IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA126/2018
[2018] NZCA 445

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	RANGITIRA DEVELOPMENTS LIMITED Respondent

Hearing:	9 August 2018 (further submissions received 15 August 2018)
Court:	Asher, Brown and Clifford JJ
Counsel:	M C Smith and P D Anderson for Appellant M R G Christensen and E M Gattey for Respondent
Judgment:	23 October 2018 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The declarations and orders made by the High Court are quashed.

C The questions of law on the first issue are answered as set out in [78].

D We make no declarations on the second issue.

E The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

F If any order was made as to costs in the High Court, that order is quashed.

G Costs in the High Court are to be determined by that Court in the light of this judgment.

REASONS OF THE COURT

(Given by Asher J)

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Introduction

[1] The respondent, Rangitira Developments Ltd (Rangitira),[1] wishes to develop and operate an open cast coal mine in forested hill land near Westport. It has a mining permit for the project covering approximately 884 ha of land. The proposed mine has a footprint of 116 ha, with an additional nine km of access road and 3.28 ha for out-of-pit water treatment infrastructure.

[2] Of the 116 ha to be excavated, approximately 104 ha are on reserve land administered by the Buller District Council (the Council). In order to proceed Rangitira needs a range of consents, permissions and arrangements, including an access arrangement with the Council permitting it to develop the mine in large part on the reserve, and it has applied to the Council for such access. The appellant,

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[1] We note that "Rangitira" appears to be a misspelling of the word "Rangatira" in Te Reo Māori. However, we use "Rangitira" given that it is the company's registered name and the name used throughout in the proceedings.

Royal Forest and Bird Protection Society of New Zealand Inc (the Society), opposes the development and the granting of access.

[3] This appeal concerns a decision made in the High Court at Christchurch by Nation J in which he made a number of declarations which accorded with the submissions of Rangitira.[2] The appeal is brought by the Society to challenge that decision and to seek alternative declarations that would place greater constraints on the Council when making its decision on access. At the heart of the case is the interpretation of two Acts, the Reserves Act 1977, which provides for the creation of public reserves and their maintenance and preservation, and the Crown Minerals Act 1991, which provides for the prospecting and exploration for mining of Crown-owned minerals.

[4] The parties filed an agreed statement of facts in the High Court, and the facts are also summarised in the High Court judgment. We will briefly summarise the background.

Background

[5] The land in question was reserved on 10 August 1951.[3] The reserve was vested in the predecessor to the current Council "in trust, for water-conservation purposes" on 31 October 1951.[4] The area of the reserve is considerably more extensive than that which would be the subject of the proposed mine and was described in October 1951 as covering 4,510 acres. As we have stated, 104 ha of the proposed 116 ha mine footprint would be on the reserve. A small part of the mine footprint would be on land owned by the Crown and administered by the Department of Conservation as stewardship land under the Conservation Act 1987. The mine would be 12 km from Westport.

[6] The part of the reserve which will be affected by the mine is covered in vegetation. It has extensive areas of intact low forest in which pink and yellow silver

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2 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd* [2018] NZHC 146, [2018] NZRMA 241.

3 "Land Reserved in Nelson Land District" (16 August 1951) 67 *New Zealand Gazette* 1185.

4 "Vesting a Reserve in the Westport Borough Council" (1 November 1951) 84 *New Zealand Gazette* 1640.

pine are important components. Twenty-three species of indigenous birds are identified in the mining permit area, two of which are threatened (the great spotted kiwi and the New Zealand falcon) and five of which are described as "at risk". There are at risk lizard species. The agreed statement of facts records that ecological advice provided to Rangitira was that the reserve includes indigenous vegetation and habitat of indigenous fauna which are significant in terms of s 6(c) of the Resource Management Act 1991.

[7] The proposed mine site and wider mining permit area is on ranges that have a high degree of natural character. The backdrop ranges are described as having high aesthetic value. There is little evidence of human influence in the area save for one small hut and some evidence of exploratory drilling. The landscape advice provided to Rangitira as part of its application for resource consent was that the mine site has a very high natural character and is part of a mountain range that is high in visual amenity value. The ranges can be seen from Westport.

