IN THE SUPREME COURT OF NEW ZEALAND SC 106/2016

BETWEEN **HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED**
Appellant

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**
MINISTER OF CONSERVATION
Respondents

SC 107/2016

BETWEEN **MINISTER OF CONSERVATION**
Appellant

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**
HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED
Respondents

Hearing: 27–28 February 2017

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: F M R Cooke QC and M J E Williams for the Hawke's Bay Regional Investment Company Limited

D M Salmon, S R Gepp, and P D Anderson for the Royal Forest and Bird Protection Society of New Zealand Incorporated

A L Martin, J M Prebble and J E Dick for the Minister of Conservation

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CIVIL APPEAL

MR MARTIN:
May it please the Court, Martin with Prebble and Ms Dick for the Minister of Conservation.

ELIAS CJ:
Thank you Mr Martin.

MR COOKE QC:
May it please the Court, Cooke and Williams for the appellant, Hawke's Bay.

MR SALMON:
May it please the Court, Salmon, Ms Gepp and Mr Anderson for Forest and Bird.

ELIAS CJ:
Thank you Mr Salmon. What order has been agreed?

MR MARTIN:
Ma'am, if it pleases the Court, it was proposed that I would proceed first for the Minister.

ELIAS CJ:
Thank you Mr Martin.

MR MARTIN:

Your Honours, as a framework for my oral submissions, I'll use the Court of Appeal's judgment including Her Honour Justice France's dissent. Your Honours will also have the key points in the overview to our written submissions from paragraph 4 of those submissions.

But I will begin, if I may, with some very brief introductory comments to put the issue before the Court in its wider conservation management context. Conservation encompasses active protection as well as passive maintenance of the status quo, or preservation. Both have their place in the purpose and scheme of the Conservation Act 1987. The purpose of the Act is a practical one and envisages tradeoffs to achieve the best outcome for conservation. Indeed, some tradeoffs are an inevitable fact of good conservation management. Money and time spent controlling possums in one place carries an opportunity cost in terms of effort that can be put elsewhere.

ELIAS CJ:

Can you just pause a moment. I think it is a bit faint. I don't know whether people in the public gallery can hear, can you hear? All right, that's fine.

MR MARTIN:

I'm concerned that Your Honours can hear me all right?

ELIAS CJ:

We can, but you're speaking to us, I just wanted to check. Thank you.

MR MARTIN:

Thank you Ma'am. Please let me know if I need to speak up. One of the main ways that conservation is promoted is through managing protected areas. Here, again, what is to be achieved is the best outcome for conservation of New Zealand's resources – the best outcome overall, and also at the level of the protected area in question. In this case there is an opportunity to bring another 170 hectares under protection – land that will, as far as can be foreseen, otherwise remain a farm subject to the ongoing

impacts of grazing and predators. The expert advice is that it would not require much active management to recover other than browser and predator control and exclusion of grazing. Now that's not a criticism of the current owner or their farming practices. Conservation of all of New Zealand's resources is to be promoted but private land is not de facto public conservation land. That's why we have protected areas. At its simplest, it's not that a tree in a park is more special than the same tree just outside the park. It's that the setting apart of areas of land in parks advances conservation purposes including recreation. And here, what is proposed will entail the loss of 22 hectares of an existing protected area, some of which is in poor condition, but some of which does have significant conservation value.

But on the other side of the ledger is a net conservation benefit, whereby what is lost is more than made up for by what is gained. So what is proposed involves a trade-off and whichever way you look at it there is a loss of the 22 hectares or an opportunity cost in not protecting the 170 hectares, and the Director-General's assessment –

ELIAS CJ:
Well, it doesn't necessarily follow, does it, that the 170 acres can't be protected. It could be acquired.

MR MARTIN:
There may be other ways in which that farming land could, over time, be protected, and there is a limit to how far the evidence can take us on the future of that block.

ELIAS CJ:
Yes but I wonder about your coupling the two, or contrasting the two in terms of arriving at a net gain. Whether that is really, don't you have to indicate to us that there is a connection?

MR MARTIN:
This is –

ELIAS CJ:

A necessary connection.

MR MARTIN:

There is a, we come to a central part in the argument, and I will step you through the legislative provisions that are engaged. But Your Honour is quite right, a key point in this case is the, and this is why I'm scoping it at the outset, is this interplay between land that could come under protection, and land that it is accepted would be lost.

In the Director-General's assessment active protection of the 170 hectares of the Smedley block is an opportunity to enhance both the forest park, and achieve better conservation of New Zealand's resources overall. The main issue for the Court is whether this was an assessment that was open to the Director-General in proper exercise of the revocation power conferred by section 18(7). It is an issue that turns on the proper construction of the Conservation Act, text in light of purpose, to which I will turn shortly. I will begin though by briefly outlining the land involved and will do so by reference to the Court of Appeal's description of it.

So I come to the land involved. There are maps attached, you have a number of maps through the materials, but the ones I was going to propose to refer to are attached to the appellant's submissions. So you'll have, it's appendix A and two maps there which I will introduce. I will also be referring to the Court of Appeal's decision for the descriptions of the land, and will start – that's at tab 13 of volume 1 at paragraph 32. The Court of Appeal leads into its summary of the values on the blocks in question. This information is broadly drawn from the DOC science report, and from Mr Lloyd's affidavit for Forest and Bird. At paragraph 32 the Court of Appeal notes the conclusion of the science report that, "The exchange would enhance the conservation values of land managed by the Department from both an ecological and biological point of view." That report also concludes that the Smedley block complements and would be a worthy addition to the forest part. This is at volume 3, page 701. But at 33, paragraphs (a) and (b) of the Court of Appeal

judgment, the Court refers first to the eight hectare Makaroro block, and I will indicate where that is on the maps. Just to orient you, the first map you should see attached to our submissions, is a coloured photographic map, and it has imposed on it the, to my eyes, turquoise area that is the proposed land exchange area, and it has within it an additional orange hatched area, which is also part of the land exchanged area. As you will hear that was an area that was added in essentially at the request of the Director-General during the process. So that whole area is the area that is proposed to be exchanged. You will see on this first map the outline in light blue of where the reservoir of the dam would be. If you turn to the second map you see essentially the same picture. On the right-hand side in the darker green is the Smedley exchange block, but you'll see that the orange hatched area is not shown. It is part of that block, so it is part of the exchanged area. That's the exchange block. In purple you will see two areas of land, one of which is vertical in the top centre, and the other lies to the left of that, and a bit lower horizontally. The Makaroro block is the one that lies horizontally. So this is an outlier block because the forest park is above it, and it's separated by about 600 metres of pine forest from the Ruahine Forest Park, which is the lighter green there. It's described in the science report as –

ELIAS CJ:

Sorry, the science report is the one in volume 3 at page 701 is it?

MR MARTIN:

That's right. It's described in that report as requiring a higher level of management input than the other two sites, that's the Dutch Creek one which I'll come to shortly, and the Smedley land, which is the exchange land. Just in note in terms of terminology podocarps where they are used are the tall native trees, matai, kahikatea, rimu, totara. At 33 (a) and (b) the Court of Appeal also refers to the 14 hectare Dutch Creek block, so this is the block that is vertical in purple on that second map, and the Court of Appeal goes on at paragraphs 34 through to 36 and discusses the affidavit of Mr Lloyd, the senior ecologist engaged by Forest and Bird in relation to the 22 hectares, and by using the term 22 hectares we are talking about both of the purple

areas. So both the Makaroro block and the Dutch Creek block. The Court notes a high degree of consensus and agreement among the experts about methodology and ecological significance and coming back to paragraph 33 (c) the Court refers to the 170 hectare Smedley block. As I've noted that was originally 146 hectares, which is what you see in the dark green on the second map, that was excluding an area called Donovan Gully, which the Director-General subsequently asked be added in.

GLAZEBROOK J:
That's the hatched orange?

MR MARTIN:
That's the hatched orange, Ma'am, yes. So this area, again treating it as a composite of 170 hectares, has a different geology and also extends the altitudinal range of the adjoining conservation area, which is the lighter green, and that means it supports ecosystems that are not currently present in the Ruahine Forest Park. To give you a sense of scale the Ruahine Forest Park is approximately 94,000 hectares. There's a map of the whole forest park, which is at volume 4, page 858. It's also, I think, attached to my friend Mr Cooke's submissions. All three blocks combined represent a very small area, a fraction of a percent really, of the total park area. The Smedley is over seven times the size of the Dutch Creek and Makaroro blocks combined, the 22 hectares. This is putting entirely to one side the blue duck habitat enhancement and the wilding pine eradication that is funded as part of the proposal, as referred to in the conditions in the decision.

Now before the conclusions are set out in the science report there is a useful table which is at volume 3, page 699. That table summarises the comparison of the significance criteria for the forest park revocation land and the Smedley exchange block. The Smedley block scored the same, or higher, than the two parcels of forest park revocation land for every ecological significance assessment criteria. That's noted at the bottom of –

WILLIAM YOUNG J:

Sorry, I actually lost you there for a second. What page are we looking at?

MR MARTIN:

So this is at volume 3, page 699. So there's the table there, and at the bottom of –

GLAZEBROOK J:

What is the table in?

MR MARTIN:

This is in the science report –

GLAZEBROOK J:

The same science report or a different one?

MR MARTIN:

No, the same science report.

ELIAS CJ:

None of this is contentious, is it?

MR MARTIN:

No. I wasn't going to spend much more time on it, Ma'am, before turning to the purpose of the Act. I thought I should start just orienting in terms of the land but I won't dwell on it.

ELIAS CJ:

Yes, that's fine.

MR MARTIN:

I've referred to the Court of Appeal's descriptions of it. And I'm just finally noting there what is recorded at the bottom of page 698, which is that the revocation land – sorry, the Smedley block scored the same or higher than the

two parcels of revocation land on the ecological significance assessment criteria.

I'd like to turn now to the purpose of the Act and the relevant definitions, and we'll then come on to the text of the specific sections under which the Director-General's four separate decisions were made. I'll confirm the plain meaning by reference to the relevant Parliamentary material and then return to the purpose of the Act to cross-check in light of purpose.

So really this first part, looking at definitions, is asking questions, what is conservation and how is it to be promoted. Referring here for ease of reference to paragraph 14 of the Court of Appeal's judgment. So again this is in tab 13 of volume 1 and from paragraph 14 onwards the Court sets out general provisions under the heading. Dealing first with what is set out in terms of the long title at paragraph 14, it is submitted the use of the word "promote" in the long title reflects the Act's forward looking and management focus. At 15 the Court of Appeal has, in setting out definition of conservation, added emphasis to the words "intrinsic values" but not to the other words about recreation and safeguarding future options that follow on. Without overstating this point, it is submitted that those other words again suggest a forward looking and management focus.

Just a note on terminology, before we move on, you'll see that "conservation area" is a defined term and it's set out there. This is a broad term in the Act encompassing both categories of protected land we will be discussing especially protected areas and stewardship land. Having accepted at the outset that there are some conservation values on the 22 hectares I come to the definition of "natural resources" again set out in the judgment. It's submitted that natural resources are not the same thing as conservation values.

ELIAS CJ:

Sorry, just pausing. In the submissions, I think of Mr Salmon, but there is reference to the fact that the evidence established that the features were of national significance. Is that accepted?

MR MARTIN:

Not as a bold statement. It's a matter for –

ELIAS CJ:

Well it's expressed to have been accepted throughout.

MR MARTIN:

Yes there's – it's more perhaps a matter for my friend Mr Salmon to submit on.

ELIAS CJ:

No, I just want to know what the position I because you said there are some conservation values which seems a mile away from national conservation values which were accepted.

MR MARTIN:

I don't want to split hairs on it. What, it seems my friend will draw on there, is Mr Lloyd's evidence, and in particular his summary of the ecological values of the conservation land at paragraphs 42 and 47 of his evidence.

ELIAS CJ:

Where do we find that, volume 3 at what page, don't take us to it.

MR MARTIN:

So that's in volume 2. Volume 2 of Mr Lloyd's affidavit.

ELIAS CJ:

I don't think there's any need for you to take us to it, just give us the reference, thank you.

MR MARTIN:

Sure.

ELIAS CJ:

Unless you want to take us to it.

MR MARTIN:

No, the answer to your question is that it is accepted that the land, and we're talking about the 22 hectares, contains significant ecological values within an national context. I think that's really the nub of what you're asking. As put as nationally significant that could be seen as construing something else, so a sort of a higher order of significance, but it is –

ELIAS CJ:

Sorry, just tell me what you said, accepted that there is significant ecological values in a national context?

MR MARTIN:

Within a national context, because they're using national frameworks to make the assessment, and that's set out in Mr Lloyd's affidavit. It's also traversed in the DOC report and that's in – so that's the science report we were just looking at which is in volume 3, tab 67, and it's discussed throughout the decision documents, which are the submission to the Director-General Mr Kemper's report and his decision. So it is accepted that there are significant ecological values on the 22 hectares. National significance is a phrase that's used by my friend in his submission.

ELIAS CJ:

Thank you.

MR MARTIN:

And having accepted that I come onto the definition of "natural resources" back in the Court of Appeal's judgment, and I submit that these are not limited to native species, it's a very broad definition. They include pest species,

possums, stoats, rats, there's no value judgement in the definition. The definition of natural resources extends to air and water and soil, landscape, geology, matters of that nature, including systems. It's an extremely broad encompassing definition taking in all of New Zealand's resources on its face, wherever they occur, and whether on private land or public. And it's also irrespective of the protected status attaching to land, that definition. The work this definition does in the purpose of the Act is to make clear we are concerned with the natural world rather than the artificial world, except where we're talking about historic resources, and it cannot be the intention that every single individual example of anything within the definition is to be conserved. There is embedded within the definition an acceptance that in practice conservation will involved management decisions, prioritisation and tradeoffs.

With that I come onto the next definition that's set out there which is "preservation" which in relation to a resource means the maintenance so far as practicable of its intrinsic values. It may be helpful at this point to look at an example of where preservation occurs in the Act apart from in the definition of conservation. To do that if we look at the appellant's bundle of authorities, which has a white cover, a large volume, at tab 1 you have the Conservation Act, and at page 77 of the Act are sections 20 and 22. Now I say at once, these are not sections that are engaged by this appeal. They deal with wilderness areas and sanctuary areas which are different categories of specially protected area from conservation parks, which are dealt with at section 19. But the purpose in going there is to point out that wilderness areas and sanctuary areas are concerned, among other things with preservation and indigenous species.

If you look at section 19, which is on the same set of pages there, section 19(1) by contrast, and this is a section that is engaged by this appeal, the conservation management purposes of conservation parks are concerned with all natural and historic resources and protection is the operative concept. And while we're on management purposes –

ELIAS CJ:

Sorry, protection rather than preservation is your point?

MR MARTIN:

Yes. And while we're on management purposes if we just skip forward to page 92 of the Act –

GLAZEBROOK J:

Ecological areas is protection as well.

MR MARTIN:

Yes –

GLAZEBROOK J:

What's the difference?

MR MARTIN:

And there are, I should say there are other areas as well at section 23 and 23A and B, they are also expressly protected areas. So they do deal with, the terms they used, for different especially protected areas.

ELIAS CJ:

Mightn't it simply be language that's chosen in relation to something that needs, that's capable of preservation as opposed to protection, for example, preservation of a species that's under threat. Is it really, what's the significance you take from the choice of words? Are you saying that protection envisages something less than preservation?

MR MARTIN:

Perhaps if I come on to answer your question, come on to the definition of protection because the distinction being drawn is really with what is encompassed by tat definition of "protection" which is –

ELIAS CJ:

What are you asking us to take from the use of protection rather than preservation because preservation may be the more appropriate concept to use if you're talking about something that can do, like a species.

MR MARTIN:

Protection, the difference is protection encompasses augmentation, enhancement and expansion.

ELIAS CJ:

Yes, I understand that.

MR MARTIN:

So that is the key purpose.

ELIAS CJ:

I see.

MR MARTIN:

And I'm not suggesting that –

ELIAS CJ:

But surely preservation may well also include, I'm not saying in the definition, but include augmentation and enhancement as you were talking about whio conditions for habitat that have been imposed so it just seems a little bit subtle.

MR MARTIN:

Your Honour is right, you would expect that preservation includes the improvement of the resources that are being preserved, both naturally and perhaps through engagement with them, and in my submission that points to protection in the scope of the scheme which I'll take you through, envisaging something that's much more deliberate, much more active, and involving – essentially supporting a net conservation approach. Now I say immediately

it's not submitted that the definition of "protection" itself clearly imports a net conservation approach, but it does, in my submission, support that approach.

Before we went to definition of protection I just was going to note that the, at section 25, and I don't need to take you to it, section called management of stewardship areas, every stewardship area shall be so managed that its natural and historic resources are protected. There is not there though the express reference to recreation values that you see in section 19(1). So stewardship areas are the other area of land that are engaged by this appeal. So I come to protection. Back at the Court of Appeal's decision –

ELIAS CJ:
Is there any concept of recreational user being necessary in cases of stewardship land? There probably isn't, is there?

MR MARTIN:
I'll just check that I understand the question. There certainly isn't in the legislative scheme in that way. Some, undoubtedly some stewardship land will have recreational values.

ELIAS CJ:
All right.

MR MARTIN:
Whether they are recreation for hunting or for walking. There's a range of land within the recreational –

ELIAS CJ:
But parks were set up, both the forest parks and whatever we have now, they are really set up to promote public access, are they not? Sorry, look, this is probably just a sideshow anyway. Get on to protection and the definition of it.

MR MARTIN:

No, it's a fair question Your Honour. I mean recreation values are a part of all of the land, but the conservation parks do have within them that express aspect of recreation.

ELIAS CJ:

Where is there an indication that stewardship lands are held for recreational purposes?

MR MARTIN:

In the legislation I don't believe there is an express indication.

ELIAS CJ:

No, all right.

MR MARTIN:

The sort of land that is, we're talking about when we're talking about stewardship land, does vary a lot and there is a report, which I won't take you to now, the Parliamentary Commissioner for the Environment's report in the materials, is – one of the things it does is it talks, it's not focused on specially protected areas but conservation parks at all, one of things it does is it goes through and highlights the sort of land such as St James Station in the Lewis Pass, that is stewardship land. But it nevertheless has very high natural values, and also has recreational values.

ELIAS CJ:

All right, thank you.

MR MARTIN:

So protection, which is a central definition in the Court of Appeal's – in the case, is in the Court of Appeal's judgment, page 109. It is submitted that this is central to understanding section 19(1) and hence the conservation management purposes for conservation parks like the Ruahine Forest Park. It's also central to section 25, the management of stewardship areas, which is

what conservation park land becomes if its status is revoked, and I just dwell on that point to say revocation under section 18(7), which we'll be looking at in some detail, does not, in itself, take land out of the park, it becomes stewardship land and then, of course, there is, in this case, an exchange proposed.

The definition of "protection" in relation to resource means its maintenance, so far as is practicable, in its current state, but includes, and you see at (a) and (b), restoration, augmentation, enhancement or expansion. And I note the word "but" appears to contrast what follows from the maintenance of the status quo. The word "and" wasn't used. Perhaps a small point but a point –

GLAZEBROOK J:
In its current state you could hardly augment it so it's fairly obvious, isn't it?

MR MARTIN:
But in my submission that may come back to the Chief Justice's point, that you would expect there to be a certain amount of, even within preservation, for conservation areas to get better, and certainly that to be anticipated and contemplated.

GLAZEBROOK J:
Possibly, although that doesn't say maintain in its current state. It says, maintain so you keep its intrinsic values, so if an augmentation keeps its intrinsic values so 10 black robins are better than five, then that would include preservation, one assumes. Well protection says keeps it in its current state. Preservation just says keep its intrinsic values.

MR MARTIN:
Maintain its intrinsic values, yes, but would also, must encompass a certain degree of expanding species –

GLAZEBROOK J:
Well as long as it keeps its intrinsic values yes, but…

MR MARTIN:

So it's submitted that protection is encompassing a different idea, and I'll expand on this, but in the context of specially protected areas it's encompassing augmentation, enhancement, expansion, subtly different ways of saying in some ways the same thing. I'll come on to the definition shortly. So there's quite an emphasis there on being able to within the definition of protection and protect, do things that involve increasing and adding a gain or a benefit. As I say it's not submitted that within that definition is a net conservation gain approach in itself but it, in my submission, does support such an idea.

The dictionary definitions of "augment", "enhance", "improve", are at tab 16 of the appellant's bundle of authorities. Augment, make greater by addition. Enhance, improve the quality, value or extent of and improve, make or become better. Note also in my submission that as used in section 19(1) and section 25, it isn't a single resource that is to be protected, but all of the resources under management in a conservation park or a stewardship area, whichever is relevant. So the definitions refer to a particular resource. But the usage in 19(1) and 25 is on the resources that are under management in a particular area. The definition of "protection" doesn't –

ELIAS CJ:

Can I just say, the definitions of course bear very closely on the actual determinations that are made, but I would have thought that the principal argument you have to address is the one of the structure of the Act, and whether the exclusion of exchange and sale from – the exclusion of protected land from exchange and sale, meant that there was any power to make the determination which may need to get into all of these definitions, but I'm not sure for myself why you're emphasising the definitions. Perhaps you could explain that. What do you take from these?

MR MARTIN:

Yes, the definitions, as Your Honour points out, are critical to coming on to the sections that are really germane, which is section 18(7) principally, but also in

my submission section 19, and which I'm arriving at very shortly. Also 16 and 16A. So those are the – that is the, section 16A is the exchange provision which does have within it the net conservation gain idea, and so starting with the definitions, as the Court of Appeal did, to sort of flow into the discussion of the specific provisions that the Court must construe –

ELIAS CJ:

Well we have, of course, read the Court of Appeal decision. I think you can go perhaps a little faster through this. It's just that I'm not sure how important in the end the definitions are.

MR MARTIN:

All right, Ma'am. I will move forward to those sections now. In this section I'm going to be submitting that the broad purpose supports enhancement. That the scheme enables enhancement of specially protected areas to achieve a net conservation gain, and that's through section 18(7) and section 16A. That the discretion of section 18(7) is not rigidly prescribed, and that ultimately revocation is not limited only to situations where land has lost values.

ARNOLD J:

I don't want you to address this now, but at some point I would like you to address it. The argument seems to be that you look at the conservation estate broadly, or globally, and in this case we're looking at a particular forest park, and looking at an exchange of 22 hectares for 170 hectares, but is there any limit if one takes that approach with the Minister looking at the conservation estate across the entire country so that if, for example, there's a small conservation park in the Wairarapa somewhere, which somebody wants to use for a particular development, and they say to the Minister, well look, we have a big area of land adjacent to a forest park up in the Waikato somewhere, and it's really good land and it would be a considerable enhancement of that forest park up in the, conservation park up in the Waikato, so we would like you to effectively permit an exchange of the small conservation park in the Wairarapa for the much larger area adjacent to the

one in the Waikato. And would that be justified taking a global view of the conservation estate, that on balance the conservation estate nationally is enhanced by that swap?

MR MARTIN:

And I can answer that by saying, on the approach that is being submitted for by the Minister, that could not proceed because –

ARNOLD J:

Well I know that, I assumed that would be your answer, but what I want to know is if you're right about the interpretation of the particular provisions, what is there in the provisions to prevent that? In other words I'm thinking about the logical outcome of your interpretation.

MR MARTIN:

Yes Sir. And the answer to that, in large part lies in section 19(1). So it is submitted that you can't have a whole park disappear and still be protecting the park as a management unit, if you like, and so the idea of taking the whole entirety of a park and substituting it effectively with one in a different geographical area, would not be consistent with the application of section 19(1) and –

GLAZEBROOK J:

Well I think 18(1) was, or 19(1) is it?

ELIAS CJ:

19(1) does, I don't understand that 19(1) provides a brake such as that. It's about how you manage every conservation park. The question that's being put to you is – I would have thought that there is no logical impediment if your argument is right.

WILLIAM YOUNG J:

Well you would say that if the entire park in the Wairarapa disappears then it has not been so managed to protect its resources because that park no longer exists.

MR MARTIN:

Exactly, yes.

WILLIAM YOUNG J:

Whereas here the park still exists, in fact it's larger.

MR MARTIN:

Yes, and with respect Justice Arnold's example engages two different reasons why it couldn't proceed. One, that the whole park ceases to exist, effectively, so you've not complied with section 19(1) in that respect. But also there's the, even if you only had a part of that park, and you moved to a different area of the country like that, you're not having the situation where you have here where you're putting land back into the park. So you're not enhancing, augmenting, expanding the particular conservation park. So that's an essential safeguard, in my submission, on the operation of this sort of proposal in relation to a specially protected area. Stewardship areas, of course, are different. They operate on the basis that you could do essentially what his Honour suggested with stewardship land, at least in theory, subject to the overall purpose of the Act being achieved, which is not a, that's, in itself, a significant check, in my submission, in practice.

ELIAS CJ:

So you say that section 19(1) means that the sort of approach you're advocating here could only apply to augmentation of existing parks, or improvement of existing parks, so it would have to be an exchange that was contiguous, or something of that sort?

MR MARTIN:

Yes Ma'am. So the levels, in my submission, are these. There's obviously, there's the need for public process, for public hearing process, which we'll come to, which doesn't apply in the case of an exchange of stewardship land, and it does apply here. Put that to one side, it's a significant check of process. But in terms of the issue we're talking about here, there are really three things that are engaged. One, there's got to be a good and proper purpose to do it, and when we come to some of that evidence the decision-maker spent some time examining the values engaged on a particular piece of land. Then there has to be effectively a park purpose that's achieved, a conservation management purpose at a park level. So that is, in my submission, from section 19(1) and appropriately informs the discretion in section 18(7). So your park needs to be made better, if I can put it that way. Needs to be enhanced. Then there is last, but certainly not least, the overall purpose of the legislation, to achieve conservation, which has within it concepts of preservation, but also protection. So in that way, with the public hearing process as well, you actually have layers of protection that are not present if the land is stewardship and you are seeking to exchange it. For a start if it's stewardship you don't need to have the public hearing process. You do still consult with the local conservation board but you don't have the public hearing process, and the sort of transaction that his Honour Justice Arnold suggested, would in theory be possible, albeit that it would still have to satisfy the conservation purpose. It would have to promote conservation overall. Which may well be a significant hurdle.

It is submitted that the stewardship land category is a gateway category for land leaving the protection of the Act. There are two ways this can happen. It can happen through disposal, which occurs under section 26, and that requires a public hearing process, and secondly it can happen through an exchange under section 16A, which does not require such a process. But it does require consultation with the local conservation board, as I've mentioned, and there must be a net conservation gain.

Which brings us to section 18 which is set out in full on page 111 of the Court of Appeal's judgment at paragraph 19, and it simply sets out, it's an easy way to reference the full text of section 18. We are, of course, concerned with 18(7) in particular. It's a statutory power to revoke the conservation park status with the effect, as I've said, that the land becomes stewardship land and may thereafter be managed as stewardship land, disposed of or exchanged. It's a broad discretion clearly but applying this Court's judgment in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42, which is in the bundle at tab 15, the power to revoke must be exercised to promote the policy and objects of the Act which are to be ascertained from the Act as a whole, and the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. It is submitted there are two special protections that apply to a conservation park. Under section 18(5) conservation parks must be managed in a manner consistent with the purpose or purposes concerned, and that is the specific conservation management purposes in section 19(1) in my submission. So protection as defined and recreation. So that's where the section 19(1) test fits in the section 18 analysis. And then secondly the other protection if you like that is different for conservation park to stewardship, is found in section 18(8), which is before the specially protected status can be revoked and the land becomes stewardship, a public hearing process is required under section 49.

It is submitted that the requirement for a section 49 process confirms Parliament's intention that the power to revoke can be exercised where conservation parks still has some values. If revocation can only occur where there are no values justifying protection, a public hearing process, in my subsection, seems unnecessary –

WILLIAM YOUNG J:
Well I suppose there might be a debate as to whether the assumption is right.

MR MARTIN:
That it is unnecessary.

WILLIAM YOUNG J:

Yes, so whether the assumption that there are no conservation values is correct.

MR MARTIN:

Yes. In my submission that's right. Sorry, I think I misunderstood –

WILLIAM YOUNG J:

Well that might be a reason for having a public hearing.

MR MARTIN:

To check whether that –

WILLIAM YOUNG J:

Yes.

MR MARTIN:

Yes, that might be one reason you might still have a public process.

WILLIAM YOUNG J:

Although if it was confined to that point one might expect it to be specified.

MR MARTIN:

Yes Your Honour. In my submission it still seems surprising, given the way in which the section 49 process is used, that if all you were really doing was validating expert evidence that there were no conservation values left at all, in a piece of conservation land you submit that to a public hearing process.

ELIAS CJ:

Well that is the scheme of an awful lot of Resource Management Act 1991 determinations and other management decisions concerning natural resources. That there is an assumption that actually public process will enable correct decisions to be reached.

MR MARTIN:

There's a limited – I don't want to overstate this point because Your Honours are right, it is a possible interpretation that is simply there as a check that there are no values. What I would submit is that before land can be disposed, so it ceases to be conservation parks, becomes stewardship land, before it can be disposed of as stewardship land, it would need a public process at that point. So it does seem to have unnecessarily duplicated that –

ELIAS CJ:

Different questions being addressed though.

MR MARTIN:

They are different questions but if the first question is being addressed on that basis only, that there are no conservation values, in my submission you might wonder whether it really is worth the cost and inconvenience, if you like, of a process for that purpose.

GLAZEBROOK J:

Presumably stewardship land has value in itself in any event. Some conservation value in itself?

MR MARTIN:

Yes.

GLAZEBROOK J:

Because otherwise it wouldn't be stewardship land one assumes.

MR MARTIN:

Quite right Ma'am.

GLAZEBROOK J:

So if all you're doing is shifting from a higher status to a lower status then maybe that's an indication that you can still have some conservation value in that shift.

O'REGAN J:

But aren't you dealing with the Court of Appeal's view that to remove it from conservation down to stewardship it has to have no value, so that, by definition, then when it becomes stewardship land it still has no value, and then there's a question of whether it can be sold. What I thought you were saying was if it has got no value why do you need to two different processes to sell it.

GLAZEBROOK J:

Yes.

O'REGAN J:

One moving it out and then one…

MR MARTIN:

Your Honour is right, I was approaching that point. However, I am also going to make the submission that I think Your Honour has just touched on, which is that stewardship land does have value, sometimes significant values. It seems also unnecessary, if I can put it that way, that land that's a conservation park should have no values in order to join stewardship land that may have a range of values, including high values, not always, but including high values.

ELIAS CJ:

But that isn't really the argument. The argument is having been identified as land worthy of particular protection, it's the qualities that require the protection in the first place that you need to zero in on, not whether it has some conservation values, but the values that required it to be identified as forest park, and if those values have gone, one can see that it should be held as stewardship land, but it doesn't actually meet the argument that you still need to look at the intrinsic values, those that justify the protected status.

MR MARTIN:

And certainly the intrinsic values of the 22 hectares were looked at carefully in this case.

ELIAS CJ:

Yes, I understand that.

MR MARTIN:

But I think the answer to Your Honour's question I think is that it's the protections that are important in relation to the conservation park status. So the public process and the management integrity, if you like, of the conservation park –

ELIAS CJ:

And the fact that you can't sell it.

GLAZEBROOK J:

You say as a whole, you're looking at the park as a whole. That if the 22 hectares was by itself you accept i.e. in a park by itself, you'd accept that it's status could not be changed? Unless it had lost the attributes that made it protected land in the first place?

MR MARTIN:

So if the 22 hectares was all there was?

GLAZEBROOK J:

Taken by itself, yes. I think that was your answer to Justice Arnold's question wasn't it?

MR MARTIN:

Yes, that's right

GLAZEBROOK J:

Assuming that was the conservation park by itself and that was all there was.

MR MARTIN:

Yes, the whole park. In my submission you couldn't satisfy section 19(1) effectively that the whole park was going to disappear because then you no longer have a management area at all.

GLAZEBROOK J:

And I think you also said you couldn't say let's get rid of, say it was 30 hectares, say let's get rid of the 22 hectares because I'm getting something further away in the country.

MR MARTIN:

Yes, I mean if you were, in Justice Arnold's example you were talking about the Wairarapa and Waikato. That would not seem to, in any sensible way, be managing the same conservation park area.

GLAZEBROOK J:

So your argument is pretty dependent on it being a whole of park aspect to it. Whole of conservation park i.e. an enhancement to the whole of that particular conservation park rather than conservation values generally.

MR MARTIN:

There are both elements to the argument. I don't want to understate the overall purpose of the Act in this, but what is still an important safeguard is the need to maintain the integrity of the Ruahine Forest Park, yes.

The next step is still the overall purpose, if you like, of the legislation, which I think guards against different things. It allows, for example, the possibility that there are such high values on an area of park that even a large addition to the park does not make it a worthwhile, you know, proposal. That could certainly be the case, and the values were considered very carefully in this case. So it's not simply a case of is it a bigger area. It's also looking at the values that there are in the proposal. So the purpose of the Act is important in that, absolutely.

I was going to come on to now a couple of different hearings. Firstly that there were more restrictive approaches in earlier legislation that were not adopted, and that the legislative history of these provisions does not restrict the revocation power in section 18(7). I was going to turn fairly briefly to other statutory schemes pre-dating the enactment of the Conservation Act, and governing other kinds of protected areas that are not in issue here, national parks and reserves. It's helpful in my submission to look at the provisions for removing protected status under those Acts. I'll start, if I may, with the, and this is the appellant's bundle of authorities, at tab 5, the National Parks Act 1980. In short where I'm coming to with this, Your Honours, I'm going to show you some provisions, and essentially my submission is going to be if this is what Parliament intended then Parliament had the templates, if you like, in existing, pre-existing legislation. So tab 5 you see section 11(1) –

ELIAS CJ:
Sorry, this is a statutory interpretation argument advanced from the wider statute book is it?

MR MARTIN:
Essentially it's a little more narrow and nuanced than that. It's saying –

ELIAS CJ:
It's in the same area?

MR MARTIN:
It's saying these are other protected areas of significance to the country. Parliament had these on the books at the time. If it wanted to say, you can only go to Parliament to revoke, then there was the template there. I won't labour the point but section 11(1) Act of Parliament required to exclude land from a national park, no text like that is engaged by this appeal, tab 6 is the Reserves Act 1977.

ELIAS CJ:

Sorry, what's the argument that you take from this – that there could have been a power to revoke in the Conservation Act?

MR MARTIN:

Well instead of a power to revoke, instead of the broad discretion in section 18(7) Parliament could have, if it had wished to, said you need an Act of Parliament to revoke the status, and as we'll see just in a moment that is, in fact, what the Forests Act 1949, so when the land was held as forest park under the Forests Act that is, in fact, the position.

ELIAS CJ:

But if you don't come within, if your scheme and purpose argument doesn't succeed, that's always an available option as to how you would proceed. So if you fail in that, that is something that Parliament could do.

MR MARTIN:

Yes it is. It remains an option –

ELIAS CJ:

So it's more that there is no prohibition comparable to this in the Conservation Act.

MR MARTIN:

Quite right.

ELIAS CJ:

But why should there be if there is, if you can bring yourself within the powers that have been provided. I just don't quite understand what you take from this that's of such significance.

MR MARTIN:

So the submission will be, and I will take you reasonably briefly to these more restrictive provisions, and then we look at the legislative history where it was suggested that –

ELIAS CJ:

There'd be equivalent provisions.

MR MARTIN:

Be an express prohibition in the Act, and that was rejected by Parliament. The Minister touches on, it, there was a departmental report, so the idea of having an express exclusion as you find in the, as you found in the Forests Act, was rejected by Parliament, and where that takes me in the submission is that in my respectful submission the Court of Appeal's majority decision limits the discretion in 18(7) almost to the point where that intention of Parliament is frustrated, with respect, because requiring that there be absolutely no values is a fairly small, it's a very heavy restriction on what is, on the face of it, a broad discretion.

So that's where it fits into the interpretation. I can take you reasonably quickly through those provisions because you'll find them, just so you can orient yourselves to them. So there was the national parks provision that I've touched on. At section 6 there are the Reserves Act 1977 provisions which are a little more complicated when you first come to them, but I can take you to the clear parts of those. Section 24 is about change of classification including revocation of reserves, and the part of that that's most germane for our purposes are subsections (3) and also subsections (8) and (9) and (10). So if we look at subsection (3), where you have a scenic nature or scientific reserve, and it's proposed to change that to a recreation, historic or Government purpose reserve, or a local purpose reserve, you can only do that by reason of the destruction of the forest and vegetation and so on, or the scientific or natural features, or for any like cause no longer, it's no longer suitable for the purposes of its classification. So a formulation quite close to,

in general terms, where the Court of Appeal majority gets to, expressed in the Reserves Act, but not adopted by Parliament in this case.

Now immediately prior to the Conservation Act being enacted, Ruahine Forest Park, and therefore the 22 hectares, was subject to section 19 of the Forests Act and this is at tab 4 of the bundle. Section 19, very similar terms to what we were looking at under the National Parks Act. It is submitted that Parliament could have said that an Act of Parliament is required to revoke the conservation park status, just as the Forests Act did, and just as the National Parks Act does.

ARNOLD J:
Just while we're on the Forests Act, was this forest park set aside originally under this 1949 Act or an earlier Act?

MR MARTIN:
I stand to be corrected, I think it may pre-date. There's a *Gazette* notice. The *Gazette* notice is at volume 4, tab 71.

ARNOLD J:
Yes, I had a look at that. Is that the original *Gazette* notice? Yes, I guess it would be. That's made under the, that says pursuant to section 63A(1).

MR MARTIN:
Yes. My understanding is there maybe earlier *Gazette* notices tracing back further into the 19th century.

ARNOLD J:
Oh really?

MR MARTIN:
So, but for other purposes I think, so you go back into the time of forestry, so not necessarily protected status. But it has been Crown land, if you like, for a

considerable time. And alternatively Parliament could have said, as the Reserves Act does, in relation to specific reserves –

ELIAS CJ:

Sorry, what was the forests, what were you taking us to –

GLAZEBROOK J:

Section 19, if the Act of Parliament was the –

ELIAS CJ:

Right, yes.

MR MARTIN:

That was the provision that applied immediately prior to the 1st of April 1987.

ELIAS CJ:

Yes I see, thank you.

MR MARTIN:

Where that takes me to is that there were public submissions on the Conservation Bill that raised this fact, that the Forests Act required an Act of Parliament, whereas the equivalent provisions in the Bill did not and DOC's report to the select committee responded to those submissions and that is at tab 28, and I will take you to this if I may, tab 28 of your bundle of authorities, it's just an extract from the lengthy report, but the paragraphs that I'm particularly interested in are 4.7.6 and over the –

ELIAS CJ:

What status does this have? I just don't remember that we've ever been referred to submissions on Bills as opposed to reports of select committees. I mean I'm happy for you to carry on and show us it but I'm not sure what use we can –

GLAZEBROOK J:

Does the select committee refer specifically to rejecting those submissions?

MR MARTIN:

The Minister talks about this issue so I accept –

ELIAS CJ:

All right, so it sets the scene for that, that's fine.

MR MARTIN:

I accept that this, ordinarily it's the departmental report, but the Minister picks up on this point and speaks to it. So it was paragraph 4.76 and over the page, which is later in the report because it's an extract, 4.10.6. So the point that I'm indicating, and I'll come shortly to what was said about the provisions in Parliament, but the point is that these submissions were made and the Department was, in its report, suggesting that the protections that would be, looking at 4.10.6, "Apart from the issue relating to public notice, there is some concern whether clause 18(7) permits converting a protected area into a stewardship area. Provided the procedures set out in the Bill are followed a protected area could become a stewardship area. As it has been recommended that there be public notification procedure before revocation or variation takes place there will be adequate protection."

So the point I'm emphasising through these materials is that there was before Parliament at this time an awareness that there were other provisions that had applied to this land that would have required an Act of Parliament, and you also had there the contemplation by the Department that there could be a change in status from a conservation park to stewardship land, but that the protections that were being put in place, which is the public notification, the public hearing process, would be adequate protection. So I'll come onto what was actually said in Parliament about that, and I think I said before it was the Minister who mentioned it, and I'm wrong there, it was the Honourable Philip Woollaston who raised the same point in the course of the second reading debate, and that is at tab 21.

ARNOLD J:

Sorry, could you give me the reference again?

MR MARTIN:

Yes, it's tab 21 and page 7981, and I'm looking there at the penultimate paragraph on that page, so 7981, in the penultimate paragraph, this is when he first touches on this, "In some respects the quality of protection is very much reduced. For instance, under the Forests Act forest sanctuaries could be revoked only by an Act of Parliament. They can now be revoked by notice; obviously that would be a major step, but it is less than an Act of Parliament." Then he picks up that point again on page 7983 about two-thirds of the way down. It's really the first full paragraph above the, Mr McLean in the transcript. "It is still possible, and always will be possible, for Parliament to pass an act to dispose of land, because no Parliament can bind it successors. The Bill ensures that the normal procedure that is laid down in statute is a relatively slow one that will ensure that public-interest groups and individual members of the public will have adequate opportunity to make their views known and have them listened to before such a decision is made. That right is not guaranteed by an Act of Parliament."

MR COOKE QC:

Sorry to interrupt, for the record the first reference he took you to was actually Mr Upton, the opposition spokesman, and Mr Woollaston is responding to Mr Upton's comment.

ELIAS CJ:

Thank you.

MR MARTIN:

I'm grateful to my learned friend for that correction, thank you. It is submitted that it is clear that Parliament expressly turned its mind to the question and intended the public hearing process in section 49 to be an effective substitute for Parliamentary scrutiny of revocation decisions. And on the majority's interpretation of section 18(7) an Act of Parliament is required unless there are no values. In other words section 18(7) is restricted to situations where, in my submission, there is unlikely to be a great deal of public interest anyway. So you have the hearing process, but in practice the discretion may only be

exercised where there are really no values that are likely to engage public interest. When what Parliament was intending, and the Court may have different views about the relative efficacy of the Parliamentary process versus the public hearing process but it seems clear, with respect, that what Parliament was contemplating is that the public hearing process would be a substitute on these decisions for Parliamentary scrutiny.

So again, with respect, what the majority has done is read down the discretion in section 18(7) so that despite the public hearing process protection, in any case of real public interest there would be an Act of Parliament required, and it is respectfully submitted that that approach is contrary to the text, to the board purpose, and to what is said in the Parliamentary materials. In my submission it's the very approach that Parliament rejected.

ELIAS CJ:
And what specific reference in the Court of Appeal decision are you making that submission about?

MR MARTIN:
So there are a number of references that we will come to Ma'am, but to there needing to be no values of the land before it can be revoked.

ELIAS CJ:
I see. That's fine. You'll come to it later.

MR MARTIN:
So in essence what the Court of Appeal decided is the revocation power in 18(7) could only be exercised where the land no longer had any values, perhaps because of natural events. Or perhaps because there never were any values.

Now I should say while we're on this page of Hansard, so this is 7893, earlier on that page there are the words of the Honourable Philip Woollaston that the majority relies on to read down section 18(7). These are in –

ELIAS CJ:

Sorry, what page are you at?

MR MARTIN:

So we're looking at page 7983, this is again in tab 21. So looking at the second paragraph there are a couple of references there to permanent protection, so protected permanently and permanently protected. Now this brings us to the end of the majority's paragraph 55, which is at the top of page 124 in the Court of Appeal's decision. So 55 starts on page 123 and goes over to 124, and at the top of 124 the Court of Appeal says – I'm sorry, at the end of that paragraph 55, the Court of Appeal says, "It follows that permanent protection – at least within the ambit of the administrative regime – is the defining feature of specially protected areas, which does not extend to stewardship areas." It is submitted that the key words there are "at least within the ambit of the administrative regime".

ELIAS CJ:

Well, there's nothing wrong with that statement, even on your submission, is there?

MR MARTIN:

Depending on what –

WILLIAM YOUNG J:

You say it's not permanent, not necessarily permanent?

ELIAS CJ:

Well, it's within the ambit of the administrative regime, so within the scope of the legislation.

MR MARTIN:

I agree. The Court of Appeal goes further, and I'll step you through that.

ELIAS CJ:

Yes.

MR MARTIN:

They continue, but it does on the face of it take in those words, "at least within the ambit of the administrative regime", there's not necessarily a difference between my submission and the Court's position there. The permanence of a specially protected –

ELIAS CJ:

And it is permanently protected, in any event, unless the status is changed, through a public process.

