IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 100/2019
[2020] NZSC 66

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

Hearing:	19 May 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J E Hodder QC and J K Grimmer for Appellant M C Smith and P D Anderson for Respondent
Judgment:	15 July 2020

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs of $25,000 plus usual disbursements.

REASONS
(Given by O'Regan J)

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Introduction

[1] This appeal relates to a proposal to develop and operate a coal mine (the Te Kuha mine) in an area of land that is substantially within a local purpose (water conservation) reserve (the Westport Reserve) owned and administered by the Buller District Council (the Council). Water supply for the town of Westport comes from the Westport Reserve.

[2] The appellant, Rangitira Developments Ltd (Rangitira), wishes to develop the Te Kuha mine.[1] Rangitira has obtained a mining permit for the mine under the Crown Minerals Act 1991. But to gain access to the mine site and carry out mining activities on the Westport Reserve, Rangitira must reach an access arrangement with the Council. Rangitira sought declarations from the High Court as to the matters that the Council would need to take into account in determining whether to enter into an access arrangement.

[3] The High Court granted declarations in the form sought by Rangitira, rejecting the contrary arguments of the respondent, Royal Forest and Bird Protection Society of New Zealand Inc (the Society).[2] The Society appealed to the Court of Appeal, which reversed the High Court decision.[3]

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1 Rangitira is owned by Te Kuha Limited Partnership, a limited partnership between Stevenson Group Ltd and Wi Pere Holdings Limited Partnership.

2 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society Ltd* [2018] NZHC 146, [2018] NZRMA 241 (Nation J) [HC judgment].

3 *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) [CA judgment].

[4] Rangitira appeals to this Court against the Court of Appeal decision. This Court granted leave to appeal, the approved question being whether the Court of Appeal was in error in setting aside the declarations made by the High Court.[4]

Background

[5] The Westport Reserve was created in 1951 by the Governor-General pursuant to s 167 of the Land Act 1948. A notice of the reservation was published in the *New Zealand Gazette* on 16 August 1951.[5] The Westport Reserve was vested in trust in the predecessor of the Council by an Order in Council dated 31 October 1951 as a reserve for water conservation purposes.[6] This was done pursuant to s 9 of the Public Reserves, Domains, and National Parks Act 1928.

[6] Both the reservation of the land as a reserve and the vesting of the land in the predecessor of the Council were expressed to be subject to s 8 of the Coal Mines Amendment Act 1950.[7] Under that provision, alienations of land from the Crown were deemed to be made subject to the reservation of all coal on or under the surface of the land and also subject to the reservation of the power to grant coal mining rights over the land under the Coal-mines Act 1925.[8] This was significant because, as discussed in more detail below, under s 4(1)(b) of the Coal-mines Act 1925, the Crown or a statutory office holder could grant coal mining rights over land in respect of which such a reservation had been made without the consent of the landowner.[9]

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4 *Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2019] NZSC 121. An earlier grant of leave (*Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2019] NZSC 6) was revoked when it transpired that the reserve was not, as had been thought, a local purpose reserve: *Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2019] NZSC 81. Leave was, however, reserved for Rangitira to apply again for leave in the event that the reserve was classified as a local purpose reserve: at [15] and [17]. After the reserve was classified as a local purpose reserve in October 2019, leave was granted again.

5 "Land Reserved in Nelson Land District" (16 August 1951) 67 *New Zealand Gazette* 1185.

6 "Vesting a Reserve in the Westport Borough Council" (1 November 1951) 84 *New Zealand Gazette* 1640.

7 Both were also subject to s 59 of the Land Act 1948, which reserved ownership of minerals other than coal to the Crown on a disposition of Crown land.

8 In 1951, the Land Act 1948 was amended so that the reservation in s 59 extended to coal. Section 8 of the Coal Mines Amendment Act 1950 continued to reserve ownership of coal on dispositions by the Crown of land "not being Crown land subject to the Land Act 1948". A new s 168A was added to the Coal-mines Act 1925 by s 49 of the Coal Mines Amendment Act 1972. This repealed and replaced s 8 of the Coal Mines Amendment Act 1950 and s 59 of the Land Act 1948 (as it related to coal). Section 168A was similar in effect to the provisions it replaced, but clearer as to the reservation of the rights to access the land and extract the coal.

9 See below at [31]–[33].

[7] Section 16(1) of the Reserves Act 1977 requires the Minister of Conservation to classify all reserves according to their principal or primary purpose. Classification of the Westport Reserve was initially overlooked and did not occur until last year. On 23 October 2019, the Chief Executive of the Council, acting under a delegation from the Minister, classified the Westport Reserve as a local purpose (water conservation) reserve under s 16(1).[10]

[8] In 1994, the Minister of Energy granted a permit to Milburn New Zealand Ltd to mine an area of land near Westport for coal under s 25 of the Crown Minerals Act. Rangitira obtained that permit in 1995. The permit authorises Rangitira to mine an area of land of about 884 hectares near Westport for coal. Rangitira wishes to build an open-cast coal mine, with a footprint of approximately 116 hectares, as well as an access road and other infrastructure. Almost all of this would be within the Westport Reserve.[11] The balance of the proposed mine is on public conservation land administered by the Department of Conservation.

[9] The Society opposes the proposed mine.

