IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 105/2018
[2019] NZSC Trans 13

BETWEEN **RANGITIRA DEVELOPMENTS LIMITED**
Appellant

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**
Respondent

Hearing:	8 July 2019
Coram:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Appearances:	J E Hodder QC and M R G Christensen for the Appellant M C Smith, P D Anderson and S R Gepp for the Respondent

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ORAL HEARING

MR HODDER QC:

May it please the Court. Hodder appearing with my learned friend Mr Christensen for the appellant.

WINKELMANN CJ:

Mr Hodder.

MR SMITH:

May it please the Court. Counsel's name is Smith and I appear with Mr Anderson and Ms Gepp for the respondent.

WINKELMANN CJ:

Mr Smith. Mr Hodder. So, 20 minutes?

MR HODDER QC:

Yes Your Honour. If the Court pleases, I propose to approach what I say to the Court in three parts. The first part is a bit of background to the 1 May memorandum which sets off this exercise. The second is hopefully a brief mention of the guidelines that I suspect the Court is well familiar with about revocation of leave. The third is to seek to explain to the Court why the appeal is not hypothetical. In relation to that I have a half a page hand up I'd like to submit, although I note Justice O'Regan discouraging written material in his minute of May, but they'll use that it an aide-memoire and may assist the Court. If the Court's convenient I'll have that handed up now if it's appropriate.

WINKELMANN CJ:

Yes, hand it up Mr Hodder.

MR HODDER QC:

At the risk of saying what the Court already knows, we're here because Rangitira wants to develop a coal mine on the West Coast and, among other things, it needs a range of regulatory consents, one of which is an access arrangement in relation to this particular reserve, which is administered by the Buller District Council. That technically falls under section 60(2) of the Crown Minerals Act 1991 and then the issue arose as to whether or not that access

arrangement decision is governed by the Reserves Act 1977 and in particular section 23. There was an initial decision by the Council in favour of the application. There was a judicial review brought by the Forest and Bird, and in the course of that, or as a consequence of that the Council revoked its decision. There was then a decision that was appropriate to seek some sort of declaratory approach which then went before the High Court. Justice Nation granted declarations essentially in favour of Rangitira but the Court of Appeal granted declarations effectively against Rangitira in favour of Forest and Bird, and then leave was granted to appeal by this Court. So far, so relatively orthodox.

Then came my memorandum of 1 May which has caused the difficulty. The background to that was that as we were quite close to the hearing of the appeal I was wrestling with the Reserves Act which is not, I have to say, the most straightforward piece of legislation that the legislature has benefited us with, and I was trying to understand the sequence in relationship between the various classifications of reserves. Is there a hierarchy, are they sort of interdependent or are they standalone silos. It was only relatively belatedly, I confess, I thought about the concept of what happens if it hasn't been classified at all, because there is a requirement to classify, but there was a vague impression they just hadn't been classified, and as I then focused on section 16 that says, well, in certain circumstances appropriate provisions will apply to land that hasn't been reserved, hasn't been classified, it wasn't obvious to me that section 23 was one of those. So a few days out from what was intended to be the hearing of the Court it seemed to me appropriate to say to the Court, well, this has got thus far on the basis of a somewhat vague proposition that this is a Local Purpose Reserve with a capital L, capital P, capital R, but instead of being classified as such, as far as anybody can find out, so I asked that that be checked by the Council. The Council came back and said to the best of its knowledge it hadn't been classified, and at that point it seemed appropriate, rather than wait for the Court to ask a question which raised that issue, was to volunteer the information to the Court before the hearing, which is what provoked my 1 May memorandum.

So the position appeared to be then that the Council had been operating on an as-if basis, that the reserve was being organised on the basis as-if it had been classified as a local purpose reserve under section 23 and the appropriate thing to me, as I indicated, was that the Court should be aware of that, even though the agreed statement of facts says it was a capital L, capital P, Local Purpose Reserve, and the pleading said that. The pleading doesn't actually say it's been classified, it just uses that language of "Local Purpose Reserve." So I wasn't wanting to argue the section 23 point before the Court, that is to say that section 23 didn't apply at all, it just seemed to me that if the Court's trying to think about the Act, then it was appropriate had that in mind while it was thinking about the Act. That's what was behind the 1 May memorandum. No more and no less. But there was no intention to –

WINKELMANN CJ:
Sorry, what's your approach to how this is relevant to the appeal?

MR HODDER QC:
In terms of thinking about the Act, is the fact of non-classification relevant to the way in which one interprets the Act. It was a matter which hadn't been touched on in our submissions, and I don't believe was touched on in Forest and Bird's submissions. So we're trying to get the feel of the whole Act, the consequence of a non-classification category seemed to me to be relevant as one thinks about the whole Act. It was to be no more than to alert the Court to that, that I was filing a memorandum.

WINKELMANN CJ:
But it hadn't been argued at any level, the consequence of non-classification?

MR HODDER QC:
It hadn't been argued in the Courts below. They'd simply need a proposition. I think probably best described that it was being treated as if it were classified rather than anything else.

WINKELMANN CJ:

Well it was being treated on the basis of the agreed statement of fact that it had been classified.

MR HODDER QC:
Yes.

GLAZEBROOK J:
Well not classified but was a local –

WINKELMANN CJ:
Was a local purpose –

MR HODDER QC:
Again, with a capital P.

WINKELMANN CJ:
– reserve which implicit in that is classification.

MR HODDER QC:
That's the link that wasn't completely clear. It wasn't, probably it didn't, maybe nobody thought it was necessarily clear, but it wasn't that clear. So that's the background to it. There was no intention on Rangitira's part to abandon the appeal or not to argue the appeal, and as I'll come to it remains highly relevant because at the moment, of course, the position is that the Court of Appeal decision stands as an impediment, not a total impediment, but a serious constraint on, a potentially serious constraint on an application going back to the Council by Rangitira for this access arrangement.