MR MARTIN:

Well, the permanence of specially protected area is relative to stewardship length, in my submission.

ELIAS CJ:

Yes.

MR MARTIN:

A conservation park is more permanently protected than stewardship land, but revocation does not require an Act of Parliament.

ELIAS CJ:

No. Well, but I don't think they're saying that, are they?

MR MARTIN:

Well, they don't say it requires an Act of Parliament, but they do go on later to say that it can only occur where there are no values.

ELIAS CJ:

Yes.

MR MARTIN:

And we'll come on to that. So, except there is still an area, if you like, carved out for the discretion to operate in, but it's effectively where there are no values attaching to the land any longer, which in my submission does rather restrict the discretion in a way that Parliament was not contemplating.

So just to recap, what the protections are for revocation are the public process, that the discretion is exercised for good and proper purpose, that conservation park management purposes are met, that's section 19 – in this case by adding more and better land back to the park – and conservation is promoted. So, the purpose of the Act met, in my submission through the net conservation gain approach in section 16A(2).

Now at paragraph 56 the Court of Appeal refers to the *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) decision in support of the proposition that land can only be disposed of when it is no longer required for conservation purposes. *Buller* is a High Court decision at tab 8 of the bundle. It was a case where DOC was being asked to give up land for a hydroelectric scheme where DOC still considered there to be a conservation purpose for the land, and there was no countervailing conservation benefit for giving it up. The case wasn't decided in the context of revocation of specially protected areas or in exchange. It is submitted that the good and proper purpose test, which is the wording from *Buller* simply accords with this Court's approach in *Unison*. Protection, as defined under the Act, and hence specially protected areas, and "park purposes" in section 19(1) contain within them, in my submission, the concepts of enhancement and enlargement of the conservation park. That is in contrast, with respect, to what the majority held at paragraph 57 where they say, "The whole concept of conservation is predicated upon maintenance of the status quo once land is found to meet the statutory requirements of protection and preservation." It is submitted that a specific parcel of land may no longer be required for conservation purposes because even though it still has conservation values, there is a better opportunity to achieve conservation, both at the national level, and at the relevant park level, and I mean they both need to be satisfied. That, in my

submission, could be a good and proper reason for changing part of the land status. It is the park that is managed for conservation purposes. Resources are protected as part of the park and their intrinsic values are maintained as far as practicable in order to achieve conservation purposes.

However, the majority rejects this approach and at the end of paragraph 57 says, and you'll see it discussed at paragraph 57 but it says at the end "any such instrumental value can only be realised through legislative intervention". So that's as close as the Court gets to saying that an Act of Parliament is required. There is still the carve out for where there are no values, but if you want to change the status where there are some conservation values remaining, legislative intervention is required.

I was about to move on to another section.

ELIAS CJ:
All right we'll take the morning adjournment now.

COURT ADJOURNS: 11.26 AM
COURT RESUMES: 11.45 AM

ELIAS CJ:
Yes, Mr Martin.

MR MARTIN:
I'm just going to turn to another section and the key propositions in this section were that revocation must enhance the same specially protected area, which I touched on earlier, and that here a separate revocation decision with a public hearing process, exchange and addition of land back into the park, all occurred. And so I move to the majority's paragraph 66, and despite what is recorded in the first sentence it is not the Director-General's submission that section 16A was intended to apply to specially protected conservation areas, there first needs to be a revocation, which requires a public hearing process not required for an exchange of stewardship, and section 19(1) also applies

and requires the same specially protected area to be enhanced, and this was the point that was raised by his Honour Justice Arnold. This conservation area constraint does not apply to exchanges of stewardship land. In this case the Director-General did things and considered things not required for exchange of stewardship land. The Director-General's decision were not, in my submission, collapsed or conflated into one, four distinct statutory decisions occurred. Firstly –

ARNOLD J:

Well, wasn't the terms – the terms of the delegation from the Minister to the Director-General were based on the exchange, weren't they?

MR MARTIN:

There's never been any –

ARNOLD J:

Well, where is the delegation, the actual language of it, from the Minister to the Director-General?

MR MARTIN:

The – we'll pull out the delegation and take you to it.

GLAZEBROOK J:

Sorry, while you're doing that, where were you reading from?

MR MARTIN:

66, yes.

GLAZEBROOK J:

Of…

MR MARTIN:

Oh, the Court of Appeal judgment, I'm sorry, Ma'am.

GLAZEBROOK J:

That's what I thought you said, I just didn't –

WILLIAM YOUNG J:

I think it was all the paraphrasing.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

And comment.

GLAZEBROOK J:

That was my problem, I think.

MR MARTIN:

I'm sorry, I'm just noting that…

WILLIAM YOUNG J:

I think you were addressing paragraph 66 of the Court of Appeal judgment rather than reading from it, weren't you?

MR MARTIN:

Yes, sorry, no, I was submitting in relation to it, not reading from it, yes.

GLAZEBROOK J:

I think I was busy trying to find out where you were reading from, which was, I was having some trouble keeping up. So I probably missed just about all of your submission on it, I'm probably just warning you.

MR MARTIN:

Okay, I'm sorry, Ma'am, my mistake. I'm just trying to pick up the delegation.

ELIAS CJ:

Do we have the delegation? Can you tell me…

MR MARTIN:

Yes, you do. So the delegations are in volume 3, which is the yellow volume, at tab 42.

So the answer to Justice Arnold's question, I think, is at page 499, paragraph 5 in the delegation briefing there, and the instrument of delegation follows, and there's a revocation decision and the intention to revoke.

ARNOLD J:

So it applies, at the bottom of 501, it applies in the circumstances of part of the conservation being park. So that limits the delegation to those circumstances doesn't it?

MR MARTIN:

Yes Sir. I think that's right. So there's never been any pretence, if you like, that there wasn't a –

ARNOLD J:

I thought you were saying there were four separate decisions?

MR MARTIN:

I was going to work through what those decisions were. But they were, in essence, decisions necessary to revoke conservation park, if that was decided to proceed with, in order to facilitate an exchange, and it's described variously in the documents as necessarily linked, words of that nature are used through the decision documents, to recognise that there is – the situation is that this revocation would not be being considered unless there was an openness to look at the proposed exchange. But it's –

ARNOLD J:

It's an exchange associated with the storage scheme. It's not any exchange. It's one associated with this particular storage scheme.

MR MARTIN:

Yes.

ARNOLD J:

Yes.

MR MARTIN:

In order to facilitate this particular exchange in order that those 22 hectares be required in that way, yes.

ARNOLD J:

Yes.

MR MARTIN:

Yes Sir. So it may not be Your Honour's point but there's not, there's no denying that the proposed exchange was being potentially facilitated – or was being facilitated by the revocation that's proposed but that's not, in my submission, to say that the steps are in the decision-making work conflated in the way that the Court of Appeal finds. The decisions, when I say there were four decisions that are necessary, there are really four steps in the decision-making process in order to facilitate, or revoke the conservation park in order to facilitate the exchange and put land back into the park, and those four distinct statutory steps are the declaring of the 22 hectares to be held for conservation purposes, so that's under section 7(1), and it's necessary because the land is a deemed conservation park in terms of the transitional provisions, so that's section 61(9), effectively deems this forest park land to be conservation park land, and so before you can do anything with it, it needs to be declared to be conservation park under 7(1). The second step, or second –

ARNOLD J:

Under 7(1) or 7(1A)?

MR MARTIN:

It's 7(1). So 7(1) is the provision that was used.

ELIAS CJ:

Does that appear on the approval? It's all right, I just don't see it there.

MR MARTIN:

So I'll take you to another volume, Ma'am, for that question about the delegation for section 7(1). Volume 5 is the green volume, tab 77, so these are delegations, general delegations, and the 7(1) is in the bottom of page 1230, so 1-2-3-0.

ELIAS CJ:

Sorry, were you taking us to 1230? Is this just as an example? This doesn't apply here does it?

ARNOLD J:

It's a general delegation to exercise that power.

GLAZEBROOK J:

General delegation that allows…

ELIAS CJ:

It's a general, ah, sorry, I didn't understand.

MR MARTIN:

So that is a general delegation.

ELIAS CJ:

Yes.

MR MARTIN:

And the bottom of 1230 is the one relating to section 7(1).

ELIAS CJ:

Yes.

MR MARTIN:

So the second decision is the one that we've touched on in relation to the delegation, section 18(7), to enable – so the revocation of the conservation parks, that is the 22 hectares, to enable the enhancement by addition of land to the forest park, consistent with the conservation management purposes, and then the third step or the third decision, if you like, is section, is the exchange of the 22 hectares for the Smedley block under section 16A, and you'll see that over on, in the general delegations, over on pages 1231 and 1232 in volume 5. And the fourth step or decision is the addition of the Smedley block as conservation park to the Ruahine Forest Park under section 16A(3) – again, this is on 1232 of the delegations, page 1232.

O'REGAN J:

Sorry, what was the section of where you said that, under section…

MR MARTIN:

Section 16A sub (3).

ELIAS CJ:

And it's at page what, 12…

MR MARTIN:

1232 of volume 5.

O'REGAN J:

So the only delegation that had this tag of being limited to the Ruataniwha process is the first one?

MR MARTIN:

The revocation one.

GLAZEBROOK J:

The second one, the second step.

MR MARTIN:

The second step, yes. So 71 was the first one but the revocation one, yes, was tagged in that way.

ELIAS CJ:

Just in terms of section 7(a) or 7(1A) is it? I can't remember.

MR MARTIN:

Yes.

ELIAS CJ:

Is there another Minister in this case?

MR MARTIN:

No.

ELIAS CJ:

Or 7(1) really, because the additional provision seems to have been inserted to make it clear that the Minister could act by himself or herself.

MR MARTIN:

Yes, and that is accepted.

ELIAS CJ:

Yes, so there isn't another Minister who's responsible in respect of this former – this forest park land?

MR MARTIN:

No.

ELIAS CJ:

No, thank you.

MR MARTIN:

And his – and while I'm on 7(1A), because it obviously discussed in the Court of Appeal decision, the majority's decision is accepted that on balance 7(1A) is best seen as an addendum to section 7(1), clarifying that only one Minister's required, that is the legislative history talks about the Ministers, yes.

The point that – having outlined those four steps or decisions, there are a numbers of documents –

ELIAS CJ:

Sorry, that means that you're not contending, as was contended at one stage, that it's an independent source of authority, it had to be read with 7(1), is that your position now?

MR MARTIN:

The Court of Appeal's finding is accepted and it was not, it was never a necessary part of the analysis in the sense that 7(1) was always relied on, and it was expressly relied on in the decision documents in order that there be a public hearing process, and there was a question mark raised over whether, in fact, 7(1A) might point to an alternative, but it wasn't an alternative adopted.

ELIAS CJ:

No.

MR MARTIN:

So in that sense it's a moot point.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

It's not completely moot though, is it, because if there was an alternative that might throw some light on the way in which section, the other section should be construed or applied. So do you say there was no alternative – the only

way to get this land out of the forest park was to go the route that the Minister adopted?

MR MARTIN:
That is, in effect, what I'm accepting in terms of the majority's decision.

WILLIAM YOUNG J:
No, so you accept the majority's decision on that?

MR MARTIN:
Yes.

WILLIAM YOUNG J:
Okay.

MR MARTIN:
Yes, because I'm not able to point to any other, anything else in the legislative history. It's certainly capable of being read as an addendum to 7(1) and it was originally seen as a point, and you'll see it's discussed in her Honour Justice France's decision as well, as perhaps a pointer to land being able to be revoked in other circumstances, or in more broader circumstances, than was accepted by the majority. It's not a point that, in my submission, takes me very far.

ELIAS CJ:
Well hang on. If you say that you agree with the Court of Appeal, then Justice Ellen France's use of it as an aid to interpretation is not one that you rely on?

MR MARTIN:
That's right Ma'am.

ELIAS CJ:
Thank you.

MR MARTIN:

Now there are a number of documents that are in the bundles that form part of the decision-making process. I'm in Your Honours' hands how much time to spend…

ELIAS CJ:

I think we would like to see the important documents that went to the decision-making process.

MR MARTIN:

All right.

ELIAS CJ:

I mean you do have links in your submissions.

MR MARTIN:

I'm very happy to spend the time on it. I don't want to take the Court's time unnecessarily, but I can take you through the various documents that are relevant to the decision-making process.

ELIAS CJ:

Maybe I'll just ask my colleagues. Would you find that helpful because I haven't been to them? Thanks.

MR MARTIN:

So what I might do is I might indicate and give references to some of the significant documents in that process and take you to its key ones. The application by HBRIC for the, with this proposal is at volume 4, page 1074. I wasn't proposing to take you to that –

O'REGAN J:

Sorry, it was the application for what?

MR MARTIN:

So this is the proposal to exchange the land.

O'REGAN J:
Right.

MR MARTIN:
So it's volume 4, page 1074. I wasn't proposing to take you to that one. The science report that we've touched on I won't take you to either but that's at volume 3, tab 67. Now Mr Kemper was the hearing convenor who made a recommendation to the Director-General in relation to this. His report is at volume 3, tab 55. Now I'll take you to his report which is that one in volume 3, tab 55, but I do note that he's also, there's an affidavit from Mr Kemper at volume 2, tab 18. So Mr Kemper's report followed the public process, the public hearing process, including a hearing in consultation with the Conservation Board. He undertook, I think, more than one site visit and he also commissioned the additional scientific assessment that became the DOC science report. So he took that additional step to seek more information, and it was through that process that the additional 20, in the end 23.4 hectares in Donovan's Gully was identified as a potential addition to what had been originally proposed.

One thing I will note about Mr Kemper's report is that there is a, I earlier referred to the table that listed the values of the various blocks of land, the three blocks of land. That table is updated and appended to Mr Kemper's report at page 629. So in the end of the conclusions of the science report were confirmed but the table was updated and you'll find that at 629. Now the departmental submission to the decision-maker, the Director-General, another document I wasn't proposing necessarily to take you to, but it's at volume 4, tab 73, and then we come to the Director-General's – well, and the submission document is important also because it's got –

GLAZEBROOK J:
Sorry, I just got lost. Volume 4, tab?

ELIAS CJ:

73. That doesn't have any particular status in the legislative scheme does it, that departmental report?

MR MARTIN:

It's effectively – it doesn't have a legislative step but it is effectively the material that the Director-General was considering.

ELIAS CJ:

I see.

MR MARTIN:

As part of its decision-making process, along with Mr Kemper's report. And significantly attached to that submission, so that's tab 73, in tab 74, in volume 4, are the documents that were, that went to the Director-General attached to that DOC submission. Now the Director-General's decision is in volume 3, the yellow volume –

ELIAS CJ:

Is there provision for, it seems a bit odd that after having a public hearing and somebody who makes a report as a result of a public hearing there's also a departmental report. That's just an internal matter, is it, in terms of what can inform the Director-General?

MR MARTIN:

Yes, so in terms of the, that's essentially the framework for the Director-General's decision-making and his, and the material that he's –

ELIAS CJ:

Is that the, you are recommended to take a view that, that one?

MR MARTIN:

That's at, as I say, volume 4, tab 73, perhaps we should have a look at it. It's the formalising, if you like, of the decisions that were required. So it effectively

becomes his decision document, which is then communicated to the company in a letter from the Director-General. So this document here, what I'm calling the DOC submission if you like, becomes his decision. That records his reasons and what he decided were the options. Bearing in mind that it also had all the material that is under tab 74 attached to it, and he also had Mr Kemper's report. I'm happy to go into them in some more detail but you'll see by way of, on 761 of the submission the legislation and the statutory provisions are touched on, indicated, policies that we'll be talking about later on, at 766, the conservation general policy, and over the page the Hawke's Bay conservation management strategy are discussed and there are the aspects of the decision required, so the decision to, the four decisions that I've indicated, the four steps that I've indicated are gone through, including the decision to revoke at page 774, the exchange decision and the significant part of this in my submission, the use of section 16A(3) to specially protect the Smedley block, so put it back into the conservation park. And there's also a section that goes from page 775 on the Department's section 4 obligations, so it's a requirement to give effect to the principles of the Treaty of Waitangi go in there. And in the Director-General's communication of his decision, as at volume 3, tab 57, so this is his letter to the company confirming the decision that flows from his –

ELIAS CJ:

Sorry, I've lost the tab. Was it 57?

MR MARTIN:

57. So this is the Director-General's communication of the decisions that he was asked to make in that submission document, what I've called the DOC submission, but his decision-making document. The decision he made there is communicated to the company is this letter of the 5th of October 2015. Now the Director-General, Mr Sanson, has also an affidavit in volume 2 at tab 17. Now both the DOC submission, that decision-making document, and the letter that communicates the decision to the company, show consideration of the values of the land, the conservation park status, that there's to be a revocation, an exchange and an enhancement of the forest park through the

reinstatement of the land back into the park, and so in my submission it's not simply an exchange. It is, and it's accepted and has been transparent in my submission in the process, that the reason for looking at these steps is to facilitate an exchange, and that's why they're being considered, but there are separate steps that are considered individually in the decision-making documents, and in my submission –

GLAZEBROOK J:
Well, they're not – I mean, they might be considered individually but they're considered with a view to the swap, and only because of the swap.

MR MARTIN:
They're considered because the company has come and said that it wishes to have this exchange for that reason. In my submission the Department –

GLAZEBROOK J:
But they wouldn't even get off the ground without the swap, because there wouldn't be any sense of enhancement or anything, would there, to consider?

MR MARTIN:
That's right. So the fact that land is going to come into the park is, as I've submitted, important in terms of section 19(1) because you are dealing with an area that has special protection and so it needs to be enhanced, that area needs to be enhanced. So you still have those different decisions. In my submission they're not all conflated down to an exchange, because an exchange doesn't require the public hearing process, and it doesn't require the land to be put back into the conservation parks. So those are additional steps if you like. But they are considered in the context of the company coming and saying, we'd like to swap this bit of land for that, for the dam proposal, and that is clearly apparent from the documents. It is, if I might submit, it is clear from the documents that the Department has approached this with an open mind. Open to the possibility that the 22 hectares may have values that are such that the proposal does not stack up, and you see the site visits, not only the site visits by Mr Kemper but also by the experts who

prepared the science report, but also by the decision-maker the Director-General himself and then there's comprehensive consideration of the 22 hectares values separately and by comparison with the values of the proposed exchange land. It's clear from the process that they're aware that this is conservation park and that that requires process, but it also, you know, it says something about the values that you may expect on the land and those are looked into carefully, but in the end the land that is put back into the park is part of demonstrating that those values are enhanced through those process, and the Director-General looks at that, in my submission, very carefully as part of this comprehensive process.

So in my submission where it's suggested that the process has been conflated down to a single exchange, that's really another way of saying, it's really another way of stating the argument that you shouldn't be able to revoke where there are any values, you shouldn't be able to revoke an order to facilitate this sort of exchange. In terms of the process, DOC was clear that it was taking different steps and it had, that the land had different category or different statuses attached to it. The question before Your Honours, of course, is whether it was entitled to revoke an order to consider an exchange.

ARNOLD J:
Well was there, for example, discussion of why the 22 hectares was the subject of the section 7(1) declaration but the rest of the park wasn't?

MR MARTIN:
There's not discussion of that, I don't think, in the documents, but – so the area that's been declared is the area that needs to be, if you like, considered for doing something else with, so that would be –

ARNOLD J:
So really the only explanation for it is the exchange. I mean I don't understand, that's just the reality isn't it, and to say there are four discrete steps which are approached in different ways, really is to overlook the driving force of all this. I mean if somebody had been looking at that park as a park

as a whole, and said right we're going to bring it all in through section 7, maybe there'd be something to what you say. But the fact is the only point of bringing this in under section 7(1) was to facilitate the exchange.

MR MARTIN:
So –

ARNOLD J:
There's nothing more to it than that. There's no great consideration of exercising section 7(1) independently or…

MR MARTIN:
I'm certainly not disagreeing that facilitating this proposal and considering this proposal that it was because they were approached by the company because of the dam, that's what made the process flow, if you like. In my submission it doesn't, that doesn't mean that there weren't separate steps. I'm not suggesting that they have been undertaken in some way that's completely, what would be in my submission artificially sort of divorced and separated. It's been understood and is transparent from the documents that this was the context.

ARNOLD J:
I understand that there are four steps but I just don't understand, you know, where that gets you. I mean there are four steps. So what. I mean they have a single objective.

MR MARTIN:
And in my submission it does come back to whether it is permissible under section 18(7) to revoke the conservation park status but if, and here that has occurred in order to allow the exchange to proceed and part of that will, of course, result in land going back into the park and the other things that I've discussed, so there's no avoiding, I'm certainly not meaning to suggest otherwise, but in my submission there is nothing in section 18(7) that should preclude that opportunity being considered.

ARNOLD J:

No, I understand that's your argument.

MR MARTIN:

But that, in essence, is the nub of the argument and the submission I was making just before is that conflation, that sort of language is really, in my submission, simply bringing us back full circle to can section 18(7) be used in the way that the Department has purported to use it. Not in an underhanded way or with any pretence. They have been quite clear what is happening and have endeavoured to set that out in those documents, and the consideration that's been given to the 22 hectares individually, as well as by comparison to the Smedley block, is, in my submission, clear from those documents.

ELIAS CJ:

Sorry, is there one document that really captures all the reasoning. A lot of it, which one do you rely on, or do you have to look at the affidavit and at the communication and at all the material that's referred to?

MR MARTIN:

Well there's the, what I call the DOC submission, or that decision document.

ELIAS CJ:

Yes.

MR MARTIN:

That brings things together. There are the documents that I've, that document brings things together. There is a summary, if Your Honour is after a concise summary in a two page note.

ELIAS CJ:

Well it's really just following on from what Justice Arnold was asking you about, where is there consideration in relation to the balance of the land, that sort of thing. Is there anything more than simply the merits of the exchange?

MR MARTIN:

So those documents do address the values of that land, the 22 hectares, and that submission document, also the science report and Mr Kemper's report, all address individually, sorry the 22 hectares on its own but also the comparative values, if you like, the exchange part of that. So I think the answer to Your Honour's question is that the, certainly the DOC submission decision-making document –

ELIAS CJ:

It's the DOC submission which was really the basis of the –

GLAZEBROOK J:

You're saying there was a summary but that was the summary in the submission or was there a separate summary you were going to refer us to?

MR MARTIN:

There was a separate summary which is, but I'm not relying on that so much as part of the decision-making process, that's a summary in terms of –

GLAZEBROOK J:

And where was the summary then?

MR MARTIN:

It is, it's a two page summary at volume 4, tab 72. But that's if you're looking for a sort of a summary in a short form.

GLAZEBROOK J:

No, sorry, I thought you were referring to…

MR MARTIN:

In terms of the actual decision documents, the decision documents that went to the decision-maker, are the ones that I've indicated and there's quite a bit of it.

Just a couple of other points that were arising out of that. The science report does discuss how the Smedley land will complement the values of the park, and so concludes that it would be worthy addition to the park. So this, I guess, is a submission in response to Justice Arnold's question that the park, as an entity, was considered in the science report, and you also have at paragraph 2 of the letter that was sent to the company, so this is at tab 57 of volume 3, at page 633, the Director-General making it clear that that letter, that's his decision-making letter, "should be read alongside two reports that have been provided to me, each containing a series of recommendations with a yes or no for each, which I have circled as appropriate. The reports are," and basically it's Mr –

ELIAS CJ:
Yes, that does identify it.

MR MARTIN:
– Mr Kemper's report and the departmental submission document, which is that decision-making document, and so then he goes on to record his decision in that letter to the company. So those are the decision-making documents, if you like, the notes that I indicated were a summary if you, for ease of reference really, because I accept there is quite a bit of paper.

So still really on the same point, as his Honour Justice Palmer held in the High Court at paragraph 70, "Legally distinct decisions does not mean decision-makers must blind themselves to an opportunity to enhance and expand a park," and during the passage of the Conservation Law Reform Act 1990 the Bill was amended by a supplementary order paper so that instead of applying to all conservation areas section 16A applied to stewardship areas, and this is a point that has been focused on by the Court of Appeal. To the extent that Parliament can be said to have considered that issue at all, because it arose on a supplementary order paper, the change could be seen as indicating an intention not to permit changes of specially protected land, or it could indicate an intention to ensure that specially protected land cannot be exchanged without first going through revocation and therefore a public

hearing process which, as I've indicated, doesn't otherwise apply to exchanges. So there are the two interpretations that could be drawn from the change –

ELIAS CJ:
Are there really two interpretations? Because you can have revocation in the scheme of the Act and you can't exchange other than stewardship land. Therefore if you want to exchange land that has protected status you will have to revoke that status and make it stewardship land.

MR MARTIN:
Yes, so…

ELIAS CJ:
It's not, you know, more complicated than that.

WILLIAM YOUNG J:
But that was the purpose of SOP, but that may have been the purpose of the SOP.

ELIAS CJ:
Well, it may well have been, but that is the effect of the legislation, which is rather more to the point.

MR MARTIN:
Yes, so if I understand Your Honour, it is possible to revoke a conservation park's status. It then becomes stewardship land and then as stewardship land it can be exchanged.

ELIAS CJ:
Yes.

MR MARTIN:
And so it's not a case that you are exchanging conservation park land, because that's not something that you can do.

ELIAS CJ:

Yes.

MR MARTIN:

But there are the protections of the revocation process, the public hearing process –

ELIAS CJ:

Yes. I just don't see that the legislative history changes whatever the Act is saying and the submission you're making on that, on the text of the Act.

MR MARTIN:

No.

WILLIAM YOUNG J:

I think you're anticipating an argument that's going to come from Mr Salmon.

MR MARTIN:

I am, and it is –

ELIAS CJ:

That it's an evasion of a prohibition on exchange of stewardship land.

MR MARTIN:

Yes.

ELIAS CJ:

Yes, well, I understand that argument, but I'm not sure what you derive from the legislative history that doesn't mean you don't have to meet that head-on, just on the text of the Act, I just don't see how the legislative history is particularly important.

MR MARTIN:

No…

GLAZEBROOK J:

I think, isn't that your submission, the legislative history –

MR MARTIN:

That is my submission.

ELIAS CJ:

Oh, that's your submission, I'm sorry, okay.

MR MARTIN:

You're pushing an open door, Ma'am, but…

ELIAS CJ:

Sorry, okay, thank you. Well, no wonder I was having trouble!

MR MARTIN:

No, I – but, Ma'am, that is exactly where I was heading with that, that while there are the two ways of looking at what the supplementary order paper might have been intended, it is submitted that, exactly as Your Honour put it, revocation is one stop, it results in stewardship, stewardship can be exchanged. So the question is, when can you revoke and what circumstances, and that's the question for the Court, and brings me back to my submissions about the protections that exist in relation to specially protected areas that do not exist in relation to stewardship.

ELIAS CJ:

But it doesn't arise only in terms of exchange, it also, the same structure applies to sale.

MR MARTIN:

Well…

ELIAS CJ:

Well, you can't sell. You can sell stewardship land.

MR MARTIN:

Yes.

ELIAS CJ:

Or you dispose of stewardship land, yes.

MR MARTIN:

That's right. And so the way that you would, if you were to dispose of conservation park land it would have to go through the stewardship land category first.

ELIAS CJ:

Yes.

MR MARTIN:

That's why I described it as a sort of a – stewardship land is a gateway category, if you like, for land that is going out of the Act, whether by disposal, in which case it requires the public hearing process, or by exchange, in which case it doesn't require that public process as stewardship land.

ELIAS CJ:

No, yes, I understand.

MR MARTIN:

So there are the layering of different categories here that is important to understand the scheme of the Act so that we don't end up with this argument that it's been conflated into this is really just an exchange of conservation park, there are number of steps that have been individually considered. I accept entirely his Honour Justice Arnold's point that it was to facilitate and exchange in the context of this dam proposal, but the steps are still significant in the terms of the scheme.

Where I was going to, the point I was going to make about the open processes for public input is an important value in the legislation, achieved

through consultation with conservation boards and in some instances of public hearing process, exchanges to achieve a net conservation gain do not in themselves require a public hearing process and it might be, in my submission that may simply be because of the nature of the net conservation gain concept, you're gaining through that. But revocation of protected status does require that public hearing process and that's consistent with that additional higher status of a conservation park. So that's why you have that process attaching to the revocation decision. Again, acknowledge his Honour Justice Arnold's point that much of the subject matter if you like may be similar, because you are looking at this proposal in terms of adding land back into the park, so you're looking at the land's values and how it complements the park, extends altitudinal range and the ecological values that are not present otherwise in the park, but at the end of the day there are still, in my submission, different steps that have to be followed and were followed here.

Which brings me, I think, to paragraph 68 of the majority's decision. I will be mindful of guidance earlier, so will make it clear when I'm quoting and when I'm not here. Paragraph 68 is at page 128 of volume 1, and it's at the end of that paragraph that I'm reading from, speaking of the park, "Its designation could only be revoked if its intrinsic values had been detrimentally affected such that it did not justify continued preservation and protection; for example, if the park purposes for which it is to be held were undermined by natural or external forces." And then the majority's conclusion at paragraph 70, in my submission, turns on that finding – and I'm not reading at this point from the majority's decisions. Permanence is read into the definition of "conservation" and hence into the purpose of the Act, in my submission, and the enhancement and the expansion elements of protection are effectively put to one side and, as a result, the specific conservation purposes in section 19(1) are, in my submission, not applied by the Court. What you have instead, it is submitted, is preservation, maintenance of the intrinsic values as far as practicable, although the word "preservation" isn't used in section 19(1), and it isn't emphasised by the majority in this part of the judgment in its conclusion at 70 either. Though I do want to be clear in making this submission that the Director-General is not –

ELIAS CJ:

If that "detrimentally affected" was taken out, would you quarrel with that sentence if it read, "Its designation could only be revoked if its intrinsic values were such that it did not justify continued preservation."

MR MARTIN:

In my submission the test on the discretion is not necessarily as strict as that. There may be a situation where the value –

ELIAS CJ:

So intrinsic values you would not accept, is that right?

MR MARTIN:

The intrinsic values are undoubtedly part of the purpose consideration because they are there through preservation and they're there in the definition of conservation as well. So they are certainly part of the analysis when you come to look at the purpose. But they're not in the definition of "protection" and so when you're looking at the park values, you don't have to, if you like, preserve at all costs, or maintain the absolute status quo, in terms of the particular natural resources that are being protected within the park at a given time.

ELIAS CJ:

What else, though, could you assess it against. Even if you are right and that you can make this decision by looking to what you gain with the exchange land, even if that's a correct way to proceed, wouldn't you be then assessing whether the intrinsic values of the land that you're going to exchange don't justify its continued preservation and protection in the light of what you're obtaining. It's still intrinsic values, isn't it, of the land?

MR MARTIN:

Yes Ma'am and in that sense the intrinsic values in relation to the land, the area, I accept that that's within the scope of the purpose and is properly so.

It's when you get down to I guess the sort of individual tree level that it's accepted, in my submission, the –

ELIAS CJ:

Why do you say that they are concerned about the individual tree level. They're only ever concerned about this 22 hectares.

WILLIAM YOUNG J:

They're concerned about the 22 hectares in a vacuum, though, they're not looking at in terms of what else is available. That's what the Court of Appeal's saying they weren't allowed to do.

MR MARTIN:

Yes Sir.

WILLIAM YOUNG J:

They could only look at, they had to shut their eyes to everything else, other than the 22 hectares.

MR MARTIN:

Yes.

ELIAS CJ:

But how can you avoid looking at the intrinsic values of the 22 hectares in making the assessment that relinquishing it is consistent with the conservation purposes.

MR MARTIN:

No, that's not my submission. It's not my submission that the intrinsic values on the 22 hectares are not a relevant consideration. They not only are but they, and they were given very significant consideration through this process, but they are not, they are not –

WILLIAM YOUNG J:

Not the only ones.

MR MARTIN:

Exactly.

WILLIAM YOUNG J:

Not the only considerations.

MR MARTIN:

They're not the only values. You can have regard also –

ELIAS CJ:

But don't you have to be brought to the determination that, at least in the light of the deal that's offered, they don't justify continued preservation and protection.

MR MARTIN:

By, yes, including – and they might, that might be because the individual values looked at as such that the purpose cannot be achieved by allowing those values to be lost from conservation, or it may simply be that relatively, even compared to what's been proposed, it doesn't stack up. So that isn't simply by –

ELIAS CJ:

But it's still quite a high standard if you have to be brought to the conclusion that they don't justify continued preservation and protection. It's not just a net gain determination.

MR MARTIN:

So the two tests that are being, the test that is being applied in section 16A is a net conservation gain and it has two parts to it. So there are the, and perhaps I'll take you to it rather than paraphrasing it, but section 16A, this is in tab 1 of the bundle of authorities, and it's subsection (2) that we're concerned with. So following consultation with the local conservation board, "An exchange will enhance the conservation values of land managed by the

Department and promote the purposes of this Act," with "conservation" by definition of course having with it –

ELIAS CJ:
But this is the exchange provision which applies to stewardship land.

MR MARTIN:
Yes.

ELIAS CJ:
Surely when you're deciding whether to revoke the protection that means you can't exchange you have to, you can't just go on the net benefit that clearly section 16A permits?

MR MARTIN:
No, I accept –

ELIAS CJ:
You have to make a determination that the revocation of protection is appropriate in the scheme of the Act.

MR MARTIN:
Yes, Ma'am, I accept that –

ELIAS CJ:
Well, my question is why don't you have to be brought to thinking that the land, that there's no justification because of the gain for continuing preservation and protection. Otherwise really it's to go back to what Justice Arnold was talking about: you can always make a trade.

MR MARTIN:
And this takes me back to my submissions that the values on the land, the 22 hectares hectares look at, if you like, by itself, and then by comparison, so we looked at it secondly, by comparison were assessed very carefully, and so the decision to revoke the consulate –

ELIAS CJ:

Well, it was a balance wasn't it? But is that what's requires when you're looking at revocation or is it something that's a little more respectful of the protected status of the land that you're exchanging, so that you have to be brought to the view that it's not worth protecting that?

MR MARTIN:

And that it is worth putting the other land –

ELIAS CJ:

Not that you're going to get a gain if you look at them as a comparison.

MR MARTIN:

No, and you certainly wouldn't just do that on sort of the crude land area if you like, because there are the conservation values that are important and which were looked at here. And so, as I submitted earlier, there is undoubtedly the possibility that you might have 22 for 170, but this 22 had such high values that that didn't make sense.

ELIAS CJ:

But you're talking about values that are really incommensurable anyway, so that this balancing is pretty rough. I just wonder whether the scheme of the Act isn't to give more weight to the status of protected land than you get to by really going straight to the exchange idea.

MR MARTIN:

I agree you shouldn't go straight to the exchange idea, and that's where the purpose, when I outlined the steps, you have to have a good – the three, putting aside public process, you have to have the good and proper purpose to do it, a good and proper reason to do it, then you have to have the, it works at the park level, if you level, so that's that the park is better off, if I can put it that way, and then you do still have to satisfy the conservation purpose of the Act, which is a broad purpose, in my submission it is still forward-looking and has that management component to it, so it's not a preservation purpose, it

also has protection within it. But in submitting that I am agreeing with Your Honour that the consideration of the conservation park status must be an important consideration in this, and in my submission it was given that consideration, there was a –

ELIAS CJ:

Well, where in those decision documents is there recognition of an additional concern about the fact that the land is protected, as opposed to whether the two bits of land are, you know, one is more desirable than the other? Does that come into the scales at all, the fact that this is protected land?

MR MARTIN:

It certainly is in the scales in those documents. Would Your Honour mind, I'm conscious that I will still be going at lunch –

ELIAS CJ:

Yes, you can come back to that, that's fine.

MR MARTIN:

If I considered specific points to answer Your Honour's specific question because I understand what you're saying.

ELIAS CJ:

Yes, thank you.

MR MARTIN:

And if we identify those places. Because I accept what Your Honour is saying, that I must have some part in the overall decision-making, that this is conservation park land. I also submit that it should be in those scales that the land that goes into it is worthy of becoming conservation park but each has to be looked at separately as well as by comparison and in my submission that is what occurred.

I was submitting to be clear the Director-General is not saying the definition of "protection" authorises an exchange of specially protected land. So I'm not saying that protection in itself authorises that. The work the word "protection" does in the definition of "conservation" and then in the purpose, and in section 19(1) is to enable, enhancement and expansion of resources to be considered. So a good and proper reason to revoke conservation park status can include facilitating an exchange to augment, enhance and expand the same conservation park.

At paragraph 71 the, and I'm not quoting quite at this point, the majority require the Director-General to be satisfied a specially protected area, in quotes, "no longer merits its particular designation" and should be, later, "and should be reclassified as a stewardship area." But while revocation may be a step towards conservation park land going out of the Act, that isn't the effect of the revocation decision. It simply changes the status from conservation park to stewardship and stewardship land is not generally land that has no conservation value. So this was the point that I think her Honour Justice Glazebrook raised earlier. In my submission there is no reason, in terms of the scheme of the Act, for conservation park land to have no value before it can be reclassified as stewardship area.

I come on now to paragraph 74 of the majority's judgment, but I note there are similar statements to this at paragraphs 4 and 18 of the judgment. The part of the judgment that I am referring to is at the end of paragraph 74 where the majority say, and I quote, "Whichever way it is viewed, the conflation of the revocation and exchange inquiries had the effect of circumventing a statutory prohibition which had been the subject of careful legislative consideration before its enactment." And, with respect Ma'am, this was the point that I think you touched on.

ELIAS CJ:

Although I suppose what I was just putting to you then is rather similar to what the Court of Appeal majority says in the first sentence at paragraph 74, that the whole matter has been driven by the section 16A test, and my query is

whether really that is what should have happened, even if you're right that it's possible to look to the exchange as a reason for revoking the status of the land. I'm not sure that you apply the section 16A test if you have protected land.

MR MARTIN:

Which, as I say, we can take some specific paragraphs, I think, that bring it back to that separate consideration, which may be the most effective way to answer that question Ma'am.

ELIAS CJ:

Yes. Mr Martin, can you just give me an indication of how you want to develop your argument. I'm just wanting to get some sense overall of where you're heading.

MR MARTIN:

I wasn't going to spend a lot longer on this part of the argument, before moving to the, and more briefly, to the policies, so the conservation general policy and the conservation management strategy, which is a separate issue, and then I was going to move on to what is a completely separate issue, which is the question of marginal strips. Now I wasn't going to be necessarily very long with that either.

ELIAS CJ:

No, so you would think that you would be completed in what sort of length of time after lunch?

MR MARTIN:

Certainly within an hour I would expect.

ELIAS CJ:

Yes, that's fine. We've got seven minutes, we should carry on.

MR MARTIN:
Thank you Ma'am.

ELIAS CJ:
Ten minutes according to the computer clock, which must be more accurate.

MR MARTIN:
And in that time perhaps if I just come briefly, as I indicated I would, to the dissenting judgment of her Honour Justice Ellen France, then President of the Court of course. She agreed at paragraph 87 with His Honour Justice Palmer that, and I'm quoting here from Justice Ellen France, "In making the first decision to revoke the status of the land, the Director-General was not limited to a consideration of the conservation values of the 22 hectares of the RFP land. Rather, the Director-General could consider conservation purposes more broadly." And her Honour also agreed with Justice Palmer that the Director-General did satisfy himself of what was required, that's at paragraph 88 of her Honour's dissent.

Promotion of conservation may be achieved in various ways in my submission and the focus was appropriately on the park as a whole. That's from Justice Ellen France's paragraph 89. Her Honour also saw force in the submission that at paragraph 94, and I quote, "The factors that primarily justify maintaining the conservation park status over and above stewardship, that is, public recreation and enjoyment, were not present in relation to the 22 hectares because of difficulties with access. But the RFP as a whole would be enhanced in terms of public recreation and enjoyment by the addition of the Smedley block, which would not involve difficulties in terms of access." I stop quoting there. In my submission that, of course, picking up on the element of section 19(1) that involves recreation.

Now at that point I propose to move to the question of the general policy and the conservation management strategy and will be submitting that these were considered to the extent relevant to the extent that they were of assistance. In my submission DOC did have regard to the relevant policies including those

raised by Forest and Bird to the extent it considered them to be of assistance, and the policies raised by Forest and Bird are not directive. The easiest way into this part of the argument may just be to move to the written synopsis, the appellant's submissions, if that document is available, and I can indicate where the relevant parts of the argument sit, and I'm happy to be guided by you, Ma'am, as to how much time they require. But the relevant parts of the argument starts at page 21, paragraph 80 of the appellant's submissions, then I was going to go over the page to paragraph 81.

ELIAS CJ:
So this is not para 21 of your submissions?

MR MARTIN:
So this is 81 of our submissions, yes Ma'am. So it's under the heading the relevant policies were considered at the top of page 22.

ELIAS CJ:
Yes.

ELIAS CJ:
What's the basis for saying the documents are mandatory considerations? What's the statutory authority for them?

MR MARTIN:
So the…

ELIAS CJ:
The conservation general policy and the Hawke's Bay conservation management strategy?

MR MARTIN:
So the basis in which they come to have – is considered at, I'll take you thorough it in this argument. If you look at paragraph 92, through there, this is where we're talking about whether they're directive or not. "Section 17A

requires that 'Subject to this Act', conservation areas are to be managed in accordance with statements of general policy, conservation management strategies and other documents." So section 17A confirms that in the event of conflict between the legislation and the relevant policy documents the legislation is to prevail, in my submission.

WILLIAM YOUNG J:
Okay, thank you.

MR MARTIN:
I'll just go back to where I was at 81, because the first part of the argument is that they were considered, to the extent that they were relevant or of assistance, and then the submission is developed that in any event they are not directive in a way that overrides the statutory decisions that were made.

At paragraph 82 is the policy 6A from the general policy we're dealing with at this stage, the conservation general policy. This is the one that was considered by the hearing convenor in his report, and it was also set out in the DOC submission in terms of the various limbs that you see there, section 1A(1) through to 7 – I wasn't proposing to take you to that, but there is the consideration in that submission document of this provision, which the Department considered was relevant. By contrast, Forest and Bird relies on policy 6B of the general policy, and the key words there in my submission are that they can be, that the public conservation, "As may be reviewed from time to time to ensure that the classification of the land continues," and then there's the list of considerations, and in essence the submission is that this was not a review of the park in the sense that it's contemplated by that policy 6B. But it's not a case that this wasn't considered at all, there was clearly an assessment by the Department that this was not the appropriate or relevant policy to be applied here and that it didn't assist. Similarly if I come forward to paragraph 85 and 86, we're talking here now about the Hawke's Bay conservation management strategy, and at 85 the objective is set out, which is, "To achieve the most appropriate statutory and administrative framework," and the implementation policy's 3.7(ii) is against couched in terms of, "Will

review the status of areas under management," and so again relates back to a review by the Department of land within the park. In any event, the words that follow about the change of status are not purporting to be exhaustive in my submission. And over the page at paragraph 87 it's submitted that both the Department's submission and Mr Kemper's report comprehensively set out how the present proposal achieved the relevant criteria in policy 6A, and at 88 it is indicated or set out there how the policies that Forest and Bird have raised – so this is policy 6B in the conservation general policy and 3.7(ii) in the CMS – how they were considered in detail, and so it's not the case that they weren't considered is the short point. The second point is at 92, where it is submitted that the policies that have been raised by Forest and Bird cannot have a direct effect on the decision-making because they're not binding in that sense, it's a question of complying with the Act, and the policies cannot require a different outcome, and I've set out –

GLAZEBROOK J:

What is it that – I mean, it seems to me that there's nothing in the Act that requires a different outcome to the policies as they're here, it doesn't say you can ignore the policies or forget about conservation. So wouldn't that have to be managed in accordance with those policies?

MR MARTIN:

So the policies provide –

GLAZEBROOK J:

So when you're looking at revocation wouldn't you have to look at it in terms of the polices, because you're told to under 17A? I know it says, "Subject to the Act," but surely that's looking at a specific exclusion in respect of any matter. It can't be, "Oh, well, the Act says I can consider this so I don't have to look at it in terms of the policies."

MR MARTIN:

No, it's more a question of whether they are directive in a way that has any particular bearing on this decision.

GLAZEBROOK J:

But that means you'd have to look at the particular policies to see whether they were directive in the particular situation, wouldn't you?

MR MARTIN:

Yes, which is what did occur here. So it's –

GLAZEBROOK J:

So that's your real point is that they were relevant to the particular situation, not that they didn't have to be taken into account.

MR MARTIN:

That they don't, they certainly don't direct a different outcome, yes.