[10] The Court of Appeal summarised the background to the present litigation and the parties' respective positions on the proposed mine as follows:

> [6] The part of the reserve which will be affected by the mine is covered in vegetation. It has extensive areas of intact low forest in which pink and yellow silver pine are important components. Twenty-three species of indigenous birds are identified in the mining permit area, two of which are threatened (the great spotted kiwi and the New Zealand falcon) and five of which are described as "at risk". There are at risk lizard species. The agreed statement of facts records that ecological advice provided to Rangitira was that the reserve includes indigenous vegetation and habitat of indigenous fauna which are significant in terms of s 6(c) of the Resource Management Act 1991.
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> [7] The proposed mine site and wider mining permit area is on ranges that have a high degree of natural character. The backdrop ranges are described as having high aesthetic value. There is little evidence of human influence in the area save for one small hut and some evidence of exploratory drilling. The landscape advice provided to Rangitira as part of its application for resource consent was that the mine site has a very high natural character and is part of a mountain range that is high in visual amenity value. The ranges can be seen from Westport.

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10 "Classification of Reserve" (24 October 2019) *New Zealand Gazette* No 2019-ln4938.

11 This includes a 104 hectare area which will be excavated for the open-cast mine.

> [8] The proposed mine area is part of a large coal resource. The types of coal that are present have properties that make them high value commodities which attract premium prices. The mine is expected to produce about four million tonnes of coal over its estimated 16-year mine life. Rangitira expects the mining operation to provide employment on site and in Westport for 58 full-time equivalent staff.
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> [9] The proposed mine is open cast and will remove approximately 104 ha of surface cover from within the reserve. Both Rangitira and the Society agree that without mitigation measures the proposal would result in significant adverse effects. The parties also agree that a mine would have positive social and economic benefits, although they disagree as to their extent.

[11] For the purposes of the Crown Minerals Act, a reserve that is owned other than by the Crown is treated as privately owned land. The grant of a mining permit does not entitle the holder of the grant to access the land to which the permit relates or to extract coal from the area subject to the permit.[12] In order to do that, the permit holder needs to enter into an "access arrangement" under s 60 of the Crown Minerals Act with the owner and occupier, in this case the Council. An access arrangement can allow for access to the mine so as to enable the carrying out of mining activities.[13] Rangitira applied to the Council for an access arrangement in 2015. After conducting a process involving public submissions, the Council resolved to enter into an access arrangement on 28 September 2016. The Society then applied for judicial review of the Council's decision. The Council then rescinded its decision to enter into the access arrangement, following an indication that Rangitira intended to seek certain declarations from the High Court to clarify the legal position as to the basis on which the Council could enter into the access arrangement. The Society's judicial review proceeding was discontinued.

[12] Because part of the proposed mine is on public conservation land, Rangitira also needed to enter into an access arrangement with the Minister of Conservation under s 61 of the Crown Minerals Act. An application for an access arrangement was made in March 2014. The application was jointly declined by the Minister of Conservation and the Minister of Energy and Resources in June 2018. An application for judicial review of that decision was recently dismissed.[14]

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12 Crown Minerals Act 1991, ss 47 and 54. There is an exception allowing entry for minimum impact activity under certain conditions: s 49.

13 Section 60(1).

14 *Rangitira Developments Ltd v Sage* [2020] NZHC 1503.

[13] Rangitira also needs resource consents under the Resource Management Act 1991. The required consents were granted to Rangitira in 2017, but are the subject of an appeal to the Environment Court by the Society. The appeal was placed on hold pending the outcome of the present appeal and the application for judicial review of the Ministers' decision declining to enter into an access arrangement for the public conservation land.[15]

The problem facing Rangitira

[14] Section 60(2) of the Crown Minerals Act allows the Council, as the owner of the Westport Reserve, to have regard to any matters it considers relevant in determining whether or not to enter into an access arrangement.

[15] The Council, as the administering body of the Westport Reserve, is also subject to the provisions of the Reserves Act. As noted earlier, the Westport Reserve is classified as a local purpose (water conservation) reserve.[16]

[16] Section 16(8) of the Reserves Act provides that once classified, each reserve must be held and administered for the purpose or purposes for which it is classified "and for no other purpose".

[17] Section 23 applies to local purpose reserves and so is the relevant provision in relation to the Westport Reserve. Section 23(1)–(2) provides:

> **23 Local purpose reserves**
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> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as local purpose reserves for the purpose of providing and retaining areas for such local purpose or purposes as are specified in any classification of the reserve.
>
> (2) It is hereby further declared that, having regard to the specific local purpose for which the reserve has been classified, every local purpose reserve shall be so administered and maintained under the appropriate provisions of this Act that—
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> (a) where scenic, historic, archaeological, biological, or natural features are present on the reserve, those features shall be

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15 *Royal Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council* [2019] NZEnvC 65 at [33]. The resource consent was in the name of Stevenson Mining Ltd.

16 See above at [7].

> managed and protected to the extent compatible with the principal or primary purpose of the reserve:
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> provided that nothing in this paragraph shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:
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> provided also that nothing in this paragraph shall authorise the doing of anything with respect to any esplanade reserve created under section 167 of the Land Act 1948, or section 190(3) or Part 25 of the Municipal Corporations Act 1954 or Part 2 of the Counties Amendment Act 1961 and existing at the commencement of this Act, or any local purpose reserve for esplanade purposes created under the said Part 25 or Part 2 or under Part 20 of the Local Government Amendment Act 1978 or under Part 10 of the Resource Management Act 1991 after the commencement of this Act, that would impede the right of the public freely to pass and repass over the reserve on foot, unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve:
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> (b) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.

[18] Of particular significance in the present case are:

(a) Section 23(2)(a), which requires that the biological or natural features of the Westport Reserve must be managed and protected to the extent compatible with its principal or primary purpose as a water conservation area. That means that the only derogation from the protection of the biological and natural features of the reserve outlined above is what is required for water conservation. Derogation from those features for the purpose of mining is not therefore permitted.

