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

SC 66/2018
[2019] NZSC Trans 8

BETWEEN **DOUGLAS CRAIG SCHMUCK**
Appellant

AND **OPUA COASTAL PRESERVATION INCORPORATED**
First Respondent

FAR NORTH DISTRICT COUNCIL
Second Respondent

Hearing:	9–10 July 2019
Coram:	Glazebrook J O'Regan J Ellen France J Williams J Arnold J
Appearances:	A R Galbraith QC, J A Browne and C H Prendergast for the Appellant J D Every-Palmer QC and D F McLachlan for the First Respondent J E Hodder QC, J G A Day and S W H Fletcher for the Second Respondent

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CIVIL APPEAL

MR GALBRAITH QC:

If the Court pleases, I appear with Jeremy Browne and Colleen Prendergast for the appellant.

GLAZEBROOK J:

Mr Galbraith.

MR EVERY-PALMER QC:

E nga Kaiwhakawā, tēnā koutou. Ko Every-Palmer ahau, and I appear with Mr McLachlan for Opua Coastal Preservation Incorporated, the Society.

GLAZEBROOK J:

Tēnā kōrua Mr Every-Palmer, Mr McLachlan.

MR HODDER QC:

May it please the Court, Hodder with my learned friends Mr Day and Mr Fletcher for the second respondent, the Council.

GLAZEBROOK J:

Mr Hodder, thank you. Mr Galbraith?

MR GALBRAITH QC:

Thank you Your Honour. There are some complications in this matter because of the various interests –

WILLIAMS J

No kidding

MR GALBRAITH QC:

– that the different parties have and so the party that I represent, the Boatyard if I can use that term, appeals against the Court of Appeal decision on the land law issue in relation to easements, but of course my learned friend Mr Every-Palmer's client, looking to support that judgment on other grounds, in effect has got a cross-appeal on the section 48 issue. And then we have the other issues in relation to Council's decision-making where Council says and I

have sympathy for this, that new issues have been raised by the Mr Every-Palmer's client, and they shouldn't be determined by this Court. We've made some submissions in relation to that but I think discretion being the better part of valour, I'll probably say to the Court, unless the Court disagrees, that we put some written submissions in. I won't address them, perhaps at all, or certainly not at any length, and that contest can really be between counsel and Mr Every-Palmer's client. So perhaps we see how we go, but it isn't entirely straightforward.

GLAZEBROOK J:
So is it proposed that we start with you and then Mr Hodder is it?

MR GALBRAITH QC:
I think that's the idea, yes.

GLAZEBROOK J:
That certainly seemed to me be to the correct way of doing things but quite what we do with replies, I'm not entirely sure, but I'm sure we can work out something as we go.

MR GALBRAITH QC:
I think that's the sensible way of doing it Your Honour, because I haven't heard some of what Mr Every-Palmer wants to say, so in any case he'll have the benefit of surprise.

I thought perhaps I might start just by trying to orientate the Court both in relation to the geography, if I can put it that way, and also in relation to some of the identification of some of the As, Bs, Xs Ys and Zs. Perhaps the way to first start is if Your Honours wouldn't mind having a look at volume 5 behind our tab 82, 83.

GLAZEBROOK J:
Volume – which volume?

MR GALBRAITH QC:

Volume 5 your Honour.

GLAZEBROOK J:

Oh sorry mine was hiding. I was going to deny having one.

MR GALBRAITH QC

Volume 5. This is the, it perhaps starts at behind tab 81, it's the easement documentation but it has attached to it some, behind 82 and 83, some plans which if you go across to page 303079 and 303080, you can identify on that plan just where this site is, and it's the, it might actually be better if I hold it up on 303080, it's the little pink hatched site there around on the left-hand side, around from the large marina, just by Richardson Street, which was the street which was partially closed to create the reserve.

You get a Google image of where it is if Your Honours wouldn't mind looking in the key documents bundle, behind tab 20 - and at the rear of tab 20 you'll see there's a schedule 2, it's a Google image, which Mr Every-Palmer's client has put together, which shows Doug's Boatyard arrowed, it's in Walls Bay, and you'll see on the right-hand side another, the image of what's now a very large marina which I was surprised to find when I went up there the other day to have a look. It's developed in the last, I'm not too sure, but certainly since the last time I was there. I understand that's about a 500-boat marina but I may have my numbers a little bit out. There's a lot of development. Doug's Boatyard, as you know from the facts, has been there for decades. It way precedes this.

I will, if the Court will accept, and my learned friend is happy for me to do this, I don't think it needs to be passed around at the moment, just give another photograph to the Registrar and the Court can look at it if they want to which, if I hold it up, is really a photograph looking out from the Boatyard, and you see all those little white specks in the Google image, well this is what it actually looks like on the ground, these are the boats which are moored out of Opua, so it's a fairly intensive –

GLAZEBROOK J:

Sorry, which angle is this new photo taken?

MR GALBRAITH QC:

It's taken from the reserve and you'll see it's got in it the wharf which goes out from the Boatyard, and you'll recall from looking at the resource consent that the slipway actually goes, it starts in the water because you've got to float a boat onto it to pull it out, so the slipway, and it shows where the start of the slipway is, and then the wharf which is used by a charter company and also for educating people about –

GLAZEBROOK J:

Does anyone have any concerns about that photo?

MR EVERY-PALMER:

It's a very beautiful photo.

MR GALBRAITH QC:

Yes, it's a very nice area on a nice day. So I'll just give that to the Registrar and if the Court wants to look at it, there it is. So that I think gets us geographically situated. Perhaps the other thing, just to immediately look at, is there was a joint memorandum of counsel in April, on the 8th of April filed, which referred to the fact that the Boatyard has been reconfigured since the time of the Court of Appeal judgment and in that memorandum it showed graphically where the, originally the Boatyard, the slipway went straight up, and then there were, there was a southern and a slightly northern and one in between - slipways so that boats could be accommodated on the Boatyard in those three areas. Now those rails have been removed and so the rails, the only rails now are the central slipway rails going onto the Boatyard. So the configuration of the Boatyard has changed since the Court of Appeal judgment and last Friday I think there were some further photographs provided to the Court intended largely to be updating - and if the Court has those - the first of those is simply a photograph back in 2014 which shows how the Boatyard operated at that time with the three boats up there on the,

on those side rails, and on the central rail, it doesn't exist anymore. Photograph 2 was a photograph taken back in those days where you see the side rails. The side rails don't exist anymore. Photograph 3 is a photo with some annotation provided by Mr Every-Palmer's client, which indicates – it's still a photograph taken when the rails were there, but it indicates now the boundary between the Boatyard and the reserve. You'll see it identifies the rails which have been removed, it identifies the turntable and identifies W and Y and X, which I'll talk about in a moment. Photograph 4, I'm not quite sure how that got in there because it's actually not updating, it's October 2017, but it shows some of Mr Every-Palmer's clients having a picnic by the slipway.

Perhaps more relevantly, photograph number 5 in that series not only shows the boat in which Mr Schmuck sailed out from America to New Zealand some more than 20 years ago, but you'll see it identifies a number of the areas which we're, or the Court is interested in.

WILLIAMS J:
Can you show me the photo so I know which one it is?

MR GALBRAITH QC:
So it's that one there Sir.

WILLIAMS J:
Thank you.

MR GALBRAITH QC:
So in particular it's, you'll see area A, which is the area bounded with, or the first area bounded with a blue boundary and we'll come to it but that's an area which was identified in the resource consent and that's the only area in the resource consent where there can be washdown and discharge. Areas, you'll see there are also areas X –

GLAZEBROOK J:
And where's the reserve boundary in there?

MR GALBRAITH QC:
The reserve boundary, well the reserve boundary runs across there, but starts up here two metres above the top of, or the start of X, if I can put it that way.

GLAZEBROOK J:
Right, that's what I thought.

MR GALBRAITH QC:
Sorry, it's not a very good surveyor's description I'm afraid. I'm sorry about that.

So you see that X is an easement, or was an easement, until the Court of Appeal disallowed it, which runs across the top. It's two metres effectively in from the boundary. Y, we'll come to. U, I don't think we need bother about. Z is the marine area where nobody can go in relation to washdown etcetera. Effectively it's 10 metres in from mean high water mark, but it seems to vary a little bit in some of the plans, but that was the purpose of it. Then you see the sump, which is marked on that map, which is where water used in washdown etcetera disappears into the sump and then, now it goes out to the reticulated, Council's reticulated system.

Photo 6 is really the same thing but with puffin actually down on the washdown area. Photo 7 is a plume screen. You'll see when we come to some of the documents that there's talk of prevailing winds. The prevailing wind is onshore and so usually when there is any activity with water around the place it's going to go thataway inland, not thisaway towards the walking track. But that's a screen which I think the Regional Council has encouraged the operator Mr Schmuck to have and in event that there's any concern about spray coming from washdown. What that does show, that photo though, is the walking track and so you'll see where the walking track runs. As far as I can see it's basically an unsealed track around the foreshore and it runs along the bottom of the reserve just above the, there's a retaining wall which is there to stop erosion.

WILLIAMS J:

Can you point out the walking track on that? Does it run across Z?

MR GALBRAITH QC:

Yes will be the answer Sir. I'll just find another plan.

WILLIAMS J:

And how far up Z?

MR GALBRAITH QC:

I think there's a better plan somewhere. Let me just find it. That looks to be, it certainly runs across Z.

WILLIAMS J:

Oh, is that the dotted line running there that says "Opua to Paihia walking track existing"?

MR GALBRAITH QC:

Yes.

WILLIAMS J:

It stops just before Z?

MR GALBRAITH QC:

Yes but it –

WILLIAMS J:

In fact it keeps going?

MR GALBRAITH QC:

It keeps going. It goes around the foreshore. It's not 10 feet wide, it's a comfortable walking track for a couple of people abreast is how I would describe it, from what I could see. Apparently in the joint memo after the photos –

O'REGAN J:

The plan that was in that memorandum.

MR GALBRAITH QC:

Oh yes, there's a plan there.

O'REGAN J:

It shows that bit again, it doesn't show it closer –

MR GALBRAITH QC:

It doesn't show the dimension but I think it's fair to say, well certainly when I saw a couple of people walking along it, they were walking side by side. It gets bit tighter when you get into the rougher area, when you come off to…

O'REGAN J:

But it's at the sea end?

MR GALBRAITH QC:

It's at the sea end, yes Sir, and we should have, I'll try and find it. There should be a photo somewhere which actually gives you a visual of the reserve from the sea. That would obviously also help. I'll try and find it in my mass of documents. I have seen one. If we go back to that first photo in that updating bundle that went in on Friday, that's the one with the three boats taken in 2014, it does give you a perspective because it's this one here. The walking track, you'll see there's a sign here, the walking track runs around under there and it goes along the top of the retaining wall, which runs along the top of the retaining wall, and that's the reserve there, the green, is all reserve, and for the reason that Her Honour Justice Glazebrook asked me, the reserve also runs what I would call to the left where the slipway is. So the reserve runs out across there as well. I think the area which the slipway, and the easements relating to the slipway cover is about 8% of the total reserve. I may be out by a percent, but it's something like that, and what we have at the moment is easements which aren't challenged, which for the slipway that covered that area of the reserve, and the easements which we are arguing about, are

subject to easement C, in fact are all confined within the area which the existing and unchallenged easements take up, if I can put it that way. But we'll come to that. So hopefully that's –

ARNOLD J:
Just one thing. On this photo which shows the sump, that's the only sump in the area, there's not one on the Boatyard?

MR GALBRAITH QC:
No.

ARNOLD J:
Thanks.

GLAZEBROOK J:
Can I just check with you. Obviously this is updating evidence. Do you see any significance in this evidence? Does it change anything in terms of – that's what I've assumed, but I thought I'd just better check with you.

MR GALBRAITH QC:
No I don't think we can say that that makes a difference that, no, I don't think so.

GLAZEBROOK J:
It just means that we are not going to be talking about three rails rather than one.

MR GALBRAITH QC:
It's just so you know – yes, that's right, so you know what we're actually, what's actually there. Perhaps just the other matter in starting is, as you know, this has been, the issues relating to the Boatyard have been much litigated over a long period of time in various forums. Justice Fogarty's judgment, of course, was the one which was on appeal to the Court of Appeal and it is, and as you also will know from the submissions etcetera, that both

Justice Fogarty and Justice Heath visited and viewed this site. You'll also probably be aware that Judge Kirkpatrick from the Environment Court visited the site, but he's not alone, there's been - I think Judge Jackson went because there were arguments about the zoning of the, or the use of the wharf, so he's the most environmentally environmental Judge of the Environment Court that I know. He went and visited the site and I understand there have been other decision makers also plus of course the Regional Council were all over it and Mr Hodder's District Council being all over it.

But can I just draw your attention to what Justice Fogarty did say in his judgment, which is in volume 1 of the case on appeal behind tab 9, and it's relevant to what Your Honours have just been looking at. Perhaps two things, he said on page 101079 at paragraph 58 of his judgment, "As I repeatedly mention, one of the functions of coastal reserves obvious to all is to provide access to the sea, not just for swimming but also for boating, be it in small kayaks or in yachts and motor boats. The latter need to be pulled out of the water and regularly serviced." Then he goes on to say, we're pretty pragmatic, we defend our coastline, but we're pretty pragmatic about its use, and then in paragraph 61 he said, "The operations on the boatyard are clearly compatible with families or couples picnicking on the Reserve and swimming off the little beach at Walls Bay. The easement titled Area B on NRC Map 3231b is two metres wide. Practically, it is simply a strip of ground immediately adjacent to the boundary of the private property and exists so that a vessel sitting on a frame in the private property can be washed on its northern side by someone standing on the edge of the Reserve. As NRC Map 3231b shows, Area B is a very small fraction of what is a relatively small stretch of esplanade reserve. It does not in any practical sense impede use of the Reserve. It has been objected to as a point of principle. The principle articulated several times during the hearing by counsel is that there should be no commercial activity on a reserve; that this was somehow some sacrosanct principle. It is not a principle one finds in the Reserves Act. It is a political viewpoint which is not reflected in the statute."

Now I've got to deal with that, of course, because as I say Mr Every-Palmer's clients challenge His Honour's determination and effectively Justice Heath's determination about section 48(1)(f).

Can I take the Court, I'll try and do it as briefly as possible, through some of the other documents which are background documents which, in my submission, are important to the interpretive issues which arose in the Court of Appeal for the first time, about the scope of the easements and like all things we'll start at the beginning. So can I start with the resource consent in the key documents bundle, which is under tab 1, and as you know from our submissions there have been issues prior to this, and there'd been an issue about existing use rights and the Environment Court said, no, you've got to go off and get a resource consent and so after some agonies a resource consent, which was then appealed.

GLAZEBROOK J:
Sorry I –

O'REGAN J:
Key documents bundle.

MR GALBRAITH QC:
Yes, sorry, key documents bundle. I'll try and stick mainly to the key documents bundle. So just behind tab 1 there, January 2002. Slightly complicated in that there was both a consent by, had to be a consent by the regional council and consent by the district council and so you find on page 301066 the Environment Court's consent order in relation to, first of all you see there were some aspects withdrawn. You see the Northland Regional Council decisions to place, use and maintain a wharf etcetera. Slipway, parts of a timber and stone seawall that lie within the coastal marina area, and just to draw attention on the second page of that consent, 301067, you'll see item 3, "The Consent Holder shall submit a Management Plan, to the Regional Council, for approval, within three months … shall cover all aspects of (a) The

operation and maintenance of wharf; (b) The operation and maintenance of the slipway…" etcetera and I want to come back to that.

You'll see item 4, "The Consent Holder shall review the Management Plan in consultation with the Regional Council at no greater than three yearly intervals. The reviewed Management Plan shall not take effect until its approval by the Regional Council." Then there's a deal about dredging and use of the wharf etcetera.

Perhaps go across to 301069. There's been provisions about contaminants etcetera above that but paragraph 25, "The Regional Council may … serve notice… of its intention to review the conditions of this consent … may be served twelve months after the date of commencement of the consent," etcetera. Then there's all the provisions on 301070 about discharges which goes on for many pages.

Across to 301073, item 14, "The Consent Holder shall undertake such measures as are necessary to minimise the discharge of contaminants to ground within the boatyard site *and adjacent Esplanade Reserve*. These measures shall be incorporated into the Management Plan…" More about discharges. Across to 301075, 18, again, "Shall submit a Management Plan in relation to the boat washdown area, washwater treatment system, stormwater treatment etcetera, discharge of contaminants to ground." Again 19, reviewed three yearly. Again 22, "can serve notice to review the conditions of the consent" and then if one goes to 301078 you get the Far North District Council resource consent. So that's the commercial marine slipway including turntable etcetera. Perhaps at the middle of the page under "(b)2(a). "A commercial marine slipway … concrete wash down area … shown on the attached plan and to be located 10 metres above m.h.w.s … Stormwater and conduit drains. Security light pole … Safety signage. Wharf abutment. Existing wooden and stone retaining walls." Most of those have been subject to easement approval non-challenged in 2006. "To reconstruct the slipway." Little (c), "To carry out the activity of washing down of boats prior to the boats being moved to the boatyard for repairs or maintenance or

being returned to the water, provided however that repairs and maintenance may be carried out on the reserve only in accordance with condition 8." Which is an issue we have to come back to because the Court of Appeal said that allowed for valet service.

Across the page, 301079, "Except as provided in condition 8 that no materials, tools or other items shall be placed or left on the Esplanade Reserve except as may be necessary for the passage of boats on the slipway and only whilst those activities are being carried out." 8): "Except as provided herein any repair or maintenance work on vessels shall be undertaken within the Consent Holder's site. Vessels may be washed down within that area of the Esplanade Reserve marked 'A'," so that's that "A" that we looked at previously in one of those photographs. "Any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the Consent Holder's site may be repaired or maintained on that part of the Esplanade Reserve marked 'A'" and so that's an issue.

GLAZEBROOK J:
Can we just, I've lost you, I was busy. Not your fault, it's mine.

MR GALBRAITH QC:
Sorry, 201079, condition 8, and to look at A, if you go across to the plan which is two pages on, annexed to that, you'll see there where A is marked you'll see underneath the heavy bolding of the building, which is on the Boatyard site, you'll see area A with an arrow and it's that hatched area there, just below the turntable, which is the round area, and just, we haven't got there yet, but just to give –

GLAZEBROOK J:
Can you perhaps hold it up and point?

MR GALBRAITH QC:
Yes, sure.

GLAZEBROOK J:
Oh yes I see.

MR GALBRAITH QC:
So that's area A there, which is, and you'll see there's 10 metres shown as marked just below it to the right, which is the Z, so this is the 10-metre separation from mean high water. So area A is above 10 metres from mean high water and the resource consent only allows washdown activities affecting area A. You'll also note both above and below area A there's a line, dot, line, dot. Two line dot, line dots lines which run across there. That's the bounds ultimately of the easement. So the easement is an easement over an area more than area A, but it's only area A where the activity can be carried on because of the resource consent.

So just going back to 301079 you'll see item 9, "Except as provided in this consent no vessel shall be left on the slipway within the Esplanade Reserve. All relevant safety requirements…" et cetera. "The only permitted closure of the Esplanade Reserve is for safety reasons during vessel haulage. No more of the Esplanade Reserve shall be closed than is absolute necessary."

At 12, "The District Council reserves the right, pursuant to Section 128 of the Act, to review the conditions." 13, "During periods when that part of the slipway through the Esplanade Reserve area is being used for the washing down of boats, the Consent Holder shall erect screens or implement similar measures to effectively contain all contaminants within the washdown perimeter. Screening shall be arranged at the Consent Holder's expense…" et cetera.

Then if you go across to 301081 you'll see a heading "Advice Note. The District Council will prepare a management plan for the Esplanade Reserve." So that's where the resource consenting started from, with that consent order in 2002, which had to be renewed and has been varied in certain respects since then.

There was then, if one goes to tab 2, a referral of the issues in relation to the granting of easements to a Commissioner who was appointed was Mr Dormer, who was experienced in resource management issues, and often sat as a Commissioner, and his, that's his decision which is behind tab 2 as varied by what's behind tab 3, and he also obviously visited the site and also makes observations about the sensitivity of the site and comes to the conclusion that the granting of the easement would be appropriate. You'll see on page 301138 he identifies the proposed easements, puts them into three categories.

The first is constructing the slipway etcetera, discharge contaminants moving the boats between the boatyard and the water. Secondly, easements in respect to the existing slipway and turntable "to be washed down before being moved into the yard." And perhaps just to see the way he does express that, "To allow boats on the slipway to be washed down before being moved into the yard, and for work to be undertaken on the slipway on boats that cannot be accommodated entirely within the yard." And then he talks about the two-metre wide easement, which is the one at the top end of the reserve where boats are on the southern rails.

Perhaps just note page 301139, 2.3, "… potential for adverse environmental effects … the applicant has however addressed these concerns through the installation of appropriate control traps," etcetera and of course those have been, become more sophisticated over time. Recommends the easements be granted, 2.8, 2.9 but was concerned to ensure, as you'll see on page 301142 towards the top of the page under the heading "Subject to the following conditions. 1) A condition prepared by the Council's solicitor such as will meet the concern expressed in paragraphs 2.7 and 2.8 of my report to the effect that the easement will not permit significant expansion of the boatyard's activities." What he was saying was in effect it's been there for a long time, it looks like it works okay. It'd be too tough to require it to be all moved inside the Boatyard perimeter and so, but I don't want it expanding, that's putting it simplistically what he was saying. So tab 3 is –

WILLIAMS J:

Just before you go to tab 3. Did anything happen with that 60-day restriction on boats in the cradle?

MR GALBRAITH QC:

Yes, but not here. One moment. I've got the reference to that. Yes, sorry, it's behind tab 3. That's where it comes in. So what happened was, as I think one can read into tab 3, is that the Council solicitor did some drafting, and you'll see that Mr Dormer is thanking him for his letter, and so he concludes on 301150 that the drafting, "Would reflect the intent of my recommendations and should be included in the list of easements and conditions," and so we get these five (a) to (e) which are going to be the subject of interpretation by this Court and the subject of interpretation by the Court of Appeal, "That in respect of the repair and maintenance of boats the following shall apply: (a) When boats which by virtue of their length or configuration cannot be moved so that they are entirely within the adjacent boatyard property, are placed on cradles located entirely within the adjacent boatyard property but protrude into the airspace above Sec 2 and/or Sec 3, such boats may be repaired or maintained at any time of the year."

So what we're talking about there is the cradles within the Boatyard but the aft, back end of the boat, if I can use that term, sticks out over the reserve by one inch or 10 inches or three feet or whatever it might be. So it's in the airspace. The second one was, "As a small portion of the adjacent boatyard's turntable encroaches onto Sec 2…" which is the reserve, "… boat cradles that are located on any part of the turntable but that do not otherwise encroach onto Sec 2 may utilise the turntable at any and all times of the year, and boats placed on such cradles may be repaired or maintained at any time of the year."

Now you'll see, possibly you can see from those plans we've looked at, but we'll see on the way through, that it's a big turntable. There's a part of it, a small part of it is in fact, encroaches on section 2. It's a big turntable because to haul a boat up a hill, because it is a hill, out of the water takes a fair bit of

power and grunt and, so what this is doing, it's stepping down, it's saying, well the first situation we've got are boats on cradles entirely within the Boatyard but they stick out in the air. The second situation we've got are boats entirely on a cradle on the turntable but the turntable itself is partially within section 2, and saying, well you can repair those boats, maintain them at any time. Then the third one, which became the really controversial one in the Court of Appeal, and we do need to talk about, is (c), "When boats which by virtue of their length or configuration cannot be moved so that they are entirely within the adjacent boatyard property, are unable to be placed on cradles located entirely within the adjacent boatyard property in accordance with clause (a) above, and are not located on the boatyard's turntable in accordance with clause (b) above, such boats may be placed on cradles located within that part of Sec 2 described as 'Area A'…" that's that area I took you to, "… and such boats may be repaired or maintained for an aggregated period of no more than 60 days in any 365-day period commencing on or after the date the easement is registered."

That's where the 60 days, as far as I've seen Sir, that's where that first pops up. So you've got a, we'll have to talk about this in interpretation terms subsequently, but you've got a gradation of first, where the cradles are all on the Boatyard site. Secondly where the cradles are on the turntable and thirdly, a situation where you might have a cradle which can't, which is needed that's not on the turntable and not on the Boatyard site and one of the issues, or principal issue is does that mean that the boat is on the Boatyard site, but it's the rear end, if I can use that, the back end, the stern of the boat, and which also requires support which may require a cradle, which is off the Boatyard site and off the turntable site, but on the lower part of the slipway, and if you think about the situation, if you've got, you can get roughly a 30 foot boat on the Boatyard site. If you've got a 50-foot boat it's going to be sitting on two cradles, we would say, one which would be on the Boatyard site and one which would be at the aft end of the boat, otherwise if you don't have a balance, the longer the boat, it's going to fall over. One way or the other it's going to nosedive or tail dive. But the Court of Appeal took the view,

which we'll have to come to, that the larger boat will be all on, not on the turntable, not on the Boatyard site, all on the lower part of the slipway and –

ARNOLD J:
It's only allowed to be on A isn't it?

MR GALBRAITH QC:
Yes.

ARNOLD J:
Because you can't do any work between the bottom of A and the high water mark.

MR GALBRAITH QC:
Yes.

ARNOLD J:
And A is only about 10 metres.

MR GALBRAITH QC:
Yes. The point I was going to make, Sir, later on was you've got a 50-foot boat, it's got to be on the Boatyard site because it hasn't got any chance of being simply on the lower site. It can't be.

GLAZEBROOK J:
And if it was only a 10-metre boat then it wouldn't fit within condition (c) at all because it would be able to fit in the Boatyard, is that the point?

MR GALBRAITH QC:
Yes. But the Court of Appeal only said that was the better view, but I, with great respect, think it's the only sensible interpretation of these conditions.

WILLIAMS J:

Well they were talking about the situation where there are boats stacked on the dominant tenement and so a 20-foot boat gets put in the slipway area seaward of the boundary because it just can't fit. Is that not realistic?

MR GALBRAITH QC:

Well that was the Society's argument, Sir, in front of the Court of Appeal. The Court of Appeal said that the better view was no, it's got to be the length of the boat which counts, not how many are stacked on the Boatyard site, otherwise of course you could have a boat three foot long because you've stacked up the site and you'd stick that somewhere down the slipway which doesn't make sense.

WILLIAMS J:

What I don't have a sense of is the work throughput at this place.

MR GALBRAITH QC:

Well it's a jolly sight less now Sir obviously with those rails removed, but my understanding, there's no evidence I don't think on this, it's one of the problems in this case.

WILLIAMS J:

I couldn't find any.

MR GALBRAITH QC:

And I do want to say something about that, but from the Bar I can tell you what I've been told, and it's –

WILLIAMS J:

Well, I'm not sure that you should do that. If there's no evidence there, there's no evidence there.

MR GALBRAITH QC:

Right, there isn't any evidence Sir except that you'll see, I'm not sure it's in this resource consent, you'll certainly see somewhere where it's said in one of the documents that this is a small operation and we only have to go and check out the discharge issues once every six months because it's not a lot happening. So it's, that's the best I can give you from the documents.

You'll see, just the point in little (d), just the point that His Honour made to me, "That no boat cradle or part thereof may be positioned on any part of the slipway below the seaward (eastern)… 'Area A'." So there's a constraint there, then little (e), "To enable that the Far North District Council to monitor compliance with the 60-day… boatyard's operator shall continue to keep operational diaries recording the use of 'Area A' for the repair and maintenance of boats, and such diaries will be made available…"

So that was the Dormer report and Council acted on that, and you'll see that behind tab 4, and there's one thing I do want to draw attention to in Council's decision.

O'REGAN J:

This is the District Council, not the Regional Council?

MR GALBRAITH QC:

This is the District Council, yes Sir. I'm behind tab 4. So in March 2006 they approved the easements which Mr Dormer had recommended, and you'll see A2 on the first page, which is the slipway one, "The movement of boats along the slipway between the adjacent boatyard property and the water." When one pauses for a moment and thinks about it, that's of course what you would expect for the easement because you're trying to get boats out of the water, across the reserve, into the Boatyard, and what this doesn't say, and I will be saying to you that this is important when it comes to this issue about whether you can run a valet service or not. You can't because you can only, the easement is only for the movement of boats between the Boatyard property and the water. You've got to get from the water to the Boatyard

property. You can't go half way up the slipway, have a rest, cup of tea, do some washing down, and then go back into the water, because that's not moving the boats between the Boatyard property and the water, that's only moving them onto the reserve and off the reserve, and that's not what the slipway easement is for and it couldn't be for that because it probably wouldn't comply with section 48(1)(f) if it did which I guess is the point which the Court of Appeal thought it was taking.

