IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 66/2018
[2019] NZSC 118

BETWEEN	DOUGLAS CRAIG SCHMUCK Appellant
AND	OPUA COASTAL PRESERVATION INCORPORATED First Respondent
	FAR NORTH DISTRICT COUNCIL Second Respondent

Hearing:	9 and 10 July 2019
Court:	Glazebrook, O'Regan, Ellen France, Williams and Arnold JJ
Counsel:	A R Galbraith QC, J A Browne and C H Prendergast for Appellant J D Every-Palmer QC and D F McLachlan for First Respondent J E Hodder QC, J G A Day and S W H Fletcher for Second Respondent
Judgment:	29 October 2019

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The decision of the second respondent as delegate of the Minister of Conservation to consent to the challenged easements referred to at [32] of the Reasons of the Court is reinstated.**

C **Costs are reserved.**

D **Leave is reserved to the parties to apply for consequential orders if required.**

REASONS
(Given by O'Regan J)

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Dispute over use of reserve

[1] This appeal is a continuation of years of controversy about the use by the appellant, Mr Schmuck, of land within an esplanade reserve in Walls Bay, Opua in the Bay of Islands, for his boat repair business operated under the name Doug's Opua Boatyard (the Boatyard).

[2] The appeal is against a decision of the Court of Appeal,[1] which allowed an appeal by Opua Coastal Preservation Incorporated (the Society) against a decision of the High Court.[2] The Court of Appeal quashed a decision of the second respondent, the Far North District Council (the District Council), acting as the delegate of the Minister of Conservation (the Minister), to consent to the grant by the District Council of certain easements over the reserve to Mr Schmuck.

[3] The appeal raises issues about the extent of the power of the administering body of a reserve to grant easements over the reserve under s 48 of the Reserves Act 1977 and the nature of the role of the Minister (or the Minister's delegate) in consenting to the grant of such easements under the same section. It also raises issues about the nature of activities that can be the subject of an easement.[3] In order to provide the necessary context for the discussion of these issues, we first set out the factual background.

Facts

The Boatyard

[4] The Boatyard was established in 1966 and the workshop on the Boatyard land was built in 1972. The land between the Boatyard and the sea was an unformed road. The then owner had planning consent for a slipway to cross the unformed road from

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1 *Opua Coastal Preservation Inc v Far North District Council* [2018] NZCA 262, [2018] 3 NZLR 538 (Winkelmann, Brown and Gilbert JJ) [CA judgment]. Leave to appeal to this Court was granted, the approved ground being whether the Court of Appeal was correct to allow the appeal: *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 7.

2 *Opua Coastal Preservation Inc v Far North District Council* [2017] NZHC 154 (Fogarty J) [HC judgment].

3 See below at [49]–[54] for a more detailed outline of the issues arising in the appeal.

the sea to the Boatyard, but this was for access only – it did not allow work on boats to be done on the unformed road.

[5] Mr Schmuck purchased the Boatyard in 1994.

[6] There was no direct evidence about the volume of work undertaken at the Boatyard. The management plan issued by the District Council and the Northland Regional Council (the Regional Council) for the Boatyard in 2014 refers to "the limited number of vessels hauled at this site", which indicates the volume is low.

The Society

[7] The Society's statement of claim states that it is a society incorporated under the Incorporated Societies Act 1908 for the purpose of preserving and protecting the Opua coastal area. It was formed in December 2014. The Chairman of the Society, Mr Henry Nissen, deposed that the Society was formed after many individuals expressed interest in being parties to judicial review proceedings that were being contemplated by him and others in respect of the District Council's decisions relating to the Boatyard. He said the Society has a great deal of support in Opua and the wider Bay of Islands community.

The esplanade reserve is created

[8] In 1998, the District Council stopped the unformed road. The consequence of this was that the unformed road land became an esplanade reserve as defined in s 2(1) of the Resource Management Act 1991 (the RMA) for the purposes specified in s 229 of the RMA.[4] We will refer to it as "the reserve". The road was stopped with the intention of granting easements to Mr Schmuck to regularise certain activities and installations on the area that became the reserve.

[4] Local Government Act 1974, s 345(3).

[9] Section 229 of the RMA provides:

> **229 Purposes of esplanade reserves and esplanade strips**
>
> An esplanade reserve or an esplanade strip has 1 or more of the following purposes:
>
> (a) to contribute to the protection of conservation values by, in particular,—
>
> (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; or
>
> (b) 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.

The Boatyard and the reserve

[10] The Boatyard is located to the west of the land comprising the reserve. There is a slipway from the sea that runs over the beach and the reserve to a turntable that is located mostly on Boatyard land but partially on reserve land. The turntable allowed for boats to be turned onto a number of slipways in the Boatyard, including one running north/south close to the border between the Boatyard land and the reserve (which meant a person working on a boat on this slipway needed to be on reserve land when accessing one side of the boat). This was known as the southern slipway tramrail.

[11] When boats are dragged up the slipway, they are washed while still on the slipway, that is, on reserve land. They are then moved to the Boatyard land for further

work.[5] But if the boat is too big to fit on the Boatyard land, part of the boat will remain on the reserve side of the turntable while work is carried out on it.[6]

[12] A survey plan showing the slipways and identifying the relevant easement areas is attached as Annexure 1.

1999: Easement decision

[13] In 1999, the District Council decided to grant various easements that would have regularised the activities carried out by Mr Schmuck on the reserve. The decision to grant the easements was made under s 48 of the Reserves Act, which we will discuss in detail later. That section requires the consent of the Minister (or the Minister's delegate) to any such grant. In addition, the Boatyard activity itself required resource consents.

2000: Minister's (partial) consent

[14] In 2000, the Northland Conservator (the Conservator), an employee of the Department of Conservation (DoC) who, at that time, had delegated authority from the Minister to give or withhold consent under s 48 of the Reserves Act, consented to some of the easements granted by the District Council. Consent was granted for the easements allowing boats to pass over the reserve on the slipway to the Boatyard. Consent was refused for easements that would have authorised the repair and maintenance of boats on reserve land. The Conservator considered the latter were not capable of being granted under s 48 of the Reserves Act and were contrary to the purposes of esplanade reserves under s 229 of the RMA. Mr Schmuck did not accept this outcome and the easements were never formalised.

2002: Resource consents

[15] Mr Schmuck sought resource consents to allow him to undertake some activities associated with the Boatyard business on reserve land. In 2002, the

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5 The Court of Appeal said if the only service provided in respect of a boat is cleaning (a boat valet service), the boat would be returned to the water without ever entering the Boatyard: CA judgment, above n 1, at [7]. This is disputed. We revert to this below at [61]–[66].

6 The Court of Appeal said sometimes the whole boat remains on reserve land while it is being worked on: CA judgment, above n 1, at [7]. This is also disputed. See below at [77]–[94].

Environment Court made an order by consent under which the Regional Council and the District Council granted resource consents for certain activities on reserve land. These included the maintenance, repair and washing down of boats on the slipway on reserve land and allowed certain structures to be placed on reserve land. But this did not obviate the need for easements over the reserve to permit these activities to be carried out.

[16] The Director-General of Conservation was a party to the Environment Court proceeding in which the consent order was made.

2004: Easement decision

[17] In 2004, Mr Schmuck made a new application for easements. The District Council agreed to grant some easements but not easements for washing-down, repairing and maintaining boats on the reserve land. Mr Schmuck refused the partial grant. He threatened judicial review on the basis the District Council's decision was both unreasonable and predetermined.

2006: Commissioner's recommendation

[18] In early 2005, Mr Schmuck made a further application for easements. The District Council appointed an Auckland barrister, Mr Alan Dormer, as an independent commissioner (the Commissioner) to hear the application and make a recommendation to the District Council. The Commissioner considered that the District Council had the power to grant the easements sought under s 48(1)(f) of the Reserves Act and recommended that the District Council grant them.

2006: Easement decision

[19] The District Council accepted the Commissioner's recommendation and in 2006 it exercised its power under s 48 of the Reserves Act to grant the easements sought, subject to the Minister's consent as required under s 48. We will call this "the 2006 easement decision". We will revert to this aspect of the case later.

2007: Minister's consent withheld

[20] The Minister's consent to the easements granted by the District Council was not forthcoming, however. In 2007, the Conservator sent Mr Schmuck a draft report from a DoC official that recommended that the Conservator should consent to some of the easements (relating to access and use of the slipway) but refuse consent for others (relating to carrying out work on reserve land and discharging contaminants) on the basis that they were not capable of being authorised under s 48.

[21] Mr Schmuck made submissions to the Conservator and raised the possibility of seeking a declaratory judgment as to whether s 48(1)(f) allowed for the grant of easements of the kind that the Conservator considered to be incapable of authorisation. No declaration was sought and Mr Schmuck embarked on an effort to have provisions inserted into the Reserves and Other Lands Disposal Bill permitting the District Council to grant him the easements sought.[7] The consent process was placed on hold in the meantime. But the proposed legislative amendment foundered and eventually the consent process was reactivated.

2013: Minister's (partial) consent

[22] In 2013, the District Council asked DoC to determine whether to consent to easements granted by the 2006 easement decision. The Conservator was provided with a report by a DoC official, Mr Ashbridge, recommending that the Conservator consent to some of the easements, including for the movement of boats along the slipway, and decline consent to those easements related to the washing-down, repairing and maintaining of boats, and the discharge of contaminants on the basis that they were not capable of being granted under s 48. On 27 August 2013, the Conservator, as the Minister's delegate, adopted that recommendation and issued a decision consenting to the grant by the District Council of some easements, but not those just described. In effect, the Conservator's position remained as it had been in 2007.

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[7] See Reserves and Other Lands Disposal Bill 2008 (237-2), cls 34A–34C; and Reserves and Other Lands Disposal Bill 2008 (237-3).

2013: Delegation of Minister's consent power

[23] Later in 2013, the Minister issued an Instrument of Delegation for Territorial Authorities exercising his power under s 10 of the Reserves Act to delegate to territorial authorities a number of the Minister's powers, functions and duties under the Reserves Act (these were set out in the Instrument in some detail). The delegation applied where the relevant territorial authority was the administering body of a reserve. In the present case, this meant that the Minister's power to consent to any easement granted by the District Council under s 48 could be exercised by the District Council itself.[8]

2014: Environment Court decision

[24] In 2014, the Environment Court made declarations that the land use resource consents obtained by Mr Schmuck in 2002 for the activities contemplated by the easements sought remained valid.[9]

2014: Permission decision

[25] In late 2014, the District Council resolved "as landowner and administering body" to grant "permission" to Mr Schmuck to undertake activities on the reserve land authorised by the resource consents. In effect, this purported to authorise the activities for which Mr Schmuck had sought (and the District Council had agreed to grant) easements, including those for which the Minister's consent had been refused. We will call this "the 2014 permission decision".