[8] The proposed mine area is part of a large coal resource. The types of coal that are present have properties that make them high value commodities which attract premium prices. The mine is expected to produce about four million tonnes of coal over its estimated 16-year mine life. Rangitira expects the mining operation to provide employment on site and in Westport for 58 full-time equivalent staff.

[9] The proposed mine is open cast and will remove approximately 104 ha of surface cover from within the reserve. Both Rangitira and the Society agree that without mitigation measures the proposal would result in significant adverse effects. The parties also agree that a mine would have positive social and economic benefits, although they disagree as to their extent.

[10] Rangitira requires various consents or permissions to proceed with the mine including multiple resource consents. It made a number of applications to the Council for resource consents on 29 August 2016. The Council appointed Independent Commissioners to consider those applications. On 21 November 2017 the Commissioners released their decision. They granted the consents subject to extensive conditions. That decision was then appealed to the Environment Court by

various parties, including the Society. That appeal is currently adjourned pending the determination of other proceedings.

[11] Rangitira also required an access arrangement in relation to the conservation land, which is a small part of the proposed mine site. In an application that is entirely separate from the application that is the subject of this appeal, it applied to the Minister of Conservation and Minister of Energy and Resources for an access arrangement over that conservation land. On 16 June 2018 the Ministers declined Rangitira's access request in relation to that conservation land. Rangitira has said it intends to apply for judicial review of that decision.

[12] The crucial application for the purposes of this appeal is Rangitira's application to the Council as the body in which the reserve is vested, for an access arrangement over the 104 ha of reserve land and ancillary land vested on trust in the Council and which the Council administers. That application, made under the Crown Minerals Act, was filed on 25 March 2015. In broad terms, Rangitira sought an arrangement permitting it to enter and use the relevant part of the reserve for an open cast coal mine and an access road.

[13] At a general meeting on 28 September 2016 the Council resolved to enter into an access arrangement with Rangitira. The agreement was to include appropriate conditions to ensure there were no impacts on the Westport water supply and that anything highlighted by the resource consent process would be addressed. This decision followed a submission process conducted by the Council. The Society had lodged a written submission opposing Rangitira's application. On 13 February 2017 the Society lodged an application under the Judicature Amendment Act 1972 for judicial review of the Council's decision to grant access.

History of the proceedings

[14] Following the Society's filing of the application for judicial review, on 12 April 2017 the Council rescinded its earlier decision of 28 September 2016 granting access and Rangitira filed these proceedings under the Declaratory Judgments Act 1908 seeking declarations to resolve issues of law that had arisen.

[15] Broadly it can be said that declarations were sought in relation to two issues. The first issue was whether the Council was bound to make its decision in accordance with s 23 of the Reserves Act, or whether in fact s 23 was only a factor to be taken into account when making a decision under s 60(2) of the Crown Minerals Act, and whether the Council's decision under s 60(2) could involve the weighing of other factors such as economic benefits to the region. This involves the interpretation of s 23 of the Reserves Act and s 60(2) of the Crown Minerals Act.

[16] The second broad issue involved a number of detailed questions as to how s 23 of the Reserves Act was to be interpreted and applied, in particular whether it required absolute protection of each feature of the reserve, or a balancing of the impact of the works on certain features against enhancement and mitigation measures throughout the broader reserve. There were further overlapping specific questions, including whether damage within the reserve could be balanced against mitigation and enhancement outside the reserve. For reasons that we set out later in this judgment, it is not necessary for us to determine this second broad issue.

[17] The case was argued before Nation J who delivered the decision that is the subject of this appeal on 14 February 2018.

[18] We consider now the first broad issue.

The first issue — must the Council's decision under s 60(2) be made in accordance with s 23?

The issue

[19] In its statement of claim Rangitira sought declarations as to the role of s 23 of the Reserves Act in decisions made by administering bodies of reserves under s 60 of the Crown Minerals Act. It posed the following questions of law:

> In considering the application by Rangitira over the reserve vested in the Council:
>
> (a) Is the Council required to have regard to the Reserves Act and in particular s 23 of that Act?

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

(i) the economic benefits of the mining project 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 decision under s 60 of the Crown Minerals Act in accordance with s 23 of the Reserves Act?