Now I think we can, there is then a long history, which we don't have to go into, where there were attempts to get the Minister's consent, the Minister acting through DoC, and that went backwards and forwards and off to attempts to get some Parliamentary legislation for a period between 2006 and 2013. The issue gets taken up again behind tab 8 where after all those toings and froings the Council seek DoC/the Minister's consent to the set of easements which it had consented to back in March 2006, and if we go behind tab 9 you'll see that some were consented to and some were declined by DoC acting as delegate of the Minister, and the ones that are declined are on the front page, 302063, so they declined the concrete washdown area with the discharge containment; the washing down of boats that had been moved to the Boatyard; the erection of screens, the repair or maintenance of boats that were too large; the two-metre easement up the top that ran along the top, and the discharge easements. So they were declined you'll see on page 302064 on the grounds, about the middle of the page, "That the easements are not capable of being authorised under the provisions of section 48 of the Reserves Act 1977."

Perhaps just again by way of background, DoC's position on this had fluctuated over the years. Sometimes they said it was okay, sometimes they said it wasn't okay. When it came to 2013 they said it wasn't okay. Then consent is given to the following easements, so you'll see the ones which are consented to there, constructing the slipway, and then A2 again, "The movement of boats along the slipway between the adjacent boatyard property and the water." So the easement, in my respectful submission, is only to move from the water to the Boatyard property and back to the water

again. Between the adjacent boatyard property and the water. It doesn't allow for this half way house that the Court of Appeal thought it did.

Stormwater conduit drain etcetera, etcetera, etcetera. There's no, I hope I'm right, there's no challenge, and has not been any challenge as I understand it to those easements approved by DoC and so those easements are in place. It's the use easements which have been the subject of challenge.

Then behind tab 10, and we needn't go to it in any depth, there's Judge Kirkpatrick's Environment Court decision in relation to the continued operation of the resource consent. Behind tab 11, and again I don't think we need to dwell on this, there's Council's decision, October 2014, to approve the use by the Boatyard of the uses which DoC had declined to consent to in respect of the easement, and that was challenged ultimately in the proceeding before Justice Fogarty. Then behind tab 12 there's Justice Heath's judgment and perhaps just to draw the Court's attention to paragraph 28 of that judgment. This is the judgment of course about whether there's power under 48(1)(f) to grant an easement for commercial purposes, or these easements, and he quite properly distinguishes between whether there's a power and whether they should be granted and his decision is only in relation to the power issue. He determined that there was power under 48(1)(f) so that put to rest the basis upon which the DoC had declined those particular easements. In paragraph 28 he said, "Nor do I consider that the easements would grant Mr Schmuck illegitimate occupation rights on the reserve. I agree with Mr Browne's submission that, while a limited amount of occupation will occur, that is permissible. What cannot be granted is a right to joint or exclusive possession. That is not sought in this case. The proposed easements (all of which are permitted by existing resource consents) would not give rise to a degree of occupation that would remove the ability to grant an easement."

So that's the land law issue. It was discussed in front of Justice Heath and he did come to a conclusion on that as well as the 48(1)(f) issue. Now Justice Heath, having decided that these easements could be granted, not

that they should, but they could be granted under 48(1)(f) there was then a whole lot of pass the parcel went on between DoC and the councillors as to who was going to make the ultimate decision because by that time the Minister had delegated to local authorities power, not just this power, but there's powers, if I say generally it's also a bit loose, but certainly has powers to consent to matters which he'd come to regard as being local matters rather than matters where the Minister should be involved. But as I say there was a pass the parcel went on until finally Council did reconsider the issue and tab 17 is just the executive summary of a 208 page report which Mr Swanepoel, who was then house counsel for Council, drew up and provided to counsel, and that's just the executive summary, and then the decision is behind tab 18 and the decision is uninformative if you find it at page 303060, other than it shows that the easements that were declined by DoC back in 2013 were now granted – sorry, not granted, were not consented to on behalf of the Minister by the Council.

The easements are themselves then found behind tab 19, and they're the easements which we have to discuss. There's one other document I would like to take the Court to at this stage, and it doesn't look as if the Court of Appeal referred to it, but the management plan was settled in 2014, if I can find my copy of it.

WILLIAMS J:
Give me that year date again?

MR GALBRAITH QC:
It's 2014. If I can find, in case on appeal volume 4. Sorry, it's tab 65. "Combined Council Operational Management Plan Review." You can see why they had to do it now because 2013 the Minister had consented to some of the easements so it was then necessary to put the management plan into place. It sets out on page 302142 the general principles, what it's trying to do. The second paragraph, "To affect at all practicable times and in the best practice method, a system of adherence to the above principles of consent," et cetera. "Compatibility between land use and occupation of public and

private land." Then across on page 302143 under a heading "Factors of operational management. There are nine factors of management…" the first one little (a), "The slipway operations and maintenance of the boat wash-down area 'A' including notice of any repair or maintenance work on vessels in or over-hanging that area, but above 10 meters of the MHWS/CMA; that is unable to be moved entirely within the consent holders site, by virtue of their length or configuration." Set the parameters, et cetera, of use and notice provides for.

Across the page, 302144, "Procedures for factors of operational management: a) Factor 3(a); wash-down area 'A'… will be cleaned from the previous operational day and left broom clean… any excessive debris… contained by 2 metre high screening along the boundary of area 'A' depending on wind strength and direction, where either applies. These operations may include washing, scraping, chipping, both wet and/or dry sanding…" et cetera, et cetera. "… in the preparation of a vessel for maintenance or repair prior to being relocated into the boatyard proper…" so it's the same obvious intent as the slipway condition, it only contemplates that the works done, "… prior to being relocated into the boatyard proper…" because the slipway is only for the purpose of movement from the water to the boatyard, not for dollying around going half way up and back again. So –

GLAZEBROOK J:
Can I just check your argument therefore is that the, what's actually in the easement should be interpreted in light of these management plans and resource consents?

MR GALBRAITH QC:
Yes and I'll explain why that is, because you'll see when we have a look at the easement, the easement says it's got to be in accordance with the provisions of any relevant resource consent and the resource consent provided for the management plan so the three, in my respectful submission –

GLAZEBROOK J:
So they're all linked indirectly?

MR GALBRAITH QC:
They're linked so one has to look at them to – and any third party who was going to make any sense would look at all three. So I don't think we're into the *Westfield*-type issue.

WILLIAMS J:
How often is the plan reviewed?

MR GALBRAITH QC:
Every three years Sir. There is now a 2019 one, but I'm sorry it's not in the – sorry, a 2017 one but it's not in the bundle. I thought it was '19, I think it is '19, yes.

WILLIAMS J:
It's not in the bundle?

MR GALBRAITH QC:
No, it's not in the bundle.

WILLIAMS J:
Did it change?

MR GALBRAITH QC:
My understanding is no but –

WILLIAMS J:
If you're right the easement can be changed by amending the management plan.

MR GALBRAITH QC:
The easement, well, yes, but only if it's consistent with the easement and the resource consent.

WILLIAMS J:

Yes, but it has to be –

MR GALBRAITH QC:

Well you couldn't change the –

WILLIAMS J:

When you say the easement has to be interpreted by reference to the constrained management plan, if those constraints are moved you say, well, that's okay because it's consistent with the easement, then your logic is circular.

MR GALBRAITH QC:

No, Sir, with respect, because the easement will dictate, and the easement of course has that provision saying that the slipway is for the purpose, effectively, of moving boats from the water to the Boatyard. That's what it says. So that's in the easement.

WILLIAMS J:

Right, so you say the easement is the true constraint and the management plan is consistent with it?

MR GALBRAITH QC:

Yes, the management plan, all I'm saying is it confirms the –

WILLIAMS J:

Right, I see.

MR GALBRAITH QC:

Certainly what the parties believe the easement was doing. That's really the only reason I'm emphasising this being relocated business.

WILLIAMS J:

It might be useful to see that 2019 plan.

MR GALBRAITH QC:

Yes.

WILLIAMS J:

That's a public document now anyway so.

MR GALBRAITH QC:

That's right, and that's perhaps the other thing I should say about why we can look at these things, is they are public documents so it's not like we've got something hidden away as they had in one of those English cases that nobody ever had seen. So it's a bit different. Then it goes on, you'll see the highlighted black talking about the A, B, C thing. "… **that cannot be moved by virtue of its length and configuration entirely within the boatyard site, and/or ancillary maintenance activities…**" Perhaps just note, this is not necessary –

GLAZEBROOK J:

Where's the entirely, sorry?

MR GALBRAITH QC:

I'm sorry Your Honour. Just further down that little a) about the third line up from the bottom, "… **that cannot be moved by virtue of its length and configuration entirely within the boatyard site**…"

GLAZEBROOK J:

Right, thank you.

MR GALBRAITH QC:

And just, this is not particularly relevant to interpretation, but just because it has tended to come up. If you look across the page on 302145 little e), this is about screens and containers. "… screens and containers will be used to filter emissions at all practical times to one area demarked as the paint cleaning station. Screening will also be erected, when necessarily…" et cetera, et cetera. The third sentence there, which is the point I made before, "To a

large degree, the effects of these operations, is self managing due to the on-shore wind-funnelling effect at this particular site in relationship to the landforms of the slipway." So just the way this site sits, the wind tends to be onshore taking it away from the marine area, and then perhaps also just to look at little f) for a moment, "… the boatyard has always undertaken to keep the walking track and public land access safe and open at all practical times during the daily operations of the slipway. (Screening and/or impermeable surfaces can be implemented) when needed to control any over-spray to the public land…" etcetera. "The boatyard has always secured all un-occupied machinery and/or unused equipment from any unauthorised movements during the hours of darkness." And I just note that because you'll recall the Court of Appeal saw some problem about no definition of what materials could be taken onto the easement area, which again I'll have something to say about.

Then across on page 302147, and this was the matter I was referring to, Your Honour Justice Williams, under paragraph 6, "Procedures with regard to maintenance of systems." You'll see, "Due to the limited number of vessels hauled at this site…" so that, I think, is about the best we've got, so they say, "… the containment systems only need to be monitored at a six monthly period."

WILLIAMS J:
Right. So those dinghy racks alongside the slipway, they belong to the yard, but they're not on the yard site?

MR GALBRAITH QC:
No, as I understand it, and they're subject to a separate resource consent also as I understand it, subject to correction.

WILLIAMS J:
Yes, but they're in area Y or Z aren't they?

MR GALBRAITH QC:

They're in area – so I'm told they're on the main part of the easement, but can I just check that and come back on that Sir? Right, just a few pages on from where we were, 302150…

WILLIAMS J:

148 there refers to them, you see that plan there?

MR GALBRAITH QC:

Yes, and that's within, so that dark area there is the – I'm very cautious about what I say –

WILLIAMS J:

Quite.

MR GALBRAITH QC:

Where these easements, the bounds are. I think that's within the bounds of the easement.

WILLIAMS J:

Yes, but they belong to the Boatyard.

MR GALBRAITH QC:

But they belong to the Boatyard and there's some restrictions somewhere I've seen about their use –

WILLIAMS J:

I see in the management plan they're only used by the Boatyard and can't be a public rack.

MR GALBRAITH QC:

That's right, yes, and there were –

WILLIAMS J:

But they're permanent structures in the easement.

MR GALBRAITH QC:

Yes. Just to explain perhaps a little bit about the background. There used to be a whole swag of dinghy racks somewhere in that area, a lot of them. They've been moved, or you can see on the plan at 302148, they've been moved down the other end on the reserve. Just as there used to be down there, it's not as far as the dinghy racks, there was an old slipway. The slipway originally was right down that other end and the evidence before Mr Dormer was that boats were – what happened in the old days with cleaning boats was, wouldn't happen today, put it that way.

Now the Court of Appeal judgment, as far as Mr Schmuck is concerned, fine on 48(1)(f), it confirmed what Justice Fogarty and Justice Heath had said, that you could have these easements under 48(1)(f), I'd have to look at that, but concerning, of course, for the Boatyard. The Court held that for land law reasons, not for section 48(1)(f) reasons, that these easements, these matters couldn't be granted as easements, and it came up in a rather unfortunate way because you will have seen already it was considered by Justice Heath back in 2014, and footnote 23 just maybe worth looking at in the Court of Appeal's judgment, is where the source of it is identified.

GLAZEBROOK J:

What's the page number?

MR GALBRAITH QC:

Good question, 101109, footnote 23, which if one looks up above you'll see it's just before paragraph 54 saying, "Both issues involve revisiting the earlier decision of Heath J. We are not precluded… judgment was not the subject of appeal. This is because the Society is not bound by that decision…" and same people but they weren't there at the time 2014. When I say they weren't there, they weren't in court, but they were certainly around.

GLAZEBROOK J:

I just signal though, I have a bit of an issue in terms of, which I know we're coming to, but possibly in slightly broader terms then are dealt with in the

submissions, in terms of the fact that Justice Heath's judgment seems now to be being challenged in a backhanded way.

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
But I think if that becomes of any particular moment it might be that the Court would need further submissions on that issue and also on the indefeasibility issue, which again has been only dealt with very briefly in the submissions, so I just signal that – and of course it may not be necessary to go into any of those issues, depending upon how the other matters pan out, but I thought it was worth signalling at this stage that those were certainly two issues that I was concerned about, and that the Court thought it may need further submissions on.

MR GALBRAITH QC:
If those issues are going to be determined, yes, I agree entirely with Your Honour, you would need further submissions. It wasn't argued in the Court of Appeal, and you'll see the Court of Appeal said, not a problem, they weren't there. But there's quite a bit of law on that issue, and I'm not putting this pejoratively, but the personnel who drive the present, Mr Every-Palmer's present entity, have been there for 20-odd years or so it wasn't like something happened that they didn't know, but the Minister of course argued the position that they would otherwise have argued and you can understand why they might sit on the sideline, it's a lot cheaper to sit on the sideline. So if that is an issue, Your Honour, you would need more, and if I can say on the other issue I think also, I think, and again there are reasons why it didn't come up, which we probably needn't go into.

GLAZEBROOK J:
We can understand how things have got to this stage but I thought it was just worth signalling that we're not expecting that to be dealt with definitively today.

MR GALBRAITH QC:

Thank you Your Honour, I'm grateful. That's very helpful. But you'll see under footnote 23 what happened was – and while footnote 23 starts off saying, "This first issue was pleaded," I've gone through the statement of claim and I'm dashed if I can see, it certainly wasn't pleaded in any way that I would have recognised it. It wasn't argued before Justice Fogarty. It wasn't in any submissions before Justice Fogarty. It wasn't in the notice of appeal as originally filed. It first, as far as I can see, emerged in the amended notice of appeal. Yes, there it was. But it wasn't in the issues for the Court of Appeal. It wasn't in the written submissions and it wasn't until Her Honour Justice Winkelmann, as is really recorded here, raised it somewhere towards, as I understand, the end of the day's hearing that it got some life and the Court then said, well each party can file further submissions on that issue, which was done, but there wasn't a further hearing, and I think that's unfortunate, because the parties never got to engage with the Court on the issues which were raised, and so I'm – I'll put it this way. I'm understanding of how it happened, and I'm not wishing to make any substantive point about it, but the difficulty was that the parties didn't engage in front of the Court, and it has led to some issues that the Court rested in part its decision on, that we would say would have benefited from engagement in, for example, the question which His Honour Justice Williams asked me about the 60 days. The idea which the Court of Appeal take up that 60 days times 24 hours a day - it's not in the Society's written submissions, I certainly can't discern it there, and it certainly wasn't taken up in the written submissions from Mr Schmuck and I'm sure if it had been engaged in with counsel for Council, and with Mr Schmuck's counsel, the Court would have been told that that wasn't an interpretation that any party contemplated and I think commonsensically that makes sense.

So unfortunately a few things came through. Another one is this valet service. I've had a look at the written submissions that Mr Every-Palmer's clients filed. They're perfectly appropriate submissions. They raised questions about uncertainty and that, but they certainly don't suggest there's a valet service or that that clause could be interpreted as a valet service, so that was never

engaged on by the parties with the Court. It emerges for the first time in the Court's judgment and as you will know from our submissions we say, well one it's wrong, it's a matter of interpretation, but two, we say factually it never was intended and never has been. Then my learned friend for the Society quite rightly says, ah, but there's no evidence that it was ever engaged, and of course there wasn't, it was never pleaded, because this issue, the land law issue was never pleaded in the first place, and so the two things that I do want to say is that can the Court, with great respect, be a little bit cautious about conclusions which the Court of Appeal expressed because they weren't necessarily engaged in by the parties with the Court and can they also, with great respect, can you be a little bit understanding of the fact that there isn't evidence on some of these matters because the issue was never pleaded in the first place back in the High Court so was never engaged in evidence and that's placed Mr Schmuck, and I think counsel, at some disadvantage. So there were factual assertions in the Court of Appeal's judgment, which at least on my instructions, and I've also gone through all the affidavits, I can't find a basis for. In paragraph 7 of the Court of Appeal judgment is one such, and paragraph 7 in my submission is something which the Court of Appeal have taken up in their determination in their interpretation of the easements, but you'll see paragraph 7 refers to the fact, it refers to the valet maintenance, "If they are just to be cleaned, they are then returned to the water." Well, I can't find anything in the affidavit evidence as to that.

GLAZEBROOK J:

Well wouldn't you say in any event isn't your primary argument that even if factually that's the case it's actually not - if factually that's the case it wouldn't be authorised by the easement and would therefore be illegal and that would be a matter for whoever deals with those sort of illegalities to deal with, not a matter of interpretation of the easement.

MR GALBRAITH QC:

Your Honour is completely correct, and so I don't want to dwell or go on and on on this, but just to explain why we might be a bit short on evidence and

some things might be being said that might better have been said in the High Court.

So putting that to one side, can I just say a couple of things generally about the approach before we get into more specific. You'll be aware from reading the judgment that the Court of Appeal appears to have placed some considerable reliance on the 1952 judgment of Justice Upjohn in the UK in *Copeland v Greenhalf* [1952] Ch 488. Apart from the fact that that's a problematic judgment, and I will come and say some more about it, I just wanted to say this Court already has had regard to the developments which have happened since 1952 in relation to covenants in particular, but also easements, and the *Escrow Holdings Forty-One Ltd v District Court at Auckland* [2016] NZSC 167; [2017] 1 NZLR 374 (SC) case, which I think is in our bundle behind tab 4 is one such in December 2016 where at least three members of this Court were on the Court and looking at the question of covenants, and His Honour Justice Arnold I think wrote the judgment, and if one just looks at the legal context which starts on page 388 of the judgment where His Honour goes back to *Keppell v Bailey* back in 1834, and then talks about there's a lot happened since that I can again be a bit - in this area.

WILLIAMS J:

What paragraph did you say?

MR GALBRAITH QC:

Sorry, the legal context starts at paragraph 27. Behind tab 4, page 388. What *Keppell v Bailey* was, was an early example of an idea that there could be nothing new under the sun, again if I can put it that way, which isn't an idea which retains attraction and so His Honour Justice Arnold writing for the Court discusses that in paragraphs 28 and 29. In 29 saying, well that was understandable back in those times because, "… there was no effective system for the registration of interests in land …" but as I say things have changed since then and traces through the historical development and then looks at, across on paragraph 36 and 37 what we now have in our legislation, and 38, and so says in 39, "The short point to be taken from this brief account

is that judicial and statutory developments over time have given greater recognition to the role of covenants in relation to land. As a leading land law text observes: "While easements remain distinct forms of legal and equitable rights, the tendency of modern statutory provisions has been to bring easements and covenants closer together." That's when you, you now can register positive covenants and, which you never could do in the old days, and you can have covenants in gross etcetera. With easements there's a whole lot of changes. Easements in gross, that was, could never do that. You can have easements where it's both the grantor and the grantee are the same party, those are limitation as to what its effect might be. Easements can be varied by the Court. Prescription is out. In the old days you could have easements by prescription. By statute, that's out now. So there's been, certainly since 1952, and very certainly since a lot of the very old cases on easements, the context has changed dramatically. So, I say with respect, one has to be cautious about relying too heavily on earlier cases, and some should definitely be archived.

The second general point I wanted to make is that in relation to the approach which, in my respectful submission, the Court should take to an issue such as this where you've got a grantor and a grantee trying to create an easement and in my learned friend's bundle of authorities there's a relatively recent decision of the UK Supreme Court in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2018] 3 WLR 1603, which is behind tab 8. This came out, I think it was referred to in certainly in some submissions in the Court of Appeal, but only at the Court of Appeal level. This decision came out subsequent to that and there are a couple of things which I think it's worth looking at in it, but the matter I just want to draw your attention to at the moment is the comment at paragraph 28, or perhaps just note it to the Court, it's Baroness Hale who is the, Lord Kerr, Lord Sumption. Lord Carnwarth, he dissented, and Lord Briggs, and Your Honours by the sound of it have looked at the judgment. It was certainly a step forward in the generosity of the easements which were accepted here because they were easements in support of a timeshare development which allowed for rights,

easement rights, in respect of using a golf course and internal facilities such as a swimming pool in the servient tenement.

At paragraph 28 – and that was really the fundamental issue which was being grappled with, along with the issue that those rights of enjoyment of the golf course, swimming pool, etcetera were rights that in themselves had a value. In other words, if you're playing golf, well, you play golf because you like playing golf and it's got a value itself, so one of the arguments was, well, it's not appurtenant to the timeshare because you go and do it because you want to play golf, not because it's creating any benefit in respect to the timeshare. So the Court had to grapple with this new development. And in paragraph 28 they refer to – or perhaps just to read it on page 182 – "The main authorities relied upon by the appellants in support of their submission," there was a perpetuity issue which we needn't bother about, but perhaps just to note the Court's comment about future easements because both here and in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620 (HL), which we'll hopefully look at briefly, there's a recognition that you can have easements for the future. The use may not in fact be at all in existence at the time the easements are granted or the use may develop over time, and so one of the arguments here was, well, what happens if there's further developments, they change the dimensions of the swimming pool or the golf course or whatever else there might be or there's something else which comes up as being a better form of squash court or that, and the UK Supreme Court were quite happy that you can have an easement which gives you the benefit of future developments.

But the real reason I want to just refer to this is the last – so you'll see that at the foot of paragraph 26, and they talk about significant alterations and changes – sorry, paragraph 25 is the one I meant to go to – so you see in that paragraph they say, "Construed against that contextual background," so they've been through the whole context, "the following points emerge as aspects of the true construction of the facility to grant the '81 transfer. It's abundantly plain that, whether successfully or not, the parties intended to confer upon the facilities grant the status of a property right in the nature of an

easement rather than a purely personal right," and that was an issue because of the way the wording was. "It was expressed to be conferred not merely upon the transferee but upon its successors entitled, lessees and occupiers of what was to become a timeshare development and multiple occupation. That being the manifest common intention," in other words to create an easement, "the Court should apply the validation principle," and I won't try the Latin, "to give effect to it if it properly can," and that's a principle we've referred to, the *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* [2002] 2 NZLR 433 (CA) case is another example, but that is a principle which we have in all our interpretation approaches, text in the light of the purpose, contract interpretation, it's always in the trying to ascertain what the purpose is, and if the purpose is to create a grant of an easement then the Court should try, within legitimate bounds, to validate rather than invalidate. The Court's object in life is not to knock things over but is to try and support. And you'll find also – and I won't take you to it – but in our authorities, tab 11, at page 228 there's a very similar statement from another UK case in the context of easements saying just this, saying with prescription it may be a bit harder because with prescription you can't say that both parties intended something, because prescription is something which is effectively imposed by passivity very often, but where you've got both parties intending something and a grant, then the Court should endeavour to give effect to that grant, and in my respectful submission that's the way to approach what we have here.

So having said all that by way of background I was at one stage thinking I'd go off into *Copeland v Greenhalf* at this stage, but I think it may be better just to deal with it as we come along in our submission and I may not need to say quite so much.

So there's the two issues, we've got 48(1)(f) and there's the easement issue and I think I may reverse the order we've got in our submissions and actually start with the easement issue because that's really what I've been talking about to date and we'll come back to 48(1)(f). And we pick this issue up in our submissions on page 15, and I've already referred to *Fletcher Challenge* or

that context of - we try to validate; I don't think – in paragraph 9.5 we'd referred to the *Westfield Management Limited v Perpetual Trustee Co Limited* [2007] HCA 45, (2007) 233 CLR 528 (HCA)/*Green Growth Trust No 2 Trust v Queen Elizabeth the Second National Trust* [2018] NZSC 75; [2019] 1 NZLR 161 (SC) type issue that His Honour Justice O'Regan and Justice William Young discussed in *Green Growth,* but because, as I said before, the easement itself refers to the resource consent which refers to the management plan, I don't think, with respect we're stuck with the position that the Court can't look at those or an issue whether the Court can look at those for the purpose of interpreting the easement but –

GLAZEBROOK J:

Well, I think it was recognised in *Green Growth* that if it did refer to another document then that other document could come in, especially if it's a public document.

MR GALBRAITH QC:

Yes. It's an interesting –

GLAZEBROOK J:

Sorry, I'm not sure whether *Green Growth* said especially if it's a public document, but that must be right.

MR GALBRAITH QC:

Well, I – with respect, yes, in my respectful submission. It's an interesting issue in just how far it goes, and no doubt this Court's going to end up dealing with it at some stage.

ELLEN FRANCE J:

Well, just in terms of that, I think it is clear there that Justice Glazebrook agrees with Justices William Young and O'Regan on the point of the approach to extrinsic evidence.

MR GALBRAITH QC:

Yes.

ELLEN FRANCE J:

Well, if you look at the judgment, in her footnote she refers to the paragraphs with which she does agree or not agree, and I think it's apparent from that that there is agreement with…

MR GALBRAITH QC:

Without disagreeing, if I can say that, I still think the metes and bounds of it is an issue that will depend on the facts. But I think the facts –

GLAZEBROOK J:

Well, the argument about the extent to which – it certainly doesn't say you can't look at extrinsic material and it did issue the approach in Australia in respect of that, it did say it was contextual.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

But I think it did actually specifically refer to other documents referred to in the easement itself, from memory.

MR GALBRAITH QC:

Yes. Well, I've had an interesting argument in front of Justice Edwards on that subject so when that judgment comes out, you never know, it may end up coming up here again, in relation to a quarry.

GLAZEBROOK J:

Well, it may be Justice France will be looking smug at the idea that we shouldn't be making these sort of general pronouncements. On the other hand, people do like us to make general pronouncements that provide some

assistance but obviously at the margins always those general pronouncements are subject to the particular circumstances.

MR GALBRAITH QC:
Yes, indeed. Well, I think Don McMorland described it as being a good way – in any case, a good indication for it or something along those lines.

So taking up this issue very quickly – the washing down issue at 9.7. So as you'll recall from the Court of Appeal judgment, they interpreted this easement which applies over X, Y and Z as providing for the ability to bring a boat out of the water, wash it down halfway up the, where you've seen, above the sump, and then put it back in the water again, and that would be described - that's a valet system.

Now the Court's already heard effectively what I'm going to say about it. The first thing is that the slipway easement doesn't allow for that, the slipway easement is only for the movement of boats between the water and the Boatyard, and so that's what the easement's granted for, it's not granted for taking it halfway up, washing it down and dumping it back in the water again.

In my submission, when one comes to look at these easements one should try and interpret them coherently as a whole because they're obviously, they do fit together, they fit together in relation to an activity which is going to be, if the easement is valid, is going to be operative on the ground for a considerable time. And so where you have the slipway easement saying its for moving from the water to the Boatyard, and obviously back from the Boatyard back to the water again, then one shouldn't interpret another easement if it can be literally interpreted in the way the Court of Appeal can, to be inconsistent with what I would have thought was effectively the driving or primary easement which was the slipway and the purpose of the slipway.

ELLEN FRANCE J:
Sorry, so why do you say that's the primary easement?

MR GALBRAITH QC:

Because without the slipway nothing happens. If you don't have the slipway you don't get out of the water, so it's no slipway, no boatyard, no nothing. So that's why I, I'm really speaking factually, Your Honour, about it.

And we do have a situation here where there is definitely a shared purpose of the grantor and the grantee because the grantor has granted the easement, so the intention was to grant, no doubt, a valid easement. The interpretation which I'm suggesting accords, of course, with the management plan, that's what the management plan says, it's for doing washdown prior to moving to the Boatyard site, and effectively it's really a condition of the washing down easement, that that is what is done. Now I don't think there's anything more sophisticated that one can say about this issue. There is no evidence, because it wasn't ever raised, it wasn't pleaded, and so it's a question of looking at the other easements, in my respectful submission, and trying to interpret this easement consistently with that. Is that a suitable time, Your Honour?

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.50 AM

ARNOLD J:

Before we get started could I just ask something that I'm not clear about. If I own a 10-metre yacht and I want to get the antifouling redone, so it's going to come up the slipway, get into area A, and it'll be washed down to get all the growth off and everything. Now where will the antifouling be scraped off? Will that take place on the yard or in the area A.