(b) Section 23(2)(b), which requires the Westport Reserve to be administered and maintained so that, to the extent compatible with the principal or primary purpose of the reserve, its value as a water conservation area shall be maintained. This must be read in conjunction

with the requirement in s 16(8) that the Westport Reserve be administered for its water conservation purpose and no other purpose.

[19] Section 40(1) of the Reserves Act provides that the administering body of a reserve (in this case the Council) is charged with the duty of administering, managing and controlling the reserve "in accordance with the appropriate provisions of this Act and in terms of its appointment and the means at its disposal, so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified". This reinforces the s 23(2) requirements.

[20] Accordingly, if the Council is required to give effect to s 23, there would be little or no room for a decision allowing the access arrangement sought by Rangitira for the Te Kuha mine if the impact of the mine on the Westport Reserve would not be compatible with its purpose as a reserve for water conservation purposes.

The present proceedings

[21] Rangitira commenced the current proceedings in April 2017. It sought declarations from the High Court on three questions relating to the relevance of s 23 of the Reserves Act to the Council's decision as to whether or not to agree to an access arrangement under s 60 of the Crown Minerals Act.[17] Its case was (and remains) that the Crown Minerals Act has primacy over the Reserves Act such that the Council is not required to give effect to s 23 of the Reserves Act – in other words, that the Council can grant access even though to do so derogates from or compromises the conservation purposes set out in s 23 of the Reserves Act and notwithstanding the obligations imposed on the Council by s 40 of that Act. The substance of the declarations sought is that while s 23 of the Reserves Act is a relevant consideration, the Council can take

[17] Rangitira also sought further declarations answering questions about how s 23 of the Reserves Act 1977 should be interpreted and applied in the event that the Court found that Rangitira's primary submission as to the primacy of the Crown Minerals Act over the Reserves Act was not accepted. The High Court Judge answered those questions, though on his approach to the case they did not arise: HC judgment, above n 2, at [87]–[124]. Those questions, which did arise on the Court of Appeal's approach to the case, were not pursued in that Court because it was accepted by all counsel that it would be premature to determine the issues in the absence of the full factual context: CA judgment, above n 3, at [73]–[75].

into account a range of matters, including the benefits described above at [10], in deciding whether to agree to an access arrangement.

High Court and Court of Appeal decisions

[22] Rangitira was successful in the High Court. Nation J made the declarations sought by Rangitira. The Court of Appeal, however, rejected Rangitira's proposition that the historical primacy of mining legislation was maintained by the Crown Minerals Act. It saw the Crown Minerals Act as representing a change of approach from earlier legislation regulating coal mining. In particular, the Court determined that, under the Crown Minerals Act, the decision as to the desirability of mining on or under privately owned land is a matter for consideration by the owner or occupier of the land in question.[18] In making the decision whether to agree to access rights for mining, they remain subject to all separate legal obligations in respect of the land.[19]

[23] The differing approaches led to the questions on which declarations were sought by Rangitira being answered in contrasting ways by the Courts below. The questions and answers given by each Court are as follows:[20]

(a) Is the Council required to have regard to the Reserves Act and, in particular, s 23 of that Act?

High Court: 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.

Court of Appeal: No. The Council is required, when considering whether to grant an access arrangement under s 60(2) of the Crown Minerals Act, to give effect to s 23 of the Reserves Act.

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18 CA judgment, above n 3, at [45].
19 At [46].
20 HC judgment, above n 2, at [86]; and CA judgment, above n 3, at [72].

(b) If so, can the Council, in the exercise of its 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 mining project 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?

High Court: Yes.

Court of Appeal: No. The requirements of s 23 are not for balancing against other factors not relevant to the protection of the reserve.

(c) Alternatively, is the Council required to make its decision under s 60 of the Crown Minerals Act in accordance with s 23 of the Reserves Act?

High Court: No. While it may have regard to matters referred to in s 23, it is not required to give effect to them.

Court of Appeal: Yes.

The issue

[24] The questions on which declarations were sought define the issues before the Court. But the broader issue, on which the argument focussed in this Court, was whether legislation dealing with the mining of coal and other minerals is "special" or has primacy over legislation relating to reserves.

Rangitira's "high level" argument

[25] In broad terms, the argument for Rangitira is as follows. Historically, mining legislation relating to both coal and other minerals has had a special status that has given it a form of primacy over legislation relating to conservation and environmental management and, more specifically in the present context, reserves. Legislation

relating to coal mining is special legislation and legislation relating to reserves is general legislation. In the event of a conflict between them, in relation to the subject matter of the special legislation, the special legislation should be applied.

[26] Rangitira argues that remains the case today: the Crown Minerals Act is special legislation relating to mining, as the legislation that preceded it was. So its provisions should prevail over those in the general legislation, the Reserves Act. It says the Crown Minerals Act provides an overarching framework for decisions to be made concerning the proposals to undertake mining activities in reserves. The Reserves Act imposes obligations on the administering body, but these do not impinge upon decisions relating to access arrangements for mining activities in a reserve, in respect of which the Crown Minerals Act is a "one-stop shop".

[27] From this proposition, Rangitira argues that the Council's decision on whether to agree to an access arrangement covering parts of the Westport Reserve is governed by s 60 of the Crown Minerals Act. Section 60(2) allows the Council to have regard to such matters as it considers relevant. Such matters could include economic and other local benefits. Section 23 of the Reserves Act would be a relevant consideration, but not decisive, and would not limit the range of considerations that can be taken into account under s 60(2).

