**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA119/2017**
**[2018] NZCA 262**

| | |
|---|---|
| BETWEEN | OPUA COASTAL PRESERVATION INCORPORATED<br>Appellant |
| AND | FAR NORTH DISTRICT COUNCIL<br>First Respondent |
| | MINISTER OF CONSERVATION<br>Second Respondent |
| | D C SCHMUCK<br>Third Respondent |

| | |
|---|---|
| Hearing: | 13 February 2018 (further submissions received 6 March 2018) |
| Court: | Winkelmann, Brown and Gilbert JJ |
| Counsel: | T H Bennion and E A Whiley for Appellant<br>JGA Day for First Respondent<br>B R Arapere and WMC Randal for Second Respondent<br>J A Browne and C H Prendergast for Third Respondent |
| Judgment: | 20 July 2018 at 11.30 am |

---

**JUDGMENT OF THE COURT**

---

**A The appeal is allowed.**

**B The Minister's decision of 5 June 2015 to consent to the easements is quashed, save in respect of easements A3 and E.**

**C The first and third respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.**

**D Costs in the High Court are remitted back to that Court for determination.**

## REASONS OF THE COURT

(Given by Winkelmann J)

### Table of Contents

## Introduction

[1] Mr Schmuck owns and operates a business, Doug's Opua Boatyard, on the shores of Walls Bay in Opua, Northland. For many years, dating back at least to the 1990s, the business has spilled out beyond the bounds of the boatyard land and onto a public esplanade reserve, administered by the Far North District Council (the Council). For almost as many years Mr Schmuck has been trying to obtain legal rights to support that use. In 2006, the Council granted easements to Mr Schmuck for boatyard operations on the reserve and then in 2015, acting as the delegate of the Minister of Conservation (the Minister), gave consent pursuant to s 48(1) of the Reserves Act 1977 to the grant. The easements authorise the use of the reserve to store, wash down, repair and maintain boats, and to discharge noise and contaminants associated with the operation of the boatyard.

[2] Opua Coastal Preservation Inc (the Society) is an incorporated society with the object of preserving and protecting the Opua coastal area. It challenges the lawfulness of the Minister's consent. In the High Court, Fogarty J rejected multiple grounds of challenge advanced by the Society.[1] On appeal against that decision, the Society maintains the Judge was wrong to reject the following arguments:

(a) There was no power for the easements to be granted under s 48(1)(f) of the Reserves Act.

(b) When consenting to the grant of the easements, the Minister failed to consider the purposes of the Act, and in particular, that there should be no unnecessary development of a reserve.

(c) The Minister also failed to consider the terms of the resource consents obtained by Mr Schmuck permitting him to discharge contaminants into the reserve when granting broader rights to discharge contaminants (the discharge easement) than those granted by the resource consent.

---

1 *Opua Coastal Preservation Incorporated v Far North District Council* [2017] NZHC 154 [High Court judgment].

(d) Alternatively, the Minister acted unreasonably in granting the discharge easement because it was unnecessarily broad.

[3] Counsel for the Minister appeared at the hearing to assist the Court with one issue of law, but the Minister otherwise abides the decision of this Court on the appeal.

**Factual background**

[4] Opua is in the Bay of Islands and is a seaside destination for cruising yachts. Walls Bay is a small bay with a sea frontage of only a few hundred metres in length. A footpath runs along that sea frontage, forming part of a coastal walkway. There is a wharf toward the northern end of the reserve and a slipway for boats adjacent to that which enables the passage of boats from the sea, up the esplanade reserve and to the boatyard property. We refer to this slipway as the beach slipway.

*The boatyard business*

[5] Mr Schmuck's property is to the west of the reserve and from there he runs his business cleaning, servicing and repairing boats.

[6] The beach slipway runs from the sea, up the beach and onto a large turntable. Most of that turntable is on Mr Schmuck's property, but some of it extends on to the reserve. The turntable is designed for turning boats onto a number of slipways, including the tramrail slipway running along a north/south axis on the seaside border of Mr Schmuck's property. We refer to this as the southern slipway tramrail. We attach a survey plan on which we have marked the two slips and other details relevant to this judgment (**Annexure 1**).

[7] In terms of the day-to-day operation of the boatyard, the boats are dragged up the beach slipway, where they are washed. If they are just to be cleaned, they are then returned to the water. But if they are to be worked on further, they are moved on to Mr Schmuck's property to the extent they will fit. Some boats are too large in length to completely fit onto the property and some too large to be moved there at all. The boats that fit into this latter category remain on the beach slipway in their entirety and are worked on in that location pursuant to the relevant resource consents.

[8] The boatyard was established in 1966 by Mr Leeds. It initially used a small building which sat on Crown land, on an unformed paper road between the property and the beach. In 1971 the Council (then the Bay of Islands County Council) granted planning consent to erect a boatbuilding workshop and office on Mr Leeds' land (now Mr Schmuck's) subject to the condition that "all activity be confined to that property with a minimum of inconvenience to the public usage of the beach" and that the beach slipway be moved to enable boats to be repaired on the property.[2] The workshop was built on the boatyard land in 1972.

[9] In 1976 the Council granted planning consent for the new beach slipway crossing the unformed road to the boundary of the boatyard property. The consent was subject to the condition that Mr Leeds keep the unformed road free of all material, boats or machinery and "at no time will boat repairs or any other work take place on the unformed road".[3]

[10] In an affidavit filed in these proceedings, Mr Leeds said that at the time it was the practice of established boatyards, including his, to scrape, sand and antifoul their boats at the edge of the sea between tides. As we understand it, this was not on the unformed road. He operated the boatyard in this way, in accordance with the various conditions, until he sold it in 1982.

[11] Mr Schmuck and his father purchased the boatyard in 1994 from a Mr Elliott. Mr Schmuck says that when he purchased the land it was common practice for boats to be stored on the unformed road and worked on there.