[20] Section 60 of the Crown Minerals Act provides:

> **60 Grant of right of access by access arrangement**
>
> (1) An access arrangement in relation to land may make provision for or with respect to the following matters:
>
> (a) the periods during which the permit holder is to be permitted access to the land:
>
> (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:
>
> (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.

[21] Section 23(1)–(2) of the Reserves Act provides:

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.

[22] Mr Christensen submitted for Rangitira that s 60(2) of the Crown Minerals Act is the primary provision under which the Council must make its decision on access. Section 60(2) imposes no restrictions on the Council's discretion. Therefore, the Council is not bound to give effect to, or make its decision in accordance with, s 23 of the Reserves Act. It may consider any and all factors it views as relevant to its decision on the application. However, Rangitira accepted that the Council must at least "have regard to" the provisions of s 23 when making its decision. In other words, the provisions of s 23 are a mandatory relevant consideration, but they are not the only consideration. Therefore, the Council may weigh the matters set out in s 23 against other factors such as the economic benefits of the proposed mine for the Buller District and any proposals by Rangitira to enhance natural areas outside the application area and the reserve.

[23] In contrast Mr Smith submitted for the Society that the Council must make its access decision in accordance with s 23 of the Reserves Act. In other words, s 23 obliges the Council to administer the reserve so as to protect its natural features and maintain its value as a soil, water and forest conservation area to the extent compatible with its primary purpose as a water conservation reserve. Section 60(2) of the Crown Minerals Act does not displace other applicable constraints on landowners' decision-making. Nor does it demote those constraints from obligations to mandatory relevant considerations.

[24] Therefore, in broad terms, Rangitira submitted that the answer to the questions at [19](a) and (b) should be, "Yes", and (c), "No". The Society submitted the opposite.

[25] Nation J held in favour of Rangitira:[5]

> [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.

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5 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd*, above n 2.

[26] Nation J therefore answered the questions of law posed by Rangitira as follows:[6]

> (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.

[27] The Society challenges those conclusions on appeal.

The legislative history up to 1991

[28] The Reserves Act gives primacy to the preservation and management of reserves[7] whereas the Crown Minerals Act gives primacy to promoting the prospecting for, exploration for, and mining of Crown-owned minerals for the benefit of New Zealand.[8] In order to understand the relationship between these two Acts, we begin by considering their history.

[29] There has long been legislative provision in New Zealand for the creation and administration of reserves. When this land was set apart as a reserve, s 167 of the

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6 At [86].
7 Reserves Act 1977, s 3.
8 Crown Minerals Act 1991, s 1A.

Land Act 1948 applied, giving the Governor-General the power to set apart as a reserve any Crown land. In due course the Reserves and Domains Act 1953 was enacted, and this in turn was replaced by the present Reserves Act.

[30] The Reserves Act provides for the acquisition of land for reserves, and its classification and management. Under s 16 of the Act, reserves are to be classified according to their principal or primary purpose. There is provision for recreation reserves, historic reserves, scenic reserves, nature reserves, scientific reserves, government purpose reserves and local purpose reserves.[9] As we have set out, the reserve in question in this appeal is stated to be held by the Council "in trust, for water conservation purposes" and is a local purpose reserve.[10]

[31] Section 3(1) of the Reserves Act provides:

> **3 General purpose of this Act**
>
> (1) It is hereby declared that, subject to the control of the Minister, this Act shall be administered in the Department of Conservation for the purpose of—
>
> (a) providing, for the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing—
>
> (i) recreational use or potential, whether active or passive; or
>
> (ii) wildlife; or
>
> (iii) indigenous flora or fauna; or
>
> (iv) environmental and landscape amenity or interest; or
>
> (v) natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, community, or other special features or value:

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9 Reserves Act, ss 17–23.

10 "Vesting a Reserve in the Westport Borough Council", above n 4.