O'REGAN J:
But it's based on a false premise, isn't it, the Court of Appeal decision? It's based on a premise that it is classified when in fact it isn't.

MR HODDER QC:

Well it's perhaps a bit in the way that the Chief Justice put it. It's kind of, it's assumed it was a capital L, capital P reserve. Whether it was classified was the assumption, isn't clear from anybody's perspective.

O'REGAN J:
Well the only way it can become a local purpose reserve is if it gets classified, so if you're assuming it is one you have to also be assuming it was classified as one, don't you?

MR HODDER QC:
Yes, there's a couple of options about that which I'll come to if I may shortly, but that's certainly the position.

In terms of the background on the guidelines that the Court has, we cited in our case the *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 decision that the Court gave last year. We've set that out in our submissions in reply at paragraph 44. That in turn cites this Court's decision in *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 which goes back to 2008, and that in turn picks up a whole serious of old authorities back to *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 (HL) but the general proposition is, is there a matter in actual controversy remaining, a living issue, or words to that effect, something with practical effect on the rights of the parties and in some cases including costs is regarded as a relevant factor, not a complete answer, but a relevant factor. In public law terms, and this is essentially public law, then the approach is a bit sort of wider. Even if there isn't an actual lease the Court will grant leave and maintain leave where there's a public law issue of some importance to be decided, and it's our contention that there is an important public law issue to be decided by the Court. Revocation of leave, the Court –

GLAZEBROOK J:

If we were deciding something though on totally the wrong basis, and on the wrong facts, and as I understand it there's no intention to argue the section 23 or whether it can be a reserve if it's not classified, or whether section 23 applies, then we're giving a decision that's a – well not only hypothetical but actually not even in accordance with the true facts, or the whole of the facts. Or the whole of the controversy that could, well, between these parties.

MR HODDER QC:

There will be some outstanding issues with respect to what the Court decides if it hears the appeal, I acknowledge that, but it's only if I happen to be right on that section 23 doesn't apply under section 16 that the –

GLAZEBROOK J:

But I thought we weren't going to be arguing that in this Court and therefore there'd be no answer on that question.

MR HODDER QC:

No, I'm not quite –

GLAZEBROOK J:

Do you propose that you do argue that?

MR HODDER QC:

I'm not proposing I argue that on the basis you don't have the benefit of the decisions of the Court below on that issue.

GLAZEBROOK J:

That was my point really.

MR HODDER QC:

That's right, but it doesn't mean that it's, I'm right on the point, it doesn't mean that the point can't be decided, the point that is in issue can't be decided.

WINKELMANN CJ:

So, Mr Hodder, your argument entails the proposition that whatever the outcome we come to, it won't be binding on the Council in any case because there is no estoppel as to statutory application.

MR HODDER QC:

Not on the, not on –

WINKELMANN CJ:

The proposition I – sorry?

MR HODDER QC:

No Your Honour, not on that issue.

WINKELMANN CJ:

Well what do you say would be the effect of the decision. Will Buller be bound by it. That section 23 applies to the consent process?

MR HODDER QC:

Well the decision that I would see the Court being given is whether or not, if section 23 applies, then it has the consequences, that it governs section 60(2) of the Crown Minerals Act.

WINKELMANN CJ:

But then you would say but as it happens this is not a reserve, it's classified as a local purpose reserve so that decision doesn't apply to us.

MR HODDER QC:

If we go back, when we go back to the Council for the renewed or fresh access application, that's the position I'm intending to reserve. There's probably a convenient –

WINKELMANN CJ:

Well can I just, doesn't that truly make the point that it is hypothetical because it won't even apply to you, you say it won't even apply, and also –

MR HODDER QC:
We will say that, but whether it's correct –

WINKELMANN CJ:
And also doesn't it lead to security and litigation?

MR HODDER QC:
I can't tell the Court that the decision of the Court that I'm asking the Court to make by hearing the appeal is going to resolve every issue on that application. I can't say that.

WINKELMANN CJ:
Well on your account it won't resolve any issues.

MR HODDER QC:
If I am right, but that's the question that I am trying to suggest to the Court by reference to this table I've handed up is, it's not necessarily a minority view, but it's a view that has to be established. So what the table –

WILLIAMS J:
Well are you right on the facts, anyway. I mean your new facts, are they right?

MR HODDER QC:
I don't know.

WILLIAMS J:
Well exactly. You're relying on LINZ/ What's LINZ got to do with it?

MR HODDER QC:

Well I think –

WILLIAMS J:

There's either been a classification or there hasn't, either by the Council pursuant to 16(2)(a) or whatever it is, or by the Minister, and if LINZ, whatever LINZ says is just evidence going one way or the other, but not definitive. You don't actually know whether there's been a classification.

MR HODDER QC:

The best I can do is what we've told the Court, that is that's the Council's belief.

WILLIAMS J:

But the Council's belief is based on what LINZ says on a map. So what?

MR HODDER QC:

And there is no formal record beyond that that's easily established.

WILLIAMS J:

Yes.

MR HODDER QC:

There is no register of these things that's held by anybody else.

WILLIAMS J:

And it's pretty complex reading section 16(2) and (2)(a) as to what the circumstance, and the delegation of course that you refer to, who actually gets to make the classification, and who got to make it in this case.

MR HODDER QC:

So the Courts below were invited to deal with the matter on the assumption that it was a capital L, Local, capital P, Purpose Reserve –

WILLIAMS J:

Of course, yes.

MR HODDER QC:

That's the same as –

WINKELMANN CJ:

Not on the assumption –

O'REGAN J:

Well on the fact. They were told it was one. That's different from an assumption isn't it?

WINKELMANN CJ:

Justice France?