*The land becomes an esplanade reserve*

[12] Over time attitudes changed to the release of contaminants into the environment. In 1994 Mr Schmuck asked the Council to stop the unformed road to allow him to purchase that part of it located between the boatyard property and the sea so he could comply with Northland Regional Council discharge containment requirements. The difficulty with his proposal was that when a paper road adjacent to

---

2 *Schmuck v Far North District Council* EnvC Auckland A26/2000, 10 March 2000 at [15].
3 At [17].

the sea is stopped it becomes esplanade reserve, as defined in s 2(1) of the Resource Management Act 1991 (RMA), and is held for the purposes specified in s 229.[4] Section 229 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.

[13] In late 1997 a public notice was issued, as required by the Local Government Act 1974, notifying an intention to stop the road. The notice stated that once the land became an esplanade reserve, the Council intended to grant the boatyard an easement over part of it to "firstly legalise their occupation of the land and secondly to allow the boatyard to install discharge contaminant tanks … which they are being required to do by the Northland Regional Council".

[14] In 1998, the road was stopped and the land vested in the Council as a local purpose (esplanade) reserve. It is administered by the Council under the provisions of the Reserves Act. That Act authorises the body administering the reserve, in this case the Council, to grant easements over the reserve according to the notification and consent procedures as follows:

---

[4] By operation of s 345(3) of the Local Government Act 1974.

**48 Grants of rights of way and other easements**

(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—

(a) any public purpose; or

(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.

(3) Subsection (2) shall not apply in any case where—

(a) the reserve is vested in an administering body and is not likely to be materially altered or permanently damaged; and

(b) the rights of the public in respect of the reserve are not likely to be permanently affected—

by the establishment and lawful exercise of the right of way or other easement.

*1999: First application for easements*

[15] Following the stopping of the road, Mr Schmuck applied for the grant of easements over the resulting reserve. In late 1999 the Council, as administering body, voted to grant the easements Mr Schmuck was seeking. These allowed the use of discharge containment systems on the reserve and for the use of a 7-metre-wide strip around the beach slipway not just for the passage of boats to the boatyard but also for the storage, washing down, repair and maintenance of the boats.

[16] The next stage of the process required the Minister of Conservation's consent to the grant. The Department of Conservation's Northland Conservator (the Conservator), as the Minister's delegate, consented to easements for the discharge containment systems, the presence of the turntable and slipway, and the passage of boats across the 7-metre-wide strip between the boatyard and the mean high-water mark of the sea. But the Conservator refused consent for easements allowing use of the reserve for maintenance and repairs to boats on the grounds that s 48 of the Act did not allow such easements. Mr Schmuck did not accept that outcome and no easements were documented or registered.

*2000: Resource management consents*

[17] In 2000, the Environment Court dismissed Mr Schmuck's appeal against an abatement notice issued by the Council, finding that the boatyard activities on the reserve were not protected by existing use rights under the RMA, and that resource consent authorising the activity was needed.[5] Mr Schmuck then focused on the requirement to obtain resource consents for his business activities on the public reserve.

[18] In January 2002, the Environment Court granted resource consents which allowed Mr Schmuck to place structures on the reserve and to use the reserve for various boatyard activities, including the maintenance, repair and washing down of boats on the slipway. These were granted by consent. But resource consents could not confer a legal right on Mr Schmuck to use or occupy the reserve for his business, or even to discharge the contaminants on the land of another, and so Mr Schmuck persisted with his attempts to obtain the easements he sought.

*2003–2004: Further applications for easements*

[19] In 2003 Mr Schmuck again applied for easements to allow him to operate his business on the public reserve. The easements sought were modified from the original package to match the resource consents. The Northland Conservator declined to consent to the easements sought, primarily because Council had failed to publicly

---

5 *Schmuck v Far North District Council,* above n 2.

notify the application as required by s 48(2) of the Reserves Act. The Conservator otherwise expressed himself as prepared to grant consent.

[20] In 2004 Mr Schmuck made a fresh application for easements. On this occasion Council declined the application in respect of the discharge easement and those associated with the repair of boats. Mr Schmuck protested that when making its decision to refuse the grant, Council had taken irrelevant material into account. In response to that claim Council agreed to reconsider a fresh application and appointed an independent commissioner, Mr Alan Dormer (the Commissioner), to again go through the public notification procedures of the Reserves Act.

*2005: Commissioner's report*

[21] The easements considered by the Commissioner included the easements that are the subject of these proceedings.

[22] Following hearings conducted in Paihia, the Commissioner released a report recommending that the easements, largely as sought, be granted. He described them as falling into the following three groups or suites:

> (1) First an easement is sought to construct and concrete the slipway, discharge contaminants, and move boats between the boatyard and the water.
>
> (2) Secondly, easements are sought in respect to the existing slipway and turntable, together with a number of safety enhancements, to allow boats on the slipway to be washed down before being moved into the yard, and for work to be undertaken on the slipway on boats that cannot (by virtue of their length or configuration) be accommodated entirely within the yard.
>
> (3) Thirdly, a 2 metre wide easement is sought to allow maintenance access to vessels standing on the southern slipway tramrail and/or the turntable.

[23] In his report, the Commissioner noted an "unfortunate propensity" on the part of Mr Schmuck to describe the nature of rights he was seeking as "occupation of the reserve". The Commissioner said this was not a proper description of the rights conferred by easements of the kind sought.

[24] He noted there was little opposition to the first set of easements. As to the second and third, these were opposed because they would allow the use of the reserve for commercial purposes, and there were other ways for Mr Schmuck to meet his business needs.