2015: Heath J's judgment

[26] Mr Schmuck applied for judicial review of the decision of the Conservator, as the Minister's then delegate, to decline the easements relating to carrying on work on the reserve land. The Minister, DoC and the District Council were parties to this proceeding. The Society was not. There was a preliminary question hearing before

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8 The High Court and Court of Appeal were critical of this delegation: HC judgment, above n 2, at [77]–[79]; and CA judgment, above n 1, at [40]. However, its validity is not challenged in this appeal.

9 *Schmuck v Far North District Council* [2014] NZEnvC 101.

Heath J on the interpretation of s 48(1)(f). He made two important determinations in relation to the issues arising in this appeal.[10]

[27] First, he rejected the proposition that the power to grant easements in s 48(1)(f) was limited to easements required to convey substances over reserve land.[11] He found that, contrary to the position of the Conservator,[12] the easements for washing down, repairing and maintaining boats and the discharge of contaminants were capable of being granted under s 48 and there was jurisdiction for the Minister to consent to the grant of such easements.[13]

[28] Second, in the course of determining the above issue, he addressed the question of whether the grant of the easements give Mr Schmuck illegitimate occupation rights of reserve land. He found that the easements would not give rise to a degree of occupation that would remove the ability to grant the easements.[14]

[29] Heath J quashed the decision of the Conservator to decline consent for some of the easements and remitted the consent decision in respect of those that had been declined to the Minister, or the Minster's delegate, for reconsideration. There was no appeal against Heath J's judgment.

2015: Consent decision

[30] After Heath J's judgment was delivered, there was correspondence between the District Council and DoC about who would make the decision as to whether the Minister's consent should be given to the easements granted under the 2006 easement decision, with each initially requesting the other to make the decision. The effect of the Minister's 2013 delegation was that the decision could be made by either body.[15] DoC advised the District Council by letter that the District Council should make the decision. It said the decision must be considered on its merits with an open mind. It

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10 *Schmuck v Director-General, Department of Conservation* [2015] NZHC 422 [Heath J's judgment].
11 At [22].
12 See above at [20] and [22].
13 At [30].
14 At [28].
15 Section 10(6) of the Reserves Act provides that the delegation of a decision-making power by the Minister does not prevent the Minister from exercising the power.

also noted there is a Treaty of Waitangi claim over the area and advised the District Council that, in exercising the Minister's consent power as delegate of the Minister, it was required to give effect to Treaty principles, pursuant to s 4 of the Conservation Act 1987.

[31] The District Council eventually accepted that it should act on the Minister's delegation and determine whether the Minister's consent should be given to the easements for which consent had been declined by the Conservator in 2013. The District Council received a lengthy report from its in-house counsel, Mr Swanepoel, to inform its consideration of the issues arising in relation to the proposed consent decision. The District Council accepted his recommendation that consent be granted. In 2015, in its capacity as delegate of the Minister, it gave consent to all of the easements granted by the 2006 easement decision. We will call this "the 2015 consent decision".

Easements granted and registered

[32] After the consents were granted, the easements were executed and registered. In each case the dominant tenement was the Boatyard land and the servient tenement was the reserve land. The plan attached to this judgment as Annexure 1 identifies the areas of the reserve referred to in the easement document as areas T, U, V, W, X, Y and Z. The terms of the easements are set out below. The easements that are subject to challenge in this appeal are easements A4, A5, A6 and C. We will call these "the challenged easements". They are highlighted in bold below. The terms of the executed and registered easements are:

> A. An easement over [the land comprised of the areas marked X, Y and Z on the plan (the XYZ area)] to permit the following:
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> 1. Construction and maintenance of a commercial marine slipway including a turntable and all of its integral parts, fixtures, supporting members, attachments, utilities and non-permeable surfaces.
>
> 2. The movement of boats along the slipway between the dominant tenement and the water.
>
> 3. The construction and maintenance of a concrete wash-down area with associated discharge containment systems to be located above a line 10 m above MHWS.

4. **The washing down of boats prior to the boats being moved to the dominant tenement for repairs or maintenance or being returned to the water.**

5. **The erection of screens or the implementation of similar measures to contain all contaminants within the wash-down perimeter.**

6. **The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.**

7. A stormwater and conduit drain.

8. A security light pole.

9. Associated utilities for power and water.

10. Safety signage.

11. A wharf abutment.

12. A concrete dinghy ramp (where this does not otherwise lie within the coastal marine area).

Subject to the following conditions:

1. **That all activities shall be carried out in accordance with any relevant resource consent.**

2. **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 dominant tenement, are placed on cradles located entirely within the dominant tenement but protrude into the airspace above [the XYZ area] and/or [the land comprised of the areas marked U and W on the plan (the UW area)], such boats may be repaired or maintained at any time of the year;

   (b) as a small portion of the turntable encroaches onto [the XYZ area], boat cradles that are located on any part of the turntable but that do not otherwise encroach onto [the XYZ area] 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;

   (c) when boats which by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement, are unable to be placed on cradles located entirely within the

dominant tenement in accordance with clause (a) above, and are not located on the dominant tenement in accordance with clause (b) above, such boats may be placed on cradles located within that part of [the XYZ area] marked X and Y on [the plan], 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;

(d) no boat cradles or part thereof may be positioned on any part of [the XYZ area] marked Z on [the plan] other than for the purpose of haulage of a boat;

(e) to enable the Far North District Council to monitor compliance with the 60 day annual usage limit contained in clause (c) above, the boatyard's operator shall continue to keep operational diaries recording the use of the areas marked X and Y on [the plan] for the repair and maintenance of boats, and such diaries shall be made available to the Council's monitoring officers on request.

B. An easement over [the areas marked T, U, W, X, Y and Z on the plan], to permit the following:

Access to and reconstruction of the slipway between the dominant tenement and MHWS and the concreting of that part of the slipway situated above a line 10 metres from MHWS.

Subject to the following conditions:

1. That any earthworks material which is surplus to slipway reconstruction requirements shall be secured within [the XYZ and UW area] and secured so that siltation and erosion does not occur, or be removed from the site.

2. That all activities shall be carried out in accordance with any relevant resource consent.

C. An easement 2 m wide over [the areas marked W and X on the plan], to permit the following:

Access to, and repair and maintenance of, any vessel standing on the southern slipway tramrail and/or the turntable.

Subject to the following conditions:

1. That all activities shall be carried out in accordance with any relevant resource consent.

2. That this easement shall expire after 10 years from the date of registration, subject to a right of renewal every 10 years, provided that in the event of the boatyard

property being redeveloped and alternative access not being provided as part of the redevelopment, any request for renewal will be viewed less favourably.

D. An easement over [the areas marked T, U, V, and Z on the plan], to permit the following:

1. Existing wooden and stone retaining walls (where these do not otherwise lie within the coastal marine area).

E. An easement [over the areas marked T, U, V, W, X, Y and Z on the plan], to permit the following:

1. The discharge of contaminants to air, soil, and water in accordance with any relevant resource consent;

2. The emission of noise in accordance with any relevant resource consent.

AND the following conditions shall apply in respect to the above easements:

1. The grantee shall keep current a public liability insurance policy for a minimum of $1,000,000 (one million dollars).

2. If required by Council the grantee shall make an inducement payment to Council and/or pay an annual rental as may be agreed upon between the parties.

3. The grantee shall surrender the easements to the Council at the Council's request if and when the boatyard ceases to operate, and shall reinstate the area to the satisfaction of the Council.

Relevant context

[33] As mentioned earlier, the Boatyard was granted resource consents by both the District Council and the Regional Council pursuant to a consent order made in the Environment Court in 2002. The resource consent from the District Council authorises certain activities on the reserve land. These include washing down boats prior to their being moved to the Boatyard or on their being returned to the water. Screens are required to be erected to contain contaminants within the wash-down perimeter. Repairs and maintenance are not allowed except to a vessel that is too big to be moved entirely on to the Boatyard land – and then only in area "A", which is part of the XYZ area of the easement. The District Council has the right to review these and other conditions of the resource consent on a regular basis.

[34] The resource consents from the Regional Council complement those from the District Council. One of the conditions of those resource consents is that Mr Schmuck

as consent holder is required to submit a management plan to the Regional Council relating to, among other things, the operation and maintenance of the slipway. The management plan must be reviewed at three yearly intervals.

[35] The Regional Council granted renewed resource consents for the discharge of wash water and contaminants in 2008.

[36] The management plan contemplated by the resource consents was reviewed and updated by the Regional Council and the District Council in 2014.[16] There are nine "factors of management", the relevant one for present purposes being:

> The slipway operations and maintenance of the boat wash-down area "A" [part of the XYZ area] 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 [sic] site, by virtue of their length or configuration … .

[37] In the section headed "Procedures for factors of operational management", there is reference to washing and associated activities to clean and strip hull and deck areas "in the preparation of a vessel for maintenance or repair prior to being relocated into the boatyard proper".

[38] There is also a requirement that Mr Schmuck give notice by email to the District Council "as to the proposed duration of any maintenance, repair, and/or haulage … on any given vessel standing on its cradle within or overhanging area "A" that cannot be moved by virtue of its length and configuration entirely within the boatyard site …".

[39] Both parties drew upon the terms of the resource consents and the management plan to support their interpretations of the easements.

Recent developments

[40] Prior to the hearing of the appeal counsel filed a joint memorandum outlining changes that have occurred since the decision of the Court of Appeal was issued. In particular, Mr Schmuck has removed the rails, including the southern slipway tramrail,

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[16] There has since been a further review but this postdates the 2015 consent decision.

which run from the turntable to different parts of the Boatyard as part of a general downsizing of the Boatyard operations. Mr Schmuck is also reconstructing the slipway from the sea to the shed on Boatyard land and in future will need only this central rail running from the shed through the turntable to the water. A diagram filed by the parties showing the rails that have been removed is attached as Annexure 2.

[41] As the southern slipway tramrail has now been removed, the issues related to easement C will be of no practical significance unless Mr Schmuck changes his mind about the removal of the southern slipway tramrail, which we are advised is unlikely. We will, however, set out our views in relation to easement C because it has not been formally removed from the ambit of the appeal.