GLAZEBROOK J:

Right, okay.

MR MARTIN:

The first point is important, you're absolutely right.

ELIAS CJ:

Is that a convenient time? Do you want to finish anything or…

MR MARTIN:

Absolutely yes, Ma'am, and – I mean, I was just going to conclude that section at paragraph 96 by saying the policies that Forest and Bird rely on do not require a narrow interpretation to be undertaken, and that's really, that is the conclusion on that section.

ELIAS CJ:

Yes, thank you.

MR MARTIN:

Thank, Ma'am.

ELIAS CJ:

Thank you, Mr Martin. We'll take the adjournment now.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.15 PM

ELIAS CJ:

Yes Mr Martin.

MR MARTIN:

Before the break I completed the section of my submissions on the relevant policies and I was, the final section will be on marginal strips, but before I conclude on that, and it won't necessarily occupy a great deal of time, I did want to turn to the questions that had been raised, in particular by her Honour the Chief Justice, but also by Justice Arnold. So what I will attempt to do now is not intended as an exhaustive summary of specific evidence, but her Honour asked for examples of conservation parks status being expressly a consideration and so I will take you to some passages, and refer to others, and as I say not necessarily intending for it to be an exhaustive summary but these are some key points that do, in my submission, support the values of the park as park being considered.

I'll start with volume 5, these are the ones I will take you to, to begin with, volume 5, tab 81, the top of page 1244. This document, this is volume 5, tab 81, top of 1244, this an internal departmental memo giving Mr Kemper the hearing convenor his instructions, and on page 1244 the first two paragraphs, "The submitters should…", I'm reading, "The submitters should provide reasons (backed up by quantifiable evidence of a biodiversity/conservation values nature) as to why the values within the 22 ha of conservation park are of such importance that the revocation should not proceed." Then it says, "In respect of the land exchange, I am prepared to receive comments, and in this respect." So that is Mr Kemper's instructions and then you have the statement that is in, for example, the affidavit of Amelia Geary for Forest and Bird, which is in volume 2, which is at tab 14, and it's paragraph 80, which is

at page 159 to 160. So paragraph 80 starts at the bottom of page 159 and goes over the page and the point there is that Ms Geary is confirming that Mr Kemper, she says, said, “We are here to hear about HBRIC’s application for a land exchange, which requires revocation of conservation park status, and that the submitters should describe why the values inside the conservation park are of such importance that the revocation should not proceed.” So that was that section, that part.

I will now just give you some references without taking you to them to passages in the science report. Volume 3, tab 67, page 676, the first paragraph there, and page 678, the paragraph underneath the bullet points. So that was volume 3, tab 67, page 676, the first paragraph, and page 678, the paragraph under the bullet points. So those are, that’s in the science report, for example. I will take you to Mr Kemper’s report next, and I’ll actually take you to this just so I can show you where the paragraphs I’m about to refer to sit. His report is at volume 4, tab 69, the page I’ll be going to is page 723. I should say just before I do, his recommendation on the proposal to revoke the conservation park status of the Ruahine Forest Park is at paragraphs 52 and 53, and so these passages I’m about to take you to in the appendix need to be read in the context of his conclusions, of course, but specifically on page 723, in the fourth column, which is the DOC officer comment column, the third paragraph there is the one that reads, “The land being offered by exchange has been assessed as containing higher conservation values than the conservation park land, so the Minister has been able to form an intention to exchange. Forming this intention was underpinned by the concept that the area to be revoked does not need to be retained as conservation park. In addition,” and I do emphasise those words, “by surrendering this part by exchange, DOC can obtain better values.”

So in my submission it does reflect consideration of the park and the exchange separately but still obviously as part of this overall proposal to facilitate an exchange that will enhance the values of a conservation park.

And over the page, 724, again DOC officer comment on submissions, the second paragraph on 724 in that column, the paragraph that reads, "The values in the conservation park land do not need to be retained for conservation park purposes if the Minister's delegate agrees to proceed with the exchange and revoking the land status to enable a land exchange better conservation values are obtained which can be added to the Ruahine Forest Park."

Just by way of briefly reiterating with respect to the discussion of the values in the, the discussion of the values by Mr Kemper. He drew on and quote from the departmental science report at page 709 to 715 and so that's the assessment of ecological values, and then on page 716 – this is volume 4 tab 69 – page 716 of Mr Kemper's report, he, there's the discussion of the assessment of recreational and historic values separately on that page under headings. So what you have is assessment of ecological values, assessment of recreational an assessment of historic values separately, and in short those are the relevant conservation values for a conservation park.

And I'll come now to the Director-General's letter recording the reasons for the decision, which was volume 3 tab –

GLAZEBROOK J:
So what was your separate recreational values, what page was that?

MR MARTIN:
So that's 716.

So the Director-General's letter recording reasons for the decision, that's at volume 3, tab 57, I won't take you to this now, but volume 3, tab 57, page 636, two paragraphs on that page that may give examples of the kind sort, the end of paragraph 15 and the end of paragraph 17, where the Director-General was expressly considering the values of the conservation park. And similarly, the Director-General's affidavit, which is in volume 2, tab 17, paragraphs 31, 36 and 37 similarly provide examples of that sort of specific consideration.

Unless I can assist further on that point I would propose to move to the final issue, which is the question of marginal strips.

ELIAS CJ:
Before you do that, although it might tie in with that, the easement idea or the, what was it, concession idea –

MR MARTIN:
Yes.

ELIAS CJ:
– that was first floated and rejected, do we have information about that in the materials, do we have the decision on that as to why it was not able to be adopted?

MR MARTIN:
Yes.

ELIAS CJ:
Can you just give me the reference to that?

MR MARTIN:
I'll give you the reference to that. So that document is in volume 3, tab 35, that's 454. Values are discussed at page 458. So that's a draft officer's report on the concession.

A point that, important to make on that, is the concession proposal did not involve an exchange, it didn't the Smedley block at all.

ELIAS CJ:
No, I understand that.

MR MARTIN:
So it was an application to effectively get an easement to inundate the area of the park.

ELIAS CJ:

So it was assessed simply in terms of the intrinsic qualities of the land was it?

MR MARTIN:

Yes. And so section 17U is the relevant provision in the legislation.

WILLIAM YOUNG J:

Section 17D?

MR MARTIN:

U. I should note that the application for a concession didn't proceed, it wasn't finalised, it remained a draft document.

ELIAS CJ:

Yes, thank you.

MR MARTIN:

The essential submission on marginal strips is that on a purposive approach marginal strips under Part 4A do not apply to exchanges, essentially for two reasons. Firstly, section 16A(6) is an express exemption to the operation of Part 4A and, secondly, taking a purposive interpretation, section 16A is a standalone provision.

The effect of the High Court's decision is that there may be further decisions required in relation to marginal strips. Any decisions required can be made at any time prior to disposal. Marie Long's affidavit for the Department, which is at volume 2, tab 19, at paragraph 17, outlines the "complicating factors", as she calls them, with the marginal strips. She notes that there needs to be survey to ascertain whether there's a qualifying waterway to trigger a marginal strip; if triggered, decisions whether to reduce or exempt may need to be considered; where land is to be inundated, whether a marginal strip migrates or becomes extinguished in accordance with section 24G may arise. This is a key reason why marginal strips aren't seen as material to whether the proposed exchange can proceed or not. Any marginal strip is most likely to

migrate on Crown land. As long as it remains on Crown land it will migrate with the water. So section 24G – I'm just now interpolating to make some submissions in relation to that point before continuing with Ms Long's affidavit – section 24G was introduced with the other marginal strip provisions by the Conservation Law Reform Act 1990, and according to the departmental reports the provision is intended to cover avulsion, so erosion, accretion and avulsion, and so it would seem that any sudden changes to the river were intended to be covered by section 24G(2) and a reservoir is covered by section 24G(1) and this interpretation is bolstered by the wording of the provision which reads, "For any reason."

So returning to Ms Long's affidavit, the last point was that the –

ELIAS CJ:
Sorry, is the effect of that that you always have a marginal strip, you just adjust to the shape of the water or course of the water?

MR MARTIN:
As long as it's remaining on Crown land it will simply move out of the way, if I can put it that way, it simply moves with the water. So in this case, as the expansion of the reservoir if you like, the marginal strips will keep moving, so you'll continue to have the strip but it will move and effectively be re-vested continuously until it gets to a point where that's the boundary, and then there'll be the marginal strip. That, in my submission, is the effect of 24G.

ELIAS CJ:
And exchanges are just totally outside that regime, or they're not in that regime of course, once it's exchanged.

MR MARTIN:
So two different kinds of exchanges. There's the ones that are referred to in section 24E which are the exchanges of a marginal strip.

ELIAS CJ:

Ah, I see, yes, of course, yes.

MR MARTIN:

And I will come back to that, because it's perhaps a side point but it is part of the discussion around the purposive approach here. But the exchanges that we're concerned with is of course the one 16A of land, but you can also exchange a marginal strip, and I'll cover the point while I'm on it. So if you had to take a marginal strip of a marginal strip during an exchange then it's horribly circular. So it is submitted that exchanges of marginal strips don't apply to exchange it, but I'll come back to that point. The –

ARNOLD J:

Can I just be sure, for the purposes of section 24(1), the language, "Sale or other disposition," do you accept that a swap is a sale or other disposition?

MR MARTIN:

It comes within that broad wording, Sir, yes, it does. So his Honour is referring to the definition of "sale" in section 2(1), which includes every method of disposition for valuable consideration, including barter – it's a long definition – but the point that I'm submitting is not that that definition wouldn't encompass on its ordinary meaning an exchange, it's a question of whether the Part 4A has been disapplied expressly and whether a purposive approach requires that result.

GLAZEBROOK J:

Why would you disapply it if you swap something that has a waterway in it for something that doesn't have a waterway in it? And here you're flooding the whole thing anyway, so I don't quite understand the point. But I might just be being obtuse.

MR MARTIN:

So the, just on the flooding, the 24G point that I've touched on of course means that the marginal strips don't, aren't flooded, they simply move, so it's not a case of the strips being inundated, but the ones –

GLAZEBROOK J:

But I thought the whole thing was going to be flooded.

MR MARTIN:

So the first point is that in this instance the strips will move so that they aren't flooded, but the land obviously that would otherwise have been created as a marginal strip will be inundated and –

WILLIAM YOUNG J:

So it's a marginal strip on the edge of the lake that's created?

MR MARTIN:

Yes. It's created if – I'll come back to the – the answer to her Honour's question about why would you not create one is in essence because section 16A provides for an assessment of the values on the land as part of the transfer. So it is submitted that in essence you have already made the assessment about the values, it's an actual decision rather than a deemed or automatic decision by operation of statute, and so I'll come to the provisions that provide for this, the disapplying of Part 4A, but a purposive approach assists in that analysis because you don't need a marginal strip where the values have been expressly considered as part of whether to exchange or not, and there are some complicating factors that I'll return to that, in my submission, suggest that shouldn't be required.

GLAZEBROOK J:

Can we just go back to the flooding thing? You say the marginal strip won't be flooded?

MR MARTIN:

In effect. So section 24G – perhaps I should just take you to that. So 24G – actually I should be clear, this is one of the considerations that would arise if marginal strips fall to be considered. So this is an alternative, if you like, if Part 4A applies then –

GLAZEBROOK J:

No, I understand that.

MR MARTIN:

Yes. So this is one reason, one of the reasons that Ms Long gives for why marginal strips would in any event be left for consideration later. But assuming that, for this point, that Part 4A did apply, then 24G, it's really subsection (1) and subsection (2) that we're looking at, they effectively provide for the alteration of any existing marginal strip and a new marginal strip being automatically deemed with each alteration. So as the water encroaches the marginal strip continues to be on land so that it's not inundated. As long as there is Crown land for the marginal strip to continue to move on.

GLAZEBROOK J:

Well, where's the Crown land arising out of?

MR MARTIN:

Because these strips – this is the effect of sub (3), so the end of sub (3), "A marginal strip shall be reserved on all land of the Crown and on all land the title to which is subject to this part and in no other land." So the marginal strip doesn't keep going into private land.

GLAZEBROOK J:

Well, where's the Crown land here for it to be on?

MR MARTIN:

So on the maps it would basically, it would be the forestry land and the land that's subject to the exchange.

WILLIAM YOUNG J:

So it would be taking a little more land than was originally envisaged?

MR MARTIN:

And then there would be taking the land. The point here is that if Part 4A applies than strips can continue to be on –

WILLIAM YOUNG J:

Well, on one of the strips presumably the boundary of the, the edge of the lake will be basically the park won't it?

MR MARTIN:

Yes, yes.

WILLIAM YOUNG J:

So there's effectively a marginal strip there anyway?

MR MARTIN:

There would be a marginal strip on that piece of land, yes.

WILLIAM YOUNG J:

And on the other, what's on the, as it were, the landward side of where the lake will be?

MR MARTIN:

Yes, so for Makaroro block you've got that 600 metres of, so that's the horizontal block…

WILLIAM YOUNG J:

So who owns that land?

MR MARTIN:

So that's Crown forestry land, so it's underlined by Crown –

WILLIAM YOUNG J:

So it can create a, so there's no practical difficulty about creating a marginal strip there?

MR MARTIN:

That's, in essence that's the nub of this, is that because of 24G if marginal strips apply – and I will obviously be submitting that that's not the case – but if they do they will simply move out of the way on the Crown land, and they will simply remain around what becomes a reservoir. So that's all by way of saying in my submission that this doesn't have this particular material application to the proposal here, but the point is nevertheless of –

GLAZEBROOK J:

But that it could, couldn't it? Because if that wasn't Crown land then there wouldn't be a marginal strip.

MR MARTIN:

If it wasn't land. If – and this isn't the situation on the ground as I understand it – but if you came up against a private boundary then the strip would effectively be extinguished, to the extent that it would otherwise have had to have gravitated into the private land. But it doesn't arise on the facts here.

O'REGAN J:

But that assumes that this land is flooded though, but if it's a marginal strip before the flooding starts won't there be some restriction on flooding it because it's a marginal strip?

MR MARTIN:

Not in my submission, because of section 24G, that would simply move. Section 24G envisages circumstances.

ELIAS CJ:

So does that mean you don't have to have to have an easement effectively, or has that got nothing to do with it?

MR MARTIN:

No, yes, because…

O'REGAN J:

No, because the land's being transferred, I mean, there's no…

ELIAS CJ:

No…

GLAZEBROOK J:

So getting rid of a marginal strip doesn't seem to be a conservation value, but on your argument you can get rid of them, you can swap something, allow someone to flood it, or have it go into private land without a marginal strip.

MR MARTIN:

And that's, in my submission, the effect of the 16A assessment. So we leave now section 24G and we move on to the two limbs which is –

GLAZEBROOK J:

Well, where does marginal strip comes into net conservation value?

MR MARTIN:

Because the values that are in section 24C, which are the values that are assessed for a marginal strip, are in my submission encompassed, and bear in mind this is an automatic deeming, they are encompassed in the analysis of conservation values of this land in order to achieve the purpose of the Act. So because that's your focus of an actual inquiry – and I'll come to, perhaps I'll come now to the practical difficulties with it operating the other way.

GLAZEBROOK J:
Well, I'd rather find out what the law is than the practical difficulties to start with.

MR MARTIN:
Sure.

WILLIAM YOUNG J:
Well, is the position that if a marginal strip couldn't be provided that would affect the conservation values, that would affect the balancing of the conservation values?

MR MARTIN:
That's right. So, well, it affects the balancing of the conservation values –

GLAZEBROOK J:
Well, I'd like to see why, in terms to the legislation which you keep referring to really quickly without even allowing me to write it down…

MR MARTIN:
But I, no, I absolutely will take you through the provisions.

So section 24(1) provides for the reservation from sale or other disposition of land by the Crown of the 20-metre riparian strip – so this is in the bundle, page 79 of the Act – so that's the creation of the marginal strip, and –

ARNOLD J:
So, just to be sure about this, looking at your diagram on the back page of your submissions, page 35 –

MR MARTIN:
Yes.

ARNOLD J:

– and looking at the Makaroro block, is there at the moment a marginal strip on the river side of that block?

MR MARTIN:

Are you asking the Makaroro block on the true right side, the other side from the Makaroro or…

ARNOLD J:

Well, the side that's running along the course of the river.

MR MARTIN:

So the purple areas do not contain marginal strips at the moment, they're just conservation areas.

ARNOLD J:

Right.

MR MARTIN:

So there's no marginal strip there at the moment because it's still…

ARNOLD J:

Right, okay, that's all I wanted to know.

MR MARTIN:

The question would be or question is whether or not an exchange under 16A if it proceeded would create under 24(1) a marginal strip, and the –

GLAZEBROOK J:

Which would actually be by the lake wouldn't it, if it did?

MR MARTIN:

It would be –

GLAZEBROOK J:

By the, well, by the, is it – no, not, well, I don't know whether it's a lake or a stream, whatever it is.

MR MARTIN:

Well, initially it would be by the river, and then as the reservoir filled it would be next to the reservoir.

GLAZEBROOK J:

And you say that arises under what, 24G, but it shifts?

MR MARTIN:

Yes, 24G is the shifting point, yes, if a marginal strip arises.

GLAZEBROOK J:

I'm not sure it was really thinking of you flooding the whole of your land in that circumstance though, was it?

MR MARTIN:

Well, in my submission –

GLAZEBROOK J:

I mean, it can be read that way but it seems, I wouldn't have thought it was a usual occurrence was it?

MR MARTIN:

Well, in my submission it makes sense to keep the marginal strip around the water rather than have it flooded, I mean, that's really what the –

GLAZEBROOK J:

Oh, no, I can understand that submission.

MR MARTIN:

Yes. So in that sense it makes sense for it to move regardless of what the cause of the inundation is.

WILLIAM YOUNG J:
Does “reservoir” mean anything other than an artificially created lake, does it have another meaning here?

MR MARTIN:
I don’t believe so. I will just check, but I don’t, don’t see another defined term.

WILLIAM YOUNG J:
Not defined.

MR MARTIN:
Not a defined term, no.

WILLIAM YOUNG J:
So presumably it, I mean, I presume it incorporates artificially created lakes, I can’t see what else it would incorporate.

MR MARTIN:
In my submission that's what would distinguish it from a lake.

In 24(1) subsection, so after 24(1), subsection (8) is a relevant provision for this argument –

GLAZEBROOK J:
The reason why it doesn’t occur in 24(1) –

WILLIAM YOUNG J:
It’s in 24G.

GLAZEBROOK J:
I know that, it’s just slightly odd that it doesn’t occur in 24(1), and it says, “The normal level of the bed of any lake not subject to control by artificial means,” in 24(1).

MR MARTIN:

Yes, Ma'am.

GLAZEBROOK J:

But I agree 24G says “reservoir”. Do you know where that comes from, is there another provision the we don’t know that talks about reservoirs?

MR MARTIN:

I’m not aware of anything that exists.

WILLIAM YOUNG J:

It’s probably incorporated in subsection 24(2), the sort of lake that we’re talking about is presumably a lake controlled by artificial means.

GLAZEBROOK J:

Yes, that would make sense because it’s – so, yes, it’s 24(2) would be the “reservoir” and the 24(1) is “natural bed”.

MR MARTIN:

In terms of the creation, yes. But at the time – I mean, this is assuming of course that my argument is not accept that Part 4A shouldn't apply, but if it did apply then at the time that it would be applied you're still talking about a river at that stage.

GLAZEBROOK J:

But I don’t know that you can actually – because isn’t it reserved on the land, it doesn’t say, “On the land next door.” So if you sell it you reserve a strip of that land, and doesn’t 24G move it on the land rather than the land next door? So if it’s all flooded you can’t move it.

MR MARTIN:

Well, that's true if the land next door is private land, but if –

GLAZEBROOK J:

Well, but it doesn't say. It says, "You reserve it from that land," it doesn't say, "You move it to any other land that happens to be next door," does it?

MR MARTIN:

In my submission 24G subsection –

GLAZEBROOK J:

Well, you're reserving a marginal strip from a sale, that doesn't mean you're creating a marginal strip from land that you happen to own.

MR MARTIN:

But 24G subsection (3) appears to envisage effectively that the movement of a strip being vested and re-reserved, as it were, as long as it's still on land of the Crown.

GLAZEBROOK J:

Right, okay.

MR MARTIN:

So that's to the end of subsection (3), "On all land of the Crown but not on any other land." So in my submission the key point there is that it doesn't gravitate onto private land, but while there's Crown land engaged it simply keeps moving.

GLAZEBROOK J:

I must say, I just found this whole marginal strip thing particularly vexing.

MR MARTIN:

And there are a number of inter-reacting provisions, I accept, and I…

GLAZEBROOK J:

With a number of incredibly badly worded provisions in the whole of the Act, it has to be said.

MR MARTIN:

And I'm in a position where I don't want to –

GLAZEBROOK J:

And you're trying your best to make sense of it.

MR MARTIN:

Well, and I'm not wanting to labour the point either, for the reasons I've just touched on it may not be in the end material, too material to the outcome here.

GLAZEBROOK J:

No, I understand.

MR MARTIN:

But at the same time in order to make sense of the part I do need to spend a bit of time just teasing it through. So if Your Honours are happy to bear with me I'll move here and point out where the technical legal argument for the dis-application of Part 4A arises and then I'll move to support that with the purposive reasons for seeing it that way.

So section 24 subsection (8), "Except as otherwise expressly provided, this section shall apply to the disposition of any land by the Crown under the provisions of any enactment," it's "except as otherwise provided", and where in my submission that becomes relevant is because of section 16A(6), so recall that 16A is our exchange provision here and section 16A(6) I'll take you, worth having a look at, conclude with, "Shall cease to be subject to this Act."

ELIAS CJ:

So it's section 16A…

MR MARTIN:

Capital A, 6, subsection (6).

ELIAS CJ:

"Upon transfer."

MR MARTIN:

Yes. So, "Upon transfer of any stewardship area or any part of any stewardship area under the section, that land shall cease to be subject to this Act." And so read together with, "Except as otherwise expressly provided," in section 24(8), it is submitted that section 16A(6) operates as an express exemption.

GLAZEBROOK J:

But don't you reserve it before you transfer it? So if you reserve it before you transfer it than that doesn't, then after you've transferred it it's already reserved isn't it? So you don't dis-reserve it if – that's definitely not a word – but you don't take away the reservation by the back door.

MR MARTIN:

I understand the timing point that Your Honour is raising. At its latest, the transfer would be the legal transfer on the actual, or the registration, sorry, of the exchange, and so that's the very time that the marginal strip would be created if it was going to be, and that's the point that the Act ceases to apply. So that's section 16A(6) dis-applies the act at the very point that a marginal strip would otherwise be created. I accept some very, roughly the same time, so simultaneously, but that doesn't –

GLAZEBROOK J:

It doesn't attract me as an argument in the slightest I have to say.

ELIAS CJ:

Well, I have to say that I agree with that. And also how is 16A(6) an express – what does…

GLAZEBROOK J:

"That does otherwise provide," is it?

ELIAS CJ:

Yes. Why is it an express provision otherwise? That is simply about the consequence of an exchange generally, that the Act doesn't apply. So why is that an express reference to the marginal strip provision?

MR MARTIN:

Can I contrast it was section 26A, which is the disposal provision – sorry, not 26, 26(4), sorry, which is in the disposal provision, so where stewardship land is disposed of, under that provision, 26(4), land ceases to be held for conservation purposes. So there's a difference in wording there. In the case of "disposal" of stewardship land, where a marginal strip would be, would apply, the land ceases to be held for conservation purposes, whereas under section 16A(6) the land ceases to be subject to this Act, so in my submission ceases –

GLAZEBROOK J:

Well, if it's sold it would have to cease to be subject to the Act, surely, because you're not going to buy something that's somehow subject to the Act are you?

MR MARTIN:

Well, it would –

GLAZEBROOK J:

Do the two things mean different?

O'REGAN J:

But the marginal strip is subject to the Act though isn't it, so…

MR MARTIN:

Yes. So under the title, even a private title, there would be the reservation back to –

GLAZEBROOK J:
Well, but it's not that, they haven't put that in especially for the marginal strip, have they? Or do you suggest they've put that in and had that wording changed specifically for marginal strips?

MR MARTIN:
It's submitted that the difference in wording appears to be saying that rather than having the land that has been exchanged no longer held for conservation purposes but still subject to Part 4A, so still subject to the Conservation Act, even though the title was now in private hands, there'd still be a notation on the title saying, "Subject to Part 4A," so even though that is what happens with a disposal it is submitted that the effect of 16A(6) is different, it says that "the Act" ceases to apply. So that's where the dis-application of Part 4A is submitted to arise. And I know that this is fairly technical at this point, I will come on to the purpose of reasons where it's submitted that this makes sense, but in terms of how the provisions operate that is the submission that it's different to a disposal, an exchange is treated differently, and Part 4A doesn't continue to apply to land, the Act doesn't continue to apply to land that has been exchanged, it only continues to apply to land that has been disposed of or, yes, sold if you like.

GLAZEBROOK J:
So is Part 4A, you say, the only thing that still applies to the other land disposed of?

MR MARTIN:
That's the only thing I can think of, yes.

So just sort of to, I just do note, at the risk of giving you yet another subsection, section 16A(7) says nothing in 26, or section 49, "shall apply to the exchange of land under the section". So section 26 is the disposal provision, and so that is simply confirming that nothing in that part, section 26, applies on exchange. Again, it's demarking an exchange as different to a

disposal under section 26. So that again supports the different operation of these sections.

Now the, I'm moving now into the sort of more purposive part of this argument. The purposes of the exchanges under section 16A are to achieve a net conservation gain to achieve the purpose of the Act. So taking – well, for an exchange to be agreed there must have already been an assessment of all the relevant conservation values and –

GLAZEBROOK J:
Well, did they consider marginal strips or the lack of it when they were deciding whether there was a net conservation gain?

MR MARTIN:
Well, they noted that decisions about marginal strips might follow, so that's the effect of Marie Long's evidence, that marginal strips had these complicating factors and might need to follow later if it arose. But in terms of the values it is submitted that the conservation values of the land have been considered comprehensively in the process that we've heard about.

GLAZEBROOK J:
Well, if things have been decided later and you find you don't have a marginal strip and you say, "Oh, gosh, if we'd known that we'd have made a different assessment," how can you decide it later?

MR MARTIN:
Well, yes, Ma'am, and that in effect is one of the limbs of my difficulties in terms of the purposive approach. It is difficult to come back to marginal strips after the bargain has been struck under section 16A.

GLAZEBROOK J:
Well, doesn't that suggest that either you have to take, either you have to reserve it or you have to take into account and decide whether or not you're going to beforehand, because you can't make a proper decision otherwise?

WILLIAM YOUNG J:

Unless you decide the merits are so overwhelming it doesn't matter which way.

GLAZEBROOK J:

Well, you might do, but you'd still have to consider whether that was the case.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

And you might quite easily do so. But I don't think you can say, "Oh, we'll see later whether that was actually the case."

MR MARTIN:

Well, seeing later is difficult for three reasons. I mean, one is that you've already applied the section 16A assessment, you've taken all those values into account. Secondly, the marginal strip may reduce or even entirely defeat the gain that you were seeking to achieve through the exchange, so if what you've got is a proposal there's the dockside of this, if you like, and the private party side of it, but you've entered into an arrangement where you're going to exchange one piece of land for another piece because the consideration under 16A says that this will provide a net conservation gain. If marginal strips are then found to need to be removed from that equation, then the private party cannot know exactly what they are getting at the time the exchange is negotiated, and that may result in unfairness to them, but it also may have flow-on implications for the value of the net conservation bargain that the Department has been seeking to strike.

GLAZEBROOK J:

This all seems to be arguments against you rather than for you, so you perhaps better tell me why they're arguments for you.

MR MARTIN:

Well, it's simply that they point to the complexity of trying to do an assessment under section 16A of the net conservation benefit of an exchange, taking all the values into account, and then finding subsequently that –

GLAZEBROOK J:

Well, no, but I'm suggesting you don't find them subsequently, you reserve it at the time and that's the end of it, or you take it into account in assessing the exchange. So either you don't do it at all or you do it at the time, and the complexity of doing it later suggests one or the other of those, but not the Crown's solution, which was, "Never mind, it's not too late," which is what I'd understood your submissions to be, apart from the, "You don't have to do it at all because the Act says you don't have to."

MR MARTIN:

So the point you make about you could assess it all at that same time, I suppose a difficulty that arises is that you then, the time you're making that assessment is pre-survey normally, you wouldn't be surveying the land in order to and, for example, ascertain the width of the stream and so on to determine whether it is a qualifying waterway. Sometimes it'll be obvious but not always. So there are –

GLAZEBROOK J:

Well, here it's relatively obvious, isn't it, because it's going to be flooded?

MR MARTIN:

Whether the marginal strips would arise depends on the width of qualifying waterways. So there is still a survey aspect to it.

GLAZEBROOK J:

Okay.

MR MARTIN:

Yes. So, and it's not just whether there might be a marginal strip, but there was also the extent of the marginal strip and so on. So there is a survey issue. And this is where you have those practical complications, you wouldn't normally get in to survey at the time that you're exploring and negotiating with a private landowner whether an exchange can occur. And I take on board what Your Honour is saying is that you could try and factor all of that into the test, but in fact section 16A is requiring you to look at all the values anyway, and you've got to meet the purpose of the Act. So wouldn't you just look at that in the round, decide whether or not those values effectively justify an exchange, and if they do then that is what occurs and the purpose of the Act is met, rather than then in essence revisiting that assessment at any point, even if it's before you've registered the transfer, we're trying to revisit it by factoring in marginal strips, which are essentially just another way to achieve the purpose of the Act.

ARNOLD J:

Well, except they've got that in there, 24C sets out the purposes and they are, well, they do have a fair focus on the maintenance of the water quality of the body of water don't they?

MR MARTIN:

Yes.

ARNOLD J:

Which may not necessarily come into the broad conservation assessment in terms of the forest park would it?

MR MARTIN:

In my submission they would be a part of that assessment. I take Your Honour's point that they may not weight so heavily in the balance that you would, you may still exchange the land.

ARNOLD J:
Right.

MR MARTIN:
But those factors there, so they're in 24C, you've got the conservation purposes which are as you might expect for this sort of reserve, they are directed at the adjoining waterway, but there's also the public access issue and there's the recreational issue.

ARNOLD J:
Yes.

MR MARTIN:
So those would be absolutely in the mix in a 16A assessment.

ARNOLD J:
And there is also, the Minister has an ability to reduce the extent of a marginal strip.

MR MARTIN:
Yes. So you can reduce the extent or can in fact, so you can actually grant an exemption under 24BA. So the reduction is 24B – I'm sorry, so 24B is the exemption and 24AA is the reduction in the width of the marginal strip.

ARNOLD J:
Oh, I see, yes.

MR MARTIN:
It is worth bearing in mind that these are automatic, whereas 16A is an actual assessment and a manual decision, if I can put it that way, and so in my submission it would be surprising if that express consideration and decision of those values were effectively trumped by what is an automatic deemed strip. And so –

GLAZEBROOK J:
Although there is the power to declare them exempt.

MR MARTIN:
Yes.

GLAZEBROOK J:
Although probably, I mean, that in itself might actually give some clue as to the importance of marginal strips, in terms of only are satisfied it has little or no value or any value can be protected by another means, it's pretty narrow.

MR MARTIN:
Yes, but it's –

GLAZEBROOK J:
So it's obviously an important conservation value that you have these marginal strips if you can only get rid of it because of little or no value or protected by other means.

MR MARTIN:
Yes, I take Your Honour's point. But the assessment that you're making expressly under section 16A is still one that achieves the purpose of the Act, so –

GLAZEBROOK J:
Well, no, but you say can be taken into, can be done and get rid of marginal strips, whereas the Minister can only do that in very, very proscribed circumstances, even on land presumably that's been disposed of to a third party.

MR MARTIN:
Yes, but so section 16A though is about in essence advancing the conservation objective of the Act and so, and yes it is a broader enquiry, but if those opportunities, it takes me back to the purpose of issue –

GLAZEBROOK J:

Yes, but you say you don't have to take into account the lack of a marginal strip under 16A and yet it's a very important aspect of it, so important that you still have to have it if you've disposed of land to a third party totally privately.

MR MARTIN:

It's submitted that because of the net conservation gain that you are achieving under section 16A –

GLAZEBROOK J:

But if you haven't taken into account the marginal strip, which you say you don't have to, how can you even work out whether it is a net conservation gain?

MR MARTIN:

Ah, but you don't have to take into account the strip, but you do have to take into account the values. So you have to take into account the conservation values of this piece of land where it sits, so the values on the land, plus public access and recreational values, they would have to be considered.

WILLIAM YOUNG J:

But there's no conservation, there's no marginal strip there now. The balance of advantage has proceeded on the basis that there probably won't be a marginal strip after the exchange.

MR MARTIN:

You mean in the particular case we're talking about here?

WILLIAM YOUNG J:

Yes. So no marginal strip now?

MR MARTIN:

There's certainly not one now, yes.

WILLIAM YOUNG J:

Okay, and the assessment was what? The assessment seems to have been that there probably wouldn't be a marginal strip although there might be?

GLAZEBROOK J:

I don't think it was. I'm trying to work it in principle terms. I take the practical point here that it may not have actually made any difference here.

MR MARTIN:

The wording, it may not be exactly as you put it but that's essentially, they are unlikely to arise, but may.

WILLIAM YOUNG J:

So if there was a marginal strip there would be more benefit than assessed. If there isn't a marginal strip then it's the benefit essentially as assessed.

MR MARTIN:

I think, if I'm understanding you, your question assumes that this strip doesn't move though.

WILLIAM YOUNG J:

No, I'm assuming that you're right, that there is no strip, okay, that for one reason or another there won't be a marginal strip after the exchange.

MR MARTIN:

Yes, but I mean it hasn't been surveyed or dealt with at this stage.

WILLIAM YOUNG J:

I know, but please engage with me on the terms.

MR MARTIN:

Yes.

WILLIAM YOUNG J:

I'm assuming that there won't be, all right? Can we make that assumption?

MR MARTIN:

All right.

WILLIAM YOUNG J:

So that's really the worst case from your point of view, or the worst case from the company's point of view but even on that basis, which is the basis it seems that broadly the decision-maker acted, there was a decision that the balance of advantage favoured the exchange.

MR MARTIN:

Yes.

WILLIAM YOUNG J:

So this may be a bit of a red herring in this case.

MR MARTIN:

It doesn't make any difference in this case, I think that's Your Honour's point and I think that's right Sir.

GLAZEBROOK J:

But the difficulty is if you're asking us to do it on the law we need to get the law right rather than whether it made a difference in this case or not.

ARNOLD J:

Well the other point is that if this was a sale or disposition qualifying under section 24(1) there would have to be a marginal strip and presumably there would be an additional benefit there in some way, isn't that right?

GLAZEBROOK J:

And not excluded by 16A(6)?

ARNOLD J:

Yes.

MR MARTIN:

Well if this was a straight disposal then, yes, the strip question would arise, yes.

ARNOLD J:

Well when you say “would arise” there would have to be a marginal strip, wouldn't there?

MR MARTIN:

Subject to there being qualifying waterways and subject to the other provisions around reduction and exchange and so on.

ARNOLD J:

Yes.

MR MARTIN:

Yes.

ARNOLD J:

And so then the Minister, if there was going to be some change the Minister would either have to exempt it or reduce the size of it or do whatever but the default position would be that there would be a marginal strip?

ARNOLD J:

Yes, and the reason that cuts both ways is I've mentioned that a private owner would not necessarily be able to understand what they're getting, if you like, as part of their bargain but the possibility is, of course, that what might otherwise be a net conservation gain that can be achieved for conservation isn't able to proceed because the owner says, well, either because of the uncertainty or just because of Your Honour Justice Glazebrook suggested, the maths had all been done, if you like, in advance. They decide that they can't actually, they can't use the land in the way they wish to and so the opportunity can't proceed. So it is possible that the sought-after gains for conservation

aren't able to be realised and so that cuts against the conservation purposes as well, as well as potentially acting unfairly for the private party.

I think we've probably rehearsed sufficiently the nub of that argument, unless there are other questions, that would be a point where I would conclude my submissions unless there are questions that I can assist with?

ELIAS CJ:
No, thank you Mr Martin.

MR MARTIN:
I might just take this moment to indicate that, given the public significance of the case, the Appellant Minister does not seek costs.

ELIAS CJ:
Thank you.

MR COOKE QC:
I should say in advance of handing up that one piece of paper that these aren't really a guide to my oral submissions so much as the key propositions that I will be advancing, which I say they are the decisive propositions in this appeal.

To begin with, in my submission it's important to be clear actually what is an issue in this case and importantly what is not an issue. It's not disputed that the land exchange power in section 16A allows the Minister to decide to dispose of conservation land, even when that land has significant conservation value in exchange for land of greater conservation value. To use the language of Forest and Bird's submissions, that section allows a net conservation gain approach and that is permitted when, in the words of section 16A, the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act.

So when it talks of “enhance the conservation values of land managed by the Department”, I think a shorthand for that would be that it advances the conservation estate and promotes the purposes of the Act and it’s significant, in my submission, that that is part of the scheme of the Act.

The second matter that is not in dispute is that this particular land exchange meets the requirements of section 16A, exchange that the Minister acting through her delegate has legitimately assessed as enhancing the conservation values of land managed by the Department and which promotes the purposes of the Act.

There were previous challenges to the section 16A decision amongst the seven causes of action originally advanced, but it wasn’t suggested that the 16A requirements weren’t met and that is so notwithstanding that the 16 hectares has conservation value and that it will be inundated. That is because of what is obtained in return.

Thirdly –

ELIAS CJ:
That is, though, because for stewardship land equivalent, you know, the weighing of advantage is explicitly permitted. So I don’t see the debate, really, as lying at that stage at all.

MR COOKE QC:
Which is why I said it wasn’t in dispute.

ELIAS CJ:
No.

MR COOKE QC:
And the third related –

WILLIAM YOUNG J:

You've got to show something more, don't you, that it's better for the park to have – the Smedley land and the land that's going to go.

MR COOKE QC:

That's my third proposition. It's not in dispute. This exchange will enhance this forest park as a whole. That is in accordance with section 19(1) of the Act, 19 regulating the purposes for which land is held and section 18(5) which prescribes that when you hold it for a particular purpose you must advance – you apply the management that fulfils –

ELIAS CJ:

Excuse me, these arguments would apply equally to sale, wouldn't they? If you got some stupendous price for a bit of stewardship land the same argument that one could legitimately come to the conclusion that the conservation estate generally is better off would be accepted.

MR COOKE QC:

Well it is probably not so with the case of disposal and that's what *Buller Electricity Ltd v Attorney-General* –

ELIAS CJ:

Well leave aside the fact that there is an authority, just on the statute I can't see the difference.

MR COOKE QC:

Well under section 26 there is a requirement that the land is no longer required for conservation purposes so it is, that was really the basis or one of the bases of the High Court decision to say the disposal power is limited.

ELIAS CJ:

For the 26(6) or something, is it?

MR COOKE QC:

Twenty-six. Whether that really is the case, I think it's a legitimate question to be asked, with respect, because there is a subtle difference between land no longer required for conservation purposes and land that has absolutely no conservation value because the reality is that land almost always has some potential value for conservation purposes which is quite important just to a general theme of the argument that I want to advance and I will come to later, that the designation of particular management regimes which is what is involved in these purposes are exactly that, they are management regimes. They are decisions made by the Minister as to what category of management the Minister wants to apply to categories of land and in stewardship land you have the particular tool of that management, which is the 16A exchange power, which allows you to exchange land of conservation value, the land of greater conservation value if the requirements of section 16A are made out.

But coming back to Your Honour the Chief Justice's point, I guess you can make an argument about s 16 disposal power although you could only go so far with that because of the prerequisite and section 26 which doesn't apply in 16A that is no longer required for conservation purposes.

ELIAS CJ:

So what is the provision in section 26 that you're referring to about?

MR COOKE QC:

I can't remember if it's in 26 itself or whether it's, I think it might be, it's about the 26(7).

ELIAS CJ:

No, but that's a machinery provision, that's a consequence. It's read back in, isn't it? That's what –

MR COOKE QC:

I think Your Honour is right to just note that the decision of the High Court in the *Buller* case may not –

ELIAS CJ:

They relied, it relied on that.

MR COOKE QC:

It was after all, and no lack of rigour for it, a Justice Doogue oral decision on the day of the argument but it's really, in some ways it's not really material to the argument that I advance about whether actually 26 is a bit broader than has been taken to be the case from the High Court decision because s 16A is so overtly in the scheme of the Act to allow the exchange of conservation land when it has conservation value if the conservation estate as a whole is advanced and the purposes of the Act is advanced. And that relates –

GLAZEBROOK J:

Is it section 26(2)… the satisfied that its retention and continued management as a stewardship area would not materially enhance…?

MR COOKE QC:

26(2) is a slightly more technical provision because that's talking about adjacency.

GLAZEBROOK J:

And adjacent to, yes, okay.

WILLIAM YOUNG J:

Would that apply here if the Minister had wanted to sell these two areas of land on the basis that at least one of them would then be adjacent to conservation land?

MR COOKE QC:

Your Honour's question is starting to draw me into this really technical area of marginal strips actually because I was going to come back to the subsection in the context of marginal strips. Can I dodge it now because I'm not sure that –

WILLIAM YOUNG J:
It might be a bit late in the day for marginal strips?

MR COOKE QC:
And Your Honour has drawn me into it, it's a very, it's a wet towel round the head topic, I accept that completely.

If I can perhaps steer through these things that aren't in dispute.

WILLIAM YOUNG J:
The easier stuff.

MR COOKE QC:
The easier stuff. My next proposition is there's no issue that had this land been classified as stewardship land at the outset it could have been exchanged under section 16A, even though it had significant conservation values.

ELIAS CJ:
But that's why it wasn't stewardship land from the outset.

MR COOKE QC:
Well, it was only forest park land from the outset by the operation of transitional provisions.

ELIAS CJ:
Yes, but it had been earlier identified as forest park, hadn't it?

MR COOKE QC:
Well, it had been under the previous legislation as a forest park, then under this Conservation Act when it was enacted. It was given deemed –

ELIAS CJ:
But that was a protected status in itself, wasn't it?

MR COOKE QC:
It was. There's always a "but for" in all of these propositions. I'm just trying to limit what we're arguing about.

ELIAS CJ:
Yes.

MR COOKE QC:
And it will be the same with the next one. It does not appear to be an issue that the reclassification power – that's the reclassification power in section 18(7) – can be utilised to facilitate a disposal. It's accepted you can reclassify forest park land as stewardship land so that it can be disposed of under section 26. That is, it is said, it is argued, when it has no conservation value. Indeed, that is the only way you can dispose of land that is categorised as forest park land. You have to reclassify it first under section 18(7) to do that. So it's not exercising 18(7) for an improper purpose to reclassify, to facilitate an exchange, to facilitate a disposal if it has little or no conservation value.

In fact, it also seems to be accepted that you can reclassify land under section 18 in order to facilitate that exchange under section 16A provided that, it is said, the land is assessed as having no conservation value or little conservation value. So you can reclassify to facilitate a disposal under 26 without a problem and you can reclassify to facilitate an exchange under 16A, but only if it has the equivalent of section 26 status. You can't, apparently, reclassify to facilitate a section 16A exchange in its terms. It also appears to be accepted –

ELIAS CJ:
Sorry, what do you mean by that, "in its terms"?

MR COOKE QC:
Well, 16A in its terms contemplates exchanging land that does have conservation value.

ELIAS CJ:

Oh, I see, yes. I'm sorry.

MR COOKE QC:

It also appears to be accepted – or, at least, it's never been disputed, that this land could legitimately have been classified as stewardship land. There has been no argument that because of the qualities of this land it was required to be classified as forest park, not stewardship.

ELIAS CJ:

But was that ever addressed? Because the conclusions as to its merit, conservation merit, seem to assume that it does have the – it is land that is appropriately protected.

MR COOKE QC:

This is where we get to the real essence of this case, because stewardship land and forest park land is described by the statute in almost identical terms. If it is correct that this 16 hectares can properly be treated as stewardship land, in my submission that must be the end of the argument.

ELIAS CJ:

But wasn't that the question that had to be addressed for the revocation? Is this land appropriately treated as stewardship land?

MR COOKE QC:

I think more precisely than that you can put it as "is there anything about the attributes of this land that mandates it to be categorised as forest park land and not the stewardship land?".