[25] The Commissioner characterised the issue he had to resolve as "whether, having regard to the purpose of esplanade reserves, the public interest is better served by the granting of the proposed consents, or by their being declined". He rejected any notion that easements could not be granted for private commercial purposes. He was satisfied that granting the easements would facilitate public recreational use of the sea in terms of s 229(c) of the RMA, in that the boatyard was important to the local yachting fraternity. He also considered that the operation of the boatyard added interest to those visiting the reserve. Experience with its operation over the years satisfied him that its continued operation on the reserve did not impair the walking track and was consistent with conservation values.

[26] As to the second set of easements, permitting the use of the slipway for washing down and repair and maintenance of boats, the Commissioner accepted the evidence that moving the existing plant and facilities which were operating on the public reserve would represent a considerable burden for Mr Schmuck. That burden was not reasonable because even were it possible to relocate the yard's operations entirely onto Mr Schmuck's land, that would not give rise to any significant environmental or recreational benefit to the community. The boatyard had been operating from Mr Schmuck's site for approximately 40 years. The Commissioner proceeded on the basis that for much, if not all that time, the boatyard operator had not confined his activities to the boatyard site and had worked on boats in the manner now proposed by Mr Schmuck. He considered the evidence established that such use had not impaired the use of the reserve, and that for many, the boatyard activities represented an added attraction or point of interest when they visited the reserve. He said:

> In my view, it would impose too high a burden on the applicant if he were to be required to show that no feasible alternative arrangement exists. This is especially so in the light of the historical use of the site, and the minimal degree of interference with the public amenities.

[27] The Commissioner had one reservation in respect of the second set of easements — they were not sufficiently crafted to prevent the currently "low key" scale of operations being significantly expanded, an expansion which would present a potential threat to the public's use of the esplanade reserve. While he recommended that the easement to allow work to be undertaken on boats on the reserve should be granted, he said it should be subject to a condition designed to prevent significant expansion of the boatyard activity. The solicitor for the Council later formulated a set of conditions to meet these concerns limiting the extent to which repair and maintenance work could be done on boats in the reserve. These conditions remain in the easements, which are set out in this judgment at [44].

[28] As to the third set of easements, the Commissioner said they were sought because the location of the southern slipway tramrail could not be moved further into the site and work undertaken on the coastal side of boats sitting on the rail in its current location was not possible without access to the esplanade reserve by those undertaking the work. He was less satisfied the easement was necessary than in the case of the second set but nevertheless found: "[O]n balance, [I] think it not unreasonable, especially given the lengthy historic use, that this easement be granted also". However, he recommended it be granted for a limited time because of the possibility that at some point in the future Mr Schmuck, or his successor, might embark on work in the boatyard which would render the southern slipway tramrail less problematic.

*2006: Council approves grant of easement*

[29] The Council considered the Commissioner's recommendations at a meeting on 9 March 2006, adopting them in full, without alteration, before sending them to the Minister for consent. In 2007 the Conservator, as the Minister's delegate, issued a draft report, indicating the Conservator would refuse to consent to an easement for the washing down or repair of boats on the public reserve,[6] or permitting the discharge of contaminants.[7] Consent would be refused because the easements were not capable of being authorised under s 48 of the Reserves Act. Mr Schmuck made submissions in response to that draft report and raised the possibility of seeking a

---

6 These correspond to the easements listed as A3, 4, 5 and 6 on the easements registered against the esplanade reserve and set out at [44] below.

7 These correspond to the easements set out in E1 and 2.

declaratory judgment as to the meaning and effect of s 48. Those proceedings were not commenced at that time however, as Mr Schmuck attempted to obtain an amendment to legislation to allow him to obtain the rights he needed. For a time this avenue looked hopeful for Mr Schmuck but his attempts were ultimately unsuccessful. In the meantime, the existing resource consents expired. New resource consents were granted on 20 May 2008 with an expiry date in 2016.

*2013: Ministerial consent*

[30] In early 2013 when it seemed likely there would be no legislative solution, the Council invited the Minister to complete the statutory process. In August 2013, the Conservator, as the Minister's delegate, issued a decision granting some of the easements sought but declining others. The Conservator was only prepared to grant easements which allowed the construction of a slipway, storm water and conduit drain, and easements which allowed the movement of boats across that slipway to the boatyard. The Conservator considered that easements allowing boatyard activities to be undertaken on the reserve or the discharge of contaminants onto the site went beyond the proper scope of s 48.[8]

*Judicial review proceedings before Heath J*

[31] Mr Schmuck issued judicial review proceedings, joining in the Director-General of the Department of Conservation, the Minister of Conservation and the Council, challenging the Minister's refusal to consent to these easements.[9] The Society was not a party to this litigation. The following preliminary question was heard before Heath J:[10]

> Whether s 48(1)(f) of the Reserves Act 1977 allows easements to be granted over a local purpose (esplanade) reserve for the following activities authorised by resource consents granted under the Resource Management Act 1991:
>
> (a) The construction and maintenance of a concrete wash down area with associated discharge containment system to be located above a line 10m above mean high water spring.

---

8 Again these correspond to the easements ultimately granted and registered, easements A3–6, C and E.

9 *Schmuck v Director-General, Department of Conservation* [2015] NZHC 422.

10 At [3].

(b) The washing down of boats prior to the boats being moved to the boatyard for repairs or maintenance or being returned to the water.

(c) The erection of screens or the implementation of similar measures to contain all contaminants within the wash down perimeter.

(d) 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.

(e) Access to, and repair and maintenance of, any vessel standing on the southern slipway tramway and/or the turntable.

(f) The discharge of contaminants to air, soil and water in accordance with any relevant resource consent.

(g) The emission of noise in accordance with any relevant resource consent.

[32] For the Minister, counsel argued that s 48(1)(f) limited the power to grant easements to those required to convey substances over the reserve, relying upon the *ejusdem generis* principle of statutory interpretation; namely, subsequent words should be interpreted in the context of any specific words that precede them.