The present proceedings

[42] The Society's judicial review claim in the High Court challenged two decisions, the 2014 permission decision[17] and the 2015 consent decision.[18] The 2006 easement decision is not under challenge in these proceedings. The High Court quashed the 2014 permission decision and there was no appeal against that aspect of the High Court decision.[19] It is therefore not necessary for us to say anything more about the 2014 permission decision.

[43] In relation to the 2015 consent decision, the Society's judicial review claim related to only part of that decision: the decision to consent to the grant of easements A3, A4, A5, A6, C and E. The Society did not challenge the decision to consent to the other easements, and does not object to the presence of the slipway or the use of the slipway to convey boats from the sea to the Boatyard and vice versa. Nor does it object to the use of the turntable which is partially located on area X of the reserve.

[44] The principal argument for the Society in the High Court was that the 2015 consent decision was invalid in relation to the easements just mentioned because those easements were not capable of being authorised as easements under s 48(1)(f) of the Reserves Act. This argument failed in the High Court.

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17 See above at [25].
18 See above at [31].
19 HC judgment, above n 2, at [34]–[42].

[45] In considering whether those easements were capable of being granted under s 48(1)(f) of the Reserves Act, the Court of Appeal first asked whether the easements could be properly classified as easements at all. If its answer to that was in the negative, that would mean the Minister could not reasonably consent to the granting of the easements. And even if the answer to that were in the affirmative, there still remained the question of whether they were the type of easement provided for in s 48 of the Reserves Act.[20]

[46] The Court of Appeal acknowledged that its consideration of these issues involved revisiting Heath J's judgment in respect of which there had been no appeal and in reliance on which the District Council had acted when making the 2015 consent decision.[21]

[47] The Court of Appeal found that, with some exceptions, the rights conferred pursuant to the easements in question were not capable of a valid grant of easement. As the District Council, acting as the Minister's delegate, had proceeded on the basis that those easements were capable of a valid grant of easement, it had proceeded on an incorrect view of the law and it thus acted under an error of law. So the Court of Appeal quashed the aspects of the 2015 consent decision subject to challenge in the Society's judicial review claim, except in respect of easements A3 and E.[22]

[48] The Court of Appeal also disagreed with Fogarty J's description of the requirements for a Ministerial consent decision under s 48 as being limited to acting as a check on the District Council.[23] The Court of Appeal considered that the Minister's discretion was not constrained in this way.[24]

The issues

[49] The primary issue before us is the scope of the power to grant easements under s 48 of the Reserves Act, which in turn informs the scope of the Minister's power

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20 CA judgment, above n 1, at [53].
21 At [54].
22 At [100]–[101] and [119]. At [119] the Court refers to the 2015 consent decision as "unreasonable … as it was informed by an error of law". Its analysis indicates that it is the error of law which is the foundation of the invalidity not any unreasonableness on the part of the District Council.
23 HC judgment, above n 2, at [82].
24 CA judgment, above n 1, at [110].

under that section to consent to the grant of such easements. This requires a consideration of the terms of s 48(1)(f) and the overall statutory context of the Reserves Act.

[50] In order to determine the primary issue, it is first necessary to address the broader land law issue, namely whether the challenged easements are in fact capable of being easements at all. As indicated above, the Court of Appeal found that for the most part they were not, and this is challenged on further appeal to this Court.

[51] If we determine that the challenged easements were capable of being easements and their grant was within the power in s 48, we then need to address whether the 2015 consent decision of the District Council (as delegate of the Minister) was lawfully made. The High Court considered it was. The Court of Appeal considered it was not, but this was because it considered the challenged easements were not capable of being easements. It did not consider there was any illegality in the 2015 consent decision insofar as it related to easements A3 and E, which it held were capable of being easements.

[52] In addition to the issues already mentioned, the Society raised a number of new issues in this Court. It will be necessary for us to decide whether we can deal with those issues and, if so, how we should do so. The principal argument was that in making the 2015 consent decision, the District Council gave insufficient consideration to Treaty of Waitangi claims over the area that includes the reserve.

[53] As mentioned, the Court of Appeal's consideration of whether the challenged easements were capable of being validly granted under s 48 involved a reconsideration of Heath J's judgment. A question arises as to whether issue estoppel or an analogous form of estoppel applies to Heath J's judgment (having regard to the fact that the Society was not a party to the claim that led to Heath J's judgment).

[54] Finally, there is also a question as to the impact of the fact that the easements (including the challenged easements) were registered. In particular, there is a potential issue as to whether registration of the easements gave Mr Schmuck an indefeasible

interest, such that they could not be defeased by the later decision to quash aspects of the 2015 consent decision.

Are the challenged easements valid?

[55] We deal first with the challenged easements. As mentioned earlier, consent was given for the easements other than those relating to the washing down, repairing and maintaining of boats and the discharge of contaminants in 2013. So the easements under consideration by the Court of Appeal were easements A3, A4, A5, A6 , C and E. The Court of Appeal upheld the 2015 consent decision in relation to easements A3 and E in the decision under appeal. Those still in issue (the challenged easements) are, therefore, easements A4, A5, A6 and C.

[56] For an interest in land to be an easement, it must possess the following three characteristics:[25]

(a) There must be a dominant tenement (the land deriving the benefit of the easement) and a servient tenement (the land over which the easement is exercisable).[26] In this case, the dominant tenement is the Boatyard land and the servient tenement is the reserve.

(b) The right must accommodate (that is, confer a benefit on) the dominant tenement as opposed to a personal benefit on the owner of the dominant tenement.[27]

(c) The right claimed must be capable of being the subject matter of the grant of an easement. This incorporates a number of requirements: that the easement be in sufficiently clear terms; that it is not so precarious

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25 *Re Ellenborough Park* [1956] Ch 131 (CA) at 163. See CA judgment, above n 1, at [56]. The additional requirement referred to in *Re Ellenborough Park* and by the Court of Appeal is that the owners of the dominant and the servient tenements must be different persons. This is no longer a requirement in New Zealand: see Land Transfer Act 2017, s 108(3).

26 However, it is possible to have an easement in gross in New Zealand (that is, an easement in favour of a specified person, rather than specified land): see Property Law Act 2007, s 291. Under that Act and the Land Transfer Act 2017, the terminology used in connection with easements is "burdened land" rather than servient tenement and "benefited land" rather than dominant tenement. As the Court of Appeal and counsel used the traditional terms, we will do the same.

27 This requirement would not apply to an easement in gross.

> that it is liable to be taken away by the servient owner; that it is not so extensive or invasive as to oust the servient owner from the enjoyment and control of the servient tenement; and that it does not impose on the servient owner an obligation to spend money or do anything beyond mere passivity.[28]

[57] It is only the second and third of these that is in issue in this case.

[58] The Court of Appeal found the challenged easements were not capable of being the subject matter of a grant. This was because they were too uncertain in their terms and/or they conferred a benefit on Mr Schmuck (and his Boatyard) personally rather than on the Boatyard land. We will consider each of the easements individually to assess whether the Court of Appeal was right to conclude they were invalid.

[59] Counsel for Mr Schmuck, Mr Galbraith QC, raised the question of the admissibility of extrinsic evidence in relation to the interpretation of the easements, given they are registered documents. He referred to the observation in the reasons of William Young and O'Regan JJ in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* that, generally, such registered documents should be interpreted without regard to extrinsic evidence that is particular to the original parties and not apparent on the face of the register.[29] We do not consider the question arises in the present case. The extrinsic material relied upon is the resource consents (to which the easements are subject) and the management plan (required by the resource consents). These are admissible on the approach set out in *Green Growth*.[30] That is because a reasonable future reader of the easement document could be expected to be aware of them and would recognise them as relevant and the resource consent, which refers to the management plan, is expressly and repeatedly referred to in the easement document.

[60] We now turn to the assessment of the individual easements.

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28 *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, [2019] AC 553 at [58] per Lord Briggs JSC. See also *Registrar-General of New South Wales v Jea Holdings (Aust) Pty Ltd* [2015] NSWCA 74, (2015) 88 NSWLR 321 at [64].

29 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [74]. Glazebrook J agreed with this aspect of their reasons: at [151].

30 At [74(c)].

Easement A4

[61] To recap, easement A4 is an easement over the XYZ area to permit:

> The washing down of boats prior to the boats being moved to the dominant tenement for repairs or maintenance or being returned to the water.

Condition 1 requires this activity to be carried out in accordance with any relevant resource consent.

[62] The Court of Appeal accepted that a right to wash down a boat on reserve land before it is moved to the dominant tenement might be the subject of a valid easement. But it considered that the easement was broader because it also allowed washing down of boats on reserve land and returning them to the water as part of something like a boat valet service, which would be conducted entirely on the reserve land. It did not consider that the easement as drawn was adequately focused upon support of the dominant tenement to be a valid easement but thought that a more narrowly drawn easement allowing washing down of a boat before it is moved to the dominant tenement might be the subject of a valid grant.[31]

[63] Mr Galbraith said that this interpretation of easement A4 was inconsistent with easement A2, which permits the movement of boats along the slipway between the dominant tenement and the water, but not otherwise. He said when considered in this context, the correct interpretation of easement A4 is that it permits washing down of boats prior to being moved to the dominant tenement for repairs or maintenance, or washing down of boats after they have been repaired or maintained on the dominant tenement and are being returned to the water.[32] He said this interpretation made the scheme of the easements coherent and allowed them to fit together. He said there was nothing in the evidence indicating that Mr Schmuck was conducting a boat valet operation (or contemplating doing so) and the Society did not suggest there was any such operation.

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31 CA judgment, above n 1, at [80]–[81].

32 If easement A6 comes into operation, the repair or maintenance could occur partly or wholly on the dominant tenement.

[64] Mr Galbraith said that this was an unusual case because the parties to the easements, Mr Schmuck and the District Council, were satisfied with the easements and were attempting to uphold them. He argued that the Court of Appeal's unduly narrow interpretation of the easements was wrong in principle, because the Court ought to have been trying to give effect to the easements contended for by the parties if it could. He cited for that proposition the statement of Lord Briggs JSC in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*.[33] In that case Lord Briggs JSC said, after observing that the parties intended to confer a property right in the nature of an easement rather than a personal right: "That being the manifest, common intention, the court should apply the validation principle ("ut res magis valeat quam pereat") to give effect to it, if it properly can."[34] A similar observation was made by Latham LJ in *Jackson v Mulvaney*.[35]

[65] For the Society, Mr Every-Palmer QC supported the Court of Appeal's interpretation. He noted that the wording of easement A4 replicated the wording of the relevant paragraph of the 2002 resource consents. Mr Every-Palmer argued that the observation of Lord Briggs JSC in *Regency Villas* was inapplicable where the servient tenement was a reserve rather than private land. This was because of the public nature of a reserve, which the administering body holds on behalf of the public for the purposes for which the reserve was created (in this case the purposes set out in s 229 of the RMA). We accept that a public reserve is different from private land but we see no reason to take a different approach to interpretation of an easement for that reason, unless the easement conflicts with the statutory purposes of the reserve. We do not consider it does in this case.