MR GALBRAITH QC:

My understanding, I don't think this is in evidence either Sir, but my understanding, having been up there, is that it'll be scraped down in that, in area A. You'll see in the, I can't' remember if it's the resource consent or the management plan, it requires by use of the term, and the term used is debris,

to be gathered up in cloth, etcetera, and disposed of, kept out of the marine area because, as Your Honour will know better than I, there can be material which just doesn't get washed away so that's got to be cleaned up out of that area, and you'll remember that the management plan requires broom cleaning of the area every day, but the water will run, because it's downhill, will run down into the sump so that's where that'll go.

ARNOLD J:
So then if the new antifouling is put on the boat, on the hull while it's in area A, it could go straight back into the water without ever going into the Boatyard?

MR GALBRAITH QC:
One, I'm not sure if it does get put on in area A, because that's meant to be a washdown area Sir. Two, the evidence is not there, but my instructions are that isn't, it doesn't, the Boatyard doesn't run a valet service Sir.

ARNOLD J:
That's not a valet service. I mean that's getting your anti-fouling redone and you may get it at a time when you get some other work done on the boat, but you may not. It's just something, it's part of the regular maintenance of the boat that you do every couple of seasons.

MR GALBRAITH QC:
You can't carry out repairs and maintenance in that area unless you're too big to go into the Boatyard. So if you had your, with great respect, your 30 foot, not Mr Farmer's 50 something foot boat, while it's true it could, you would be able to go into the Boatyard so unless you interpret –

ARNOLD J:
Right, so the answer is you'd scrape everything off in area A, but in terms of putting on the new anti-fouling you'd have to pull the boat onto the Boatyard, do it there and then back into the water.

MR GALBRAITH QC:
Yes Sir.

ARNOLD J:
Okay.

MR GALBRAITH QC:
So it's just a washdown area and that's the only, that's all the easement allows for. What I should have said, but it will be obvious to Your Honours but I will still say it, the judgment that the Court of Appeal has taken was because the boat didn't go on the Boatyard, therefore that service, which we say doesn't exist, didn't accommodate the dominant tenement. Now there are issues about how much accommodation one needs in *Regency*, for example, if one just looks at paragraphs 36 on, discusses that I'm content to deal with the case on the basis that the Court of Appeal did that if it didn't go on the Boatyard then it wouldn't be accommodating the dominant tenement, but because our argument is yes, it does go on the Boatyard, and so it does accommodate the dominant tenement, and the Court accepted that would be so provided the boat was washed down and then moved on to the Boatyard. It says that could be a valid easement.

We're then at easement A5, which is the screens one, and the Court of Appeal's position was because it didn't, you'll recall because we looked at some of those conditions, that there have to be screens if necessary if the wind's blowing the wrong way, so it's a conditional requirement and the management plan and the resource consent don't specify the dimensions of the screens. The Court of Appeal said because it wasn't specific in the easement as to whether they were going to be attached to the cradle or to the ground, therefore it wasn't sufficiently certain and therefore it couldn't be a valid easement. With the greatest respect, if you can have easements for future developments, *Regency* makes that very clear, you don't know what they're going to be, it does seem a, it seems to require a level of detail which one doesn't find, I certainly haven't found in any other case authority, and the Courts certainly didn't refer to any, the easement is for the purpose of

being able to erect screens to comply with resource consent/management plan, and it seems, in my respectful submission, no reason why the Court should put up an obstacle to that when the grantor and the grantee have thought it appropriate, and where there is such monitoring, as you have seen through the resource consent conditions and through the management plan conditions, where effectively the Councils can change their mind at the drop of a hat if they think that something's being done which isn't environmentally appropriate. So difficult, in my respectful submission, to see why, in terms of the law, that one can't have an easement for a purpose. A lot of easements, in fact, are for purposes because you don't know until the wall falls over what you might have to do to fix it. So you can well have an easement to repair, for example, or for the purpose of repair, but you can't specify the repair because you don't know what the problem is.

More significantly is easement A6, which is the one about the oversized vessels, and there's two issues here. The first issue is the same issue as with the washdown. It's that the Court interpreted the little c) as allowing for oversized boats to be accommodated neither on the Boatyard nor on the turntable and cradles on the turntable or the Boatyard and therefore if accommodated solely on the lower part of the slipway the Court of Appeal's view was that didn't accommodate the dominant tenement and therefore couldn't effect a grant of an easement.

If one goes back to, I'm trying to hurry through this a bit, if one goes back to the key documents and Mr Dormer's advice, which was incorporated into the 2006 Council decision - it's clear that what he was seeking to have drafted was something which didn't expand the scope of the operation of the Boatyard but went through the steps of what could happen with an oversized boat. So the first thing that could happen is you'd get an overhang. The second thing that could happen is if it's on the cradle, on the turntable, and the third thing could happen, if the boat's 50 feet, then it's going to need two cradles, one fore and one aft, and that, in my respectful submission, is how that, how condition (c) should be interpreted, because it uses the word "entirely". It says, where they can't **entirely** be – perhaps let's look at the wording in the

easement. Condition (c) is, “Where boats which by virtue of their length … cannot be moved so that they are entirely within the adjacent boatyard property, are unable to be placed on cradles located entirely within the…” dominant tenement, and with great respect that does, I think, more than implicitly suggests that they are in part within the dominant tenement and in part because they can't entirely be within the dominant tenement therefore may have a cradle which is further towards the water than the turntable, and if one reads it with a) and b) one can see how the easement is trying to deal, to step through the various scenarios, stopping short of, in my respectful submission, the scenario in which the Court of Appeal engaged or interpreted, which was that you could have the whole of the boat, all of the cradles, everything, below the turntable towards the sea, and that, with respect, if one reads again coherently in context, is not an available interpretation because it’s a stepped analysis, a), b), c), and one should take it as stepped for each particular factual circumstance, the factual circumstance where they can’t be entirely within the dominant tenement, is that which it is intended to deal with and of course the purpose of that condition was to confine the activity so it didn’t expand from what there was previously.

So, for coherence, we also point in 9.28 to conditions 4 and 9, because condition 4 provides for, prohibits materials, etcetera being left on the reserve, except while repairs and maintenance are being carried out, and condition 9 prevents boats being left on the slipway, other than as provided by condition 8. Now again, if one’s being coherent it’s very, in my respectful submission, clear that the drive of the easements, and one has to read them, in my submission, together, is to limit the activity being carried out on the reserve part of the slipway and that one should give due weight to conditions 4 and 9 and the evident purpose there, which is to keep boats off the slipway, don’t allow them to be stored on the slipway, and I couldn't help but think if I’d turned up in a Court, doesn’t have to be this Court, and a boat had been stored on that lower part of the slipway for three months with wraps over it, not being repaired, not being maintained, not being anything, and I tried to persuade the Court that that was all permitted under the easement, I do think I’d have a struggle, in fact I’m not sure I’d undertake the exercise. But if one

thinks of it, in reversing the situation, in that way it does, in my respectful submission, suggest that coherently that is not what's contemplated by condition C.

Which then leads on to this issue about is there too great an uncertainty, is there joint occupation, is there exclusive possession by the Boatyard of these areas X, Y, Z, et cetera? And that's where the Court of Appeal placed some reliance on the 1952 case of *Copeland v Greenhalf*, and if we can just quickly look at that, it's in the appellant's bundle of authorities. I said before it's a problematic case and I'll explain what I mean by that in a moment, but it was a case – it's behind tab 3 in the appellant's bundle – the Court will have looked at it so I won't dwell too much on the facts but…

GLAZEBROOK J:
I'm not 3, so…

MR GALBRAITH QC:
Tab 3, yes, Your Honour, in the appellant – not in the appellant, sorry, in the first respondent's bundle.

GLAZEBROOK J:
In the respondent's, okay.

MR GALBRAITH QC:
Yes, sorry. So there was an orchard on one side of the road and there was what they describe as a wheelwright on the other side of the road, and there was a time when wheelwrights repaired wagons and things like that but, as was recognised here, they've come to repair trucks as well. There was a 150-foot strip buried in its depth on the orchard side of the road and over a very long period of time the wheelwright business used that strip – and I think I'm putting it fairly – 'as if it was its own'. It put vehicles on there, it repaired them when it suited them, it left them there when it suited them, it had no controls whatsoever, but when somebody wanted to exit the orchard it did try and keep a gap so that they could exit the orchard but that wasn't derived from any

agreement or right of that, it was simply courtesy which, you know, quite proper courtesy, and that went on for 50 years or more, and then there came to be a parting of the ways and there was an issue about whether there was an easement by prescription, and in fact His Honour Justice Upjohn said if it had come down to if he'd thought the easement was valid he would have actually said it was created by prescription because of the passivity of the landowner. So you had a situation, landowner doing nothing except driving on and off the orchard and the wheelwright business doing everything without any controls over it at all. And it's possibly not surprising that His Honour Justice Upjohn decided that went at least a step too far, and you'll see that on page 498 of the judgment numbered 15 at the top right-hand side of the bundle, and about a third of the way down the page His Honour says, "I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint use of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. I say nothing, of course, as to the creation of such rights by deeds or by covenant. I am dealing solely with the question of a right arising by prescription," and, as I said, he said he probably would have held, if it had been valid, that it had arisen by prescription, so it shows a completely passive position by the owner and a completely controlling position, if I can use that term, possessory position, by the claimant for the easement. And, with great respect, that case has been regarded as problematic, and behind tab 11 and tab 12 – and for timing I

won't take you to those articles – but there are articles there which discuss *Copeland* and that whole issue. It morphed of course in England into a whole swag of cases about parking rights, whether you can park your car in a space and whether that excludes the owner and therefore can't be an easement, but if you're parking your car in one of three spaces then it is an easement, which in the case of the English Courts got bogged down in that.

What the article behind tab 11 says is this, *Copeland,* has been a case much more distinguished than applied, and generally on a basis of the Courts saying, "Oh, well, I don't think it quite fits the facts here," and the Hill-Smith article behind tab 11 says that's often a pleasant way of saying we don't really, don't have a lot of sympathy for the case. It certainly hasn't been generally well regarded.

Now the article behind tab 12 – perhaps just to note these page references: if one looks at pages 51 to 52, 54 to 55, 58 and 59 to 60 of the article, you'll see that effectively what the author is saying is that this was a case which on the facts as found by His Honour Justice Upjohn was a situation where the wheelwright was exercising the rights effectively of a freeholder, and when one think about things like possession and that of course one thinks about trespass, for example, which is a possessory remedy and you can only bring it if you're in possession. Well, perhaps the wheelwright could have brought a trespass proceeding but it would be hard to see Mr Schmuck bringing a trespass proceeding in relation to areas X, Y or – in our present case. Now –

ELLEN FRANCE J:
The first of those articles I think seems to suggest that *Copeland* is more about certainty or lack of certainty.

MR GALBRAITH QC:
Yes.

ELLEN FRANCE J:

So quite how do you see the question of certainty fitting in in the interpretation?

MR GALBRAITH QC:

It depends what – because in *Copeland* of course there was no ground, there was nothing there to look at to see what the certainty was. So the certainty had to arise from whatever the evidence was of the facts for which a prescriptive right was being sought. You're in a different situation where one has a grant because you have the terms of the grant. Now the grant has got to be interpreted, I absolutely accept that, but with a prescriptive situation you don't have the grant. So in *Copeland* there was no definition of "limit" at all. It was just whatever the wheelwright decided to do was, the wheelwright did, and you find that again if you look at that old *Att-Gen for Southern Nigeria v John Holt & Co (Liverpool) Ltd* case, I think it was the Privy Council thing in 1905 about the warehouses where the Privy Council said, one, you've got to be modern and two, yes you can have an easement for storage but they claim too much in that case, so it wasn't certain what the bounds of it were. Now here we've got something bounded by the grant. I accept immediately there's been an issue and the Court held that it was the definition in the grant was too uncertain and I need to deal with that. So you start in a different position to *Copeland* because of the fact of the grant, and of course the *Regency* principle that you try and validate, what parties have agreed to create, or wish to create. So certainly it's got to be looked at in that context, Your Honour, but we still have to have a look at the actual definition of the grant.

Can I just say briefly a little bit, I'll try and be brief, about *Moncrieff*, which probably some of the Court have had a look at, which is a case in which there's – two of the Judges referred to *Copeland*. The other three, one of whom wrote a very short judgment, didn't take any notice of *Copeland* which I think is a fair reflection of where *Copeland* sits these days. You'll see that *Moncrieff* is behind tab 6 in our bundle. What again one has to be a wee bit careful about in some of these cases is that a lot of them, a lot of the cases

aren't about grants, actual grants where the grant has been defined. They're about where you're trying to imply a grant out of a transaction, for example, vendor to purchaser, and the vendor then comes along and says, ah, but I meant to retain an easement over something or other. Or you get your prescription, which you can't have any more of course in New Zealand. So *Moncrieff* was a case where there was a right of way access and the question was whether you could imply into that a right to park. So again it's not a grant of a right to park, so I'm just going to be a wee bit careful about these cases. There were, I was going to say bewildering, but there are a variety of decisions in the UK about parking rights and it's reflected in one of these cases that the reason that there's so many cases about parking rights is that they're very valuable in some parts of London, for example, so they litigate these things like billy-o, and one of the issues which arises is the issue I just mentioned a moment ago, is because there's a great deal of uncertainty about how one applies this validity test under the fourth head for easements of whether there's joint occupation or whether there's possession and control etcetera.

There's no definition, which I've seen at least in the cases, which encompasses the reality of what actually happens and so if you think, for example, of pipelines. I'm doing one for Watercare at the moment, water pipeline. The exclusive possession, I mean it's a nonsensical construct with a pipeline because whoever owns the pipeline has got the exclusive possession, the owner hasn't got any, and that's just the reality of it, and yet we've never suggested that an easement for a pipeline, and in fact section 48(1) deals with pipelines, nobody has ever suggested that's not an easement. If you think about the what used to be the easement you could get if your house encroached on the next door neighbour's land, there's now a different remedy. It's called a relief now under the new Act but under the old Act it was an easement. Exclusive possession, obviously, for that bit of the house. No control by the owner. I mean that's that, it was an easement. So it's an area which I've certainly found difficult to grapple with.

But just to look at *Moncrieff* for a moment, at least in the context of *Copeland*. *Moncrieff*, as I say is behind tab 6. Lord Scott's judgment, Lord Hope's judgment is useful. Pages 2628 is useful and Lord Hope, in my respectful submission, takes a reasonably modern view of it. Lord Rodger's judgment is perhaps with Lord Neuberger's the most comprehensive of the judgments. But Lord Scott at paragraph 56 of his judgment, which is at page 2641, does deal with *Copeland* and only two of the Judges do. At 56 he says, "*Copeland v Greenhalf* [1952] Ch 488, a case that goes the other way…" having gone through cases where easements were granted, "… was a case in which a prescriptive easement to use a strip of land by the side of a private roadway for depositing vehicles and for other purposes connected with a wheelwright's business had been claimed. Upjohn J, at p 498, rejected the claim on the ground that: 'Practically, the defendant is claiming the whole beneficial user of the strip of land … It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner…'. There may be arguments as to whether the facts of the case justified those remarks but, for my part, I would accept that if they did Upjohn J was right to reject the easement claim and to require the defendant, if he was to succeed in resisting the plaintiff's claim to remove him from the land, to establish a title of adverse possession."

So it's on that ground that, "… the defendant is claiming the whole beneficial… virtually a claim to possession… to the exclusion of the owner," that Lord Scott is prepared to concede if those facts were correct, that that would be appropriate.

Lord Neuberger refers to *Copeland* only in roughly passing, paragraph 135 on page 2662. "The decision of Upjohn J in *Copeland v Greenhalf* [1952] Ch 488 has been relied on in England to support the contention that the right to park cannot be an easement. In that case, Upjohn J held that the right claimed in that case could not be an easement because, 'Practically, the defendant is claiming the whole beneficial use' of the land in question… This is consistent with what Lopes LJ said in *Reilly v Booth…*" and you'll see *Reilly v Booth*

discussed in the tab 12 article, "… namely that an easement could not give 'exclusive and unrestricted use of a piece of land'," and then goes on.

Now the Court of course here, in *Moncrieff*, decided that there was, could be an easement for parking in part in Lord Neuberger's judgment because the parties had cut a deal at some stage where they'd only parked two or three vehicles in a number of locations towards the top of the property, and you see that in the last two pages of Lord Neuberger's judgment. But it's clear, I think, in reading the judgment that for there to be an exclusion of the owner sufficient to invalidate an easement, it has to be something of the nature of claiming the whole beneficial user, as they say in *Copeland*. That inevitably, as the Judges in *Moncrieff* recognise, any easement is going to restrict the owner's occupation, possession, but possession of course is a legal concept, even though it depends on facts, and possession requires intention as well as exclusion of others, and in our situation where we've got an easement which is defined in the terms which it is, and confined in the terms which it is by the resource consent, which itself is confined by the term of the management plan, then it is, in my respectful submission, not possible to say that this is falling within the concept of *Copeland* as, unfortunately, what the Court of Appeal did say.

So perhaps just to look at why the Court of Appeal said that, and you'll find that in the judgment at, it's really starting at 71, paragraph 71, on 101115, where they're saying the rights are extensive, et cetera, and that's subject to what this Court may think about that right to have oversized boats. Paragraph 72, we say factually the second sentence is incorrect and that the boats will of course rest in part on the Boatyard/turntable and part on the slipway. But they then go on to say in paragraph 72 at the foot of the page, and it's not clear what is meant by the wording "which by virtue of their length", et cetera. "Does it assume the Boatyard's empty, does it allow the boat," et cetera? "We think the former is the better interpretation, but note the uncertainty in definition and the likely enforcement issues for any owner trying to control this."

Now two comments on that. If that's the better view – this isn't an opinion, this is a judgment – if that's the interpretation, and that's the better view in my respectful submission, it's the proper view, then the Court should have interpreted it in that way and if they interpreted it in that way then that's the way of that particular issue as being uncertain. It's not appropriate to have a grant and just say, "Oh, look, we think it probably means this but we'll call it uncertain," because otherwise everything's going to be uncertain that ends up in Court, it shouldn't be in Court unless there's an argument on the other side. So if that's the better interpretation, as I say, in my respectful submission, it's the proper interpretation, well, then, that's what should have been applied. But the last line and a half is repeated more than once in this particular section about the likely enforcement issues for any owner trying to control this. There's not a skerrick of evidence before the Court of Appeal that the Council felt any difficulty about controlling any of this, and this had been going on since at least the resource consent in 2002. So while it's nice for the Court to be concerned about that, this wasn't put to Council because, as we know, once the further submissions went in there was no further hearing, and my understanding is that counsel for Council would have said the same thing as Mr Schmuck, that, one, the better interpretation is the proper interpretation and therefore there wasn't a problem about enforcement.

Then 73, is this 60-day limit, "further uncertainty" about that, a suggestion that it's to constrain, "Only the time spent working on the boat, and not the time during which the boat can be stored on the beach slipway." Now again, never put to the parties, and certainly never put to Council or Mr Schmuck, a very unusual interpretation. It's true that, I think, in the management plan where it said, "You've got to keep a diary and you've got to tell us about boats that are being repaired or maintained under condition C," and it says though, "And you've got to tell us how long you think that'll be for." Now if you're talking about trying to put it down to hours and minutes, well, that's impossible, so they're clearly talking about days and they want to know, because they're worrying about the 60 days, how long that boat's going to be repaired and maintained partially extending onto that lower slipway. So with the greatest respect to the Court of Appeal that's not a realistic interpretation

of the 60-day limit and it certainly wasn't put to the parties. The Society did take issue about the 60-day limit because they said it's not controlled as to when it might apply so it might be at Christmas time, or that sort of thing, and that's when the Reserve obviously is more used. But it certainly didn't suggest that it's 60 times 24 hours.

So then paragraph 74 says, well, there's not much in the resource consent, but you've got to read the resource consent with the management plan and there's a great deal in all of those. And the last sentence in 74, "The consent allows boats to be stored there for repair," with respect is incorrect if it's saying that you can simply store boats on that lower slipway and walk away and not come back for three weeks and not bother about whether you're actually repairing them or not. As I say, conditions 4 and 9 of the resource consent simply don't admit that, well, of the resource consent.

75, about the Health and Safety at Work Act, with great respect is completely irrelevant. That Act applies whether you've got a valid easement or an invalid easement or whatever you've got, you've got to comply with the Health and Safety at Work Act. It's got nothing to do with the validity of the easement, it's just law. And so quite where that comes in – well, it shouldn't come in.

76, "No limit on what materials may be brought onto the site to allow repair and maintenance." Well, yes, it's right that they'll have to take materials on site, and you'll recall in the management plan they've got to be removed. You'll recall also that the management plan recognises that that has been or is done by the Boatyard out of working hours, they secure materials and equipment. Nothing unreasonable, nothing that would suggest that this creates a justification for saying that the easement's not valid. It's interesting when one looks at the right of way easements and how the Property Law Act 2007 deals with that now in section, in schedule 5. I mean, schedule 5 says you can, using a right of way easement, you can use it for vehicles, bring effectively what you like with it, and you can have it for your invitees and anybody you want to invite to come along, and legislature obviously thinks that reasonable in relation to a right of way. The only materials that are going

to be on site are those which are going to be used for the purpose of the boat which is being dealt with.

And then 77 says they're, "Extensive and ill-defined, Council cannot meaningfully exercise control." Well, again, as I've said, no evidence from Council as to that, and they're the party that is the party which should be concerned about that. And there seems perhaps just at the foot of that, talking about the entry of people onto the reserve, "To undertake work, at least during daylight hours," well, in our submission you'll recall we referred to what Lord Hope said about that sort of argument in *Moncrieff* that one's got to be practical about these things. We set it out in paragraph 9.39 of our submissions that he said, the three reasons, discounting an abuse of the right, the first is right of access, "Granted only in favour of the owner," "Not the public generally." Well, the rights here are only in favour of the Boatyard. The second reason is, "The servitude right must not be used invidiously to the other's detriment," and the third reason is that it has not been suggested there's been any abuse of the kind over the period there from 1948, and there's certainly no evidence here of that abuse by Council. And you'll recall that the management plan indicates that this is a small-scale operation, and of course that's what Justice Fogarty also said, and he said that it didn't interfere with reasonable use of the reserve and the use of the little beach at Walls Bay.

So, with respect, it's a long, long way from the *Copeland* situation which the Court of Appeal appears to have relied upon, and I think it would be unfortunate, with respect, if *Copeland* gets introduced as a relevant case for New Zealand law because it's certainly had a chequered history in the UK and has caused more problems than it, with great respect, is worth. Interesting that the UK Law Commission looked at this whole issue about easements, profits à prendre, etcetera, in 2011 and *Copeland* is regarded as being the high point of what's called the ouster principle, and the UK Law Commission said that the ouster principle should be abolished, "It causes more problems than it's worth," and the UK Supreme Court referred to the Law Commission report in that particular respect in the judgment in *Regal* and in the

Law Commission report at page 69 of the report, it's a long report. "So the ouster principle is a different matter. We have explored the difficulties to which it gives rise, it's hard to see the principle is particularly useful, easements will not of course normally deprive the serving donor of any reasonable use of servient land but if the parties wish to make such an arrangement without conferring exclusive possession it is hard to see why they should not do so. In line with that thinking the Courts have been moving to a less conservative view of parking easements. We conclude therefore that while an easement must not grant exclusive possession the ouster principle should be abolished. An easement that stops short of exclusive possession, even if it deprives the owner of much of the use of his land or, indeed, of all reasonable use of it, is valid." And that was the position of the Law Commission, and given all the disputes about parking rights in the UK one can see why they might have come to that view. So that's easements, A6.

And the final one is easement C, and this is the one which runs along the top for roughly two metres, where you've got a boat on rails which no longer exists on the southern boundary, for example, where to do work on the reserve side of the boat when the boat's located there you need to go onto the reserve to do that work. Now the rails aren't there anymore, so the Court could take the view, well, that's moot, and it's certainly moot in a practical sense, but what we're concerned about is that we don't want the uncertainty basis, which is really what the Court of Appeal has found against that easement on to somehow or other be confirmed in this Court and therefore come back to haunt the Boatyard down the track on some further issue. So that's why we say in 9.46 the easements are necessary going forward, but we are concerned about the Court of Appeal's reasoning. It's the same reasoning as I've talked about in relation to easement A6. Perhaps just note what we say in 9.51 and 9.52, it's what I said earlier, that if easement C wasn't there then in fact the other easements all encompassed in a physical sense by the easement which are unchallenged and which already exist, so in a physical sense they'll accept that the easements constitute uses, permitted uses. In a physical sense the other easements, A6, A5, etcetera, are all within the bounds of easements already consented for the slipway etcetera.

Easement C is an extension. It's roughly 2.3% of the total area, 1385 square metres. Perhaps just while we're here just make a comment, because you may come across it in the cases. One of the ways that Courts have tried to get around the sort of, if you've got a defined carpark space they've said, well, as I said before, if there's three carpark spaces, and you can pick and choose, then it can be an easement argument. If it's only one carpark space it's going to be an easement. If it's a garage and you've got a key, sorry, to it can that be an easement or not, and the Courts have tended to say, and there are academic arguments both ways, well if there's a choice and if there's a bit of space and that, well, I was going to say who cares, but that's putting it too simplistically, then it shouldn't be an issue. It's not excluding the owner, it's not exclusive possession and with great respect we haven't got exclusive possession here in any sense because these activities are all sporadic. The A6 one with the overhang, etcetera it's only when you've got a boat that's too big. The other ones, it's only when you've got a boat on the – well, now that's the only situation because you don't have the southern spillway, but even with the southern spillway it's only when you've got to work on the far side of the boat, the boat that's on the reserve side, the rest of the time the easements are not being utilised. So it's a country mile, as I said before, from the *Copeland* situation.

Now I'm sorry about the time Ma'am. I've still got 48(1)(f) to deal with and so I should go back and do that, though it really is a sort of a cross-appeal point. If I could then move from easements to that, which really picks up at section 5 of our submission. This reserve, as you'll know, what happened here was that the Boatyard had been in operation for a long time. What's now the reserve area was part of an unformed road, Richardson Street or Richardson Road, whatever it is, and to try and regularise what had been going on there were discussions between Mr Schmuck and the local council, and I think the Regional Council too, and the idea was to close the road and grant some easements and tidy the whole thing up. Mr Schmuck did have the ambition at the time to purchase the closed road, but because it's within a coastal area that wasn't possible. So under 345 of the Local Government Act 1974 it got vested as an esplanade reserve and we've set out in 6.1 what it says about

local reserves and in 6.3 we've set out about esplanade reserve but in a sense, I can't take this too far, but in a sense it's kind of by accident what happened, happened. It's not like a reserve that was taken for a particular purpose, like a scenic reserve taken for a purpose, a historic reserve taken for a purpose, that sort of thing. It fell into the lap of council because of a road closure.

So 6.3 set out the purpose of esplanade reserves and perhaps just to note there, so this reserve hasn't got a particular purpose, but as 229(a) of the Resource Management Act 1991 says, the following purpose is, "… to contribute to the protection of conservation values by, in particular, – (a) maintaining or enhancing the natural functioning of the adjacent sea …" etcetera, etcetera. Across the page, "To enable public access to or along any sea, river, or lake; or (c) to enable public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values." I think, with respect, if you think back to Justice Fogarty's judgment, he's right. It's not just so you can sit there passively and look at the sea, and it's not simply so you can go swimming, you have, as those photos show, you've got an environment which is really a boating environment, more than anything here, and so Justice Fogarty's recognition in his judgment that if you've got boats, they've got to come ashore in stages and you've got to deal to them.

So we pick up 48(1)(f) in section 8. Just looking quickly at section 8, if we just go through, because the principal argument, I believe, for the Society is, well, you can't have it for a commercial purpose, but if one looks down section 48 that we've set out in 8.1, the Minister may grant rights of way and other easements over any part of reserve for, (a) any public purpose; (b), providing access to any area included in blah blah; which is how the slipway exists; (c) the distribution or transmission by pipeline of natural or manufactured gas et cetera. Now those are commercial activities. All of those are commercial activities. These days we don't have the old Government doing everything. Well, not as much in any case. Then (d) an electrical installation or work, as defined in section 2 of the Electricity Act 1992, all commercial activities.

Provision of water systems, commercial activity. Providing or facilitating access or the supply of water to or the drainage of any other land, that can easily be a commercial activity. Or for any other purpose connected with any such land, and that's the issue which has been debated in front of Justice Fogarty and Justice Heath and the Court of Appeal, and which all three Courts have been persuaded that because that is an open clause "for any other purpose connected with any such land" it's not to be confined or defined or constrained by the *ejusdem generis* principle, and we set out, and I don't think I need to go to 8.4 and 8.6, what two of those Courts have said about that.

As we say in 8.9 the purpose of 4.8 is to allow easements over reserves. That doesn't mean it's, the Society's submissions suggest we're saying, well it's an open day, because of course to get an easement over a reserve there's a difficult process path to go through. One has to get, it has to be granted by local council, and then it was subject to ministerial consent, I'm sure there's a delegation at the moment, but that has to be appropriately exercised. So it's not just an open licence and easements, very generally, will of course be commercial, and there's no suggestion in the wording of section 48 that there is any such constraint.