> (b) ensuring, as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape which in the aggregate originally gave New Zealand its own recognisable character:
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> …

[32] Section 40(1) of the Reserves Act describes the functions of the body charged with administering the reserve, in this case the Council:

> **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.
>
> …

[33] When the Reserves Act was enacted in 1977, the Crown owned and controlled access to all minerals existing on or under the surface of the land. For the purposes of the issues in this appeal the Coal-mines Act 1925, the Coal Mines Amendment Act 1950 and the Mining Act 1971 applied to any coal and minerals in the reserve in 1977.[11]

[34] Under s 4 of the Coal-mines Act, coal mining rights could be granted over Crown land and lands over which the power to grant such rights was vested in or reserved to the Crown under any statutory or other authority.[12] Under s 8 of the Coal Mines Amendment Act all alienations of land from the Crown were 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. We note also that s 59(1) of the Land Act provided that, in any dispositions of Crown land, ownership of any minerals on or under the soil was reserved to the Crown. Under s 59(2), all dispositions were made subject to the Crown's right to access the

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[11] The Mining Act 1971 applied to minerals other than coal, see s 2(a). Section 26(1) of that Act provided, notwithstanding anything to the contrary in any other Act, land of a certain type was to be open for mining. Under s 26(2)(b) that land included public reserves.

[12] Coal-mines Act 1925, s 4(a)–(b).

land in order to extract the minerals. There was no requirement for the Crown or the mining licensee to reach an agreement with the landowner or occupier regarding access to the land for the purposes of mining. That position applied equally to reserve land.

[35] Consistent with this regime, in 1977 when the Reserves Act was enacted, it was specifically provided in s 109(2) of that Act that the Crown had the ability to exempt coal mines from the function of that Act. Section 109(1) and (2) provided:

> **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.
>
> …

[36] Also consistent with this, s 5(2) of the Reserves Act expressly stated that the Reserves Act was to be subject to any Act passed either before or after the commencement of the Reserves Act which made any special provision with respect to a particular reserve.

[37] Therefore, when the Reserves Act was enacted the Crown could declare a reserve which contained coal to be subject to the Coal-mines Act. As well, s 109(1) of the Reserves Act gave the Mining Act (which applied to minerals other than coal) primacy with regard to the right to mine minerals. Despite the preservation and

protection of reserves required in the Reserves Act, those provisions could not prevail over the rights of the Crown in relation to minerals. Whatever the nature of the owner or occupier and provisions relating to the land, it was up to the Crown as to whether mining would take place.

[38] The Coal-mines Act was repealed by the Coal Mines Act 1979. That later Act was:[13]

> 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.

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.

Therefore, the application of coal mines legislation to reserves was continued.

[39] It follows therefore that we agree with the summary of Nation J as to the position in 1977:[14]

> [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".

[40] Another important aspect of the mining regime prior to 1991 was that mining activities were not subject to the land use control provisions of the Town and Country Planning Act 1953. In *Stewart v Grey County Council* the Minister had granted a mining licence giving the holder the exclusive right to occupy the appellant's freehold land for a term of 10 years for the purpose of mining gold and silver.[15] The appellant

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13 Coal Mines Act 1979, long title.
14 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd*, above n 2.
15 *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA).

owner and occupier had strenuously objected to that. It was held that the Mining Act was an exclusive code in respect of the use of land for mining purposes under mining licences granted under that Act. The Town and Country Planning Act did not apply.[16]

[41] However, in 1991 there was a significant change to this position.

Legislative change to the mining regime

[42] The regime whereby the Crown effectively controlled access to coal and other minerals changed with the enactment of the Resource Management Act and the Crown Minerals Act in 1991. Significant portions of the Coal Mines Act were repealed, and under the new Crown Minerals Act the definition of minerals was extended to include coal.[17] The repeal included Parts III and IV of the Coal Mines Act, which 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. There was no replacement for s 8 of the Coal Mines Amendment Act.[18] The use of land for mining purposes, which up to that point had not been subject to the Town and Country Planning Act,[19] now became subject to its successor, the Resource Management Act.