[66] We consider the interpretation for which Mr Schmuck contends is an available interpretation and one that better coheres with the scheme of the easement document, especially easement A2. Adopting the approach outlined in *Regency Villas*, we

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33 *Regency Villas*, above n 28.

34 At [25]. The Latin maxim referred to by Lord Briggs JSC translates broadly as "so that the matter may flourish rather than perish". See also, in a different context, the observation of the Court of Appeal in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [58]: the Court "will then do its best to give effect to [the parties' intention to enter into a contract] and, if at all possible, to uphold the contract despite any omissions or ambiguities".

35 *Jackson v Mulvaney* [2002] EWCA Civ 1078, [2003] 1 WLR 360 at [23].

interpret easement A2 as allowing the washing down of boats only when they are about to be moved to the Boatyard for repair or maintenance work or are being moved from the Boatyard to the water after such work. In light of that interpretation, there is no doubt the easement supports the dominant tenement, as the Court of Appeal recognised.[36]

Easement A5

[67] Easement A5 is an easement over the XYZ area that permits:

> The erection of screens or the implementation of similar measures to contain all contaminants within the wash-down perimeter.

Condition 1 requires this to be carried out in accordance with any relevant resource consent.

[68] The Court of Appeal observed that the wording of this easement contemplated the erection of screens but was imprecise as to whether they were fixed to the ground or fixed to the boat cradle. It envisaged it would be the latter but this needed to be stated in the easement. It concluded that the easement as drawn was too uncertain to be valid.[37]

[69] Mr Galbraith said the purpose of the easement was to implement measures to contain contaminants in order to comply with Mr Schmuck's resource consents. The easement is directed to this purpose and should not be invalidated because it does not prescribe the precise nature of the screens or other protective measures. He emphasised the ability of the District Council to monitor the use of screens and the containment of contaminants under the resource consents and the management plan.

[70] The Society argues that if Mr Schmuck's interpretation is accepted, the easement would give Mr Schmuck a discretion to do what he likes to contain the contaminants.[38]

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36 CA judgment, above n 1, at [81].

37 At [82].

38 At the hearing, Mr Every-Palmer suggested photographs of the screen used by Mr Schmuck showed it was outside this confined area. It is not possible for us to determine whether that is right or not. If it is, that might indicate non-compliance with the terms of the easement, but we do not see it as affecting the interpretation of the easement itself.

[71] The requirement that an easement must be capable of reasonably exact description is an aspect of the fourth requirement set out in *Re Ellenborough Park*.[39] If it is so vague or so indeterminate so as to defy precise definition, it cannot rank as an easement.[40] However, the authors of *Gale on Easements* observe that "there appears to be no reported case in which an express grant of a supposed easement has been held to create no easement because the wording of the grant is too vague".[41]

[72] We do not think the easement as drafted is too uncertain to be a valid easement. The purposes of the screens is clear. So too is their required location within the XYZ area given that they must contain contaminants in the concrete wash-down area constructed and maintained under easement A3. This is a confined area. The fact that the purpose of the easement is to allow for measures required by the resource consents to contain contaminants does not seem to us to affect the interpretation of the easement. Nor do we consider it matters whether the screens are attached to the cradle holding the boat being washed down or fixed to the ground. We therefore respectfully disagree with the Court of Appeal's assessment that the easement is too uncertain to be valid.

Easement A6

[73] Easement A6 is an easement over the XYZ area that permits:

> The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.

[74] This easement is subject to condition 1 (requiring it to be carried out in accordance with the relevant resource consent) and also the detailed requirements of condition 2. The Court of Appeal interpreted this easement as permitting not only the repair and maintenance of vessels that are partly on Boatyard land and partly on reserve land, but also vessels that are located entirely within the areas marked X and Y within the reserve.[42]

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39 See above at [56](c).

40 EH Burn and J Cartwright *Cheshire and Burn's Modern Law of Real Property* (18th ed, Oxford University Press, Oxford, 2011) at 640.

41 Jonathan Gaunt and Paul Morgan *Gale on Easements* (20th ed, Sweet & Maxwell, London, 2017) at [1-44].

42 CA judgment, above n 1, at [63(b)] and [67].

[75] The Court of Appeal saw a number of difficulties with the easement given its broad interpretation of the scope of the permission granted. In particular:

(a) The Court considered that the easement did not satisfy the requirement that an easement must confer a real and practical benefit on the dominant tenement.[43] However it considered that, if the easement had been limited to allowing the overhang of boats in the Boatyard onto the reserve, and possibly a right to enter the reserve to work on those boats, this might satisfy that requirement.[44]

(b) The Court concluded that the right granted by the easement, as it interpreted it, was not capable of forming the subject matter of an easement. This was because it undermined the ability of the District Council to exercise meaningful control over the XYZ area. Rather, the rights conferred were so extensive and uncertain that they amounted to joint occupation of area XYZ of the reserve.[45]

[76] As to the first of these concerns, the Court of Appeal referred to *Re Ellenborough Park* as authority for the proposition that a right over land does not amount to an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement.[46] That can be contrasted with a personal benefit to the owner of the land. The Court of Appeal accepted that where a business is well established on a site so that its operation is properly seen as connected to the use of the land (as the Boatyard is in this case), an easement may be validly granted that supports the operation of the business on the land.[47]

[77] Mr Galbraith did not take issue with the Court of Appeal's statement of the law, but queried its application to easement A6, even as interpreted by the Court of Appeal. His principal argument was that the Court of Appeal had interpreted the

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43 At [68] and [78].
44 At [66]–[67].
45 At [77]–[78].
46 At [56(b)] and [64], citing *Re Ellenborough Park*, above n 25.
47 At [65], citing *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389, (2002) 11 BPR 20,605 at [30].

easement to allow for a boat to be entirely located on reserve land while undergoing repairs and maintenance, when, properly interpreted, this was not permitted. Rather, the easement permitted repairs and maintenance to a boat that was located partly on the dominant tenement (the Boatyard land) and partly on reserve land. Once that interpretation was adopted, then even on the Court of Appeal's own analysis, the easement accommodated the dominant tenement, not just the business located on the dominant tenement.

[78] Mr Every-Palmer was also content to adopt the Court of Appeal's view of the law. He emphasised that, while an easement that benefitted a business operated on the dominant tenement may meet this requirement, that could not extend to an activity that is carried on entirely on reserve land, as easement A6 did on the interpretation of the Court of Appeal, which he supported.

[79] We also accept the Court of Appeal's statement of the law.[48] Lord Briggs JSC in *Regency Villas* said that the question of whether an easement accommodates the dominant tenement is a question of fact and depends on whether the right serves the normal use and enjoyment of the dominant tenement.[49]

[80] We consider it is arguable that, even on the Court of Appeal's interpretation, the easement accommodates the dominant tenement because even if the vessel being worked on were located entirely on reserve land, the work would be undertaken as an element of the business operating on the dominant tenement. But we do not need to engage with the legal argument because we accept the interpretation of the easement advanced by Mr Schmuck. We consider that the word "entirely" in easement A6 signals that it is dealing with the situation where the vessel is partly, but not completely, on Boatyard land. This is supported by:

(a) condition 2(a), which also uses the term "entirely" and refers to boats that "protrude into the airspace above" areas of the reserve;

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48 *Re Ellenborough Park* has, since the Court of Appeal's decision, been affirmed by the United Kingdom Supreme Court in *Regency Villas*, above n 28, at [48]–[52] and [81].

49 *Regency Villas*, above n 28, at [43].

(b) condition 2(b), which refers to boats on cradles located on the turntable. The turntable is partly on Boatyard land and partly on reserve land; and

(c) condition 2(c), which refers to boats which "by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement".

[81] The Court of Appeal considered the fact that condition 2(c) allowed for boats to be placed on cradles located within areas X and Y of the XYZ area to be repaired meant that all of the boat would be on the reserve land when under repair.[50] While the language is not as clear as it could be, we consider the repeated references to "entirely within" the Boatyard in easement A6 and conditions 2(a) and (c) signal that the intention is that the easement allows for repairs of boats located partly on Boatyard land and partly on reserve land. It also allows for a cradle or cradles to be located on reserve land, but only where the cradles cannot be located entirely on Boatyard land because of the length or configuration of a particular boat. If there were two or more cradles required for a boat (as the use of the plural "cradles" in condition 2(c) appears to allow for), the easement allows the cradle to be entirely on reserve land, not for the boat to be entirely on reserve land. The boat must be at least partly on Boatyard land.

[82] Mr Galbraith noted that condition 1 required the activities permitted by easement A6 to be carried out in accordance with the resource consent. He argued the resource consent therefore aided interpretation of the easement. He noted that conditions 4 and 9 of the resource consent resolved concerns expressed by the Court of Appeal. Condition 4 provides that no materials, tools or other items are to be placed or left on the reserve except when necessary to haul a boat up the slipway or when repair or maintenance work is carried out on a vessel in area "A", which is a small part of the XYZ area. Condition 9 prohibits any vessel being left on the slipway within the reserve except as permitted under the resource consent. In practice this means a vessel can remain on the slipway only within area A and, given the small size of that area, it cannot be intended a vessel that fits entirely within that area could be left there. This is because a vessel that would fit in area A would clearly fit inside the Boatyard and

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50 CA judgment, above n 1, at [63(b)] and [67]. See also above at [74].

thus would not meet the condition of easement A6 that it can be availed of only when a vessel does not fit inside the Boatyard.

[83] Mr Every-Palmer accepted the resource consent was a legal overlay which could inform one's view as to the realistic uses of the reserve but argued it did not affect the interpretation of the easement.

[84] We consider that the resource consent does assist the interpretation of the easement given condition 1 regulates the operation of the easement. The Court of Appeal interpreted easement E by reference to the resource consent and management plan. We accept Mr Galbraith's submission that this approach was also appropriate in interpreting easement A6.