ELLEN FRANCE J:

No, I was making the same point. I think it's more than an assumption and it is, to be best of our current knowledge, now shown to be not a correct assumption. That's the difficulty I have with the approach that you're taking.

MR HODDER QC:

Well it's certainly it's stated as an agreed fact that it's a local purpose reserve. There's a degree of ambiguity about what that means. The easiest assumption is that method had been classified. I accept that it is now, at least, seriously unclear that it ever was classified, we just don't know absolutely as Justice Williams says.

WINKELMANN CJ:

Isn't the most direct route for you to seek a recall judgment in the Court of Appeal and re-argue it because I think the prospect you face is if you argue this case which you say on your view of the facts, just a factual issue, we'll produce purely hypothetical result which will not bind you, that's your account, but there's an alternative view which is that it will bind you, even if you're factually mistaken.

MR HODDER QC:

Yes, there are a number of possibilities that arise.

WINKELMANN CJ:

And there'll be litigation about that fact.

MR HODDER QC:

And to some extent what I'm suggesting to the Court is the best way to get back to the process is to get back to an application which is uncluttered by litigation that's actually here except a definitive ruling by this Court on the issue that the Court of Appeal did decide.

WINKELMANN CJ:

Or alternatively the best approach is to resolve the factual situation, perhaps in the Court of Appeal, I don't know, by applying for a recall of the judgment and having that issue resolved and the Court of Appeal address it afresh.

MR HODDER QC:

Because it's a factual issue, Ma'am, our submission would be that it's easier to get that resolved at the very beginning back at the Council process and track through.

GLAZEBROOK J:

Well then the other way of doing it is to go back to the very Council process and take that through, whatever judicial review process we work through.

MR HODDER QC:

But if we do that I'm confronted with a Court of Appeal decision on whether section 23 applies.

WINKELMANN CJ:

Which is why you need to apply to recall the Court of Appeal decision.

MR HODDER QC:

But Your Honour is suggesting I do so on a factual basis, which seems difficult.

WINKELMANN CJ:

Not so because you're going to proceed on the basis that it's a mistake of fact. It seems like you're proceeding on a mistaken basis.

MR HODDER QC:

But that would require a factual enquiry before the Court of Appeal which seems unorthodox, which is why I'm suggesting it needs to go back to the very beginning for factual findings.

GLAZEBROOK J:

Well you're not going to get a different factual finding from the Council, are you, other than we don't believe it has been classified because we can't find anything that says anything further. What else are you going to get from the Council, and anyway you could put evidence before the Court of Appeal.

MR HODDER QC:

At this stage I can't be certain what the facts would be, Your Honour.

WILLIAMS J:

Well that's a good reason for recall. Find out the facts and then apply for recall.

MR HODDER QC:

Well the facts –

WILLIAMS J:

Or not if the facts turn out to be what was originally proposed. I don't, in my experience this isn't so uncommon that council records buried in some container somewhere are found and produced the very sort of resolution that you expect. It's just the Council know about it or may not have bothered to look.

MR HODDER QC:

The reason I'm suggesting that going back to the Council is a starting point is I can't foresee what other issues might arise. It was thought by the time that this litigation we now are concerned with was commenced it would be helpful to get some clarity about section 23, and so a range of declarations were sought in the High Court. Half of those didn't survive past the – I mean there were decisions made in the Court of Appeal on the matters that aren't the subject of declarations, but the other ones about clarification were not pursued further in the Court of Appeal, so it's an incomplete ruling by the Court of Appeal, as it were, on the scope of section 23. So that's why I'm suggesting to the Court that it is in a no different position to the Court of Appeal in deciding the issue that is before it, and that will help in most scenarios. The purpose of the table is to demonstrate that it's not hypothetical. Proposition A allows for the possibility that Justice Williams has been raising, among others, that says, well may it is the case that it was classified, we just haven't found it yet. In that case clearly the declarations are relevant because section 23 will apply and the scope of section 23 and whether it's to have regard to or must give effect to becomes a critical issue.

The second one is that as forest and Bird has indicated their position would be, doesn't matter about section 23 classification, you get there under section 16(6) because it's one of the "appropriate provisions" that would apply in any event.

GLAZEBROOK J:

But if that is what they're going to be arguing, then whatever we decide it would go back to the Council, well unless we decide in your favour on section 23, it would go back to the Council and come back up here anyway.

MR HODDER QC:

But it's inevitably going to have to go back to the Council Ma'am. There's no question of that.

WINKELMANN CJ:

I think part of your argument and part of your position turns on your view that you were not going to be bound by, should you be unsuccessful in this Court, that you're not going to be bound by that declaration because you could just say, oh well that was on a different factual basis, which is those three cases you cited to us.

MR HODDER QC:
Yes.

WINKELMANN CJ:
The 1937 appeals case, two of them about electricity meters, strangely enough, but not being read at the multiplication factor, and one about a taxation prosecution. Those cases seem very distinguishable to me and it seemed to me that there's a, you face a real risk that you will be bound by those declarations.

MR HODDER QC:
I don't doubt there's a risk Ma'am. The question is the degree of risk is obviously a question for debate. Can I get there at the end of this table Ma'am? So B it says, is what I understand Forest and Bird will say, it doesn't matter, section 23 does apply, in which case the rulings in the Court of Appeal become highly relevant and an impediment from Rangitira in a fresh application, or the Council may come to be classified on the responses that Forest and Bird had when we filed the original memorandum was to say to us will you please join us in a rapid reclassification or classification, and it's possible that can be done by either the Minister or by the Council in some prompt fashion. That presumably is what Forest and Bird will ask somebody to do. In that scenario the same position applies.

ELLEN FRANCE J:
Sorry, just going back to B, do you accept, as Forest and Bird say, that section 16(8) does not apply?