We have also drawn attention to the fact that where a constraint akin to the *esjusdem generis* is intended by the statute, that that is in fact particularly provided for, and so in our 8.12 we give three examples where the statute talks about like purposes - and should - then there is effectively something like an *ejusdem generis* situation. Again it's worth noting, 8.12(a), I'm talking about community buildings, playcentres, kindergartens, plunket rooms or other like purposes. Now I know they're all positive activities but playcentres and kindergartens very often are commercial. Then little (b), farming, grazing, cultivation, cropping, or other like purposes, again very often commercial. So even in the particulars of section 48 and section 61 there are activities which are specifically identified as appropriate for easements which are commercial, leaving aside the generality of the wording in 48. And we've contrasted with the wording in three other sections in 8.11 where "for the purposes" has got that general connotation.

Now the Society's submissions suggested that we couldn't say this because two of those sections succeeded the section 48(1)(f), but as we say in our reply, 48(1)(f) was in a re-enacted form, re-enacted in, and I've just lost our reply submissions, 1996, and so was re-enacted succeeding the section 61 examples we've taken the Court to and nobody wanted to change 48(1)(f) to read "like purposes". So contextually there is no constraint on the actual words that are used in 48(1)(f).

We, in paragraph 8.17 have referred to a number of other indicia in the Reserves Act where commercial activities are specifically recognised, and it's quite interesting that in some of those reserves, scenic, historic et cetera, it quite specifically recognised that leases, for example, can be granted for commercial activities. In respect of local purpose reserves under little (f) there, you'll see we refer to section 61, and that actually constitutes the administering body, a leasing authority, under the Public Bodies Leases Act 1969 which as the Court will know allows, obviously, for commercial leasing, and it then has, what it says, "in addition specific leasing powers" which are also set out, which are those which, some of those which we just looked at a moment ago. So the administering body has the powers under the Public Bodies Leases Act, as a leasing authority, and there are those specific extensions which we've talked about.

Unless the Court had questions on 48(1)(f), that's probably all I'd say. I mean I could go through all these sections but they're identified there.

Now our submissions also go on to deal with some of the public law issues which are directed more at Council than at us, and if I could, I think the sensible thing is for me not to, if you wouldn't mind reading what we've said in support of what Mr Hodder says, but I don't think I should take more of your time on that. But if something does crop up, because I haven't heard the argument for the Society, and I may need to say something before the end of tomorrow.

GLAZEBROOK J:

I think that makes sense not to deal with it now because it's much easier to deal with it in reply, if need be.

MR GALBRAITH QC:

Thank you Your Honour. I'll just remove myself.

GLAZEBROOK J:

Thank you Mr Galbraith. Mr Hodder, we still have quarter of an hour before lunch, so at least I think you can get started.

MR HODDER QC:

Probably helpful if I do Ma'am. Just to be clear I am understanding that we have a day and a half of the Court's time?

GLAZEBROOK J:

I think we would have preferred that it would be done in a day but we also don't want to rush counsel.

MR HODDER QC:

I suspect that with what I was hoping to say to the Court, and what my learned friend Mr Every-Palmer wants to say, that maybe optimistic about one day.

GLAZEBROOK J:

I think we've realistically realised that that's the case. But we still would appreciate, not necessarily trying to get done in one day, but at least getting done as quickly as we can.

MR HODDER QC:

Thank you Your Honour. So the Court appreciates that we represent the Council. The Council is a sort of a somewhat involuntary party in a number of respects in relation to this litigation, and it is probably appropriate that I am sandwiched between my learned friends in relation to the debates on this issue. So I have nothing that I propose to say about the interesting land

law issues which Mr Galbraith has gone through, and I've got nothing to say about section 48(1)(f) that he hasn't said, so I won't be touching on that. My focus is essentially on the public law issues. We have raised in our written submissions a question of the conduct of the case by the Society. I'm actually not planning to spend much time on that, and I'm not going to pursue the estoppel by conduct point as a separate point by itself, but there's an overall issue which my learned friend Mr Galbraith has pointed to that one of the consequences is that there is isn't evidence on a whole series of issues that there would have been if pleadings had been taken a little more seriously at an earlier stage.

So what I was proposing to do is to say something preliminary by way of background. Talk about the section 48 process, which is effectively part 2 of our written submissions. Something about the relevant considerations, which is part 3 of our written submissions. Respond to the Society's approach to the particular errors, and then say something briefly about the conduct of litigation, as I say not very much.

The way in which the issues have developed is set out in the table, the revised table, in fact, to our reply submissions, and as the Court will see most of those, in fact, focus on the public law issues. So that appendix at the back, there's a series of issues. The first one is about the power to grant easement for private commercial purpose, if Your Honours have that. This is at the end of our reply submissions on page 9. Those are the reply submissions dated 27 May Ma'am.

GLAZEBROOK J:
Yes, I have seen them, they just don't seem to have made it onto the bench.

MR HODDER QC:
Well I can probably explain if it helps Your Honour. The first issue is the one that's a section 48(1)(f) issue on which I have nothing to say. The 2(a)(b)(c) and (d) are ones that are in the amended version in effectively the "cross-appeal", which are late issues, and that's indicated in the table itself, and then

on page 10 there are actually a range of new arguments in the Society's written submissions about material difference in easements, insufficient consultation, breach of Treaty principles, and errors in the recommendations made by Mr Dormer. That underpins the concern that the Council has, that in effect we do have what Her Honour Justice Glazebrook described as backhanded, but what's more conventionally a collateral challenge, effectively, to Mr Dormer's report to the Council's 2006 decision and then the matter is being litigated in the sort of the second half the 2010s. That creates a series of problems which sort of permeate various other aspects of this.

So the position the Council are in is not limited to the Council's own status. If the Court has volume 3, the orange volume of the common bundle, the particular issue that we have at the moment arises if we turn to page 301.195, this is the July delegation. I think this is tab 58, it would be, I don't have tabs in my volumes but that's tab 58, I think. So page 301.195, it's a letter from the Department of Conservation to the chief executive of territorial local authorities in New Zealand explaining there had been a revised delegation of powers under the Reserves Act 1977, which is attached, and in the third paragraph, it said that these extend the scope of the existing powers by removing previous limitations. "It is envisaged they would better enable local authorities to make decisions affecting reserves and are in accordance with the spirit of the changes taking place within the Department of Conservation with an emphasis on conservation with communities," and there's a reminder in the last paragraph that it must, "… still act in accordance with the requirements of the Reserves Act…"

Onto the next page, "Expectation that local authorities will maintain a distinction between their role as the administering body… and their role as a delegate of the Minister. It is important to note that the decision making function, whereby the merits of the proposal are considered, is a fundamental responsibility to the reserve administering body. The Minister is not the decision maker, but has, instead, a supervisory role in ensuring that the necessary statutory processes have been followed," etcetera, and the Court can and will read those passages.

And then the appendix, which is the nature of the delegated functions, has some purpose in the formal documents on 301.198, and the Court will see on 301.201 that one of the delegated matters is the section 48(1) power. And so this issue can crop up anywhere and the essential concern that the Council has, and this is effectively acting as a representative of the rest of the territorial authorities, is that what it recognises is that it has a distinct role, and indeed recognises the supervisory role, the difference between the way that Justice Fogarty approached that role and the way that the Court of Appeal approached that role both puts up some kind of a higher threshold than a check, which is the effective argument that I wish to put to this Court that there is a checking role, and it puts it at a higher level which itself is not very clear what it is but it looks like it has overtones of acting as if it were engaged in some sort of judicial review of the original body, ie itself, when it grants in principle but subject to the ultimate consent of the delegate, an easement.

So in our submission, the simplest and most straightforward and the most practical and the most legitimate way to deal with this is that it is a check, that this is an exercise to make sure that there has been a reasonable job done by the original grant or authority decision, that it is a new look, that it requires nothing more than what is reasonable in the circumstances. In some cases, that may require quite a lot of work, but in the nature of this case, which is fairly static sort of issues, as the Court has heard, this has been an issue that's been around for decades, it's not a dynamic issue where new information is coming in week by week or even year by year, then the Council, we will be submitting, is entitled to say "A whole lot of work's been done in the past to get to the point where we are now", so the Court, we urge, can acknowledge that the Council has the benefit, by the time it gets to exercise its role as delegate in 2015, or the work that Mr Dormer did back in 2005, the Council decision, I think it is in 2006, the work that's done by DoC and the conservator in granting consent to a number of the easements at an earlier point as well, and in particular, the benefit it has of Justice Heath's judgment which is the outstanding issue between what the conservator allowed as the Minister's then-delegate and what wasn't allowed.

And so in a sense, what the Council has done, we say, is perfectly sensible. It's got a full report, which I will go into after lunch to some degree, and it has the benefit of Justice Heath's judgment saying "There isn't a section 48(1)(f) problem here", and it makes a decision accordingly. Then it gets to the Court of Appeal and in effect, it has been given the message by the Court of Appeal that because the easements are uncertain, it - the Council - has, in exercising its role as delegate, acted unreasonably in its exercise of the statutory power under section 48(1), and we say that's both harsh and wrong as a matter of interpretation of the Act.

So starting with – perhaps the starting point is section 48(1) before I go much further, just to indicate one of the points that we make in the written submissions, but if the Court has section 48, the Act itself is among other places in the appellant's authorities at tab 2, but I imagine that the Court's pretty familiar with section 48 by now, another of the provisions in the Reserves Act that requires a certain amount of nuance as Your Honours apart from Justice Arnold appreciate from yesterday but anyway, section 48(1) makes clear that "Subject to subsection (2)", which I will come to, "and to the Resource Management Act 1991," which reinforces the point my learned friend Mr Galbraith makes that we can't separate these things in any kind of artificial and deep way, "in the case of reserves vested in an administering body," ie the Council", the administering body, with the consent of the Minister and on such conditions as the Minister thinks fit, may grant rights of way", and when, of course, concerned with 48(1)(f), which I'm not concerned about. But it's the administering body that may grant the right of way and effectively subject to the consent of the Minister and any conditions the Minister chooses to take. So that's now been delegated, of course, to the Council, which means the Council has taken over the Minister's role, and, of course, responsibilities.

Section 48(2) is important, we say, because it says "Before granting a right of way or an easement under subsection (1) […] the administering body shall give public notice in accordance with section 119 specifying the right of way or

other easement intended to be granted, and shall give full consideration, in accordance with section 120, to all objections and submissions received in respect of the proposal under that section." And as we've explained in our written synopsis, that means a full process has been gone through and before the Council gets to the stage in its role as grantor, contingently, of making a decision. That, we say, doesn't have to be replicated when you get to the role as the delegate. The Minister doesn't have to do it, nor does the Council as delegate, and to some extent, the Court of Appeal judgment acknowledges that but somewhere, it's pointing in a direction higher than Justice Fogarty's check and lower than a complete replication but the indication is it's kind of more towards the latter than the former, and what we're looking for in this Court, if the Court feels inclined to do so, is an indication that actually, Justice Fogarty got it right in terms of what that criteria would be.

So what I was going to do then was to proceed through the documents that provide the background before I turn to the detail. The Court's been taken to some of them but if the Court has the key documents bundle, with one exception which I've been to there, the exception being the Minister's delegation I've just taken the Court to, and the starting point from my perspective is that at tab 2, we find Mr Dormer's report, and as he explains in his first paragraph, he's had a two day hearing, and so that reflects the requirements of 48(2), and if the Court were to look at pages using the red pages that are the volume numbers, the summary of comments and objections that runs on pages 30, 31, 32 is very detailed, precisely what's contemplated by this process that a whole lot of objections are being invited, received, and addressed in a responsible way by a commissioner, and it's those that then inform the decision to grant the easement, which is what we find in tab 4 of the key documents bundle which my learned friend took you to.

That may be a convenient point for me to pause before I come back to the rest of it, Your Honour.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

MR HODDER QC:

If Your Honours please, I was, before the lunch adjournment, had I think just drawn the Court's attention to Mr Dormer's report. It is in the key documents bundle at tab 2 and at tab 3, there was an addendum. Tab 4 is the Council meeting which adopted his proposals and my learned friend Mr Galbraith took you to that. The only thing I add to that is at page 39, using the numbers at the top, you will see about a third of the way down an "AND THAT" in capitals, "the Council adopts the summary of objections, comments, and statements", you will recall that was attached to Mr Dormer's report, the last few pages, "for forwarding to the Minister of Conservation's delegate", and that was duly done as we see at tab 5, that's the letter to the Northland conservator for seeking Ministerial consent. The first couple of pages or three pages set out the details of the easements and conditions but starting at 43 and onto 44, there's background, and likewise, on 45 is background plus reference to various materials that were attached.

The reason that I've taken the Court to this briefly is simply that the decision to consent, in our submission, is only seen as part of a lengthy and detailed process. It doesn't just have a completely standalone basis. That point is perhaps also emphasised by the document under tab 6 which is the report, effectively, to the Northland conservator, that pre-dates the conservator granting consent to some but not all of the easements, and I mention this in part because it has a discussion of aspects of the legal analysis at page 53 and feeds into the further report at tab 8 from which we have a long gap, and that report in August 2013, again to the Northland conservator, the background document, contains a section, for example, at page 97, section 4 Conservation Act 1987, which addresses issues around the Treaty of Waitangi, and that's on pages 97, 98, 99, 100, through to 102. A series of objections are extracted from the matters of concern to Ngāti Hine

and Ngāti Manu as described at the bottom of page 98, and there's comment on each of those propositions through to the end of a text on page 102.

And then tab 9 gives us the actual decision of the conservator. It's recorded "consent declined" and as my learned friend pointed out, page 135 after (e), the grounds for declining with easements "were not capable of being authorised under the provision of section 48 of the Reserves Act 1977." That's a topic that had been debated around, as my learned friend said, in various forms by lawyers for the Council and lawyers for DoC and others but that was the impediment that was recorded in this particular decision as the Minister's then delegate decided it.

So that led to the decision or the matter being taken to the High Court and gives rise to Justice Heath's judgment and by this time, there has been in fact a delegation to the Council but Justice Heath's judgment you've been taken to, the relevant part is that there can be easements of the kind that were proposed for the Boatyard. There was a "could" as opposed to "should" decision but the point was squarely addressed and argued for, the Department of Conservation and the Minister arguing against the proposition that His Honour Justice Heath took.

As my learned friend also said there was certainly a lot of pass-the-parcelling on the next few documents which are between DoC and the Council. In the end, DoC was insistent, and we see this at tab 15, page 208 in the penultimate paragraph, last sentence, "The matter is now a local issue but it is exactly the type of decision that the Minister considered that the Council should be making, hence the delegation under section 48". If one stops to say "Well, why would it be a local issue?", one might suggest the answer is that because these sorts of issues are likely to be well-known to those in the area as opposed to those in Wellington or wherever the relevant regional conservator might be based. And so it was a conscious decision to make that delegation. The delegation power and the Reserves Act which is section 10 has some safeguards. The decision can still be made by the Minister if

necessary and there are issues – it deals particularly with the issue of whether an administering authority can grant an easement to itself.

In any event, that then leads to the Council being seized of the matter in its capacity as delegate under the 2013 delegation and it gives rise to the report written by Mr Swanepoel as inhouse counsel, which we find at tab 17. It's a detailed report and the recommendation is that in the light of Justice Heath's judgment in particular that there was no jurisdictional impediment, that the suite of easements that are being granted by the Council then as long ago as 2006 should be granted in the form proposed. There is a history set out in these pages, I don't think it's appropriate to spend the Court's time in going through them in detail, but there's a discussion of the history of the matter in some detail taking the matter through. At page 217 is the discussion of options with reference to the judgment of Justice Heath in the High Court. At page 218, there is a discussion of a delegated power and what that involves. Then 219 is the discussion of the legislative provisions, section 48, they're at 220. At 221, references to other provisions that are relevant not least section 23 of the Reserves Act and section 40 of the Reserves Act, and section 229, the Resource Management Act.

Then it goes on, it has a section about the consideration by the Far North District Council as the administering body. That goes over the next couple of pages. There's then a discussion of the Treaty of Waitangi at the bottom half of 222 and that carries on with reference to particular issues that are then addressed in the next few pages. The end result is a conclusion at 224 that there be exercise of discretion to allow the easement for area A, for example, the reasons set out succinctly on page 225, including the fact of the clarification of the High Court, the Conservator of Northland had considered the matter, followed the process followed, and that the tangata whenua were represented at the hearing, and that there was no basis to refuse the easements and give effect to the resource consent, and therefore, the recommendation is set out on 225 and 226.

In his affidavit, Mr Swanepoel explains this report was 208 pages. The balance of the document could be seen from pages 226 and 227 here where we have all the attachments and attachment 6 through attachment 22 but including, for example, attachment 12 is the Ashbridge submission. That's the detailed one that went to the conservator. It has a detailed summary of the iwi concerns and the discussion of those, and then the powers of the legislation are set out in the last batch of attachments.

So the Council had before it in its role as delegate a comprehensive report where it's a perfectly reasonable amount of information for it to make its decisions, and in due course, it did make its decision, and under tab 18, turning to page 244 of that document which are the Minutes of the 5 June 2015 meeting, we see at item 9 on page 244 that the Council as the Minister's delegate reconsiders consent to the proposed easements and resolves to grant those. It's perhaps worth noting at the bottom of the box on page 245 that one councillor requested her vote against be recorded and the deputy mayor abstained from voting, so something other than a complete rubberstamping of the exercise. We don't have any detail about the length of the debate or information about that but that in itself, we say, has some significance.

So that process, in our submission, was one that was a significant process, and entirely explicable in terms of the legislation and what the legislation might expect.

So coming back to the reason for the Council's concern at this hearing, it is that in the Court of Appeal analysis, the proposition is that it is not sufficient for there to be a check, that there must be something more than that, and that we find in the Court of Appeal's judgment which leads up to the decision at 100, so paragraph 110, which echoes what's in paragraph 106, the Court of Appeal is saying it is not persuaded or doesn't agree with Justice Fogarty that a check is the right language. For example, at 110, "We disagree with the Judge that the Minister's consent role is that of acting as a check on the Council" then goes on to say "There is nothing in the statutory

scheme that suggests the Minister's discretion is constrained. To the contrary, it suggests the Minister remains free to take a different view to Council as to whether an easement should be granted, having regard to issues of jurisdiction as the Minister earlier did in this matter and as to the purposes of the Act". No doubt there is a scope for there to be a different view taken on the consenting part of the section 48 process. On the other hand, as we explain in our submissions, we hope succinctly, that one more so might expect that in most cases, if things had not gone wrong the first time, you would not expect to find necessarily a different approach on consent. A fresh look is likely to find that there was a decent job done the first time round or a reasonable job the first time round.

GLAZEBROOK J:

Can I just check what you say is wrong with, say, what's in paragraph 106 and 110 in the sense that all it's been saying is that the Minister's free to take a different view, which has to be right?

MR HODDER QC:

Yes.

GLAZEBROOK J:

And that he or she is not limited to checking the decision-making process, and again, that would have to be right? So as the Minister took a look at it and said "Well, I know you've looked at all of these Treaty of Waitangi issues but I take a different view on the Treaty of Waitangi issues", for example, then you accept that the Minister is perfectly entitled to say "Well, in that case, I won't allow this"?

MR HODDER QC:

Yes, I do. Absolutely. There's no question that there's –

GLAZEBROOK J:

Well, it's just – what do you expect us to do then with what's said in 106 and 110 is…

MR HODDER QC:

Well, that's one of the difficulties about the language of both Courts below is that there's some doubt left as to what's required. If the proposition is a supervisory one, which is the language used in the delegation document itself, or the languages that have a check, which can be a check that includes revisiting each of the components of the exercise, then there can be no complaint. But insofar as the implication of the judgment is that what was done was insufficient, that what was done was not sufficient to qualify for the purposes of section 48(1) as a consenting exercise, then that's the point that causes the trouble.

GLAZEBROOK J:

I understand what your point is, I was just trying to pin down the language that you say we should overturn, if that makes sense. Because as far as I can see you don't actually take any objection to what's said in 106 and 110, so is it the application of that or…?

MR HODDER QC:

The difficulty, and Your Honour is exactly right that we're not saying there's a particular phrase here that we wish to reverse. The phrase that's causing difficulty is the one that says that Justice Fogarty got it wrong.

GLAZEBROOK J:

Yes.

MR HODDER QC:

And it's that part that causes the difficulty. So insofar as they're both talking about the same thing, that's fine if they're talking about the same thing, but there's an implication which creates a degree of confusion if he's got it wrong somehow when he's saying check, and what the Court of Appeal is talking about is something different.

GLAZEBROOK J:

Well I think, I mean you could read it by saying if Justice Fogarty was saying the only thing that can be done is a check, and there isn't an ability to look further if the Minister thinks it appropriate, then of course Justice Fogarty got it wrong, because if it was only a check on process, has this process been done correctly, but no ability to say well the process may have been done correctly, I think the process was very good in respect of the Treaty of Waitangi for instance, but I just take a different view.

MR HODDER QC:

Yes –

GLAZEBROOK J:

And I picked the Treaty of Waitangi because that's one of the issues that…

MR HODDER QC:

That's right. So all I can perhaps do, I think I said at the outset, that if the Court is inclined to do so, and to elaborate a little further, because the Court of Appeal is perhaps a little cryptic in this way, says that Justice Fogarty is not right. It doesn't really offer a particularly clear positive proposition, then we may not have any great difficulty. So as the Court knows from our written submissions we say that of course it's possible for the Minister or their delegate to undertake a major enquiry if they so choose. It depends on them. It depends on the circumstances and what they decide to do. But to the extent there is an implication in the Court of Appeal's judgment that a major independent exercise is required as opposed to one that is less extensive, then we say this Court is, would appropriately indicate that that's not necessarily the case. It all depends on the circumstances.

GLAZEBROOK J:

Well possibly just getting back to if the Minister decides. Would you accept there could be circumstances where it might be said in a supervisory jurisdiction that the circumstances did require –

MR HODDER QC:

Yes.

GLAZEBROOK J:

So what I'm trying to get to is does it depend on the facts? So for instance if, and I suppose it's tied up with the process, if in fact there had been a very cursory and not actually in any way useful look at the Treaty of Waitangi, for instance, one might, would you accept that in that case there might be an obligation to?

MR HODDER QC:

Yes, yes. But, so absolutely –

GLAZEBROOK J:

Right.

MR HODDER QC:

There's nothing, no way I can disagree at all with what Your Honour is putting to me and so one of the things that will be had regard to by the consenting party under section 48 will be the extent of what happened up to that point. We say that is a relevant consideration and in this case where there had been an extensive series of processes the Court was entitled to do that. The puzzle for us in the sense of the Council's position is we thought that's what Justice Fogarty was saying, but the Court says he got it wrong, and we're still kind of not quite clear why, with respect.

WILLIAMS J:

You'd agree, wouldn't you Mr Hodder, that if the Court of Appeal were right about whether these rights granted were capable of being easements, that was an area in which the Minister could say, look, I'm sorry, you're wrong.

MR HODDER QC:

If the Minister could get to that point, yes.

WILLIAMS J:

Yes, or even FNDC if they decided, because of course the person who heard the evidence was not FNDC but its own delegate.

MR HODDER QC:

That's right.

WILLIAMS J:

So that's clear.

MR HODDER QC:

Sorry, can I just elaborate on that point slightly in answer to Your Honour. One of the issues that we had a slight concern about with this is that in effect perhaps what the Court of Appeal was contemplating was something akin to the role of a court on judicial review in its consent capacity compared with the rest of it, and the very argument you already heard from my learned friend, and you'll hear from my learned friend Mr Every-Palmer about, what an easement means and what it's boundaries are. It's not the sort of thing we expect to be able to be definitively decided by the delegate under section 48, or the Minister. So the Minister –

WILLIAMS J:

Just run that sentence by me again?

MR HODDER QC:

So the proposition is that the section 48 consenting power is not akin to the power of the High Court on judicial review. It doesn't require the same sorts of inquisition of the various things, including the legal aspect of it.

WILLIAMS J:

Yes, but it would be open to the Minister or his or her delegate –

MR HODDER QC:

Yes, if the Minister had a clear view that there was a problem here on the law then of course the Minister could intervene.

WILLIAMS J:

Should intervene in fact.

MR HODDER QC:

Yes, I accept that too. But in this case, this is an area that was not actually resolved by the Court of Appeal, as has been explained, and the advice up to that point had been conflicting in various ways. It's, in our submission, utterly legalistic to expect a council or any other administering body to come to a definitive view about what the margins are on various aspects of land law, unless there's a clear problem. So to the extent that there's a suggestion that the Council has made an error by not killing the definitive opinion, or the clinically correct opinion on what is and isn't capable of being an easement. We say that isn't a proposition that holds up against the power or is to be held against the party exercising the section 48 power.

GLAZEBROOK J:

Can I just check with you, I thought that the issue that had been batted around was actually whether section 48 allowed easements of this type, which is a jurisdictional issue, which was actually sorted by Justice Heath's judgment.

MR HODDER QC:

That's right.

GLAZEBROOK J:

I didn't understand that there were any issues such as those that the Court of Appeal have now, based on *Copeland* etcetera, raised at an earlier stage or am I mistaken on that?

MR HODDER QC:

That is the issue. The way in which the Court of Appeal reasoning operates is that because the Council didn't pick up that issue, and deal with it in the way that it saw it as being outside that area, if indeed it got to that point, then the Council had acted unreasonably because it was based on an error of law. The implication is that what could the Council have done - the Council presumably could have got more definitive legal advice, or got more legal advice, or something.

GLAZEBROOK J:

Well legal advice about something that wasn't actually apparently aware of.

MR HODDER QC:

Well if –

GLAZEBROOK J:

It was aware of the section 48 – as I understood, it was aware of the section 48 jurisdictional argument, that was the whole reason it went to Justice Heath.

MR HODDER QC:

Yes.

GLAZEBROOK J:

But nothing else went to Justice Heath so it doesn't seem to me as though there was anything else in issue, or was there?

O'REGAN J:

Justice Heath did say it was capable of being dealt with by –

GLAZEBROOK J:

Yes, that's right too, so it must have been raised in front of Justice Heath. He said it wasn't an exclusive possession, no that's right, I'd forgotten about that. It just immediately slipped my mind. Well I suppose we come back to the point that I made right at the beginning to Mr Galbraith that it seemed to

the Court that we needed more submissions if we got to that point on what Justice Heath's judgment actually means in that regard.

MR HODDER QC:

Can I perhaps at this point interpose to some extent on what I was going to say, probably about the right point anyway. There are two cases that the registrar has which I explain them by handing up at this stage because the most recent of them came out two weeks ago, and I was only reading it last week, and it seemed to have something useful to say about the role of the Council as it approaches this, so if I can explain that. So the unreported judgment, which is called *Campaign Against Arms Trade*, as the Court may be aware, just recently the Court of Appeal in England and Wales has held that there are constraints on whether the British Government can authorise sale of arms to Saudi Arabia. That's the subject matter of the case, but for my purposes what's significant and perhaps helpful is the discussion that starts at paragraph 58, and I perhaps preface this because my understanding of the essential complaints brought by the Society against the Council in public law terms is either a failure to take into account relevant considerations or a form of unreasonableness, and this happens to have a discussion of what is described as the *Tameside* principle, which I'm sure the Court is familiar with. It outlines that in paragraph 58, the duty for a decision maker to take reasonable steps to acquaint themselves with relevant information in order to answer the question which they have to answer.

Then paragraph 59, which I wasn't aware of, and the Court may have been but I wasn't, that the general principles of the *Tameside* duty had been summarised and in particular the Court of Appeal here quotes an earlier decision this year by the Court of Appeal itself, which summarises that *Tameside* duty in ways that seem to me to be relevant to our position here and you'll see the enumeration about half way through that quote. "First the obligation of the decision maker is only to take such steps to inform themselves as are reasonable. Secondly, subject to a *Wednesbury* challenge it's for the public body and not the Court to decide upon the manner and intensity of the enquiry to be undertaken, see *Khatun* and I'll come back to

that. Thirdly, the Court shall not intervene merely because it considers that further enquiries would have been sensible and desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the Court shall establish what material was before the authority, only strike down if no reasonable authority to possess that material could suppose the enquiries they made were sufficient.

Five and six are not quite our case. They're a bit more related to the facts of this case but the Court will see those. Just for completeness, at paragraph 60 of that case, it says this was an iterative process. There were ongoing arms sales and ongoing discussion between Saudi Arabia and the United Kingdom about the human rights observance in Saudi Arabia and therefore, the divisional Court was right to have regard to the up to date information. As I mentioned earlier, our case is not really iterative. Our case is pretty static in terms of the dynamics of it. The question has been one that's been plagued by jurisdiction and similar issues for some time.