[85] Once it is accepted that easement A6 permits repair and maintenance work only on boats located partly on Boatyard land and partly on the XYZ area of the reserve, the argument that it does not accommodate the use and enjoyment of the dominant tenement largely falls away. As a matter of fact, it clearly supports the business operated on the dominant tenement by allowing repair and maintenance work to be carried out on vessels that do not fit completely within the boundaries of the Boatyard. That is sufficient connection with the dominant tenement to satisfy the requirement that the easement must confer a real and practical benefit on the dominant tenement.

[86] We turn now to the second concern raised by the Court of Appeal: the rights created were so uncertain and extensive that they effectively allowed Mr Schmuck joint occupation of area XYZ of the reserve.

[87] The Court of Appeal relied on *Copeland v Greenhalf*.[51] That case concerned a claim to an easement by prescription, rather than by grant. Upjohn J rejected the claim, finding the claimed right to park vehicles on the easement land without restriction was too extensive to constitute an easement. We consider *Copeland* is of

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51 *Copeland v Greenhalf* [1952] Ch 488 (Ch).

doubtful authority now. It is, as just noted, a case about a claim based on prescription not grant. It has been criticised and doubted.[52]

[88] The test for whether an easement amounts to joint occupation is usually formulated as whether the proposed easement would leave the servient owner without reasonable use of their land.[53] This is commonly termed the ouster principle. But in *Moncrieff v Jamieson*, Lord Scott doubted the correctness of the ouster principle. He observed that every easement will bar some use of the servient land and that sole use for a limited purpose was not inconsistent with the servient owner's retention of possession and control.[54] While "reasonable use" is traditionally assessed by reference to the servient tenement as a whole, Lord Scott considered the relevant inquiry is the impact upon the land subject to the easement.[55] In Lord Scott's view, the correct test is "whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land".[56]

[89] More recently, in *Regency Villas*, Lord Briggs JSC noted that the extent of the ouster principle was a matter of some controversy, which he did not find necessary to resolve. He later added:[57]

> …the ouster principle rejects as an easement the grant of rights which, on one view, deprive the servient owner of reasonable beneficial use of the servient tenement or, on the other view, deprive the servient owner of lawful possession and control of it.

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52 See *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620 at [56] per Lord Scott who questioned whether it could truly be said, as Upjohn J had said in *Copeland*, that the defendant in that case was "claiming the whole beneficial user of the strip of land" subject to the easement. In *Moncrieff*, it was held that a servitude (the Scottish equivalent to an easement) giving access included a right to park vehicles, in contrast to the outcome in *Copeland*. See also Peter Luther "Easements and exclusive possession" (1996) 16 Legal Studies 51; and the report of the Law Commission of England and Wales *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) at [3.207]–[3.211], where the Commission recommended that the ouster principle should be abolished.

53 *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 (Ch) at 1288; and *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 1 WLR 764 at [8]–[9].

54 *Moncrieff*, above n 52, at [54]–[55].

55 At [57].

56 At [59]. Lord Neuberger endorsed the test proposed by Lord Scott. However, he reserved his position given it was not necessary to decide the point: at [143].

57 *Regency Villas*, above n 28, at [61].

[90] For reasons we will come to, we do not think it is necessary to resolve this controversy either.[58]

[91] The Court of Appeal's interpretation of easement A6 led it to conclude that the easement was too broad because the District Council could not be said to retain possession and, subject to the reasonable exercise of the rights in question, control of the reserve. So the rights under easement A6 gave Mr Schmuck at least joint occupation of the reserve.[59] In particular:

(a) there was no limit on the time that boats protruding into the reserve could be worked on under condition 2(a);[60]

(b) there was a limit under condition 2(c) of 60 days per year, but the Court thought this was unclear as to whether it meant 60 working days or 60 multiplied by 24 hours;[61]

(c) the scope of activities required for repair and maintenance work was wide, and there was no limit on who and how many people could enter the reserve to work on the boats protruding into it;[62]

(d) the words "[not] entirely within the dominant tenement" did not make it clear that this was because the relevant boat was too big to fit on the Boatyard land when no other boats were on that land impeding the subject boat or just that the fact other boats were occupying the space on the Boatyard land prevented all of the subject boat fitting on that land;[63]

(e) there were health and safety concerns;[64] and

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58 This was also the view of the Court of Appeal: CA judgment, above n 1, at [60].
59 At [78].
60 At [71].
61 At [63(b)].
62 At [71].
63 At [72].
64 At [75].

(f) there were no limits on what materials could be taken onto the reserve by Mr Schmuck to do repair and maintenance work.[65]

[92] Mr Every-Palmer supported the Court of Appeal's analysis. He pointed to the possibility that the Boatyard operation could become more intensive in the future. If that happened, work on the reserve could increase, the number of employees present on the reserve could increase and greater impediments could be imposed on other users of the reserve as a result. If these possibilities became reality, that would exacerbate the concerns raised by the Court of Appeal.

[93] We consider the concerns raised by the Court of Appeal were overstated:

(a) In relation to (a), we do not consider a time limit is required to make an easement valid. It needs to be remembered the area on which overhanging boats may be repaired is a small part of the reserve.

(b) In relation to (b), we consider the first possible interpretation suggested by the Court of Appeal is the correct interpretation.[66]

(c) In relation to (c), the scope of activities may be wide, but there is a clear limitation that they involve repair and maintenance work on a vessel, only on the part of a vessel overhanging from the Boatyard land and only in a small area of the reserve. We do not see the lack of further detail as invalidating the easement.

(d) In relation to (d), we have concluded above the provision is for boats located partly on Boatyard land and partly on reserve land in accordance with condition 2(c) only.

(e) In relation to (e), we see health and safety concerns as being matters for resolution under the resource consents and management plan and

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65 At [76].

66 The resource consent, which specifies the permitted hours of work on the reserve land (7 am to 8 pm on Monday to Friday, and 8 am to 8 pm on Saturdays, Sundays and public holidays), supports this interpretation.

through general health and safety regulation. We do not think they affect the validity or interpretation of the easement.

(f) In relation to (f), the resource consent, to which the easement is subject, provides the necessary controls.

[94] In summary we are satisfied that on our interpretation of easement A6, it does not deprive the District Council or members of the public of reasonable use of the reserve (the servient tenement). The area affected by the easement is small, the circumstances in which it can be invoked are constrained and there is the 60-day limit that sets an upper boundary to the amount of time allowed for work on boats located partly in the XYZ area of the reserve, which will apply whether or not the Boatyard business expands. Nor do we consider the easement deprives the District Council of possession or control of the easement area for the reasons just given. We consider that easement A6, though not very elegantly drafted, is a valid easement.

Easement C

[95] Easement C is an easement over areas W and X on the plan (a two-metre wide strip) to permit:

> Access to, and repair and maintenance of, any vessel standing on the southern slipway tramrail and/or the turntable.

[96] In addition to the condition requiring compliance with any resource consent, which applies to all the challenged easements, there is a further condition as to term. The easement is for a 10 year term but is subject to renewal. We discuss this in further detail below.

[97] As mentioned earlier, the removal of the southern slipway tramrail makes this easement redundant.[67] But, as it forms part of the appeal and Mr Schmuck pursued in argument his case that the Court of Appeal was wrong to decide that easement C was invalid, we will briefly consider it.

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[67] See above at [41].

[98] The Court of Appeal considered that, as drafted, the scope of this easement meant the District Council did not have the ability to control areas W and X and therefore the easement deprived the District Council of reasonable use of the land.[68] The Court of Appeal's concern was that the easement did not specify the extent of use, the number of persons entering the reserve for the purpose of working on vessels on the southern slipway and the nature of the tasks they would undertake (beyond the requirement for compliance with resource consents). It noted "[a]s an aside" there was uncertainty about the term.[69] We will come back to this.

[99] The Society supported the Court of Appeal's view. It argued that the right given to Mr Schmuck by easement C amounted to joint occupation of the reserve.

[100] Our comments on easement A6 apply equally to this easement. We do not consider the omission of the details highlighted by the Court of Appeal invalidates an otherwise uncontroversial and limited easement, when it is considered in the context of the other easements and the fact that it would involve working on a single vessel at any time. Given that the vessel being worked on would be on the rail in the Boatyard, the easement would be availed of only to work on one side of the vessel. It is hard to see why any concern about numbers of people working at one time arises. The limited area of the easement and the fact that work would be on one vessel at any one time ensures the number of workers located on areas W and X would always be limited. We agree with Mr Galbraith's submission that exhaustively stating limits is not a requirement of a valid easement. That applies even more so in this case where the District Council is also the regulator and so can determine the practical effect of the condition that Mr Schmuck must comply with the resource consent.

[101] We agree with the Court of Appeal that the condition as to term and renewals is not well drafted. However, the Court of Appeal did not suggest this infelicity of expression invalidated the easement and we see no reason to come to a different view.

[102] We are satisfied easement C is a valid easement.

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68 CA judgment, above n 1, at [85].
69 At [86].

Is there power to grant easements for commercial operations on an esplanade reserve?

[103] In the Court of Appeal, the Society argued that s 48(1)(f) did not confer a power to grant easements for private commercial activity to be conducted on a reserve. This was rejected by the Court of Appeal.[70] A similar argument had been rejected by Heath J and by Fogarty J.[71]

[104] The Society gave notice under r 20A of the Supreme Court Rules 2004 supporting the judgment of the Court of Appeal on two other grounds, one of which was that the Court of Appeal had erred in its conclusion about the scope of s 48(1)(f).[72]

[105] Mr Every-Palmer said that, interpreting s 48 from its text in light of its purpose, as required by s 5 of the Interpretation Act 1999, led to a conclusion that s 48(1)(f) did not confer a power to grant easements for private commercial work on a reserve. This inevitably focused on the power of the District Council as grantor of the easements, rather than the District Council as delegate of the Minister in granting consent. As already mentioned, the 2006 easement decision (that is, the District Council's decision to grant the easements) is not under challenge in this appeal. However, the argument was put on the basis that, because the District Council had no power to grant the consents, the Minister could not have the power to consent to their grant.

[106] Section 48 provides as follows:

> **48 Grants of rights of way and other easements**
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> (1) Subject to subsection (2) and to the Resource Management Act 1991, in the case of reserves vested in an administering body, the administering body, with the consent of the Minister and on such conditions as the Minister thinks fit, may grant rights of way and other easements over any part of the reserve for—
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> (a) any public purpose; or

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70 At [99].