MR HODDER QC:

Our proposition is we disagree with them that it's an appropriate provision to apply section 23 as one of the appropriate provisions referred to in section 16(6). Sorry, 16(8). My apologies, 16(8).

WILLIAMS J:
The for no other purpose clause.

MR HODDER QC:
That should be a correction to my B, sorry Your Honour.

WILLIAMS J:
Yes, that's the for no other purpose clause, that was what the question was about. Is your argument that 16(8), which was relied upon in the Court of Appeal, quite significantly, does not therefore apply to you anymore?

MR HODDER QC:
Well section 16(8) wasn't the key to the decision of the Court of Appeal. Section 23 was applied effectively directly by the Court of Appeal.

WILLIAMS J:
Yes, but they did cite 16(8).

MR HODDER QC:
They cited section 16(8) as part of their discussion of the Act but the proposition I understand is that section 16(8) means that even if it hasn't been classified under section 23 as a local purpose reserve in those terms, then it's an appropriate provision which governs the reserve, in any event, by virtue of section 16(8). That's the point where we disagree with Forest and Bird. That says that –

WILLIAMS J:
Do you mean by – sorry, can you just check 16(6) and 16(8)? We may be at cross-purposes.

MR HODDER QC:

Yes, I can do that. Yes, in fact my learned friend disconcerted me slightly. My proposition was section 16(6) is relevant.

WILLIAMS J:
Yes.

MR HODDER QC:
Which says, “Every existing reserve shall be held and administered for the purpose of its existing reservation … under the appropriate provisions of this Act …”

WILLIAMS J:
Right, now just check 16(8).

MR HODDER QC:
16(8) applies after classification.

WILLIAMS J:
Exactly, that was the point of the question.

MR HODDER QC:
Yes.

WILLIAMS J:
So 16(8) has no application, you would say, if there hasn’t been a classification.

MR HODDER QC:
Correct, because there’s no classification.

WINKELMANN CJ:

And that's accepted by Forest and Bird isn't it?

MR HODDER QC:

Yes, so my apologies for the confusion around 16(6). My reference in B to section 16(6) is correct. Proposition D is the Council, and this may well be what's happening now, administers the reserve as if it was classified as a local purpose reserve, for all relevant purposes, and intends and prefers to continue to do so as a matter of discretion. If that's the case then how section 23 is interpreted, whether it's a have regard or give effect to, is also relevant we'd say. E is a scenario that we're contending for. We flag the 1 May memorandum that by virtue of non-classification reserve is administered under the 51 orders and appropriate provisions that don't include section 23. In those circumstances the declarations wouldn't be relevant, and that's the proposition that Chief Justice Winkelmann put to me, that I'd be wanting the reserve to go back to the Council with, and if I could I would.

The last one is a point that also the Chief Justice raised, was if for some reason you were stopped from advancing E, then you're stuck with one of A through D, and that is relevant. So while I'm not in a position to exclude E because I've come up with it, and I think it's got legs, everything else in every other scenario remains entirely relevant, and so in our –

ELLEN FRANCE J:

Sorry, can I just ask about D? In a public law context, if it's not classified, on what basis does the Court say, well that doesn't matter, we can just treat it as if it is.

MR HODDER QC:

The Council Ma'am?

ELLEN FRANCE J:

Well, D assumes that the Council is applying section 23A on the basis that as if.

MR HODDER QC:

Yes.

ELLEN FRANCE J:

In a public law context if that is not correct on what basis does the Court say, well that's okay. It's not like some other civil problem where the parties may agree that they can proceed on a particular basis is it?

MR HODDER QC:

I had contemplated that the Council as having a discretion as to how to approach it could say, we think the approach set out in section 23 is a good approach to follow and we will.

WINKELMANN CJ:

Are we to assume that's the correct approach and then do we have to go off on a parallel enquiry as to whether or not it's a correct approach, and that's a new enquiry which hasn't been explored in the lower Courts, so we'd be sitting as a first court and a final court.

MR HODDER QC:

It's correct that it hasn't been explored on an "as if" basis or I would say that "as if" was effectively the understanding that everybody had.

WINKELMANN CJ:

Well …

MR HODDER QC:

The position that's been, you have before the Court now and before the Courts below is probably an ill-resolved understanding or assumptions about a combination of A, B or D, without anybody ever being absolutely precise about it.

GLAZEBROOK J:

The problem I have is that unless you win in this Court, and 23 is irrelevant, then all of those matters are still going to come up, aren't they? So this is all predicated on this is useful because if I win I then get rid of some of these issues, but if you don't win all of these issues remain and will just start again at Council and come all the way back up here. So in fact, which was my point, is that we don't have everything in front of us in order to resolve the issues between the parties once and for all, including the estoppel point, and all of this is predicated on this will be really useful to me if I win, but you can't assume you're going to win in this Court. You could lose, in that case absolutely everything of these other things is up for grabs again, so it does not resolve unless you win everything in your favour. Now obviously you want to resolve everything by winning, but we have to take into account the possibility that you won't.

MR HODDER QC:
We might be at cross-purposes on what I'm seeking to achieve in this Court.

GLAZEBROOK J:
No, if what you want to achieve in this Court is to say section 23 is irrelevant whether it's classified or not and it's all under the Mines Act.

MR HODDER QC:
No Ma'am.

GLAZEBROOK J:
All right, so perhaps you want to say what you want to achieve in this Court then.

MR HODDER QC:
What I want to achieve is what was, I want to get us back to the High Court declaration.

GLAZEBROOK J:
Well exactly, that's the point.

MR HODDER QC:

But it means that section 23 is relevant it's just not the dominant exclusive consideration.

WINKELMANN CJ:

Yes but Justice Glazebrook is right though, isn't she? All these problems go away for you and there will be no security of litigation if you win in this Court?