[33] In a judgment delivered in March 2015, Heath J accepted the submission of counsel for Mr Schmuck that in the task of statutory interpretation, s 5(1) of the Interpretation Act 1999 took precedence and that the *ejusdem generis* principle is largely subsumed within that provision's text and purpose analysis.[11] While he acknowledged it was not possible to confer joint or exclusive possession through the grant of an easement, the Judge considered that level of possession was not sought by Mr Schmuck. The easements proposed would not give rise to the degree of occupation that would remove the ability to grant an easement.[12]

[34] He said:

> [25] I reiterate the important distinction between the jurisdictional power to grant a right of way or easement and the discretion whether or not to allow one to be created. From a jurisdictional perspective, the focus is on the degree of connection between the dominant tenement …[13] and the servient tenement ….[14] In this case, there is a physical connection. The Esplanade Reserve and

11 At [26].
12 At [28].
13 The boatyard land.
14 The esplanade reserve.

> the boatyard are contiguous parcels of land. That, in my view, is a sufficient connection, for the purposes of s 48(1)(f).

[35] He continued:[15]

> The creation of a structure is not an insurmountable impediment to the grant of an easement. Having said that, the nature and extent of the structure will be relevant to the discretion whether the easement should be granted; in the sense of considering what its likely effect will be on members of the public using the reserve.

[36] Heath J also rejected a submission on behalf of the Director-General and Minister that emissions and discharge of contaminants should not be permitted. A resource consent for those activities had already been granted. Whilst the Minister and the administering body had to turn their minds independently to the question whether the easements were capable of being granted and should be granted under the Act, he said:[16]

> … it is (in the absence of an inability to draft the easement in a sufficiently precise manner) difficult to contend that an easement cannot be granted to formalise a resource consent; particularly one issued with the consent of the Council and the Director-General.

[37] The Judge quashed the Minister's refusal to consent to the easements and directed remission of the issue of consent to the Minister for reconsideration.

*Minister delegates power to consent*

[38] In July 2013, prior to the issue of the judgment of Heath J, the Minister delegated powers under s 48(1)(f) to the Council as territorial authority and administering body of the reserve. That delegation, dated 8 July 2013, allowed Council to consider applications that had previously been referred to the Department of Conservation's Northland Conservator for consent of the Minister for matters such as the granting of leases, licences or easements over council-vested reserves.

---

15 *Schmuck v Director-General, Department of Conservation*, above n 9, at [27].
16 At [29] (footnotes omitted).

[39] The delegation described the division of responsibility between the local authority acting as the administering body, and the local authority when acting as a delegate of the Minister as follows:

> 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 the 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.

[40] This delegation is highly unusual. It could be argued that it replaces a two-step process involving two separate decision-makers with a single-step process and a single decision maker. The effect of the delegation is that the Council makes both decisions contemplated by s 48(1)(f). It might be thought that in these circumstances any difference of view between the two decision-makers is unlikely. However, the legality of that delegation is not an issue pursued by the Society and so we do not address it further.[17]

[41] The delegation also suggests an unusual constraint upon the Council when acting as delegate of the Minister. It suggests that the Minister's delegate is to perform a task akin to judicial review — exercising a supervisory role, checking the Council's compliance with the procedures set out in the Act, and satisfying him or herself that, on the basis of the evidence, the decision is a reasonable one.

[42] The Society has not argued that Council acted unlawfully when making the delegated decision in accordance with this direction. Nevertheless, the role of the Minister, and the matters he or she must take into account, lies at the heart of this proceeding. We therefore return to this issue when addressing the second ground of

---

[17] In its Amended Statement of Claim in these proceedings, the Society alleged that this was an invalid delegation, but did not pursue that argument in the High Court, and did not attempt to do so on appeal.

appeal. As the argument developed, and as we come to, the approach we propose to adopt is not opposed by any party.

*2015: Council grants consent as Minister's delegate*

[43] An extensive report was prepared by the solicitor for the Council to assist the Council, acting as the Minister's delegate, in reconsidering whether consent should be given to the proposed easements. The report outlined the protracted history of Mr Schmuck's attempts to regularise the business's use of the esplanade. Mr Swanepoel, the Council's solicitor, noted the Conservator had earlier declined consent based on a lack of jurisdiction but that Heath J's judgment clarified that the Council, as the Minister's delegate, had jurisdiction to consent to the grant of the easements. He reported that tangata whenua had been fully consulted and their objections considered. He attached the report of the Commissioner recommending the grant of easements. Mr Swanepoel concluded: "There therefore appears to be no basis to refuse the easements that give effect to the resource consent held [b]y Mr Schmuck".

[44] At its meeting on 5 June 2015, the Council consented to the grant of easements, acting as the Minister's delegate. The easements as consented to were registered in July 2015. We set out the terms of the easements in full below taken from the easement which was ultimately registered. The alpha-numeric numbering in the registered easement differs from that used in earlier drafts of the easement. To assist with comprehension, it is the numbering system employed in the registered easement we use throughout this judgment:

> A. An easement over [the areas marked X, Y and Z on the plan] to permit the following:
>
> 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 MWHS.

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 Section 2 SO 68634 and/or Section 3 SO 68634, such boats may be repaired or maintained at any time of the year;

   (b) as a small portion of the turntable encroaches onto Section 2 SO 68634, boat cradles that are located on any part of the turntable but that do not otherwise encroach onto Section 2 SO 68634 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 Section 2 SO 68634 marked X and Y on DP 487568, 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 Section 2 SO 68634 marked Z on DP 487568 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 DP 487568 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 Sections 2 & 3 SO 68634 and secured so that situation 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 DP 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.