[43] The Crown Minerals Act also changed the provisions relating to how access over land was acquired. Section 54(2) provides that the holder of a mining permit shall not prospect, explore, or mine in land to which the permit relates otherwise than in accordance with an access arrangement agreed in writing between the permit-holder and landowner (or determined by an arbitrator in accordance with the Act). As Panckhurst J put it in *Powelliphanta Augustus Inc v Solid Energy New Zealand Ltd*, these new Acts represented "an entirely new regime for mining minerals in New Zealand".[20] This significant change was summarised frequently in the papers and debates leading up to the Act going through its Third Reading.[21] It was

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16 At 583 and 584.
17 Crown Minerals Act, s 2.
18 See in contrast Crown Minerals Act, s 8.
19 See discussion above at [40].
20 *Powelliphanta Augustus Inc v Solid Energy New Zealand Ltd* (2007) 13 ELRNZ 200 (HC) at [5].
21 (5 December 1989) 503 NZPD 14170; (28 August 1990) 510 NZPD 3952–3953; and (4 July 1991) 516 NZPD 3049.

put this way during the Third Reading by the Honourable John Luxton, Minister of Energy, when he stated:[22]

> In summary, the consent of the Minister of Energy will deal only with the allocation of the Crown's right to minerals. The external environmental effects will be dealt with by the normal planning and resource consent procedures by consenting authorities. Landowners will have the right to say "No" to mining on their property.

[44] We accept as correct the statement of Kós J in *Tui Trust Mining Ltd v Minister of Energy* about the position that now applies to access to land for mining purposes:[23]

> [11] The mining permit does not mean the miner has any rights to enter the land lying above the minerals. The miner must reach access arrangements with the landowners and occupiers. That is a matter of ordinary contract. … In general, the miner must negotiate access, chequebook in hand.

[45] The Crown Minerals Act therefore swept away Crown control of access to minerals, and gave control of access to the owner or occupier of the land to be mined. That owner would be subject to all the laws that applied to the use of the land. The mining permit-holder would require consents under the Resource Management Act. The old coal mines regime ceased to apply.

Analysis

[46] Under the Crown Minerals Act, the owner has the right to grant or deny access, and under s 60(1) the agreement may provide for a wide variety of matters of the sort that could be expected to be included in a contract for access to land. Then, again consistent with the new regime in 1991 giving control of access to the owner or occupier, it is stated in s 60(2) that an owner or occupier, in considering whether to agree to an access arrangement, may have regard to "such matters as he or she considers relevant". Section 60(2) empowers a land owner to agree or not agree to mining on the land as it thinks fit. It cannot and does not affect separate legal obligations a landowner has when considering such a possibility. A power to consider other matters as the owner considers relevant can hardly be construed as ousting obligations of a legal nature in respect of the land.

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22 (14 August 1990) 510 NZPD 3426.

23 *Tui Trust Mining Ltd v Minister of Energy* (2011) 16 ELRNZ 505, [2012] NZRMA 25 (HC).

[47] Section 60(1) and (2) are not worded in a way which appears to oust the application of other legislation or any contract relating to a piece of land. Section 60(2) is a permissive provision. The section is entirely devoid of the sort of prescriptive language that could be expected if Parliament's intention was to use the section to override another piece of legislation applying to the land over which access was sought, such as s 23 of the Reserves Act.

[48] We therefore agree with the submission for the Society that, properly interpreted, s 60(2) merely specifies that the Crown Minerals Act does not impose any constraints upon landowners' decisions on access. It does not free the landowner from otherwise applicable constraints on decision-making.

[49] Rangitira's approach would permit the administering body of the reserve to grant access that would defeat the primary purpose for which the reserve is held by permitting a weighing of factors that run contrary to protection of the reserve's features. It could be expected that if that far-reaching effect was intended by s 60, Parliament would have said so.

[50] We are unable to accept Rangitira's position that the provisions of s 23 are merely a mandatory relevant consideration under s 60(2). On its face, that is inconsistent with Rangitira's primary submission that s 60(2) is the sole provision under which decisions on access are made and that it "imposes no restrictions on the Council's discretion". Moreover, s 23(2) states that every local purpose reserve "shall be" administered in accordance with the provisions of the Act in order to manage and protect the reserve's features. Rangitira's submission involves effectively re-writing that provision so that requirements are demoted to mere considerations. We consider that is contrary to the plain language of s 23.

[51] We now consider other relevant sections and instruments.