GLAZEBROOK J:

Well isn't it just the fact that it was classified as forest park land and is, therefore, classified as forest park land under the Act?

MR COOKE QC:

That's really, with respect, not an answer.

GLAZEBROOK J:

Well it may not be except that it's the legal answer, isn't it, under this particular legislation and one of the – you might say that the definitions are fairly similar and if they are then it might be that the legal classification and the historical classification is the end of it unless you can – because otherwise you might, you can presumably say the same about any of the forest land.

MR COOKE QC:

The only difficulty with that way of looking at is that it ignores that the classification, the re-classification power in section 18(7), Parliament did not intend this land to be classified once and for all, it's given to the Minister the power to change the classification in circumstances –

GLAZEBROOK J:

I understand that but there has to be a reason and it can't just be, well – leaving aside an exchange, it can't just be, well, the definition is fairly the same so I think I will just change it to stewardship which even, I think your clients would accept that without the greater benefit this wouldn't have been an appropriate thing to do.

MR COOKE QC:

My submission would be that in light of the way the Act describes forest park land and the way that it describes stewardship land the question of categorisation is indeed a question of policy and discretion for the Minister.

GLAZEBROOK J:

Because it's the same you can just at a whim change it?

MR COOKE QC:

The Act sets up a regime where the Minister makes certain policy decisions. One of the policy decisions that the Minister makes is to decide what system

of management will be applied to certain land holdings. That power to initially decide that and to amend that isn't constrained by any overt bright line test.

ELIAS CJ:

It's constrained by subsection (8), however, notification and participation which must be –

MR COOKE QC:

Absolutely.

ELIAS CJ:

– which must be against a framework of legislative policy.

MR COOKE QC:

It is against a framework of legislative policy but there's nothing in that legislative policy that says certain land must be forest park rather than stewardship. So the Act gives it to the Minister who has, in this legislation, policy setting functions, gives it to the Minister to decide what category of management will be applied to particular land holdings and gives the Minister the power to change those designations and the main constraint that Your Honour Justice Glazebrook talked about, doing it on a whim but the main constraint of that is public participation precisely because these are major policy setting decisions that a minister is making and the public should be able to participate in a hearing process about particular land holdings.

GLAZEBROOK J:

But after that the Minister can still do what he or she likes with no constraint on this and we all know the consultation doesn't guarantee that consultation is even listened to.

MR COOKE QC:

I don't accept the without constraint point.

WILLIAM YOUNG J:

There would have to be a rational basis for concluding that the alienation restrictions ought not to apply, that the forest park alienation provisions ought not to apply to this land.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Because that's the only distinction really, isn't it?

MR COOKE QC:

Yes, well there are two distinctions between the categories, one is for recreational access –

WILLIAM YOUNG J:

I see, yes.

MR COOKE QC:

– is more promoted for forest parks but otherwise the key difference between forest park and stewardship land is exchangeability and disposability. So rather than it being illegitimate for the decision-maker to consider whether this land should be exchangeable it is the key mandatory consideration that one would have to take into account in deciding whether allowing this land to be exchanged or to be exchangeable is consistent with the Minister's intentions for fulfilling the purposes of the Act. But I don't accept that the public participation process or the necessity for the Minister to act in accordance with the principles, purposes and policies of the Act can be really fairly described as unconstrained. They are important constraints. But what is not set up by the statute is a very careful regime with a bright line test that tells you that land with some attributes must be forest park and others must be conservation. The Act leaves it to the Minister to make policy decisions, guided by the Minister's appreciation of what best serves the policies of the Act, having gone through the public hearing process.

GLAZEBROOK J:

But surely the fact that they are deemed under the Act to be forest park or conservation parks because they've been forest park sets up an indication that there has to be a particular reason. I'm not saying that the exchange isn't a particular reason, but your submission seems to be that because there's no difference in definition you change it after public consultation.

MR COOKE QC:

If there is good reason to.

GLAZEBROOK J:

But what can be the good reason to if it's not that you have an exchange that makes it better?

MR COOKE QC:

Well, this wouldn't be the first occasion when the Court has had to consider a broadly-worded power of a Minister guided by the purposes of the Act and good reason. It doesn't mean you have to read in a series of constraints to it, and after all, the decision of this Court in *Unison* which talks about broadly expressed economic control powers can be said to apply equally to the Minister's powers here. The main restraints as to this Court outlined in *Unison*, acting for proper purposes, fulfilling the purposes of the Act, but otherwise the Minister does have a discretion to decide which category of management is applicable to the land and there's nothing illegitimate in the Minister deciding to reconsider what land is in the Ruahine Forest Park in order to facilitate an exchange that meets in 16A, which by definition can only be met if the purposes of the Act are enhanced and the conservation estate is advanced. So that would provide the good reason to reclassify, having regard, obviously, to the attributes of the land that is being reclassified. Of course that would have to be carefully considered. It's a mandatory consideration, inevitably, when you're changing the classification. But there can't be anything wrong in reclassifying to facilitate an exchange that is permitted by 16A precisely because it serves the purposes of the Act.

WILLIAM YOUNG J:

But why else would you want to change land to stewardship land, unless you wanted to sell or exchange it?

MR COOKE QC:

I guess there could be examples of reconciling the boundary on the outer edges of conservation land.

WILLIAM YOUNG J:

But wouldn't that involve – if it's rationalising boundaries it would involve sale or exchange, wouldn't it?

MR COOKE QC:

It may. It doesn't necessarily do. You could reclassify a piece of land on the edge of a forest park as stewardship land without a particular exchange proposal.

WILLIAM YOUNG J:

Yes, of course but what would be the point of doing so?

MR COOKE QC:

Usually there wouldn't be. You know, there might be a disciplined approach by the Department to say, "Well, look, where are we really fulfilling recreational use in the forest park? We're not really making any effort to allow recreational use in this area up here. That could be reclassified as stewardship land." This was part of the assessment of this land, that it wasn't being used for any recreational purposes.

ELIAS CJ:

Your argument, though, would have to apply to the other categories of protected land, too, because again, they can – their classification can be changed.

MR COOKE QC:

It can be but the other categories – the difference between forest park and stewardship is the description of their management is almost identical. You can't say that with respect to other categories. Wilderness areas, sanctuary areas have a much – the legislation gives a much clearer description of the management appropriate for those particular –

ELIAS CJ:

Of management.

MR COOKE QC:

Yes.

ELIAS CJ:

But the disposition powers –

MR COOKE QC:

Well the disposition powers are neutral in describing the attributes of land, it's only the sections that describe the management regimes of special purposes that give you an insight as to what Parliament contemplated by them, and the other categories that we look and see from section 19 onwards do have more, if you compare these other areas with stewardship areas they are different. So if you look at wilderness areas, 20(1) and the list of subparagraphs and (2), are much more elaborate in terms of what is there and what is to be managed. Ecological areas is a bit ambiguous I accept. Sanctuary areas is more, has a more specific management regime and you've got watercourse areas and amenity areas and wildlife management areas so they are –

ELIAS CJ:

But all of these management requirements are while that status is maintained. The structural argument you were addressing to us are that the Minister in reclassifying can take in to account the desirability of exchange or disposition or whatever surely must apply to all these categories of land?

MR COOKE QC:

Well they could potentially apply but with less moment because there is more of a difference between –

ELIAS CJ:

There's more protection while they remain classified as they are.

MR COOKE QC:

Yes, but the more important point from my point of view to the argument is that the description of conservation parks in section 19 and stewardship areas in section 25 is almost identical. So given that and given that the real difference between them is, first, recreational access and, second, exchangeability and disposability, those are your things that are most going to guide you should this land be available for exchange by reclassification as stewardship land.

ELIAS CJ:

So the contrast is between section 25 and –

MR COOKE QC:

19(1).

ELIAS CJ:

19(1).

MR COOKE QC:

And that's all the statute tells us about these two categories.

GLAZEBROOK J:

Apart from the fact that one is disposable and one's not.

MR COOKE QC:

Yes, so –

GLAZEBROOK J:
But if your argument is you can just shift them because their management is the same that can't be right, can it, but when you added that you do have to take into account the exchangeability –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– that's not your argument, in fact it is whether this should be able to be exchanged can be a factor in terms of whether you – is a mandatory factor in terms of whether you can move it?

MR COOKE QC:
Yes, because if –

GLAZEBROOK J:
And I probably don't have a problem with that.

MR COOKE QC:
Well I'm grateful for Your Honour but I suppose –

ELIAS CJ:
But it applies equally to the other classes of protected land. Exchangeability and –

GLAZEBROOK J:
A different management regime is what the other classes, yes.

ELIAS CJ:
– disposition – no I understand that but they equally, you're determination under s 87 –

MR COOKE QC:
18(7).

ELIAS CJ:

18(7) could equally in the case of other protected lands take into account the fact that you will be transferring them for exchange or for sale.

MR COOKE QC:

Yes but the "but" is that the key question that is going to be asked of a decision-maker under section 18 subsection (7) is what are the differences between category one and category two? When it comes to conservation parks and stewardship land there really are only two attributes that are different, one is recreational access and the other is exchangeability and disposability. With these others – wilderness areas, watercourse areas – there are a lot of other characteristics of the management in addition to exchangeability that would, to use the proposition put to me by her Honour Justice Glazebrook, be limitations or constrictions on the Minister's discretionary power. So you would have to look at the particular attributes of the management regime when it came to a reclassification decision, and those attributes were varied depending on what category the land was in, in the first place. And apart from what I've mentioned in terms of the subparagraphs of these areas, there is this fact that conservation parks use protected as part of the management, as does stewardship areas, whereas under those the other categories you've referred to, for example, the wilderness areas, talks about preserved, so another attribute that's different.

ELIAS CJ:

So you're accepting the submission that we heard that protect and preserve, the difference is significant?

MR COOKE QC:

Well, it is significant that the Act has set up those two concepts and defines them and says in relation to protection, the protection involves this additional element. I accept the exchange Your Honour Justice Glazebrook had with my learned friend that the act of preserving must include some senses of improvement. But I also agree with the submission of my learned friend that that puts even greater significance on the legislature decision to say that

protection includes its augmentation, enhancement or expansion. That must be a significant attribute of the management regimes that are applied to some but not all of these categories of specially-protected land. So again, this goes into the scope of the Minister's discretion to reclassify under 18(7). It is permissible for the Minister to take into account the concepts of augmentation, enhancement, or expansion which are in both categories, both forest park land and stewardship land.

GLAZEBROOK J:
Say we don't have an exchange at offer at all and we have this particular land. What would be the things the Minister would take into account in deciding whether it should be exchangeable or not, in your submission?

MR COOKE QC:
They will include just how much conservation value the land had, whether it could be found elsewhere in the Ruahine Forest Park.

GLAZEBROOK J:
Why in the Ruahine Forest Park?

MR COOKE QC:
Well, if you look at section 19 you are making decisions –

GLAZEBROOK J:
Let's take the whole of the Ruahine Forest Park. What, if the Minister decided that he'd quite like it to be exchangeable in future but with nothing whatsoever in contemplation, what would he take into account?

MR COOKE QC:
The premise of Your Honour's question demonstrates the difficulty with it. Your Honour may be right that it is much more likely that this kind of decision would be made in relation to a concrete exchange proposal.

GLAZEBROOK J:

Because you wonder otherwise how you could do it.

MR COOKE QC:

You could work out which is best.

GLAZEBROOK J:

Because that was your initial submission, that it was at will because the management was the same but as soon as you say you take into account whether you can make an exchange, well, I do have some difficulty how you could do that in the raw. You may with this, as you say, because of the recreational issue.

MR COOKE QC:

It would be odd, though, wouldn't it, if it were thought that this exchange, this reclassification power was narrower when you didn't have an exchange proposition.

GLAZEBROOK J:

Well, that's why I asked you and then it's a bit how long is a piece of string because obviously Parliament has thought that these things are worthy of going into a different regime of stewardship land because that's what they did in the transitional provisions.

MR COOKE QC:

And vice versa.

GLAZEBROOK J:

Yes, but one would have thought, therefore, that you'd have to work out what it was about it that was either no longer – or part of it no longer meant that it came within that regime.

MR COOKE QC:

That's really why I've said this idea is at the heart of the case. If this land can properly be placed in either category it's difficult to see how there's any substance to the case. If there's nothing about the attributes of the land that require it to be forest park and if it can be stewardship land and once you get to that point and you accept that the 16A exchange enhances the purposes of the Act that must be the end of the challenge.

ELIAS CJ:

Well does that mean, though, that there is no enhanced protection for forest park land at all in terms of the section 18(7) determination?

MR COOKE QC:

But the way that that enhancement is taking place is through that exchange, that was enhancing –

ELIAS CJ:

But if you have to make out – there must be some sort of – you would say there's no threshold because they are managed for the same objects?

GLAZEBROOK J:

If they mean the same you can switch them at will would be your, that's what you're – put it at its highest, that's what your submission is, because there's no difference between them you can switch it at will and therefore it actually is totally silly having a conservation park with no disposability because you have no constraints on just switching them from one to the other.

MR COOKE QC:

I think I have to respond on two respects on that. I don't go as far as saying they are identical and they can switch freely between the two precisely because there are two legislative attributes of importance that distinguish between the two.

ELIAS CJ:

So you have to concede that.

MR COOKE QC:

Yes.

ELIAS CJ:

So what's the difference?

MR COOKE QC:

Well recreational access and then whether they should be exchangeable, should be available to be – those are the two differences –

ELIAS CJ:

Are they differences because both of them might cause you to reclassify? I just don't see that there's any real difference. You have to say that there is a difference because otherwise you've got the scheme of the statute against your submission but I don't understand what in reality what the difference would be?

WILLIAM YOUNG J:

Well you might say, I suppose, no one ever goes to this land so therefore it's not so appropriately slotted in as forest park as it might be for stewardship land.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

And then you might also say well the only other difference is that we can get rid of one and not the other and in the scale of things this is land, conservation land we can get rid of whereas that wouldn't be the case if X, Y and Z.

ELIAS CJ:

If nobody wanted it.

WILLIAM YOUNG J:

No, but if there were particular conservation values.

MR COOKE QC:

Yes, if you looked at the land and say actually there really are some very important attributes of this land and so – and the Minister has a discretion having considered those whether this category of management or that category of management is the more appropriate one in the Minister's opinion.

ELIAS CJ:

Well I don't have a problem with the Minister having a decision that he can exercise from time to time as to whether something should be in one category or another. What I find it difficult to accept is the conflation between forest park land and stewardship land because it seems to me, well apart from anything else it comes under the heading protected land. So it's clearly a category which has greater protection than stewardship land so if you are moving it from one category to another forget what your ultimate objective is for the moment, there must be some reason for doing that?

MR COOKE QC:

But if the statute says, as it does, that stewardship land is different because it is exchangeable then that must be a legitimate thing for the Minister to take into account when deciding whether to change the categorise –

ELIAS CJ:

What, that we can sell it?

MR COOKE QC:

Yes, because what Your Honour's –

ELIAS CJ:

Most of it probably is saleable, the nicer it is the more saleable it probably is.

MR COOKE QC:

And that's why Parliament's vested with the Minister that difficult question and the other thing about it being the scheme of the Act what Parliament overtly decided was that that power of re-designation would only be exercised following this public hearing process and that's precisely why there was the public hearing process. It's so those potentially controversial decisions –

ELIAS CJ:

The public hearing process here was against the notice given as to what the object was that it was for this exchange.

MR COOKE QC:

Yes, and that makes sense, doesn't it, because the difference between forest park land and stewardship land, is its exchangeability.

ELIAS CJ:

Yes, I understand.

MR COOKE QC:

So that would be the one thing that you would have to focus on in the particular case. How does one imagine other cases where there wasn't a proposal? I think possibly Parliament may not have turned its mind to what are the circumstances but one thing we can say is that transferring for disposal was within the contemplation of Parliament when it gave to the Minister that reclassification power.

ELIAS CJ:

I still think that there is a symmetry between the sale power and the exchange power, and the fact that you say that one has to be for conservation, well, I'm not sure that it really does get to that.

MR COOKE QC:

It's certainly true that 16A raises a different test from 26. 16A can only be applied when it's been decided, the Minister has decided, again, the policy

decision, that the exchange will enhance the conservation values of land managed by the Department. That's the first requirement.

ELIAS CJ:
Sorry –

MR COOKE QC:
Section 16A(2). So the Minister should not authorise any such exchange unless the Minister is satisfied after consultations with the consultation board that the exchange will enhance the conservation value of land managed by the Department, so that's enhance the conservation estate, and promote the purposes of the Act. It must be significant that that is in the scheme of this Act that the Minister is allowed to make those decisions. Unless the Act says that this land must be categorised as forest park and not stewardship, I say that that must be the end of the challenge.

What's interesting about this case in some ways is that we are arguing without very close consideration of section 18 and the wording of section 18 itself, and interestingly you won't find much analysis in the Court of Appeal's decision about the wording of section 18. Because that's the section that is actually being exercised in this case. So we look at two – so we've got to look at the text of section 18 in light of its purpose, and we look particularly at 18(1) and then 18(7), so 18(1). That's general land to be held for the purpose of a conservation park and ecological area or any other specified purpose, or for two or more of those purposes and subject to this Act it shall thereafter be held and the public notice hearing process is set out by subsections (2) and (3).

Then subsection (7) subject to subsection (8) the Minister may, by notice in the *Gazette*, vary or revoke the purpose or any or all of the purposes for which the land or interests held under subsection (1) is held and it shall thereafter be held accordingly.

Then subsection (8) is that you have got to follow the same public hearing process.

So we've got to look primarily at the text and purpose of these powers but also look at how the statute contemplates forest park and stewardship land as well. But I would say a series of things about these powers. The first is the power is vested in the Minister which, as I say, the Minister has the policy setting functions under the Act. The Minister establishes general policy and the administration of the Act is subject to the Minister's guidance. So the Minister has this policy setting function.

We have the requirement for the public engagement. We have an objection and hearing process and that is consistent with these powers being significant policy setting powers and they are an important constraint on the Minister's discretion, but the third point is that otherwise the power is broadly expressed. There are no prerequisites or tests in this section. It's a "may do so" not "must do so" provision. It is a matter of discretion or policy for the Minister. There is nothing in the sections that suggest that the Minister must do particular things with certain lands of certain attributes.

The next point is the power to vary or revoke under section 18 subsection (7), the power actually in issue here is expressed in equivalent open terms with the same public hearing requirement. This is no lesser power, the power the minister of one Government does not limit the power of the next minister and that is critical because here the Court of Appeal majority says that once land has crossed the threshold, their word, of special protection the Act contemplates permanent protection and it can only be varied under subsection 8 if the land completely loses its attributes by natural or external forces which presumably is a reference to a forest fire or some equivalent event. Where do we find in the Act a power in section 18(1) that is so profound but the power in subsection (7) that is so limited? There is nothing in the sections that suggest that, in fact completely the opposite. The powers are expressed in equivalent terms.

Finally, what I say is significant about the wording of these provisions is what the Minister is doing is declaring purposes for which land is to be held, that is, declaring their applicable regime that will apply to the land, even more specifically, which set of statutory powers should be made available to the land, a policy setting function. There is nothing in section 18 that suggests the majority's limitation on the exercise of section 18 subsection (7) and of course you need to look at the statutory provisions that describe the management but before I do that it is important to know, and I know my learned friend, Mr Martin, did say to understand that this was a deliberate decision, that is a deliberate decision to allow the Minister the ability to reclassify land and then change it and my learned friend took Your Honours to section 19 of the Forests Act which is the regime that previously applied to forest land and the fact that an area could not be excluded except by an Act of Parliament but when it came to enacting the Conservation Act and the background of the Conservation Act one year after the State-Owned Enterprises Act 1986 with that Labour Government's decision to reconcile much of the assets of the State, if I can put it that way, and decisions were being made about the State's land holdings but it was understood that was not possible to assess all the land holdings, had to decide whether they would be held for conservation purposes or used for economic purposes and that is why a decision was made to allow reclassification of land and that reclassification both ways, coming in or going out. It was a two-way door and that was a deliberate decision of the Government of the day.

ELIAS CJ:

Well it wasn't even decided, it was left to be determined whether it would go to a State Owned Enterprise, in any event.

MR COOKE QC:

That as well, but the important thing about the design of the legislation was to give the Minister the power to re-designate and that's to go one way or the other and there are two things about the legislative history that are important, the overt legislative decision to make the decision about categorisation a discretionary decision of the Minister when before it said it can only be

changed by an Act of Parliament and, secondly, during the drafting of the Conservation Act a decision was made to change the description of stewardship land so that it was equivalent to forest park land and they were attributes that were criticised by the opposition at the time of enactment and those are the passages that my learned friend, Mr Prebble, took Your Honours to and if I could just briefly go back to those.

ELIAS CJ:

Can I just ask, are you happy to sit on for a little bit, is that all right, you're happy to sit on?

MR COOKE QC:

Do you want me to go on?

ELIAS CJ:

Yes, I think we should because we are likely to be slightly disrupted tomorrow morning. I am concerned that we are going to run out of time.

MR COOKE QC:

Just so I know, how long would you like Your Honours?

ELIAS CJ:

Well do you think it's possible that we might conclude you even with the –

MR COOKE QC:

There's no chance of that.

ELIAS CJ:

There's no chance of that, how long do you need?

MR COOKE QC:

I think I will need another hour and a half.

ELIAS CJ:

Well then we'll have to sit later. We might take an adjournment and sit on.

MR COOKE QC:
Okay.

ELIAS CJ:
I'm talking about tonight, should we sit on until five.

O'REGAN J:
We've got a 4.30 meeting.

ELIAS CJ:
Yes, we could change that. Do you want to take an adjournment or do you want to carry on?

WILLIAM YOUNG J:
Well do you want to take an adjournment for five minutes?

ELIAS CJ:
It's 10 past four, isn't it? We'll carry on until 4.30, thank you.

MR COOKE QC:
Thank you, Your Honour, and I will try and be as efficient as possible, if I can put it that way, and I know Your Honours, I'm going to take Your Honours back to where you've been but –

ELIAS CJ:
I was a bit encouraged that you seemed to have got to number six and completed it I thought.

MR COOKE QC:
Well I haven't quite got to number six actually but I'm covering one to five as I'm going. As I said, this is not a description of my argument, these are just the ultimate propositions.

ELIAS CJ:
No, I understand that.

MR COOKE QC:

But if I could bother Your Honours by going to tab 21 of the Appellant's bundle of authorities which are those Hansard passages and one of the reasons to go to this is because the Court of Appeal majority referred to these passages in relying on the view that they took of the legislation but tab 21 and page 7979 at first. So we're dealing there with a speech of the opposition, a Mr Upton, and I'm about, so that's about two-thirds down the page, the second line of that, "We are told that every stewardship area shall be so managed so its natural and historic resources are protected. The definition of conservation parks which are part of the specially protected area states that every conservation park shall be so managed so that its natural and historic resources are protected. That is an identical formula and also both categories of land can be disposed of in the same way. There is no longer a distinction between stewardship lands and conservation lands."

So that was the first of Mr Upton's two points and I invite Your Honours to turn the page, page 7981, second to bottom paragraph. "The Opposition believes that it is important there is some parliamentary instruction about the ethic of management for those specially protected areas. In some respects the quality of protection is very much reduced. For instance, under the Forests Act forest sanctuaries could be revoked only by an Act of Parliament. They can now be revoked by notice. Obviously that would be a major step but it is less than an Act of Parliament. What justifies that downgrading?" And it's that that led to what Mr Woollaston, who was not the Minister, has said in response beginning at 7983. And at 7983, the second and third paragraphs at the top of the page refer to the difference between forest park and stewardship land. The second one, "He did not read 17(1)(b) which states, 'No other conservation area, and no interest in any other conservation area, shall be disposed of at all.' That is the single difference. Of course the Bill requires the same standard of care and protection for stewardship areas while they are held as stewardship areas. Why should there be a lesser standard of protection to allow their downgrading before a decision is made about their permanent protection or disposal? The difference is that stewardship land is to be held effectively until that decision is made." And then he goes on to deal

with the change about the permanent protection and talks about how significant the potential change by an Act of Parliament is, and the last paragraph is a speech, “It is still possible, and always will be possible, for Parliament to pass an Act to dispose of land, because no Parliament can bind its successors. The Bill ensures that the normal procedure that is laid down in statute is a relatively slow one that will ensure that public-interest groups and individual members of the public will have adequate opportunity to make their views known and have them listened to before such a decision is made. That right is not guaranteed by an Act of Parliament, and the member for Raglan knows it. I have seen him vote for some scurrilous Acts of Parliament, promoted by the National Government and passed in the dead of night, that have taken away public rights and disposed of land.”

Then the other just important thing to note in the same category is what Dr Cullen said, and if I can invite Your Honours to go onto page 7996, and I’m at the middle of the page, “Nobody looking at the Bill can say that this is or ought to be the last legislative word on conservation administration and legislation. It clearly is not. The bill is designed to deal with the process of transference that will occur on 1 April. That transference is important. Much allocation has already been decided, but much remains to be decided. That is precisely the purpose of some elements of the Bill. The Bill leaves open the options in terms of allocation. That is why the Government has said that some areas will be managed as if they were conservation areas or stewardship areas.” And that’s the reference to section 61, which is the transitional provision.

“The Opposition cannot make up its mind whether the Government should rush into decision-making and allocate finally and permanently millions of hectares of land, or whether it should not have allocated any of it before 1 April. The opposition is all over place… It fails to realise the crucial significance of sections 60A and 60B, the inclusion of which probably is the most important victory for conservation forces in the country’s history. The Bill transfers to the administration of the Department of Conservation a huge area of land, and the consent of the Minister of Conservation will be required for

any of that land to be transferred out again. I am surprised that the Opposition did not wake up to this."

So that is why it's clear from not only the statute itself, but also the Hansard passages –

ELIAS CJ:
We don't normally, of course, roam quite to this extent through the Hansard passages.

MR COOKE QC:
No, and I don't have to because it's in there in the text of the enactment. I'm just saying my submission is –

ELIAS CJ:
That the legislative materials don't suggest anything else.

MR COOKE QC:
They don't suggest anything else, and more importantly they don't suggest this was an accident, or let's put it this way, a much cleaner answer to Mr Upton's criticism by Mr Woollaston would have been to say, as the Court of Appeal did, ah, but you can only take it out of the forest park category if it completely loses its attributes such as by a forest fire. That would have been a nice answer to the criticism made by Mr Upton. But that's not what the Act was ever intended to provide. The answer to the criticism was, but there's a public process that has to be followed for any decision on reclassification that will lead to disposal. Then the other attribute of that is Dr Cullen mentioned this is not the last legislative word and within two years we had the Conservation Law Reform Bill 1989, which became the Amendment Act in 1990, in which 16A was inserted into the legislative scheme. So that was – and by that stage Mr Woollaston was a Minister. So within that period of time, as Dr Cullen suggested, it wouldn't be the last legislative word. The power of exchange was added into this matrix of decision-making that was going to be

followed for land in deciding what its ultimate end use would be. But with the public process being followed to bend the limitation.

So that brings me back to my proposition that given the, we're really dealing with three sets of statutory provisions here. We're dealing with section 16A disposal (and section 26 I guess). We're dealing with section 18 and 18(7) right to reclassify, and then we're just dealing with the description of the management regime, so that's section 19 and section 25. So to find the Court of Appeal majority's constriction on the section 18(7) power, if you don't find it in section 18 itself, the only other place it could be is in the statutory descriptions of the management regimes. My submission is that when you look at those there is no room for the concept of permanent protection in the way that the majority has said, and as I have already said the descriptions of management regimes involve sections 19 and 25 are almost identical. We've got the public recreation. Here the decision papers disclose that the 16 hectares in question were not being used for public recreation. And also, the decision papers disclosed that this overall proposal would enhance public recreation because you would have the new area adjacent to the Gwavas conservation area which was linked to the forest park through the rights of access through the Crown forestry licence areas. So the decision papers said that those attributes are being enhanced by the decisions that were being involved.

And then as we've already discussed, the key difference is exchangeability.

Now, that inevitably means or requires that the Minister or the Minister's delegate would have to consider the attributes of the land in question and there may well be things that may make a Minister decide, well, this land is just too valuable to exchange. But that's a matter to be weighed up by a Minister. That's the area of her discretion. What can be said is that land that meets the standards for exchange in 16A, that is, that the exchange will enhance the conservation areas of land managed by the Department and promote the purposes of the Act would be obviously eligible for consideration for reclassification under 18(7) precisely because you would be fulfilling the

purposes of the Act and enhancing the conservation estate. You can't say that to so do would be acting for an improper purpose.

In some ways, you can see this case is actually not really being about what the Court of Appeal said, because the Court of Appeal majority has introduced a bright line test in 18(7) that just isn't there, the test being you can only reclassify it as ever having lost its attribute it had in the first place. A more precise description of the issue in this case is really whether to exercise the 18(7) power to facilitate an exchange is to exercise the power for an improper purpose. Once you see that that is the real issue and you see that 18(7) exists precisely to enable to do that, you can see there's no basis for the improper purpose contention.

Just one other thing about the idea of the Court of Appeal's tests, as I say, it really in the end hinges on whether there were attributes of this land that meant it had to be classified as forest park, and not stewardship land. One of the difficulties is that there's a kind of verbal trick in the idea of saying, well, it's the attributes that it had in the first place, so if you lose those attributes then you can reclassify, because you never get to know what those attributes are.

The other thing about that is that the Court of Appeal indicated that the land would have those attributes when the decision was first made to give it the protected status and the irony of that is that the Court of Appeal identified the moment that it crossed the threshold in this case was in the very decision that was made that it should be reclassified to exchange. If I can take Your Honours briefly to the judgment in volume 1, in paragraph 68 of the Court of Appeal's decision. 68 was page 128 of the case.

68 is, "We are satisfied that any inquiry under 18(7) is limited to whether the repercussions are appropriate by reference to the particular resource. It does not allow a relativity analysis of the type undertaken by the Director-General from the viewpoint of what were the net gains. Once the land crossed the threshold of special protection – in the present case, by way of the

Director-General's declaration in the deeming provisions under section 61 – its designation could only be revoked if its intrinsic values had been detrimentally affected such that it did not justify continued preservation and protection; for example, if the park purposes for which it is to be held were undermined by natural or external forces." But in the present case, as their Honours said, it was the Director-General's declaration in the deeming provisions under 61 which happened simultaneously with a decision under 18(7) to reclassify it.

Just to illustrate that, if I can invite Your Honours to go to bundle 4, tab 73, page 758.

ARNOLD J:
Seven?

MR COOKE QC:
My learned friend Mr Martin identified this as the Departmental report and as he explained it effectively became the formal decision paper because the formal decisions made by the Minister's delegate, the Director-General, recorded in this table on pages 757 through to 759. So all the necessary steps and decisions are here and you'll see, "Agree to declare the RFP land to be held for conservation purposes under section 7(1) which has the effect of deeming it to be held for the purposes of conservation park by section 18(1), and then agree that subject to a *Gazette* notice giving effect to the 7(1) declaration to revoke the purposes for the RFP land as conservation park on the basis you wish to proceed with the proposed exchange of the RFP land." So there is no moment in time for this land to have obtained and lost the values.

ARNOLD J:
But that can't be right. Surely if you exercise a statutory power under section 7(1) it has meaning, it has an effect, and the effect of it was that this parcel of land was declared to be conservation park. Then you have the ability to change that status. But it's got to hold the status before it can be changed.

Implicit in the decision to give it that status is a view about its conservation values.

WILLIAM YOUNG J:
It can hardly be a view that it should never be sold, though.

MR COOKE QC:
I think also this might be a technical diversion as I believe the only reason why this was done was to trigger the public consultation process, because the land was deemed to be a conservation park.

GLAZEBROOK J:
I was going to ask you that and felt embarrassed to ask.

MR COOKE QC:
It's actually slightly baffling why this was done.

WILLIAM YOUNG J:
Well, it's a conservation park anyway.

MR COOKE QC:
Because it was already –

GLAZEBROOK J:
Well, that's what – so I was a bit puzzled as to why.

MR COOKE QC:
So it was deemed to be a conservation park under section 61 but then to actually bring it within section 18 they thought, well, we need to actually make a declaration under section 7 to bring it within 18, then we follow the public.

ELIAS CJ:
They didn't need to do that.

MR COOKE QC:

Well, I don't think they did.

ELIAS CJ:

But they did need to follow the public notification route to exercise 18(7).

MR COOKE QC:

Absolutely. It would have been much simpler had they just –

ELIAS CJ:

Gone to 18(7).

MR COOKE QC:

Straight to 18(7). But they thought for whatever technical reason that they needed to do a 7(1) first. So the Court of Appeal can't be right. This is not a moment in time.

GLAZEBROOK J:

No, but it already was.

MR COOKE QC:

This was deemed to be conservation park.

GLAZEBROOK J:

So it was already a conservation park and had attributes, presumably, that made it so, just because it was a forest park.

MR COOKE QC:

True.

GLAZEBROOK J:

So whatever attributes it had that made it a forest park were transferred over, I would have thought.

MR COOKE QC:

That's fair enough, except as the Hansard passages show, there was a lot of land that was being put into the transitional provisions categories.

GLAZEBROOK J:

As forest park?

MR COOKE QC:

Yes, if you go to section 61 which is the –

GLAZEBROOK J:

To be made conservation land. Sorry, I meant from forest park into that category.

MR COOKE QC:

It was moved from forest park straight by section 61 as deemed –

GLAZEBROOK J:

Yes, but forest park were already protected and thought to have major protection.

MR COOKE QC:

Under the old Act.

GLAZEBROOK J:

Because you could only change it under the old regime by Act of Parliament. The fact that there was a ragtag of other land that might have come in that way I'm not sure makes changes that –

MR COOKE QC:

I'm not sure it was just a ragtag because as Dr Cullen said, "We're going to manage land as if it was conservation park." So this land came within section 61.

ARNOLD J:

In order to dispose of it and get around section 61(9) they had to declare it under –

MR COOKE QC:

61, sorry which?

ARNOLD J:

Because of section 61 subsection (9) didn't they have to declare it so they could transfer it?

MR COOKE QC:

That was the technical path they took. We declare it as section 7(1) and then we follow the 18(7) public process of reclassification. So it's deemed –

ARNOLD J:

Because it's deemed to be a forest park.

MR COOKE QC:

Yes, and it can't be –

ELIAS CJ:

They still had to, didn't they, under section 61 they had to go one of the two routes, either to transfer to a state-owned enterprise or to declare it under section 7(1), didn't they?

MR COOKE QC:

Yes.

ELIAS CJ:

So that technical requirement was imposed by the Act?

MR COOKE QC:

Yes, that is the argument and if you look at 61(9) what it was doing is that until it is declared – had someone actually look at the land and decide how it should be then it's deemed to be this park and –

ELIAS CJ:

So it's a protective –

MR COOKE QC:

In the meantime.

ELIAS CJ:

– holding pattern but you know some of it is going to go state-owned enterprises but the balance is going to be brought under section 7(1).

WILLIAM YOUNG J:

What does the expression "conservation purposes" mean? Is land held as a stewardship area held for conservation purposes?

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Would it be possible simply to make a 7(1) declaration that the land is held for stewardship?

MR COOKE QC:

Yes, and then deal with it that way.

WILLIAM YOUNG J:

Is this the argument that the Court of Appeal didn't go much on?

ELIAS CJ:

No that was 7(1A).

WILLIAM YOUNG J:

Sorry?

MR COOKE QC:

That's slightly different because there is the 7(1A) might suggest you can do this without the public process.

WILLIAM YOUNG J:

But say the Minister had just said, “Here’s the land, it's parked under section 61, I want to make a declaration under section 7(1). Could the Minister under section 7(1) declare that it is held as a stewardship area?

ELIAS CJ:

A stewardship, yes, I would have thought so.

WILLIAM YOUNG J:

And then that would have cut out all the argy-bargy, public argy-bargy?

MR COOKE QC:

I'm told if you look at 61(3).

WILLIAM YOUNG J:

Yes, I see, okay.

MR COOKE QC:

So it's a technical and necessary step under section 61 and the other aspect of 61 is, perhaps it's been implicit, is there’s a prohibition on disposal while its being protected in that way and then you turn your mind to its actual categorisation. It's deemed to be a forest, a conservation park and then you can follow the public process for reclassification and then the additional argument –

WILLIAM YOUNG J:

Sorry, I don't quite understand this. Why couldn't the Minister under either – so you say subsection (1) the Minister can't do anything in respect of land that's Crown forest land?

MR COOKE QC:

Subsection (1) of what?

WILLIAM YOUNG J:

Section 7 – sorry, this is Crown forest land within the meaning of section 2 of the 1989 Act I take it?

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

So just this mean that section 7(1) didn't apply?

ELIAS CJ:

No it had to be declared to be held for conservation purposes under section 7(1) but when that declaration is made it has the effect of Crown, of conservation park so the route then was the 81(7).

GLAZEBROOK J:

Is your argument that –

WILLIAM YOUNG J:

I can't work it out actually.

GLAZEBROOK J:

The question – the way it’s worded is slightly odd, isn’t it.

MR COOKE QC:

Your Honour observed before, some of the Act has a lot of wet towel around the head material, I think this is one of them, that they've made it much more complicated, it seems, than it needs to be.

WILLIAM YOUNG J:

Well it… subsection (3), if it means what it seems to mean to me, then there wasn't power to make a notice in relation to that land under section 7(1).

ELIAS CJ:

Yes there was because –

WILLIAM YOUNG J:

Because nothing in that land applies to, would apply to it. Nothing in subsection (1) would apply to this land.

MR COOKE QC:

So the way – I don't think much turns on this.

WILLIAM YOUNG J:

No.

ELIAS CJ:

It's just it's about a declaration that it's held for conservation purposes. Once that declaration is made, which is the only option to passing it on to a state-owned enterprise, then you're into the section 81 regime if –

MR COOKE QC:

Yes, 18.

ELIAS CJ:

Sorry 18(1) regime if you want to change its status.

WILLIAM YOUNG J:

Yes, but say you've just declared it held for conservation purposes, namely as a stewardship –

ELIAS CJ:

You can't, because of 61(3).

GLAZEBROOK J:

That's what I thought you were asking, because if the deeming stops as soon as you make a declaration under 7(1)…

MR COOKE QC:

It becomes two different types of deeming. It's deemed generally to be conservation park and then once you've done this it's deemed to be a *Gazette* notice.

WILLIAM YOUNG J:

I see.

GLAZEBROOK J:

Yes, yes.

WILLIAM YOUNG J:

Okay, I understand.

MR COOKE QC:

And then you can follow the process.

GLAZEBROOK J:

Yes.

MR COOKE QC:

So actually when you go into Hansard you understand. They wanted the public process to be followed in relation to this land. The argument about

section 7(1A) is precisely because 61(3) only refers to 7(1) and not to 7(1A), and so the argument is –

ELIAS CJ:
Oh there's another power?

MR COOKE QC:
Yes, a much – well, I wouldn't sort of lead partway – the only effect of this is it might have been thought that for transitional lands you could do it without a public hearing process. But because that path wasn't followed, again I don't think we need – there are so many powers to follow that are legitimate powers that I wouldn't bother going down the path, this is a public access argument –

ELIAS CJ:
I think we've talked to a standstill so we'll take the evening adjournment. How long do you want to be tomorrow?

MR COOKE QC:
I will likely be, say, three-quarters of an hour.

GLAZEBROOK J:
I think we're starting at 10.30 tomorrow.

MR COOKE QC:
Yes, Your Honours have said you're releasing the other judgment at 9.30.

ELIAS CJ:
Yes, it won't take that long though. Clearing the Court might take some time.

MR COOKE QC:
Can I suggest this though, Your Honours – that we are all here and ready to go as soon as we can.

ELIAS CJ:

As soon thereafter as counsel may be heard. Yes.

COURT ADJOURNS: 4.33 PM

COURT RESUMES ON TUESDAY 28 FEBRUARY 2017 AT 10.20 AM

ELIAS CJ:
Yes, Mr Cooke.

MR COOKE QC:
Thank you, Your Honours. Just to explain how I will go this morning, I want to spend a bit of time finishing off the question concerning the reclassification decision and that will have dealt with numbered paragraphs 1 through to 5 of my one-pager. I want to spend a very brief amount of time on the policy and strategy question, a couple of points to make about that, and then I'll attend to question 6 on my list and then I will attempt to simplify it and present simple, coherent propositions about marginal strips.

But if I could first go back to the reclassification decision and first make a couple of additional points about section 18(7), and then try and draw some of the themes together that were the subject of my submissions yesterday, the two additional points I wanted to make about the particular provision, 18(7), is first at the conclusion of yesterday we were discussing the transitional provisions in the Act and it's important to understand that the power to vary or revoke a designation under section 18(7) is not a power that's limited to transitional provision land. Parliament has made the deliberate decision that that power applies to all categories of special purpose established and recognised under the Act. It's not just a transitional provision power. It's a more broad power.

ELIAS CJ:
But what – I mean, clearly it is so what do you draw from that?

MR COOKE QC:
Well, I just wanted to make sure that the discussion we were having yesterday about the transitional provisions wasn't describing the full extent of the ability to reclassify.

ELIAS CJ:

Which makes your argument even more significant. It's not just confined to that area of land.

MR COOKE QC:

Yes, and as we saw from the Parliamentary materials yesterday, that was a deliberate decision to move, to give the Minister that discretionary power. Also yesterday I submitted that the breadth of the power in subsection (7) wasn't any less broad than the breadth of the power in subsection (1) to originally decide upon the designation. It's just an additional factor to mention about subsection (7) is that it's a power to vary or revoke the purpose or any of the purposes and I think the language that was used here was to say revoke the 16 hectares but of course it could just as easily be described as varying the original forest park designation to remove the 17 hectares. In fact, they're one and the same step, if I can put it that way. Varying or revoke all or any of the purposes does reiterate the breadth of that power. Of course, it's all subject to this public hearing process which is elaborately set out in section 49.

To bring all the threads that I submitted yesterday and the concern of Members of the Court has been that this reclassification power is in a sense just collapsing into the exchange power in section 16A and in my submission that is not what happened and is now how the Act works. As I submitted yesterday, what is required under section 18(7) is a consideration of the categorisation and the categories of land and the management regimes that each category contemplates, and it gives the power to the Minister, a discretionary power, to make a change decision and in making that decision the obviously mandatory consideration because you have to exercise this power for proper purposes taking into account the mandatory considerations. There are two in this case, one is the recreational values recognised by forest park lands that are not overtly recognised by stewardship land and, secondly, its exchangeability. And it's important, as I stressed yesterday, that the public hearing process gets engaged here because the public hearing process –

ELIAS CJ:

Is that an adequate description? I know that recreational values loom large because they are identified but they are not the only value so is that overstating it a bit? If you had, for example, what are the other protected lands? If you had a wilderness area is that the most, or ecological area –

MR COOKE QC:

Then you would be adding to that list of mandatory requirements.

ELIAS CJ:

Yes, you'd add to the list but you wouldn't exhaust what were relevant mandatory requirements because surely other conservation values which attached or adhered to the particular land would also be relevant.

MR COOKE QC:

Yes, I accept that. I'm not saying recreational thing is the only consideration.

ELIAS CJ:

No, all right, that's what I was just querying.

MR COOKE QC:

But I say that two critical ones here are recreational attributes because that's one of the key differences between the two.

ELIAS CJ:

Yes.

MR COOKE QC:

And secondly, and I accept in Your Honour's question really this is implicit, that should I reclassify this land so that it becomes exchangeable and inherent in that is what are the qualities of this land and are they such that even if the exchange power were to exist I would decide, no, I still think there are values in that land that means it should be kept as a forest park.

ELIAS CJ:

Yes.

MR COOKE QC:

So you have to consider the attributes of the land, that's a mandatory consideration as well.

ELIAS CJ:

Yes.

MR COOKE QC:

And in terms of the public process, the public process didn't exist because of the exchange power in 16A, it existed because of the reclassification power and that is why the public hearings took place should this land, give its attributes, be reclassified, that was the scope of the inquiry. And the reason why they didn't use 7(1A) that alternative route is precisely because of the importance of that public process and I just take Your Honour's brief to volume 3, tab 40.

ELIAS CJ:

Which colour is it?

MR COOKE QC:

Yellow.

ELIAS CJ:

Is it yellow?