71 Heath J's judgment, above n 10, at [22]–[27]; and HC judgment, above n 2, at [73].

72 The Society did not, however, cross-appeal against the Court of Appeal's finding that easements A3 and E were valid easements that had been lawfully granted and consented to under s 48(1). In its written submissions, it made it clear this did not indicate it agreed with the Court of Appeal's finding about easements A3 and E and intimated that, if it succeeded in resisting Mr Schmuck's appeal, leave should be granted for it to cross-appeal against the Court of Appeal's decision in relation to easements A3 and E. This was not pursued at the hearing and on our approach to the case it is not a live issue.

(b) providing access to any area included in an agreement, lease, or licence granted under the powers conferred by this Act; or

(c) the distribution or transmission by pipeline of natural or manufactured gas, petroleum, biofuel, or geothermal energy; or

(d) an electrical installation or work, as defined in section 2 of the Electricity Act 1992; or

(e) the provision of water systems; or

(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.

(2) Before granting a right of way or an easement under subsection (1) over any part of a reserve vested in it, 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.

…

[107] Mr Every-Palmer argued that the catch-all phrase "for any other purpose connected with any such land" in s 48(1)(f) needs to be considered in the context of s 48 as a whole and also within the statutory scheme of the Reserves Act.

[108] In relation to s 48, Mr Every-Palmer's argument was that the easements contemplated by s 48 were in two broad categories [73] the facilitation of utility services (s 48(1)(c), (d) and (e)); and access and the provision of basic amenities to other land (s 48(1)(f)). He said a literal interpretation of the catch-all phrase at the end of s 48(1)(f) would override Parliament's intention to limit easements to those two broad categories. Thus, he argued, the phrase "any other purpose" had to be read as "any other *similar* purpose". The "other purpose" referred to in s 48(1)(f) must have a connection with the other powers conferred by that paragraph. He did not suggest this was an application of the ejusdem generis principle, but rather just interpreting the provision in light of its context. He was right to reject the application of the ejusdem generis maxim because there is, in fact, no "genus" in s 48(1)(f) that could limit the general wording at the end of the provision.

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[73] In addition to the provisions for public purpose easements (s 48(1)(a)) and access easements in respect of licences and leases granted under the Reserves Act (s 48(1)(b)).

[109] Mr Every-Palmer also discussed the scheme of the Act, highlighting the specific powers given to administering bodies in relation to different types of reserves and the constraints imposed on those powers. He said that in the absence of a specific provision, commercial activity should not be permitted on a reserve. We do not accept that submission. As the Court of Appeal noted, the restrictions on an administering body's power to enter into leases or licences of reserve land (in ss 61 and 74 of the Reserves Act) do not apply to the grant of easements under s 48.[74] So the fact that the powers to enter into leases and licences are confined to certain specified purposes does not mean the power to grant easements is similarly confined.

[110] Nor do we consider that s 48(1) itself should be interpreted in a manner that imposes a restriction on commercial activities that is simply not mentioned in that subsection. Most of the uses for which easements may be granted under the other paragraphs in s 48(1) to which Mr Every-Palmer referred are themselves commercial uses.[75]

[111] Mr Galbraith pointed out that it would have been simple for Parliament to use the phrase "for any other similar purpose" or "for any like purpose" if that had been its intention. He noted that "for any like purpose" is used elsewhere in the Act.[76] We agree this tends to suggest that the more general wording in s 48(1)(f) means what it says.

[112] Mr Galbraith also highlighted that there were a number of references in the Reserves Act to the carrying on of commercial activity on reserves, which counted against the argument, based on the scheme of the Act, advanced by Mr Every-Palmer. Again, we agree.

[113] We conclude that the Court of Appeal was correct that there is no justification to read down the meaning of the phrase "for any other purpose connected with any

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74 CA judgment, above n 1, at [94].

75 Fuel pipelines, water pipelines and electricity installations, for example.

76 Reserves Act, s 61(2A)(a), s 61(2A)(b) and s 109(3). The first two of these were included in the Act by Reserves Amendment Act 1978, but the words "or any like purposes" appeared in s 109 from the time of enactment of the Reserves Act.

such land" in s 48(1)(f) to exclude easements for commercial activities.[77] We therefore reject the Society's argument on this point.

Was the 2015 consent decision unlawful?

[114] In its r 20A notice, the Society argued that the District Council as delegate of the Minister had acted unlawfully in the 2015 consent decision for four reasons. In its submissions these reasons were revised and reduced to three:

(a) The District Council (as delegate of the Minister) failed to undertake a sufficiently thorough review. A subset of this ground is that the District Council (as delegate of the Minister) did not engage adequately with tangata whenua and Treaty of Waitangi issues relating to the reserve.

(b) The District Council (as delegate of the Minister) failed to identify that the District Council (as grantor) did not undertake appropriate balancing between the purposes of the reserve and the easements.

(c) The District Council (as delegate of the Minister) considered and consented to easements that were materially different from those that had been considered by the Commissioner and the District Council (as grantor).

[115] Mr Every-Palmer accepted that these were matters that had a different focus from the points made in the r 20A notice but asked that the Court consider them, arguing there was no prejudice to the other parties. Counsel for the other parties objected to this, pointing out that the Society's case has changed at each stage of the proceeding.[78] They pointed out that there was no lower court decision on most of these grounds. This meant that this Court would have to address the issues as first and final Court.

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77 CA judgment, above n 1, at [99].
78 A point also noted by the Court of Appeal: at [112].

[116] In his oral submissions, Mr Every-Palmer addressed the Treaty point referred to above on the basis that this was the strongest point and if the Court did not accept his submissions in relation to it, then it would also not be with him on the other points.

The nature of the Minister's consent power under s 48

[117] We are satisfied we should address one aspect of the argument about the thoroughness of review. We had full argument on the role of the Minister (or Minister's delegate) when asked to consent to easements that have been granted by the administering body under s 48. The High Court and Court of Appeal came to different views on this issue. The District Council argued that this point had important precedential value not just for it but for other territorial authorities exercising the Minister's consent power under the Instrument of Delegation.

[118] In the High Court, the Society submitted that the District Council, before reconsidering the Minister's consent decision as required by Heath J's judgment, ought to have re-advertised the application and then considered whether or not to consent with the benefit of any further submissions received in response. Fogarty J rejected this. He said the consent of the Minister was "a check, not a full consideration starting again as it were".[79]

[119] The Court of Appeal did not consider the role was as limited as Fogarty J said it was. It described the task of the Minister or Minister's delegate as "akin to judicial review".[80] It accepted that the Minister was not required to undertake a full merit-based assessment of the proposed easements, but added:[81]

> … we see nothing in the statutory language or scheme of the Reserves Act to suggest that in exercising the discretion to consent or not to consent, the Minister is limited to checking the Council's decision-making processes.

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79 HC judgment, above n 2, at [81]–[82].
80 CA judgment, above n 1, at [41].
81 At [106].

[120] Later, the Court of Appeal acknowledged that it is the body granting the easement that is required to consider objections made under s 48(2) of the Reserves Act. It added:[82]

> We therefore agree with Fogarty J that the same full consideration of objections is not mandatory for the Minister. However we disagree with the Judge that the Minister's consent role is limited to acting as a check on the Council. There is nothing in the statutory scheme that suggests the Minister's discretion is so constrained. To the contrary, it suggests that 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 very matter) and as to the purposes of the Act.

[121] The Court of Appeal's view was that, in exercising the s 48(1) consent discretion, the Minister was required to have regard to legal constraints on the rights that can be conferred under the Reserves Act and the purposes of the Reserves Act. It saw these as mandatory considerations for the Minister.[83]

[122] As mentioned earlier, the Minister delegated his consent function to territorial authorities.[84] In the present case, the delegation meant the District Council effectively wore two hats because it was the administering body of the reserve and also delegate of the Minister. So it had to decide in its former capacity whether to grant the easements and in its latter capacity whether to consent to the grant of the easements. As already noted, in the present case the District Council appointed the Commissioner to undertake the public consultation process required by s 48(2) and acted on his recommendations in granting the easements in the 2006 easement decision.

[123] The delegation was effected under s 10 of the Reserves Act. The relevant provisions of that section are subss (1), (3) and (6), which provide:

> **10 Delegation of Minister's powers**
>
> (1) The Minister may from time to time delegate any of his or her powers and functions under this Act (not being the power to approve any bylaw) to any individual, committee, body, local authority, or organisation, or to any officer or officers of the Department specified by the Minister, either as to matters within his or her jurisdiction

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82 At [110].

83 At [111].

84 Above at [23]. The Instrument of Delegation for Territorial Authorities was signed by the then Minister, Hon Dr Nick Smith MP, on 12 June 2013.

> generally, or in any particular case or matter, or any particular class of cases or matters, or in respect of any reserve or reserves.
>
> …
>
> (3) Subject to any general or special directions given by the Minister, any person, committee, body, local authority, organisation, or officer to which or to whom any powers have been so delegated may exercise those powers in the same manner and with the same effect as if they had been directly conferred on that person, committee, body, local authority, organisation, or officer by this Act and not by delegation.
>
> …
>
> (6) No such delegation shall prevent the exercise by the Minister himself or herself of any of the powers and functions conferred on him or her by this Act.

[124] A letter dated 8 July 2013 from DoC to local authorities accompanying the Instrument of Delegation included the following explanation:

> There is an expectation that local authorities will maintain a distinction between their role as the administering body of a reserve 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 of 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; that the administering body has taken the functions and purposes of the Reserves Act into account in respect of the particular classification and purposes of the reserve; that it has considered any objections or submissions from affected parties; and that, on the basis of the evidence, the decision is a reasonable one.

[125] Counsel for the District Council, Mr Hodder QC, argued that the Minister's power under s 48(1) was a supervisory power. The Minister was not obliged to, but was entitled to, undertake a deeper review. He argued the advice given by DoC to territorial authorities, which we have reproduced above, correctly described the task that territorial authorities were required to undertake when exercising the Minister's consent power as the Minister's delegate. He disputed the Court of Appeal's characterisation of the task as "akin to judicial review".

[126] Mr Hodder argued the scheme of s 48 supported his position. The sequence of steps leading to the execution and registration of an easement begins with the request for an easement; the administering body then gives public notice and must consider

the submissions received;[85] the administering body then decides to grant the easement (with conditions if appropriate), subject to the Minister's consent. The Minister or his or her delegate then consents (again, applying conditions if appropriate). Any easement that is granted must comply with the RMA.[86] He emphasised it is the administering body, not the Minister, that is required to engage with the public and which makes the decision as to whether or not the easement should be granted.