*These proceedings*

[45] The Society issued the present proceedings challenging two decisions. The first, a decision of Council in 2014 to grant "permission" to Mr Schmuck to carry out the private commercial boatyard activities on the esplanade allowed for in the resource consent. We have not described the 2014 decision in the narrative set out above, as the issue is not appealed. The second, the decision to consent to the grant of easements over the reserve for carrying out the boatyard activities made in June 2015, which is the focus of this appeal.

[46] The proceedings were heard in the High Court before Fogarty J. The Judge said that in making the 2014 decision, the Council had purported to exercise a right of ownership, the grant of permitting use of the land, when it did not have that right.[18] To the extent the Council's decision ever had any effect, it was therefore quashed. There is no challenge to that finding on this appeal.

[47] In relation to the June 2015 decision, the Society challenged the Minister's decision (made by the Council as the Minister's delegate) to consent to

---

[18] High Court judgment, above n 1, at [34]–[42].

the granting of easements A3, 4, 5, 6, C and E. These easements allow the construction and use of a wash-down facility area with associated discharge containment systems, the repair of boats on the reserve and the discharge of contaminants on to the reserve. The Society did not and does not challenge the Ministerial consents given in 2013. It follows that the Society does not object to the presence of the beach slipway or the use of those facilities to convey boats from the sea to the boatyard. Nor does it object to the use of the turntable, although part of the turntable is on the reserve.

[48] The Society argued that the easements subject of the 2015 consent could not be authorised as easements under the Reserves Act.[19] First, it argued that the Council as the Minister's delegate had failed to consider the purposes of the Reserves Act and other relevant considerations, and had considered several irrelevant considerations. The Society listed irrelevant considerations allegedly weighed by the Council, including the boatyard's existing use rights over the reserve, that the boatyard's economic viability depended upon its use of the reserve for boatyard activities and the fact that a resource consent for some of the activities had already been obtained by the boatyard. Secondly, the Society argued that the challenged easements were not the type of easements which could be authorised under s 48(1)(f) as they were inconsistent with the purposes of that Act. Thirdly, that the easements were invalid because they did not conform with the scope of the resource consents. Fogarty J summarised the Society's core submission as follows:

> [52] The core submission is that there is no legitimate reason for these permanent facilities to be built on the Reserve rather than on the boatyard land.
>
> [53] The decision increased the area that permitted boatyard activity beyond the original resource consent, significantly expanding the area of the Reserve adversely affected, by increasing the width of the slipway corridor in the boatyard use of Area B on the NRC Map 3231b.

[49] Fogarty J rejected these arguments. As to the first argument, the Judge noted that the Minister's consent, given by the Council as delegate, was not a full reconsideration.[20] He was satisfied that the grant of easements was consistent with the purposes of the Act, since one of the purposes of coastal reserves is to provide access

---

19 At [47].
20 At [77] and [82].

to the sea, not just for swimming but also for boating. Boats, he said, need to be pulled out of the water and regularly serviced. There was also nothing in the purpose of the Act which meant that an easement could not be granted for private commercial purposes.[21]

[50] The boatyard activities on the esplanade were compatible with families picnicking on the reserve or swimming off the beach.

[51] As to the second argument, the Judge considered the grant to be consistent with s 48(1)(f), agreeing with Heath J that the interpretation of the provision is not limited by the *ejusdem generis* rule. The cleaning of hulls or maintenance of vessels while resting on the slipway is "connected with the operations of the boatyard on the adjacent private property" and can be understood as "an easement … to the advantage of the adjacent private property upon which is located the boatyard business".[22]

[52] The Judge addressed and rejected the third argument that the easements were invalid because they did not conform with the scope of the resource consents. He said:

> [85] It will be recalled that grants of easements under s 48(1) are subject to subs (2) and to the RMA. The words in s 48(1) do not require easements to exactly match the RMA consents. This is a very minor inconsistency with the RMA consents. I do not think that the lack of a precise match between the easements and the RMA consents is an area in error which makes illegal the grant of the easements. If need be, there are powers under the RMA to amend resource consents.
>
> (footnotes omitted)

**First ground of appeal: does s 48(1)(f) of the Reserves Act 1977 permit the granting of the easements?**

[53] This ground of appeal raises two issues. The first is whether the rights granted are easements at law. It is common ground that if the rights conferred on Mr Schmuck are not properly classified as easements, they cannot be easements for s 48(1)(f) and

---

21 At [61].
22 At [74].

the Minister could not reasonably consent to them.[23] The second issue is, even if the rights granted are easements, are they the type of easement provided for in s 48 of the Reserves Act?

[54] Both issues involve revisiting the earlier decision of Heath J.[24] We are not precluded from that course even though Heath J's judgment was not the subject of appeal. This is because the Society is not bound by that decision, as it was not party to the proceeding. We also note that although the easements are registered, the respondents do not plead or rely upon indefeasibility of title as relevant to any relief should the Society succeed with its appeal.

[55] There is no real dispute as to the basic principles as to the nature of an easement, although wide differences exist about their application.

*Legal principles of easements*

[56] An easement comprises either a positive or a negative right to derive some limited advantage from the land of another.[25] It is a right less than freehold or leasehold, and cannot confer the intensity of possessory control which is associated with either of those estates. If an interest is to be an easement, it must possess the following four characteristics:[26]

(a) there must be a tenement over which it is exercisable, referred to as the servient tenement, in this case the esplanade reserve. That benefit must be for another piece of land, referred to as the dominant tenement;[27]

---

23 This first issue was pleaded, and was raised in the amended points of appeal. However, it did not feature in written submissions filed for the Society. At the beginning of the hearing we raised with counsel whether the issue was pursued. Mr Bennion confirmed that it was. To ensure fairness to all parties we allowed the parties to file additional written submissions on this issue.

24 *Schmuck v Director-General, Department of Conservation*, above n 9.

25 Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at 596.