The order creating the reserve and s 5(2)(a)

[52] Section 5(2)(a) of the Reserves Act suggests that Act does not give way to other enactments unless those other enactments can be read as prevailing over the Reserves Act:

> **5 Restricting application of this Act**
>
> …
>
> (2) Except as otherwise specially provided herein, this Act in its application to any reserve shall be read subject to—
>
> (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.
>
> …

[53] When the land was reserved on 10 August 1951, it was reserved:[24]

> … 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 …

[54] Likewise on 31 October 1951, when the land was vested in the predecessor to the Council, it was noted as being:[25]

> 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.

[55] Mr Christensen appeared to submit that "special provision" was made for mining on this reserve in terms of s 5(2)(a) when the land was set apart as a reserve in August 1951, and therefore the reserve is subject to coal mining rights. He also appeared to submit that the vesting of the reserve in the Council in October 1951 fell within s 5(2)(b).

[56] We are unable to see how s 5(2)(a) or (b) assist Rangitira. The enactments referred to in the August and October 1951 Gazette notices are long repealed and there

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24 "Land Reserved in Nelson Land District", above n 3.
25 "Vesting a Reserve in the Westport Borough Council", above n 4.

are no corresponding replacements. The Reserves Act was not in force at the time of the notices. Therefore, we do not consider that the "subject to" parts of the notices can have any bearing on the key issue before us, being the interpretation of s 60(2) of the Crown Minerals Act and s 23 of the Reserves Act.

Other sections

[57] Section 9 of the Crown Minerals Act provides:

> **9 Other legal requirements not affected**
>
> Compliance with this Act or the regulations does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.

This indicates that s 60 of the Crown Minerals Act does not remove the need for the Council to comply with s 23 of the Reserves Act.

[58] In addition to ss 23 and 40 of the Reserves Act, the Council is also bound by s 16, entitled "Classification of reserves", which provides in subs (8):

> (8) When classified under this section, each reserve shall be held and administered for the purpose or purposes for which it is classified and for no other purpose.

In our view s 16(8) reinforces the application of the provisions of the Reserves Act designed to protect reserves.

[59] Mr Christensen submitted that s 16(8) could not be absolute, and if it were it would be impossible in most if not all cases to grant an access arrangement for a reserve. We do not consider s 16(8) is so absolute, yet it is a clear indication that a reserve should be administered in accordance with its purpose.

Implied repeal

[60] It was held in the High Court that, 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.[26] For the reasons we have given, we do not

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[26] *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd*, above n 2, at [70].

agree with this conclusion. Resort to the doctrine of implied repeal is unnecessary. For the reasons given above, the Crown Minerals Act is not in any way inconsistent with the Reserves Act and does not purport to limit it. As we have set out, the continued application of ss 23 and 40 of the Reserves Act in relation to access arrangements for coal mining is entirely reconcilable with the scheme of the Crown Minerals Act. This is not a situation where "two statutory provisions are totally inconsistent with each other, so that they cannot stand together".[27]

Section 61

[61] Section 60 can be contrasted with s 61 of the Crown Minerals Act. Section 61(1A)–(2) provide:

> (1A) The Minister of Conservation or the Minister and the Minister of Conservation, as the case may be, must not accept any application for an access arrangement, or variation to an access arrangement, or enter into any access arrangement, or variation to an access arrangement, relating to any Crown owned mineral in any Crown owned land or internal waters or land of the common marine and coastal area described in Schedule 4, except in relation to any activities as follows:
>
> (a) that are necessary for the construction, use, maintenance, or rehabilitation, of an emergency exit or service shaft for an underground mining operation, where these cannot safely be located elsewhere, provided that it does not result in—
>
> (i) any complete stripping of vegetation over an area exceeding 100 square metres; or
>
> (ii) any permanent adverse impact on the profile or surface of the land which is not a necessary part of any such activity:
>
> (b) that do not result in—
>
> (i) any complete stripping of vegetation over an area exceeding 16 square metres; or
>
> (ii) any permanent adverse impact on the profile or surface of the land that is not a necessary part of any activity specified in paragraph (a):
>
> (c) a minimum impact activity:
>
> (d) gold fossicking carried out in an area designated as a gold fossicking area under or 98A:

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[27] JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 471. See also *Stewart v Grey County Council*, above n 15, at 583.