The second case I've handed up is the *Khatun* case that's referred to in that quote and there's a loop here that sort of takes us back closer to home. So in that case, in the judgment of Lord Justice Laws at paragraph 33, he's discussing the question of relevant considerations right at the very bottom of the page. And then over onto the next page, still on paragraph 33, leads then to the question about what are those considerations? Paragraph 34, the starting point would be the speech of Lord Scarman *In Re Findlay* in the House of Lords decision of 1985 where he then sets out the quote from that particular speech, in particular, coming back to the judgment of Justice Cooke in the Court of Appeal in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

So that's the general proposition that there'd be desirable considerations that aren't mandatory because you actually focus on mandatory considerations for relevance, and then significantly, for my purposes, in paragraph 35, Lord Justice Laws says "The *CREEDNZ* supports not only the proposition that

where a statute conferring discretionary powers provides no lexicon then it is for the decision-maker and not the Court to conclude what is relevant, subject to a *Wednesbury* review, but it also gives authority for a different but closely-related proposition that it is for the decision-maker and not the Court, subject again to *Wednesbury* review, on the matter and intensity of the enquiry to be undertaken and to any relevant factor accepted to be demonstrated as such".

Applying that proposition which, in my submission, reflects New Zealand law as well as English law, that proposition here, then we say that provides a description of the role of the delegate under section 48 as well. It's for the delegate to decide the level of enquiry subject to reasonableness or rationality considerations, and in this case in our submission it is a very, very long stretch for society to say that there is something irrational in the processes being followed all the way and the level of intensity of enquiry that's been undertaken by the Council. And it's that flexibility and that approach which would appear to be, we think, consistent with what Justice Fogarty's judgment has the tenor of, and that tenor somehow or other has been undermined by what the Court of Appeal has said in the case that is now subject to this appeal.

WILLIAMS J:
In most cases there'll be something in the lexicon when it's a statutory process, and even if there are no set criteria there's a statutory purpose and that will provide some scope or some limitation to the scope, otherwise you have no ascribed discretion at all, and that's long been rejected as proper.

MR HODDER QC:
Yes.

WILLIAMS J:
So I wonder how helpful those principles are?

MR HODDER QC:

Well, I suppose in one sense – I'm trying to rid my mind of the word "concertina" but I can't quite. So the proposition is that when you get to section 48, the consenting discretion, the size of it depends on the circumstances and the assessment of those circumstances and the size of the inquiry is for the decision-maker or, in this case, the Council's delegate or the Minister.

WILLIAMS J:

Right, absent statutory purpose bloopers.

MR HODDER QC:

And so either a clear statutory indication that they must do something they haven't done or irrationality, as the reservation is there. In our submission neither of those can be made out in this case and therefore the Council's decision is, we say, kosher. It's sound.

GLAZEBROOK J:

What about assuming there wasn't a decision by – because it is slightly tricky in the sense that what the Court of Appeal have said is that these aren't able to be granted by law, so if the Minister has made a decision that is actually an error of law, ignoring the fact there has been an earlier decision, and so when they made their decision they were doing so on what they understood to be the law and could hardly say, well we're going to ignore what Justice Heath said and we still think the law is something different.

MR HODDER QC:

Yes. Well unusually, I'm not sure why this happened, but the Court of Appeal says the ultimate fault in the Council was irrationality or unreasonableness because of the error of law, whereas I thought error of law was sufficient for whatever purpose there was.

GLAZEBROOK J:

That's what I was really asking you so just leaving aside the Justice Heath judgment and pretending it didn't happen, if in fact we get to the stage and find that the whole thing has been based on error of law, then what do we do at that stage?

MR HODDER QC:

Then you have a potential ground to set it aside. You probably have a discretion, or the Court has a discretion whether to exercise it or not, but certainly you've made out a ground of error of law.

GLAZEBROOK J:

So you would say that, leaving aside what actually happened in this case, that it can be set aside on error of law –

MR HODDER QC:

Yes.

GLAZEBROOK J:

– and it would be a discretion issue –

MR HODDER QC:

Correct.

GLAZEBROOK J:

– as to whether it would be in the particular case.

MR HODDER QC:

Particularly the lapse of time and various other bits and pieces, yes, Your Honour, I'd accept that. In a sense the Council, one of the stings of this of course is the Council was ordered to pay costs having followed Justice Heath's decision in the process and that, again, goes back to the idea of what's the Council really supposed to do if there's a lesson to be learned by

this Council and other councils about how you approach this role, what is it. Well it appears to be –

WILLIAMS J:

Don't trust High Court Judges. I mean that's the common law, isn't it, that's just the way the cookie crumbles. If a superior court disagrees with a decision that's been relied on then that's the way it is. The Council's not the only outfit stuck with that problem.

MR HODDER QC:

Yes, that's true, although in a case, in a judgment that hasn't been contested, it gets more complicated as well.

WILLIAMS J:

Sure.

MR HODDER QC:

And that's the issue that Justice Glazebrook has been referring to.

ELLEN FRANCE J:

Could I just check, Mr Hodder, there's nothing in the legislative history that helps in terms of what was envisaged as to the scope of the consent power?

MR HODDER QC:

Not that I could find, and not that I've seen Your Honour, no. I have seen nothing in the legislative history that tells us that. I think all we can do is look at the legislation and say why would that be. In some cases there might be thought to be some kind of conflict of interest, or something else which makes it appropriate for that to be done. It maybe that there might be a contest between conservation values on the one hand, and what the Council wants to do on the other, the same point of conflict. In this situation it doesn't seem to be a scenario that we're really actually addressing here.

WILLIAMS J:

The other thing is that it's not always councils who are the administering bodies. They're often, you know, the equivalent of the school board.

MR HODDER QC:

Yes, Your Honour, exactly right.

WILLIAMS J:

And Ministerial supervision, to use that word very broadly, is going to often be very necessary in those circumstances.

MR HODDER QC:

Thank you Your Honours. So in terms of what I was going to address, the last thing is just to, the points that are raised in our reply submissions is effectively the new points that are raised by my learned friends on public law matters, and we address those in our reply submissions. I'm not sure there's much else I can usefully add. The idea of a sufficiently thorough review in my submission are encompassed in the kinds of things I've already been taking the Court too. That's really a matter for the decision-maker to decide. The failure to undertake appropriate balancing, is really the same thing. If you have a series of factors and it's a question of balancing that is almost quintessentially a matter for the decision-maker subject to rationality boundaries or some clear statutory steer that one prevails over the other, and again my submission is that neither of those prevail here.

To the extent that the Treaty issue has been raised, at this stage we address that on our page 3, paragraph 2.3 of our submissions, and I reiterate that Mr Ashbridge's report to the Conservator has a lengthy discussion of the issues that were raised by the iwi. We have no evidence about what else it is that is of concern. I know there's been reference to the fact there was a Treaty of Waitangi claim filed at a later stage but that, of itself, we have absolutely minimal detail about what that might be or what it is going to cause and in our submission, it doesn't require any more of the Council. It's possible the Council could have done more as a matter of choice but it didn't.

The last point that I have on my proposed list of things to address is the conduct of litigation point. So that was the matter that's addressed in this latter part of our initial submissions –

WILLIAMS J:
Just before you go onto those, a couple of points, Mr Hodder. One is the length of time in which Mr Schmuck has been engaged in trying to achieve what he wants to achieve means that the gap between the Dormer assessment and enquiry and FNDC's consideration and the Minister's is rather large, six or seven years, something like that. Don't you think that's got to be a factor to be taken into account in how deep the subsequent enquiry needs to be?

MR HODDER QC:
It could be, Your Honour, but it probably goes to the iterative nature of the enquiry described in that *CAT* Court of Appeal decision I've just been referring to, the recent English one, and what I've described is a more static set of positions, if I can put it that way.

WILLIAMS J:
Right, so you say that the facts – while on the surface, that might be so, but on the facts, nothing much changed except the removal of the slipways, the north and south slipways?

MR HODDER QC:
And there's no suggestion or no evidence that I've seen that says that there's some new issues out of left field or out of anywhere that says "Here's an entirely new factor, new circumstance, new concern that hasn't been addressed before".

WILLIAMS J:
It might be because there was no deep enquiry.

MR HODDER QC:

Well, if there was going to be a challenge in the Courts, we'd expect the evidence of that to come through, and it doesn't. The other point, perhaps, to answer Your Honour, is that while the Dormer report goes back to 2005, the Ashbridge report is from 2013, that's more kind of contemporary, and the Ashbridge one has that relatively detailed section addressing the issues that the iwi had raised.

WILLIAMS J:

Well, there's an amendment to the Treaty of Waitangi Act around 1991, something like that, that excludes private land from claims and defines private land as including council land, so it may be that that's not a relevant consideration anyway. I can't remember the details of the legislation.

MR HODDER QC:

Yes, we addressed that to some extent in our submissions.

WILLIAMS J:

Do you? Right.

MR HODDER QC:

It's not clear why the Council is constrained by the fact there's a claim against the Crown for breach of the principles of the Treaty in dealing with Council property. That isn't clear as to why that would be the case.

WILLIAMS J:

Well, the provision explicitly excludes –

MR HODDER QC:

Council land from private –

WILLIAMS J:

– council land from Waitangi Tribunal recommendations for return.

MR HODDER QC:

Yes.

GLAZEBROOK J:

Nevertheless, I think the issues here were more – I would have thought that they should still be considered in the context of objections in the same way as anyone else, even if it's not a proprietary-type claim.

MR HODDER QC:

And clearly, they were. The objections were made fully as set out in the attachment to the Dormer report and as summarised in the Ashbridge report. The essence of those concerns, as I have understood them and read them, is they are both lack of consultation, in a sense, and the issue about the impact on the environment of the overall operation itself, but in fact, as the issues are clear, it's not the overall operation we're concerned about, that's not, in a sense, challenged, it's simply the scope of the easements that go with it.

In terms of the conduct of litigation, as I said, I'm not going to pursue the estoppel by conduct point. There's a denial provided in the submissions for the Society, it hasn't been pleaded, and so I'm not going to take that point further. But there is the ongoing conduct and the point I'm really making is our paragraph 4.6 in our initial submissions, page 15, council's –

WILLIAMS J:

Your first submissions, did you say?

MR HODDER QC:

Our submissions, our first set of submissions, the initial submissions dated 13 May. It's not just a standard moan from a litigator saying "Well, the goalposts keep on moving", it's a particular issue for councils because they have a lot of issues like this arising and it's ratepayers who have to bear the cost of these things and you have some councils, including FNDC, which hasn't got a huge rating base, but every time this has to go through a litigation process then that's a cost for taxpayers. So the moving of the goalposts has

real, as it were, governance consequences for a body such as the Council here and there aren't many other bodies around the place. There's a proper acknowledgement in our friend's submissions for the Society that they have been seeking to move if not goalposts then at least the touch flags quite a bit, and in our submission, that doesn't really work as consistent with the way the system is supposed to work and it doesn't help this Court because the Court then doesn't have the benefit of two decisions below before it gets to the issues it has to raise. All that's set out in our amended table attached to our reply submissions and beyond that, I think I would let the matter rest.

So subject to any further questions Your Honours have, that's all I wanted to say on behalf of the Council.

GLAZEBROOK J:
Looks like no questions. Thank you, Mr Hodder.

MR HODDER QC:
Thank you, Your Honours.

GLAZEBROOK J:
Mr Every-Palmer. While you're getting ready, can I just remind you or your instructing solicitors that this typeface is really very difficult to read and there is a page limit which is not got around by having really small type.

MR EVERY-PALMER QC:
I apologise, Your Honour. There's no attempt to circumvent the Rules.

GLAZEBROOK J:
No, I understand that, it's just, you know, young eyes may be fine with this sort of stuff but not all eyes are.

WILLIAMS J:
That's all right. I had no difficulty at all, Mr Every-Palmer.

MR EVERY-PALMER QC:

I was going to say if it was any consolation, I was struggling as well.

GLAZEBROOK J:

The Rules do say 12 point.

O'REGAN J:

The Rules are specific about this and you should comply with them. That's just – why don't you comply with them?

MR EVERY-PALMER QC:

I thought we were, Your Honour, I did check, and maybe that it's the font choice rather than the font point size. It may be something as technical as that but –

GLAZEBROOK J:

It's about rule 3 or 4, right at the beginning, the point size.

MR EVERY-PALMER QC:

We were cognisant and we thought we were compliant but I do apologise.

GLAZEBROOK J:

Well, it might be 12 point in some obscure script but it's certainly not 12 point in any other script.

O'REGAN J:

It's about 10 or 9.

MR EVERY-PALMER QC:

Your Honours, I have a three page roadmap and a supplementary bundle which contains five items. The first three relate to indefeasibility so I suspect that I won't have to trouble you with them for more than a couple of minutes. The fourth one is a decision of the Northland Regional Council in relation to the resource consents. Some weight's been placed by my learned friend Mr Galbraith on the consents in terms of interpreting the easements but also

in terms of getting comfort as to how activities are conducted so it seemed important to give the Court a copy of that decision because various resource consents have been, or the application for renewal has been disallowed because of non-compliance, and for concerns of pollution, and the fifth document is the most relevant of the three Tribunal claims that relate to the Esplanade Reserve.

So starting with –

GLAZEBROOK J:
And I'm assuming nobody has any objection to any of this material? I'm thinking of the last one in particular.

MR GALBRAITH QC:
Yes, we do, Your Honour, and I haven't had a chance to properly read it, but I understand that the resource consent issue has been heard before the Environment Court recently.

GLAZEBROOK J:
Yes, there was an appeal, wasn't there?

MR GALBRAITH QC:
Yes, and my learned friend's explanation of it is not accepted either. It seems to be new evidence or a new matter upon which, if it was going to be taken into account, we'd want to call some evidence. It's one of the problems with the way these things keep arising.

GLAZEBROOK J:
Well, I think we'll take it for the moment and we'll see where Mr Every-Palmer wants to take this and then Mr Galbraith, if you make any points in reply that you need to, depending upon what use has been made of it.

MR GALBRAITH QC:
Yes, thank you.

MR HODDER QC:

As you might have anticipated, I have a similar thought about tab 5 which is –

GLAZEBROOK J:

Yes, I thought you might.

MR HODDER QC:

There's an affidavit from Mrs Marks which the Court will have seen in the seven affidavits which in a very general way talks about the claims. If there are any submissions to be made on this that, sort of, then again, we would say outside the scope of any proper updating evidence at this stage of the process.

GLAZEBROOK J:

Well again perhaps we'll see what use is made of it, if any, and then hear in reply.

MR HODDER QC:

Thank you Your Honour.

MR EVERY-PALMER QC:

Thank you Your Honours. Starting with the Reserves Act, which is tab 2 of the appellant's bundle of authorities, the purposes of the Act is set out in the long title and the purpose statement from the long title - the Act makes provision for public reserves for various purposes including the protection of the natural environment. Section 3 goes on to explain that reserve land is held for purposes including recreational use, environmental and landscape amenity, that's section 3(1)(a) and then in (c), also this is particularly relevant to esplanade reserves, to ensure as far as possible the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands et cetera.

There are various categories of reserve land. Recreation reserves, historic reserves, scenic, nature, scientific, Government purpose and local purpose

reserves, each of them reflecting different primary values that are being protected by the regime, and the common feature for all those type of reserve is that land is held by the administering body as a custodian, as a trustee for the public users and for the purposes that are set out in the Act. That's the first characteristic. It's a statutory embodiment of the public trust type doctrine where land is held by an administering body, or Government authority, but the real reason it's held is for a different set of users.

The different types of reserve are subject to various different constraints, the Act is very prescriptive as to what can happen with different bits of reserve land and as we'll get to shortly there are a detailed set of provisions going through type of reserve by type of reserve. We've set out exactly what the decision-maker can do in relation to it. The Walls Bay Esplanade Reserve falls in the category of local purpose reserves. Other things that might fall into that category could include a cemetery or a public hall or soil conservation areas and as the name suggests an esplanade reserve is typically an open area next to a river or large body of water where people may walk. So access is provided both to the body of water but also along the adjoining area of land.

The purpose of an esplanade reserve is set out in the Resource Management Act, which is tab 3, and the Act provides that an esplanade reserve has one or more of the following purposes, and there's no more specific purpose given to this reserve, so we take it that all three are potentially applicable. (a) to contribute to the protection of conservation values by, and then a list of features which all relate to nature. "(i) maintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or (ii) maintaining or enhancing water quality; or (iii) maintaining or enhancing aquatic habitats; or (iv) protecting the natural values associated with the esplanade reserve or esplanade strip; or (v) mitigating natural hazards."

So (a) is about protection of conservation values, natural values in relation to both the reserve, the esplanade reserve and the sea next to it. (b) is, "To enable public access to or along any sea, river or lake." So that's for people to get into the water, also to walk along the reserve itself, and (c) is,

"To enable public recreational use of the esplanade reserve and the adjacent water body, where the use is compatible with conservation values." So (a) protection of the natural environment; (b) access; (c) recreational use - but there is a hierarchy, (c) is subject to (a). The recreational use has to be consistent with the conservation values that are outlined above.

These purposes are of fundamental importance in this case because the Reserves Act hooks into these purposes. It always talks about what the primary purpose or the purpose of the reserve in question is, and so whenever we see a reference in the Reserves Act to the purposes for this particular reserve, it's going back to the protection of these conservation values, public access and subject to conservation values, public recreational use of the reserve or the adjacent sea.

So to see how those purposes apply in the context of the Reserves Act we can go through some of the power provisions of the Reserves Act starting with section 23(1). The provisions of this Act, "Shall have effect in relation to reserves classified as local purpose reserves for the purpose of providing and retaining areas for such local purpose or purposes as are specified in any classification of the reserve." So –

GLAZEBROOK J:
Why do you say it's a local purpose reserve? I think I might have missed that step in the logic.

MR EVERY-PALMER QC:
I think that comes from the process by which the road was stopped under the Local Government Act and I think it's that step that makes it a local purpose esplanade reserve. I can check on that overnight. There's no contention that it is –

GLAZEBROOK J:

No, I understand that, it's just it does help to know where it fits in. I understand it being an esplanade reserve but where it fits within this as well and why would just be useful for our information

MR EVERY-PALMER QC:

Yes, I'll double check. I think it comes from the road stopping process, but at any rate it's clear that it is an esplanade reserve, in particular – sorry, a local purpose reserve, in particular an esplanade reserve and with the purposes in section 229 of the Resource Management Act defining its purpose.

WILLIAMS J:

So just remind me when the road was stopped, the 90s, wasn't it?

MR EVERY-PALMER QC:

Yes, 1998.

GLAZEBROOK J:

It doesn't sort of terribly naturally fit in with that definition it has to be said but …

MR EVERY-PALMER QC:

With the Resource Management Act purposes?

GLAZEBROOK J:

No, the local purpose reserve.

MR EVERY-PALMER QC:

I'm sorry Your Honour in what sense do you see a clash?

GLAZEBROOK J:

It's better if I think you give us the material. It's just, well I think it's better if we understand exactly how it became that and then it may well not fit that easily but it'd be said to be that so …

MR EVERY-PALMER QC:

Yes, well it certainly is an esplanade reserve, it certainly has those Resource Management Act purposes and the Reserves Act ties into those purposes through 23 –

GLAZEBROOK J:

That I understand. I'm with you as far as that goes.

MR EVERY-PALMER QC:

Thank you. So section 23(1) then section 40(1). These set out the functions that an administering body has. The functions and the powers are dealt with separately. Here the administering body, the Council, has, "The duty of administering, managing and controlling the reserve under its control and management in accordance with the appropriate provisions of this Act and in terms of its appointment and the means at its disposal, so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified."

So the Far North District Council holds this piece of land to ensure that it's used, enjoyed and developed for the purposes set out in the Resource Management Act and not for any other purposes.

WILLIAMS J:

What then is the relevance of section 23 at all?

MR EVERY-PALMER QC:

It does seem duplicative. The structure of the Act is to go through the different types of reserves in 20, 21, 23. It's a bit of a tautology in 23 that –

WILLIAMS J:

It's just there are a number of things in 229 that could be picked up as scenic reserves or, you know, an esplanade reserve around a lake, probably quite useful as a scenic reserve rather than a local purpose reserve.

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:

Anyway, you pick your purpose out of 229, not out of anything in section 23, so does it make a practical difference that you say this is a local purpose reserve?

MR EVERY-PALMER QC:

What I'm giving background to, Your Honour, is to understand the relationship between the ability to grant easements and the purposes of the statute as applied to esplanade reserves.

WILLIAMS J:

So unless you've got a local purpose reserve, you can't grant an easement, is that what you're walking us through.

MR EVERY-PALMER QC:

No, you can't, you can grant an easement over any type of reserve, but our submission, perhaps if I step back slightly. There are three arguments for the Society. The first is they're not capable of being an easement. The second is that section 48(1)(f) doesn't permit this sort of easement, it's just outside the Council's powers, and the argument that I'm moving, this is the background to, is an argument that says that any broader interpretation of section 48(1) that would allow this type of easement, is inconsistent with the Reserves Act both in terms of esplanade reserves, but also any other type of reserve because there are constrictions on what can be leased or licensed in relation to those reserves.

WILLIAMS J:

Sure, but you don't need 23 for that, you need the rest of the Act.

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:
Good, thank you.

MR EVERY-PALMER QC:
And section 40 was the functions of the administering body. Section 60 sets out its powers in relation to local reserves. Sorry, section 61. Subsection (1), it has the power, "In the exercise of its functions under section 40, to do such things… consider necessary or desirable for the proper and beneficial management, administration, and control of the reserve and for the use of the reserve for the purpose specified in its classification."

So again going back to the section 229 purpose. There's then a, I'll just point it out while we're here, it has the power to grant leases in subsection (2). That, in my submission, is clearly subject to subsection (1), you can't grant a lease for something which doesn't come within the power in subsection (1) and that's confirmed by subsection (2A) which extends the leasing power to cover community buildings, playcentres, kindergartens, Plunket rooms and other like purposes, and also farming.

GLAZEBROOK J:
Sorry, I've lost where you are.

MR EVERY-PALMER QC:
Section 61. Subsection (1) is a power to do things for the purpose of the reserve. Subsection (2) makes the administering body a leasing authority for the purposes of the Public Bodies Leases Act. Subsection (2A) also says that in addition to those leasing powers you can also give leases to community buildings et cetera.

GLAZEBROOK J:
What I didn't understand was what you were taking from that?

MR EVERY-PALMER QC:

So if section 41, section 48 is interpreted the way that it has in the Courts before, there's a very broad power to grant easements and that would include things which if they were by way of lease or license wouldn't be permissible on this type of reserve or any other type of reserve.

GLAZEBROOK J:

And why do you say that?

MR EVERY-PALMER QC:

It maybe, if I let that argument develop – sorry. In the case here a perhaps more natural way to deal with someone who wanted to wash down boats or repair boats on your land would be to grant a lease or a licence for it. You wouldn't immediately think of an easement. It's a bespoke arrangement. You might have health and safety concerns, you might have timing limits.

GLAZEBROOK J:

Just tell me why they couldn't grant a lease for that.

MR EVERY-PALMER QC:

Because the power in subsection (2) of section 61 as interpreted by the Court of Appeal, and in my submission correctly interpreted, has to be to do with the powers, has to be for the purpose of the local, of the reserve in question.

GLAZEBROOK J:

Well if I want to set up an ice cream stall on a reserve and I want to lease that for that purpose, why doesn't that relate to the enjoyment of the public, assuming that my ice cream stall is not going to have an adverse effect on conservation values.

MR EVERY-PALMER QC:

If it came within section 229 then it could be permitted.

GLAZEBROOK J:

But you said I couldn't have a lease, therefore I couldn't have this type of thing under 48. I'm just saying, why can't I have an ice cream stall, that I lease some land for an ice cream stall, obviously not on this reserve, I think it's probably too small, but on a beachfront reserve because the public actually need ice creams and drinks when they're enjoying their picnics et cetera. Or need or want, but it certainly increases their enjoyment, I would argue, when I was –

MR EVERY-PALMER QC:

Yes, it would be my submission that that's not – it might increase their enjoyment but that that's not the sort of enjoyment envisaged by section 229 of the RMA.

GLAZEBROOK J:

Well to enable public recreational use of the reserve where the use is compatible with conservation values.

MR EVERY-PALMER QC:

Yes, it may Your Honour –

GLAZEBROOK J:

You're in the middle of nowhere, you have to walk three kilometres to get there, you've got young children who are very thirsty. I mean you may decide not to do it because you may decide it's not related, I'm just saying why can't you.

MR EVERY-PALMER QC:

Yes, it –

GLAZEBROOK J:

Because that's your argument, isn't it, in a nutshell, that you can't have – well I probably shouldn't put words in your mouth. What is your argument in respect of that?

MR EVERY-PALMER QC:

No, it's where you're going, that it's not consistent with the purpose of the local reserve to allow industrial activity to be carried out on the reserve.

GLAZEBROOK J:

Well I'm talking about retail activity, an ice cream stall, I might even be talking about one of those ones that's an ambulatory one, one of those little carts that I roll around.

MR EVERY-PALMER QC:

The retail store, the ice cream store I think is a much more difficult case than the Boatyard, but the Act does, it is extremely prescriptive so if we were dealing with a recreation reserve then there are, there is specific provision for granting leases or licences for carrying out any trade or business on that particular type of reserve. You don't see a similar provision in relation to local purposes so the argument would be that the reference to it in relation to scenic reserves means it's not possible in relation to public use, local purpose reserves. But I'm not, we don't have to decide ice cream stands today, we have to decide whether the Boatyard can go there.

O'REGAN J:

So are you contending for a position where there are no easements. I thought you hadn't cross-appealed.

MR EVERY-PALMER QC:

No, so –

O'REGAN J:

So it's a given that there are some easements, we're just determining about the scope of them, aren't we?

MR EVERY-PALMER QC:

No, there are some easements that were granted in 2013 that are not challenged by the Society, the basic access easements, but certainly it's

notice to support covers a challenge to the Court of Appeal's decision that section 48 was broad enough to cover any easement, we say it doesn't cover the easements in question, so it's support on other grounds –

O'REGAN J:
But you'd need an appeal, wouldn't you, because you need to change the result. You haven't appealed, you haven't got leave.

MR EVERY-PALMER QC:
We're not changing the result because we won on the quashed easements, we're supporting them on the grounds.

O'REGAN J:
Yes, but you're trying to extend it to the non-quashed easements.

MR EVERY-PALMER QC:
No.

O'REGAN J:
No, so you're accepting they're there.

MR EVERY-PALMER QC:
Yes.

O'REGAN J:
So you're accepting there is going to be some easements over this reserve?

MR EVERY-PALMER QC:
Access easements.

GLAZEBROOK J:
For commercial purposes.

MR EVERY-PALMER QC:
Access easements.

O'REGAN J:

So doesn't that undermine the argument you're just making to us?

MR EVERY-PALMER QC:

No Your Honour there's a, when we get to the wording of 48(1) there's a distinction between access and other activities.

ARNOLD J:

So access –

O'REGAN J:

So commercial –

ARNOLD J:

– does include commercial access? I mean, it's a commercial boatyard, presumably, there will be a charge for hauling the boat up on the rails, so that's commercial and that's fine.

MR EVERY-PALMER QC:

The Society has never challenged that easement. It sees it as an appropriate balance to allow access over the reserve.

ARNOLD J:

But it does – that acceptance carries an implicit acknowledgement that there can be commercial activity, doesn't it, on the reserve?

MR EVERY-PALMER QC:

Only, in my submission, if a basic nature in terms of access over the reserve, not to conduct a natural business activity. Sure, there is a commercial element to going across from the water into the Boatyard, I accept that, Your Honour, but it's a world of difference, in my submission, between that and the repair and maintenance work and washing down etcetera.

ARNOLD J:

Okay, thank you.

WILLIAMS J:

So do you say 61(1) is the constraining provision insofar as leases are concerned? You mentioned 61(2) but I'm not seeing…

GLAZEBROOK J:

61…

MR EVERY-PALMER QC:

Yes, 61(1).

WILLIAMS J:

(1), right, okay, so you can't establish that this sort of activity is desirable for the proper and beneficial management, administration, and control of the reserve, particularly given that the slipway predates the reserve by 40 years? Okay – no, yes, 40 years.

MR EVERY-PALMER QC:

Sorry, Your Honour, I missed the first part.

WILLIAMS J:

So the constraint you're pointing to is the phrase "necessary or desirable for the proper and beneficial management, administration, and control of the reserve and for the use of the reserve for the purpose specified in its classification", i.e. for the purpose of section 229. Isn't there a good argument that it's desirable for the proper management of the 229 purposes that proper provision be made for something that isn't apparently within those purposes but pre-existed it by 40 years?

MR EVERY-PALMER QC:

If it's consistent with the natural environment, with the conservation values, or access to or along the…

WILLIAMS J:

Sure, but I guess the phrase that the RMA would use is an "environmental bottom line". It's there. You have to manage it. You have to manage it properly. If you could lease it, you could close down public access. If you restricted it to an easement right, public access would remain, and the pre-existing infrastructure would also be able to be used. Isn't there a good argument that's a sensible compromise?