[127] This sequence means that by the time the Minister's consent power is engaged, there will have been a full consideration by the administering body of public feedback and RMA issues by the body required by s 48 to do this. In those circumstances, there is no basis for imposing on the Minister any greater role than a supervisory role, ensuring the earlier steps in the sequence have been carried out in accordance with the legislative requirements.

[128] Mr Hodder argued that the analogy with judicial review could be seen as suggesting "inappropriate legalism". He submitted the requirement is better described as the Minister (or Minister's delegate) being sufficiently informed to make a reasonable supervisory decision whether or not to consent and, if so, whether to impose conditions.

[129] Mr Hodder took issue with the Court of Appeal's conclusion that the 2015 consent decision was unreasonable because of an error of law about the validity of the easements and the antecedent finding that the legality of the easements was a mandatory consideration. As we have found the easements were valid, this no longer has practical impact. While we can see some concern about the characterisation of the 2015 consent decision as "unreasonable", we think the Court of Appeal meant no more than that if the Minister consented to the grant of easements that on review by a court were found to be invalid, the fact the administering body had purported to grant them and the Minister had purported to consent to that grant could not "cure" that invalidity.

[130] It is clear that the Minister is entitled to give general or special directions in relation to the delegation under s 10(3) and, once those directions are given, the

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85 Reserves Act, ss 48(2), 119 and 120.
86 Reserves Act, s 48(1).

decision-making power that has been delegated must be exercised subject to those general or special directions. It is notable, therefore, that the letter accompanying the Instrument of Delegation described the delegated role as a supervisory one: ensuring that the necessary statutory processes have been followed; that the functions and purposes of the Reserves Act have been taken into account; that the administering body has considered objections or submissions from affected parties; and that the decision is reasonable. That is what led Fogarty J to describe the role as a "check". We see the terms "check" and "supervisory" as useful shorthand descriptions of the role but neither provides a comprehensive description. We agree with the Court of Appeal that the Minister or the Minister's delegate cannot consent to an invalidly granted easement, and to that extent must have regard to the legal constraints on the rights that can be conferred under the Act. But we do not consider that the Minister is under any obligation in process terms to reconsider the matters taken into account by the administering body in granting the easement, so long as they are within the administering body's powers.

[131] In characterising the Minister's power as supervisory, we are not intending to create any artificial limit on that power. All we are saying is that there is no requirement to re-run the process already undertaken by the administering body of the reserve. However, if the Minister takes a different view of the situation from that taken by the administering body, there is nothing to stop the Minister refusing to consent to a decision that the administering body has made lawfully and which the administering body considers is reasonable. We agree with the Court of Appeal that the Minister is free to take a different view from that of the administering body as grantor. But there is also nothing requiring the Minister to reconsider matters decided by the administering body and the Minister does not act unlawfully if he or she does not do so.

[132] We accept Mr Every-Palmer's submission that the Minister's decision is not a rubber-stamping exercise.[87] But we do not think that undermines our description of the Minister's power above. In the absence of any statutory requirements as to process, it is for the Minister (or Minister's delegate) to determine what is relevant to

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[87] See *Hastings District Council v Minister of Conservation* [2002] NZRMA 529 (HC) at [50(a)].

the decision and the manner and intensity of the inquiry into any such matter (beyond the essentials of checking that the statutory process has been undertaken by the administering body and that the easement was lawfully granted), subject only to challenge on grounds of unreasonableness.[88]

[133] We think Mr Hodder was correct that the concerns the Society has about the challenged easements really relate to other steps in the sequence of decision-making in relation to the easements. The Society's primary concern about public access to the reserve is better directed at the process undertaken by the Commissioner and the decision by the District Council (as the local agency best informed about those issues and accountable to the local people affected by the issue) to grant the easements than at the Minister's consent decision.[89] Its concern about compliance with the RMA is better directed to the resource consent process, which, we understand, the Society has been involved with since the Court of Appeal's decision was delivered.[90]

The process leading to the 2015 consent decision

[134] The Society argues the approach of the District Council to the consent decision was not sufficiently thorough. It is notable that, despite its views as to the nature of the consent power, the Court of Appeal had no concerns about this in relation to the easements it found were capable of being easements, easement A3 and E.

[135] We do not intend to engage further with this point. To a large extent, the Society's case in this context relied on its submission as to the nature of the consent process, which we have rejected. We accept that the point was not pleaded and was not in the r 20A notice, and there would be unfairness to the other parties if we were to decide the point as first and last court. This is compounded by the fact that we would be evaluating the process against the background of our conclusions as to the

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88 *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37 at [35] per Laws LJ for the Court. See also *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]; and *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade* [2019] EWCA Civ 1020 at [59].

89 As noted above at [42], the 2006 easement decision is not under challenge in these proceedings.

90 See *Schmuck v Northland Regional Council* [2019] NZEnvC 8; and *Schmuck v Northland Regional Council* [2019] NZEnvC 125.

nature of the process, when the Society's submissions were based on a different understanding of what the process required.

Treaty of Waitangi considerations

[136] Mr Every-Palmer advanced the argument in this Court that the District Council had failed to engage with tangata whenua and failed to give sufficient consideration to the Treaty claims over the area that includes the reserve.[91]

[137] It is difficult for us to discern whether there is substance to this argument. It is significant that the Society is the party advancing the argument, rather that the Treaty claimant. Mr Every-Palmer said there are iwi members involved with the Society but that is quite a different thing from the relevant iwi or hapū (or their representative) being parties to the proceeding. We cannot do the issue justice on the basis of the evidence before us and without allowing the District Council a fair opportunity to respond. We are also reluctant to address the issue in proceedings to which the relevant Treaty claimants are not represented. We do not therefore engage further with this argument.

Other grounds

[138] We see the other grounds of challenge to the 2015 consent decision in the same light. They needed to be advanced and addressed at first instance to be properly considered by this Court.

Issue estoppel

[139] We do not need to address the question of whether issue estoppel or something analogous to it arises in relation to Heath J's judgment. We indicated at the hearing that if it did arise and we agreed to address it, we would seek further submissions. As it transpires, the issue is now moot and we say no more about it.

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[91] A witness for the Society, Ms Marks, gave evidence that there are three Treaty claims on the area that includes the reserve. One of them (Wai 2424) was made by Ms Marks and relates to environmental degradation in Walls Bay.

Indefeasibility of title

[140] The impact of the registration of the easements after they were formalised (following the 2015 consent decision) did not arise in the High Court because that Court upheld their validity. In the Court of Appeal, the issue was potentially live. In the Court's judgment as first issued, the Court noted that "although the easements are registered, the respondents [the District Council, the Minister and Mr Schmuck] do not plead or rely upon indefeasibility of title as relevant to any relief should the Society succeed with its appeal".[92] Subsequently the judgment was recalled and re-issued with the words "plead or" removed.[93] The Court of Appeal reserved leave for the parties to apply for consequential orders if required, in light of the fact that the easements in issue had been registered.[94]

[141] The position before this Court was that Mr Schmuck wished to rely on indefeasibility if his appeal otherwise failed. But neither of the Courts below had addressed the issue. We indicated at the hearing that we would call for further submissions on the issue if the issue arose and we considered it was appropriate to deal with it. As we have found the easements are valid, the issue does not arise.

Result

[142] The appeal is allowed. The decision of the District Council as delegate of the Minister to consent to the challenged easements is reinstated.

Costs

[143] We reserve costs. Both Mr Schmuck and the District Council claimed costs. The Society sought an order that costs lie where they fall in the event that it was unsuccessful in the appeal on the basis that the case concerns a matter of real public interest beyond the interests of the Society, the Society's position had merit and the Society acted reasonably in the conduct of the proceedings. The District Council disputes the last of those. We seek submissions from the parties on that issue and on

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92 CA judgment, above n 1, at [54].

93 *Opua Coastal Preservation Inc v Far North District Council* [2018] NZCA 510. The Court refused to call for and hear further submissions on indefeasibility as Mr Schmuck sought.

94 CA judgment, above n 1, at [120].

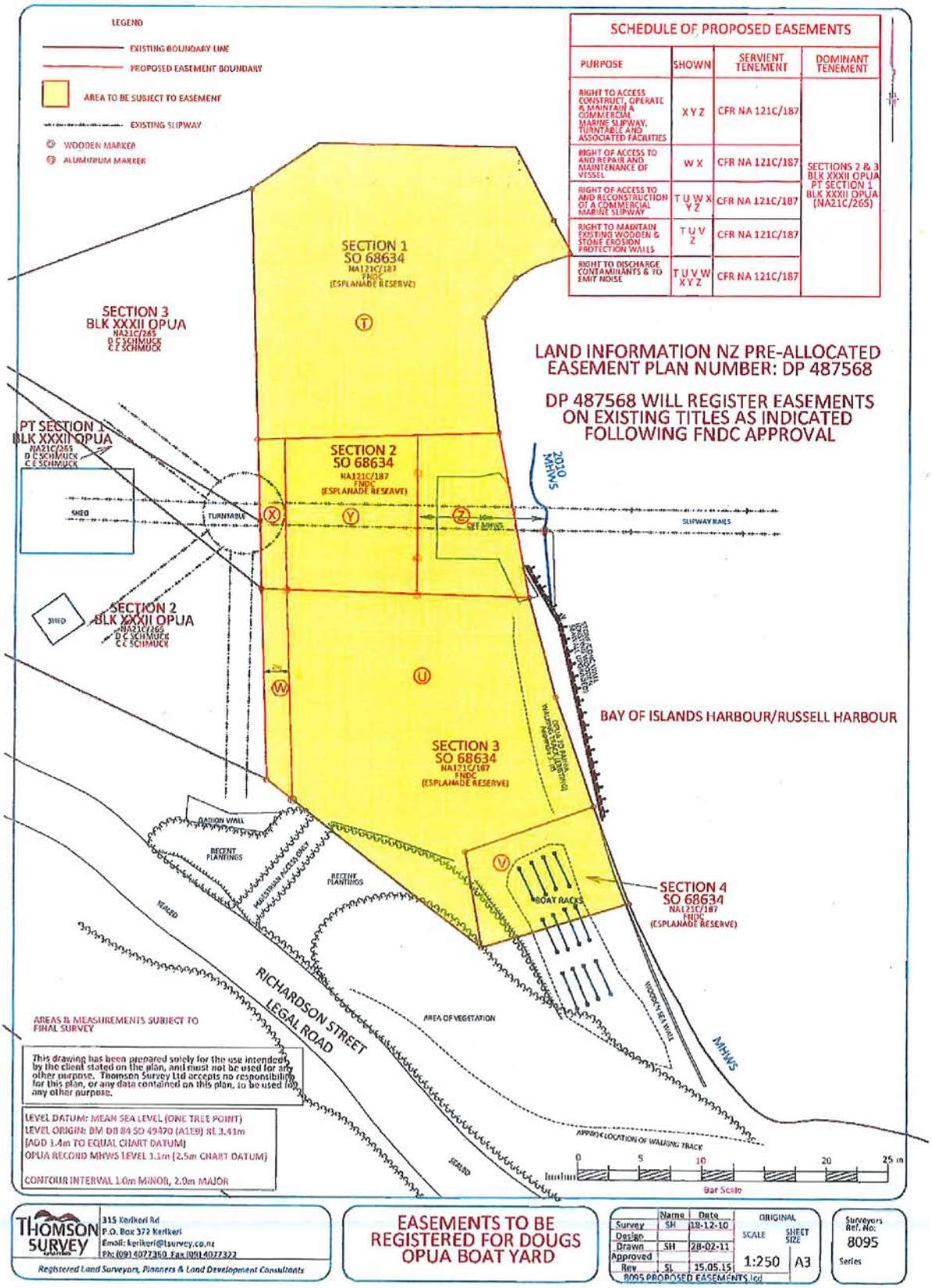
costs generally, both in this Court and the Courts below (unless the parties are able to agree on costs). Submissions from Mr Schmuck and the District Council should be filed and served by 15 November 2019, submissions from the Society by 29 November 2019 and reply submissions from Mr Schmuck and the District Council by 6 December 2019.

