**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 105/2018**
**[2019] NZSC 81**

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

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| Hearing: | 8 July 2019 |
| Court: | Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ |
| Counsel: | J E Hodder QC, M R G Christensen and J K Grimmer for Appellant<br>M C Smith, P D Anderson and S R Gepp for Respondent |
| Judgment: | 26 July 2019 |

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## JUDGMENT OF THE COURT

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**A Leave to appeal is revoked.**

**B Costs of $6,000 plus usual disbursements are awarded to the respondent.**

**C Leave is reserved to apply again for leave to appeal if the proposed appeal is no longer moot.**

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**REASONS**
(Given by Glazebrook J)

[1] On 20 February 2019, this Court granted leave to appeal[1] to the appellant (Rangitira) to appeal against the judgment of the Court of Appeal in *Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc*.[2] The approved question was whether the Court of Appeal erred in setting aside the declarations made at [86] of the judgment of the High Court.[3]

[2] It now appears that the agreed statement of facts presented in the High Court may have contained a significant error. The question dealt with in this judgment is whether this means that leave to appeal should be revoked.

## Background

[3] Rangitira wishes to develop and operate an open cast coal mine in forested land near Westport. It has a mining permit for the project, which would involve the excavation of 116 hectares, nine kilometres of access road and 3.28 hectares for out-of-pit water treatment infrastructure. Of the 116 hectares it proposes to excavate, 104 hectares are on reserve land administered by the Buller District Council (the Council).

[4] Rangitira applied under s 60 of the Crown Minerals Act 1991 for an access arrangement with the Council to allow the development of the mine on the reserve land.[4] It then applied to the High Court for various declarations about the role of s 23 of the Reserves Act 1977 and its relationship with s 60 of the Crown Minerals Act 1991.

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1 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2019] NZSC 6 (William Young, O'Regan and Ellen France JJ).

2 *Royal Forest and Bird Protection Society of New Zealand Inc v Rangitira Developments Ltd* [2018] NZCA 445, [2019] NZRMA 233 (Asher, Brown and Clifford JJ) [*Rangitira* (CA)].

3 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd* [2018] NZHC 146, (2018) 20 ELRNZ 312 (Nation J) [*Rangitira* (HC)].

4 Rangitira has also applied for a number of consents under the Resource Management Act 1991: see *Rangitira* (CA), above n 2, at [10].

[5] In summary, the High Court held that:[5]

(a) The Council should have regard to the Reserves Act and in particular s 23 of that Act as relevant considerations under s 60(2) of the Crown Minerals Act.

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

(i) the economic benefits of the proposal to its district; or

(ii) the enhancement of other natural areas (outside the application area and outside the reserve) by Rangitira which may form part of Rangitira's proposals.

(c) The Council is not required to make its decision under s 60 of the Crown Minerals Act in accordance with s 23 of the Reserves Act. While it may have regard to matters referred to in s 23, it is not required to give effect to them.

[6] The Court of Appeal set aside the declarations made in the High Court. It held that the Council, when considering whether to grant an access arrangement under s 60(2) of the Crown Minerals Act, was required to give effect to s 23 of the Reserves Act and that the requirements of s 23 are not to be balanced against other factors not relevant to the protection of the reserve (such as any economic benefits of the mining project).[6]

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5 *Rangitira* (HC), above n 3, at [86].
6 *Rangitira* (CA), above n 2, at [78].

**Agreed statement of facts**

[7] The proceedings in the High Court proceeded on the basis of an agreed statement of facts. This statement said that the reserve at issue is a Local Purpose (Water Conservation) Reserve:

> The proposed 116 ha mine footprint is located over two different land parcels/tenures: public conservation land administered by the Department of Conservation ("DoC") as Stewardship land under the Conservation Act 1986[7] and land managed by the Council under the Reserves Act 1977 as Local Purpose (Water Conservation) Reserve. The proposed access road is located on both public and private land. The proposed coal load-out facility is situated on private land.

[8] As we understand the position, the reserve in question was set aside in 1951 for water conservation and vested in the Council. This was done under s 167 of the Land Act 1948 and s 9 of the Public Reserves, Domains and National Parks Act 1928. In terms of the 1928 Act, the reserve became a "public reserve".[8]

[9] Section 16(1) of the Reserves Act 1977 provides that the Minister shall, by notice in the Gazette, classify all reserves (whether existing before or after the commencement of the Act) according to their principal or primary purpose, as defined in ss 17 to 23.[9] Section 23 relates to local purpose reserves.

[10] In the course of preparing for the hearing of the appeal (at that stage scheduled for hearing on 7 May 2019), Mr Hodder QC discovered that the reserve in issue did not appear to have been classified. By memorandum of 1 May 2019, he informed the

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7 Rangitira made a separate access application with regard to this conservation land: see *Rangitira* (CA), above n 2, at [11].