MR COOKE QC:

Yes. Behind tab 40 you will see this is the proposal to how this potential revocation should be considered and on page 487 it's the very last paragraph of paragraph 3.4 I want to draw Your Honours' attention to: "Despite enabling a simpler exchange process, use of section 7(1A) is not recommended because the area in question poses high values; those values are recognised

in its deemed conservation park status which is a special for of protective overlay; and there is a high public interest in changing the protected status of such land. It is therefore considered that public consultation is appropriate." And my –

GLAZEBROOK J:
Sorry, I've lost where you are.

MR COOKE QC:
On page 487, 3.4, the last of those paragraph in 3.4.

GLAZEBROOK J:
The last one, thank you.

ELIAS CJ:
There is a question as to whether this is a correct characterisation of section 7(1A) in any event.

MR COOKE QC:
I understand that.

ELIAS CJ:
Yes.

MR COOKE QC:
But they at least thought there was a –

ELIAS CJ:
Yes and they were –

MR COOKE QC:
But they were saying but this is sufficiently significant land for us to fully engage with the public about it and my learned friend Mr Martin took Your Honours to that document which indicated that the advice to the public was to be it is to be the reclassification decision that is the subject of this

consultation and therefore what it is about the attributes of this land that mean I shouldn't reclassify as the focus of the public inquiry.

Then when you come to the report of that public inquiry, one of the things the report said was, it addressed this question of recreational access and it's in that report that you find the advice to the decision-maker, that this land is not used for recreational access, and in fact what will happen with the new land as you get greater public access, if you've got a new area to go to, you've got access to that land through the Gwavas conservation to the new area of land. So that has enhanced the recreational values concept. Then the other concept that I accept is completely mandatory is this what are the qualities, the conservation qualities of the land itself. Now even that doesn't collapse completely into the 16A inquiry. I think as I said yesterday, if you've got land that meets the 16A test, particularly because it talks of enhancing the conservation state and fulfilling the purpose of the Act, you've got a good starting point for the question of reclassification. But still the Minister has a discretion to decide that whether this land should be available for exchange in light of its attributes or are the attributes sufficiently significant that I won't make this land available for reclassification, even though 16A is met, and that was at least part of the purpose of the science report, where the group of scientists went through and analysed in considerable detail the qualities, not just to the land being obtained by way of exchange, but of the land that was to be exchanged itself. So a very detailed analysis of the qualities of the 16 hectares including whether those qualities were evident elsewhere in the Ruahine Forest Park.

It would be a mistake to try and go through all the examples of how the science report does that, but if I could just briefly touch on that by going to, in the same volume, tab 67. You can see that there are four department scientists who are the authors of this report, and if you start at 683 of that report, there's the heading, "Improved knowledge gained from site assessments," in the middle of 683, and you start going through each of the attributes of the land. So, for example, that second paragraph under that heading which begins, "The long lasting impact of logging," et cetera. You

see at the bottom of that paragraph, “The loss of emergent podocarps from the Dutch Creek black beech forest contrasts with the unmodified black beech podocarp forest further up the Makaroro River catchment.” So what you’re getting in this report is an assessment of the values of the 16 hectares looked at in the broader context of the Ruahine Forest Park as a whole, and you get that throughout all these attributes. So, for example, if you go, and the next bit is about the Makaroro River braided river habitat. The second paragraph there. There has been concerns raised about the scheme. “Our aerial assessment revealed kowhai to be present on the banks of the Makaroro River well into Ruahine Forest Park, with a kowhai dominated face on the bank opposite the western end of the Makaroro River parcel,” et cetera. And you get each of those kind of assessments for all the attributes, and I won’t necessarily go through, Your Honours, each and every one of them. But you’ve got the assessment of the braided river habitat, which is in the immediately preceded paragraph. The kowhai, the fish habitats on page 686. The threatened land environment in 687.

ELIAS CJ:

Don’t you need to show us how these were addressed in the decision-making document and the questions that were posed. I know it’s a sort of a form and a tick the box, I don’t mean that pejoratively, that’s the way these things are presented for decision. But I’d quite like you to correlate those, the identification of those qualities and those comparisons with the decision that was taken. What page do we find that again?

ARNOLD J:

It’s 687.

ELIAS CJ:

Thank you. I mean, do they. I don’t know whether they do?

MR COOKE QC:

Well 687 is still within the science report and the formal –

ELIAS CJ:

No, no, sorry, I want the form –

MR COOKE QC:

The formal decision paper really is – it doesn't provide all the reasons for the –

ELIAS CJ:

I know, well, I don't know. Can you just remind me where I find it? I want to have a look at it against this discussion.

MR COOKE QC:

Yes. Your question puts me on the spot. I've got it. It's behind tab 38. No, that's not right.

ELIAS CJ:

Mr Martin said it was the key decision-making document.

MR COOKE QC:

I thought he – oh, it's in tab 73, the pink volume, volume 4.

ELIAS CJ:

I have written down "effectively the decision paper" on that.

MR COOKE QC:

That's a formal one but it's just a summary of the actual decisions made in agreeing to it. I think the best place you get for seeing the decision-maker taking into account the material I've just been taking Your Honour to is the decision-maker's affidavit where he said he took into account the science report, he agreed with it, and he thought it was a robust science report.

ELIAS CJ:

Well, does that mean that on this effectively the decision paper, there isn't anything that you can take me to?

GLAZEBROOK J:
We were taken to the departmental tick the box and then we were taken to the actual decision. This one's the actual decision, isn't it?

MR COOKE QC:
Yes.

GLAZEBROOK J:
And it does relate to the wetland if you look at the executive summary on page 755. There's a discussion on the parcel and the attributes, at least in summary.

MR COOKE QC:
If Your Honour is going through to – yes, here's the summary on page 765 to 766. This paper does summarise –

ELIAS CJ:
The science report.

MR COOKE QC:
Yes. And as I say, the Director-General, as the Minister has delegated in his affidavit, explained how he took into account the science report in that respect. So, for example, at 770, you've got the reference to recreation.

ELIAS CJ:
That's fine. All I was doing was saying this is the science report but how was it taken into account, and it's shown.

MR COOKE QC:
If you go to 768, it's summarised. Of course, a summary can only summarise but it's summarised in paragraph 75.16 and on. So it's linked in, if I can put it that way.

ELIAS CJ:

Yes, yes.

MR COOKE QC:

And my point about that, and if I go back just to the science report itself, it does address all these values. At 67, I just wanted to demonstrate that. Page 698, the conclusions or the summary of where they get to after conducting that analysis at the bottom of page 698, "Smedley block scored the same or higher than the two parcels of the Ruahine Forest Park revocation land. This is attributed to the diversity of habitats offered by the size and altitudinal ranges …" et cetera.

Over the page, second sentence, "In contrast, the Ruahine Forest Park relocation lands make a disproportionately much smaller contribution to the present values of Ruahine Conservation Park."

So it's not right to say that there has been no consideration of the attributes of this land. In fact, it's been a very disciplined exercise to say, well, what are the attributes of this land? How do they contribute to the forest park overall? And that enables the decision-maker to decide not only on the exchange but whether there are attributes of this land which mean it should not be exchanged. So that's why I say that the statutory requirements in section 18(7) which must be the really critical ones are met, or were properly met in this case.

Just while we're on this topic, it was something that came up yesterday where my learned friends, Forest and Bird, have in their submissions described this land as nationally significant and Your Honour the Chief Justice, asked about that. There is one line in an earlier – the earlier draft paper on the concession which didn't proceed – there is one line in that paper where the report writer identifies that another person has described it as nationally significant but otherwise all of the materials do not describe this land as nationally significant, even Forest and Bird's own affidavit doesn't describe it as that.

So this land definitely has conservation values as the science report identified but no one in this case has identified them as nationally significant.

ELIAS CJ:
I'm sorry, I can't remember whether I asked for the reference to the decision on the concession?

MR COOKE QC:
Well there was no decision.

GLAZEBROOK J:
We were given the material, I actually had it open just before but now I've lost it.

MR COOKE QC:
It's in volume 3, tab 35 is the draft concession.

ELIAS CJ:
Volume 3?

MR COOKE QC:
Tab 35, is the proposed concession decision which didn't proceed and the one liner that I've just referred to that my learned friend has obviously used is on page 460 that last paragraph says, “A breakdown—A breakdown of the land in question is above, and as advised by Simon Moore, some of the land appears to be nationally significant.” But that's the only place I have been able to see where someone has said that.

Just two other tidyings up, if we can call it that. Your Honour Justice Arnold asked about the origins of the forest park status. No one has identified any previous decision which described the attributes of the park that can be relied on. The best I can provide in the record is that there is a brief description of the history of the land in volume 4, tab 71 at page 773 in paragraph 7.1 and following, describing what the land was, how it was previously held from

pre-1881 days but we can't find in that anything that would give you some decision identifying attributes of the land that led to a designation in the first place.

ARNOLD J:
Thank you.

MR COOKE QC:
And Your Honour the Chief Justice asked a question early in Mr Martin's submissions about where do we find recreational access as part of stewardship land, and it isn't one of the overt purposes for which stewardship land is managed but it nevertheless implicitly part of stewardship management because the definitions of stewardship land begin by describing a stewardship area as a conservation area. It says, "Stewardship area means a conservation area that is not," and then it is a list of things that it is not, and conservation is defined, and defined in a way that includes recreational. So recreation would remain part of the stewardship area.

ELIAS CJ:
Yes, well what I was just trying to identify was whether there was any hierarchy so that this category was predominantly for recreational purposes but it is really that it is simply identified as one of the qualities provided for in land of this category.

MR COOKE QC:
Yes. So that's really all I wanted to say about the exchange decision and really that I think the issue that the Court has been struggling with is "isn't there somebody that should be directed to the attributes of the land itself and whether it should be forest park land rather than stewardship land that can be exchanged", and that is certainly true, and that is exactly what was inquired into and addressed, because it is a very important policy decision for the Minister or the Minister's delegate to make, about whether it will be reclassified and therefore available for exchange. And so I say that actually

18(7) was met in its terms quite appropriately in this case, and it wasn't just collapsed into a 16A decision.

Unless Your Honours have any questions about that I'd then like to move on to the question of the relevance of the policy and the strategy. This is something that I think I can address quite briefly. First, by saying that I support my learned friend's submissions for the Crown in relation to this point and in particular the concept that the policy and the strategy were taken into account to the extent that they were relevant. But I did want to just emphasise two points about this. The first is that these policies and strategies don't say that the Minister can only exercise the reclassification power if certain requirements are met. They just indicate when the Department may review the land.

So they don't purport to constrict what the Minister can do under section 18(7), and just to reiterate that, can I just take Your Honours to the policy which is in volume 3, the yellow one, tab 34, which is the policy. First, just go to the relevant policies themselves on page 415. You'll see that 6(b), at the top of 415, first of all it starts "subject to statutory requirements", so that tends to suggest that the statute still applies in its terms, and it just said "conservation lands may be reviewed" and then it gives a list of circumstances which my learned friend Mr Martin has indicated, particularly looking at 6, would apply in this case. But it's just the "may be" as well. If you go back to page 399 there's a thing about how you interpret these policies, and 399, 1(d), in the middle of that box, "The words 'will', 'should' and 'may' have the following meanings," and you go from "i. A deliberate decision has been made by the Minister to direct decision-makers… ii. Policies that carry with them a strong expectation of outcome without diminishing the constitutional role of the Minister," and reserving that statutory context. And, "iii. Policies intended to allow flexibility in decision-making, state that a particular action or actions 'may' be undertaken." So we're in that category here. So it's not intended to be directive.

GLAZEBROOK J:

Well, I mean you may review it, that's right, but if you do review it, doesn't it say you do so under those categories? Taking into account those matters?

MR COOKE QC:

I don't think the policy does say that, with respect.

GLAZEBROOK J:

Well just because it says "may", I mean it obviously, depending upon whether they're appropriate to be taken into account in the particular decision, but normally, yes, you may review it and if you do then you do so taking into account these and any other relevant factors.

MR COOKE QC:

I think the only thing I need to say is that this does not purport to be the only circumstances where the Minister may reclassify. It doesn't purport to do that.

GLAZEBROOK J:

Well when does it purport to do anything else?

MR COOKE QC:

It just purports to guide the Department in terms of when they might raise a question of reclassification. Because that's what policies are supposed to do. They're supposed to guide the Department in their administration of the Act without taking away from the Minister's ultimate statutory powers. And that's really the second point I wanted to make about this if –

GLAZEBROOK J:

But doesn't the statute refer to policy, so it can't be assuming it's just the departmental policies, or only taking the Department into account.

MR COOKE QC:

That was my second point – is that if you look at the Act these policies are not supposed to direct the Minister. If you look at the relevant section under

which there is established 17A. So you start at 17A, first of all it says, "Subject to this Act, the Department shall administer and manage all conservation areas in accordance with statements of general policy." So subject to the Act –

ELIAS CJ:
So does the Department not include in the definition the Minister? I mean, I wouldn't have thought it did.

MR COOKE QC:
No.

GLAZEBROOK J:
Well, what about 17B?

MR COOKE QC:
Well, that was what I was going to go to next. "The Minister may approve statements of general policy for the implementation of this Act," et cetera.

GLAZEBROOK J:
Well, has the Minister approved these policies?

MR COOKE QC:
Yes. Then 17B(2), "Nothing in any such general policy shall derogate from any provision in this Act."

GLAZEBROOK J:
Well, I understand that but does it derogate from the provision of the Act providing things that must be taken into account? I would have thought not because that often is the case, isn't it? In the Immigration Act, for instance, there are policies and the Department is supposed to administer and the Minister takes those policies into account in making decisions, and actually quite rightly.

MR COOKE QC:

With respect, I think this framework is different. The ultimate question is, when it comes to an exchange decision which does the Minister apply, the terms of the policy or the terms of the statute?

GLAZEBROOK J:

Well, I don't think it's quite as easy as that. If you have a general discretion and then you have a policy that sets out factors that you take into account, it doesn't derogate from the general discretion that just says take account of these factors, doesn't it?

MR COOKE QC:

Well, it depends on how you're reading that policy. If you're reading that policy so that it says a decision can only be made to re-designate if certain criteria are itemised and satisfied, then you are implicitly amending the discretionary power to change.

GLAZEBROOK J:

Well, it depends whether you think that discretionary power is unlimited in any event, and your concession that you take into account the attributes of the land would suggest that it's not, at least in any sensible way.

MR COOKE QC:

I'm not suggesting that the power in 18(7) is unlimited. I say you look into the Act.

GLAZEBROOK J:

Well, sometimes you seem to and sometimes you don't. With respect, your submissions skate around on that.

MR COOKE QC:

To make it absolutely clear, the power in 18(7) is constrained. It's constrained by the purposes of the Act. It's constrained by the particular attributes of forest park land and stewardship land in the context of this decision. It's not

an unlimited power, and those are the statutory factors that Parliament wants a decision-maker to take into account. If the policy was purporting to change those and have different factors that would determine whether you could re-classify, that would involve the discretion in 18(7) being changed by the policies.

ELIAS CJ:

Then the policies would be invalid if they were inconsistent with the legislation. But nobody's suggesting that. But if you have these policies, surely any decision-maker has to take them into account. That's the whole purpose of having them, and it's the whole purpose of not specifying things in the legislation that have to be taken into account so that policies can be set from time to time.

MR COOKE QC:

I don't need to succeed on this argument because these policies were taken into account.

ELIAS CJ:

Yes, well, that's what I would have thought was your stronger point. But you're going for a sort of – are you saying only the Minister stands outside these policies?

MR COOKE QC:

Yes.

ELIAS CJ:

Well, that's …

MR COOKE QC:

Because they're guiding the Department. The Minister establishes them to guide.

ELIAS CJ:

So if the Director-General makes the decision he's bound but the Minister isn't?

MR COOKE QC:

Well, here the Director-General is exercising the Minister's –

ELIAS CJ:

He's the delegate – but, oh, that's dreadful.

GLAZEBROOK J:

Well, in any event, if the Minister approves general policy statements under 17B they do apply to him.

MR COOKE QC:

Well, the Minister approves them.

GLAZEBROOK J:

And possibly he, in deciding that the policy is fine, is saying, "Well, we will abide by these policies and I do constrain my discretion in respect of it until the policy has changed." But as you say, the strongest point is probably that you don't need to win on this.

MR COOKE QC:

So the Court obviously decides this case for other purposes as well.

GLAZEBROOK J:

That's what slightly concerns me about your argument, which is very, very much broader than the Crown argument. I'm not sure in a context of a case like this that it would be at all appropriate for us to decide on the broader concept which one can quite understand why the respondent might be slightly worried about it, from a policy point of view.

MR COOKE QC:

Well to the extent that it's relevant for the Court's ultimate determination I've made the submission on this that that they are there to guard the Department rather than tie the Minister, him or herself, but I don't want to keep on pushing on a door that's not opening particularly widely for me.

ELIAS CJ:

Is there any difference, I suppose there is under modern legislation between the Minister and the Department because formerly there did not used to be.

MR COOKE QC:

They have quite different roles under this legislation.

ELIAS CJ:

Under this legislation, I see.

MR COOKE QC:

The Minister has the policy setting role, describing the role of the Department it says, "Subject to the directions of the Minister" –

ELIAS CJ:

But the Minister also has decision-making functions.

MR COOKE QC:

Yes decision-making, overt decision-making functions, that's right, under the statute such as 18(7), the one in issue here and 16A exchange power.

Anyway, I didn't want to say any more about that because of the danger of going into arguments I don't need to and that brings me then onto marginal strips which is even the more difficult –

ELIAS CJ:

Can you remind me because I am now totally confused about marginal strips. Are marginal strips, why are they relevant in this case? Is it because they weren't taken into account, is that all?

MR COOKE QC:

No, but their only relevance is this. It was part of Forest and Bird's original challenge to say these decisions are unlawful because marginal strips weren't considered but that point has dropped away. His Honour Justice Palmer said, "Well that's a matter that still needs to be addressed. We don't even know if these waterways are three metres wide or not, it's still a matter yet to be addressed," and that point wasn't taken further on appeal by Forest and Bird, but the Crown and my clients cross-appealed His Honour's decision that the marginal strip provisions applied but His Honour said, "Yes they do apply."

ELIAS CJ:

But why should we determine that if it's not a controversy between the parties now?

MR COOKE QC:

Well that cross-appeal by the Crown and my clients was dismissed by the Court of Appeal although they didn't analyse the point they just dismissed it and so it's subject to the application, I believe grounded by this Court, as to whether the marginal strip provisions apply.

GLAZEBROOK J:

We'd have to determine, wouldn't we, because otherwise the determination stands, is that your point?

ELIAS CJ:

But there's no determination, as I understand it, by Justice Palmer.

MR COOKE QC:

He said, "The marginal strip provisions apply."

GLAZEBROOK J:

Do apply.

ELIAS CJ:

Well if their –

GLAZEBROOK J:

Their application has to be decided later.

O'REGAN J:

Yes, so he did make a decision.

ELIAS CJ:

But there's no finding of fact that anything is –

MR COOKE QC:

Three metres.

ELIAS CJ:

Three metres.

MR COOKE QC:

No.

ELIAS CJ:

I see, so subject to the factual determination, it's determined.

MR COOKE QC:

Yes, it's applicable.

GLAZEBROOK J:

But the fact of determination, as I understand it, takes, will take quite a lot of working out and if that can be avoided –

MR COOKE QC:
It will take a bit of survey.

GLAZEBROOK J:
– with the cross-appeal being allowed that would certainly save difficulty –

MR COOKE QC:
That's one factor. From my client's point of view it would avoid the cost of having to do that and it may, and it seems that even if marginal strips do apply 24G is a practical solution for this case because the water moves when the river is flooded it becomes a reservoir, the marginal strip moves on Crown land. And we're only talking about Crown land here, marginal strips only ever get created on the Crown side, they never get, they don't get created on the private side because the Crown doesn't own the land up abutting the river on that side. So that might be a practical answer to this particular case and it will be helpful if that is the practical answer for the Court actually to say so because there's a lot turning on this project. Millions of dollars have been spent on it so it would be very helpful to have an answer on that question.

But if I can capture in a nutshell, if 24G doesn't work that way what the problem with marginal strips application would be and that is what was involved here was my clients seeking to provide land in exchange for acquiring strips of land along the edges of a river and a stream. Essentially what they were seeking was marginal strips that weren't marginal strips as created because you only create those when the Crown disposes of land. So there are no marginal strips in existence but what my clients were seeking were areas of land along the edge of rivers and streams and if the marginal strip provisions do bite and reserve back marginal strips that may be almost all of the land that has been acquired under the exchange.

ARNOLD J:
I mean that's just a practical problem and there is a mechanism in the Act to deal with it and that is that the Minister can grant an exemption or limit the –

MR COOKE QC:

The more significant power will be the power of exchange of marginal strips and that's the power under 24E. I'm not sure that the Court –

ARNOLD J:

Can we go back to this diagram behind the Appellant's submissions?

MR COOKE QC:

Yes.

ARNOLD J:

And look at the Makaroro block alongside the river.

MR COOKE QC:

Are you looking at figure 2, Your Honour?

ARNOLD J:

Sorry?

MR COOKE QC:

The second of those two?

ARNOLD J:

The second one, yes, the one right at the back.

MR COOKE QC:

In the Crown's?

ARNOLD J:

Sorry, the Crown's, yes, I'm sorry. So we've got that purple area for Makaroro block and in the normal course assuming that that river is more than three metres if the Crown disposed of that land, sold it or whatever, there would be a marginal strip by virtue of Part 4A or whatever it is.

MR COOKE QC:

Yes, section 24.

ARNOLD J:

Right, and as I understand the Crown argument is that reasoning doesn't apply here because there's an exchange and these provisions in Part 4A don't bite on an exchange and I have to say for myself I just do not follow the logic of that.

MR COOKE QC:

My argument is somewhat different. My arguement is that the purposes of reserving marginal strips – marginal strips arise when the Crown is disposing of any type of land and reserves that the marginal strips, subject to the exercise of the Minister's statutory powers in relation to marginal strips in the sense once they've come within conservation estate but when the Minister himself or herself is actually themselves dealing with a question of the land in question you don't deem marginal strips to be created because the Minister and the Department are in control of this land to begin with and deciding what to do with it. Marginal strips bite when another Crown agency disposes of land and it's deemed to create marginal strips unless once the Department gets that control decides it shouldn't be. Here the Department, the Minister, is in control of the disposition in question and is in control under the machinery of the Act to decide what, if any, area along the edge of the river and the stream should be reserved as a marginal strip.

GLAZEBROOK J:

How do you get rid of the automatic deeming? I'm not talking in a situation like this but if there was just a sale? Are you saying if it's a sale by the Minister of Conservation you don't have a marginal strip but if it's a sale by the, I don't know, the Ministry of Justice you do?

MR COOKE QC:

What I say is that when the Minister of Conservation discloses conservation land alongside a river or stream and actually whether it's three metres wide or not –

ELIAS CJ:

He can decide whether to have marginal strip or not?

MR COOKE QC:

He can decide whether to have a marginal strip, yes.

GLAZEBROOK J:

Well where do you get that from the statute? How do you get rid of the deeming?

MR COOKE QC:

Well I get rid of the deeming, is the way Your Honour put it, by looking at section 24 which is the section that deems it and I interpret this purposively and I note, and I accept what Your Honour Justice Arnold put to my learned friend yesterday, that this is a disposition but if you look into 24 it is, there is a distinction between the Crown on the one hand and the Department on the other and you can see that in 24(2A), "Where the Crown proposes to sell or otherwise dispose of any land, the responsible department of State or agency shall notify the Director-General of the proposal; and the sale or other disposition shall have no effect unless and until that requirement is complied with." So you're distinguishing between the responsible department or State or agency on the one hand and the Director-General of the Department on the other and 24 is dealing with transactions that the Department of Conservation is not in control of.

ELIAS CJ:

I just don't see how you can read down these deeming provisions.

ARNOLD J:

I mean, this is Crown land. I just don't understand how it's not being disposed of by the Crown. I mean, I take your point that section 2A …

ELIAS CJ:

That's a notification provision.

ARNOLD J:

That's right, and obviously you need that in circumstances where it's a department other than the Department of Conservation.

MR COOKE QC:

Well, another point is whether the statute contemplates that the Minister could dispose of marginal strips under the disposal powers. If, under the disposal powers, it was contemplating that the Minister could be disposing of marginal strips, that would support the argument I've –

ELIAS CJ:

Why? Because surely he would have to do so consciously.

MR COOKE QC:

Sure. But you wouldn't have the deeming machinery. You would say that when the Department – when the Minister disposed of large area on the edge of rivers and streams if the statute contemplates he can dispose of it including the marginal strip, then you wouldn't be looking at the marginal strip's deeming provisions. You'd say the disposal in exchange.

ELIAS CJ:

Well, he'd have to exercise that power, wouldn't he?

MR COOKE QC:

Sure.

ELIAS CJ:

But absent that, surely the deeming kicks in because it's for all Crown land.

MR COOKE QC:

Well, I'm just pointing out that if you look at section 27, which is the disposal power, it does contemplate this and I think as Your Honour Justice Young drew my attention to 26(2) yesterday, which was about adjacency, and you see at the very end of 26(2) "or in the case of any marginal strip of the adjacent water or public access to it". So when you're disposing of a marginal strip you have to consider the adjacency being the adjacent water and public access to it."

ELIAS CJ:

It's very difficult to find 26, too, in the statute book, because of all of these Zs and things.

MR COOKE QC:

I'm sorry. It's section 26(2).

GLAZEBROOK J:

Possibly easier in the actual booklet.

ELIAS CJ:

It's probably much better in that, yes.

GLAZEBROOK J:

Unusually we've got the …

ELIAS CJ:

Yes, I've found it.

MR COOKE QC:

All I am saying about that is that it contemplates the Minister – and this is a difference between my learned friend Mr Martin and I… I do think the same

concept applies to disposals as well as exchange, that is, that the Minister's in charge of disposal and exchange of stewardship land on the margins of rivers and streams and makes the conscious decision himself to reserve marginal strips or dispose of them. You don't go into the deeming machinery.

ELIAS CJ:

Maybe I'm just very slow on this, but section 26(2) arguably isn't about disposing of marginal strips.

GLAZEBROOK J:

It's adjacent. But in any event, that assumes a marginal strip that you're disposing of and here the difficulty is there isn't, as I understand it, well, we don't – there isn't at the moment because there wouldn't be anyway until you dispose of it but it's likely as far as I understand that if it was, if it remained just a river that there wouldn't be a marginal strip anyway, although do we even know that? Let's assume we're not flooding it.

MR COOKE QC:

That requires a survey. I think there is a decent prospect that this is more than three metres wide, on average.

GLAZEBROOK J:

So it could well trigger the deeming even without the flooding, and of course with the flooding.

MR COOKE QC:

It moves.

GLAZEBROOK J:

Because it will be moving, although that's probably an interesting question if it didn't have a marginal strip requirement beforehand, does flooding later create one?

MR COOKE QC:

No, what happens is if it is created, it's created on the disposal of the stewardship land under the exchange.

GLAZEBROOK J:

Well, exactly, which must be for the river itself.

MR COOKE QC:

Then the marginal strip is created when the course of that river is altered and it's flooded into a reservoir.

GLAZEBROOK J:

It will move out.

MR COOKE QC:

It will move on the Crown land and for that reason this may be from my client's point of view somewhat moot.

GLAZEBROOK J:

Yes.

MR COOKE QC:

If 24G applies, the problem with this is it's a very tortuous Act and there's an awful lot of money that's already been spent on this project is now tied up in these tortuous arguments about whether the Department exactly got the right approach to this decision-making. The reason why I'm putting forward the whole gambit of issues from the Court is because we can't afford not to put every proposition forward. So if it would be easier for my client if the Court just said it doesn't apply at all, and I think there is a decent argument to say it doesn't because there is a way of controlling marginal strips another way in this Act.

ELIAS CJ:

Surely if that is said, surely – well, at the moment my preliminary view is that marginal strips do attach on the exchange because it's a disposition of land. I don't see section 26(2) as actually authorising disposal of marginal strips.

MR COOKE QC:

Can I just address that point?

ELIAS CJ:

Yes.

MR COOKE QC:

If you look at 26(2), "The Minister shall not dispose of any land or any interest in land adjacent to these things unless satisfied … or in the case of any marginal strips," so that's the disposal of any land. You can't dispose of any marginal strip of the adjacent water of public access to it.

ELIAS CJ:

Well, I don't think that's right. I think it's whether the land in the case of any marginal strip, that's the land adjacent to the marginal strip, would adversely affect public enjoyment of the adjacent water. That's how I would scan that, myself, just on a quick look.

MR COOKE QC:

It's not saying you can't dispose of any land if it harms any marginal strip.

ELIAS CJ:

No, I don't think it does.

MR COOKE QC:

It says won't dispose of any land without adversely affecting these other things, these adjacent things, and in the case of a marginal strip you can't sell a marginal strip if you harm the adjacent water or public access.

ELIAS CJ:

No, I don't think it has anything to do with selling a marginal strip, myself. I think it's about selling land if the effect of the selling of the land is that you can't, via the marginal strip, have public access to the water. Anyway…

GLAZEBROOK J:

Certainly if it does mean what you say you would wish – I think everybody would wish they'd said so more clearly.

MR COOKE QC:

Everyone, and I'm sure all counsel and all the Members of the Court, would say wouldn't it be wonderful if …

ELIAS CJ:

But if you have a deeming provision and on your submission 26(2) enables the Minister to carve out of the deeming provision, you'd really expect in the deeming provision to see an exception provided.

GLAZEBROOK J:

And it does, because it goes through the clear certain exemptions to be except to increase the width, to decrease the width, to notify the intention to reduce them.

ELIAS CJ:

Yes, that's under that provision.

GLAZEBROOK J:

Yes, that's what I mean, the deeming provision does actually have its own limitations.

MR COOKE QC:

But in a sense what would happen in this case – although we might be saved by 24G anyway – but in this case it would be an exchange decision on a 16A where the very land you've exchanged has been reserved under 24 and then

you have to apply the exchange decision under 24E. You see, you'd be doing exactly the – you'd be going around in a circle. It can't be that literal.

ELIAS CJ:

No. Isn't the simpler thing simply that there is a marginal strip created but, as you say, it's a perambulatory marginal strip.

MR COOKE QC:

Yes. But one of the things about this Act is that because of its technicalities you're not going to find a decisive answer in particular texts, and the other thing that my learned friend Mr Martin emphasised and which I have in the written submissions is 16A(6) says this land will not be subject to the Act, which is another indicator, I would suggest, of the overall scheme. So what I was suggesting is that you're trying to make this Act work as Parliament must have intended. With the land that's already in the control of the Department, it assesses what should happen with these boundaries of the river when it's making its decision to dispose or exchange of the land and it can reserve a marginal strip. You don't have to go through the deeming exercise, and in this case when it came to the exchange decision there was an exhaustive consideration of waterway attributes of the 16A in their 16A exercise. There was in fact a separate report commissioned and provided on waterway associated attributes of this land.

GLAZEBROOK J:

And the other argument probably, if you wanted to have that argument is in terms of the purpose of marginal strips because the waterway is actually going to disappear, the river, because the whole purpose of exchanging it is to flood it then none of the conservation purposes in section 24C really apply, certainly to the river.

WILLIAM YOUNG J:

They then apply to the lake, don't they?

ELIAS CJ:

Yes, that's what 26G reads.

GLAZEBROOK J:

(inaudible) … so you get your 24G once you get there.

MR COOKE QC:

Well if it moves and if it moves this whole exercise may become an exercise in –

ELIAS CJ:

Well there's no need to make any determination because wherever the water ends up there will be a marginal strip under 26G if the deeming provision has effect.

MR COOKE QC:

If that's what the Court says I would be perfectly happy, but as I say, millions of dollars turns on this. My client has engaged in a lengthy process of a department under which it is sought to obtain land on the edge of a river and a stream. It's been required to find other land of greater conservation value in order to get that. In the exercise of deciding whether that should be exchanged, there's been detailed assessment by the Department as to the aquatic values of the land in question and just to give Your Honours a reference to that, it's in volume 3, tab 67 at page 611 is the aquatic values report which was peer reviewed in the report at volume 3 at tab 68, and then we get confronted with a proposition that all the land we obtained is now reserved as marginal strips or might be. And so that's the difficulty facing Hawke's Bay Regional Investment Company in terms of this case.

GLAZEBROOK J:

Sorry, did you say volume 3, tab 68?

MR COOKE QC:

Sixty-seven.

ELIAS CJ:
Sixty-seven, thank you.

MR COOKE QC:
And you will see at page 711 there is an appendix 3 to that report, is a report entitled, “Comparison of aquatic fresh water conservation values between existing conservation and in private land proposed for exchange.”

So I'm not sure there is much more I can add to the submission on this but I do say this is not one of those questions which is determined by literal wording, it's determined by what Parliament must have intended by the suite of different provisions and whether the real substance of what Parliament is concerned about is addressed in the decision-making, which I say it is in the 16A decision-making.

Now that deals with my question 7, proposition 7 and 8 on my list of propositions and, therefore, addresses all of the matters I wanted to say by way of submission, so unless Your Honours have any questions those are submissions from my client.

ELIAS CJ:
Thank you.

MR SALMON:
May it please the Court?

ELIAS CJ:
Yes, Mr Salmon.

MR SALMON:
I think with the refinement that's taken place I can be fairly brief on some issues and it might be useful to foreshadow the structure of the pace taken.

ELIAS CJ:

Yes, that would be helpful, thank you.

MR SALMON:

Given that marginal strips are in front of you now I was going to cover them last but I'd suggest I cover them first.

ELIAS CJ:

That would be helpful, before we forget.

MR SALMON:

Yes, well before I forget, Your Honour. And then I intended to go through the key issue dealing first briefly with a recap on the key sections from the Forest and Bird perspective and then the decision itself dealing, in particular, with the proposition that somehow the inherent conservation values were considered in the decision-making process. It will be no surprise that I will point to indicia that again and again they were only ever considered in a relativistic sense, in other words, comparing the 22 hectares with the other block.

ELIAS CJ:

So I now have lost track of where the case started out. So when you come to that, it would help me if you took us back to the statement of claim to see what was in issue.

MR SALMON:

Yes, certainly Your Honour.

ELIAS CJ:

Yes, thank you.

MR SALMON:

And then on the back of that review of the legislation and the decision to develop my key arguments in answer to those of the appellants as to why we

say that questions of exchange do not properly enter into the consideration required under section 18 for revocation.

The other issue following that is the policy documents issue, which Ms Gepp will argue, if that pleases the Court.

ELIAS CJ:
Yes.

MR SALMON:
So I'll leave that until the end and she can bow out on that note.

ELIAS CJ:
Yes, thank you.

MR SALMON:
Marginal strips, which I think I might be able to complete before the break, the first point is to –

ELIAS CJ:
We'll go on a little after 11.30 if you need to finish that.

MR SALMON:
Thank you.

The first point, just in case it was – and I don't think it was advanced of this intention but just in case it's understood that there is an investment on hold and pending because of the marginal strips issue, my understanding is that in fact through the local body elections in the relevant Hawke's Bay region the entire project is just on hold. So I don't say that my friend was suggesting that was …

ELIAS CJ:

Well, there's nothing really, though, before us that we could proceed on, is there, to that effect?

MR SALMON:

Either way, Your Honour.

ELIAS CJ:

No.

MR SALMON:

I'm just mindful my friend has suggested this is holding things up. If anything, there's our submissions on the leave application which address that point. I understand it's a matter of public record that there's been a sea change at the local body level. I just note that, lest I be seen to have agreed with it.

The next point is just a point of clarification regarding the figure at the end of the DOC submissions in case it's not clear to the Court. The question of marginal strips is, as a matter of fact, is not restricted just to that horizontal piece of land in figure 2, but also to the vertical purple land and that is a matter that there is some evidence on. You'll see you can see some blue in the purple land. None of that has been surveyed to assess the three metre point either.

WILLIAM YOUNG J:

Sorry, what are we talking about?

MR SALMON:

There are two parts to the 22 hectares, the two purple parts.

GLAZEBROOK J:

Yes.

MR SALMON:

I just anticipated you might have been given the impression that the only area where marginal strips were arising was the horizontal part.

ELIAS CJ:

No, no.

WILLIAM YOUNG J:

Because it's Crown land anyway.

MR SALMON:

No, no. It doesn't affect the legal issue. It's just in case it's relevant. I was going to give you an evidence note where someone has attempted to anticipate what the survey would show, which shows that there are marginal strips issues on both sets of land. So that's, again, just in case.

GLAZEBROOK J:

Do you want to give us the reference again?

MR SALMON:

Certainly. It's the Lloyd affidavit, 52 volume 2 tab 15, which refers to his mapping out of where the marginal strips may arise, all subject to survey, in volume 4 tab 70.

WILLIAM YOUNG J:

But the area where the marginal strip would be is Crown land, isn't it?

MR SALMON:

I believe so, Sir.

WILLIAM YOUNG J:

So what would be the purpose of reserving the marginal strip there?

MR SALMON:

Sorry, I –

WILLIAM YOUNG J:

When it's already Crown land.

MR SALMON:

It's currently Crown land.

WILLIAM YOUNG J:

Yes, but the adjoining land is Crown land.

MR SALMON:

I'm not sure that the land to the east of that is, Sir.

WILLIAM YOUNG J:

It's to the west, isn't it?

MR SALMON:

Let me check that, if I can, over the break to make sure I'm right.

WILLIAM YOUNG J:

Okay, I see.

GLAZEBROOK J:

It's the other side.

WILLIAM YOUNG J:

Okay, I see, so it's on the east but not necessarily on the west.

MR SALMON:

Correct.

WILLIAM YOUNG J:
Okay, thank you.

MR SALMON:
But my key point on marginal strips was going to be this is a very simple and narrow issue. The way in which it came before the High Court has been correctly described to you. The issue and the only issue argued since then and raised until the more developed arguments about section 24 and section 26 from my learned friend has really been a question whether or not there is an express exclusion to the deeming provisions, and so that is an argument that the section 16A machinery precludes the entire application of Part 4A.

So in my respectful submission the questions about what might happen if and when marginal strips arise on the deeming provisions under section 24G, while interesting, are so speculative and not before you that, unless it would assist you, I won't spend undue time on them.

The only thing I would note before turning to the key issue about section 24G is that there is I think some credible concern about interpretation issues. Again, only ones I'm addressing because my learned friend indicated that perhaps a way for the Court to move forward was to make some decisions about the meaning of 24G. I just note while we're on it the section doesn't necessarily capture the specific facts of the case as it may become and this relates to I think some questions from Justice Young yesterday, about reservoirs and when a river becomes a reservoir. Section 24G captures under subsection (1); changes in the shape of any foreshore or the margin of any lake or reservoir, et cetera, and then separately, the alteration of course of any river or stream neither of which on their face capture turning a river into a reservoir. It's not a point that need distract us today but highlights, I think, the risks of beginning an investigation into what might happen under section 24G with facts that have not happened yet.

So where that leaves me is simply supporting the High Court and Court of Appeal decisions on this point which involve the finding that you've explored, to some degree, with my learned friend that section 16A does not deem the entire marginal strips provision out of any exchange process.

I think the first point to note is that it would be surprising as a matter of public policy if it was decided that the deeming provisions would apply to any other form of disposition, any sale, but not to exchanges, that would be surprising given the cultural significance allocated to the Queen's Chain.

So a good reason would be expected to be able to be identified for why that was backed out of the exchange provisions but in any event, the argument that the section 16A(6) language is an express exclusion, respectfully, is simply wrong. Section 16A(6) provides that upon the transfer of any stewardship area that land shall cease to be subject to that Act, to this Act. Firstly, that doesn't really read like the sort of express contracting out from Part 4A that one would expect. But secondly, it simply doesn't arise because the land that is subject to the marginal strip is never transferred and the reason for that is apparent as a matter of logic and apparent on the language of section 24.

Section 24(1) provides that the marginal strip is simply, "Deemed to be reserved from the sale or disposition," so it is not part of what's conveyed, that's the first point.

ELIAS CJ:
That was 24 what?

MR SALMON:
24(1).

ELIAS CJ:
Yes.

MR SALMON:

So the only exception, and of course the appellants are relying on section 24(8) which provides that; “Except as otherwise expressly provided, this section shall apply…” so their argument is that the express provision in marginal strips will not arise is that section 16A reference to upon the transfer of stewardship land it ceases to become part of this Act.

So the part of the land that is the marginal strip is never transferred, it simply does not meet the exclusion in section 16A.

WILLIAM YOUNG J:

It thought, it may be a matter of semantics, but I thought the title to the marginal strip would go to the purchaser but with a notation on the title?

MR SALMON:

Nearly I think Sir. I think the answer is in section 24D. Now 24D(1) provides that upon registration the certificate of title will record that it relates to or is subject to this part of the Act but subsection (6) provides that the land comprised in the certificate, and I think the answer is, yes, it's semantic but important semantics, “Shall be deemed to be all the land described with the exception of any portion that is deemed to be reserved marginal strip under this Part,” if Your Honour follows. So the simple answer is that to the –

WILLIAM YOUNG J:

Is this because they don't survey, they don't normally survey so there’s not a separate title?

MR SALMON:

I think it is to avoid a separate title for the marginal strip but the certificate of title is only evidence of title if there’s no section like this making clear that title is never conveyed. Here there is just not a transfer of the marginal strip, not in substantive terms because management and substantive ownership stay with the Crown and not in strict semantic. Semantically strict legal terms because of section 24D(6)(a).

So with respect to my learned friend the argument that section 16A somehow presents a carving out of the Queen's Chain provisions for this one form of disposition and no others does not make sense on a policy level and is not supported by the plain meaning of the Act.

And I think that takes me with 20 seconds to go to the morning break so, or at least by this clock. If I can briefly mention that the reference to section 26 is not, with respect, compelling. The Chief Justice's observations on the proper reading of that section are the observations I was going to make in response to it. The entire section is about stewardship land and stewardship land only and the title makes that clear but also the reading which is contrary to the syntax of the section, the reading that would see that section enabling the disposal of marginal strips would see marginal strips with their significant cultural and national significance being relegated to the equivalent of stewardship land, in other words, being able to be disposed of with no hearing and no fanfare and, as I will come back to after the break, the passage of the Conservation Act recognised that the important parts of the conservation have stayed which must include the Queen's Chain, are an entirely different category from stewardship land.

So on any level it's, respectfully submitted, that it is, that that issue simply cannot go in the appellants' favour. The marginal strips regime applies and that is the only issue under appeal on marginal strips as precluded by 16 or not.

If that's a convenient time, Your Honours?

GLAZEBROOK J:

It seemed to me that the whole purpose of the exchange was so the land could be flooded and it's really coming back to the purpose of marginal strips. Is there a purpose in having a marginal strip reserved when in fact the land is going to be flooded in the first place? Now therefore there might have been a

power to declare the certain powers exempt under section 24, it hasn't happened but I was just, sorry, 24B. Perhaps think about it over the break.

MR SALMON:

I can answer that now with some initial thoughts at least. The first point is, of course, they didn't do that and thus we –

GLAZEBROOK J:

No, no, I realise that.

MR SALMON:

We just have the rare dry legal issue I've addressed. The second is that of course if they did that it would disadvantage the conservation estate because there would not be the ability to have the roaming marginal strips that flow from section 24G, so it would be surprising to back out marginal strips because that will be depriving the country of the marginal strips wherever they would ultimately settle.

GLAZEBROOK J:

Yes, although as you say, it's a slightly odd provision that has a roaming from a river to a reservoir –

MR SALMON:

Yes.

GLAZEBROOK J:

– and it doesn't easily fit within it when that is the whole purpose of the marginal strip provision in the first place.

MR SALMON:

Yes.

GLAZEBROOK J:

So one probably couldn't do this if you had a marginal strip there.

MR SALMON:

I think they would argue, with some weight actually, that section 24G read purposively caught also a river that expanded to become a lake, to be fair on them but –

GLAZEBROOK J:

Well I can understand that but if you had a marginal strip and you decided consciously that you were going to flood it and therefore flood the marginal strip and therefore flood the whole of the land, and if it didn't happen to have Crown land you've actually taken away the whole purpose of having the marginal strip in the first place. One wonders whether you would be allowed to do that. Here, of course, this is the whole purpose of the exchange and that has always been the purpose of the exchange and that was what was taken into account –

MR SALMON:

Yes.

GLAZEBROOK J:

– in the decision-making. So it's a different provision, it's a different situation from –

MR SALMON:

The standard.

GLAZEBROOK J:

– I'm given land, it has a marginal strip and I decide consciously without that having been indicated beforehand to flood it and then, ha ha, I've got rid of the marginal strip.