Leave reserved

[144] We are unsure as to whether the challenged easements have been removed from the register and, if so, whether any formal steps are required to reinstate them. We reserve leave to the parties to apply for consequential orders if required.

Solicitors:
Henderson Reeves Lawyers, Whangarei for Appellant
Bennion Law, Wellington for First Respondent
Law North Lawyers, Kerikeri for Second Respondent

ANNEXURE 1


LEGEND
EXISTING BOUNDARY LINE
PROPOSED EASEMENT BOUNDARY
AREA TO BE SUBJECT TO EASEMENT
EXISTING SLIPWAY
WOODEN MARKER
ALUMINIUM MARKER
SCHEDULE OF PROPOSED EASEMENTS
PURPOSE | SHOWN | SERVIENT TENEMENT | DOMINANT TENEMENT
RIGHT TO ACCESS CONSTRUCT, OPERATE & MAINTAIN A COMMERCIAL MARINE SLIPWAY, TURNTABLE AND ASSOCIATED FACILITIES | X Y Z | CFR NA 121C/187 | SECTIONS 2 & 3 BLK XXXII OPUA PT SECTION 1 BLK XXXII OPUA (NA21C/265)
RIGHT OF ACCESS TO AND REPAIR AND MAINTENANCE OF VESSEL | W X | CFR NA 121C/187
RIGHT OF ACCESS TO AND RECONSTRUCTION OF A COMMERCIAL MARINE SLIPWAY | T U W X Y Z | CFR NA 121C/187
RIGHT TO MAINTAIN EXISTING WOODEN & STONE EROSION PROTECTION WALLS | T U V Z | CFR NA 121C/187
RIGHT TO DISCHARGE CONTAMINANTS & TO EMIT NOISE | T U V W X Y Z | CFR NA 121C/187
SECTION 1 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
SECTION 3 BLK XXXII OPUA NA21C/265 D C SCHMUCK C E SCHMUCK
PT SECTION 1 BLK XXXII OPUA NA21C/265 D C SCHMUCK C E SCHMUCK
SECTION 2 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
SECTION 2 BLK XXXII OPUA NA21C/265 D C SCHMUCK C E SCHMUCK
SECTION 3 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
SECTION 4 SO 68634 NA121C/187 FNDC (ESPLANADE RESERVE)
LAND INFORMATION NZ PRE-ALLOCATED EASEMENT PLAN NUMBER: DP 487568
DP 487568 WILL REGISTER EASEMENTS ON EXISTING TITLES AS INDICATED FOLLOWING FNDC APPROVAL
2010 MHWS
SHED
TURNTABLE
SLIPWAY RAILS
BAY OF ISLANDS HARBOUR/RUSSELL HARBOUR
RETAINING WALL
RECENT PLANTINGS
PEDESTRIAN ACCESS ONLY
BOAT RACKS
SEALED
RICHARDSON STREET LEGAL ROAD
AREA OF VEGETATION
MHWS
APPROX LOCATION OF WALKING TRACK
AREAS & MEASUREMENTS SUBJECT TO FINAL SURVEY
This drawing has been prepared solely for the use intended by the client stated on the plan, and must not be used for any other purpose. Thomson Survey Ltd accepts no responsibility for this plan, or any data contained on this plan, to be used for any other purpose.
LEVEL DATUM: MEAN SEA LEVEL (ONE TREE POINT)
LEVEL ORIGIN: BM DB 84 SO 49470 (A1E9) RL 3.41m (ADD 1.4m TO EQUAL CHART DATUM)
OPUA RECORD MHWS LEVEL 1.1m (2.5m CHART DATUM)
CONTOUR INTERVAL 1.0m MINOR, 2.0m MAJOR
0 5 10 20 25 m
Bar Scale
THOMSON SURVEY
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EASEMENTS TO BE REGISTERED FOR DOUGS OPUA BOAT YARD
Name | Date
Survey SH 18-12-10
Design
Drawn SH 28-02-11
Approved
Rev SL 15.05.15
ORIGINAL
SCALE 1:250
SHEET SIZE A3
8095 PROPOSED EASEMENTS.lcd
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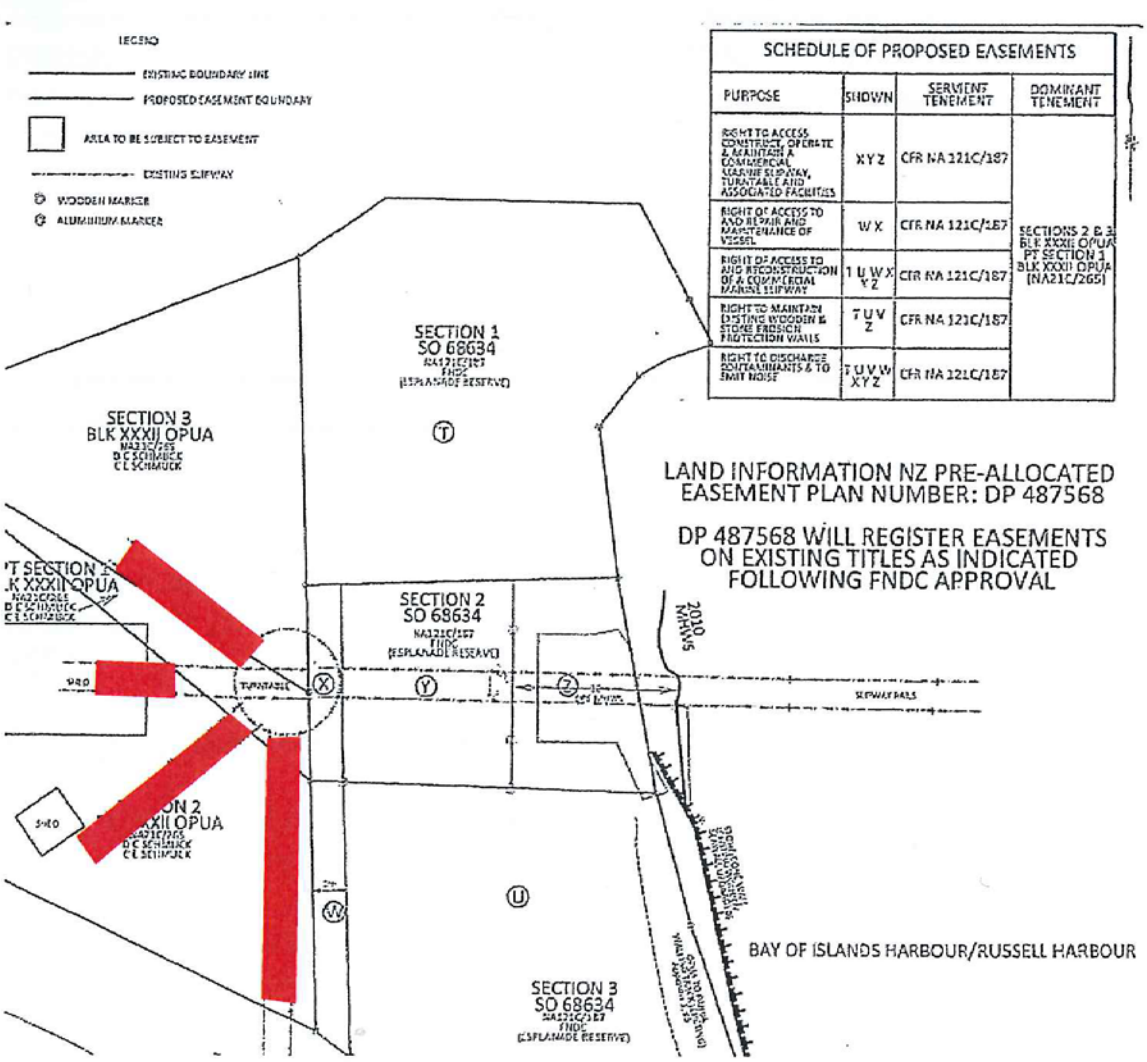
Series

ANNEXURE 2


LEGEND
EXISTING BOUNDARY LINE
PROPOSED EASEMENT BOUNDARY
AREA TO BE SUBJECT TO EASEMENT
EXISTING SLIPWAY
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SCHEDULE OF PROPOSED EASEMENTS
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RIGHT OF ACCESS TO AND REPAIR AND MAINTENANCE OF VESSEL | WX | CFR NA 121C/187
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SECTION 1 SO 68634
SECTION 3 BLK XXXII OPUA
SECTION 2 SO 68634
SECTION 3 SO 68634
(ESPLANADE RESERVE)
LAND INFORMATION NZ PRE-ALLOCATED EASEMENT PLAN NUMBER: DP 487568
DP 487568 WILL REGISTER EASEMENTS ON EXISTING TITLES AS INDICATED FOLLOWING FNDC APPROVAL
SLIPWAY RAILS
BAY OF ISLANDS HARBOUR/RUSSELL HARBOUR