MR EVERY-PALMER QC:

The Environment Court, I think, did consider existing use arguments –

WILLIAMS J:

That's different. Existing use rights are different to – you're already dealing with a significantly compromised foreshore, has been since 1966. You can't wish it away.

MR EVERY-PALMER QC:

Yes, and the Society doesn't wish away the slipway. It's happy for boats to be taken in and out of it. Its objection is to activities being carried out on the reserve which could equally well be carried out on the Boatyard.

WILLIAMS J:

Right. But hasn't it always been the case, isn't that the evidence, that the washing down occurred there?

MR EVERY-PALMER QC:

Certainly some –

WILLIAMS J:

What might be new are the skirts but that's better for the environment, not worse.

MR EVERY-PALMER QC:

Some washing down has occurred but certainly nothing more fully on the reserve until 2014/2015.

WILLIAMS J:

But you see, it must have been the case that there was washing down occurring before it was unlawful because this outfit predates the controlling legislation.

MR EVERY-PALMER QC:

Yes, but before this, it was a road and there were –

WILLIAMS J:

Well, not a road actually.

MR EVERY-PALMER QC:

A paper road and it's set out in some of the historical materials that the original consent to build the Boatyard clearly required that all activity had to occur on the Boatyard premises.

WILLIAMS J:

Where do I find that? Was this raised in the enforcement proceedings in the '90s, was it?

MR EVERY-PALMER QC:

It's probably included in the background. The paragraph 5 of our submissions – so this is from 1994, at least the time when the appellant purchased it. The area that is now the reserve was an unformed road. The relevant consents that existed at that time made clear that all repair and other boatyard work was to be confined to the Boatyard and the footnote there refers back to two documents in the case on appeal which were the original two consents for the original construction of a building on the Boatyard site and they're in volume 3.

WILLIAMS J:

Right, so you're talking about recommended condition 3?

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:

And as far as you know, that was the consent granted?

MR EVERY-PALMER QC:

Yes, and that at no time, as I say, up until 2014/2015 was there any lawful right for washdown or repairs to be conducted on the land both as a reserve or as a paper road.

ARNOLD J:

I think the evidence was a lot of this washdown activity took place between high water mark and low tide so it wasn't being done on the reserve but it wasn't being done on the Boatyard either. It was actually being done on the waterfront.

MR EVERY-PALMER QC:

Yes. I'm not sure at what time the change in the location occurred or how much was done at that stage. The evidence is, you know –

ARNOLD J:

No, I understand.

MR EVERY-PALMER QC:

– some of that's getting quite historical. So the Society's concerns is that the washing down activity, the water blasting, the scraping of the hulls, sanding, and spray painting, that work taking place on the reserve interferes with the ability of the Council to beautify, plant on the reserve, or add facilities to the reserve in an ongoing sense, and also that esplanade users are prevented

from being on those relevant parts of the reserve when that activity's taking place.

GLAZEBROOK J:
That's interesting but not relevant to us, is it? Or if it is relevant to us, can you explain why?

MR EVERY-PALMER QC:
So the first –

GLAZEBROOK J:
Because you've got the slipway and boats going up and down it in any event.

MR EVERY-PALMER QC:
Yes.

GLAZEBROOK J:
So that's going to have the same effects that you're talking about. What my point really was that we're not here to review the Council's decision or indeed the Minister's decision in that sort of way unless you can say there's some unreasonableness or proper review ground or unlawfulness.

MR EVERY-PALMER QC:
Yes.

GLAZEBROOK J:
So I was just asking you what that submission was relating to.

MR EVERY-PALMER QC:
Yes, so the Society's first argument is the one accepted by the Court of Appeal that the easements are incapable of being easements at law. The second is that on a careful reading of section 48(1)(f) that although it permits basic amenity like access, including for a commercial purpose, that it does not permit the washdown and boat maintenance work to take place. Then the third argument is that even if this easement was within section 48,

that it was unlawful in an administrative law sense for three reasons. The first is that the Council as grantor in 2006 didn't undertake a sufficient review of the conflict between the use of the reserve for esplanade purposes and the boat building activities. It's very superficial in terms of that analysis and that the Council as consentor by not taking its own sufficiently thorough review failed to –

GLAZEBROOK J:
So is that a process argument, an unreasonableness argument or what, but maybe we – the best thing might be to actually go through your submissions in the order that you wanted to, and I note the next one is not capable of being an easement at law.

MR EVERY-PALMER QC:
Yes. It –

GLAZEBROOK J:
Then bring those matters in where they're relevant rather than at the beginning. For myself I always find it much easier to understand why I'm being told something if I know what the proposition is that it's supposed to be backing up.

MR EVERY-PALMER QC:
Yes Your Honour. I had just meant it as a brief introduction to the activity on the reserve but I'll go straight to issue 1, not capable of being an easement at law. There certainly is development, and I think it was fairly well explained by my learned friend Mr Galbraith in terms of the law in the United Kingdom, as to the test for ouster and when an easement creates too much occupation or possession of a reserve, and in *Regency Villas* previously easements for recreational purposes have been frowned on. So there's a lot of development in the UK. However, here in my submission it's a difficult test case because there isn't much information before the Court as to conveyancing practice in general so just a note of caution about using this case to develop the law of easements. Also easements are well incorporated into our statutory

framework. On a quick search this morning there were some 293 statutes and legislative instruments that refer to easements. It's not to say that the meaning of easements is fixed in time but there was probably a sense of what an easement was when those statutes were enacted.

So perhaps I should deal first with the interpretation of the easements. My learned friend Mr Galbraith submitted that the easements weren't, in fact, as extensive as they appeared to be to the Court of Appeal. I took there to be four reasons for that. Firstly, it might be helpful to turn to the easements –

GLAZEBROOK J:
Can we perhaps just check with you. If the easements were constrained in the way that Mr Galbraith said, do you still say they're still not able to be done under section 48, and as I understood it, and this is a very broad brush, if in fact any washing occurs just on the way to the Boatyard, or the way out of the Boatyard, or alternatively with the one that in fact is no longer an issue on the other side, or in relation to boats that have to hang over.

MR EVERY-PALMER QC:
Even on the most extreme read down version of the easements, we would still say they're not capable of being easements at law.

GLAZEBROOK J:
All right, and why do you say that?

MR EVERY-PALMER QC:
It may be simplest if I go through the interpretation argument first because it's not an either/or situation. You might accept some of his arguments about the interpretation but not others.

GLAZEBROOK J:
Well I'm just asking you to accept totally his interpretation and why that would still be unlawful.

MR EVERY-PALMER QC:

So we would say –

GLAZEBROOK J:

I'm not saying we have accepted his interpretation just to be very clear, I'm just trying to get the bounds of the argument on a legality.

MR EVERY-PALMER QC:

Yes. So we say that – sorry, I think there are four interpretation arguments. The first is that A6 only applies in a two cradle situation. The second that A6 doesn't apply if the only reason you can't accommodate a boat is because the Boatyard is full. Thirdly, that the 60 days can only really be approximately a boat a day that you don't aggregate all the time the different boats have been there in total in a fine-grained way, and fourthly, that A4 is not a valet service. We would say that it's still problematic – I think if you accepted all those things then the accommodating the business issue would fall away because it would all have some connection to the land. You'd no longer have a self-contained washdown service or a self-contained repair service occurring off the land. But we would say that it still ousts the normal use of the reserve for esplanade purposes. The reserve is dedicated to the particular section 229 purpose and the public would be excluded while those activities were taking place on area A and there's no 60 day limit in terms of washing down. There's no time limit in terms of washing down as well at all, it can take place any time. So we would say that even on the most read down version they're so extensive that they amount to joint occupation.

WILLIAMS J:

Sorry, you're going to have to help me with this, I'm not following it. So first of all you said if you adopted the most read down version, and you went through your four points, you accept that you can't say that the activity is therefore self-contained on the servient tenement, so you would concede that. But you would say it's not for a bona fide reserve purpose, that's a different question to the validity of the easement. That's the, well at least the private law validity of

the easement, that's about the public law validity of the easement, and then you said –

GLAZEBROOK J:
It excludes so it's joint occupation –

WILLIAMS J:
It excludes who and when?

GLAZEBROOK J:
The public.

MR EVERY-PALMER QC:
The public and the Council. So the Council's –

WILLIAMS J:
For how long?

MR EVERY-PALMER QC:
For an indefinite period.

WILLIAMS J:
Why is it an indefinite period, I'm just not following?

MR EVERY-PALMER QC:
There's no 60-day limit, there's no limit to the amount of work that can occur on the reserve.

WILLIAMS J:
That's the bit I don't get.

MR EVERY-PALMER QC:
For the washdown period. So the 60 day limit doesn't apply to overhang and doesn't apply to washdown.

WILLIAMS J:

Sure, so does that mean –

O'REGAN J:

But it doesn't block the walking track, does it?

MR EVERY-PALMER QC:

So the access to the esplanade reserve isn't just over the walking track, it's over the whole reserve. It's a –

O'REGAN J:

But it would only block the area where the boat work is actually taking place, and it wouldn't stop you walking past it, so it doesn't stop public access to the reserve, it just limits the area of the reserve to which the public can have access.

MR EVERY-PALMER QC:

Yes.

O'REGAN J:

But that's hardly saying it excludes the Council from the reserve.

MR EVERY-PALMER QC:

Well on any easement there's likely to be some subset of the total land that's affected, but it's quite a considerable percentage of the usable area of the reserve. Mr Galbraith referred to a figure of 8%, but if you look at the map, for example, at the back of the joint memorandum of counsel from 5 July, the area above, the space above area A which is section 1, that's all bush. The area –

GLAZEBROOK J:

Sorry, do you want to just lift it up and point it out, please?

MR EVERY-PALMER QC:

Yes, so section 1 up there is all bush, which you can see from the photographs, and it's got the squiggly bush line around it. Then you have the easement –

ELLEN FRANCE J:

Sorry, in terms of the bush, what's the evidence about accessibility into the bush?

MR EVERY-PALMER QC:

No evidence in relation to that, Your Honour.

ELLEN FRANCE J:

So all we've got is what we see from the photos?

MR EVERY-PALMER QC:

Yes, where it looks – I don't understand it to be contested but the main area that the public would be able to promenade or walk around the reserve is the sloped green area. If you look at photograph number 1…

ELLEN FRANCE J:

Well, I must say, that wasn't my understanding of where people might be able to walk.

MR EVERY-PALMER QC:

Well, they can walk around the edge of the water, that's where the walking track to Paihia goes, but in terms of where you might walk in the reserve, this area is bush, and you can see from the photograph that it's quite a steep bush line there. Then there's further bush and dinghy yards there. So it's really just this gently sloping grass area out front.

O'REGAN J:

But it's not the easement that's stopping people walking in the bush. It's the bush. That's not Mr Schmuck's fault.

MR EVERY-PALMER QC:

No, Your Honour, but in terms of it affecting 8% of the reserve, it's affecting more like a half or a third of the usable area of the reserve where people would and do want to go.

O'REGAN J:

You're trying to get us to accept an argument that it excludes the Council and the public from the reserve. The fact that it's quite hard to climb through trees doesn't mean that the public are excluded from it. And this does nothing to that area of the reserve at all. It's completely irrelevant to it.

MR EVERY-PALMER QC:

As Lord Scott said in *Moncrieff*, it's – the part of the servient tenement that you look at is the area that the easement's over. You don't look at –

O'REGAN J:

Yes, but we've already accepted that there's going to be an access easement, haven't we?

MR EVERY-PALMER QC:

Yes.

O'REGAN J:

So it's already compromised in terms of the reserve values?

MR EVERY-PALMER QC:

Yes.

O'REGAN J:

So the only difference is what goes on in that small area, that 8% of the reserve. That's all we're concerned about.

MR EVERY-PALMER QC:

Yes.

O'REGAN J:

So how is that translating it from an accessway to the way that it allows for washing and 60 days a year of sanding? Why does that exclude the Council from the reserve? Just as a matter of fact, that just seems to me to be nonsense.

MR EVERY-PALMER QC:

Well, Your Honour, when the boats are on the slipway and being washed down and there's spray up from that and when the screens are up, they can't access that part of the reserve and to –

WILLIAMS J:

Where the boat is, you mean?

MR EVERY-PALMER QC:

Where it is, where people are working around –

WILLIAMS J:

The promenade path is still available, isn't it?

MR EVERY-PALMER QC:

Absolutely, there's –

WILLIAMS J:

So as long as they walk briskly, they won't get too wet?

MR EVERY-PALMER QC:

Yes, but the reserve is the whole area, so if they want to –

WILLIAMS J:

Well, of course.

MR EVERY-PALMER QC:

– play a game or picnic in that area then that's where the conflict of use comes from.

WILLIAMS J:

Yes, except, as I said, that conflict of use has been there rather a long time. My question about the washing down part which you say is unlimited as to time and therefore must be read as exclusive, in theory, you may be right, but that's not very realistic, is it? We do have to, as Justice Robertson once said, look at this in the real world and, you know, how many boats are going to be washed down? Are we talking about a long queue of boats that are going to be constantly washed 365 days a year? I wouldn't have thought so.

MR EVERY-PALMER QC:

Yes. Well, if Your Honour's right in terms of the easement analysis that one has to be realistic and the best we can, on the evidence, form a view as to how much interference there is with the normal use of the reserve, I accept that. The questions though about how much use it would get, in my submission, that goes to – that is evidence that Dormer should have looked at in his report, and didn't look at, he should have asked "Where else can boats go to get repaired?" and of course, there's the big marina just around the corner and part of my client's frustration is that those questions of "Is there alternative options here? Could all this work just as easily be done on the Boatyard and not colonise the reserve? Could it be done at the marina?", those questions have never been properly determined by the Council and that's part of the judicial review complaint.

WILLIAMS J:

Perhaps, but that's not about whether the easement is valid or not.

MR EVERY-PALMER QC:

No.

WILLIAMS J:

And I just wonder whether you're overcooking your cabbage insofar as the easement as the exclusivity of this area is concerned and probably not helping.

MR EVERY-PALMER QC:

Yes. We are talking about the scenario where Mr Galbraith's interpretation arguments carry the day and that it's the minimal version of the easement.

WILLIAMS J:

Sure, exactly, yes. So if there's washing down occurring, given what appears to be the scale of this thing, we're not talking large industrial here, we're not talking about a Liverpool shipyard, you're not going to get that sort of large-scale exclusion of the public along that area. You are, of course, where the boat is actually parked but otherwise not.

MR EVERY-PALMER QC:

Yes. It's also not washing down with a sponge. It's water blasting.

WILLIAMS J:

Yes.

MR EVERY-PALMER QC:

And that was considered by the Northland Regional Council in the decision I handed up. If I could just take Your Honour to that, so that's the supplementary bundle.

WILLIAMS J:

Tab 5?

MR EVERY-PALMER QC:

Tab 4. So the Council says "We consider undertaking water blasting" –

GLAZEBROOK J:

You'll have to tell us where it says it.

MR EVERY-PALMER QC:

Paragraph 186. There are no page numbers, sorry, Your Honour.

GLAZEBROOK J:
Again, that doesn't seem to me to go to legality at all.

MR EVERY-PALMER QC:
So –

GLAZEBROOK J:
I mean, our trouble here is if you're wanting us to make anything of this, we haven't got any evidence whatsoever as to what's actually happening. So the theoretical possibility that you could have boats up there – because remember, if Mr Galbraith's argument is correct, they can only be on their way to and from the Boatyard. The Boatyard does not accommodate, as I understand it, enough boats that would allow very much in the way of water blasting activity of the type you're saying that actually excludes the public for longer than a relatively short time, does it?

MR EVERY-PALMER QC:
Yes. I was –

GLAZEBROOK J:
I mean, I'm not sure. Do we have evidence on how many boats can be accommodated in the Boatyard?

MR EVERY-PALMER QC:
No, Your Honour, I –

GLAZEBROOK J:
It's small though?

MR EVERY-PALMER QC:
It is a small boatyard. It previously had four rails. Now there's only a single rail going from the turntable. I accept that, Your Honour, I was really responding to His Honour Justice Williams' comment about minimal interference from the water –

WILLIAMS J:

Right, you're talking about the activity footprint. That's bigger than just the boat –

MR EVERY-PALMER QC:

Yes, bigger than the boat –

WILLIAMS J:

– if people can't be anywhere near them because they'll get doused if they are.

MR EVERY-PALMER QC:

Exactly, Your Honour, and there'll be, to the extent it's screened, it means there's an eyesore screen on the reserve.

GLAZEBROOK J:

But that's got nothing to do with an easement, has it?

MR EVERY-PALMER QC:

Except to the extent of ouster of the normal other uses of the servient tenement.

GLAZEBROOK J:

Well, so are you saying if you had a boat being water blasted once a month for, I don't know how long it takes to water blast the boat, but that would be an ouster, or what – because it has to be a scale, doesn't it? It would just have to be a scale.

MR EVERY-PALMER QC:

Absolutely, Your Honour. It's always a question of degree and the Court –

GLAZEBROOK J:

And how are you expecting us to make any pronouncement on that whatsoever without any evidence whatsoever as to – and I'm talking about not just what has actually been used, but the actual capacity to do so.

The submission is based on it allows them to do X, Y and Z, but if practically that can't happen…

MR EVERY-PALMER QC:

Yes. I take Your Honour's point that it would be preferable to have more up-to-date evidence on that, and certainly I'll submit later that-

GLAZEBROOK J:

Or any evidence.

MR EVERY-PALMER QC:

Yes, or for Mr Dormer to have looked at any evidence as to how often it would be used and what the overspray would be like –

GLAZEBROOK J:

Well he was working, as he said very clearly, only in terms of keeping the existing business, which was always a small business, open and not expanding those activities at all, and that was the basis of him saying those are the sort of conditions that have to be put on the use, wasn't he?

MR EVERY-PALMER QC:

Yes.

GLAZEBROOK J:

Which is the genesis of those conditions in the management plan.

MR EVERY-PALMER QC:

Yes. Is it helpful to talk about the interpretation of those?

GLAZEBROOK J:

Yes, I just wanted to get the, so we've got the answer I think on…

MR EVERY-PALMER QC:

Yes, so I would accept that the accommodation of the business issue would drop away. I would still maintain that there's still an ouster there but I

appreciate the difficulty of that argument if the interpretation arguments are accepted, and I would just add to it that the easements to be valid easements also have to be sufficiently definite and in my submission the uncertainty identified by the Court of Appeal and in the context of this debate today about what they mean, should disqualify them from being easements, particularly in the context of an easement over a reserve where if the Council is going to enforce these easements, one, they should be clear; if the Boatyard owner is going to take trespass action against a member of the public, the easements should be clear on their face as to how they're intended to work. Just on that –

GLAZEBROOK J:
When you say "on face" are you excluding the resource consent in the management plan or do you accept that they're included?

MR EVERY-PALMER QC:
They're not really interpretive aids, in my submission, they're a different legal overlay. The legal status of the management plan isn't clear to me. I understand that you have to have one as a condition of the resource consent but I don't understand there to be any particular penalty for non-compliance. So leaving that to one side, but the resource consent itself I would see it not so much as an interpretive aid. The resource consent can change from time to time, but it's a legal overlay which may inform your view as to the realistic uses of the reserve, rather than affecting the interpretation of the easement.

ELLEN FRANCE J:
But where the easements are use easements, aren't the two working in tandem?

MR EVERY-PALMER QC:
Not, in my submission, as to – certainly in terms of what happens on the reserve they're used in tandem but I'm not sure that the resource consent helps us interpret the easement.

ELLEN FRANCE J:

Do you agree that the Court's approach in interpretation should be to try to validate rather than invalidate? The *Regency* line?

MR EVERY-PALMER QC:

In my view it's more difficult when it's an easement over a public reserve and you have those competing public interest issues at play. It's not a straight two party commercial transaction. Here the Council entered into it but the Council is the custodian or the trustee on behalf of the public. So in my submission there's no, it's not, if the easement wouldn't otherwise be valid it's not appropriate to interpret it so far as for it to become valid. It should be interpreted and then it's validity chosen, decided.

GLAZEBROOK J:

With a competing public interest isn't that dealt with with the processes that are mandated for an easement, in terms of public consultation and notification etcetera, and the requirements in terms of how the Act is to be done. I'm just not sure how that actually relates to a land law issue which is what we're talking about now. It certainly relates to the public law issues but I can't understand it in the land law sense.

MR EVERY-PALMER QC:

No. The 48(2) process certainly is a procedural protection for the granting of an easement but I don't see it as relevant to the capable of being an easement --

GLAZEBROOK J:

But you say we somehow take into account that it's a public reserve and don't do what we'd do with any other easement?

WILLIAMS J:

Well perhaps one way through it is to at least have to take into account the interests of third parties where it's a public trust reserve, can I use that shorthand.

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:

And that's what sets it apart from the very private law issues involved in trying to work out validity as between servient and dominant tenement owners.

MR EVERY-PALMER QC:

Yes, I'd gratefully adopt that approach. Finally on the topic of uncertainty as to the application of the easements. If you look at the July joint memorandum at photo 5 you can see the area A line about three-quarters of the way down the page, then downhill from that you have the sump and the plumed screen line. So both the sump and the plume screen are on area Z and that's confirmed by the map at the back of the memorandum, which shows in the top quarter the washing down plume screen, the vertical line and the sump just to the left of that, both being on area Z. I presume the Boatyard's position is that they're lawfully in area Z but if you look at easement A3, back of the key documents bundle. Tab 20. So tab 20, the easements are at the back of the joint chronology. So at A3 easement holders are permitted to construct and maintain a concrete washdown area with associated discharge containment systems –

GLAZEBROOK J:

I'm sorry, I'm not quite sure where you are.

MR EVERY-PALMER QC:

So it's the easements and it's easement A3. The copy I'm working from is tab 20, in the red 264. So the concrete washdown area has to be located above a line 10 metres from mean water high springs and the A5 defines the screens, which have to contain all contaminants within the washdown perimeter, which is presumably a reference back to A3, so the screen can't be on Z.

GLAZEBROOK J:

I'm sorry, I don't understand the point.

MR EVERY-PALMER QC:

So the point is as to the workability of the easements or whether they're too uncertain, it's presumably the Boatyard's contention that the screen is lawfully where it is, that's where they've drawn it, that's where they've shown the photographs of it, but it's downhill from the 10 metre mark. It's closer to the forehorse than 10 metres and therefore, in my submission, isn't consistent with A3 or A5. I don't –

GLAZEBROOK J:

But that doesn't mean it's uncertain. That just means that it's not compliant. I don't see the uncertainty there. Because if you say it's not compliant with the –

MR EVERY-PALMER QC:

Yes. I presume they think it is compliant and –

GLAZEBROOK J:

Well, they might be wrong but it doesn't mean it's uncertain.

ELLEN FRANCE J:

Sorry, can I just check, is it clear that the sump is in Z?

MR EVERY-PALMER QC:

From the photograph, it is, but those lines are just hand-drawn lines. From the map, so the back of the joint memorandum, does Your Honour see where "sump" is drawn?

ELLEN FRANCE J:

Yes, I do, and I just couldn't see that those lines carried on.

MR EVERY-PALMER QC:

Yes, so the two red circles that are half –

ELLEN FRANCE J:

Yes.

MR EVERY-PALMER QC:

So they form a vertical line which is the division between Y and Z. So the sump and the screen are to the right of the line.

ELLEN FRANCE J:

So on the right-hand side, that line should be carrying on to that red circle?

MR EVERY-PALMER QC:

So where the two red dots are between Y and Z, they form a line which is the divider between them, the sump is to the right of that line, and the screen is to the right of that line.

WILLIAMS J:

So who's drawn these lines on the photo?

MR EVERY-PALMER QC:

On the handwritten ones –

WILLIAMS J:

On photo 5.

MR EVERY-PALMER QC:

– are by the appellant Mr Schmuck.

WILLIAMS J:

And what datum has he used, do you know?

MR EVERY-PALMER QC:

I don't know.

WILLIAMS J:

Maybe he's wrong.

MR EVERY-PALMER QC:

Maybe on the photos but on the map, that's how they're drawn.

WILLIAMS J:

Sorry, I don't have that. I've got a different map so…

MR EVERY-PALMER QC:

It is on the back of the joint memorandum.

O'REGAN J:

It's the back of what you've got in your right hand, the last page.

MR EVERY-PALMER QC:

So it's from Thomson, Sir –

GLAZEBROOK J:

So you say that all of Z is not 10 metres above mean high water?

MR EVERY-PALMER QC:

That's how Z is defined.

GLAZEBROOK J:

So where's that defined there?

MR EVERY-PALMER QC:

It goes back to the original easements…

GLAZEBROOK J:

Well, it doesn't matter. I don't think we – I beg your pardon –

MR EVERY-PALMER QC:

It goes to the uncertain –

GLAZEBROOK J:

My point just says “How can it be uncertain?” You say Z’s defined by that. We know what “mean high water mark” is, although I gather it might have been shifting slightly.

WILLIAMS J:

Slightly?

MR EVERY-PALMER QC:

If – I presume they have an argument to say why it’s valid but that goes to uncertainty and difficulty of enforcing these things.

O’REGAN J:

Did the High Court of Court of Appeal say anything about this point?

MR EVERY-PALMER QC:

There was no information about screens before the Court of Appeal so –

O’REGAN J:

Or was this argument made in the Court of Appeal?

MR EVERY-PALMER QC:

So this relates to the updating evidence that’s been provided to this Court. So the Court of Appeal had no particular information about the screens.

WILLIAMS J:

But I don’t think this is an uncertainty point, it’s very certain, and you might be very certain that it’s impossible to undertake these activities within these constraints because the easement will be breached as soon as you do it but that’s a different issue for a different day in a different forum, isn’t it?

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:

I mean, it may be that your argument is that you squeeze these people so tight that they can't do what they had been trying to do but that's not a certainty question.

MR EVERY-PALMER QC:

Yes. I don't think anyone will say that they're a well-drafted set of easements and given their purpose to limit the other uses of the public reserve, in my submission, that's one of their deficiencies is their just uncertainty of application.

GLAZEBROOK J:

Is that a convenient point, Mr Every-Palmer?

MR EVERY-PALMER QC:

Yes, Your Honour.

COURT ADJOURNS: 4.05 PM

COURT RESUMES ON WEDNESDAY 10 JULY 2019 AT 10.01 AM

GLAZEBROOK J:
Mr Every-Palmer.

MR EVERY-PALMER QC:
Good morning, Your Honours, and may it please the Court. Your Honour Justice Glazebrook left me yesterday with a question about how the esplanade reserve came to be a local purpose reserve. The answer, I think, is through a combination of the Local Government Act and the Resource Management Act. Section 345(3) of the Local Government Act provides that when the relevant road was stopped, "there shall become vested in the council as an esplanade reserve (as defined in section 2(1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991", and then when we get to the definition in the Resource Management Act, an esplanade reserve can be in one of two categories, either "a local purpose reserve within the meaning of section 23 of that Act, if vested in the territorial authority under section 239", which the Far North District Council is, or else it's an esplanade reserve "vested in the Crown or a regional council", which this one isn't.

It is slightly odd because it doesn't actually provide that it is a local purpose reserve. It more says there are two categories and this one's the local purpose category. So I haven't had a chance to check whether my friends take any different view as to it but we can let the Court know if there is but –

GLAZEBROOK J:
I'm not sure anything turns on it. I just was interested just as to why it was.

WILLIAMS J:
Can you just explain, so if it's vested in the Crown if it's an old Queen's Chain esplanade reserve, for example, then its classification is not directed by statute, is that what you said?

MR EVERY-PALMER QC:

It's a reserve but which of the reserves isn't determined.

WILLIAMS J:

Isn't determined, right, but it is if it's vested in the TLA?

MR EVERY-PALMER QC:

Yes, it's a local purpose reserve or at least it's assumed by that definition that if it's in a TLA, it's a local purpose reserve.

WILLIAMS J:

Assumed? What do you mean by that?

MR EVERY-PALMER QC:

So it sets up –

WILLIAMS J:

Does it say it is or isn't?

MR EVERY-PALMER QC:

It sets up two categories, TLA and local purpose, or Crown or regional council, and it's assumed in the definition that if it's in the first category, it's a local purpose reserve. So I can't find an operational provision which says it is but it's certainly assumed by the definition of "esplanade reserve" that if it's vested in a territorial authority, it's a local purpose reserve.

WILLIAMS J:

Okay. So what's that section number?

MR EVERY-PALMER QC:

So it's in the definition section, section 2 of the RMA.

WILLIAMS J:

When you say "assumed", do you have the words?

MR EVERY-PALMER QC:

So “esplanade reserve means a reserve within the meaning of the Reserves Act 1977 which is either (i) a local purpose reserve within the meaning of section 23 of that Act, if vested in the territorial authority under section 239; or (ii) a reserve vested in the Crown or a regional council under section 237D”.

WILLIAMS J:

Right, so it’s possible to read that either as it’s covered by that definition if it has been classified as a local purpose reserve or it will be a local purpose reserve. It could go either way.

MR EVERY-PALMER QC:

Yes, and I think it’s the latter.