MR SALMON:

Yes, and without –

GLAZEBROOK J:
Of course it would be an odd situation where that would happen but –

MR SALMON:
It would indeed and without considering whether there would indeed be a basis to stop the Department from doing that –

GLAZEBROOK J:
Well, exactly.

MR SALMON:
– we're dealing with the hypothetical of course. The final answer I would submit is this: it is true that the exchange, the entire decision-making process was about the exchange and the entire exchange was about enabling HBRIC to pursue its quest for a dam. It's not true though that the dam would necessarily happen and the reasons why that might be I've already referred to some of them but others relate to the controversy surrounding water quality and agricultural intensity. So it would be a big call for the Department, and we're dealing with a hypothetical, but it would be a big call to deprive the estate of marginal strips for something that might not happen when leaving them there for another day would be the safest status quo, if I can put it that way.

So I understand the point Your Honour is making but the facts, as they develop, maybe different but they are, with respect, to be developed as they actually happen.

Is that a convenient time?

ELIAS CJ:
Thank you Mr Salmon, we'll take the adjournment.

COURT ADJOURNS: 11.36 AM
COURT RESUMES 11.53 AM

ELIAS CJ:

Thank you, Mr Davey.

MR SALMON:

Thank you. Unless you have any further questions on marginal strips –

ELIAS CJ:

Oh, I called you Mr Davey.

MR SALMON:

That happens a lot, Your Honour.

ELIAS CJ:

There is another one, isn't there?

MR SALMON:

There is a Mr Davey.

ELIAS CJ:

Oh, yes. I am sorry about that.

MR SALMON:

Not at all. He'll be very pleased.

The next topic, then, is the key issue for today. I think it will be useful to go through the key sections, not in undue detail but in order to – it's something of a refresh but also because it gives a platform just to comment on a few of the points that have been raised in relation to each section as we go, and to give a platform for developing the argument as to interpretation around the revocation power.

In that context, it's appropriate to start with the transitional provisions in section 61, which is usefully in the first instance read alongside section 62.

Section 61, relating to the forest park land, which comes into the estate as protected land, and section 62 covering stewardship land – that distinction is not a minor detail in the Act. It's an absolutely key component of the legislative scheme and was indeed almost the very first thing that the Minister described when introducing the Bill to the House. Now, I don't for a moment suggest that you need to read any Hansard but I couldn't do much better than the Minister's speech in summarising what can be drawn from the Act and the language he used describing it, and the decision in the Act to make or to create two distinct management categories of land, one of which was the vital conservation land, which was to be safeguarded and protected, and the other was not his words at this point but the holding pen. In case you wish to read the Minister's language, it's behind tab 19 and the key pages are 6139 and 6140. But the Minister described –

GLAZEBROOK J:
Did you say 6139 and 6140?

MR SALMON:
6139 and 6140 of tab 19 in the bundle of authorities. Now, his comment that the category of land that's to be protected – or all land, in fact, is to be looked after so that "its inherent characteristics remain unaltered" but for stewardship land that does not rule out farming or other activities. Where it can be shown they could be used commercially et cetera, then provision is made for disposal. Similarly, if some of the land is of such high conservation value that it needs to be formally protected, the Bill provides the means for giving that protection. Then he goes on to say, "The second category of land provided for in the Bill is for those areas that are to be protected. Those consist of land given protection under the Forests Act including wilderness areas, ecological areas, forest sanctuaries and conservation parks. Those categories of protected areas are carried forward into the Bill, which also provides for management regimes appropriate to the present designations."

Then over the page he observes that while in relation to stewardship land which must still be preserved pending decisions around it, he describes the

Conservation Department acting as a “caretaker”. But in respect of reserved or protected estates, on the other hand, the Department will act in the role of kaitiaki or guardian.

He describes this as a new era of management of the conservation estate that fulfils the clear consensus that arose from the Government’s consultations: giving prominence to the management of the country’s heritage reflects a coming of age in New Zealand society.

So we’ve moved on from the pioneer mentality, he said, and are protecting the conservation estate accordingly.

Now, that’s really just backdrop or his language rather than mine for describing the two categories that are created, one containing the subject land in this case carrying through protection already given under the Forests Act.

I mention that because the suggestion was made by one of my learned friends that this land has not even yet been – or had not yet been assessed to see whether it would be protected. In fact, it had been assessed by Parliament and deemed to be protected because it was already protected under the Forests Act. So if anything, it would be surprising that a watered-down level of protection was intended by making the specially-protected land not nearly as protected as it seemed.

So section 61 identifies that category as specially-protected land that captures the subject land. The first provision to note, obviously, which you’ve been to, is section 61(2), which provides that until a declaration is made under section 7(1), that is conservation land and deemed to be a conservation park. The next provision which my learned friends had relied on for their argument and which Justice Ellen France relied upon in the Court of Appeal in her dissenting judgment is subsection (3). Just pausing on that, the argument, as I understood it, in the Court of Appeal, at least, and I understood Mr Martin to indicate that this point was no longer pursued, but the argument is that because the deeming as a conservation park continues under section 61(3) if

there is a declaration under section 7(1) because that doesn't mention section 7(1A) Justice Ellen France took the view that there was a workaround whereby had section 7(1A) rather than section 7(1) been used to make the declaration there would have been no protection, simple as that.

The Court of Appeal, in my submission, rightly held – the majority, that is – that that wasn't the correct reading of section 61 and it was really oversight that the references to section 7(1) in subsection (2) and subsection (3) did not include 7(1A) and there's a lot of force in that argument. But it's made abundantly clear that it must be right, in my submission, by subsection (9) because even if section 7(1A) was used and even if the minority judgment on the significance of the presence of section 7(1A) against section 61 was otherwise right. Subsection (9) provides –

WILLIAM YOUNG J:
Subsection (9)?

MR SALMON:
Subsection (9).

WILLIAM YOUNG J:
Of what?

MR SALMON:
61, my apologies, Sir.

WILLIAM YOUNG J:
I'd gone back to 7, sorry.

MR SALMON:
No, we've all been blaming the structure of the Act rather than ourselves so I'm going to hold onto that, my apologies.

Subsection (9) unambiguously provides that until there is a section 7(1) declaration the land simply cannot be disposed of. So the majority's view that all three of those references to section 7(1) have to be read as including section 7(1A), with respect, must be right and the one reading of it that is not available is the appellant's one which says, "Please read in an applied reference to 7(1A) in subsection (9) but not into subsection (3).

WILLIAM YOUNG J:
I didn't think the appellant, well I didn't think Mr Martin, anyway, was arguing this?

MR SALMON:
He's not and I thought I understood my learned friend, Mr Cooke, to retreat from the argument yesterday but it came back in today in some form so for completeness I'm addressing it. I don't think it flies. Obvious policy wrinkles if it was a tenable argument but I mention it in part because the dissenting judgment put particular emphasis on that and perhaps we hadn't argued it as fully as we might have. On the day I think it was an argument identified by her and I may not have addressed it fully on my feet, so I wanted to address it completely now.

O'REGAN J:
Was there any discussion at the time this legislation was passed about the idea that this was a holding pen and that, you know, was it envisaged that in fact a decision would be made about whether it would be declared under section 7 or passed to an SOE immediately or was it contemplated that the status quo would just be allowed to run on?

MR SALMON:
Yes and no. My understanding of it, and I haven't read every page again now, but my understanding of it is the stewardship land was the holding pen.

O'REGAN J:
Right.

MR SALMON:

So it was envisaged that the stewardship land would be worked through and my friends have presented the protected land as if it hadn't been looked at yet. It's important and relevant and a statutory interpretation seems to recall that, as my learned friend Mr Cooke pointed out, the Forests Act protection was strong for this forest park and someone had decided that it would be a forest park under longstanding legislation and has been regarded as such –

O'REGAN J:

But it's hard to reconcile that with the idea that it could have been farmed off to a forestry corporation to cut down the trees, I mean, doesn't it? This status actually says one possibility is that the land be passed to a State Enterprise which presumably would include Forestry Corp, would have at the time included Forestry Corporation?

MR SALMON:

Yes.

ARNOLD J:

I mean that seems counterintuitive if it was already a forest park.

MR SALMON:

It does seem counterintuitive and perhaps it was a mechanism recognising that there might be some errors in there. We're not dealing with that possibility of course but I think in answering your question the holding pen was more the stewardship land and certainly, and it's clear throughout Hansard, the understanding was the stewardship land was the part that might have farming on it and that could continue or might have some access and that could continue.

O'REGAN J:

But I mean, for example, in this case if this dam had been done by one of the electricity generation companies that were SOEs presumably this land could have just been transferred as an SOE which again seems pretty

counterintuitive, you know, it does seem it would be a better protection if the section 7 step was taken to bring it under the mainstream provisions of the Act.

MR SALMON:

Yes, it does and provided, of course, the proper processes for that allocation were followed I accept Your Honour's point.

ELIAS CJ:

There was no process specified, was there, for whether it was vested in an SOE or made the subject of a section 7(1) declaration? There wasn't public participation in that assessment, was there?

MR SALMON:

No, I don't think there was and I'll be corrected on that if need be by a more competent off-sider but the reason for that might have been something of an old-school mentality whereby these SOEs, while separate entities, soon at the time of the passage of the Act, really it was all moving land around within the Crown in the Crown's mind, so I would say it's understandable that they might have seen the way in which it's put on the Crown's books as a different question and of different importance than which ones are protected.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well, it may be in any event that you couldn't dispose of it until you'd gone through a disposal process, even to an SOE.

WILLIAM YOUNG J:

Wasn't there a notice procedure?

MR SALMON:

I can't remember what 24 says.

O'REGAN J:

Anyway, sorry. I distracted you.

MR SALMON:

No, not at all. I'll come back to that, I think, and deal with it once I've …

ELIAS CJ:

It's just I wonder whether you're being a little bit too definite in saying there wasn't a holding pen idea, while accepting that stewardship land was definitely land that was to be sorted through, the background to this is this huge transfer of all the Crown assets which were either going to go to SOEs if they were required for their business purposes or were to be sorted further if of use to the SOEs and if not to DOC. DOC really was left holding the bag. DOC and Landcorp, although Landcorp was farming land.

MR SALMON:

Yes. I'm not suggesting that there was not envisaged to be any process of considering the appropriateness of the protected designations, more that as I read the surrounding materials the holding pen in substantive terms was regarded as being stewardship areas because that was the area that was not protected in full because definitely very different levels of protection were envisaged as applying to the two parts. My learned friend Mr Cooke has made a good fist of arguing that really there's not much difference between stewardship land and protected land, but the vital difference is that one was clearly within the conservation estate and the other was to be reviewed for all sorts of possible purposes. So Your Honour is right that it was envisaged that the protected land could be looked at. That's what the provisions are about. That's why subsection (7) of section 18 is there. But certainly it wasn't envisaged and in fact wasn't done to go and review those, and we have some evidence in this case of that because even when they finally came to look at this forest park they only looked at it because HBRIC came knocking asking for a piece of it and only then they looked at the little bit that HBRIC wanted. So this has only been a process, in this case, that's been followed because a

commercial entity wanted some land, which is a theme I'll come to in looking at how the legislation works.

O'REGAN J:

But the idea that it's land that can only be disposed of, you know, if essentially its conservation values that are destroyed, they seem to run slightly counter to the idea that it can be passed over to an SOE without any process at all.

MR SALMON:

Yes, and I'm just being tentative on the lack of process on that part until I've looked at it, if that pleases you, Sir. I accept Your Honour's observation in principle but I'm not sure about the process to accept that it's right in detail.

ARNOLD J:

Is there a section 61(2) refers to forest parks – is that a defined term anywhere? The reason I ask is – I mean, the Crown had large holdings of forest land that was really developed, ultimately, to harness but none of them would have met the definition of forest park or would they have?

MR SALMON:

I don't think any of those forest plantations would have.

ELIAS CJ:

No.

GLAZEBROOK J:

They're protected under the Act, one assumes, although it doesn't say so. Although 24 of the State-Owned Enterprises Act does say it ceases to be under the forest park legislation if it's vested in an SOE but it doesn't say anything about – I've just looked at it. It doesn't say anything about process so it may be that the process for disposals under the Act still has to be followed.

MR SALMON:

Yes, I think that may be right and that's my tentativeness about Justice O'Regan's question. Even if it were included in here, it's stewardship land so the forest parks are the next level down from national parks, I guess, under the old forest park regime rather than being a catch-all for every piece of forestry land administered by the Crown, if that makes sense, Your Honour.

ARNOLD J:

Yes, thank you. That's helpful.

MR SALMON:

The key point, though, that I was seeking to draw from section 61 other than supporting that very different basketing of the two categories of land was that the section 7(1A) argument can, in my respectful submission, be put to one side, which brings us to the section 7(1) process. I think Your Honours have heard enough on that. The simple point is that the making of that declaration makes the forest park a conservation park.

And then we come to section 18(1) and 18(7) and again you've spent a reasonable bit of time on those. I would note only that both 18(1) and 18(7) should be determined against the policy of the Act.

It's relevant to note that the various categories of protected areas are not mutually exclusive. In other words, one might have expected – and I'll come back in reviewing the decision because the nationally significant parts of this land include watercourse areas – a full consideration of the park or part of the park to involve consideration of whether it's appropriate in a conservation park under section 19 but also whether sections 20 through to 23B apply, in other words, is it also a wilderness area? Is it also an ecological area or a sanctuary area? And I mention that because the heart of the difference between the parties here is that Forest and Bird says the decision of what is in the sacrosanct basket of land that is not to be touched and what is stewardship land, that question is answered by asking what has the intrinsic qualities to justify it being part of a conservation estate.

My learned friends would say that that question is answered by comparing it to its marketable value or what it can be exchanged for in another context. In other words, they undertake a relativistic approach which treats its conservation values as fungible to coin a phrase.

One thing we can see in my respectful submission in looking at section 18 is that we shouldn't be unduly focused on the meaning for a conservation park but note that the categories of protection need to be considered by reference to sections 19, 20, and so on, if that proposition makes sense.

ELIAS CJ:
So you're saying that if the Minister was making the section 7(1) determination in accordance with – as the gateway to the land being able to become stewardship land he had to consider not only the exchange and the relative benefits but also whether part of the land should be further protected?

MR SALMON:
No, I'm saying something more decisive than that. My case is that the Minister should never have looked at the benefits of exchange at all.

ELIAS CJ:
I realise that, but just on this point, it hadn't really occurred to me that if you lost on the more absolutist view that you can't look at exchange at all, it might be that the process – I just wondered whether you were arguing that the process in any event miscarried because the Minister treated it as simply an assessment of comparative advantage rather than looking at the conservation qualities which might require additional protection in the particular blocks of land.

MR SALMON:
Yes, and I think the answer is we're part way to that in saying through a number of causes of action the same thing is said in the statement of claim about proper purpose and relevant consideration of legality and so on.

By looking at this as a question, a comparative question, which is Your Honour's proposition, in the exchange context and by linking the question to exchange the decision-makers must conduct which is linking the complaints to the fact that it was always, in exchange context, relativistic. I understand the distinction you're making that in the abstract it could have been argued that there was error in not considering some further nuance of the conservation values.

The statement of claim predates my involvement, but it's responsibly and rightly focused on the comparative assessment in the exchange because – and I'll come to this – that is in fact all the decision was about, ever. My learned friends have pointed to the fact that conservation values and amenities were looked at. It's true that they are mentioned or described but never in an assessment that's, in our submission, proper. Never in the context of what is the standard that makes you worthy of conservation, only ever in the context of saying, well, given this proposition that's been presented to us by HBRIC, which is better?

Just rounding out very briefly on the Act and dealing with an argument that my learned friend Mr Martin made, and I'll perhaps come to this in a bit more detail soon, but I think it was Justice Arnold who put the proposition about remote land and the selling of it, and someone cherry-picking something and saying, "Well, I got land in Wairoa," wherever it was, these case scenarios that we all envisage where the land could just be sold on the same basis.

I think Mr Martin's answer to that was no because of section 19. Now, section 19, he said, because it's concerned about the conservation park meant that the only use of the exchange provisions for conservation park would be ones that supplement the conservation park land. I was just going to note that it's not available to the appellants to argue that section 19, properly interpreted, supports the view that there can be cutting and dicing of an existing forest park or conservation park to alter its borders. Simply because the plain terms of section 19 make clear that there cannot be, as part of the mandate to manage section 19, any reduction in park area.

That's because of the definition of "protected", which you might recall you looked at early on in the argument. But which means "its maintenance so far as is practical in its current state, but includes restoration" and – and here is the part about size of park – "augmentation, enhancement, or expansion". There's simply not a recognition of an ability to reduce to manage. So it can't be argued that section 19 contemplates any boundary adjustments that reduce the area of the park.

GLAZEBROOK J:
But there could be boundary adjustments that augment, couldn't there?

O'REGAN J:
But it's not here because –

MR SALMON:
Yes, yes.

GLAZEBROOK J:
Which I think was Mr Martin's argument.

O'REGAN J:
But on that basis that's what happens here, isn't it?

MR SALMON:
On a net basis, it's got bigger.

O'REGAN J:
Yes. Well, isn't that augmenting it or expanding it?

MR SALMON:
No, with respect, I think an augmentation is the simple matter of expanding or adding to it without –

WILLIAM YOUNG J:

You're dissecting the –

GLAZEBROOK J:

You actually can't subtract that.

WILLIAM YOUNG J:

There's a subtraction and then there's an augmentation?

MR SALMON:

Yes.

WILLIAM YOUNG J:

Well, why can't you just conflate it and say they're the same transaction and therefore it's an augmentation?

MR SALMON:

Well, firstly, with respect, I don't think the Act is envisaging that in section 19. But secondly, that's not what happened here. No one looked at the whole park in any real sense because they only deemed the 22 hectares to be conservation park. They never even brought the rest of the park through.

WILLIAM YOUNG J:

Well, there are references to the rest of the park.

MR SALMON:

There are references to it. But it's not a conservation park. As I understand the process – and I'm happy to be corrected – they took the 22 hectares and said, "We want to exchange it. Let's make a declaration and let's bring it through."

GLAZEBROOK J:

But it is a conservation park until it's under section 61, isn't it? The rest of it's clearly a conservation park.

MR SALMON:

It's deemed to be but not declared to be.

GLAZEBROOK J:

Well, but deemed to be is good enough under most statutes.

MR SALMON:

I guess that's right. My point is just they are only bringing through the 22. But to candidly confront the proposition –

GLAZEBROOK J:

Well, that's probably a technical argument because one wonders whether they did need to do that, but …

MR SALMON:

Yes. But to confront the biggest problem I have in the argument, which is the proposition you've put to me, that I'm being overly pernickety in saying that augment wouldn't allow – cutting off one finger to save two, or to get two more.

WILLIAM YOUNG J:

Well, say that a conservation park adjoins private land and it's got a sort of a bit of a squiggly boundary. So there's a boundary adjustment which takes off five hectares and adds 100. The lines, the boundaries, are redrawn. Would that not be an augmentation?

ELIAS CJ:

You have to say it isn't.

MR SALMON:

I am saying that. I don't think I have to, to succeed today in toto, but on this interpretation of section 19, yes.

ELIAS CJ:

Isn't the answer that you can't dispose of it?

MR SALMON:

Correct.

ELIAS CJ:

So augmentation cannot include that sort of netting augmentation?

MR SALMON:

Correct.

GLAZEBROOK J:

But if you can exchange, why can't you have an augmenting?

ELIAS CJ:

You can't exchange.

MR SALMON:

You can't exchange it because it's not stewardship land.

GLAZEBROOK J:

Oh, no, sorry. I thought that you probably can't do anything like that, even if it was augmenting it.

ELIAS CJ:

Section 19 really is just another wheel of the coach. The real argument is that you cannot dispose of the land.

GLAZEBROOK J:

Yes.

MR SALMON:

Yes, and you're right, the wording "protect" also applies to stewardship land but as the Minister said in introducing, of course you look after the land while you've got it and the only thing that can be done with stewardship land is because of the exceptions regarding sale or exchange. So I'm endeavouring to advance the argument that "augment", properly read in context, doesn't mean a trading or boundary adjustment in the manner Justice Young put to me. But in any event, it cannot, in scheme, section 19 cannot allow for that sort of boundary adjustment.

WILLIAM YOUNG J:

Well, it can't in itself.

MR SALMON:

No. So my point is really just, we cannot use section 19 to somehow inform a reading of section 16A to assist the appellants because section 19 does not, on its face or in context, indicate an intention that any part of this park land be given away while it is conservation park.

WILLIAM YOUNG J:

What's the purpose of being able to change the purpose for which land is held?

MR SALMON:

The purpose?

WILLIAM YOUNG J:

I mean, there are limited differences between stewardship land and conservation park. One relates to access for recreation. The other relates to disposability.

MR SALMON:

Yes.

WILLIAM YOUNG J:
So what would you say the purpose – what do you contend is the purpose?

MR SALMON:
Subject to noting, of course, that's only if the other categories of protection should not and do not apply to this client, which my client has feelings about so I note that. That aside, I agree the vital distinction, the vital distinction between stewardship and protected land is that protected land cannot be sold. That's the vital distinction.

WILLIAM YOUNG J:
In deciding whether to transfer, to change the designation of the land, is it not relevant to consider whether it should be sold, it should be capable of being sold.

MR SALMON:
And my answer to that is no, it's not. Shall I deal with that now and why that is?

WILLIAM YOUNG J:
Deal with that in your own time.

MR SALMON:
In short, I would say – I'll come back to it, if I may, after working through the decision, in fact, why don't I deal with it now seeing you've asked, Sir. The first point is that at its heart, that argument asks the Court to take what is the consequence of deciding that land is or is not so special that it should be protected from sale to make it the key criteria for protection, if Your Honour follows.

My learned friend Mr Cooke says – and his words were "key criterion" – that whether or not you want to sell it – "want" in a general sense, not a pejorative sense – whether you wish to sell this land should decide which basket you put it in.

WILLIAM YOUNG J:
No, I don't think he does say that. I mean, it depends on who "you" is, actually. What he's saying is that in deciding whether the land should be reclassified –

ELIAS CJ:
Retained.

WILLIAM YOUNG J:
First look at it, the question of recreational access. Well, that probably doesn't help your side of the argument that much here because this isn't really used for recreational access. And then secondly look at the other difference. Is this land appropriately categorised as land which can never be sold, or is it appropriately categorised as land that can be sold or exchanged?

MR SALMON:
Yes, but on that last part –

WILLIAM YOUNG J:
It's not just a matter of, "Well, I want to sell it so we should re-designate it."

MR SALMON:
Well, can I explain why I said that because your last part brings us back to what defines whether it should be available to be sold and there's a circularity in my learned friend's – it was a very clever way he advanced the notion that the tail wags the dog here. But it is the tail wagging the dog in the argument. I'll try to develop why, if I may, because that seems to me to be the biggest issue today and the point that concerns at least some of the Court.

The proposition we make is that that question whether any property should be in Part A or Part B is whether its inherent conservation qualities are special enough to warrant it not being part of the trading fund, to put it in a certain way.

Now, firstly it's an axiom of the New Zealand conservation legislation – including the other Act my learned friend has referred to – that some land simply cannot be touched because of its conservation value, the National Parks Act being an extreme, but the concept is not surprising that some land would be not touchable no matter how much gold was under it.

The second point, again, I think this is an axiom of the conservation regime is this, conservation values are not fungible. They're not able to be put in front of an actuary and calculated to be given a trading value or a price. The Minister described it well. The conservation estate is all that's left of a resource that doesn't come back, and so some of the land simply isn't up for grabs at any price, because there isn't a dollar value of a snail that's depleted or of access for locals to a river they can swim in or whatever it may be.

So those two starting points, I respectfully submit, are very important bookends for a consideration of how one views section 18.

The next point is that for reasons that relate to the inherent value of the land in a conservation sense, they've been put in one basket or the other. In this case, it's been put in the "should be protected, cannot be sold" basket.

When I say "we want to sell it" I wasn't meaning to be pejorative. What I was meaning is this. This is why this hard case causes problems. This is not a case where the Department, for example, attempted to present a tennis ladder of conservation importance of its available resources and saw that when it ranked all of the conservation parks and other protected land, this bit was the least valuable on a conservation level and said, "We don't think this meets the threshold." This was a case where a private entity, not unlike His Honour Justice Arnold's example, created a comparison in which this land was able to be shown to be less appealing on a conservation level than some other land, but in doing so, ruled out a whole bunch of other important considerations like, "Well, if we want this other land why don't we just buy it?"

WILLIAM YOUNG J:

Well, the land – in a world of limited resources there are limits to that argument, aren't there?

MR SALMON:

To how much money could be found to buy the land, there may be. They didn't look at it so we don't know. There may be. But it also defined them – by framing the question so narrowly it meant the Department never said, as it should have, in my submission, under the Act, "Well, if we don't have funds in the general kitty what stewardship land should we sell?" It never said that. This wasn't about improving – and this isn't a legal answer or an interpretation answer – this wasn't about finding funds to buy desired land. This was responding to the specific proposal of a corporate entity.

WILLIAM YOUNG J:

But aren't you really still coming back to the question is this land, land which ought to be preserved for ever from sale?

MR SALMON:

Yes.

WILLIAM YOUNG J:

You're saying here that the problem here is that it was assessed in the context of a specific commercial proposal rather than a whole of conservation estate assessment.

MR SALMON:

Yes.

WILLIAM YOUNG J:

So that's a different issue. You're still accepting, aren't you – and correct me if I'm wrong – that the question for the Minister is on the classification that is this land, land which ought to be preserved forever.

MR SALMON:

No, I'm not accepting that the Minister would look at it in that way. The Minister would look at it in terms of saying, "Are its integral, inherent features ones that need to be conserved and this be protected?"

WILLIAM YOUNG J:

But I think they sort of have done that, haven't they?

MR SALMON:

No, they haven't. Let me take my point further, if I might. In this case, one property was presented against this property. If one accepts that there will always be a possible relating of conservation values of any two pieces of land, one must also accept that on your limited funds example there must always be a price which would justify selling, even quite a stunning and important park.

WILLIAM YOUNG J:

What's so bad if you get an even more stunning and important area?

MR SALMON:

I'm not saying it's necessarily good or bad. I'm saying it's not lawful. But if I can develop this just for a moment, Your Honour, there will be – if one pursues the view of that form of value – there will always be a price or a property that enables one to persuade the Department to give up protected land because one will always be able to say, "Okay, they value that in this way," or, "They need this many dollars." One will be able to go and say, "Well, I know you've got this lake in Fiordland that's in the conservation park X but you're having trouble funding pest eradication. So here's some dollars. Do you want to consider whether you want to declassify it to stewardship land so that I can fund pest eradication?" Now, on any interpretation that my learned friends have advanced on their case, that can be done.

GLAZEBROOK J:

I don't understand that it can because you're talking about exchanging – disposal is under a different category that you're talking about being able to exchange and perhaps if I also say that your argument about inherent protection values was actually where Mr Cooke got this morning. I don't believe he was necessarily there all through his argument the day before, but that is exactly what he was arguing this morning.

MR SALMON:

Well, dealing with your first point first, if I may, because I intended to come to this, too, so I'll just deal with it now since it's raised, you're right that we're dealing with exchange right now. One of the questions put to my learned friends was, but the same would apply to sale. I think it was from the Chief Justice yesterday. In my submission, the same point would apply to sale. There's no doubt about that, that if you can revoke protection status for exchange you must be able to revoke it for the purposes of sale.

GLAZEBROOK J:

No, it's just that there's a different process for sale than exchange. I'm sorry, that was the – yes, of course you can revoke it but there's a different process and yet another public process, isn't there?

MR SALMON:

There's a public process for sale but not exchange. Of course, there has to be a public process in this case for revocation.

GLAZEBROOK J:

For revocation, yes. And, in fact, if you were revoking it for sale there'd be two public processes, in fact.

MR SALMON:

Yes. That's right.

GLAZEBROOK J:

Where's the sale provision?

ELIAS CJ:

Twenty-six.

O'REGAN J:

But all this is saying is that you don't think there should be a power to declassify. I mean, if the statute allows it, it allows it. I mean, the fact that it will allow some terrible thing to happen if we have an aberrant Minister is it doesn't help us interpret the statute, does it?

MR SALMON:

No. I'm not saying I don't think there should be a power. I am saying that I think the criteria against which the power is assessed, the use of the power is assessed, do not include that one is wanting to trade it.

O'REGAN J:

I know you're arguing that. I'm just saying I don't think it helps to say, "And if I'm wrong about that, terrible things will happen." Why does that help us interpret the statute?

MR SALMON:

I'm not saying – I'm not meaning that in an *in terrorem* way. I'm meaning it in a way that bears upon our view of the protected land. Because what we are seeing in this case is a view of the way one values the estate that has repercussions that the framers of the statute can be deemed, can be regarded as having presumably considered. The first proposition that I'm seeking to advance is, protected land is land that, on its face, that just isn't for sale. Yes, it can be reclassified. The core question for me to persuade you on is, if they want to sell it, is that a relevant factor in reclassifying or not? What I'm coming to is, if that is then there is a significant erosion of the protection in practical terms which bears on whether Parliament would have intended that

protection to be open to these influences. So it's not me seeking to mount some sort of *in terrorem* floodgates argument at all.

O'REGAN J:

But, I mean, Parliament could easily have said conservation land can't be sold and it can't be reclassified to allow it to be sold or that it needs an Act of Parliament to be sold, as it does in the National Parks Act.

MR SALMON:

Yes. Well, on the Act of Parliament one can imagine that given the volume and nature of the estate it was inheriting there was concern about requiring an Act of Parliament for all.

ELIAS CJ:

Your argument is that reclassification can't be for the purposes of disposal. It has to stack up in terms of the values of the particular land and whether it is worth retaining in the more protected category.

MR SALMON:

Yes. That's exactly it.

WILLIAM YOUNG J:

Well, is it really quite that because I think you'd accept that if there was a whole of conservation estate survey and the Minister had said, "Well, these plots of land, A, B, C and D really aren't worthy of permanent protection, they ought to be available for sale," that would be a relevant consideration.

MR SALMON:

And I think Your Honour is putting to me –

ELIAS CJ:

If they're not worthy of retention, that's the assessment. If you had got down to the last tiny, shrunken bit of conservation estate and all of it is extremely

important and highly protected then you couldn't do that sort of calculus, it seems to me.

MR SALMON:

No, and perhaps the hard case anticipating what might be said is we imagine we might be in a global depression and there is simply no funding to maintain the parks and the calibration might change. I can envisage Your Honour might put that to me so that if one imagines a tennis ladder of the 900 conservation assets at the bottom there has to be something. Your Honour might, I image, be thinking, well why not, what is wrong with reclassifying that as stewardship land and that is a good question. Whether that could be done isn't our case today of course, because for all the Court knows this was second from the top.

WILLIAM YOUNG J:

You may agree with me on this, your primary complainant is that this issue was assessed in the context of a specific commercial proposal?

MR SALMON:

Yes, and assessed with the question, do we want to exchange it?

WILLIAM YOUNG J:

With a particular exchange in mind?

MR SALMON:

Yes, that's the primary complaint. I do submit though that any formulation of the probanda, to call them that, for exercise of the power to revoke status that includes “can we get something for it” –

WILLIAM YOUNG J:

But any analysis of whether something should be retained or be available for sale must carry with it some sort of sense of what might we get for it if we sold it, even the one that you were sort of postulating where the money has run out and they've got to, as it were, reconfigure the estate.

MR SALMON:

And I'm suggesting to Your Honour that that is not the way in which the framers of this Act viewed protected land. There wasn't a price at which the conservation values could be displaced, because if Your Honour's proposition is right I understand it, I think… If Your Honour's proposition is right, as I keep bidding higher or offering more land in exchange or whatever it might be, there will be a point at which my money or value outweighs –

WILLIAM YOUNG J:

Well maybe, but maybe that the analysis would be that the particular features of this piece of land are such that it can't be replicated, its loss would be permanent and particular conservation values would be forever destroyed.

MR SALMON:

Yes, and we –

WILLIAM YOUNG J:

So you might have that so that might not be one where you just eventually meet a price.

MR SALMON:

That might not be and two points in relation to that… One is of course that's not what happened here because we don't know in substantive and simple terms what was lost, we know that relative there was seen to be a gain. In other words –

WILLIAM YOUNG J:

We did know, because don't they say well some features are there but they are also present in the rest of the farm park?

MR SALMON:

Some of them although the watercourse aspects were superior and of national significance but my point is it was only ever in the context of the particular exchange. But secondly and more importantly, Your Honour is right, one

could take a more reduced view of it and say well it might be that there is no price that would be payable for some things but the moment one allows for some degree of equating conservation value to tradable bargain value one has departed from the spirit of the Act. So the core of the argument from us –

WILLIAM YOUNG J:
Well how is the Minister meant to set the price when stewardship land is sold?

MR SALMON:
In the market.

WILLIAM YOUNG J:
But might that not involve comparing the incommensurables, the conservation values of the land to be sold as against the price to be paid, would the Minister have to do that?

MR SALMON:
It mightn't – I'm not sure if the Minister has to do that but the Minister has the right to sell it and that right presumably enables it to be on a market basis but –

WILLIAM YOUNG J:
Or on a better than market basis.

GLAZEBROOK J:
Well it's not entirely clear because I think Mr Martin suggested that disposal was different and you had to come to a view about conservation values. Whether that's true on the form of the statute but I wouldn't have thought we would be looking at that in any event because it's not before us.

ELIAS CJ:
Well, I don't think we are looking at it, but we're looking at the scheme of the Act and it does seem to me that some sort of – that most of the arguments

that are being addressed to us apply to the other form of disposition. So I would think we do have to look at it. I'm not so sure –

GLAZEBROOK J:
I'm saying nothing definitely, though.

O'REGAN J:
But a disposition for money, I mean, what you're saying is it's money but somehow it's tagged that it can only be used for a particular purpose, but if the Crown sells land, the money just goes into the consolidated fund and what happens after that is for the Minister of Finance to decide. So I don't see how you could ever get a disposal which was linked to pest control and some other catchment.

MR SALMON:
Well, I think I'm addressing there my learned friend's suggestion that the Minister – and this was more developed in the Court of Appeal – that the Minister nearly needed to be satisfied that that deal was a superior conservation outcome.

GLAZEBROOK J:
Well, we do need to –

O'REGAN J:
I think we should just stick with exchange, you know. We've got enough on our plate without dealing with cases that aren't in front of us.

MR SALMON:
Certainly, and I'm not intending to depart from the case we have. My apologies if it sounded like that, but I do echo the Chief Justice's observation that in understanding the scheme of the Act because in my submission whatever can be done with exchange can be done with sale. But with even less regard for the particular park, because you're right, the funds

could be used for all sorts of things. So without getting into counterfactuals in any detail –

O'REGAN J:
Well, that's why you could never do the comparative analysis with the sale, because all you're getting is money. The money might be used to fund a coalmine, you know.

GLAZEBROOK J:
Well, you might not be able to.

O'REGAN J:
So you could never say, "I think this is a fantastic conservation outcome because the money's going to be used to track possums somewhere." Because you don't know what it's going to be used for.

MR SALMON:
Well, I think a decision-maker looking at it could say, "This person is prepared to devote a fund as part of this to track maintenance or pest control." I'm really addressing the proposition which I think must be right, that the revocation power must, at the very least, require a conservation focus in the decision-making, in which case there would have to be at least some association, I would think, to revoke on my learned friend's best case.

GLAZEBROOK J:
I would suggest probably the disposal power has to have at least some regard to the conservation aspects because stewardship land could be relatively important. When you're deciding what you are going to sell, one would expect to have at least some regard. In fact, the grounds suggested you do have to have regard to conservation values when deciding what and when to sell. It's not just a matter of a totally free decision. If it was a totally free decision there'd be little need for public consultation, one would assume.

MR SALMON:

Yes, I think that's right. So, sorry, I'm not meaning to suggest that conservation values ignored on that at all. I think also there'd be regard had to whether it should be reclassified as protected land, for example, and we might have to look at that.

GLAZEBROOK J:

Well, obviously you might have to in certain circumstances, yes.

MR SALMON:

All I'm looking to develop is that in the scheme of the Act, given that whatever the approach to revoking protection to enable exchange is, it would also apply when revoking protection to enable a sale.

ELIAS CJ:

Well, I know that the analysis has proceeded on a two-step basis but the more I hear this the more it seems to me that the critical issue is the determination to change the classification, the section 7.

MR SALMON:

Yes, it is.

ELIAS CJ:

Yes, that's the critical issue.

MR SALMON:

Yes.

ELIAS CJ:

And in deciding whether matters have been properly considered in coming to that determination, you have to consider the consequences, which are that the land becomes amenable to sale or to exchange. Now, the only justification that is put forward here for the revocation of status is the exchange. So, of course, you have to consider that. But the classification is in the context that

the protection against any disposition will be removed. So you have to consider the intrinsic values of the land is your argument, isn't it?

MR SALMON:

Yes, it is my argument and I supplement that by saying – and I've said it clumsily, I think, in answering Justice Young but in saying that if one analyses what happens with any other approach one unsettles the statutory scheme and most importantly, and Mr Cooke addressed this in part and I haven't come to it yet, one collapses a careful statutory distinction between stewardship land and protected land and one does that because Mr Cooke's argument, let's remember is that this tradability is the, his words, key criteria. So the key criterion on their argument under section 18(7) is the prospect of a trade which means that that key question of whether something is protected or not is the prospect of a trade which means that it is being treated and asking well is it a good thing to trade it as akin to stewardship land. In other words, the division between stewardship land and protected land only makes sense if it's defined by intrinsic qualities and the ability to sell as a consequence of the classification. Once the ability to sell becomes the controlling factor in the classification then everything is stewardship land.

And in the statutory scheme if we might just pause and reflect on what that means for these parks. The Ruahine Forest Park is enormous and nationally significant.

GLAZEBROOK J:

Can I just –

MR SALMON:

Yes.

GLAZEBROOK J:

As I understand it, this was only a decision to reclassify because you could make the exchange and wouldn't have been done otherwise.

MR SALMON:

Correct.

GLAZEBROOK J:

Now I suppose you could say, well, that shows it shouldn't have been done because you shouldn't have changed the classification but in fact it is only done for the exchange, it's tied together, and it wouldn't otherwise have been open for free disposal.

MR SALMON:

Again –

GLAZEBROOK J:

Because all of the decisions were made together and all happened together and were contingent on each other.

ELIAS CJ:

And was conditional, yes.

MR SALMON:

Yes it was in fact conditional. I was surprised to hear the suggestion that more than that was – there's no doubt that this was done conditionally and only for the exchange and thus there is no doubt that really this was an exchange decision dressed up as a revocation decision. In other words, it was being treated –

ELIAS CJ:

That's a very high hurdle you seem to be posing because you do seem to be taking a very formalistic view that you can't consider the reason that's being put forward for the reclassification which is acknowledged to be the exchange here and I'm not sure that that, that's right as long as the value, the intrinsic values of the land are actually assessed in making that determination.

MR SALMON:

Yes, and Your Honour, it's open to Your Honour to find that it is a factor, I accept that. Our case is that it's not at all, but that it is factor but that nevertheless the assessment of values must be intrinsic not relativistic, that would be the mid-point outcome.

WILLIAM YOUNG J:

I just missed that?

MR SALMON:

That the assessment of the values of the 22 hectares must in and of themselves be of their intrinsic value not simply relating them to the Smedley land and saying which one is better overall.

GLAZEBROOK J:

But it's always going to be a relative assessment, isn't it, because it's always going to be a relative assessment whether a pristine lake in Fiordland is better than, has more conservation values than a not so pristine lake in the North Island.

MR SALMON:

It is going to be in the –

GLAZEBROOK J:

I'm not suggesting that that would necessarily be a split between North and South.

MR SALMON:

No.

GLAZEBROOK J:

But it is going to be relative, it's going to be a relative analysis, isn't it?

MR SALMON:

It is in relation to stewardship land and my friends are asking that it be here.

GLAZEBROOK J:

No, in relation to any land, isn't it? If you're looking at what has conservation values, if it has a habitat and the only habitat for five very, very endangered species that's going to be of more intrinsic value than one that is not a habitat for any endangered species, one would have thought.

MR SALMON:

Yes, Your Honour is right and I wasn't intending relativistic to be or relative to be –

GLAZEBROOK J:

You just say “just relative” in terms of particular land.

MR SALMON:

Yes, if Your Honour means relative in the sense of compared to our general conservation values and the entirety of the conservation estate I guess I'm calling the intrinsic.

ELIAS CJ:

Well it's not disembodied, it's not an inquiry just on the merits of the two pieces of land, there are more values that have to be taken into account in that, in the assessment. Isn't that the argument?

MR SALMON:

Well my argument is that the relative positions of the two pieces of land were not relevant and that it should have been wholly the intrinsic values.

ELIAS CJ:

Yes, I understand that.

WILLIAM YOUNG J:

Sorry, this is just section 18(7).

GLAZEBROOK J:

No this is to the seven, well –

ELIAS CJ:

Yes, it's 18(7).

WILLIAM YOUNG J:

Because for the exchange decision a relativistic assessment is only required.

ELIAS CJ:

Inevitable, which is why they can't be exactly coincidental.

WILLIAM YOUNG J:

No, I agree with that, I agree with that.

ELIAS CJ:

But I'm not sure, I mean it does seem to me that the parties are both taking fairly absolutist views and I'm not sure that the real area of concern to me is not simply were the values taken into account because Mr Cooke has made quite a good fist, I think, of saying that they were and you are going to have to, when you come onto it –

MR SALMON:

Yes, and I will.

ELIAS CJ:

– demonstrate that but in a way we've almost thrashed to death the structural argument, haven't we?

MR SALMON:

I think we have the Act to a large degree. Might I try to engage with what Your Honour is saying because it's important?

ELIAS CJ:

Yes.

MR SALMON:

Our, you'd call it extreme or rigid position might be at one end of the spectrum which is no regard can be had to be bargain represented by the exchange. My learned friends say that that was the key criteria and so we're at polar extremes. I think Your Honour is saying there might be a middle ground where all the intrinsic values, as I call them, must be taken account of but it is not improper to take account of the fact that there is an exchange possibility and that is not accepted by Forest and Bird but that represents a middle ground, as I will come to. We would say, and will say, the manner of investigation here was such that in fact what Mr Cooke has skilfully conveyed as considering inherent values was only ever considering the comparison of inherent values and that that doesn't meet Your Honour's formulations. I will come to that.

ELIAS CJ:

Yes.

MR SALMON:

But just pausing for a moment and the statutory scheme, I accept Justice O'Regan's concern that we not descend into counterfactuals but if we take a view of what this estate actually is –

ELIAS CJ:

A bit odd being said from this bench.

MR SALMON:

Or at least not in this case. If we take a poor view of the conservation estate the Ruahine Forest Park is very big and very significant. There's 22 hectares, we have an issue about how significant they were but the estate is made up of many areas of protected land, some big and some small and once the question of which ones retain classification is opened up to involve a consideration of what can be obtained for them, whether by exchange or by sale, there is an unsettled effect on the entire estate that is significant in a statutory interpretation sense. I have talked about the fact that there would be

an almost put option on a developer and I don't mean that pejoratively, but there would be the ability to present, as was presented here, a *fait accompli* bargain.

ELIAS CJ:

Well they have got to have the happen stance that there's contiguous land really, don't they, of value?

MR SALMON:

Yes, which might be the case with a number of rural properties, I don't know, but that's only for exchange or they've got to be able to present the appealing bargain for a sale. So there is the ability –

GLAZEBROOK J:

Well the sale might still be different because it's gone so if it might be that you had quite different considerations for something that says it's gone forever as against something that says that's gone but we've got something better.

MR SALMON:

Well I think it would be hard for the appellants to argue that that's the case because the very reason for saying that there must be regard had to this key consideration of tradability must apply in terms to the ability to sell.

GLAZEBROOK J:

Well it doesn't have to, does it, because there is a difference between exchanging for something better and losing altogether because under – if you look at what the Minister says, once it's gone it's gone, but an exchange is, once that's gone it's gone but we have something better which is quite different.

MR SALMON:

It's different in some ways. Still what's gone is gone but I think I'm, with respect, right in saying that everything they have said would be said there too. her Honour the Chief Justice –

GLAZEBROOK J:

Well it might be but I'm saying it might not be accepted because what's gone is gone and an exchange is, in terms of the conservation estate as a whole what we have now is something better than we had before.