(e) any special purpose mining activity carried out in accordance with a mining permit.

(2) In considering whether to agree to an access arrangement, or variation to an access arrangement, in respect of Crown land, the appropriate Minister, or the Minister and the appropriate Minister, as the case may be, shall have regard to—

(a) *the objectives of any Act under which the land is administered; and*

(b) any purpose for which the land is held by the Crown; and

(c) any policy statement or management plan of the Crown in relation to the land; and

(d) the safeguards against any potential adverse effects of carrying out the proposed programme of work; and

(da) the direct net economic and other benefits of the proposed activity in relation to which the access arrangement is sought; and

(db) if section 61C(3) applies, the recommendation of the Director-General of Conservation and summary referred to in that subsection; and

(e) such other matters as the appropriate Minister considers, or the Minister and the appropriate Minister, as the case may be, consider relevant.

(Emphasis added.)

[62] Under s 61, access arrangements in respect of Crown land and land in the common marine and coastal area can be reached by agreement between the relevant Minister and the mining permit-holder. Section 61(2) lists mandatory relevant considerations for the Minister, which include the objectives of any Act under which the land is administered and any purpose for which the land is held by the Crown. As can be seen, there is in this section specific provision for a balancing of particular factors such as the economic benefits of the proposed activity.

[63] Mr Christensen accepted that Rangitira's argument, which treats the provisions of s 23 of the Reserves Act as a mandatory relevant consideration under s 60(2), would effectively create a regime that is equivalent to s 61 for reserve land administered by local authorities. If Parliament intended that result, it could have enacted similar specific provisions for reserve land. It did not.

Section 109

[64] Nation J placed weight on s 109 of the Reserves Act, set out above at [35], as 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".[28] He considered that the general effect of that section was to give priority to predecessor mining legislation. Applying s 22 of the Interpretation Act 1999, the Judge held that the references to the Mining Act and the Coal-mines Act in s 109 are to be read as references to the Crown Minerals Act.[29] Section 22(2) provides:

> **22 References to repealed enactment**
>
> …
>
> (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.

[65] Section 109(1) is of no assistance to Rangitira, because it refers to the Mining Act, and that Act did not apply to the mining of coal. As we have set out, in 1977 when the Reserves Act was enacted coal mining had its own separate legislative regime comprising the Coal-mines Act, the Coal Mines Amendment Act and the Land Act. These enactments are not the Acts referred to in s 109(2). However, applying s 22(2), the references to the repealed enactments in s 109(2) may well have been interpreted as applying to the replacement Acts up until 1991.

[66] Yet, as we have set out, in 1991 the old coal mining regime was replaced by the Resource Management Act and the Crown Minerals Act. Under the new regime the Crown ceased to control access to coal, and landowners were given the ability to grant or refuse access. In addition, the planning controls in the Resource Management Act would now apply. As we have set out above, these were fundamental changes to the mining regime.[30]

[67] Section 22 therefore does not assist. It applies to enactments which replace the repealed enactment without modification. Sections 109(1) and (2) do not refer to

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28 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd*, above n 2, at [76].
29 At [73].
30 See discussion above at [42]–[45].

enactments which were in any way "replaced". There is nothing that "corresponds" to the old regime in relation to minerals or coal. Those repealed provisions and the concepts behind them are gone. An entirely new regime has been put in place.

[68] We agree with the submission for the Society that the purpose of s 109 was to make it clear that reserve land could continue to be declared open for mining pursuant to the predecessor coal mining legislation. The concept of land being declared open for mining is gone under the Crown Minerals Act. Section 109 is in effect redundant. We disagree with Rangitira that Parliament has simply failed to update the statutory references in s 109 to refer to the Crown Minerals Act. What has been overlooked is s 109's repeal, not its updating.

[69] Thus we do not consider it correct to conclude as the Judge did that s 109 of the Reserves Act is a "ranking provision" explaining how the courts should deal with any conflict between s 23 of the Reserves Act and s 60(2) of the Crown Minerals Act.[31] Section 109 has no application to the interpretation of those two sections.