[28] Rangitira also argues that s 109 of the Reserves Act supports its case that mining legislation has primacy over reserves legislation. We address this argument in more detail below.[21]

[29] The Society supports the contrary view, which found favour with the Court of Appeal. In brief, its position is as follows. The Crown Minerals Act represented a break from the legislative regime relating to coal mining (and other mining) that preceded it. While earlier legislation relating to mining for coal and other minerals may have been special legislation and may have had primacy over legislation relating to reserves, the Crown Minerals Act reversed that. When considering whether to agree to an access arrangement, the Council is obliged to *give effect to* s 23 of the Reserves Act. Section 60 of the Crown Minerals Act does not limit that obligation.

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[21] See below at [61]–[72].

[30] To evaluate that submission, we first consider the legislative regimes applying prior to the enactment of the Crown Minerals Act and contrast that with the regime that now applies under the Crown Minerals Act. We consider this from the point of view of a reserve that is not Crown land but in respect of which the Crown reserved ownership of the coal under the surface and the right to grant coal mining rights. The Westport Reserve has these characteristics.

The position under the Coal-mines Act 1925

[31] From 1926 until 1980, coal mining in New Zealand was regulated by the Coal-mines Act 1925. Section 4 provided for coal mining rights to be granted over certain classes of land. Those classes included "lands over which the power to grant such rights is vested in or is reserved to the Crown under any statutory or other authority",[22] as well as certain specified types of reserves and state forests.[23]

[32] Coal mining rights in a mining district were granted by the Warden of that district; rights over land outside a mining district were granted by the Commissioner of Crown Lands.[24] Every grant of a coal mining right was subject to the consent of the Minister of Mines.[25] In 1972, the Coal-mines Act 1925 was amended so that all coal mining rights were granted by the Minister of Mines.[26]

[33] As noted above, when the Westport Reserve was created and vested in the Council, the Crown reserved ownership of the coal and the power to grant mining rights over it under s 8 of the Coal Mines Amendment Act 1950.[27] Under that section, alienations of land by the Crown were deemed to be made subject to the reservation of all coal on or under the surface of the land and also subject to the reservation of the power to grant coal mining rights over the land under the Coal-mines Act 1925. This was significant because, under s 4(1)(b) of the Coal-mines Act 1925, coal mining rights could be granted over land in respect of which such a reservation had been made without the consent of the landowner. Therefore while the Coal-mines Act 1925

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22 Coal-mines Act 1925, s 4(1)(b).
23 Education reserves, kauri-gum reserves, scenic reserves and state forests: see s 4(1)(c)–(f).
24 Section 3.
25 Section 24.
26 Coal Mines Amendment Act 1972, ss 3 and 28.
27 See above at [6].

continued in force, the Warden of a coal mining district or the Commissioner of Crown Lands could grant coal mining rights (these could comprise coal prospecting licences, coal mining leases and tramway licences) over a reserve with the characteristics of the Westport Reserve. Coal mining leases granted under the Coal-mines Act 1925 entitled the lessee to "raise and dispose of coal" from the land subject to the lease.[28] Neither the owner of the land on which the reserve was situated nor the administering body of the reserve (the Council is both in relation to the Westport Reserve) had any decision-making role in the grant of access.[29]

[34] It is clear therefore that the regime under the Coal-mines Act 1925 did give primacy to coal mining over the values of a reserve. We accept Rangitira's submission to this effect.

The position under the Coal Mines Act 1979

[35] The Coal Mines Act 1979 repealed and replaced the Coal-mines Act 1925. Under s 20 of the Coal Mines Act 1979, the Minister of Energy was empowered to grant to any person a coal mining right over "any land whatsoever". As had been the case in respect of a coal mining lease under the Coal-mines Act 1925, a coal mining licence under the Coal Mines Act 1979 was a comprehensive right to extract coal. A coal mining licence under the Coal Mines Act 1979 included the necessary right to access and use the land over which the right was granted.[30]

[36] Section 21 provided for coal mining rights over classes of "Crown land", including public reserves. Mining rights over a public reserve that was Crown land could be granted by the Minister of Energy, but under s 21(4), the consent of the Minister "charged with the administration of the land" was required. In the case of a reserve, this was the Minister of Lands (later the Minister of Conservation).[31] Before

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28 Coal-mines Act 1925, s 14(1). This was replaced by s 34 of the Coal Act 1948. Section 34(2) made explicit provision for "rights and way-leaves and other easements" to be included in coal mining leases granted under the Coal-mines Act 1925. Although much of the Coal Act 1948 was repealed by the Coal Mines Amendment Act 1950, s 34(2) survived.

29 There was, however, a process for making objections to the Warden or Commissioner. Notice of an application for a coal mining right had to be given "to all persons whose interests obviously will be affected" (s 22(1)). Such a person could then object in writing (s 22(3)). Provision was also made for an objector to appear at a hearing of an application(s 23(e))).

30 Coal Mines Act 1979, s 55.

31 See Conservation Act 1987 (as enacted), s 65(1) and sch 2.

giving such consent, the Minister of Lands was required to consult the administering body of the reserve.[32]

[37] Counsel for Rangitira, Mr Hodder QC, argued that s 21 would have applied in the case of the Westport Reserve. There was discussion at the hearing as to whether that was correct, but Mr Hodder maintained it was. The reason for doubt was that the Westport Reserve was owned by the Council and, on the face of it, was not therefore "Crown land". However, the term "Crown land" was not defined in the Coal Mines Act 1979 and Mr Hodder argued it included, in this context, public land that was not held in the name of the Crown but over which the Crown had a statutory right to grant mining rights. The argument has some complexity. Because it relates to repealed legislation and, on our approach to the case, does not affect the outcome, we do not attempt to resolve it.[33] We will accept, for the purposes of argument only, that s 21 did apply. If it did, Rangitira would be correct that the primacy of coal mining legislation over reserves legislation continued during the currency of the Coal Mines Act 1979.