WILLIAMS J:

Luckily, it doesn’t matter in this case.

MR EVERY-PALMER QC:

Exactly.

WILLIAMS J:

Good, thank you.

ARNOLD J:

Before you get underway, could I just ask something, and to deal with it, could you just take the joint chronology and the easements table that’s done on page 5 of that? Because that’s very helpful in the way it’s coloured. A3 is not challenged although you do say in your submissions that if you win on other things then it has implications for A3 and I think you seek leave to cross-appeal on that but could we just put that to one side? So we’ve got a valid easement, A3, and that deals with the construction and maintenance of a concrete washdown area with associated discharge systems. So you’ve got that facility there, and one must assume it’s there for a purpose and there to be used. When we come to A4, as I understand it, the objection to that which

the Court of Appeal accepted was that the final words “or being returned to the water” were not qualified by a phrase like “from the dominant tenement”. So I take it if words like that were added, from the point of view of the Court of Appeal’s reasoning, that easement would be fine?

MR EVERY-PALMER QC:

Yes. The Court of Appeal, I think, thought that the differently-worded easements could deal with the issues that they had identified.

ARNOLD J:

And indeed – and that’s Mr Galbraith’s argument, I think. He says that’s what it means anyway. Now I’m not entirely clear. If that’s what it does mean, your client’s position is still that it, what, goes too far?

MR EVERY-PALMER QC:

In terms of capable of being an easement, the interpretation issue were addressed whether it accommodates the land or accommodates the business but we would still say that it amounts to a joint occupancy of the reserve so is not a valid easement.

ARNOLD J:

But how can you argue that if you don’t challenge A3? I mean, A3 provides for a washdown area. The logical time for washing down is as you take it up to the yard to be worked on and presumably, as you take it back, if it needs a bit of a tidy-up from the work that’s done on it.

MR EVERY-PALMER QC:

Yes. I appreciate Your Honour’s point. It was before I became involved in the case whether or not to cross-appeal was decided.

ARNOLD J:

Okay. Well, now, let’s go to A6 because this has been exorcising me. It seems to me that A6 focuses on whether a vessel can fit within the yard by virtue of its physical characteristics, that is, if it’s too long or possibly, I don't

know, multihulls or something might raise particular issues, I'm not sure. But anyway, it's determined not by whether the Boatyard is full or empty at a particular moment. What it's determined by is the characteristics of the vessel.

MR EVERY-PALMER QC:
Yes.

ARNOLD J:
If that is right, as I understand it, area A, the length of it between the seaward side and the landward side is something like 10 or 11 metres, isn't it?

MR EVERY-PALMER QC:
Approximately.

ARNOLD J:
Yes, well, a boat of that size is always going to be able to be accommodated on the Boatyard if you – unless the Boatyard was full, which is irrelevant, so the length of the boat, the physical characteristics of the boat, are not going to prevent it being accommodated unless it's a highly unusual configuration, as I say, some sort of multihull or something.

MR EVERY-PALMER QC:
Yes. I would part company with Your Honour in saying whether or not the Boatyard is full is irrelevant. In my submission, it has to be a combination of the size and the length and configuration of the boat and the state of the Boatyard and the particular time, so both in terms of what rails are actually in place and whether there are other boats occupying those rails. So in my submission, a straightforward reading or application of condition 2(c) is that if the Boatyard is already completely full, and in the current configuration of the Boatyard, that would only take one boat because there's only one rail past the turntable, then 2(c) is activated and there's nothing to stop the Boatyard repairing a second boat completely on the foreshore.

ARNOLD J:

Okay, so that's a question of what A6 means, and I must say for myself, I had not read it that way because it does seem to focus on the characteristics of the vessel. But if you're right then it could be that a vessel of 10 metres would be entirely within area A.

MR EVERY-PALMER QC:

Yes and Mr Galbraith says that this is only intended to deal with a two-cradle situation, a particularly large boat, but there's nothing in 2(c) as drafted to suggest that it's a two-cradle scenario and if I could take Your Honour to the management plan that we looked at yesterday, which is in the case on appeal, volume 4 at 302.144…

WILLIAMS J:

Sorry, just give me the volume number again, please?

MR EVERY-PALMER QC:

Volume 4.

WILLIAMS J:

Tab? I've got it, it's fine.

MR EVERY-PALMER QC:

Tab 65, page 302.144, so Mr Galbraith took you to this passage under the heading 4. If you can find your way down to "Notice by email" which is the bottom third of the paragraph under 4, "Notice by email will be provided to the Council at the end of each working day as to the proposed duration of any maintenance repair and/or haulage and any equipment and/or materials to affect those works on any given vessel standing on its cradle within or overhanging area A". So that certainly seems to contemplate that there will be boats being repaired completely within area A which, in terms of how this can work in practice, supports my interpretation and the Court of Appeal's interpretation that it does allow for standalone maintenance work to carry out on the reserve which is, the Court of Appeal found, means that the easement

benefits the business but it's not benefitting the land because it becomes disconnected with the land. So overhang is one thing but a self-sufficient operation on the reserve is another. So both in terms of the plain reading of A6 –

GLAZEBROOK J:
Just though, it is contemplated that you might have to have two cradles with those large boats, isn't it, so that there would be a cradle within the reserve?

MR EVERY-PALMER QC:
This wording seems to suggest that there's also a scenario where the boat is entirely within area A.

GLAZEBROOK J:
Well, it will be standing on a cradle within the reserve if it needs two cradles is the point I was making. It won't just be overhanging if it needs two cradles because it will need to have one at the aft and one at the stern.

MR EVERY-PALMER QC:
Yes, so in that scenario, it would be across both reserve and the Boatyard.

GLAZEBROOK J:
Exactly.

MR EVERY-PALMER QC:
But my submission is that this envisages a vessel –

GLAZEBROOK J:
Well, it might wrongly, because it might have taken the wrong interpretation as well as the easement, mightn't it?

MR EVERY-PALMER QC:
Yes, and if Your Honours looked at the joint memorandum from Friday, there is only one cradle on the Boatyard now. So either A6 isn't being used, they can't have a two-cradle scenario now because there's only one cradle, in

which case, in my submission, it's moot, or the Boatyard isn't complying with Mr Galbraith's interpretation of the easement.

ARNOLD J:
So your interpretation of A6 is that it effectively gives the Boatyard the right to extend its operations into A6?

MR EVERY-PALMER QC:
Yes.

ARNOLD J:
It's an extension of the scope of the Boatyard?

MR EVERY-PALMER QC:
Yes, and it also allows for migration of work that could have been conducted on the Boatyard into the reserve, and we see that rails have been removed from the Boatyard. So whereas previously there were four different rails the boats could be taken to within the appellant's property, now there's only one, a short, straight rail. So the capacity for the Boatyard to accommodate and work on vessels is being reduced and the way that I read the easements, that means that they are more entitled to do work on the reserves. So it's, if you like, it's not merely an extension of the Boatyard but also, it allows for a migration of the Boatyard work from the Boatyard onto the reserve.

GLAZEBROOK J:
Is there anything – sorry.

ARNOLD J:
I was going to say that's sort of slightly odd because I think Mr Dormer said that it's to preserve the Boatyard, not to extend its scope.

MR EVERY-PALMER QC:
He, I think, was focused on the 60 day limit rather than on – and the 60 day latches onto this condition (c), it doesn't apply to overhang or washdown, but

he wasn't, in my submission, focused on a two-cradle scenario. There's nothing in Dormer about two cradles. There's nothing in any one about two cradles. They're not mentioned.

ARNOLD J:
Okay, thank you.

WILLIAMS J:
That was Mr Galbraith's evidence, was it?

MR EVERY-PALMER QC:
Yes, until Mr Galbraith's evidence.

WILLIAMS J:
Can we just –

GLAZEBROOK J:
If I can just – I was next.

WILLIAMS J:
Were you?

GLAZEBROOK J:
Well, I ceded to Justice Arnold so – the question I wanted to ask is what does it matter for – it may well matter very much for the Reserves Act issue but what does it matter in terms of an easement if in fact you can do work on the reserve totally as long as it doesn't amount to joint occupation?

MR EVERY-PALMER QC:
Yes, Her Honour –

GLAZEBROOK J:
Assuming that those cases are right and that that is a restriction.

MR EVERY-PALMER QC:

So the Court of Appeal's analysis, which I gratefully adopt, is that in a scenario where you're doing self-contained work on the reserve, you're no longer accommodating the Boatyard land –

GLAZEBROOK J:

But does that matter? So you say it's the Boatyard land that's important but if you do a washdown, you're not accommodating the Boatyard land either, even if you're on the way back and forward because a washdown's totally on the reserve.

MR EVERY-PALMER QC:

In my submission, you are accommodating the land or can be seen to be accommodating the land if the washdown's on the way to the Boatyard for repair work and it's a necessary incident of that but not if it's a self-contained washdown valet service.

GLAZEBROOK J:

Well, what about the parking easements that are said to be valid as long as they don't – you say they're accommodating the land because people are parking there and then going to the other land, is that…

MR EVERY-PALMER QC:

Yes.

GLAZEBROOK J:

But here, they're – so it's not just a link to the business?

MR EVERY-PALMER QC:

Yes.

GLAZEBROOK J:

And do you do that on some kind of – if they did that once out of whatever amount of times? Because as soon as you're allowed to do it once, does that

invalidate it or do you look at the easement as a whole as to why you might have it?

MR EVERY-PALMER QC:

In my view, you look at the likely realistic commercial uses of the easement. It's not merely one.

GLAZEBROOK J:

Well, that would be quite difficult when you're actually working out whether an easement's valid or not, wouldn't it? So if you have the possibility of doing something totally on the reserve once, does that actually totally invalidate the easement, in your submission, in a land law sense? So I'm not – obviously, there's totally different considerations involved because it's a reserve but we're talking about land law at the moment?

MR EVERY-PALMER QC:

Yes, there's no suggestion that it's just a one-time repair –

GLAZEBROOK J:

It doesn't matter whether it is or it isn't. What I'm asking you is if you are allowed to do that once does that invalidate. So if it said, only if the Boatyard is full and only for no more than three days a year, can you do it totally on the reserve, does that make it an invalid easement is the question?

MR EVERY-PALMER QC:

I would have to accept it's a question of degree so I wouldn't see a one-off as being fatal to the easement. But in my submission that's not the scenario we're dealing with here.

GLAZEBROOK J:

Well, all I'm saying is you can't look at what actually happens because nobody who's going along and looking at the easement is saying well I interpret this in terms of what actually happens. They're looking at in terms of looking at the easement. So my question remains, if there's some possibility that's it's used,

but there's also other possibilities that do relate to the business and the land, what do you say about that?

MR EVERY-PALMER QC:

In my submission you should, best you can, look at the realistic commercial use of the easement. It is not a - I accept that there's a degree of - the evidential foundation is not ideal but in my submission it's a neutral factor between the parties. These proceedings were launched straight after the easements were granted in the middle of 2015, in fact there were already proceedings on foot and this was added in, and there's similarly no evidence from the Boatyard as to the number of boats that are going to be used. Whether it's going to be a self-contained valet service or what the throughput is –

GLAZEBROOK J:

I just said to you that what actually happens and the facts I'm really not interested in. I'm interested in the interpretation.

MR EVERY-PALMER QC:

Yes, well in my submission it is completely open on the easements and in light of the management plan to have boats which are entirely situated on area A. The Boatyard can only accommodate one other boat in its current configuration and I think when you read, if you accept that interpretation of A6, and then read A4, it wouldn't make sense to require - before you could have a washdown - the boat to go onto the Boatyard land. If you've repaired it, if you can validly repair it on the reserve then you should be able to wash it down then as well.

WILLIAMS J:

If we look at the 2019 management plan, I think you circulated a copy of it.

MR EVERY-PALMER QC:

Not by me. There was one by my friends.

WILLIAMS J:
Of course, yes, it's not your plan. Well maybe you should take an opportunity to take a look at it and see whether that affects your interpretation of the 20, what is it 14, the earlier management plan. Not now but at some point I'd like to hear you on that.

MR EVERY-PALMER QC:
Yes.

WILLIAMS J:
You would argue, wouldn't you though, that if this is interpreted as allowing stacking, given that there's only one queue now, then that's deeply problematic.

MR EVERY-PALMER QC:
Yes.

WILLIAMS J:
But if it's interpreted as not allowing stacking, but being focused entirely on length and configuration of the subject boat, you probably don't have a problem with it.

MR EVERY-PALMER QC:
Then it would only be an overhang situation.

WILLIAMS J:
It would, necessarily, wouldn't it?

MR EVERY-PALMER QC:
Yes.

WILLIAMS J:
I guess you would say well why don't they wash it down up on the hard.

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:

But given that you haven't attacked the washdown in A3, is that argument in any way relevant to us?

MR EVERY-PALMER QC:

The way I would put our approach to A3 is that it wasn't cross-appealed. The –

WILLIAMS J:

You don't like it?

MR EVERY-PALMER QC:

We don't like it.

WILLIAMS J:

And you're not – yes, I understand.

MR EVERY-PALMER QC:

And if the Court finds – no, I'll leave it there.

WILLIAMS J:

It places you in a bit of a bind on the logic of your argument, doesn't it?

MR EVERY-PALMER QC:

Yes, but it's not an acceptance of the legality, it just wasn't cross-appealed is the nub.

WILLIAMS J:

Sure, okay.

MR EVERY-PALMER QC:

So unless there are any further questions on issue 1, that concludes what I had to say on that. Then we come to issue 2, which is the interpretation of section 48(1)(f) and amongst other places that's in the appellant's authorities at tab 2. I think there was some suggestion yesterday that this was a new argument or there was some issue about it being properly before the Court. That's not the case. This was always part of the Society's statement of claim. It was considered and rejected in the High Court. Considered and rejected in the Court of Appeal and was part of the initial notice to support on other grounds, so I completely accept when we get to issue 3 there are issues of newness and it'll be in the Court's discretion whether you entertain those arguments, but in my view there's no obstacle and this issue is properly before the Court.

The issue in a nutshell is the interpretation of for any other purpose connected with any such land which is at the end of 48(1)(f), and the Society's position is that the, on conventional interpretation principles that should be interpreted as reading, for any other similar purpose connected with the land, referring back to the rest of (f). Now before I step through why I say that's the appropriate interpretation I do have to confront, the High Court twice has looked at that question and the Court of Appeal once, and we are currently zero from five Judges in favour of that interpretation, and in my respectful submission the reason the argument didn't gain traction before those Courts was that there wasn't a focus on the detailed matrix within the Reserves Act of what you can and cannot do on different types of reserve.

Secondly, there was no situation of section 48 as an exception to the general purposes of the Reserves Act. So not always but generally if we're in a section 48 situation, an easement's been granted, it's not going to be for a reason which sits well with the Reserves Act. If a transmission tower or a gas distribution pipeline is placed on a reserve it's very unlikely that it's going to be consistent with the primary purposes for which the reserve is held by the administering body.

So to turn to the Society's argument in relation to interpretation, if I could ask you to turn to our written submissions, paragraph 67, and my apologies again for the small font. Would it be at all helpful if we provided another copy to the Court?

GLAZEBROOK J:

Yes, very helpful. I can say that with alacrity speaking for my colleagues as well as myself. And one that actually, because for some reason the typeface seems unbelievably faint as well on mine, so it's a double annoyance. Not that obviously we would hold that against anybody. It'd certainly be helpful to have a proper copy.

MR EVERY-PALMER QC:

The Society will be pleased that the first line of the judgment won't be, "Due to the nine point font."

WILLIAMS J:

Well I think what'll happen though is that whatever the judgment says is, you'll get it in nine point font. Your colleagues will get it in normal font.

MR EVERY-PALMER QC:

I thought all I could do was apologise, but if I can wear some penance then I'd be grateful. So at paragraph 67 there's a summary of the detailed framework in the Act and it's extraordinarily detailed and I encourage Your Honours to look through the sections of the Reserves Act and I won't go through all of these, but just to look at the first four that are listed in paragraph 67. There are specific provisions dealing with accommodation, which can be provided under certain circumstances including for a local purpose reserve but only where it's necessary because of the purposes of the reserve. There's provision for erecting buildings and tracks in relation to a communications station, there's provision for exclusive temporary use of recreation services for games or sports and associated facilities on recreation reserves, and there are also specific provisions dealing with when permission can be given to carry out any trade or business or occupation within a reserve, and the list

goes on and it's an extremely detailed framework which is consistent with the purposes of the Reserves Act where certain land is held for particular purposes to benefit the public for those purposes and tight constraints are placed on the administering body as to what it can do in relation to the land and it's a very, very lengthy and detailed regime, type of reserve by type of reserve, as to what can be done and what can be done with a licence or a lease, it's extremely detailed.

And so when you have got that sort of prescriptive detailed framework, in my submission, Parliament cannot have intended that the last four words of section 48(1)(f) could mean any easement whatsoever that would, amongst other things, allow private commercial work, boatyard work, for example, to be conducted on a local purpose reserve, because what that would do is undermine the detailed set of criteria and categories and permissions which are set up by the rest of the Act. So that's the first major point in favour of the interpretation urged by the Society is to read the Act as a whole and to have consistency with the detailed matrix.

ELLEN FRANCE J:

Reading the Act as a whole though, it does envisage, in a number of different ways, that there will be what you might call broadly "commercial activity", so even if you look at scenic reserves, for example, that refers to the possibility of open portions being developed for amenities and facilities, and then you have other specific types of reserves like the aerodrome ones, and there are others in that category, that presumably do admit at least a level of commercial activity.

MR EVERY-PALMER QC:

I absolutely agree with that, Your Honour, and that's really part of my argument that the Reserves Act is specific as to when commercial activity and what types are permitted and that this small part of section 48(1)(f) shouldn't be able to enlarge it to "and any other commercial activity which is permissible under an easement".

WILLIAMS J:
Do you think it's not possible that local purpose is a generic category because we don't know what the purpose is, that's why it's called a local purpose, and why you can have accommodation halls, pumping stations, masts, because the myriad circumstances within which a local authority will want to use some land for some local government purpose is so wide that you are not stuck with the scenic, scientific, recreational sorts of purposes that are enumerated in detail, and if you read section 23, you will see that the reference to a scenic, historic, archaeological, biological, blah blah is only to the extent compatible with the purpose. It seems to be proceeding on the basis that the purpose is likely to be, or at least occasionally will be, an entirely different thing unrelated to what we would normally associate with reserves.

MR EVERY-PALMER QC:
Yes.

WILLIAMS J:
So if that's the case, a grab-all might well be a useful thing for local purpose reserves which you wouldn't need with the other kinds of reserves?

MR EVERY-PALMER QC:
Yes, and the drafter thought of that. So in section 61(1), there are broad powers of leasing for the purposes of a local purpose reserve but it has to be consistent with the purposes of those reserves.

WILLIAMS J:
Yes, well, everything has to be consistent with the purpose of the reserve, it's just local purpose reserves are not your standard reserves.

MR EVERY-PALMER QC:
And section 61 –

WILLIAMS J:

They can be for some very workaday industrial purposes. You know, if you're walking through the bush and you see a pumping station, that's likely to be a local purpose reserve set aside for that, you know, highly industrial in its kind of setup, so if you can do that by lease, why in the world wouldn't you be able to do that by easement? It's less intrusive.

MR EVERY-PALMER QC:

Well, in my submission, and this is presumably the view which has been taken by the Council as well, is that this wouldn't pass the test of being for the purposes of the reserve, the section 229 purposes, to allow commercial, industrial boat –

WILLIAMS J:

Yes, but we're talking about the interpretation of 48(1)(f), not 229. That's a separate –

MR EVERY-PALMER QC:

Yes. So – sorry to interrupt.

WILLIAMS J:

No, shoot.

MR EVERY-PALMER QC:

So 61(1), I took Your Honour to that, because that addresses the concern that local purpose reserves can be for all and sundry so you need broad powers to deal with them. That then means you don't need to interpret 48 broadly to deal with it because it's covered by 61.

WILLIAMS J:

But only by way of lease. If it can be – what's the logic in doing it by lease but not by easement? You want flexibility with these, you know, micro-uses, if you like.

MR EVERY-PALMER QC:
Leases usually have a term.

WILLIAMS J:
Well, they're perpetual, can be, and they're provided for as perpetual leases in the Act.

MR EVERY-PALMER QC:
Yes. So 61 provides broad powers in relation to local reserves and leasing. 48 is not limited to local reserves, it applies across all of them, and in my submission, given that 61 exists and given that this applies to all reserves, you should be careful taking an overly expansive view of section 48(1)(f).

The other way I can come at that is from the actual language of section 48(1), and if you read down from (a) in 48(1), there seem to be four distinct categories of easements that the drafter had in mind. (a) is any public purpose, so if it's for a public purpose, there is a broad easement power there, so anything else is dealing more with private purposes.

(2) is ancillary. If you've got a valid agreement, lease, or licence under the Reserves Act but you need a right of way or other easement to access it then that can come under (b).

Then (c), (d), and (e) seem to be related because they all deal with utility services, either provision to the adjoining land or just distribution transmission generally. (c) deals with distribution and transmission by pipeline of gas, petroleum, biofuel, and geothermal energy. (d) deals with electrical installation work, so it could be power poles, and then (e) deals with provision of water systems. So those three, in my submission, form a category of utility services.

Then we get to (f), "providing or facilitating access or the supply of water to or the drainage of any other land not forming part of the reserve or for any other purpose connected with any such land." In my submission, the draftsperson

must have had in mind any other similar purpose because otherwise it would be eroding the scheme of those four categories within section 48.

There's also no rationale for having a broader scope to give easements under 48(1)(f), and tellingly, it's just not the way that you would draft it if you meant any other easement whatsoever connected with the land. In our submissions, we set out the more logical alternative which would be to flip (f) around and say, and this is if the draftsperson intended it to apply the way that the appellants say it does, you'd write it as "any purpose connected with any other land not forming part of the reserve, including but not limited to providing or facilitating access or the supply of water to or the drainage of any such land". So in my submission, the purpose and the context and structure of section 48(1)(a) through to (f) lead to the conclusion that (f) must have been intended to refer in the last words to any other similar purpose connected with any such land.

ARNOLD J:
So what sort of purpose do you have in mind? What would be a similar purpose?

MR EVERY-PALMER QC:
So if there was a telecommunications cable that you wanted connected to your land, that would come under (f). The (f) is just talking about the classic sort of easements, access, supply of water, drainage. There's no suggestion that it's a more expansive set. And also, in my submission, the heading in section 48 gives some kind of clue as to the scope where it's focused on grants of rights of way and other easements with an emphasis on rights of way. Nothing to suggest that any sort of easement whatsoever is intended to be caught.

Really, this, for the Society, is its primary argument. I've dealt with the property law issue first because that's what the Court of Appeal founded on but really, the reason the Society brought this was over what's permissible under the Reserves Act, and as I say, it's not only been five-zip against me so

far, but no one's been particularly troubled or slow to come to that conclusion but I respectfully submit that it is the proper interpretation. I'm not doing anything fancy. We're just reading that statute in its context in light of its purpose and its structure.

O'REGAN J:
But you're really asking us to read in the word "similar" aren't you?

MR EVERY-PALMER QC:
Yes.

O'REGAN J:
I mean, why would we when the Act chooses to use that – well, "like" I think it uses elsewhere, in other places, but doesn't use it here. It seems a bit odd if there was an intention to limit the last few words to something of the same class as the preceding ones that they didn't use a word like that, doesn't it?

MR EVERY-PALMER QC:
Yes. It is potentially a contraindication but what weakens it here is that the sections with the word "like" came in at a different time. This section was in the original Act and then the slightly different language came in in 1978 and 48 has been re-enacted since then without the wording being changed, so there was an opportunity for a careful draftsman to go back and say "Well, I've used 'like' here, I should put 'like' in there" but my point is that it's not that you've got contemporaneous statutory drafting where you can draw a conclusion from that very slight difference.

O'REGAN J:
It would be pretty unusual to have a provision saying "or for any other anything" when "other" means actually limited to similar, wouldn't it? Particularly here because they don't seem that, it's not that tight a class, is it?

MR EVERY-PALMER QC:
Yes, it does relate to –

O'REGAN J:

"Providing access"…

MR EVERY-PALMER QC:

– basic amenity to the land, access or carriage…

O'REGAN J:

So is it access of water, you're saying?

MR EVERY-PALMER QC:

No, access – the way I read that is access to the land, in a classic right-of-way sense.

O'REGAN J:

Because, I mean, (b) deals with access to other land, doesn't it?

MR EVERY-PALMER QC:

That's within the reserve where there's some lease or licence granted, so it's not dealing with other land.

O'REGAN J:

Whereas (f) is a more general thing of access over the reserve to somebody else's land?

MR EVERY-PALMER QC:

Yes. Not necessarily more general but different.

O'REGAN J:

But that doesn't really sit, it's not a very neat category then if it's – like a walking track or a drainage pipe or a water supply pipe, they're not very similar things. So when you say they've got to be similar to those, do you mean similar to any one of those?

MR EVERY-PALMER QC:

As a group, in my submission, they represent basic amenity to the other land, access, conveyance of people or things.

WILLIAMS J:

The classic situation will be esplanade reserves actually, where people want to get access to their own land, and they will practically all the time, and won't need an easement for it, so it's where access needs to be formalised in some way, usually probably because they want to put a boat ramp in there for their own, I'm talking about for their own private purposes because there are thousands of those things all along our lakes and coastlines and rivers. So don't you get pretty close to like when you have a boat ramp that's for a boatyard?

MR EVERY-PALMER QC:

The Society's position is that given the rest of 48, and given the rest of the Act, that Parliament can't have intended commercial boatyard activity to be within that category –

WILLIAMS J:

Sure, but that's the vibe. We're talking about, you're unpicking your analysis. You say well *ejusdem generis* has got to apply here, it wouldn't be blown wide open if access is in, I think that's the point Justice O'Regan was making, if access is in, and if access formalises into an easement it's, on my suggestion anyway, really only going to be where you need some sort of structure to provide access, and in esplanade reserves that'll be a boat ramp usually to a little boat shed. This is like that, isn't it?

MR EVERY-PALMER QC:

Yes, in my submission no, that you, it's become a different kind of thing –

WILLIAMS J:

Oh it's commercial but a lot of these other uses are plainly commercial and private, so that's not outside the contemplation of 48.

MR EVERY-PALMER QC:

It's, everything in (f) is very passive.

WILLIAMS J:

I'm not talking about (f), I'm talking about the other items in 48.

MR EVERY-PALMER QC:

Yes, yes.

WILLIAMS J:

Much bigger commercial operations than this one.

MR EVERY-PALMER QC:

Oh, absolutely. With passive infrastructure in terms of (c), (d) and (e) from a utility services company.

WILLIAMS J:

Sure. What you've got really against you in the underlying merits is this thing pre-dates the reserve. So you would want to read an Act that didn't shut these things down.

MR EVERY-PALMER QC:

Well the Society takes no objection to the accessway.

WILLIAMS J:

Sure.

MR EVERY-PALMER QC:

Even if it's for commercial purposes and it's the – the activity we're talking about, if it did occur on the reserve before the Act it wasn't occurring lawfully.

WILLIAMS J:

Okay.

ARNOLD J:

If all the easements dealt with was washing down on the way to the Boatyard, and out of the Boatyard, you could see that as part of the concept of access, couldn't you? That access must be determined by what you're creating access to and the washing down, at least the washing down of the boats may well be part of the concept of access, mightn't it?

MR EVERY-PALMER QC:

Not in my submission Your Honour. The washing down could occur in the Boatyard equally as it doesn't have to occur before you get there, it's not an inherent part of access to the Boatyard. It's a boatyard service that could be conducted on the yard and it's by these easements being conducted on the reserve.

ARNOLD J:

Okay.

MR EVERY-PALMER QC:

So that's issue 2, which is in my submission the prism through which this case should be decided, and if Your Honours were –

GLAZEBROOK J:

Subject to the issue of whether you can do so. In these proceedings.

MR EVERY-PALMER QC:

Your Honour, I don't see any obstacle –

GLAZEBROOK J:

Well I see quite a big obstacle, I might say to you, in terms of Justice Heath's judgment but…

MR EVERY-PALMER QC:

Yes. The Society wasn't a party to that.

GLAZEBROOK J:

I'm not really worried about that. It's just that these proceedings are actually trying to take away what have now become private rights, so we've got both that issue in terms of the Council operating on a perfectly valid view of the law, based on Justice Heath's judgment, and the indefeasibility issue. I have signalled at the beginning that we would probably be seeking further submissions on that if we get to that point, but I just wanted to make it absolutely plain to you that those points are still very much on the table, as far as I'm concerned.

MR EVERY-PALMER QC:

Yes, well if Your Honour is minded in that direction then an opportunity to provide further written submissions would certainly be appreciated.