Conclusion on the first question

[70] For the reasons we have given, we do not think it is correct to consider the issue before us in terms of whether s 60(2) of the Crown Minerals Act or s 23 of the Reserves Act has "primacy". Section 60(2) is a permissive provision that merely clarifies that the Crown Minerals Act does not impose any constraints on the landowner's decision on access. It does not oust the application of other legislation. Because of the directive nature of s 23, the Council is obliged to give effect to its terms. There is no conflict between the two Acts.

[71] This means that the Council cannot enter into an access arrangement that is incompatible with the principal or primary purpose of the reserve.[32] It must give effect to s 23 of the Reserves Act. The obligations placed on the Council in s 23 are not merely mandatory considerations to be weighed against economic advantages to the local community and the enhancement of other natural areas outside the reserve.

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31 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd*, above n 2, at [76].
32 Reserves Act, s 23(2).

[72] We conclude that the questions of law posed by Rangitira should be answered differently than they were answered by the learned High Court Judge. The answers we give are as follows:

> In considering the application by Rangitira over the reserve vested in the Council:
>
> (a) Is the Council required to have regard to the Reserves Act and, in particular, s 23 of that Act?
>
> **Answer: No. The Council is required, when considering whether to grant an access arrangement under s 60(2) of the Crown Minerals Act, to give effect to s 23 of the Reserves Act.**
>
> (b) If so, can the Council, in the exercise of its discretion under s 60(2) of the Crown Minerals Act, weigh the matters set out in s 23 against other factors such as:
>
> (i) the economic benefits of the mining project 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: No. The requirements of s 23 are not for balancing against other factors not relevant to the protection of the reserve.**
>
> (c) Alternatively, is the Council required to make its decisions under s 60 of the Crown Minerals Act in accordance with s 23 of the Reserves Act?
>
> **Answer: Yes.**

The second issue — what is meant by s 23(2)(a) and (b) of the Reserves Act?

[73] The second broad issue is comprised of a series of questions about the interpretation of s 23(2)(a) and (b) of the Reserves Act. In its statement of claim Rangitira sought directions on the following:

(a) 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 on any areas of the reserve which would not be protected by undertaking the mining project?

(b) In relation to the management and protection of the scenic, biological and natural features within the reserve, as referred to in s 23(2)(a):

(i) 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?

(ii) 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?

(c) 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):

(i) 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?

(ii) 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?

[74] Nation J answered the questions as follows:

(a) 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.[33]

(b) In relation to the management and protection of the scenic, biological and natural features within the reserve, as referred to in s 23(2)(a):

(i) 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.[34]

(ii) 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.[35]

(c) 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):

(i) 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

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33 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd*, above n 2, at [110].
34 At [113].
35 At [118].

maintaining the value of the reserve itself as a soil, water and forest conservation area which would be relevant under s 23.[36]

(ii) 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.[37]

[75] The Society challenged all of the above declarations on appeal. However, during oral submissions counsel for both sides relied heavily on hypothetical examples to explain their respective positions. In response, we asked counsel whether the questions posed were amendable to determination in the abstract. We invited the parties to confer on this issue and file a joint memorandum. They did so and have agreed that the making of the declarations sought would be premature in the absence of the full factual context. They therefore invited us to allow this aspect of the appeal by consent, quash the declarations of Nation J and make no substitute directions of our own. We so order.

Result

[76] The appeal is allowed.

[77] The declarations and orders made by the High Court are quashed.

[78] In substitution for the declarations made by Nation J on the first issue, the following declarations in response to the questions in the statement of claim are made:

> In considering the application by Rangitira over the reserve vested in the Council:

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[36] At [122].
[37] At [124].

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

Answer: No. The Council is required, when considering whether to grant an access arrangement under s 60(2) of the Crown Minerals Act, to give effect to s 23 of the Reserves Act.

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

(i) the economic benefits of the mining project 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: No. The requirements of s 23 are not for balancing against other factors not relevant to the protection of the reserve.

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

Answer: Yes.

[79] We make no declarations on the second issue.

Costs

[80] Rangitira must pay the Society costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[81] We are not clear whether any order for costs was made in the High Court. If no order was made, costs should now be determined in the High Court in the light of this judgment. If any order was made, it is quashed, and costs are to be determined afresh in the High Court in the light of this judgment.

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