MR SALMON:

Yes, as I've noted, of course, that argument one could see arising in a sale context too given shortage of funds, as Justice Young pointed out, funds aren't commonplace. But can I engage with that, because again it's important. The argument – and, indeed, the proposition put to me by the Chief Justice was that it seems an extreme position for me to say that the reason why the revocation is being considered is not a factor. In this case, it's an exchange. That would apply in terms to the fact that someone is trying to buy it. So it would be difficult – and it's true, Your Honour, that you may look at it differently if it came back before you. I think my learned friends and I are hoping we never come back on this Act, at least as it's written now.

GLAZEBROOK J:

I think we're probably hoping that as well.

MR SALMON:

The point being, though, that that reason would apply in terms and Mr Cooke's elegant phrasing of this as "because it's the only real difference between conservation park land on the one hand and stewardship land on the other, it must be considered." It's not that it's tradable that's the difference. It's that it's disposal, full stop. So it must, I think, with respect, capture sale.

So I think, with respect, I am right to say that those risks to the estate and those policy consequences follow this interpretation and I would submit it would be surprising if Parliament had intended that people view the protected part of the conservation estate in the way that HBRIC viewed this land. That's the first point.

But the second point is if we step back on a general level and look at this from a policy perspective, with this suite of big and small parks around the country, some small little coastal places that are the last holdout against development, whatever they might be, the interpretation I'm advancing of the protected category and of 18(7) is one that sees stability and predictability about those pieces of land. Every neighbour and every user of a resource in the far North knows that that is a beach they can stop on.

The approach my learned friends are asking the Court to embrace is one that says that a newcomer or a developer or –

GLAZEBROOK J:
Well, actually, it wouldn't be the Crown's approach because the Crown says that you couldn't dispose of the small park because you're getting something better somewhere else, as I understand the Crown's argument.

MR SALMON:
Yes, you're right. It was the Crown's argument. Mr Martin argued that but he argued it by reference to section 19 and the rules or the law that governs operation while it's still a conservation park. None of that would apply if it was declassified or had its status revoked. So whether it's because there would be an exchange of something else nearby or whether it was because of an offer of money or on a conservation level someone took the view that more land at the back would –

GLAZEBROOK J:
No, I think he was saying the 18(7) power could not be used to do that, so yes of course once it's gone you can but he was arguing – and he may be wrong on a statutory interpretation basis but his argument was that that wouldn't be possible.

MR SALMON:
Yes. I think he is wrong. The argument in the Court of Appeal was that that could only be done if it increased the overall conservation benefit, as I

understand the argument, and obviously that's a wide-open question with a general fund and so on. The argument that Mr Martin advanced was that, as I understand it, it couldn't be done in relation to section 19 land, conservation park land, because section 19 was focused on improving that specific park, and what I'm suggesting is – and this is the reason I focused on section 19 earlier – section 19 is not the operative provision and it's not controlling in the interpretation of 18(7). The question is whether the –

WILLIAM YOUNG J:
But wouldn't this be material for the exercise of a discretion under section 18(7)?

MR SALMON:
It would be material to the exercise of the discretion to look at whether it had the characters that justified it being a conservation park or a watercourse park or whatever.

ELIAS CJ:
Whether it required protection.

WILLIAM YOUNG J:
Or how can protection best be provided? How can it best be protected? Might not that be material to a section 18(7) determination in relation to a piece of it?

MR SALMON:
It might be if that was what was being looked at but I'm not sure even that's right. But what I'm endeavouring to advance is the proposition that firstly the moment the test of what bargain can we achieve, even if it's with the best will in the world, one makes – firstly, one collapses that distinction and conservation park land really is stewardship land, and that was the submission that gained traction in the Court of Appeal because the section 18(7) process becomes about the exchange and that definitely happened here. I'll go through them. Every report, every question – even the affidavits

from the decision-makers say, “We only did this so we could,” and every consideration the environmental impact was comparing these. So that is what – ironically – that is what there was a public hearing about. There was a public hearing in this case about something that the Act did not need a public hearing for. It needs a public hearing for the revocation because that’s about those intrinsic important public values where someone can say – and the public notification of these things is important – “I use that for hunting or fishing or swimming”. There is no public hearing for an exchange and yet that’s what the public hearing turned out to be about, reflecting that Mr Cooke is right, that this became the key consideration. It became, in fact, the only consideration.

ELIAS CJ:

Well, it was the reason for the reclassification that was put forward.

MR SALMON:

Yes.

ELIAS CJ:

We probably have to take the adjournment, if that’s a convenient time.

MR SALMON:

Yes, it’s a convenient time.

ELIAS CJ:

All right. We will take the adjournment now.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.16 PM

ELIAS CJ:

Thank you Mr Salmon.

MR SALMON:

I thought it might be a sensible time to go through the decision process and deal with the basis on which I have said that in every meaningful sense this was a decision-making process about the exchange and the relative benefits of the exchange and not what we submit is the proper focus. So as a general proposition I think it's fair to say that the decision-maker and the other deponents for the Crown were very upfront about the way in which the decision-making process was run. In our written submissions we've given reference to some of the evidence so I won't go through it in great detail but just give some examples of how up front they have been because it does seem, in my submission, to be clear.

The Sanson affidavit, which is in bundle 2 at tab 17 candidly describes the process in this way, this is at paragraph 22: "I noted Mr Kemper's view that the proposed exchange would enhance the conservation values of land managed by the Department," now just pausing there, that is the section 16A test as you will recall, "and promote the purposes of the Act. I also noted his view that if I was of the mind to revoke the status of the RFP land to progress the proposed exchange I would first need to declare the land be held for conservation purposes. He recommended that I accept his recommendation to revoke the conservation park status of the RFP land if I wished to progress the exchange subject to declaring the land to be conservation park." And that's a response on an upfront description of what he did. It was a revocation of status done only to enable the exchange and if it's necessary Mr Kemper's affidavit presents the same impression.

And in that context is one that really did, and I now turn to this point, focus on the relative merits of the exchange as if this were solely an exchange decision. So this is an attempt both to give you a sense of the way in which the decision was made and to support the submission that what was purported to be a revocation decision with a public hearing was in fact, because of the legal approach taken by the Department, an exchange decision under section 16A in drag.

So perhaps the first point is the delegation. I know you've been to that. I'm not sure if it needs refreshing but the terms of the delegation as noted were expressly to consider it only in the context of, “Being required for a land exchange associated with the Ruataniwha water storage scheme,” and that's at volume 3, tab 42.

ELIAS CJ:

Has anyone got my volume 2? What colour is volume 2?

MR SALMON:

It's yellow, Your Honour.

GLAZEBROOK J:

Volume 3 you mean?

MR SALMON:

Did I say 2?

ARNOLD J:

Yellow. No volume 2 is a thin volume and its blue.

GLAZEBROOK J:

But you're referring to –

ELIAS CJ:

Thank you, I have it, yes, yes, that's fine.

MR SALMON:

I'm onto yellow and 3.

ELIAS CJ:

No, you're earlier reference was to it, I'm just a bit behind.

MR SALMON:

My apologies.

ELIAS CJ:

That's all right, thank you.

MR SALMON:

So the next document –

O'REGAN J:

What point do you make in relation to the delegation? You're not saying it's an invalid delegation.

MR SALMON:

No.

O'REGAN J:

You're just saying that it shows that everything is geared up towards the end result.

MR SALMON:

Yes. It frames the approach as being an approach about should the exchange proceed and I don't think I'm actually making a provocative submission in saying that's plainly what was done. It was done. My friends, indeed, I don't think are saying, either, that it wasn't done, although they haven't gone to some of the language I will. The submission instead is that in making that exchange judgement would the swap improve the status of land generally owned by the Department? They were effectively imposing the section 16A exchange test upon the section 18(7) revocation test and as is now clear we are arguing that that section 18(7) test is different in terms and needs to be quite different to reflect the purposes of the Act.

So the next document to go to is the departmental submission in volume 4. I've endeavoured over the break to cut this back to not the minimum but a limited selection of materials. This is volume 4 at page 73. This, as you've clarified with my friends, is really – this represents not just the departmental

submission but the decision. Although we've been to it, it's possible that you've not been given a complete understanding of it just because of time.

The executive summary begins at 1.1 on page 755 by making clear the framing of this issue. It has arisen because of a proposed exchange. The exchange is for the purposes of the water storage scheme.

At 1.28, it's noted that one of the parcels is rare in the landscape and contains 3.3 hectares of acutely threatened – and that's a defined term – land environment. It goes on to describe it.

ELIAS CJ:
Sorry, "acutely threatened" is a defined term in what?

MR SALMON:
Oh, sorry, I'm not purporting to know where that is defined from. I'm meaning to suggest that they have given it first letter caps.

WILLIAM YOUNG J:
Whereabouts is the reference to that? Sorry.

MR SALMON:
1.2A.

GLAZEBROOK J:
It's not in the policies, is it?

MR SALMON:
I'm told it's not a term of art, so it may just be a drafting style.

GLAZEBROOK J:
Right.

MR SALMON:

It is a term of art? Oh, I am told it is a term of art.

ELIAS CJ:

Whose art? I suppose we want to know. Is it authoritative? Is it derived from some planning document?

MR SALMON:

The Land Environments of New Zealand database. I don't think much turns on exactly what it is. So I've perhaps given it undue attention. In relation to 1.2B, the Dutch Creek parcel, a description of the resources there and over wetland which could be considered significant. This is the type of thing that had more focus than some of the other documents we'll come to and which might have justified other protective classification.

Then at 1.4, a description of the steps involved to enable exchange.

I pause there and on the delegation because one of the causes of action, to answer your question, Your Honour, is that it was an improper purpose to exercise this power just to enable an exchange. That's one of the big causes of action. That is very much maintained, that argument.

ELIAS CJ:

Well, is the pleaded cause of action that it's an improper purpose just for the purposes of exchange or that it's an improper purpose to consider it at all?

MR SALMON:

I'll make sure I get it right. In making the revocation –

ELIAS CJ:

Sorry, volume?

MR SALMON:

Volume 1 tab 8 at page 42. The paragraph is, "In making the revocation decision, the Director-General erred in that the power was exercised for an improper purpose, being to facilitate a proposed land exchange."

Back on the decision at volume 4 tab 73, on page 758 are the relevant yes/no selections for the decision-maker. The pertinent one here being item O. "Agree subject to a *Gazette* notice giving effect to the section 7(1) declaration, to revoke the purpose of the RFP land as a conservation park on the basis that you wish to progress the proposed exchange of the RFP land for the Smedley land." So that is that purpose clearly recorded and also the realpolitik of the transactions. This was definitively not a situation where there was, on any analysis, an assessment whether absent the exchange proposal this land did not warrant being part of the park. My learned friend Mr Cooke suggested that that was something of an open question. It's not accepted that that is an open question. The indications are very strong on the evidence that it warranted protection as evidenced by the approach on the concession, which I'll come to. It's never, as I understand it, been asserted that the land didn't have the conservation values per se absent the exchange to justify revocation. Over on page 764 at 5.7 and 5.8 there is, I note, a recording of Forest and Bird's objection about the proper lawful approach and that purpose point raised upfront. The view was not that that is not what's happening but that it was lawful, which is the issue before us today.

Then over on 771, and the summary at 5.28, the final four lines of that paragraph read, "If you approve the revocation of the purpose of the RFP land on the basis that you are satisfied that the Smedley land meets the test in section 16A, you should – subject to gazetting – proceed formally to authorise the exchange and give effect to that authorisation by *Gazette* notice." So there we have quite clearly recorded that the revocation was going to be approved on the basis that the section 16A test was met.

So that was why I said – not with great success – before lunch that the approach taken by the Department did collapse the exchange test and the

revocation test, and collapsed the meaningful distinction between stewardship land and protected land.

There we see it, in my submission, in quite stark terms. The revocation was made on the basis that the wrong sections test was met.

Finally in this document, on 774 and 775, it's interesting to note the different way in which the removal from protected status was approached for the 22 hectares hectare block compared to how the then-protected status of the Smedley block would be treated.

If I can just contrast paragraph 8.1 which concludes with these words, "Provided you are satisfied that the purpose of the RFP land should be revoked to enable the exchange to be progressed, you may agree to revoke the purpose of the RFP land."

But over on 775 when dealing with what would then happen to the Smedley land, it's more tentative. This isn't a material point, but reflects what the real focus was here. I'll just allow Your Honours to read 10.1 to 10.3 briefly, but the key brief is that 10.3 concludes that in a much more tentative way that it may be open to the decision-maker to classify the Smedley land as forest park.

That reflects at its heart, in fact, a different approach to section 18(1) there in 10.3 than was applied to section 18(7) at paragraph 8.1. At paragraph 8.1 and earlier the test for revocation was the exchange test, wrongly. At paragraph 10.3 there is exactly the standalone inherent conservation value assessment that we are submitting is required under section 18.

The next document, and I'm sorry to jump bundles now but this is back in bundle 3, is the technical report at tab 65.

ELIAS CJ:

Sorry, I'm a bit curious about that 10.3 because one would have thought if the whole basis was the exchange it was exchange for land to be protected equivalently so that –

MR SALMON:

But then left it open to decide.

ELIAS CJ:

So that the way the, it just raises a question as to the way the exchange is explained is accurate, that it wasn't augmentation of the Ruahine Forest Park if that was so.

MR SALMON:

Yes, well I think in effect because it was all done at once it's fair to say that the Director-General was bringing it in at the same time as letting the other one out. So I'm not suggest –

ELIAS CJ:

Yes, well it's just probably the way it's formulated, it's probably not significant at all but –

MR SALMON:

It's only significant in a sense that I would submit that it reflects the proper approach.

ELIAS CJ:

Yes, I understand that that's why you referred to it but, anyway, that's fine, thank you.

MR SALMON:

This next document was volume 3 at 65 and the short point here is that this entire technical report, which is a conservation values report, is expressly framed as being comparative, in other words, it is that comparison required

under section 16A effectively described in the proposal on the first page and thus the assessment on page 670 is that on balance effectively overall, "The habitat and species values are marginally better," sorry, "in the Ruahine Forest Park section are marginally better than the values in the Smedley exchange block and not all habitats are duplicated. River bed will be lost, however, the similar forest habitat in the Smedley block is 5.5 times," et cetera, et cetera, "for these reasons the proposed exchange does reflect an enhancement of conservation values from an ecological point of view." So most definitely not a comparison of the 22 hectares with any general standard warranting protection, with any general assessment of the conservation estate and its needs but instead specifically and only with the Smedley block.

ELIAS CJ:

Sorry, and what is this report?

MR SALMON:

This is a DOC report into various relative environmental benefits and disadvantages, I suppose, between the two sites. This is part of the decision-making process and went into the decision-making process. And I'm going through these just because my friends have said, well, look they looked at the conservation features and the environmental features and, as I anticipate, may be clear, it's only every done when the document is read in toto as part of a comparison.

ELIAS CJ:

It also indicates up front that the merits of the proposal haven't been considered, it's just focused purely on the values of the land swap or land exchange. So that's what this report is doing, presumably other reports look at the other aspects.

MR SALMON:

They look at other aspects of it but all of them, in my submission –

ELIAS CJ:

Don't add up.

MR SALMON:

– consistent with – it's only ever Smedley or the 22 and the same, for example, is apparent even from the face of the full technical report at tab 67, even the title makes it clear there on page 674, "Assessment of proposed land exchange," and the executive summary begins by saying, "It was produced following a request to undertake a comprehensive," et cetera, et cetera, "applicable to the Ruahine Forest Park revocation land and the Smedley exchange block, and to provide the convenor with a report detailing the conservation values of each, as well as a comparative analysis of the two sets of values." So it was always a question of comparing the two.

ELIAS CJ:

But it does detail the conservation values of each which you say should have been done.

MR SALMON:

We say it should have been done. They were then not assessed by reference to any standard other than the Smedley block. So it's not said that they don't list some values, it is said that they did not assess those values –

ELIAS CJ:

Yes.

MR SALMON:

– by reference to proper objective standards.

WILLIAM YOUNG J:

Did they not assess them in terms of the significance of those that would be lost?

MR SALMON:

No, in substance, no they didn't. They described them but they didn't assess whether they were acceptable losses or not. They assessed whether the net outcome of the swap was a plus or a minus.

WILLIAM YOUNG J:

Well if you look at 677.

MR SALMON:

What which, sorry, Sir?

WILLIAM YOUNG J:

677, the second to last bullet point, that seems to be a focus on a factor of the 22 hectares rather than by way of comparison.

MR SALMON:

Yes it is.

WILLIAM YOUNG J:

Now I agree the fundamental focus is by way of comparison but as part of that wouldn't there have to be a focus on the intrinsic merits of the, intrinsic qualities, I should say, of the 22 hectares?

MR SALMON:

Yes there is. So I've probably been unclear, I apologise. The proposition is not that the features of the land were not identified in broad terms, and that's not to say there'd be common ground between my client and DOC on them but there was identification of them, the question is what were they compared to and how were they assessed.

WILLIAM YOUNG J:

Well most of it is by way of comparison, I agree, but some of it is, well, this is going to be lost and it's not going to be replaced.

MR SALMON:

Yes, but at no point –

WILLIAM YOUNG J:

I suppose they are not going to be replaced I suppose might be comparison but –

MR SALMON:

Yes, at no point was the question asked, is that an acceptable loss in its own right putting aside whether or not there is an exchange. So my argument is not that there wasn't, for example, a water issue listed on that page.

WILLIAM YOUNG J:

But mightn't that have been an inquiry that would have been better made in relation to sale rather than an exchange?

MR SALMON:

No, with respect, I think I understand your question. It's an inquiry that I would say must be undertaken in relation to revocation. If Your Honour doesn't accept that revocation properties shouldn't be looked at for potential sale then the books shouldn't be reviewed for which ones are up for grabs. If Your Honour goes against me on that then I can see one would be minded to say, well, this is an approach that could be taken but our essential case is that the revocation stage this sort of assessment is never done because the question is not can we get a bargain for this land, whether in conservation terms or otherwise, it is still a view that there is a bargain.

GLAZEBROOK J:

But even if you only take in the exchange which I must say is my view at the moment, that you can restrict it to that and there might be different considerations if you were selling, I would have thought even from that point of view you'd have to take into account losses in the sense that even if there is a huge net gain the loss might be so significant to the conservation state as a whole that it just wouldn't be appropriate to swap it out.

MR SALMON:

Yes.

GLAZEBROOK J:

And that's your point here, that that was never assessed in terms of are these acceptable losses per se as against by comparison in terms of the net gain.

MR SALMON:

Yes, that's right, and indeed there are further problems as one draws back and looks at it in a wider context. Even questions like, could this land be obtained in another way, we're not asked. So this really was a –

GLAZEBROOK J:

Well it would be an odd question to say could the land be obtained in another way because I would be surprised if you were wanting to obtain extra conservation land that this would be the land that you would choose. You might choose something in a wetland or coastal, I would have thought, over and above.

MR SALMON:

Yes, you may be right but that says a lot, in my submission, doesn't it, about the way in which this decision was packaged and brought to DOC.

GLAZEBROOK J:

I thought you might say that.

MR SALMON:

Well, I do.

GLAZEBROOK J:

But equally if you're looking at it on a park basis this might be a more sensible thing to do by way of exchange, even if you wouldn't buy it.

MR SALMON:

Yes, but again, the blinkering – I'll deal with this now, if I can, in this way. The blinkering that happened because DOC allowed itself to be seduced into thinking that the appropriate test was, should we give HBRIC the strip of land it wants in exchange for the strip of land it's found meant that the Department did not assess whether absent that swap it should dispose or downgrade the status of the 22 hectares.

O'REGAN J:

But it wasn't intending to swap absent – I mean, it wasn't intending to downgrade absent the swap.

MR SALMON:

No.

O'REGAN J:

So why might it consider it?

MR SALMON:

Well, it might consider it because, for example, it also didn't consider is this the sort of land we would swap this land here for if we were going to. This isn't the only land around that's not in the reserve. This is the land HBRIC found someone who was willing to say yes, if you can get –

O'REGAN J:

Well, it was in the right place, too, wasn't it? It was continuous to the …

MR SALMON:

It was in one of the right places but there's a huge boundary to this park, but also this is not the only land that could have been swapped for it. So this is not a situation where this was the only way of getting that land. This is a situation in which DOC blinkered itself to questions like, is there other –

O'REGAN J:

You're asking it to blinker itself even more, to pretend there's no swap when in fact there is.

MR SALMON:

Not at all. I'm asking itself to blinker itself from that but un-blinker itself from everything else.

O'REGAN J:

Well, you can't have it both ways. I mean, you can't blinker yourself from one decision then un-blinker for the next. If you're saying every decision has to be considered pretending that no other decision has ever been made, that's the point you have to stick to. You can't change it half way through.

MR SALMON:

If I've come across as saying that, I've erred. I'm saying that when making the decision about revocation the question of whether there's a swap is put to one side. Then when we come to the question of the section 16A swap, respectfully, I think it can –

O'REGAN J:

But you're only challenging the revocation decision.

MR SALMON:

Correct.

O'REGAN J:

Yes, so the rest is irrelevant to what we have to decide, is it?

MR SALMON:

Well, yes in the sense that I'm not asking you to overturn that part, but no in the sense that they show the improper purpose to have heft and weight, which bears on my statutory interpretation argument. In other words, the headwind I'm trying to move towards today is as to whether we should back out from

consideration in revocation contexts the question of whether there's an available exchange.

I'm observing that if one allows in the question of an available exchange to what we say is an intrinsic assessment, then a can of worms gets opened that I am submitting Parliament would not have intended and, as I have been endeavouring to show, the section 18 test becomes conflated with a section 16A test.

WILLIAM YOUNG J:
Why would you ever re-designate conservation park land as a stewardship area? What would be the purpose of doing so?

MR SALMON:
The purpose would be if it didn't meet the conservation values represented by conservation policy and an assessment of all its values. Now, my learned friends have put up something of a straw man in submitting that the Court of Appeal said it all had – the conservation values had to be completely destroyed by act of God and so on.

WILLIAM YOUNG J:
They did, didn't they?

MR SALMON:
They didn't. They didn't say that and we didn't submit that. The Court of Appeal actually said – and they encapsulated our position well so I'd like to go to it.

ELIAS CJ:
Well, just before you do, I'd like to ask Justice O'Regan whether he had a reply.

O'REGAN J:
No, it's all right. I was going to ask exactly the same question.

ELIAS CJ:

Okay, fine.

MR SALMON:

I think paragraph 70 of the conclusion which is tab 13 of the first bundle required to ask whether the land which has satisfied the statutory criteria for special protection is no longer required for conservation purposes. That is, "Its intrinsic values no longer justify protection. Account must be taken of the purpose of the special protection to permanently maintain its intrinsic values, provide for its appreciation and recreational enjoyment by the public, and safeguard the options for future generations as well as the emphasis on recreation which distinguishes conservation parks from other specially-protected areas. To be clear, the permanence of protection is not absolute. It depends on the land concerned maintaining the values for which it was designated."

WILLIAM YOUNG J:

Well looking at 68, the assumption is that the existing status of the land is the starting point and one can only change if there has been some detrimental subsequent event such as a natural disaster which warrants reconsideration. It doesn't seem to open the door for a reconsideration of the appropriateness of the original classification of the land.

MR SALMON:

Well the example of natural forces is only one. One can imagine that the perception of conservation and value would be another. If pukeko were mistaken for takahe, for example, of course, that could be revisited. I don't think Forest and Bird, I will be corrected and told to correct the position if so, but I don't think Forest and Bird is claiming they can never be looked at again nor indeed that the Court of Appeal said so.

WILLIAM YOUNG J:
They are saying it actually really, “It could only be revoked if intrinsic values had been detrimentally affected,” so something’s happened.

ELIAS CJ:
Well I wonder whether, as I put to Mr Martin, whether really that had been detrimentally affected such that should actually be deleted because I would have thought it's sufficient for arguments if it could only be revoked if its intrinsic values –

MR SALMON:
Were affected.

ELIAS CJ:
– did not justify continued preservation and protection, that's your argument, isn't it?

MR SALMON:
Yes it is, it is.

ELIAS CJ:
And it's a little confusing because what they've done is they've given an example but they have worded it as if the example is the entire –

MR SALMON:
Yes they have, and Justice Young is right that that reading can be taken from that paragraph. I was going to go to paragraph 76 as well as indicating what I read to be a pretty accurate reflection of our case. Perhaps I will let you read that.

ELIAS CJ:
So the whole of that you want us to read?

MR SALMON:

Yes. So whether it's with the gloss that Your Honour has identified in relation to that paragraph 68 or otherwise I think the Court of Appeal's decision in toto can be fairly read as not closing the door on reassessment unless everything has been destroyed by an act of God, but instead its central point is that any reassessment has to be based on the inherent and intrinsic qualities of that land and thus reflects the case we are seeking or urging the Court to take today which is one that recognises that one can't open the door to consideration of exchange benefits without, one, also entertaining sale benefits and, two, without conflating the tests and collapsing this distinction, and if one thing is clear from the extrinsic materials pre-passage of the Act and from the structure of the Act itself it is that meaningful protection on a kaitiaki or guardianship level was intended by these protected land categories.

O'REGAN J:

Just to be clear, you're not trying to uphold the final sentence of 68 of the Court of Appeal judgment?

MR SALMON:

I'm not saying in terms that to the extent that that is part of the raise. I read that as an example of what could happen.

ELIAS CJ:

Well it might be detrimentally affected because there'd been an earthquake or, I don't know, something like that but it might – I don't know how you can get entirely away from a comparative assessment though or a contextual assessment.

MR SALMON:

Yes.

ELIAS CJ:

Because it might not justify continued preservation and protection because –

MR SALMON:

It's one of only two left with the animal on it.

ELIAS CJ:

Yes, or the animal has gone.

MR SALMON:

Yes.

ELIAS CJ:

Or –

O'REGAN J:

Or the Department has bought, has had a new piece of land come into the estate which provides a much better habitat for that animal.

MR SALMON:

Yes, in other words the ground has moved and, yes, I accept that –

ELIAS CJ:

Or no one is using that bit of land.

O'REGAN J:

Well, that's true in this case.

ELIAS CJ:

Yes, well, although it's only one of the values, isn't it?

MR SALMON:

It is, and one of them, as can be seen from the documents, is the scarcity of river braid in that area and freshwater issues, and that is –

ELIAS CJ:

Is there any assessment of this in terms of wilderness values or not?

MR SALMON:

To some degree and I'll come to that in relation to – Your Honour asked in particular about the concession. I had two documents I was going to go to before that but they really make the same point. They just make it abundantly clear that this was conditional and driven by the exchange. So if Your Honours don't need more material on that, I was going to go to tab 68 as well. Because this – well, in fact tab 68, which is the wetland report, identifies specifically that the wetland here is superior to the Smedley block. So again in that fungibility sense there's a real question about assessing that by comparison to the net benefits of Smedley rather than in its own right.

O'REGAN J:

This is tab 68?

MR SALMON:

Sixty-eight, yes. I'm just mindful of time. So I can through it if it would help but it might be more useful to go –

ELIAS CJ:

What are you wanting to draw us –

MR SALMON:

Just that this document, which a peer review obtained by DOC, suggests that in –

ELIAS CJ:

And is that the science report you've been taking us to that's peer reviewing or something else?

MR SALMON:

Yes, I think it is. So it's providing peer review of the science report, as it says above the heading. Then it says it does not adequately address matters related to freshwater fish and aquatic habitat values. If stream and native fish

were being considered in isolation, the 22 hectares is of higher ecological value than Smedley and the land swap without a dam would result in a net reduction in stream and native fish conservation values held within the DOC estate. That ties in with my earlier submission that it was, of course, an open question whether this land would qualify for status as a watercourse park under section 21, I think it is.

So in terms of some of the criteria, it had superiority but again that got amortised or washed out in the accounting against Smedley.

The final document to go to, and this is the most telling in a way, is the concession document which Your Honours have been taken to, at least briefly. That's in the same bundle volume 3 at tab 35.

Now, at 458 the report reviews the significance of the 22 hectares against the four key values which the report writer regards as governing assessment, and these are – and this is the second-to-last paragraph on that page –

ELIAS CJ:
Sorry, I've lost the page.

MR SALMON:
We're on page 458.

ELIAS CJ:
Oh yes, thank you.

MR SALMON:
The four national priorities for protecting rare and threatened biodiversity on private land, MIE and DOC, from 2007 is used and the short point is as they work through on that page and into the next they're all net, all four. This is one of two places where national significance are identified. My learned friend identified one on the facing page, but you'll see at the bottom of that indented paragraph at the top of page 459 the conclusion is, "There is no doubt,

therefore, that the areas of indigenous habitat which are subject to the proposal contain significant ecological values within a national context."

ELIAS CJ:
Sorry, I …

GLAZEBROOK J:
Right at the end.

MR SALMON:
Yes, above the paragraph in the normal margin, "In the simplest terms."

ELIAS CJ:
Oh yes, I see, thank you.

MR SALMON:
And then there's a summary of the significance and loss, not just from that land but neighbouring land from the dam.

This ties into the note about national significance repeated then at page 460, which is the one Mr Cooke identified. At the bottom of that page, the last normal margin line, "A breakdown of the land in question is above and as advised by Simon Moore, who is a DOC advisor, some of the land appears to be nationally significant."

Now I said that this is a striking document and, with respect, it is because at this point the test being applied to whether a concession be granted was one that did not involve that relative assessment by reference to the Smedley block, and the conclusion, the plain conclusion is that nationally significant value would be lost, and that is why, of course, the concession went nowhere. But it is striking that concession was not applied because that is a real life litmus test for what the answer would have been were DOC to consider the proper test in this context for revocation, instead of the question is, on balance, it worth revoking it for that land that HBRIC has identified.

That confirms what is, respectfully, just abundantly clear on the documents, which is this was only happening, not because the land didn't warrant conservation, and not because it didn't warrant its section 21 protection, and not because it didn't warrant the other protection, this was only happening because of the exchange. So against that background I –

ELIAS CJ:

Well, this is an illustration really of, I mean leaving aside the fact that it's concerned with the same land, this is an illustration of what you say the consequences are of conflating the inquiries.

MR SALMON:

Yes, and it's also me seeking to answer an earlier question of yours about the improper purpose pleading.

ELIAS CJ:

Yes, I understand.

O'REGAN J:

What's the statutory test for the grant of a concession though?

MR SALMON:

The statutory test –

O'REGAN J:

Is it the same as the revocation test?

MR SALMON:

No, but I believe it excludes, I'll get that in a moment, I believe it excludes, there's a lot I'm told.

O'REGAN J:

I see. Don't worry about it.

MR SALMON:

That's when we next come back –

O'REGAN J:

It was just, the point you made seemed to be saying effectively they're the same test.

MR SALMON:

Sorry, I was, but I was submitting that possibly a little bit lazily by reference to the way in which the report was written assessing the environmental impact. If that makes sense. So I wasn't purporting to know the answer to that.

ELIAS CJ:

You're not saying that they would deliver the same outcome, you're saying it's illustrative of the context dual assessment that needs to be done in the revocation decision.

MR SALMON:

Yes.

ELIAS CJ:

That if you simply do it on a comparison you're not actually weighing in the scales the important conservation values.

MR SALMON:

That's correct, and I appreciate it sounded like a slippery slope argument when I made it earlier. But as a matter of logic it's an important one. If one accepts that there will always be something a bit better than any land one wants to swap for, then really this could always happen. This isn't unique or odd. It will always be possible to find, perhaps, the less commercially valuable land, which incidentally DOC could have bought cheap, and set up a decision-making context that achieves the windfall and removes land from the conservation estate.

ELIAS CJ:

Just looking at the statute, you're actually, well it's irrelevant really. But I noticed there was a – am I right in thinking, or was I dreaming it perhaps, that DOC is empowered under the statute to sell stewardship land for its purposes, for conservation purposes, to apply proceeds to conservation purposes.

MR SALMON:

Yes, it's a very broad – the proceeds. 26 is very broad in its test compared to the exchange one which requires a net benefit to all land.

ELIAS CJ:

Yes.

MR SALMON:

So exchange doesn't actually require benefit to the particular park, or anything like that, to all land, and sale is broader.

ELIAS CJ:

Don't worry about it. I just thought I'd read something.

MR SALMON:

Yes, I think you might have got the point that Ms Gepp was noting, is that there's also provision for wash-ups and surplus payments in the exchange context, but I think that's a bit off point.

ELIAS CJ:

I see.

MR SALMON:

Perhaps if we come back to that, she may have greater knowledge when she gets to her feet shortly.

ELIAS CJ:

Yes, sorry.

MR SALMON:

Not at all, it's my fault. So against that background I want to try and capture my argument because I think, unless you have more questions on the decision or the Act we've covered them.

The first was just to address briefly, I would say, the straw man that has been presented at times in this case, less so before you orally but certainly it has been argued that the effect of what Forest and Bird are seeking to do, the effect of its argument is a net conservation disadvantage and just because that submission has been made previously that's not the case. DOC is not saying that, sorry, Forest and Bird is not saying that DOC cannot go and look at purchasing further land and it's not saying that it can't find ways to obtain the Smedley block. It is simply saying in terms of what's available to sell or trade to do it, it doesn't go looking through its protected lands, and it's not reasonable for DOC to submit that there's a net conservation disadvantage when it chose not to look at whether it could buy Smedley outright – it's not valuable land – or exchange other already stewardship land with no conservation values. So that's just, I'm noting that's –

ELIAS CJ:

Well there's just the other side of the coin of the argument that there is a, that all you are concerned about is a net conservation advantage.

MR SALMON:

Yes, and that's, yes, that's right, that's right Your Honour. So in terms of what can be drawn by the decision itself that's the subject of today's hearing and putting aside the wider interpretation issues for a moment, the first proposition which I would submit is made out is that the purpose of revocation was for the exchange or nothing else. The second is that it was never decided that, in its own terms, it was not appropriate to continue protection for the 22 hectares.

O'REGAN J:

Sorry, could you just say that again? It was never?

MR SALMON:

It was never decided that the 22 hectares did not, in their own terms, justify having protection continued and, indeed, I don't really think that has ever been contended in Courts below or here. Instead the reality was, and this really does almost seem to be common ground given the key criteria argument put forward by Mr Cooke, this was all about the exchange and against that background the rhetorical arises, well having seen how this was assessed, which is to look at the 22 hectare block against Smedley in a one-or-the-other basis, a wrongful one-or-the-other basis, one question arises which is, how would a pure exchange decision be any different? And in terms of what was had regard to here, it would not have been. Beyond addressing the statutory machinery to reach the stewardship point, every aspect of every report and decision made clear that the comparative assessment reflected the statutory test for exchange, not some view of section 18(7) and that it was only being done for exchange.

So that leads me to the next submission which is, what we see here is in fact in every sense, except where it most matters, a section 16A exchange decision and that is not – whatever approach to interpretation should be taken it cannot be that protected land can become unprotected by following the exchange test and the exchange process because that, on any analysis, does collapse the distinction.

So I appreciate I've had difficulty conveying this in a very coherent way before lunch. The upshot of that is on analysis the test applied here is the exchange test and that reflects the inevitable reality that the case advanced by DOC and the legal interpretation followed in the decision documents is one that collapses the distinction. That is not hyperbole, that is what has happened. If exchange will justify removing protection then the exchange test is being applied as the only test and protected land is not in fact any safer from disposal than stewardship land, and whatever nuances Your Honours see in relation to the relevant factors under section 18, in my submission, the correct approach cannot be the one taken by DOC, and urged on you today.

So in conclusion, if DOC had assessed the 22 hectares in isolation in the rough manner as was done in the concession report, and concluded that it just didn't have inherent conservation values, we would not be here. I would not be arguing for example, Sir, that unless they all burnt down the status remained. We would almost certainly not be here. That would be a very difficult decision to review. Instead we are saying that this decision was wrongly made because it followed a wrong purpose. Because it conflated a test and because it took account of the carefully selected proposition put up by HBRIC which misled it into not having regard to whether this important conservation land had environmental qualities of its known that justified protection in its own right. And in that context to claim, as my learned friends do, that the park has been improved by this, which is the obvious reaction that the net effect of this was some net benefit, is not a fair submission because the question really is, improved compared to what. The Smedley land wasn't being destroyed. It wasn't being intensively farmed and the RMA provides some protections, but more particularly it was for sale and could have been bought. The assessment was not compared to what one would expect for a competent inquiry, which is, if there's conservation in Smedley, how can we get it, and then we might have a case about funding and about whether there were funds available, and about whether there was other land.

O'REGAN J:

That's just a straw man, isn't it? That was never a prospect, buying the Smedley land. I mean – so I just don't see – of course they could buy land all over the country if they had unlimited amounts of money, but they don't.

ELIAS CJ:

But the submission is that –

MR SALMON:

Yes, I agree Sir. My point is, they took account of that and that was the improper purpose, and the irrelevant fact. Your Honour is almost putting that in way that might mount, justify an argument in support of me, with respect,

which is that is proof that this decision was not about conservation values. They weren't looking at it. They weren't looking at disposing of this land.

O'REGAN J:

Well it was about conservation values, it's just that you're saying it was about the wrong ones. It was about overall are the conservation values enhanced by the swap or not, and you're saying that was the previous because they hadn't got to the swap proposition yet.

MR SALMON:

It nearly was. I agree it was in some ways. Of course, as I said, the land wasn't being, it wasn't disappearing and it wasn't being used in a way that harmed its present value, which is one of the reasons it was of conservation interest. So the conservation values were there and not disappearing, it just wasn't part of the park. So yes it was improving the park on DOC's analysis, but it wasn't necessarily a net conservation gain. But my point is not to straw man the thing and waste your afternoon Sir. It's to note that the focus, the proof is in the pudding because the realpolitik of the approach taken by DOC was one that was blinkered to all possibilities other than HBRIC's proposal, and had the effect of blinkering DOC to better ways of acquiring that land, and to whether it could acquire that land while keeping the 22 hectares and finally, and most importantly, it blinkered DOC from making the sort of assessment that was made in the concession report, and at the heart of it, that is our case.

ELIAS CJ:

Well your argument really is that it's the comparator that's wrongly constrained the inquiry that's being undertaken.

MR SALMON:

Yes, yes.

ELIAS CJ:

And that instead of, and that it's really the comparator that's the straw man, that's your argument.

MR SALMON:

Yes, that's right. Well it put DOC astray, yes, and I do apologise. I know that none of us like *in terrorem* straw men or slippery slope arguments, but the obviously concern in this case is about its wider implications as well as just this dam, and so they are, they're important that we think about them the way Parliament would have. I said before there will always be a price, or there will always be a better piece of land than everything but the best. And thus it is a strong submission, I would say, that opening up the classification process to be governed by consideration of the consequences of classification risks no park status actually being concrete. The thing that makes it certain is that it can't be sold. If it can be reclassified whenever it should be sold, then the very permanence of these parks is lost, if that makes sense.

O'REGAN J:

Is this the first time that this has happened, the use of this revocation power followed by an exchange, has happened?

MR SALMON:

I'm not sure. I think DOC may need to answer that. It's the first time I've had to litigate it, Sir, and I've promised you already I won't do it again.

GLAZEBROOK J:

Don't make promises you might not be able to keep.

MR SALMON:

I can give you the answer because Ms Gepp has pointed to paragraph 4 of our written submissions. This represented a departure from the Department's usual practice which formally followed the approach endorsed by the Court of Appeal of revoking specially-protected status only where the conservational land did not have conservation value justifying that status. That's footnoted to various materials in the case on appeal. So I should have known the answer to that.

ARNOLD J:

Can I just understand one point? You addressed it earlier but I'm not quite sure that I understood fully. The delegation has this limit, as you pointed out, applies in the circumstances of part of the Ruahine conservation park being required for a land exchange associated with the water storage scheme. So that's a limit on the delegation of the power to revoke under 18(7). So does it follow from your argument that that delegation must necessarily be improper in the sense that it limited the scope of the inquiry simply to the exchange, or do you say, well, no, it was still open to the Department to think more broadly about the other options, and if there were other options, to consider them?

MR SALMON:

I guess it depends in part – answering you as I think about it, whether the delegation is read as acknowledging the circumstances or as requiring it to be the purpose or a relevant criteria. If it were doing the latter, then it would be defective. I accept that.

ARNOLD J:

Well, it's really saying you can only exercise the power of revocation for the purpose of facilitating the land exchange.

MR SALMON:

It's certainly coming close to that, Sir, and if it's read as doing that, then yes, it would be defective. That's not a point that's, I think, from memory, pleaded. But I think just looking at it again –

ELIAS CJ:

It wouldn't need to be, would it, because the ultimate decision will be whether the decision has proceeded on a right basis. That, too, may have constrained it but I don't think it would.

ARNOLD J:

I think it's theoretically possible for the delegate to think about a range of other options and to say, "Well, I'm not going to revoke in order to effect this land exchange because there's other ways of doing this," or something like that.

MR SALMON:

Yes. But I think her Honour the Chief Justice is right, in my respectful submission, that if there's an error here it's likely translated into an error into the decision.

ELIAS CJ:

Well, it may be a rolled-up error.

MR SALMON:

Yes.

ELIAS CJ:

It's like if you have an invalid warrant, or something.

MR SALMON:

That's the next case.

So I think that sums up, unless I can answer further questions, why we do say that this has collapsed the distinction that was a vital part of the Act. The founding plank of the Act, on an issue that's of real cultural and national significance, and that once the collapse is properly understood then whatever interpretation is otherwise taken it is clear, respectfully, that the approach taken here was defective. This was not only a purpose. It was the only purpose and it must, with respect, be too far for DOC to treat this as the only purpose.

Unless the Court has further questions, I'll hand the …

ELIAS CJ:

No, thank you. Before Ms Gepp starts, how are we going? Should we plan to sit on?

MR SALMON:

Ms Gepp estimated to me, if it helps, about 20 minutes. Given how clear the issues now are I think that is probably right and at least before lunch I asked Mr Cooke about his reply and at that point he had one and a half points to make. I'm sure there will be more now.

ELIAS CJ:

I'm not worried about the – I mean the number of points is not always a good indication of the length of time. I just wondered, would you like to take an adjournment and sit on or do you want to carry on?

WILLIAM YOUNG J:

I'm happy to go on.

ELIAS CJ:

Happy to go on? Okay, thank you. Thank you, Ms Gepp.

MS GEPP:

I understand why Mr Salmon offered me a couple of telephone books but I think I'm possibly tall enough to manage.

Before I address you on the policy issue I did just want to point out to Your Honours that if you were interested to understand the reference to "acutely threatened" then the appropriate reference is Dr Lloyd's affidavit, volume 2, tab 15 at page 180.

In relation to the statutory policies there are, as I apprehend it, three issues. The first is whether the polices, as a matter of law, can affect the exercise of the discretion to revoke status. The second is whether, as a matter of fact, they are relevant to the decision that was being taken in this case, and the

third is whether the Director-General did act in accordance with or have regard to them in making the decision.

The first I don't intend to spend a lot of time on as I anticipate from your questions earlier that that may not be a significant issue. So I would just point to the provisions themselves for management planning which start at 17A of the Act. The first providing that, “The Department shall administer and manage all conservation areas and natural and historic resources in accordance with statements of general policy and conservation management strategies.”

Then at para 17, sorry, at section 17B the policy providing for the – the section providing for the manner in which the policies are created, and as Your Honours noted earlier, it's the Minister that approves them and they are for the implementation of the Act. So a parallel could be drawn in some ways with the hierarchy of plans under the Resource Management Act which are also for the implementation of the Act and they give substance to the provisions of the Act in relation to particular circumstances. Of course nothing in the policy may derogate from the Act and it hasn't been suggested that these policies that are before you are, in any way, ultra vires.

The process for the preparation and approval of these statements is onerous. It involves public consultation and consultation with a range of interested entities such as the Conservation Authority. And there is a to and fro process before they are ultimately approved which you can see in the provisions of 17B.

The analogous policy for conservation management strategies is 17D and, again, the policy is to, the purpose of the strategies is to implement general policies and establish objectives for integrated management of natural and physical resources under the Conservation Act and a range of other Acts. And conservation management strategies are a mandatory document unlike conservation general policy which is an optional document. Again, they may

not derogate. In this case they may not derogate from the Act or from the general policy.

The process for their preparation and approval is at section 17F, again, it's a reasonably onerous process requiring public consultation and the involvement of the Minister although in this case they are eventually approved by the Conservation Authority.