26 *Re Ellenborough Park* [1956] Ch 131 at 140.

27 In New Zealand, this requirement has been partially abrogated by s 291 of the Property Law Act 2007, which permits an easement not attached to, or appurtenant to, other land. However, this first requirement continues to apply to easements not registered "in gross" such as this one.

(b) the right must confer a benefit on the dominant tenement as distinct from conferring some merely personal advantage or convenience upon the dominant owner;[28]

(c) the dominant and servient owners must be different persons; and

(d) the right claimed must be capable of being the subject matter of a grant.

[57] As to the last, there are various aspects to this requirement. Relevant for these purposes are the following: the right must be sufficiently definite, there must be a capable grantor and grantee, and the right must not be so extensive it amounts to joint or exclusive occupation.[29]

[58] The test for whether the grant of an easement amounts to joint or exclusive occupation is usually formulated as whether the proposed easement would leave the owner with "reasonable use" of the servient land.[30] If it would not, then it could not be a valid easement even if the other characteristics are present because the right is not capable of being the subject matter of a grant. However, there is considerable uncertainty in the law as to how much occupation is too much occupation for the purposes of an easement and even as to what the appropriate test is for the fourth element outlined above.[31]

[59] In *Moncrieff v Jamieson,* the House of Lords was prepared to recognise rights to park cars as an easement, even though the exercise of the rights conferred excluded the owner from use of the land subject of the grant.[32] Lord Scott observed that every easement will bar some ordinary 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.[33] Although in some decided cases courts have assessed the impact upon

---

28 See *Re Ellenborough Park*, above n 26; *Ackroyd v Smith* (1850) 10 CB 164 (Comm Pleas); and *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389, (2002) 11 BPR 20,605.

29 *Re Ellenborough Park,* above n 26, at 164; and *Olo Ltd v KA No 3 Trustee Ltd* [2014] NZHC 1075, (2014) 15 NZCPR 332 at [28].

30 *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 (Ch).

31 Jonathan Gaunt and Paul Morgan (eds) *Gale on Easements* (20th ed, Thomson Reuters, London, 2017) at 34.

32 *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620.

33 At [54].

the whole land, Lord Scott saw the relevant inquiry as the impact of the easement upon the land affected by the rights conferred. He criticised also the reasonable use test, proposing as an alternative whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.[34]

[60] In that same case, Lord Neuberger said he was attracted to the view expressed by Lord Scott: that a right can be an easement, notwithstanding that it entails the grant of exclusive use for a limited purpose, if the owner of the servient tenement nevertheless retains possession and control. But he preferred not to decide the issue (and the case was not decided on this point) because of the possible implications of confirming such a principle. In particular, he was concerned that if the Court were to recognise as valid an easement granting exclusive occupation, that might lead to unexpected difficulties. He said:[35]

> … if the right to park a vehicle in a one-vehicle space can be an easement, it may be hard to justify an effectively exclusive right to store any material not being an easement, which could be said to lead to the logical conclusion that an occupation licence should constitute an interest in land.

It is also unnecessary for us to resolve the issue reserved by Lord Neuberger. In this case it is sufficient for our purposes to adopt as the test whether the Council, as administrator of the reserve, retains possession and, subject to the reasonable exercise of the right in question, control of the reserve. We are satisfied that is an appropriate explication of the expression "reasonable use".

[61] The insistence upon the four requirements for the grant of an easement was traditionally explained as a reluctance to qualify title to land with uncertain and onerous obligations.[36] But it is also necessary to distinguish between rights arising from easements, leases and licences because, as Lord Neuberger observed, the law proceeds upon the basis that these are different legal concepts. Common law and statute recognise and impose different rights and obligations depending upon whether the rights are properly construed as arising pursuant to a lease, licence or easement.

---

34 At [59].

35 At [144].

36 See Edward Burn and John Cartwright *Cheshire and Burn's Modern Law of Real Property* (18th ed, Oxford University Press, Oxford, 2011) at 640; and *Webb v Bird* (1862) 13 CBNZ 841 at 843.

In the case of reserves, as we come to, the Reserves Act regulates the right to confer licences, leases and easements quite differently.

[62] The next step is to apply these principles to the easements at issue on this appeal. These issues are difficult, arising in large part from the unusual nature of the easements the Council has purported to grant. They are extensive and poorly detailed, and they are designed to allow Mr Schmuck proprietary rights to carry on his business on the reserve.

*The use of the beach slipway: repair and maintenance of boats in Section 2 and the storage of boats on the reserve for this purpose (A6)*

[63] We first address the rights purportedly conferred in easement A6, as qualified by conditions 2(a)–(e). Mr Schmuck submits that this easement benefits the dominant tenement, the boatyard, because it supports the operation of his business which is located on his land. This easement permits:

(a) Boats that sit on cradles that are positioned wholly on the boatyard land, or wholly on the boatyard land and the turntable (which is partially on the reserve), to protrude into the airspace of Section 2 of the plan and the use of that section of the reserve for the maintenance and repair of those boats, at any time of the year and for any duration. Although condition 2(a) states that it allows Section 3 to be used for this use, that is inconsistent with the easement granted in "A" which relates to Section 2 only.

(b) Boats that sit on cradles that are partially or entirely on the reserve land to be stored on areas X and Y on the plan, and repair and maintenance done on them. The total aggregate of time working on the boats is limited to 60 days per year. Since the easement contemplates an adding up of part days, it is not clear if this contemplates 60 working days, or 60 x 24 hours. We note that areas X and Y extend over a significantly greater area than the beach slipway, but we assume that in practice these boats will be stored on that slipway.