MR HODDER QC:

I'm not sure about that Ma'am. If I succeed in this Court then what will happen is I'll have the High Court declarations in favour of Rangitira which means that –

WINKELMANN CJ:

Yes, so the other issues will pop up, surely.

MR HODDER QC:

Yes.

WINKELMANN CJ:

But the issues in relation to section 60(2) are more or less squared away? Or is there –

MR HODDER QC:

No.

WINKELMANN CJ:

– or there are continuing issues regarding …

MR HODDER QC:

There will be continuing issues. Whatever happens it will be seriously contested.

WINKELMANN CJ:

All right, but if you lose you say that there are a plethora of, in effect, of issues that you still wish to explore?

MR HODDER QC:

There are two main issues that we would – if we lose, if the Court grants, continues the leave, and we run the argument and if we succeed then the High Court declarations are restored, the ones that are relevant. If we –

WINKELMANN CJ:

Okay, so just let's take it maybe more slowly. If you succeed, what do you say then flows?

MR HODDER QC:

If we succeed then we have to go back to the Council, and the Council then is entitled to take into account other considerations besides section 23 in determining the access application. Whereas the Court of Appeal declarations say section 23 is the exclusive consideration.

WINKELMANN CJ:

Right, and what's the counterfactual?

MR HODDER QC:

Well if we win we will go back to the Council and file a fresh application. Forest and Bird will object on various grounds no doubt. What they are I can't predict, but there will be an issue, it will be contested, there is no question about that.

GLAZEBROOK J:

So, no, let's take this slowly as well. The counterfactual is what, that the Court of Appeal declaration is upheld.

WINKELMANN CJ:

That's if you lose.

MR HODDER QC:

That's if we lose. I'm about to come to that. If we lose –

WINKELMANN CJ:

You're still on if you win.

MR HODDER QC:

– then we go back to the Council.

GLAZEBROOK J:

Sorry, I'm just – I think I might have got lost here. If you win the High Court declaration remains. The Council can take into account other considerations. Okay, so then you go back to the Council and get a decision and there may still be other litigation, was that the point?

MR HODDER QC:

Correct, there'd be a range of issues Ma'am, yes.

WINKELMANN CJ:

There was one interpretive issue that remained outstanding, that hadn't been resolved. What was that, can you just refresh my memory?

MR HODDER QC:

In terms of the High Court, Court of Appeal?

WINKELMANN CJ:

Yes.

MR HODDER QC:

Well the High Court gave some thoughts about what section 23 might mean, and what, it wouldn't be, wouldn't matter, and the Court of Appeal by agreement between the parties didn't resolve those issues but it set aside the High Court's declaration so they don't survive. So we would be going back to

the, on the, if we win on the declarations on the Court of Appeal point we'd be going back from scratch, as it were, with simply the High Court declarations saying that section 23 is merely a relevant consideration, it doesn't have to be absolutely given effect to, to the exclusion of other factors. If we were to lose in this Court on the point that we're proposing, then we would go back and we would say, well notwithstanding that we can still get it home through section 23. That's –

WILLIAMS J:
Well but you'd also say, oh, got our facts wrong, section 23 doesn't apply.

MR HODDER QC:
That's what we'd also now propose to argue unless –

WILLIAMS J:
So it's sort of heads I win, tails you lose.

WINKELMANN CJ:
Okay, so let's just go through this slowly. If you lose, your first resort will be to say, actually that decision doesn't apply because in fact the facts are other than we had agreed?

MR HODDER QC:
It will be one of the positions we'd answer, we'd no doubt be answering the alternative.

WINKELMANN CJ:
Well, we're interested in that position so let's look at that.

MR HODDER QC:
That would be E. We would be advancing E unless we were estopped.

GLAZEBROOK J:

No, sorry, when you say you can still get home on section 23 was that because it's not classified, that would be the argument, or is there another argument?

MR HODDER QC:
If the proposition is that we must give, that the Council must give effect to section 23, and it can't take into account other considerations, we would say that Rangitira's case on the merits would still get through section 23. That's what the application would say.

WINKELMANN CJ:
So if the Court of Appeal decision applies to you, then in any case you can meet the section 23 threshold?

MR HODDER QC:
We believe so, yes, but it's harder. That's the reality of it.

WILLIAMS J:
So those are your three parts?

GLAZEBROOK J:
No, no, because the next argument is, isn't it, that in any event section 23 doesn't apply because it's not a reserve?

MR HODDER QC:
That's the new argument, yes. This argument hasn't been explored anywhere else.

WINKELMANN CJ:
And that will be your first argument before the Council, won't it, because it's an easier argument for you.

MR HODDER QC:
But it'll be in the alternative, I imagine that – Your Honour is probably right, it will be the first argument but they'll be in the alternative.

GLAZEBROOK J:

And then that might be met by an estoppel argument?

MR HODDER QC:

Quite so. That's clearly what Forest and Bird wishes to argue. They can take some comfort from some of the remarks from the Bench today.

GLAZEBROOK J:

Well it would certainly be met by a, yes it does apply argument, based on section 16(6).

MR HODDER QC:

Yes.

GLAZEBROOK J:

Okay. Are those the only three?

MR HODDER QC:

I think so. So the only propositions, those issues would arise, if we were to go back, on that scenario, go back having not persuaded this Court to set aside the Court of Appeal declarations. So I repeat, the only proposition that we are asking the Court to consider is whether the Court of Appeal declarations on their own terms are sound. That is to say, that when one looks at section 23 in relation to section 60 of the Crown Minerals Act, it is the governing consideration and other considerations are irrelevant. That's an important issue of public law, beyond the position of Rangitira, but it's obviously directly relevant to Rangitira and the scenarios I've been intending to outline, and indeed it will be contested even if we're successful on that in various forms. So it's a long way, we submit, from the classical mootness case which says, either your case is now hopeless you can't win, or the case is completely irrelevant because nobody is affected by it.