The last provision that I would draw your attention to is section 17N, which is on page 55 of the appellant's bundle of authorities, and the point is just to note that the statements of general policy and conservation management strategies are expressed in subparagraph (2) as not restricting or affecting the exercise of any legal right or power by any person other than the Minister or the Director-General or Fish and Game Council. So these provisions are expressly contemplating that this hierarchy of statutory policies will affect the exercise of legal powers by the Minister.

The way in which these policies operate –

ELIAS CJ:
So that's, you say, a textual indication to counter Mr Cooke's submission that the Minister's above these?

MS GEPP:
That's correct, Ma'am.

The way in which these policies operate was considered in the *Rangitoto Island Bach Community Association Inc v Director-General of Conservation* [2006] NZRMA 376 (HC) decision, which is the respondent's bundle of authorities at tab 6, in that case, the word "hierarchy of policies and plans" is used at paragraph 37 and the equivalent policies are described as a mandatory relevant consideration at paragraph 59 of the decision.

There's also a useful discussion, in my submission, in that case of the concept of derogation, with the Court noting that policies that guide the exercise of a discretion do not derogate from it because the fact that the discretion exists is decisive against any concept of derogation. But nonetheless, they provide at paragraph 82 of that decision guidance to the way in which the decision is to be exercised.

So turning to volume 3 of the case on appeal, this is the conservation general policy at tab 34. The relevant page is 414. This entire chapter concerns changes to public conservation lands. Such changes can only be affected by a decision of the Minister and yet there are extensive policies included in this document relating to such changes which, again, in my submission, responds to my learned friend's statement that the Minister is not bound by these policies. If so, chapter 6 may as well have been left out of the document.

6A concerns land acquisition or exchange, and this policy was expressly considered in the decision. However, policy 6B was not. I'll get to that in relation to the decision in a moment. But this policy 6B is the one concerning the classification of public conservation lands. As my friend observed, it does say that they may be reviewed from time to time. With respect, I would adopt her Honour Justice Glazebrook's interpretation of this policy in that while there is no obligation to review public conservation lands classification, should the decision be made to do so then items 1 to 6 guide the decisions that can be made as to the outcomes of such a classification exercise.

You can see that they are all focused on giving appropriate protection and preservation to the land itself, in line with the appropriate approach to classification that Mr Salmon has urged upon you. They are not concerned with achieving broader conservation gains by using the ability to classify and declassify land to achieve such broader aims.

Leaving the conservation general policy and turning to the Hawke's Bay conservation management strategy –

WILLIAM YOUNG J:

Just pause there. You're going to come to the decision soon, I take it.

MS GEPP:

Yes, Sir.

WILLIAM YOUNG J:

All right. Well, I'll wait until then.

MS GEPP:

The conservation management strategy is in volume 5 at tab 76, page 1221, or 1222 is the better reference. Again, this is a section of the policy that is entirely, of the strategy, rather, that is entirely concerned with the ministerial function of land classification. It's not concerned with purely departmental management steps. So in my submission, it clearly relates to the Minister's decision on classification whether that be delegated or otherwise.

The introduction to it is illustrative of the reasons why, at least in the Hawke's Bay classification is considered to be important and I note in the second paragraph that it notes that the Conservation, Reserves, Conservation and Wildlife Acts contain provisions for the classification of lands, the purpose of protected areas classification is to ensure there is adequate control and management and appropriate levels of development and preservation for different areas.

WILLIAM YOUNG J:

Sorry, what are you reading from?

MS GEPP:

The second paragraph on page 1222. And why is it important? It is important because, I quote, "Protected area status can be significant in determining how an area is perceived by the public, and the level of use it receives."

In the third paragraph, the second sentence begins, “However, there is a need to review the status of many other areas, as the existing status may not necessarily reflect their natural values.” Again the focus on status being concerned with reflecting the actual values of the land in question.

I would skip over the rest of the introduction and move down to the objective which is to achieve the most appropriate statutory and administrative framework for the protection of natural or historic resources on lands managed by the Department. Again, the focus on the land itself.

Turning over the page to 1223, the particular policy that Forest and Bird says was not– should have been considered and was not in this case was number ii, “The Department will review the status of areas under its management and proceed to appropriately alter them if necessary. This may result in a change of status to give greater protection to natural or historic resources or it may result in disposals or exchanges of lands which have low natural or historic value.”

So in the context of implementing the Act in the Hawke’s Bay this is the relevant policy for both status both status changes and exchanges of land.

In that context, turning to the decision itself, the Director-General’s affidavit is at volume 2, tab 17, and he addresses the statutory policies at page 193. And on paragraph 27 about half way down the page, and he records that, “The Department submission and Mr Kemper's report,” –

ELIAS CJ:
Sorry, what paragraph?

MS GEPP:
27, Ma'am. He records that “The Department submission and Mr Kemper’s report identified policy 6(a) to be the relevant policy in the Conservation General Policy.” And you have the report, I don't intend to take you to it, that is an accurate reflection of what the report said.

Then down at paragraph 28, Forest and Bird submitted the RWSS, that the Ruataniwha Scheme, was contrary to policy 6(b) to (d). Of course our submission wasn't concerned with the Ruataniwha Scheme – it was concerned with the revocation decision – but the Director-General has couched it in that way but other than that, it's certainly correct to say that Forest and Bird raised policy 6(b) to (d) and said that the decision was inconsistent with them.

Mr Kemper's report said that 6(b) was not relevant in the circumstances as the conservation values had not been destroyed in the Ruahine Forest Park land thus giving rise to the need to reclassify it, and section 6(c) and (d) relate to disposal, they say.

So it's interesting to note there the way in which the hearing convenor had suggested the only circumstance in which the revocation power would need to be exercised and the only circumstance in which a conservation policy on revocation could possibly be relevant. So in my submission on the one hand the appellants urge you to enable the exchange to be considered relevant to the revocation, but on the other hand they say that a policy relating to revocation is only relevant when values are destroyed.

Turning over the page to paragraph 29, the Department's submission noted that section 3.7 of the Hawke's Bay conservation management strategy but determined that, like policy 6B of the conservation general policy, it related only to the Department's own review of the status of areas under its management and decisions it needs to make.

ELIAS CJ:

Sorry, I'm just a bit slow on this. Paragraph 28, does that mean that none of the policy 6B(2D) apply?

MS GEPP:

That was the Department's position, yes.

ELIAS CJ:

Because 6B wasn't relevant because it still had conservation values.

MS GEPP:

Yes.

ELIAS CJ:

And C and D were only relevant to section …

MS GEPP:

Disposal.

GLAZEBROOK J:

It's very, very odd.

ELIAS CJ:

It's very odd, yes. Sorry. Carry on.

MS GEPP:

Thank you.

That deals with the conservation – in that paragraph Mr Kemper is referring to the conservation general policy and then over the page at 29 Mr Sanson, the Director-General, is referring to the conservation management strategy, and they take the same position. I'm reading from the end of the second line. "Like policy 6B of the conservation general policy, it related only to the Department's own review of the status of areas under its management and any decisions it needs to make as a consequence of rationalising its holdings. That differs from the current situation as HBRIC had applied to exchange land parcels rather than the Department initiating his own review of his land holdings."

So the last sentence there is that the Department's view was that the proposed exchange was consistent with the CMS and I agreed. But that must be read in the context that the only – that they've already decided that section 3.7 is not relevant.

ELIAS CJ:
Doesn't apply, yes.

MS GEPP:
So in my submission, to the extent that my friends have said these policies were carefully considered and given little weight or carefully considered and considered of little relevance, they were expressly disregarded.

GLAZEBROOK J:
And you would say for slightly odd reasons?

MS GEPP:
Yes, Ma'am.

WILLIAM YOUNG J:
Where's the actual passage in Mr Kemper's report which –

GLAZEBROOK J:
Yes, I thought he actually said something slightly more sensible than that but it obviously hadn't been – but maybe he didn't.

MS GEPP:
It's volume 3 tab 55 at page 612.

WILLIAM YOUNG J:
I think he has been misquoted.

GLAZEBROOK J:

Well, the trouble is that's what the Director-General said he understood from it which makes it even more …

ELIAS CJ:

And the Director-General makes the decision.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

This is an affidavit.

ELIAS CJ:

Well, we've been told that his affidavit is a good source of what his decision was.

WILLIAM YOUNG J:

What he's done is perhaps the same thing as the Court of Appeal. He's taken what was given as an example as if it was a rule. If you look at what Mr Kemper actually said.

MS GEPP:

Page 612 of tab 55 in the third bundle.

WILLIAM YOUNG J:

Policy 6B, for example, would apply.

ELIAS CJ:

Where is it?

GLAZEBROOK J:

It's in the table.

WILLIAM YOUNG J:

Would apply if the CP values were destroyed, so he's given an example. He hasn't said that its application is confined to that, although I agree he doesn't say why it doesn't apply.

MS GEPP:

You're correct that in that sentence he's giving an example but the previous sentence, Sir, says that in respect of policy 6 the submitter has referred to the wrong policy, so there can be no question that he is saying that for whatever reason policy 6B does not apply in this circumstance and at the second paragraph of this same block of text he says that the relevant policy is 6A. This provides for land exchanges and provides – including boundary changes which provides strong support for the view that exchanges are not limited to boundary adjustments, and so on and so forth.

GLAZEBROOK J:

What's really happening here is it brings out the submission that Forest and Bird is making effectively that it was a 16A decision not a revocation decision, so they were looking, so if they were right and a 16A decision is sufficient and net gain is sufficient then 6B probably was not relevant because 6A deals with the exchanges, but if they're wrong then there must be a fairly strong argument that they should have looked at 6B and section 3.7 in the Hawke's Bay Plan.

MS GEPP:

I'm 90% of the way with you, Ma'am, but I think that I would still say that even if they are right about the net conservation benefit being sufficient, even if all you are doing technically is a revocation to enable an exchange policy, 6A only looks at the benefit side of the exchange, the acquisition side and it doesn't look at the loss side, and in fact when we get to the conservation management strategy, section 3.7, expressly does deal with exchanges. It says you may revoke and then exchange land of low conservation value. So it's dealing with exchanges and despite that, and I'm at the very last line of the block of text on page 612, it was still considered not to be relevant

because it deals with DOC's own review of its land and any decisions it needs to make as a consequence without rationalising its holdings. In the current case DOC is dealing with a third party which has approached it with a view to exchanging one block of land for another. The 16A test is one of enhancement and provided that test is achieved then there is no impediment on the exchange of high value stewardship areas. Of course we are not dealing with a stewardship area but that's the way it is expressed in this document.

I will give you a reference but in the interests of time, unless you would like me to –

ELIAS CJ:
Sorry, so he's saying that the section 16A test is the test applied and the only issue really is enhancement?

MS GEPP:
Yes.

ELIAS CJ:
And this report was relied on by the Director-General in the decision?

MS GEPP:
Yes, ma'am, and in fact it forms part of the decision because the Director-General's letter to the dam company says that his decision is comprised of the three documents: the letter itself, the departmental submission and this hearing convener's report.

ELIAS CJ:
So what you're taking us to here is relevant for the policy application but it's also relevant to the principle argument too.

MS GEPP:

It is, and it's one of the references that I think Mr Salmon gave you but didn't perhaps take you to.

ELIAS CJ:

Yes, sorry, I had overlooked it, I hadn't appreciated it.

GLAZEBROOK J:

But you say anyway, on its face 3.7 does deal with exchanges.

MS GEPP:

That follow a revocation decision.

GLAZEBROOK J:

And, of course, there is the half way house and actually even though the full way house that Mr Cooke indicated that you do have to look at the actual conservation values of the particular property in any event.

MS GEPP:

Yes, Ma'am. If I could give you one further reference but perhaps not take you to it. It's in the departmental submissions and I'm in your hands if you'd like me to take you to it but it's volume 4, tab 73 –

GLAZEBROOK J:

That's what we talk about as being the tick the box –

MS GEPP:

The decision – while there's two versions of it in your bundle there's –

GLAZEBROOK J:

Yes, I was just wondering which one.

MS GEPP:

There's the tick box and then there's the full document. So tab 73 is the full document, I think. Yes, it's the full document.

GLAZEBROOK J:
When you say, sorry, just – when you say the three documents went to the - as the decision, was that the smaller tick the box or the larger one? Was it the 73 one?

MS GEPP:
It's the same document, one with annotations on it, so Minister doesn't specific, sorry, the Director-General doesn't specifically say which he's referring to but it's the same document.

GLAZEBROOK J:
Right.

O'REGAN J:
What was the place, tab 73 you wanted us to look at?

MS GEPP:
It's page 766.

O'REGAN J:
766.

MS GEPP:
And you will note that the policy 6A is comprehensively assessed in that part of it but similarly to the documents I've already taken you to, the other polices are considered not relevant.

So obviously with this being a question of whether it was, whether the decision was made in accordance with it, or having appropriate regard to it as a mandatory relevant consideration, the question of whether the decision actually was consistent with those documents is essentially a merits one that would fall to be assessed if Your Honours decide that there has been an error and this decision is reconsidered. So I don't intend to address Your Honours on that merits question in any detail but other than to note that Dr Lloyd's

affidavit does look at those criteria, for example, the question of things like, does it have low value, some of the policy words that are used, and provides at least an opinion as to the inconsistency of this decision with those policies. But I say that purely for context.

ELIAS CJ:

Well it means that there is something to be looked at if the inquiry has gone off on the wrong view. So it couldn't be said that it would have made no difference.

MS GEPP:

It goes to the materiality Ma'am.

ELIAS CJ:

Yes, thank you.

MS GEPP:

So that essentially does conclude my submissions on this point and therefore the respondent's case so unless Your Honours have any particular questions we will leave it at that point.

ELIAS CJ:

Thank you Ms Gepp. So Mr Cooke were you going to go next? That practice of unrolled replies, reversal of replies, seems to have gone. It was always applied. But that's fine, Mr Martin.

MR MARTIN:

Ma'am, I'll begin, if I may, with some points responding to specific issues, and then I will be guided by the Court how much value there will be in focusing on specific matters of concern, the principal one being, as I have listened to the submissions, the extent to which the resources of the 22 hectares in the context of the park were given specific consideration, and there are a number of examples of where that occurred, and I'll be guided by the Court to the extent to which you want me to take you to such examples.

But I'll begin first of all with just some preliminary points in response, in reply to my friend Mr Salmon. He used the terminology at times, no doubt just in terms of shorthand while submitting, of "protected land". In order to avoid any artificial difference emerging in that respect, I would repeat my submissions that stewardship and specially protected areas are both conservation areas, and therefore are clearly both protected areas of land. They still have value, stewardship land clearly does, is still capable of having values, at times very high values, and applying the decision in *Buller* that land cannot be disposed of, or sold, unless it no longer is required for conservation purposes. It can be exchanged under section 16A where the net conservation gain test is satisfied. But in my earlier submissions I characterised that, as stewardship land being a gateway category for land going out of the Act, either by disposal under section 26 or through exchange.

The second point I was going to make was around the document that was particularly referenced at volume 3, tab 65, page 668. So this was a preliminary assessment of ecological values and the point I really wanted to make was that you'll recall that Mr Kemper, when he came to the public hearing stage, considered there had been insufficient assessment of values and that's how the science report came about, so the more comprehensive assessment that you've heard about. The concession document –

ELIAS CJ:
Sorry, so what are you saying, that this one's preliminary and overtaken by the science report?

MR MARTIN:
Overtaken is my point.

The other point I was going to make is just context around the –

ELIAS CJ:

But the peer review document relates to the science report, does it, that we were taken to?

MR MARTIN:

Yes, and it, as I understand it, led to the adjustment of the table that is set out in the science report but then is updated and appears in Mr Kemper's report. So there was an adjustment through that process of peer review.

Just another point by way of reference, the concession application that went nowhere, the draft document that was not finalised, is discussed in evidence which I'll just refer you to.

ELIAS CJ:

This is evidence in the High Court?

MR MARTIN:

So the relevant affidavit is by Arna Litchfield and it's at tab 20 of volume 2. The paragraphs that are most relevant for the questions that arose are paragraphs 7 and 8. Particularly 7, the Department's analysis of the concession application at preliminary draft report. Again, I'm – it says at 9 the Department's initial view at that time was that the application appeared to be contrary to and this point, I think, responds to Justice O'Regan's enquiry about the relevant provisions for considering a concession. They're referenced at paragraph 9 on page 219 section 17U(2), (3) and 17W, which brings me, really, to the principal point I was going to make in reply, which is to submit that it is accepted by the Department that what was required was a consideration of the values of this block, the 22 hectares, and in the context of the park and it is submitted that that occurred and is demonstrated by the various documents that you have, by which I mean notably the science report but Mr Kemper's adoption and references to that in his report which the Director-General had in the – what's been called the DOC submission but which is the document that contained the decisions that the Director-General

made and had appended to it the large number of documents that you have in the bundle.

ELIAS CJ:
Tab 75.

MR MARTIN:
Yes, that he considered. Then, of course, there's the actual decision letter the company which expressed the Director-General's conclusions.

It is submitted that in the course of that process the values on the land were considered and the nub of it is this, in my submission: if there had been a value that was found there, and I don't mean this – it's obviously hypothetical but I don't mean it in an irrelevant or glib way – if there had been a plant found there that was particularly threatened or particularly rare in that location, and didn't exist elsewhere in either the country or perhaps in the park, then that would be the sort of issue that I apprehend the Court to be concerned about, that sort of analysis, and in my submission that is the sort of analysis that has occurred, and it brings me to the list that I was going to be guided by the Court around of examples through the, particularly the science report, where that sort of analysis has occurred, and that's carried forward into the other decision documents.

ELIAS CJ:
Do you want to just give us the references? I don't think it is in contention that values were identified and discussed throughout this process. The question is how they were viewed, what sort of approach was taken to the decision. It's there that the real issue for the Court seems to me to be.

MR MARTIN:
Yes.

ELIAS CJ:

So I think give us the references but maybe I'll just check whether anyone wants you to take us to them or whether we just want them.

MR MARTIN:

I will do that, because there are a number of them there. They're illustrative of this, I think, central point. Just before I do that, and I'll conclude with that list, the – I think the other point I was just going to just return to is that the argument that I advanced in my principal submissions around section 19(1) and how it requires the park level, the park effectively, or the integrity of the park to be taken into account and for land to be added back into the park, which is the effect of section 18A(6), and the decision the Director-General made there. The reason I say that is an important step and protection is not only because of section 19(1) but also because of section 18(5), so the requirement to manage in terms of the park purposes. So the effect of that is that you can't, in my submission, simply sell the park land or revoke the park status in order to sell the land. For starters, as I think again his Honour Justice O'Regan noted, the money would, in any event, go into the consolidated account and not into the budget of the Department. But more to the point, you are doing something quite different there that, taking resource out of the park, and there isn't any countervailing benefit that you are being able to consider in the context, that is for the park and also in terms of the overall test of what is required to promote conservation, so the purpose of the Act.

ARNOLD J:

Isn't part of the, I don't want to sort of dwell on it, but if you look at the exchange provision, 16A(2), it does seem to contemplate that you might exchange land in one part of the country for land in another, so that in terms of an exchange it seems possible on the language, going back to my example, to change the small conservation park in the Wairarapa to stewardship land in return for an exchange of a much larger area adjacent to a conservation park somewhere else in the country. I mean it doesn't seem to me to be inconsistent with that language. Now if that's right –

ELIAS CJ:

Before you ask that question, can I just ask what's the reference to local conservation board in that provision?

ARNOLD J:

Yes, well I wondered about that actually, and I think what happened in this case there were several local conservation boards who were consulted, but I'm not sure what that does refer to. Whether you would have to talk both to the local one that you were giving up, and the new, the area where you were getting the addition.

ELIAS CJ:

It doesn't sort of read like that but, yes.

ARNOLD J:

No, so it's subject to that –

ELIAS CJ:

Yes.

ARNOLD J:

– which I agree is – but if that's right, if that's how the exchange provision can work, doesn't that undermine your section 19 argument? Because if an exchange of that sort is within the contemplation of the exchange provisions and if you are entitled to undertake the sort of process that was undertaken here, that is to focus on the merits of the exchange and then to take the steps necessary to give effect, to focus on the merits of the exchange and then to take the steps necessary to give effect to the exchange, it seems to me it does undermine that section 19 argument because in changing the status of the small area, the small conservation park in the Wairarapa, I am, on my interpretation of the exchange provision, allowing a legitimate or facilitating a legitimate exchange. And, you know, if you're right that you can consider all of this simply on the basis of the efficacy of the exchange, why shouldn't that – why doesn't that undermine the section 19 argument?

MR MARTIN:

Sir, I do understand the concern. What you've described is, in my understanding, correct where you have a stewardship exchange of what's currently stewardship land. In my submission, what this illustrates is, in fact, what occurred here was not simply a conflation of the test so that there was simply an exchange and it's for this reason something more was required and did occur here. One of those things is the public hearing process, so a significant point but you understand that and put that to one side. That's the effect of section 18(8).

But to answer your question, Sir, the other significant difference here, because this is conservation park, is that you have section 18(6) requiring this land to be managed in terms of the park purposes and the park purposes are set out in section 19(1). You can't achieve that in relation to the revocation under 18(7) unless, in my submission, you are achieving an outcome that works not only at the purpose level of the Act, which would apply to all exchanges, but also works at the Ruahine Forest Park level. You have to be able to achieve through 18(6) and section 19(1) enhancement – whichever word of those you wish – protection through enhancement augmentation and so on – of the park. And so it operates as another important protective check on what is going on. First of all, there's the public process that doesn't otherwise apply. Secondly, there's the enhancement of the park.

So to answer your example, if it's conservation park you can't go to another area and do the swap, no matter how advantageous it might look, because you do still have to have those park purposes satisfied and similarly, in my submission, you wouldn't be able to effectively negate the whole park.

ARNOLD J:

So you are saying that once a park, always a park? And all we're ever talking about is tinkering to some extent, to a greater or lesser extent.

MR MARTIN:

I think sensibly read section 18 with section 19 envisages that the integrity of the park is what you are managing, and that it would be very difficult to conceive of a situation where there would be good and proper purpose to simply revoke the whole park status unless, perhaps, there was some sort of a natural disaster. But, I mean, even then forestry grows. You know, values may still be present.

But I think those two key points, the public process and the integrity of the park, if I can put it that way, operating the way I've just described, those are the things which mean this land is specially protected. Stewardship land is not a valueless category, and in fact they're managed for essentially the same values except for their recreation component, and stewardship in practice may be highly valuable, like St James Station. It's not that the land is less valuable. It's that they're being – land that's in a conservation park is specially protected in the ways that I have indicated, and that must be present in your revocation analysis, and we're obviously going to go through the particular ways in which that was considered, but in one sense my submission is the fact that the Director-General has turned his mind to the fact that it's conservation park, there has been the public process, we've had the references earlier to the fact that Mr Kemper went to the submitters and said, "Tell me what the values are here that means this should remain as park." You've had that focus and then, as I'll come to shortly, you've also had the various examples, which I'll just refer to, where they look at individual things that are on the land, where else they occur in the relative, in the area, including in the forest park, and, yes, then they go on to make a comparative assessment as well, but they're doing both separately. That is, those are the protections that are special, but obviously not absolute.

So as I say, perhaps officially, but I think it is, it seems to me to be the crux that the Court does have the opportunity to be satisfied that there has been this sort of engagement by the decision-maker and by the experts who looked at the matters. I will, if the Court pleases, just take you through where you can find those illustrative examples. So the science report is in volume 3.

There is an appendix 1 to that report which is at page 706 and 707, and that, it's also reflected in the purpose at 679, and what I'm drawing your attention to there is, so it's 706.

ELIAS CJ:

Sorry, what are you replying to, first of all, what submission is this in response to?

MR MARTIN:

This is replying to Mr Salmon's principal submission really that there's only been consideration of an exchange.

ELIAS CJ:

Oh, of the exchange.

MR MARTIN:

There's been no comparator. This is the principal point that, and what I'm going to indicate is some examples of where, in fact, specific context and individual resources were considered. So the first of them is dealing, though, with the instructions, if you like, around the report, the brief. So at 706 in volume 3.

O'REGAN J:

I thought you were just going to give us a list, rather than take us to them, is that what you're doing?

MR MARTIN:

I'm happy to do that Sir.

ELIAS CJ:

That's what I suggested. But if you particularly want to take us to anything in order to make a submission, or develop the submission, do so, but otherwise your point simply is that these references indicate that a wider context was looked at, not just exchange, is that right?

MR MARTIN:

Absolutely, so I'll run through them and I'll give you some pointers so that you can find them. On page 706 of volume 3 there's a heading "Purpose" in the area underneath that, and at the top of 707 are relevant to what the science report authors were asked to do. That is also reflected in the purpose statement on page 679. On page 681 there is reference to site assessments at the top of page 681, the first paragraph, which is in the context of the surroundings and adjacent land. Page 683, in the middle of 683 there's a reference to the Dutch Creek habitat, both of those paragraphs there refer to the vicinity and the surrounding area and the context, including in the final part of the second paragraph where it's referring to other areas of the catchment.

GLAZEBROOK J:

Can I just check, the submission that you're answering is that, yes, they were looked at but when the assessment was made it was only a comparative assessment so Dutch Creek can go, the oxbow, whatever, can go because we're getting some even better thing, and possibly also because some of the habitats were elsewhere in the conservation. There was a comment on that I remember seeing. So the fact they considered them is not contrary to the submission that's been made, it's that they were only considered in the context of the comparison.

MR MARTIN:

And that is the point that these examples are illustrating that it wasn't just in that way, that they were –

GLAZEBROOK J:

Well when they came to do the mop up at the end that's how they were considered, so you're not showing us independent consideration of those independently of the comparison, are you? Well it actually goes against the instructions which was to do it in terms of the comparison.

MR MARTIN:

Well the instructions were to look at them, so the instructions are the ones at –

GLAZEBROOK J:
Well the delegation. Sorry, I'm talking about the decision-making.

ELIAS CJ:
I think that was the point that I was raising with you earlier but I think unless there's something that you particular need to draw our attention to the references are probably enough if they are of this sort of nature.

MR MARTIN:
All right.

ELIAS CJ:
But if there's something that really does –

GLAZEBROOK J:
It does show –

ELIAS CJ:
– that the assessment was made on a wider basis, that's fine, take us to it.

MR MARTIN:
I will run through those references. I think taken individually and together they do answer that point that's being asked in the sense that they are showing an assessment of the values here on this land in its context. Yes, albeit in the context of ultimately them making an assessment of the exchange because that's how this has arisen for consideration, that's not controversial but it's not simply a, it's a purely comparative exercise. You've got the individual assessment. If I can put it this way, it's a simplified way, but there is the looking for the special plant on the blocks as well as the looking in comparison –

ELIAS CJ:
Well I think we see that though from the summary, don't we, because they list the red mistletoe that's going to go and the habitat, there was some habitat that – the fernbird habitat.

MR MARTIN:
Yes.

ELIAS CJ:
So clearly they have looked at the detail of what is on the land. If that's all you're taking us to this for I don't think you need to take us to it as long as you give us the references.

MR MARTIN:
All right, the only thing I would add to that is they also at points in this talk about what else is in the path more broadly, what else is in the, if you like, the ecological area so it's not simply –

ELIAS CJ:
I see.

MR MARTIN:
– where this braided river is here, it's also where else is it in this area of valley where there's the fernbird where else would the habitat be. So there is that context around it that isn't simply a straight swap context albeit that the issue has arisen in the context of a particular proposal.

I take on board the guidance Your Honours are giving me. I will move quickly through these other examples which arise at, also on 683, the final paragraph which is in relation to the Makaroro block. At 686 the penultimate paragraph on that page is another example.

Over the page to 687, the second paragraph under the heading "Threatened land environments". And then again 689 there's the fourth paragraph on that

page which begins with the name of the author Scrimgeour and the next paragraph which begins with the name of the author Cheyne. It's at the top of page 699 there's the reference to the disproportionate, sorry, there's the reference to the Ruahine Forest Park revocation lands makes a disproportionately much smaller contribution to the present values of the Ruahine Conservation Park and at 701, and this is I think the final reference from this report, there is the paragraph, the second to last paragraph in the whole substantive report which I draw your attention to.

Also relevant are paragraphs in the Director-General's letter to the company about the information he considered at paragraphs 7 and 8 –

ELIAS CJ:
Sorry, reference again?

MR MARTIN:
7 and 8.

ELIAS CJ:
No, where do we find it?

MR MARTIN:
The letter, the letter reference. Volume 3, tab 57. That's the letter from the Director-General to the company recording his reasons for his decision. Paragraph 7, 8 and 17 illustrate that point. Unless there are further questions, Ma'am, that was all I proposed to raise.

GLAZEBROOK J:
So you said –

ELIAS CJ:
8 and 17.

GLAZEBROOK J:

8 and 17, thank you.

MR MARTIN:

Thank you, Your Honours.

ELIAS CJ:

Thank you Mr Martin.

MR COOKE QC:

So Your Honours, I just want to address to – my one and a half points have become two and a half points. Hopefully I can address them promptly.

O'REGAN J:

Two and a half small points.

MR COOKE QC:

Yes, we'll see. The first point I think is probably the most significant point and it goes to the key issue in the appeal which is the nature of the power in section 18 subsection (7) in the ability and its interrelationship with the section 16A exchange power. And in my submission, the key question therefore is why does the reclassification power in section 18(7) exist, and in my submission it is there so that the Minister is able to decide whether the attributes of another regime should be made available for particular land. That must be the very purpose of having a power to change the regimes so that the Minister decides whether the attributes of that other regime should be made available and, of course, here the key attribute, the difference between the regimes is the power to exchange.

So it cannot be the case, as my learned friend for Forest and Bird submitted, that the exchange is an irrelevant consideration to this decision under 18(7). It must in fact be the critical consideration that the Minister is required to address given what is involved in making a decision under 18(7), and the management regimes involved in this decision tell you why you would be

doing this and also tell you what the relevant considerations would be. So contrary to the submission this idea of the exchange is a pivotal relevant consideration on a correct interpretation of the statute to the section 18(7) question.

Now there is no issue that the values, the conservation values of the land that is involved are also critical but you cannot say that what is set up here is a parliamentary system whereby land of particular attributes must be put in one category or the other and this is the difficulty with the idea that it turns solely on the intrinsic values, intrinsic conservation values of the land because it's very difficult to know from the statute what that means in terms of these categories because it doesn't tell you in the statute whether land with particular attributes must be placed in one category or the other.

GLAZEBROOK J:
But it does a fairly good steer on some of them, doesn't it, if you look at –

MR COOKE QC:
I accept with some of the other categories it does.

GLAZEBROOK J:
Yes, all right, it gives a pretty good steer, it seems to me. Now I suppose a Minister could not put it into one of those categories but may well be reviewable if in fact it –

MR COOKE QC:
It really did have those attributes.

GLAZEBROOK J:
Yes.

MR COOKE QC:
But we're just dealing with the case that we've got and it's –

GLAZEBROOK J:

Well you can't, I mean, you can't say those things and then say, well don't worry about the indications in the statute that do say it means something.

MR COOKE QC:

No, I accept Your Honour's point, but where the management regimes in question do identify greater attributes, then they become part of these mandatory considerations when the Minister is making the decision. So that supports my submission in a way because what we're dealing with here is, and the question whether it should be forest park land, conservation park land or stewardship land, so we focus on this particular attributes of those two categories of management.

And one of the other difficulties by saying it turns completely on intrinsic values is that that is inherently judgmental, inherently evaluative, you cannot –

ELIAS CJ:

So is a comparison.

MR COOKE QC:

Yes, yes, but that doesn't – what I'm saying is the values, the conservation values of the land are clearly a mandatory consideration for the Minister but exactly what weight the Minister puts on the particular attributes, conservation attributes of one parcel of land as against or alongside the question of whether the land should be exchanged are questions of weight for the decision-maker under section 19(7). What significance –

ELIAS CJ:

But nobody is entering onto the merits of the assessment, that's not the purpose of, that's not what we're here about. So we're not looking at questions of weight we're looking at questions of approach mandated by the statute.

MR COOKE QC:

But in the end that's what the challenge does come down to. It comes down to a question of attacking the weight given to particular attributes that in the end because my learned friend can't be correct in saying that the exchange is an irrelevant consideration, it must be relevant to the section 18(7) analysis and in my submission is the key question for changing the regime. So then it's a matter of bringing these attributes into play –

ELIAS CJ:

Well that's the question, has that happened or has it only been the comparison that has driven the decision.

MR COOKE QC:

It is inevitable when you are asking the question, should this management regime be changed so that the exchange power is available that you will do two things. You will look at the attributes of the land in question and you will look at the requirements for an exchange under the Act, and when you look at those two things, it's inevitable that your science report, for example, will deal with both parcels of land in the one document and it will be assessing what the attributes of the land that is currently conservation park actually are and do so by reference to other attributes of the forest park more broadly or conservation values more broadly and, because the whole purpose of this is to enable the exchange power to be available, what is it that could be obtained by way of the exchange. So in the end, in my submission, it does come down to a criticism of weight because the Minister, or the Minister's delegate here, must make the decision whether the attributes of the land in question that we're dealing with in light of the proposal for exchange mean this proposal should proceed or not.

And it is evident from the material, including material that my learned friend Mr Martin just cross-referenced, that the attributes of the land being reclassified was considered in its own right and to the list that my learned friend added I would like to add one more reference and that's in volume 3,

tab 55 at page 611 where, in the table there – it may actually be, if I could take Your Honours to that reference.

ELIAS CJ:
Tab?

MR COOKE QC:
Tab 55, page 611.

ELIAS CJ:
Thank you.

MR COOKE QC:
This is appended to the report of the hearings officer to the Director-General because here in this table we get, in the very first entry, the argument of Forest and Bird that you can't use this reclassification power purely to authorise an exchange. You'll see the DOC officer comment in the next column, the second paragraph in, after referring to section 18. "Revocation could occur if the land held values not worthy of conservation park status."

Also, the Act enables revocation of CP land to facilitate an exchange that will benefit the land administered by the Department and where the tests for an exchange are met. The land being offered by the exchange has been assessed as containing higher conservation values than the CP lands if the Minister has been able to form an intention to exchange. Forming this intention was underpinned by the concept that the area to be revoked does not need to be retained as conservation park. On the right-hand column there's them agreeing with the DOC officer's response.

GLAZEBROOK J:
Well, I mean, that's an assertion. But why doesn't it need to be and when was that assessed separately? Except in the context of saying it's not as good as the other land.

MR COOKE QC:

There are two things. It's self-evident that you wouldn't assess it separately. You would send your scientist out to do both tasks.

GLAZEBROOK J:

Well, no, no. I'm not suggesting that you would do it separately in terms of – but where was it considered separately and said it doesn't have the attributes that would make it – apart from as a comparator that means it should be retained as a conservation park.

MR COOKE QC:

Well, that is not done separately in that way.

GLAZEBROOK J:

So it's only because of comparatively it doesn't – it's not as good as the Smedley block, then it doesn't require the retention as a status. And that might be perfectly fine. But if that's not what was done, then I want to know where it wasn't done.

MR COOKE QC:

Well, I can't say any more. When the science officers assess what the conservation values of the 16 hectares are and then assess the conservation values of the land being obtained by the exchange, they inevitably do that. It's artificial to suggest that there should be some exercise which separates the two tasks and particularly when the statute doesn't tell you in any definitive way when it has to be forest park and when doesn't it.

GLAZEBROOK J:

Well, the policies might well tell you the things you do take into account, which just weren't.

MR COOKE QC:

Well, I'll come to the policies in a moment but just dealing with this point, the statute doesn't tell you what are – to use the expression that has been used – acceptable losses. It's a matter of judgement for the decision-maker after receiving the data on what's involved in the parcels of land. It doesn't tell you when land warrants protection as a forest park. What happens is you just get told what the conservation values of the land are and you make the appropriate decision under section 18(7), guided primarily by the idea of which set of provisions do I think is appropriate to fulfil the purposes of the Act for this land?

So it's implicit in the whole exercise that you are looking to see what the conservation value of this land is and whether it needs to continue to be part of a forest park or whether it can be exchanged. They're all part of the same inquiry.

GLAZEBROOK J:

But it's not whether it can be exchanged in the abstract. It's whether it can be exchanged in the context of the particular land, and so it's a comparator exercise.

MR COOKE QC:

Which makes it even more inevitable that you will be doing this with even more rigour around that particular question. That's why the delegation sets the parameters around that in the sense that this won't proceed without an exchange, but that doesn't limit the legitimate inquiry under section 18(7). You still look at the attributes of the land and ask the question, are they such that I am happy that this land be subject to exchange? That's why the Department will go through all of those attributes in considerable detail and they are satisfied, yes, there's nothing about the loss of those attributes that causes us particular concern because those attributes are elsewhere in the forest park and also it meets the exchange standard under 16A, that's what the reports do.

So unless Your Honours have further questions about that I'll deal next with the question of policies and the only additional point I wanted to make about policies is that, and I understand if my arguments are not accepted and it is said that those policies do bite on the Minister's delegate decision –

ELIAS CJ:
What do you say? They were complied with, it was your fallback?

MR COOKE QC:
Yes, and I say that, and I'm sorry to go back to the policies, but if we just do go back to them in bundle 3, tab 34, page 415. Not only – and it's 6(b) here that is relied upon, not only does that say, use the words "may be" that I emphasised in the primary submissions by reference back to how you read these policies but, in my submission, 6(b) v and vi, Roman numerals v and vi do contemplate what has actually been engaged in here in terms of the analysis undertaken by the decision-makers and this is part of the 'or's that are in this policy. So they are broadly expressed policies that are enabling in nature and I would submit, v and vi of them capture exactly what the Department and the Minister's delegate did in this case.

And similarly in relation to the strategy, and under the framework the strategy is supposed to implement the policy. In my submission the strategy, which is in bundle 5 at tab 75 is in similar effect. You see the objective on page 1222 is to achieve the most appropriate statutory administrative framework for the protection of natural and historic resources, and then implementation again is, it is enabling. Roman numerals ii said, "The Department will review the status of areas under its management and proceed to appropriately alter them as necessary", and then, "This may – this may result in a change of status to give greater protection to natural or historic resources, or it may result in disposals or exchanges of lands which have low natural or historic value." It's not saying that that is the only, those are the only circumstances in which the Minister makes, decides that power. So there is nothing about either of the strategy or the policies that are inconsistent with what was done.

Now I just had two other more minor points.

WILLIAM YOUNG J:
So what we've had is the half, is it?

MR COOKE QC:
You've had the twos, you've had the one and two and now I come to the half, and a half in two quarters, I suppose.

The only other thing of substantive moment I want to address was section – my learned friend, Mr Salmon, addressed 24G during his submissions and I just wanted to underscore one of the things about 24G that, in my submission, can't be right in my learned friend's submission, because my learned friend submitted that 24G(2) wouldn't apply when you are creating a reservoir and the marginal strips wouldn't move in those circumstances, but that ignores really the words of 24G(2) and the obvious purpose of the provision. It starts, "Where, for any reason, the course of any river or stream is altered and the alteration affects an existing marginal strip," so when the marginal strip is affected, "a new marginal strip shall be deemed to have been reserved simultaneously with each and every such alteration." And then if you go over the page, subsection (4) talks about the dimensions moving of the marginal strips.

So it just applies when a marginal strip is affected when there is a change to the course of a river or stream which is what happens when either there is a natural event and a lake is formed or when there is a dam created and a reservoir created because it's for any reason that change occurs, and then it's the marginal strips change, whether they are alongside of what will now be a reservoir, a stream, a river, or whatever and I think my learned friend even accepted there would be a lake so there's no reason why it couldn't be a reservoir, as well.

O'REGAN J:
I think he accepted that on a purposive interpretation.

MR COOKE QC:

He did for a lake, which I think he might have reserved the position about a reservoir.

O'REGAN J:

But he also said it wasn't an issue.

ELIAS CJ:

Well, here they're all rivers anyway.

MR COOKE QC:

Well, you can understand why from my client's point of view subject to what happens in this case it could well be an important issue.

GLAZEBROOK J:

Well, the trouble is deciding it in the abstract might be somewhat difficult.

ELIAS CJ:

But aren't these existing rivers, the question is whether on disposal whether marginal strips attach to them. If they do, then as the water creeps in the course of the river is altered and section 24G(2) would seem to apply.

MR COOKE QC:

Thank you. If the Court said that, that would be perfect.

GLAZEBROOK J:

Well, whether we will, it depends the extent to which it was an issue below.

MR COOKE QC:

Well, it was – this argument was advanced in the Court but it was one of those reasons why Justice Palmer said this is to be further considered.

GLAZEBROOK J:

But why would we not just allow it to be further considered?

ELIAS CJ:

But it doesn't need to be decided because it is what it is. It's not an issue, it's not a live issue between the parties.

MR COOKE QC:

Well, the effect of the marginal strip provisions is an issue in this cross-appeal that we had in the Court of Appeal, which is part of this appeal to this Court. In that cross-appeal I referred to what was relied on in the High Court, so it is in this case and it's really –

ELIAS CJ:

But you're really asking us to make a declaration as to the meaning of 24G(2).

MR COOKE QC:

Well, I'm asking the Court to, in their analysis of the marginal strip provisions in deciding how they work effectively, indicate whether 24G is part of that and how it works.

ELIAS CJ:

But if this all goes ahead, your client's going to get some streams and then there's a question of whether the deeming provision lies, but why should we decide that?

MR COOKE QC:

Because the marginal strip issue is alive in the case.

ELIAS CJ:

I can't remember why that's so.

WILLIAM YOUNG J:

Well, relief's been sought in relation to it. A declaration has been sought, I take it.

MR COOKE QC:

Yes.

ELIAS CJ:

Declaration has been sought?

GLAZEBROOK J:

Can we have a look at the cross-appeal? Allowing its appeal in respect of the decision that an exchange is a disposition for the purpose of section 4, but otherwise upholding the High Court decision. So I would have thought that was all you were asking. Obviously we'd decide it's not a disposition then we'd allow the cross-appeal but if we decided it was we uphold the decision or is that not you as the first respondent? What does the second respondent say? Support the judgment on the other grounds.

ELIAS CJ:

Sorry, where are you?

GLAZEBROOK J:

It's exactly the same.

MR COOKE QC:

We're behind tab 7.

GLAZEBROOK J:

No, 24 and Part 4A do not apply when stewardship land is being exchanged. That's all we were asked to do.

MR COOKE QC:

And actually the next paragraph, intends to support the judgment on the grounds advanced by both respondents in the High Court.

GLAZEBROOK J:

Well, I think you need to be a bit more explicit.

MR COOKE QC:

Well, the argument about that is …

GLAZEBROOK J:

Sorry, if this was something we needed to be a bit clearer on it, being part of it.

MR COOKE QC:

It was in the application for leave, an explanation of how the marginal strip issue was important.

ELIAS CJ:

In the application for leave.

MR COOKE QC:

I don't know if it's in this bundle. Yes, it's in 2.6 behind tab 1.

ELIAS CJ:

Those provisions did not apply in the present case.

MR COOKE QC:

Yes, that's the principal argument about marginal strips, whether how these marginal strip provisions work and whether they apply to this situation.

GLAZEBROOK J:

I suppose it does say the extent to which they apply.

ELIAS CJ:

So perhaps we have to look very quickly at what Justice Palmer said, that you are appealing.

MR COOKE QC:

Well, what he said was that Part 4A applied and that there would need to be a consideration of whether and how the marginal strip provisions worked and we cross-appealed that issue and we argued –

ELIAS CJ:

Well, if you're cross-appealing that you're cross-appealing that Part 4A does not apply.

MR COOKE QC:

And how it applies, if it does apply.

WILLIAM YOUNG J:

Well, we may or may not deal with it. I'm not sure we can get to the bottom of it now.

MR COOKE QC:

Okay. The only other thing, and I'm being sensitive about raising this, I should say from my client's point of view timing is actually important.

ELIAS CJ:

It's a bad day to talk about timing.

MR COOKE QC:

I know, at 4.35. There has been a lot of money, millions of dollars, spent on this project. It is correct that the project is under review by the Hawke's Bay Regional Council but not in the sense of preventing –

ELIAS CJ:

Well, we shouldn't add to the difficulties that they have to look at. We had appreciated that there was some urgency about this.

MR COOKE QC:

Yes, and the Court also accommodated an early fixture for that reason and I think we're all grateful for that.

Unless Your Honours have any more questions, that's all I wish to say.

ELIAS CJ:

All right. Thank you very much. We can't give an indication of when we will deliver the judgment. We will reserve our decision but we are mindful of the circumstances you refer to, thank you.

COURT ADJOURNS: 4.38 PM