Non-application of planning law to coal mining

[38] Prior to the enactment of the Crown Minerals Act, mining activities were not subject to the Town and Country Planning Act 1953. In *Stewart v Grey County Council*, the relevant Minister had granted a mining licence giving the holder the exclusive right to occupy Mr Stewart's freehold land for a term of 10 years for the purpose of mining gold and silver.[34] Mr Stewart strenuously objected. The Court of Appeal held that the Mining Act 1971 was an exclusive code in respect of the use of land for mining purposes where a mining licence was granted under that Act. This meant that the Town and Country Planning Act did not apply.[35]

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32 Coal Mines Act 1979, s 21(7)(b).

33 The equivalent provision in the Mining Act 1971, s 26, omits any reference to "Crown land". In addition, the definition of "Crown land" in the Land Act 1948 excludes all reserves, whether vested in the Crown or not: see *Smith v Nolan* HC Greymouth AP9/86, 14 May 1987 at 3–4; and *Stafford v Accident Compensation Corporation* [2020] NZCA 164 at [319] per Williams J.

34 *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA).

35 At 583–584.

[39] That case was applied in a coal mining context in *Solid Energy New Zealand Ltd v Buller District Council*.[36] Chisholm J said the broad principle expressed by the Court of Appeal in *Stewart* could be applied to coal mining under the Coal Mines Act 1979.[37] The Coal Mines Act 1979 was, he said, "a comprehensive code which pre-empted the coal mining field".[38] Similarly, in *Powelliphanta Augustus Inc v Solid Energy New Zealand Ltd*, Panckhurst J applied *Stewart* and described the Coal Mines Act 1979 as "a code in relation to coal mining in New Zealand".[39]

Summary of the pre-Crown Minerals Act 1991 position

[40] In summary, we accept Mr Hodder's submission that the legislation applying to coal mining prior to the Crown Minerals Act (the Coal-mines Act 1925 and, subsequently, the Coal Mines Act 1979) was a code and, in that sense, was "special" legislation. Decisions about coal mining in reserves were made by statutory decision makers under coal mining legislation, applying the criteria in that legislation. They were not required to take into account the requirements of the reserves legislation, albeit that under s 21 of the Coal Mines Act 1979 the Minister of Lands (or Minister of Conservation) had to consent and the administering body of a reserve had to be consulted.[40]

Minerals other than coal

[41] Mr Hodder submitted that a similar argument could also be made in relation to mining legislation relating to minerals other than coal. The mining of minerals other than coal was regulated by the Mining Act 1926, and later the Mining Act 1971. The Mining Act 1971 continued in force until repealed by the Crown Minerals Act.

[42] Under s 26 of the Mining Act 1971, certain classes of land, including public reserves, national parks and state forests were declared to be "open for mining". The consent of the Minister of Lands (later the Minister of Conservation) was required for the grant of a mining privilege, and such consent could be given subject to conditions.

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36 *Solid Energy New Zealand Ltd v Buller District Council* [1998] NZRMA 385 (HC).
37 At 390.
38 At 390.
39 *Powelliphanta Augustus Inc v Solid Energy New Zealand Ltd* (2007) 13 ELRNZ 200 (HC) at [40].
40 Accepting for the purpose of argument that s 21 of the Coal Mines Act 1979 applied: see above at [37].

The Minister was required to consult the administering body of the relevant public reserve before giving consent.[41] A mining licence under the Mining Act 1971 allowed extraction of the mineral and provided the necessary access and other land use rights.[42] As *Stewart* illustrates, it also obviated the need for planning consent. It was, as the Court of Appeal noted in *Stewart*, "a clear and detailed statutory code determining and controlling, under the direction of the Minister, the use and development of land for mining purposes".[43]

[43] We accept Mr Hodder's submission that the Mining Act 1971 was also a code. Decisions relating to mining for minerals other than coal on or under reserve land were made under the Mining Act 1971, applying the criteria in that Act. The decision makers were not required to take into account the requirements of the Reserves Act.

Crown Minerals Act 1991

[44] The Crown Minerals Act replaced both the Mining Act 1971 and the Coal Mines Act 1979, so it regulates all minerals including coal. Section 11(2) provides that every mineral reserved under an earlier enactment continues to be reserved in favour of the Crown, notwithstanding the repeal of the enactment under which the reservation was made. However, unlike the coal mining legislation that preceded it, the Crown Minerals Act does not provide for mining licences and mining leases which give the holder not only the right to extract coal, but also access to the land and the powers and permissions required to do so. Under the legislation in force before the Crown Minerals Act came into force, only one decision by a public official was required for the holder of a mining licence to have a legal basis to extract coal from land within a reserve. This is no longer the case under the Crown Minerals Act.

[45] Under the Crown Minerals Act, a person wishing to undertake a mining activity must obtain a mining permit. A mining permit issued under the Crown Minerals Act gives the right to extract coal, but does not confer on the holder a right of access to the land (other than for a minimum impact activity).[44] Rather, an access arrangement must

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41 Mining Act 1971, s 26(8)(b).
42 Section 87.
43 *Stewart*, above n 34, at 583.
44 Sections 47 and 49.

be agreed with each owner and occupier.[45] In addition, any necessary resource consent must be obtained from the local or regional authority. Section 9 provides that mining operations must comply with all other applicable legal requirements. This includes the Resource Management Act.[46] Potentially, therefore, three different decisions from three different decision makers may be required.