GLAZEBROOK J:

I don't think the public law helps you very much because you wouldn't have got leave in the first place if it hadn't been a matter of public importance, and yet leave can be revoked in those circumstances.

MR HODDER QC:
Yes.

GLAZEBROOK J:
So it obviously is a point of public importance. The question is whether it's hypothetical or, for me at least, whether it actually deals with all of the issues between the parties, and whether it's better to deal with all of them, especially where they're legal issues involved, which there are in relation to section 16(6).

MR HODDER QC:
Yes, well with the benefit of hindsight we can see things might have been done differently.

GLAZEBROOK J:
Absolutely.

MR HODDER QC:
But the position we are is that we're confronted with a Court of Appeal decision that says section 23 is a dominant consideration. That's an impediment for us if we have to go back to the Council on the current state of facts.

WINKELMANN CJ:
It does seem to me –

WILLIAMS J:
So – sorry, can I just. Is your best argument that you're midway through the substantive process you're having to go through to get what you want, and

that whatever the facts an answer on this issue will be of assistance in processing, in going through that process?

MR HODDER QC:
Yes Your Honour.

WILLIAMS J:
So it's not a waste of time.

MR HODDER QC:
No Your Honour.

WILLIAMS J:
Right, well now I understand what you're arguing, thank you.

MR HODDER QC:
Sorry. That is –

WINKELMANN CJ:
Your position would be somewhat strengthened, wouldn't it, if you weren't keeping this thing up your sleeve about not estopped by the decision.

MR HODDER QC:
Well I tried to take it out of my sleeve as soon as it arrived there Ma'am but –

WINKELMANN CJ:
No, you're just, you're saying, and it's important to us, but it's not that important, because if you uphold the Court of Appeal decision we're going to argue we're not bound by it.

MR HODDER QC:
Well it wasn't a cunning plan Ma'am.

WINKELMANN CJ:
It makes it a rather unattractive proposition.

MR HODDER QC:

And the first reaction of Forest and Bird was in their submission to say, but you can't raise a new issue, and I agree, we shouldn't be raising a new issue in this Court that hasn't been argued in the Courts below. It's why we're not suggesting the Court deals with E. We don't have any dispute about that. But that doesn't negate the relevance of the issues that are before the Court on the basis of the Court of Appeal's declarations and where they differ from the High Court declarations. That does remain a major issue that needs to be determined.

ELLEN FRANCE J:

Yes, but hypothetical potentially on your case.

MR HODDER QC:

Contingent, but yes. If I was right on E, which nobody knows yet, then it would become less so, but it wouldn't be hypothetical for the purposes of the rest of the population that has to deal with interface between section 60 of the Crown Minerals Act and section 23 of the Reserves Act.

WINKELMANN CJ:

What about the prejudice to the respondent who's pursuing public interest litigation and you're saying that they should go through the expense of this, even though it may, in fact, not assist them one jot, even if they're successful.

MR HODDER QC:

That probably sounds in costs to some extent, if we get to that point, but the proposition to some extent goes back to the *Baker* case that we cited in our reply memorandum. The matter is all ready to go so those are in a sense sunk costs. It'll have to be determined at some point who meets them, but they're there. So I repeat, I'm not asking for an opportunity to change any submissions, to argue any different issues than we were ready to argue before I filed the memorandum. I, of course, feel somewhat sheepish about having filed the memorandum, having provoked all this, but I thought it was

the appropriate thing to do because it was a fact that I thought the Court should take into account.

GLAZEBROOK J:

Well thank you, that was obviously absolutely the proper thing to do and we thank you for it.

MR HODDER QC:

What I didn't want to do was pull the plug on the entire appeal. So Your Honours I suspect that I've covered all the ground that I usefully can. Unless there are any questions our position remains probably best put by Justice Williams.

WINKELMANN CJ:

That it would be helpful to you, is that it? Is that proposition that it would be helpful to you to have this appeal?

MR HODDER QC:

I'd go wider than that. It would be helpful to all parties to know where they stand on the section 23 "give effect" versus "have regard to" issue, and beyond that it would be helpful to everybody in the populous to understand that issue as well. So we are included in that being helpful camp, but we're not exclusive.

WINKELMANN CJ:

Thank you Mr Hodder. Mr Smith?

MR SMITH:

Good morning Your Honours. I can probably best work from my learned friend's table setting out the bases on which his client says that this Court's judgment may still be useful. Starting with proposition A, we are, of course, in a state of factual uncertainty but the evidence, such as it is, certainly the basis on which the Council has proceeded on this case, is that the reserve has not been classified, and neither of the parties before the Court are at present in a

position to contradict that, as I understand it. So that is a point on which further enquiries could be carried out but if we're attempting to identify what the most likely hypothesis is, it is that this reserve has not been classified. So the Council has apparently proceeded on the basis of an approach to section 16(6), that treats that as an "as if" provision, and that is what my learned friend now questions.

The application of section 16(6) will rest on a substratum of facts, but is ultimately a question of statutory interpretation, which will apply across all unclassified reserves, one might assume. So the respondent understands that there are a significant number of unclassified reserves being managed on this "as if" basis, so the question of how a section 16(6) of the Act applies to those reserves is one of some significance, but it is, and it is a legal question and when that question comes to be decided there may be a decision. The respondent's position will be section 23 applies, but equally there may be a judgment as a matter of law that section 23 does not apply and that the protective regime that applies to an unclassified reserve is based on management in accordance with the original purpose for which the reserve was vested, together with some other appropriate provisions of the Reserves Act that don't include section 23. All of which is to say that we may come to a position, but it's not the respondent's position but it is the appellant's position, that section 23 will not apply to any unclassified reserves. So the hypotheticality, or the contingency, is not simply one of what may happen on the facts of this case, but on the appellant's argument, this question of the application of section 23 to an unclassified reserve will never apply for anyone.

