)(b):
>
> 1. is the Council limited to the value within the boundaries of the Reserve or can it consider the maintenance and enhancement of the value of areas beyond the boundaries of the Reserve as soil, water and forest conservation areas?

[120] In s 23(2)(b) Reserves Act, the reference as to the value of the reserve is as a soil, water and forest conservation area, not the value of areas outside the reserve as a soil, water and forest conservation area.

[121] Nevertheless, it may be that enhancement of areas outside the reserve, as soil, water and forest conservation areas, may assist in enhancing the value of the reserve itself as a soil, water and forest conservation area. It is conceivable that steps might be taken with regard to the protection of vegetation and reduction of erosion outside the reserve which would assist in maintaining the value of the area within the reserve as a soil, water and forest conservation area. Whether the value of the reserve as a

soil, water and forest conservation area might be affected either negatively or positively by works or measures which might be taken outside the reserve should be a factual matter for the Council to consider.

[122] Had it been necessary, I would thus have answered this questions as follows:

> The Council can consider Rangitira's proposed works and maintenance and mitigation or enhancement measures, both within and outside the reserve, in determining to what extent granting access on conditions would maintain the value of the reserve as a soil, water and forest conservation area. As far as the protection and maintenance measures outside the reserve are concerned, it is how those measures would impact in maintaining the value of the reserve itself as a soil, water and forest conservation area which would be relevant under s 23.

Fifth further question – In considering the effect of the proposal on the reserve as a soil, water and forest conservation area, can gains in one area of the reserve be weighed against negative effects in other areas of the reserve?

[123] The final question posed was

> … in relation to maintaining the value of the reserve as a soil, water and forest conservation area, as referred to in s 23(2)(b):
>
> 2. can the Council take an approach to the maintenance of the value of the Reserve as a soil, water and forest conservation area by balancing positive effects at some areas of the Reserve against negative effects at other areas of the Reserve?

[124] Had it been necessary, I would have answered this question as follows:

> The Council can balance all adverse effects and all measures proposed by Rangitira to restore and enhance the reserve in coming to an overall decision on whether the value of the reserve as a soil, water and forest conservation area can be maintained if the access application is granted, subject to appropriate conditions.

Costs

[125] With these answers to the various questions included in the statement of claim, Rangitira has been successful in these proceedings. If no agreement is reached over costs, Rangitira is to file a memorandum as to the costs which it seeks by 20 March 2018. The Society is to file their response within 21 days of receiving Rangitira's memorandum. The memoranda are to be no longer than five pages. I will then determine any costs issue on the basis of those memoranda.

Solicitors:
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