[46] Section 48 cancels any Crown right of entry to land that is reserved by statute. It provides:

> No right reserved to the Crown, by virtue of any enactment, to enter any land for any purpose in connection with prospecting or exploring for, or mining, any mineral, shall have any effect.

[47] The effect of this provision is that the statutory right of the Crown under previous legislation relating to coal mining (or mining for other minerals) to access, or to grant a right to another person to access, land not owned by the Crown for mining purposes came to an end when the Crown Minerals Act came into force. This cancelled any right of access in respect of the Westport Reserve implicit in the reservation pursuant to s 8 of the Coal Mines Amendment Act 1950.[47]

[48] Section 54(2) makes it clear that the holder of a mining permit cannot access land for mining purposes unless it has an access arrangement with the owner and occupier of the land. It provides:

> (2) The holder of a permit in respect of a mineral (other than petroleum) shall not prospect, explore, or mine on or in land to which his or her permit relates otherwise than in accordance with an access arrangement—
>
> (a) agreed in writing between the permit holder and each owner and occupier of the land; or
>
> (b) determined by an arbitrator in accordance with this Act.

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45 Section 54(2). See also *Tui Trust Mining Ltd v Minister of Energy* (2011) 16 ELRNZ 505 (HC) at [11].

46 *Gebbie v Banks Peninsula District Council* [2000] NZRMA 553 (HC) at [35]; *Grey District Council v Graham* (2007) 9 NZCPR 32 (HC) at [63]; and *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324, [2013] NZRMA 275 at [2]. See also CA judgment, above n 3, at [45] and [66].

47 See above at [6].

[49] Section 60 is the section dealing with the grant of a right of access for mining of coal or other minerals by access arrangement in relation to land that is not Crown land. It provides:

> **60 Grant of right of access by access arrangement**
>
> (1) An access arrangement in relation to land may make provision for or with respect to the following matters:
>
> (a) the periods during which the permit holder is to be permitted access to the land:
>
> (b) the parts of the land on or in which the permit holder may explore, prospect, or mine and the means by which the permit holder may gain access to those parts of the land:
>
> (c) the kinds of prospecting, exploration, or mining operations that may be carried out on or in the land:
>
> (d) the conditions to be observed by the permit holder in prospecting, exploring, or mining on or in the land:
>
> (e) the things which the permit holder needs to do in order to protect the environment while having access to the land and prospecting, exploring, or mining on or in the land:
>
> (f) the compensation to be paid to any owner or occupier of the land as a consequence of the permit holder prospecting, exploring, or mining on or in the land:
>
> (g) the manner of resolving any dispute arising in connection with the arrangement:
>
> (h) the manner of varying the arrangement:
>
> (i) such other matters as the parties to the arrangement may agree to include in the arrangement.
>
> (2) In considering whether to agree to an access arrangement, an owner or occupier of land (other than Crown land) may have regard to such matters as he or she considers relevant.

[50] Section 60(2) provides that an owner or occupier of land (other than Crown land) may have regard to such matters as he or she considers relevant in considering whether to agree to an access arrangement. As the Westport Reserve is not Crown land, having been vested in the Council, s 60(2) applies in this case.[48] Section 60(2) does not affect the other legal obligations an owner or occupier may have.

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[48] Different considerations apply to Crown land: see Crown Minerals Act, s 61.

[51] The freedom of an owner or occupier of land to refuse to agree to an access arrangement under s 60(2) is qualified by s 66. That section applies when a person wishing to undertake mining activities has sought to obtain an access arrangement by agreement with the owner or occupier under ss 50 and 60 but the owner or occupier has refused to enter into such an arrangement. In broad terms, s 66 allows the Minister of Energy to serve notice on the owner or occupier to enter into an access arrangement or consent in writing to an arbitrator setting the terms of an access arrangement. If the owner or occupier does neither, then the Governor-General may, by Order in Council, declare that the terms of access be determined by an arbitrator, notwithstanding the owner or occupier's objection to that course.

[52] Importantly in the context of the present case, s 66(1)(b) excludes certain classes of land from the s 66 regime. As counsel for the Society, Mr Smith, pointed out, one of the excluded categories is "a class of land to which any of paragraphs (a) to (g) of section 55(2) relate". Section 55(2)(a) refers to "any land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 of the Conservation Act 1987". The Reserves Act is one of the Acts specified in that Schedule. That means s 66 does not apply to land within a reserve. Where an access arrangement is sought over land within a reserve, the decision as to whether to agree to the access arrangement is for the owner or occupier of the land to make. If the owner or occupier refuses to agree, it cannot be forced into an arbitration under s 66. Section 66 does not, therefore, apply to land in the Westport Reserve.

Did the Crown Minerals Act retain primacy for mining legislation?

[53] Against that background, we now turn to Rangitira's argument that the Crown Minerals Act is, like its predecessor Acts, a code or "one-stop shop" regulating access arrangements for the purposes of mining that prevails over general legislation such as the Reserves Act. The Court of Appeal rejected this argument. It found:

> [45] The Crown Minerals Act therefore swept away Crown control of access to minerals, and gave control of access to the owner or occupier of the land to be mined. That owner would be subject to all the laws that applied to the use of the land. The mining permit-holder would require consents under the Resource Management Act. The old coal mines regime ceased to apply.

[54] For the reasons that follow, we agree.

[55] It is clear there was a legislative intent to take away the primacy of mining legislation when the Resource Management Bill 1989, which on introduction included the provisions that became the Crown Minerals Act, was introduced. The explanatory note provided:[49]

> The Government's policy aim is to provide a neutral regime which neither promotes nor discourages mining relative to other activities. This involves efficient allocation of the mineral resource, taking account of sustainability questions, improved status for affected landowners, and putting environmental controls on the same basis as other land uses.