WINKELMANN CJ:

So you're saying it's more than hypothetical, that the appellant's actively argue that our finding does not apply?

MR SMITH:

Correct, and that it would not apply to anyone because that argument would not be based primarily – it could be based on a factual argument about

whether this reserve has been classified, but would also be based on a factual proposition that it has not been classified and therefore as a matter of law section 23 does not apply. So this Court is giving a judgment on the assumption, or a basis that section 23 as a default in a general sense applies to the management and administration of an unclassified reserve subject to the effect of section 60 of the Crown Minerals Act and section 109 of the Reserves Act. In the case of a mining application that may be a judgment that is a dead letter in the sense that when courts, and potentially this Court, come to consider whether section, the correctness of that basis, whether section 23 in fact does apply to unclassified reserves. If the Court concludes that it does not, then as a matter of law there will be no room for the application of a judgment considering how section 23 might be displaced by section 60 because it will never apply at all.

WILLIAMS J:
Well presumably one of these as ifs will apply?

MR SMITH:
Well, there will be a protective regime, yes.

WILLIAMS J:
So it has to be an as if, one these classifications has to be inferentially relevant even without a classification, because otherwise the reserve unclassified has no purpose. Is it the case that all of them have an equivalent of subsection (8)?

MR SMITH:
Subsection (8) is a provision that applies if the reserve is classified under the Reserves Act. So that applies across –

WILLIAMS J:
Sorry, okay – do the identified classifications, one of which must apply even if there hasn't been a classification, otherwise subsection (6) won't make any sense, as appropriate must mean one of these, right? It can't mean none of

them because those provide the purposes for which the land is administered. The only question is which one.

MR SMITH:
Well Your Honour has captured what Forest and Bird's argument would be.

WILLIAMS J:
Right, so my question is do the classifications include exclusive purpose clauses?

WINKELMANN CJ:
That's section 40 you're talking about I think.

WILLIAMS J:
Is it?

WINKELMANN CJ:
Which is the provision which is that the body must administer the reserve in accordance with its purpose. Is that what you're talking about?

WILLIAMS J:
Well that or something in each of these classifications saying you must be true to this purpose, and no other.

WINKELMANN CJ:
That's section 40.

MR SMITH:
So yes is the answer, and all of the purposes in section 17 through 23, for which the reserve might be classified, do contain what I would call similar protective provisions to those that apply under section 23, which would be another part of the respondent's argument for why those kind of protective

provisions are part of the appropriate provisions that apply under section 16(6).

WILLIAMS J:
So is there a battle about whether any of them apply?

MR SMITH:
Yes there is Your Honour. So Your Honour has captured what I understand, what is Forest and Bird's argument, that one of these classifications must, essentially the administering body picks the best fit, pending actual classification, from the menu of options in the Reserves Act. My understanding of the appellant's position though is that none of those classifications apply, and that the reserve is to be managed in accordance with its purpose, as given in its vesting, and otherwise that only the generic provisions of the Reserves Act, that are not contingent upon any particular classification apply pending classification.

WILLIAMS J:
I see, thank you.

WINKELMANN CJ:
Do you think that they will argue that section 40 doesn't apply? Was the purpose is water conservation, isn't it?

MR SMITH:
The purpose is water conservation. I perhaps defer to my learned friend on that. It does say the purpose for which it's classified.

GLAZEBROOK J:
Your point in short though is that that is actually a major legal issue, which will arise should it go back presumably unless we go back to the High Court decision, although it will even arise in relation to that, because if it's unclassified and there will be an issue as to which of these provisions actually applies one assumes. I'm just going back to if Mr Hodder's client wins in this

Court, even going back to the High Court declaration there will be issues about section 16(6) I would have thought if this is an unclassified reserve.

MR SMITH:

There will be Your Honour, I imagine. On the topic of the High Court judgment, the declarations that the High Court gave are that section 23, I'm paraphrasing, that section 23 is the mandatory relevant consideration, and the Court of Appeal's declaration was that section 23 must be given effect to. So I must confess I'm unsure how, on the appellant's case, they would seek to go back to the High Court's declaration as the relief that they seek because that would itself –

GLAZEBROOK J:

It still has section 23.

MR SMITH:

It still has section 23 in it. Now I would say that is the only relief that is available in this litigation given the pleadings and the agreed facts, but nonetheless we face the difficulty that the appellant now says that is the wrong basis in reserves, that it may challenge that. I say the appellant would be estopped from raising that. Recognise that there may also be raised the question of whether the local authority, as a matter of public law, can be restrained from applying whatever the correct statutory regime to the management of the reserve is, whatever may have happened between this parties in this litigation. So that would be a part that my learned friend has signalled would be raised as a part of a response to an estoppel point. So it does, yes, it's understating things to say the procedural position is one of some complexity when we come back from the Council.

WILLIAMS J:

Is it the case that pursuant to section 16, including subsection (2A), that either the Council or the Minister must classify it? Is there a "may" anywhere that could apply to this, or is it always a "must"?

MR SMITH:

It's a "must" Your Honour, or it's a "shall". Section 60 –

WILLIAMS J:

Right, sorry, yes, a "shall". Okay, so you could apply for mandamus if you wanted to.

MR SMITH:

Yes.

WILLIAMS J:

That might help clarify matters.

MR SMITH:

Well, yes, that's certainly a possibility Your Honour, that either party could apply to have the reserve classified, which would remove this uncertainty for the future. As my learned friend says it's option C in the table. It's not a step either party, to my knowledge, has taken so far and I'd suggest this Court would not ordinarily hear a case on the basis that the facts may change in the future to make it relevant, even if that's a matter that's within the control of the parties.