GLAZEBROOK J:

Well I think they just haven't been dealt with adequately in the submissions that we've got at the moment, and because of that…

MR EVERY-PALMER QC:

It was, the idea that there was an estoppel or any other hurdle to the Society bringing this claim wasn't raised in the High Court, it wasn't raised in the Court of Appeal, there was…

GLAZEBROOK J:

Well anyway, it will be raised in this Court, wherever it was raised, because we're not prepared to –

O'REGAN J:

It was mentioned in the Court of Appeal judgment so I think it must have been raised.

MR EVERY-PALMER QC:

In terms of an estoppel –

O'REGAN J:

Well the Court said we're going to proceed even though there's an estoppel argument.

MR EVERY-PALMER QC:

Yes, it certainly pointed out that there's no issue with proceeding, it didn't say despite an estoppel argument it just, in my reading it was just explaining that despite the issue apparently having been addressed it was free to be relitigated in this context, but I appreciate where Your Honours are coming form. That, in fact it's not an unhelpful stance to take when it comes to issue 3, which is where I am saying that the Court should take the bull by the horns and look into some issues which haven't been fully ventilated in the Courts below.

ELLEN FRANCE J:

Well that's not quite right, is it, they haven't been ventilated at all.

MR EVERY-PALMER QC:

No, so it's a really unusual way this case has proceeded. So the statement of claim and the cause of action in question is a judicial review cause of action. It dealt with both ultra vires but also just a traditional wide-ranging review of the Council as delegate for the Minister's decision. That is repeated in Justice Fogarty's decision, and was argued, and the evidence relates to it. Then His Honour says that he'll address and note each of the judicial review arguments, mentions one but none of the others, and concludes his judgment. Then we get to the Court of Appeal where the Society didn't focus on that aspect of the case and the Court very quickly dismissed the judicial review-type arguments without discussion as to their merits really in its judgment. But we do – so it's completely the case that you don't really have, there's no meaningful first instance decision-making around these arguments, so it is completely an exceptional case where I say that it is nonetheless in the interests of justice to look into them, and we do have the advantage of a full record from the decision-maker, all the documents are here, so it is just an application of judicial review principles.

What I proposed to do was to discuss what I see is the strongest argument for judicial review here on the basis that if you're not with me that that's an appropriate argument to be considering, then I won't be able to convince you with any the others. They are set out in detail in the written submissions, and there's nothing particularly I wanted to elaborate on them in oral argument.

So the argument I wanted to talk about is the failure to give sufficient consideration when it came to the Council and in particular the failure to consider the position with respect to Treaty claims over the reserve and that's summarised in our submissions at paragraph 94 where we explain why we say a full consideration was required, in particular because of the length of time that had passed since Dormer had considered it, it's now nine years have moved on. Health and safety legislation has changed, presumably use of the reserve will have evolved, and there's no up to date information as to the Boatyard's intentions. Then at 98 –

GLAZEBROOK J:
Well can I just see what the argument is. You're saying we should reconsider that or are you saying the Minister should have relooked at that?

MR EVERY-PALMER QC:
Yes, the Minister's delegate should have.

GLAZEBROOK J:
When they were doing the review?

MR EVERY-PALMER QC:
When they were seized with the consenting decision in 2015.

GLAZEBROOK J:
Right.

MR EVERY-PALMER QC:

And what I'll develop a bit more is the, in particular it's obligation to look into the Treaty implications of the case, and if I could ask the Court to turn to tab 13 of the common bundle, sorry, the key documents bundle. So this is part of the "pass the parcel" correspondence and at the bottom paragraph DoC writing to the Council, "You should also note that there is a Treaty claim over the area and the Opua boatyard easements have been raised in the Waitangi Tribunal in the context of the Northland Inquiry. A reconsideration of the original decision will be likely therefore to attract some interest. Finally, the Council should also be aware that in making a decision under s 48 Reserves Act the Council, as delegate of the Minister of Conservation, is bound by s 4 Conservation Act. This requires the Council to give effect to Treaty principles."

Then at tab 17, page 222, these are the red numbers at the top of the page, heading, "Treaty of Waitangi (Section 4 of the Conservation Act 1987)." So this is the Swanepoel report. "Issues regarding the Treaty of Waitangi and the Minister's obligations pursuant to section 4 of the Conservation Act 1987 were property considered in the Ashbridge Report (see pages 26-31 of the report). What is required is that the decision makers, among other things, seek comments from the Tangata Whenua on the proposal as it affects their values. The Minister, through his delegate, needs to have regard to their views and make an informed decision accordingly."

And if we go back to those pages of Ashbridge, which are tab 8, this is page 97 of the red numbers, there's a consideration of section 4. This, of course, pre-dates this Court's decision in *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, so I think a very much a focus on consultation rather than the to give effect to the view that now prevails. The view of section 4 is set out and then there's quite a lengthy discussion, but nothing about the Northland Inquiry or the claims that are before the Waitangi Tribunal, this is all a discussion of the issues that were raised back in 2006 –

GLAZEBROOK J:

What do you say is the relevance there's a claim?

MR EVERY-PALMER QC:

That in considering the claim the Council is delegate of the Minister and giving effect to the Treaty should have been first informing itself, what is the claim, what are the tangata whenua interests in the reserve and –

GLAZEBROOK J:

All right, I understand that question, but do you know what the – you have the claim I think. Why do you say it's relevant to this decision?

MR EVERY-PALMER QC:

Because it –

GLAZEBROOK J:

In any way of giving effect to the Treaty.

MR EVERY-PALMER QC:

Because it alleges mismanagement of the reserve and pollution of the environment and because the land could potentially, importantly the land could potentially be involved in redress through a settlement of the Treaty claims in the area.

GLAZEBROOK J:

Well how do you give effect to the Treaty other than looking at the sort of things that are looked at in terms of pollution et cetera. I mean just an allegation of mismanagement and a possibility of return doesn't seem to me to mean that you make a different decision.

MR EVERY-PALMER QC:

So firstly, in my submission, there's a duty for the decision-maker to inform itself –

GLAZEBROOK J:

Yes, well I've got that as a submission.

MR EVERY-PALMER QC:

Then in terms of what – the difficulty here in granting an indefinite easement is that it has an impact on potential use of the reserve in redress in settlement. Redress is a well-recognised Treaty principle, and that's the one that I say is not being given effect to, and of course under the Treaty of Waitangi Act, as Justice Williams referred to, section 6(4A), there can be no, in 1993, there can be no recommendation for the Tribunal to return the land, because it's not Crown land as relevantly defined. But of course in Treaty settlements there's often, local authorities are often involved in coming up with co-governance arrangements or potentially could agree to the vesting of the reserve. That has to be with their consent or by legislation but the difficulty here is that a permanent private property right has been granted to a boatyard and effectively tied the hands of future decision-makers in relation to redress options.

GLAZEBROOK J:

But then you wouldn't be able to give any sort of easement, would you, on that logic?

MR EVERY-PALMER QC:

Well, in my submission, that was a question for the Council as delegate for the Minister.

GLAZEBROOK J:

But now you're saying – I can understand the not informing but what you have to say is that we would have to say what, that no reasonable council could have come to that decision? Well, what grounds of judicial review are there? I can understand the informing.

MR EVERY-PALMER QC:

Yes, so it's a straightforward error of law and misapplication of section 4 and the threshold –

GLAZEBROOK J:

Well, how come – so you say it's an error of law not to look at the fact there is a Treaty of Waitangi claim?

MR EVERY-PALMER QC:

Yes.

WILLIAMS J:

Well, I think, I mean, you've probably got a useful argument when you say that the advice to the Minister ought to have included reference to the particular claim and to particular complaints about what was going on at the site, the suggestion that the hard area be fenced off and no access provided at all, that to be consistent with section 4, that ought at least to have been in front of the Minister. But given you're not opposing easements per se, aren't you really operating right at the margins?

GLAZEBROOK J:

You're saying it's an error of law as well. I agree with Justice Williams, you might say he should have been informed and take it into account, but you're saying it's an error of law not to?

MR EVERY-PALMER QC:

Yes. So just to answer questions in turn, absolutely, in my submission, the Minister, or in this case, the Council as the delegate for the Minister, should have been informed of those claims and it should have been up to date information, it shouldn't have been the stale –

WILLIAMS J:

Well, given that the claim has been lodged since the last piece of advice, it's only at that stage a couple of years old and is site-specific, so I get that.

MR EVERY-PALMER QC:

And importantly, Ashbridge doesn't do an update. Ashbridge was just a desktop exercise.

WILLIAMS J:

So for myself, I think you could argue a procedural error of law, their failure to take into account an obviously and mandatorily - given section 4 - relevant consideration. Your problem, in my mind, is what difference would it have made if you'd not opposed to all of the easements firstly; and secondly, in any event, any redress provided by statute in the face of section 6(4A) of the Treaty of Waitangi Act would always be subject to these rights anyway.

MR EVERY-PALMER QC:

Yes, so if we establish a reviewable error either through failure to take into account a relevant consideration or an inadequate report to the decision-maker in the Nelson context, or as just a straight-out breach of section 4 by not undertaking the same exercise, if we get through any of those gateways then it becomes a question of, well, could it have made any difference? And in my submission, it's not my onus to show what the Council would have decided had it undertaken the proper approach, merely that it may well have made a difference, and in terms of how they may have seen the easements, an obvious thing to do is to say "Well, rather than create an indefinite encumbrance on the reserve and tie our hands, let's do a five year easement now, maybe with Ngāpuhi, maybe a 10 year easement would cover the time up to settlement, but let's just do something temporary so we're not tying the hands of the Council", and –

WILLIAMS J:

But you're only fighting at the margins, aren't you, because you're not fighting all of the easements. So really, on the substance, you're re-fighting about the washdown.

MR EVERY-PALMER QC:

Yes, to the Society, which includes tangata whenua representation, it is –

WILLIAMS J:

Yes, I see that one of the submitters is the claimant, Ms Marks.

MR EVERY-PALMER QC:

Yes, Maiki Marks, and her affidavit, which is in the case on appeal, volume 2, does go into the background and goes into these Waitangi Tribunal claims but in terms of being at the margins, both the Society and the tangata whenua objection really cuts in not at access but it's the commercial activity beyond that taking place on the reserve, and that's actually highlighted in the Ashbridge report. So at page 102 –

WILLIAMS J:

What tab is that, sorry? That's tab 8, is it?

O'REGAN J:

Tab 8, yes, that one.

MR EVERY-PALMER QC:

At the bottom there, Ashbridge, just before conclusion, is noting that Ngāti Manu, its opposition was for easements that went beyond access, so that's where it thought that the balance was drawn, and that meant that –

GLAZEBROOK J:

Sorry, I've lost you.

WILLIAMS J:

102.

O'REGAN J:

102.

WILLIAMS J:

Red 102, yes.

MR EVERY-PALMER QC:

So it wasn't at the margins in terms of –

WILLIAMS J:

But it may be in the way that I'm thinking about it and that is what do Ngāti Manu and Ms Marks raise that's not already raised and thoroughly ventilated given that you're already fighting now about the washdown, because you've not fought the existence of easements generally, so you can call tangata whenua up in aid to the extent of your appeal, right, so to which you point to the reference to Ngāti Manu wanting no spreading of commercial activity onto the area A, but those are exactly the arguments raised by your client, with no additional elements, so what would the Minister and/or the delegate hear about that point that's any different to what your clients are already complaining about?

MR EVERY-PALMER QC:

Well, the Minister, under section 4, or delegate, was required to turn its mind to these issues and consider the implications for redress, redress being a well-recognised Treaty principle, and to say "Well, how would these easements, which are objected to, how would granting them now at this point in time affect redress possibilities in the future?"

WILLIAMS J:

Except that you in your appeal already concede the creation of interests in land by way of access of easements. So you can't say the Minister should have fought hard about that when you're not fighting it.

MR EVERY-PALMER QC:

About the additional easement, Sir.

WILLIAMS J:

Right, so that's why it comes down to washdown.

MR EVERY-PALMER QC:

Yes, well, washdown and repair and maintenance on –

WILLIAMS J:

Yes, that's commercial activity in that area, but those are precisely the arguments that are already being run and there doesn't appear to be any particular cultural dimension to that as being run by Ngāti Manu, and they do talk about environmental disfoliation and so on, that's fully understood, in fact, all of that was ventilated in the Regional Council hearing and the FNDC hearings. So the question is while you may have a point in theory, what's your point in practice?

MR EVERY-PALMER QC:

It might be the same objection but it's a different lens that it's being looked at. It's by a Minister of the Crown or delegate with a fundamental obligation, in the words of the Whales case, to give effect to the Treaty in this decision. They should be thinking "Well, might there be other arrangements that can be implemented over this reserve going forward, and would the additional easements be problematic from that perspective? Would they reduce remedial options going forward?"

GLAZEBROOK J:

Mr Every-Palmer, I actually must say I'm still rather worried about that hypothetical in the future in terms of redress, especially when this isn't directly related to redress, it's not on Crown land, but leaving that aside, what you've just said does bring to bear the question of what you say the Council as delegate of the Minister should have been doing, because this seems to be, well, the Minister should actually, even if this had been done yesterday in terms of the consultation and consideration of Treaty of Waitangi issues nevertheless specifically turned his or her mind yet again to that and considered them all over again in detail and document that. So what is your submission in terms of the duty on a Ministerial delegate in these circumstances?

MR EVERY-PALMER QC:

To inform itself with up-to-date information as to –

GLAZEBROOK J:

I'm sorry?

MR EVERY-PALMER QC:

To inform itself with up-to-date information as to the Treaty claims –

GLAZEBROOK J:

No, this is more generally I'm asking the question.

MR EVERY-PALMER QC:

To inform itself of – sorry, Your Honour, more generally?

GLAZEBROOK J:

Well, more generally, when the Council as delegate of the Minister is performing this function, what do they have to do, do you say?

MR EVERY-PALMER QC:

Undertake an inquiry that is reasonable in the circumstances and comply with the usual administrative law duties, including compliance with legislation such as section 4.

GLAZEBROOK J:

So you say you have to undertake an inquiry?

MR EVERY-PALMER QC:

So it's a two-step process to create an easement. There's a grant and then there's a consent. The consentor has to give genuine consideration. To give genuine consideration, you have to inform yourself. I agree with Mr Hodder that there should be a fairly wide margin of appreciation allowed to the decision-maker as to what they do and what steps they take but where that becomes such a, in my submission, dramatic failure by not asking anyone, not seeking any views from anyone, just relying on past very historic information

and not turning its own mind to how this is going to work on the ground or what the Treaty implications might be.

GLAZEBROOK J:

Can you just go back to generic? So you have to give it genuine consideration, it has to form itself with up-to-date information, there's a wide range of appreciation but they'd have to undertake whatever enquiries…

MR EVERY-PALMER QC:

Reasonable enquiries.

GLAZEBROOK J:

Is there anything else they have to do? You say they can't rely on past historic information but obviously, they'd have to rely quite a bit on past historic information, so what's…

MR EVERY-PALMER QC:

It depends on – I'm going from the generic back into the specific. In these particular circumstances, it wasn't sufficient to rely on.

GLAZEBROOK J:

All right. So…

O'REGAN J:

Do we have evidence here of what changed in between – I mean, that's one of the concerns I've got about dealing with this point. We seem to be in a bit of a fog, don't we, as to what actually did change.

MR EVERY-PALMER QC:

Certainly the Treaty of Waitangi claim was lodged so in that part of it, I have that. There's no – obviously, it's a period of time where there's been quite a bit of health and safety reform and we don't know, because the decision-maker also didn't ask, whether the use of the reserve had changed

or the use of the Boatyard but there's no specific information as to what was shown.

O'REGAN J:
So I mean, you're asking us to assume that something significant happened that required the Council as consenter to redo the process it had done earlier as granted?

MR EVERY-PALMER QC:
My submission is that it should have asked that question, "Has anything changed?", not –

GLAZEBROOK J:
Yes, but when you're asking us to interfere, you would normally have put forward a whole pile of stuff that says "and if they had done" – and I appreciate you've done that with the claim, "and if they had done so, there would have been" – but my problem with that claim is I want to know what changed and why that changed something and you've answered that in terms of future redress. But there would normally say "and if they had done that, they would have found XYZ and K", and then that was obviously unreasonable for them not to have made those further enquiries.

MR EVERY-PALMER QC:
Yes.

WILLIAMS J:
Well, I think you can say what changed is the specific claim now arguing that it had multilevels, environmental redress, and interference in culturally important land which they want back, that's what the claim says and it's –

O'REGAN J:
Do we have evidence of that though?

WILLIAMS J:
Yes, it's in the claim.

GLAZEBROOK J:
Well –

WILLIAMS J:
And those specifics are provided in the 2013 particularisation, really, of the Sir James Hēnare claim filed in the '80s. So perhaps you can argue that given the obligation to give effect to the Treaty, this stuff would have been borne in mind and wasn't. Perhaps you can argue that.

GLAZEBROOK J:
I gave him the Treaty, it's just we were talking generally on the other things.

WILLIAMS J:
But your problem is that given all of that, what's in play in a manner that's consistent with your case? Because you're not tangata whenua and tangata whenua aren't in the Court. You are and you're piggybacking on their claim. So it has to be within the parameter of your case.

MR EVERY-PALMER QC:
The claimant for Wai 2424 is part of the Society and has given evidence in this case, so those issues are, in my submission –

WILLIAMS J:
Yes, but she's not a plaintiff here. Neither is Ngāti Manu or Ngāti Hine so it's important to keep the right hats on.

MR EVERY-PALMER QC:
When it comes, Your Honour, to the legality of the decision, I'm not sure hats matter. It's either legal or illegal.

WILLIAMS J:
Often, it does matter. All right, thank you.

MR EVERY-PALMER QC:

Thank you, Your Honour. I have no further submissions. I appreciate the Court's engagement with that issue which is a new issue and that it's not, of course, your normal procedure but in my submission, it is in the interests of justice to deal with it and all the information required is before the Court and unless there's anything else I can assist the Court with, those are my submissions.

GLAZEBROOK J:

So the only issue you want us to deal with is the Treaty of Waitangi issue, is that right?

MR EVERY-PALMER QC:

Well, I rest on my written submissions for the remainder of the judicial review but I certainly – if you're not with me on that strongest judicial review argument, I wouldn't make progress on the others.

GLAZEBROOK J:

Right, I understand. So there's nothing new that you can say that has arisen in relation to the other ones is what you're indicating?

MR EVERY-PALMER QC:

Yes, so I still stand by them as per my written submissions but nothing to add to them. I should say for completeness, the issue of estoppel by conduct, Mr Hodder wasn't pursuing that although I understand Your Honour may have concerns.

GLAZEBROOK J:

Well, I don't think it's so much estoppel by conduct, it's just that whole issue that I think we, if we get to that stage, we will be wanting your submission and on indefeasibility but there's really no point in doing it in a half pai manner and if it really comes down to it, it might even be that we need to reconvene the hearing but we can again cross that bridge when we come to it.

MR EVERY-PALMER QC:

Yes. Thank you very much, Your Honour.

GLAZEBROOK J:

Thank you. Mr Galbraith, are we having you first, are we?

MR GALBRAITH QC:

Thank you, Your Honour. Very briefly on section 48, there is, and I think I did say it originally, a difference with local purpose reserves and other reserves because they can cover a wide range of purposes and there's nothing in the statute which in any sense limits them, and just taking up the point that His Honour Justice Williams made, if you think of esplanade reserves as local purpose reserves, esplanade reserves – I was going to say "run amok around the country". That's not quite the way to put it but there are an awful lot of them and there are an awful lot of activities, if I say, associated next door to esplanade reserves and it may not just be the private house wanting a small boatshed because when you think of chartered boats which go out or you think of Lake Taupō with the boats that take fishing people out or whatever else, there are bound to be access and there are bound to be – well, when I say "bound to be", I would be surprised if there aren't commercial activities associated with those which are permitted to be on the esplanade reserves. Whether they put easements or not, I wouldn't have a clue, but it's not just this one little property and just this one little issue.

WILLIAMS J:

My experience is most of them, if they've got physical infrastructure like a slipway, and many do, are required to have them regularised by some means. Sometimes it's an annual licence. Sometimes it's an easement.

MR GALBRAITH QC:

Yes, that is correct, Sir, and I do know something about Lake Taupō because we've got an argument coming up in Court about that for Tūwharetoa in a few weeks' time. So it is important, in my respectful submission, when looking at section 48, to recognise that it is trying to deal with a generic situation, it's

identified things that one can more specifically think about, and you can identify a lot of those (a)s through (f)s or at least (b)s through (e) from what one knows about access rights which are obtained for various utilities, but they are a specific identification which, in my respectful submission, isn't intended to be exclusive, and when one comes to (f), of course, as my learned friend quite properly said, it's a rather odd conjunction of access because it's not the access to where a lease or licence has been created, it's access in general, along with some water issues and then the unqualified and for any other purpose, and it just, in my respectful submission, seems consistent with the generic nature of local purpose reserves and esplanade reserves and you just don't know what the issue might be that might arise. The constraint, of course, is the process, that it's got to go through a proper process of notification, hearing, Ministerial consent. So that's the constraint, so it isn't just an unlicensed entitlement to easements.

Then there's the more precise issue, of course, can it accommodate the commercial easements and 48 itself? The specific categories except for little (a), the public purpose one, are all commercial activities, certainly some are a utility form, and of course, as His Honour Justice Arnold said, the slipway itself is commercial because it's there for a commercial purpose and the sort of operations that I was speaking about that you might find on lakes with charter boats et cetera et cetera are undoubtedly all commercial and are accommodated. And of course, when one steps back and thinks about the wider reserve issue we have in New Zealand where a lot of land is DoC-controlled because it is reserves, commercial concessions are commonplace, subject to proper process, on all such reserves. That's what – and the point that His Honour Justice Williams made to my learned friend that when you've got section 61(1) here allowing leases for trade, business, or occupation, it would be odd if a lesser interest, because a lease, of course, is exclusive possession, that's the criteria, the lease and easements have to be less than exclusive possession, it would be surprising if there wasn't an ability to have a lesser interest conferred, again subject to all those process constraints.

Just quickly on the easements themselves, my learned friend took Your Honours to what was in the 2014 operations or management plan where it referred to a boat on a cradle. That – I think that's explicable if one goes back to Alan Dormer's original decision in paragraph 2.7 because what he raised in 2.7 was that Mr Schmuck had said "Well, what if it's only partially on the cradle on the slipway?" and said "Well, no, no, I think Mr Schmuck's quite genuine in what he's trying to achieve but we should make it so it's only if that cradle is entirely on the slipway so you don't get expansion by creep" I suppose is what he was thinking of. Provided the A6 is interpreted as I would submit it should be where it's an issue of length and potentially configuration of boat then quite clearly, it is a two-cradle situation, cradle fore and aft, if you do have a larger boat, and if one looks back at that paragraph 4, I think it is, in that management plan, you will see that it's still qualified, the cradle situation being entirely on that area, is still qualified by the qualification of length configuration. It's quite specifically qualified.

WILLIAMS J:
That'll mean most of the boat is then –

MR GALBRAITH QC:
Most of the boat should be on the front end.

WILLIAMS J:
But if your cradle is entirely within the slipway area then most of the boat will be? Because your centre of gravity is in the middle of the cradle, presumably.

MR GALBRAITH QC:
Except that the boat is meant to be – our interpretation, of course, Sir, is meant to be as far as possible within the Boatyard, so it's only where it can't be entirely within the Boatyard that there should be an issue, and if it can't be entirely within the Boatyard, that's where you get your two cradle situation if you have a boat long enough.

WILLIAMS J:

Yes.

MR GALBRAITH QC:

If you've only got a boat that's 30-odd feet or whatever it is then it'll be in the Boatyard.

WILLIAMS J:

Any single cradle situation you say will be mostly or entirely on the private land?

MR GALBRAITH QC:

Yes, Sir, that's our interpretation.

WILLIAMS J:

And he has to buy another cradle to create your scenario and he hasn't got one yet?

MR GALBRAITH QC:

I'm just – that's something factually I just don't know the answer to and we haven't got any evidence of but there were four cradles originally, of course.

WILLIAMS J:

There's a little tag there that may well be your answer.

MR GALBRAITH QC:

Sorry. That says "bowsprit". Not that that totally helps me.

WILLIAMS J:

Mention the bowsprit!

MR GALBRAITH QC:

I'm not sure that totally solves my lack of information. But previously, there were cradles, because what they had to do was take a boat up the principal

slipway then spin it on the turntable and then go off to the three sides. I doubt that –

WILLIAMS J:
You had at least three, probably.

MR GALBRAITH QC:
Yes, I suspect there's – look, I don't know. But I'd be very surprised if they've disappeared, put it that way, but I don't know. I'm trying not to give evidence. And just – so that's on that issue. Look, Your Honours know the background to this and what His Honour Justice Williams did say yesterday, it's been an attempt going on for a long period of time now to try and tidy up something which was unsatisfactory. There's no argument about that. What had developed since the Boatyard was created was unsatisfactory. Mr Dormer's decision or advice to – it was a decision, I guess, and determination isn't in issue before this Court but it's worth a read because he does step through and deals with 229, for example. He deals with "Could this all be relocated within the Boatyard?" No, he said that would be too onerous. He deals with "Can we fix this in the future?" Yes. He talks about getting rid of the southern rail loop. He doesn't put it quite as explicitly as that but he identifies that as being desirable. Those things have happened.

So in my respectful submission though, it's not in issue before this Court. It was a two day comprehensive determination of the same issues that continue to be ventilated, and then Council of course tried to take up the situation of converting the resource consent which he had been considering into the easements which he had been considering and then there's been all the problems which have continued from March 2006 when Council made its decision approving those continuing on down.

I don't think I need to say any more really about that except that I think my learned friend very fairly indicated that the thread which has been the fundamental concern for the present Society, which is a party here, and the personnel of that Society who have been under various heads along the way

involved in this issue, has been the 48(1)(f) issue, really, and that it's only manifested through the washdown or it's manifested through "Can you have a boat sticking with an overhang or whatever?" but the fundamental issue has been the 48(1)(f) and we would say, and I know that Her Honour has indicated that if needs be that this issue can be ventilated but it was determined, we would say, by Justice Heath's decision and that's where it should have rested.

Unless Your Honours have any – sorry, one thing I should have said, my learned friend raised the issue of where the sump is, whether it's within the 10 metres or outside the 10 metres. I don't know the answer to that and I can't tell from the plans because if you look at the plan which is attached to the 2014 maintenance agreement, it looks like it might be within the 10 metres but it might not. If it's not, it's got to be fixed, as simple as that, or a variation's got to be applied for and obtained, so it's no quarrel, it's meant to be 10 metres from mean high water mark.

So unless there was anything which Your Honours want to ask me…

GLAZEBROOK J:
Thank you, Mr Galbraith.

MR GALBRAITH QC:
Thank you very much.

GLAZEBROOK J:
Does your friend want to just – if after the adjournment there's something else factual then we'll hear from –

MR HODDER QC:
I might only take two minutes, it's up to the Court.

GLAZEBROOK J:
Two minutes? Well, in that case, we'll…

MR HODDER QC:

If the Court pleases, obviously, the point that's been raised by my learned friend Mr Every-Palmer in relation to the possible enquiry triggered by the filing of the claim, the difficulty that I think we have as the Council and possibly the Court has is that the evidence that the Court has on this is in the form of the Marks affidavit and the Ashbridge report and what I haven't heard from my learned friend is anything that says that there's an issue that's been raised on the new claim that hasn't been addressed in relation to those matters, that they are essentially environmental matters, and the fact that there is a different claimant in a different forum making effectively the same concerns about that, in our submission, doesn't take the point far enough to be one that justifies this Court giving it weight here.

In the balance of that, while the argument could be made that given section 4, it was certainly possible for the Council to have made an enquiry as the delegate into what this claim was about, what we haven't heard is that the claim was about something different, and it would raise the question of the Council about how much more of a process it has to restart. That is to say if it takes the iwi's concerns into consideration, does it then have to go through a public process with everybody else again which repeats the exercise that had been done at an earlier stage? In our submission, it doesn't take us that far. Therefore, the Council was legitimately able to rely on Ashbridge and indeed, going back to Dormer, on the issues that have been ventilated by iwi in the past.

GLAZEBROOK J:

I think Mr Every-Palmer came down to the possible redress issue. Do you have anything to say on that?

MR HODDER QC:

It's a long bow, with respect to my learned friend. This is simply a claim at this stage, it hasn't been upheld, and as Justice Williams has pointed out, there's a constraint on what … . So yes, I accept there could be a prism about these things, but these are long-term processes, decisions have to be made, and

there's a limit to how long the matter can be held off pending the outcome of a claim such as this unless it has something radically new which we have no evidence that it does.

If the Court pleases, that's all I wanted to say.

GLAZEBROOK J:

Well, thank you very much, counsel, for your helpful submissions and we'll be giving judgment in due course and if we do find we need to call for further submissions, we will let you know and it may be that we'll look at those issues in another hearing if we need to but I'm not sure we'll necessarily be able to let you know very quickly because obviously, we have to work out what our view on the – because there's no point in having submissions that are hypothetical, depending upon the view we come to, but anyway, we'll give our judgment in due course.

HEARING ADJOURNS