[56] The legislative process that culminated with the enactment of the Resource Management Act and the Crown Minerals Act was interrupted by a change of Government in 1990. That led to a reconsideration of some aspects of the Bill. But the statement of purpose just quoted is reflected in the Crown Minerals Act as enacted, at least insofar as it applies to reserves and other classes of land held or managed under the Conservation Act or any other enactment set out in sch 1 of that Act.

[57] The following provisions demonstrate that the legislative intent was realised in the Crown Minerals Act:

(a) The statement in s 9 that compliance with the Crown Minerals Act does not remove the need to comply with other enactments, meaning that any necessary resource consents must be obtained for mining pursuant to a mining permit. As Mr Smith argued, it also means that other legislation, such as the Reserves Act, must be complied with.

(b) The limitation of the scope of a mining right in s 47 to a mere right to extract coal, without the characteristics of a coal mining right under the Coal-mines Act 1925 and Coal Mines Act 1979. This means a miner, having secured a mining right, has to obtain an access arrangement from the owner and occupier of the land and a resource consent from the relevant consent authority.

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[49] Resource Management Bill 1989 (224-1) (explanatory note) at xiii.

(c) Section 48, which removed the reservation of the Crown's right to grant access rights for coal mining in a reserve.

(d) Section 54(2), which made it clear an agreement with the owner and occupier was required for an access arrangement.

(e) Section 60(2), which provided that an owner or occupier could take into account any matter it considered relevant in deciding whether to enter into such an agreement.

(f) The exclusion of reserves from the ambit of s 66, meaning that the owner of a reserve could not be required to submit to compulsory arbitration on the terms of an access arrangement.

[58] In the case of a reserve such as that in issue in this case, the owner (the Council) cannot be required to enter into an access arrangement under the Crown Minerals Act. It is purely a matter of agreement. Unlike under the Coal-mines Act 1925 and Coal Mines Act 1979 (and, in respect of minerals other than coal, the Mining Act 1971), there is no ability for the Crown or a statutory office holder to mandate mining for coal or other minerals in such a reserve.

[59] We consider the change of approach to mining under the Crown Minerals Act intentionally brought to an end the special status of mining legislation. This is fatal to Rangitira's argument as to the primacy of the Crown Minerals Act over the Reserves Act. In the case of a request for an access arrangement, the Council as owner of the Westport Reserve is given a wide freedom to agree to an access arrangement or decline to do so under s 60(2) of the Crown Minerals Act. But under the Reserves Act, it is required to give effect to ss 16(8) and 23(2) and, accordingly, to give effect to the requirement to administer and maintain the reserve so that its value as a water conservation reserve is maintained. There is nothing in s 60(2) of the Crown Minerals Act that limits the obligations of the Council under the Reserves Act.

[60] We conclude, in agreement with the Court of Appeal, that Rangitira's primary argument fails.

Section 109 of the Reserves Act 1977

[61] We have not overlooked Rangitira's argument based on s 109 of the Reserves Act. Section 109 provides:

> **109 Application of Mining Act 1971 and Coal Mines Act 1925 to reserves**
>
> (1) Nothing in this Act shall in any way restrict the operation of any of the provisions of the Mining Act 1971 with respect to dealings under that Act with reserves.
>
> (2) Notwithstanding anything to the contrary in this Act or any other Act, the Governor-General may from time to time, by Order in Council, declare to be subject to the Coal Mines Act 1925 or to any specified provisions of that Act, as if it were Crown land as defined by that Act, any reserve within the meaning of this Act consisting of land vested in the Crown or alienated from the Crown as a reserve which contains coal:
>
> provided that every grant of a coal mining right over any such land so declared to be subject to the Coal Mines Act 1925 or to any specified provisions thereof shall be subject to the consent of the Minister, who may refuse his or her consent or grant it unconditionally or on such conditions as he or she thinks fit to impose:
>
> provided also that in the case of a scenic reserve this subsection shall be read subject to the Coal Mines Act 1925.
>
> (3) No coal mining right under the Coal Mines Act 1925 may be granted over any reserve for soil conservation or river control or other like purposes except with the prior consent in writing of the Minister for the Environment.

[62] Section 109(1) reflected the special nature of the Mining Act 1971 in relation to mining for minerals other than coal. Under the Mining Act 1971, all areas, including reserves, were "open for mining".

[63] The purpose and effect of s 109(2) is more elusive. It contemplates the need for an Order in Council to declare reserve land to be subject to the Coal-mines Act 1925 in order to facilitate coal mining in the reserve. But, as noted earlier, the Crown reserved the power to grant coal mining rights over the Westport Reserve,[50] so it had no need to resort to the power contained in s 109(2). Mr Hodder suggested that s 109(2) may have been directed at reserves where no similar reservation had been

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[50] See above at [6].

made (for example, reserves created before the coming into force of the Coal Mines Amendment Act 1950) and thus the Order in Council contemplated by s 109(2) provided a legal basis for the Crown to grant coal mining rights over a reserve which it did not otherwise have. We accept that is a possible explanation. It is not necessary for us to reach a definitive view for reasons that will become apparent. Mr Hodder argued that s 109(2) was consistent with his thesis that Parliament intended reserves legislation to yield to mining legislation.