*Does the easement accommodate the dominant tenement?*

[64] As discussed at [56], an easement must confer a real and practical benefit on the dominant tenement.[37] To satisfy this requirement, the right constituting the easement must have some necessary connection with the normal enjoyment of that tenement and be reasonably necessary for its better enjoyment.[38] In *Re Ellenborough Park,* Lord Evershed MR explained that:[39]

> … a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is *reasonably necessary* for the better enjoyment of that tenement, for if it has no necessary connexion therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties.
>
> (emphasis added)

[65] Where a business is so well established that its operation is properly seen as connected to the use of the land, as this business is, an easement may validly be granted that supports the operation of the business on the land.[40] Thus a public house may have an easement to fix a signboard to the house next door,[41] and a shop may have an easement allowing it to put a stall out in front of it on market day.[42] The easement accommodates the dominant tenement in that it supports the conduct of the business *on* the dominant tenement.

[66] Easements which support the overhang of items situated on the dominant tenement into the servient tenement also have been recognised in some circumstances. For example, in *Suffield v Brown* the Court accepted the proposition that an easement to allow the overhang of the bowsprit of a boat in dock into adjoining land could be

---

37 *Halsbury's Laws of England* (5th ed, 2017, online ed) vol 87 Real Property and Registration at [743].

38 See *Re Ellenborough Park*, above n 26. See also *Clapman v Edwards* [1938] 2 All ER 507 (Ch); *Ackroyd v Smith,* above n 28; *Bailey v Stephens* (1862) 12 CBNS 91 (Comm Pleas) at 115; and *Simpson v Godmanchester Corp* [1897] AC 696 (HL) at 707.

39 *Re Ellenborough Park,* above n 26, at 170; citing G C Cheshire *The Modern Law of Real Property* (7th ed, Butterworth, London, 1954) at 457.

40 *Clos Farming Estates Pty Ltd v Easton,* above n 28, at [30].

41 *Moody v Steggles* (1879) 12 Ch D 261.

42 *Ellis v Mayor of Bridgnorth* (1863) 15 CB (NS) 52.

the subject matter of a valid grant.[43] Likewise, in *Ward v Kirkland,* the Court accepted as valid an easement which permitted the necessary maintenance of buildings and structures on the dominant tenement that were situated hard up against the boundary of the servient tenement.[44]

[67] It might be that a right that allows the overhang of boats in the boatyard onto the reserve would satisfy the first required element for the grant of an easement because it supports the operation of the business on the dominant tenement. Possibly also a right to enter onto the reserve to work on those boats. But the rights conferred in A6 are far broader than that. An easement that allows boats to be located on cradles sitting entirely on the reserve and to be repaired or maintained in that position supports the business, but not its operation on the dominant tenement. The business conducted on the reserve does not touch the dominant tenement, even though the connected financial transactions may find themselves reflected in any books of account held on that site. The necessary connection between the rights and the enjoyment of the dominant tenement is therefore missing, and what is conferred is merely a personal advantage to the owner of the boatyard.[45]

[68] We have considered an argument that since the business is located on the dominant tenement, anything that supports it is in a sense supporting the dominant tenement. Clearly there are issues of degree involved. But where the business activity to be conducted on the reserve does not in any substantial way touch the dominant tenement, it seems to us that it is properly viewed as conduct on neighbouring land which confers a personal advantage on the business owner, and not an advantage on the land. It does not fulfil the first required element for an easement. Such a right could be supported by a licence or a lease, but not an easement.

*Is the right capable of forming the subject matter of an easement?*

[69] The Society also contends that this easement fails because the extent of occupation granted to Mr Schmuck amounts to joint occupation and the related point

---

43 *Suffield v Brown* (1864) 4 De G J & S 185 (KB). Although the right was not recognised as an easement in that case, the court accepted that such a right could, in appropriate circumstances, be the valid subject matter of a grant.

44 *Ward v Kirkland* [1967] Ch 194.

45 See *Re Ellenborough Park*, above n 26; and *Clos Farming Estates Pty Ltd v Easton*, above n 28.

that the rights granted are too wide and vague to constitute a valid grant of an easement.

[70] The necessary inquiry under this head involves consideration of the nature and extent of rights granted, and the clarity with which they are expressed. These concepts are related because conferral of rights of use and occupation that are uncertain as to extent and effect may undermine the ability of the servient-tenement owner to control his or her land depriving that owner of reasonable use. This is the point made in *Copeland v Greenhalf*:[46]

> Practically, the defendant is claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or at any rate, to a joint user …

[71] In this case the rights are, as the Society argues, both wide-ranging and uncertain. First, the rights are extensive. There is no limit to how often boats sitting on cradles situated entirely on the dominant tenement and/or turntable may protrude into the airspace of Section 2. There is also no limit on who and how many people can enter onto the reserve to work on boats protruding into Section 2. As currently drawn, any number of employees, agents, independent contractors or arguably boat owners could enter Section 2 and perform any task that fits within the description of repair and maintenance. Those tasks include sanding, water blasting, spray painting, application and removal of marine grade paint, installation and removal of rigging systems. The easement permits the repair to boat hulls utilising suitable materials such as fibreglass and wood.

[72] Boats may also be placed on cradles partially or entirely located on the servient tenement (Section 2). In practice, they will sit on the beach slipway. The easement provides some limits to the extent of use and circumstances in which this use will be allowed. But there is difficulty with those limits. The walkway is preserved by the condition that no part of any cradle may be positioned on area Z except for the haulage of a boat. That is clear enough. However, it is not clear what is

---

[46] *Copeland v Greenhalf* [1952] Ch 488 at [498].

meant by the wording: "which by virtue of their length or configuration cannot be moved so that they are entirely within the dominant tenement". Does it assume for the purposes of that measure that the boatyard is empty of other boats? Or does it allow that the boat cannot be moved on to the boatyard because it is full through the storage of other boats? We think the former is the better interpretation, but note the uncertainty in definition and the likely enforcement issues for any owner trying to control this.