8 As broadly defined in s 2 of the 1928 Act. The 1928 Act definition included land that was a "public reserve" within the meaning of the Public Reserves and Domains Act 1908 (again, defined in s 2) and the 1908 definition adds to the definition in the Public Reserves Act 1881 (again, defined in s 2). A similar, albeit wider, definition of "public reserve" followed the 1928 Act in s 2(1) of the Reserves and Domains Act 1953. The 1953 Act was replaced by the Reserves Act 1977, which is still in force. Again, "reserve or public reserve" is defined in s 2(1). Critically, in both the 1953 and 1977 Acts, "public reserve" or "reserve" includes land set apart under Part 12 of the Land Act 1948 (which includes s 167) but does not include any land to which s 167(4) of the Land Act 1948 applies, that is where Crown land was set aside for public works: para (l) of the definition of "public reserve" in the 1953 Act; and para (k) of the definition of "reserve or public reserve" in the 1977 Act.

9 We note that the Minister can delegate all powers, except for the power to approve bylaws: Reserves Act 1977, s 10(1). Section 16(2A) also provides for the situation where any reserve was vested in a local authority which did not derive its title to the land from the Crown – the local authority shall, by resolution, classify it according to the reserve's principle or primary purpose as defined in ss 17 to 23.

Court of this.[10] Mr Hodder in that memorandum suggested that s 16(6) of the Reserves Act means that:

(a) the reserve is properly understood as being managed by the Council for the purposes of its original reservation (under the 1951 Orders in Council); and

(b) management involves the "appropriate" provisions of the Reserves Act. In his submission, this means only the generic provisions of the Act, which are not premised on classification (for example, ss 27 and 79).

[11] After a telephone conference with the parties, by minute of 3 May 2019, the hearing of the appeal was adjourned and submissions were sought from counsel on the factual and legal implications of Rangitira's position that the reserve has not been classified as a "local purpose reserve", including whether the Court should hear the appeal or revoke leave. After receipt of those submissions, a hearing on this issue was convened.

**Parties' submissions**

[12] On behalf of Rangitira, it is submitted that:

(a) The principal issues addressed in the appeal (involving the interplay of s 60 of the Crown Minerals Act 1991, and ss 23 and 109 of the Reserves Act) remain of general and public importance.

(b) These issues may well remain of specific significance for the relevant reserve, given that (i) there is some uncertainty on whether or not the reserve has been classified; (ii) there is room for argument about which provisions of the Reserves Act apply to unclassified reserves; and (iii) if unclassified, the reserve may later be classified.

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[10] As he was obliged to do.

[13] On behalf of the respondent (Forest and Bird), it is submitted that Rangitira should not be able to argue the appeal on a hypothetical basis: ie that the reserve is subject to s 23 of the Reserves Act, a hypothesis that Rangitira says is not correct. Forest and Bird, do, however, maintain that the basis on which the case has proceeded to date is correct and, even if wrong about this, it is too late for Rangitira to change its position.

**Our assessment**

[14] We accept that the issue of the relationship between s 23 of the Reserves Act and s 60(2) of the Crown Minerals Act is a matter of general or public importance. If it had not been, then we would not have granted Rangitira's application for leave to appeal.

[15] We also accept that the appeal would not be moot if:

(a) it is later found that the reserve had in fact been classified;

(b) the reserve is later classified;

(c) it is found that s 23 applies to non-classified reserves, as Forest and Bird maintain (but contrary to Rangitira's view); or

(d) Rangitira is held to be unable to resile from the position in the agreed statement of facts.

[16] The scenarios in (a) and (b) have not yet occurred. We do not know if (c) and (d) apply and these issues would not be before us in the appeal. This means that the appeal is currently moot. We also accept Forest and Bird's submission that the appeal, if it were to go ahead, would be argued on a hypothetical basis: that the reserve has been classified when in fact it likely has not been. Further, it appears that, if the appeal were to go ahead and Rangitira did not succeed in overturning the Court of Appeal decision, it would argue before the Council in the access application that s 23 has no application to non-classified reserves. The appeal therefore would not resolve matters between the parties.

[17] Taking all the above factors into account, we consider that leave should be revoked.[11] Leave is, however, reserved for Rangitira to apply again for leave to appeal against the Court of Appeal's decision should any of the scenarios listed in [15] occur. If that were the case, the appeal would no longer be moot.

**Result**

[18] The grant of leave is revoked.

[19] Costs of $6,000 plus usual disbursements are awarded to Forest and Bird, in relation to this hearing on whether leave should be revoked.

[20] Forest and Bird has also asked for costs for the steps taken by it in the appeal before its adjournment. As the mistake as to classification (if indeed it was a mistake) was mutual, we consider these costs should lie where they fall.

[21] Leave is reserved to Rangitira to apply again for leave to appeal if the proposed appeal is no longer moot.

Solicitors:
Natural Resources Law Limited, Christchurch for Appellant
Gilbert Walker, Auckland for Respondent

[11] Senior Courts Act 2016, s 74.