[64] It was common ground that s 109(2) of the Reserves Act had no function after the Crown Minerals Act came into force. Section 109(2) was not updated when the Coal Mines Act 1979 was passed, so the reference to the Coal-mines Act 1925 remained. Whatever limited role it had during the time the Coal-mines Act 1925 was in force, it lost it when the Coal Mines Act 1979, which provided an independent framework for granting coal mining rights over reserve land, was passed. That situation did not change when the Crown Minerals Act was passed. In short, s 109(2) is a dead letter.

[65] Rangitira argues that s 109(1) has a continuing function despite the repeal of the Mining Act 1971 and the fact that the Mining Act 1971 applied only to minerals other than coal. It relies on s 22(2) of the Interpretation Act 1999. Section 22(2) provides:

> A reference in an enactment to a repealed enactment is a reference to an enactment that, with or without modification, replaces, or that corresponds to, the enactment repealed.

[66] Rangitira argues that the reference in s 109(1) to the Mining Act 1971 should be read as referring to the Crown Minerals Act in relation to both coal and other minerals, even though the Mining Act 1971 did not apply to coal. That would mean that, as a result of the application of s 22(2) of the Interpretation Act, s 109(1) of the Reserves Act would be read as providing:

> Nothing in this Act shall in any way restrict the operation of any of the provisions of the [Crown Minerals Act 1991] with respect to dealings under that Act with reserves [whether related to coal or to any other mineral].

[67] The Court of Appeal rejected this argument as follows:

> [67] Section 22 therefore does not assist. It applies to enactments which replace the repealed enactment without modification. Sections 109(1) and (2) do not refer to enactments which were in any way "replaced". There is nothing that "corresponds" to the old regime in relation to minerals or coal. Those repealed provisions and the concepts behind them are gone. An entirely new regime has been put in place.

[68] Mr Hodder emphasised that s 22(2) of the Interpretation Act refers to a reference to an enactment that "replaces" or "corresponds" to the enactment repealed. His argument involved the following propositions:

(a) the fact that the Crown Minerals Act differed from the Mining Act 1971 in some respects did not rule out the application of s 22 to the interpretation of s 109(1);

(b) all that was required was that the Crown Minerals Act be "of the same character" as the Mining Act 1971;

(c) this was satisfied as long as the function and subject matter of the Crown Minerals Act was essentially the same as the Mining Act 1971, and directed to the same "mischief"; and

(d) precise correspondence is not required.[51]

[69] Mr Hodder's argument that the Crown Minerals Act "corresponded" to the Mining Act 1971 was based on his thesis that the Crown Minerals Act carried on the longstanding prioritisation of mining over other legislation, including legislation relating to reserves. We have already rejected that argument. We agree with the Court of Appeal that the differences between the Mining Act 1971 and the Crown Minerals Act are such that the latter cannot be said to "correspond" to the former.

[70] Even if we accepted that the Crown Minerals Act corresponded to the Mining Act 1971 for the purposes of s 109(1), Mr Hodder's argument would still face the

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[51] *Re Eskay Metalware Ltd (in liq)* [1978] 2 NZLR 46 (CA) at 49. This case dealt with the predecessor to s 22 of the Interpretation Act 1999, s 21 of the Acts Interpretation Act 1924, which referred to "any subsequent enactment passed in substitution for" the repealed Act.

considerable hurdle that the Mining Act 1971 did not apply to coal. So applying s 22 to s 109(1) in the manner proposed by Mr Hodder would extend s 109(1) to apply to coal mining as well as other mining, essentially by the side wind of the rule of interpretation in s 22. We reject that proposition. If the Crown Minerals Act were seen as corresponding to the Mining Act 1971, that could only be in relation to minerals other than coal, given that the Mining Act 1971 had no relevance to coal mining.[52]

[71] Even if Rangitira's argument was accepted and the interpretation set out above at [66] applied, we do not see how it would assist Rangitira's case. That is because there are no specific provisions in the Crown Minerals Act "with respect to dealings under that Act with reserves" (to use the words of s 109(1)) that would lead a court to interpret the Crown Minerals Act as altering the interpretation of the Reserves Act itself. As noted earlier, s 9 of the Crown Minerals Act provides that compliance with the Act does not remove the need to comply with other enactments. It is clear from s 60(2) that there are no restrictions on the matters that can be taken into account by an owner or occupier in determining whether to agree to an access arrangement. That cannot be read as absolving the administering body of a reserve from compliance with the provisions of the Reserves Act, particularly ss 23 and 16(8).

[72] For these reasons we conclude that s 109 of the Reserves Act does not provide any basis for adopting Rangitira's "high level" argument.

Local Government Act 2002

[73] Finally, Rangitira sought support for its argument from the Local Government Act 2002. Section 10 of that Act provides as follows:

> **10 Purpose of local government**
>
> (1) The purpose of local government is—
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

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[52] See *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505 at [95]–[98].

[74] Section 13 provides that s 10 (and s 12(2)) applies to a local authority performing a function under another enactment to the extent its application is not inconsistent with the other enactment. The Council is a "local authority".[53]

[75] Rangitira argues that the High Court's declarations, which it seeks to have restored, achieve greater harmony with the Local Government Act. It says that in a free and democratic society, an interpretation which enables more democratic local decision making should be preferred.

[76] We do not accept this submission. As we have said, s 60(2) of the Crown Minerals Act does not free a local authority which owns or occupies a reserve from the need to comply with the Reserves Act when deciding whether to agree to an access arrangement. That being so, the Local Government Act does not assist.

Result

[77] For these reasons we uphold the decision of the Court of Appeal. The answers it gave to the questions before it were correct. The appeal is dismissed.

[78] Rangitira must pay the Society costs of $25,000 plus usual disbursements.

Solicitors:
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[53] Local Government Act 2002, s 5(1) definitions of "local authority" and "territorial authority" and sch 2.