My learned friend's point D, I simply adopt what Justice France raised in Her Honour's question to my learned friend about how that could be a relevant possibility if legally it's not found to be the correct one. It's not a matter of discretion for the Council whether it manages the reserve in accordance with section 23 or not. That is, it is either obliged to or it's not. Proposition E is, of course, what my learned friend seeks to reserve. The proposition, the response to that is to say it would clearly, and my learned friend does not seek to raise it as a new point in this Court, but we'd say there's no lacuna that allows the appellant to not seek to argue the point in this Court, but to belatedly reserve it for argument somewhere else if the point is captured in the pleadings and agreed facts.

It doesn't cure the reasons why this Court would not allow them to raise it for the first time in this Court to say they can get around the rule in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 by belatedly saying, well we do wish to take that somewhere else. Had that point been raised at the outset, I would say, before the High Court, the Court would not have agreed, no doubt, to take the case on the basis that there was at least two different interpretations of the protective regime that might apply to the reserve land, being either B or E in my learned friend's table, and that rather than determining that issue the Court would skip ahead to step 2 in the analysis and say, well if the answer to that first issue is that section 23 applies, it is or is not displaced, would suggest that the High Court would either have determined that prior issue on its own first, and said, well what is the protective regime that generally applies to this land, or would it take in the two issues together, to say well let us determine what is the protective regime and then having determined that, identify what the effect of section 60 of the Crown Minerals Act –

O'REGAN J:

But this was an agreed statement though, wasn't it? I mean I don't know that you can put it all onto the appellant. If the statement is wrong it's just as much your problem as their problem. I don't see how you can rely on the error in the statement.

MR SMITH:

Well the statement is not, in our submission, an error. This is not properly characterised, in our submission, as a mistake of fact. At the risk of giving evidence from the Bar slightly the officer's report for the Council, that preceded the Council's decision, identified that the reserve was not classified, but said that this "as if" point applied, so that section 23 applied nonetheless.

O'REGAN J:

That isn't what the agreed statement of facts said, so it was wrong.

MR SMITH:

The agreed statement of facts says it is a local purpose reserve, or it is managed as a local purpose reserve.

O'REGAN J:

Which we now know is incorrect. At best it's managed as if it's a local purpose reserve, even though it isn't.

WINKELMANN CJ:

So your point is that the parties knew the true state of facts but regarded it as inconsequential and now the appellant has looked at it further and decided it probably is consequential.

MR SMITH:

I'm not in a position to say what the actual factual position is, but objectively the Council had identified that this was not classified as a reserve but was managing it as if it were a reserve, and that then was followed by the statement that's in the agreed statement of facts which I would submit is not, understood against that background is not inaccurate but contains an assumption about the application of section 16(6) –

O'REGAN J:

Of course it's inaccurate, it's completely different. It's either a local purpose reserve or it's not, and what we're being told now is it's not. The fact that the Council is pretending it is one doesn't make it one.

MR SMITH:

Well the agreed statement of facts says that the land is managed by the Council under the Reserves Act 1977 as a local purpose water conservation reserve. I'd submit that if, the position is that it has not been classified, but that under section 16(6) the appropriate provisions of the Act –

O'REGAN J:

Yes, but we don't know that though. We can't assume that. The statement of facts took that out of the play but it's actually a live issue, isn't it?

MR SMITH:

Well that's correct -

O'REGAN J:

And you were party to that statement of facts. I don't think you can take advantage of that to then say, well we're now going to hold it against the appellants.

GLAZEBROOK J:

That's not before us though. That will be a live issue if it – I think that's your point, isn't it, that these are going to be live issues later, and you've responsibly also said that it maybe also that in a case of a statutory interpretation issue that the Council itself couldn't be bound to a wrong interpretation, whatever the outcome of this litigation.

MR SMITH:

That's correct, Your Honour, thank you. So the position is simply that this, I'm seeking to advance, is simply that the circumstances in which this came to be in the agreed statement of fact may be relevant to whatever the next stage is, and it may not be correct to classify, categorise it as a mistake of fact, rather than mistaken assumption about the legal consequences of known facts.

WINKELMANN CJ:

So Mr Smith what do you say is the correct pathway for the appellant then?

MR SMITH:

Well what we have said in our, either our submissions or our memorandum, is that leave ought to be revoked and then the status of the Court of Appeal decision would be a matter for an application to that Court. That is the forum in which I anticipate this question about whether this is a mistake of fact, or whether it is a question upon which the appellants took a considered position

from which they now wish to resile, would become relevant to whether the Court might entertain a recall application or not.

Then, of course, there's the further matter that's been raised in argument about whether in any event a question about whether the appellant can take this point or not might be rather arid if in any event the Council can't be bound other than to manage the land in accordance with whatever the correct protective regime is, and that may well be where the parties end up. But for today's purposes I'm saying that all of the issues we've discussed made this an unsuitable case to consider this issue in at this time.

I'm conscious that we were given about an hour and we're coming up on about an hour.

WINKELMANN CJ:
Have you finished your submissions Mr Smith?

MR SMITH:
I have.

WINKELMANN CJ:
Thank you.

MR HODDER QC:
Nothing much to say in reply Ma'am to say that the proposition that the judgment might be a dead letter re: unclassified reserves, we don't know about the classified reserves so it wouldn't be a dead letter in relation to classified reserves, or indeed if section 16(6) does apply across the board.

Beyond that I'm not sure there's much that hasn't been canvassed already before the Court. So are there any questions the Court has?

WINKELMANN CJ:

No, thank you Mr Hodder. Thank you counsel for your submissions. We'll take some time to consider them and we will let you know the outcome in due course.

COURT ADJOURNS: 10.57 AM