[73] We have already noted the uncertainty as to the calculation of the 60-day limit but there is further uncertainty with that. Because of how the limit is expressed it appears to constrain only the time spent working on the boat, and not the time during which the boat can be stored on the beach slipway.

[74] We acknowledge that the conditions contained in the resource management consent are imported into this easement. But those conditions add little. The consent limits outdoor activities associated with the boatyard to 0700–2000 hours Monday to Friday, and 0800–2000 hours on the weekend and public holidays. In essence, it allows outdoor activities for all daylight hours. It provides that vessels may not be left on the beach slipway except as provided in the relevant resource consent. The consent allows boats to be stored there for repair.

[75] In argument, we raised with counsel the implications of the Health and Safety at Work Act 2015 and the legislative duties to ensure that the work is carried on in a safe manner. Counsel had not considered the issue and as a consequence, no evidence or argument addressed it. It is however an issue we flag for the parties, because of the obvious need to keep members of the public safe from any hazards or dangers that may arise from any work or substances generated by that work.[47] It seems to us that compliance with basic health and safety requirements is likely to require of Mr Schmuck that he keep the public away from parts of the reserve at times.

[76] There is also no limit on what materials may be brought onto the site to allow repair and maintenance. We accept the Society's submission that it is implicit in

---

[47] Health and Safety at Work Act 2015, ss 36 and 37.

the grant that Mr Schmuck will be able to take materials on site to allow this function to take place.

[77] Taken in their entirety, the rights granted to the boatyard are properly described as extensive and ill-defined, and to an extent that the Council cannot meaningfully exercise control over the use of Section 2 of the reserve by the boatyard. Council can enforce the 60-day limit, and there is adequate record-keeping to allow that — subject to the uncertainty as to the nature of the limit we have identified. Council cannot however exercise any meaningful control over the storage of boats on the beach slipway, or the entry of people onto the reserve to undertake work on boats protruding into the airspace of Section 2, at least during daylight hours.

[78] To conclude on this aspect of the rights conferred by easement A6 as registered, we are satisfied that they are not the type of rights capable of being created by easement to the extent they do not accommodate the dominant tenement nor are they rights capable of being the subject matter of a grant. To express this latter point in terms of the test as we have formulated it, it cannot be said that the Council retains possession and, subject to the reasonable exercise of the rights in question, control of the reserve. The rights conferred are so extensive and so uncertain that they amount to, at least, joint occupation of Section 2.

*Easement for the wash-down area (A3, 4 and 5)*

[79] The construction of the wash-down area and containment system (easement A3) is, as we understand it, part of the rebuilt slipway. We are told by Mr Browne for Mr Schmuck that the facility does not involve any additional structure above the slipway. The Society, appropriately, does not object to the slipway. We say appropriately, because the slipway supports the operation of a conventional and well-defined easement, allowing the passage of boats across the reserve to the boatyard. Since the wash-down area involves no additional structure, we consider it too can be the subject of a valid grant of easement.

[80] The right to wash down a boat on the reserve before it is moved to the dominant tenement might also be the subject of a valid grant of easement. That is because allowing this activity is incidental to the repair and maintenance of the boat

on the dominant tenement. But the easement conferred in A4 is broader than that. It also allows the washing down of boats on the reserve and returning them to the water as part of something like a boat valet service. Washing down of boats is, as the easement reflects, a distinct part of the business and easement A4 is drawn broadly enough to allow this part of the business to be conducted entirely on the reserve. We do not consider the easement, as drawn, is adequately focused upon support of the dominant tenement.

[81] A more narrowly drawn easement supporting the right to wash down a boat before it is moved to the dominant tenement might then be the subject of a valid grant of an easement. But as presently drawn, A4 cannot be.

[82] As to A5,[48] as worded it contemplates the erection of screens but is imprecise as to whether these are fixed to the ground or whether they are fixed to the boat cradle. We envisage that they would be fixed to the boat cradle and are included in the grant because of the requirements of the resource consents. If they are to be attached to the cradle, that should be made clear in the grant of easement. In any case, as presently drafted, the easement is too uncertain to be valid.

[83] Our conclusions on easements A3, 4 and 5 are therefore as follows:

(a) Easement A3 for the construction of a wash-down area and contaminant system is valid on its own terms. The issue arises with its use.

(b) Easement A4 for the washing down of boats is invalid as it allows the operation of a standalone boat wash service on the reserve.

(c) Easement A5 for the erection of screens is invalid as the grant is too uncertain.

---

[48] We do not know what practical steps compliance with the resource consents might entail. It would be of concern if compliance with resource consents, or indeed with health and safety regulation, required that the work area be fenced off from the public. This is not an issue we have taken into account in our analysis of the rights granted, but we imagine it is an issue to be further explored on any reconsideration of a request for consent to the grant of easements.

*Easement associated with the southern slipway tramrail*

[84] This is the easement contained in easement C. It allows the use of a two-metre strip that extends over Sections 2 and 3 of the plan for the purpose of accessing, repairing and maintaining boats sitting on the southern slipway tramrail.

[85] We see some merit in an argument that the right to access boats that rest on cradles located on this slipway adequately supports the operation of the business on the boatyard site — the second element of a valid grant of an easement. However the easement is, like the use of the beach slipway for repair and maintenance (A6), unlimited as to extent of use, numbers of persons entering the reserve for that purpose and the nature of the task they undertake on the boats, beyond the requirement that Mr Schmuck comply with any resource consent. Because of the inability to control use of this portion of land, the grant of easement deprives the Council of reasonable use of the land.

[86] As an aside, we also note considerable uncertainty with the term. The right to renew at 10 years appears to be an automatic and perpetual right of renewal, yet there appears the proviso "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". In the context of an automatic right of renewal, it is difficult to know how that proviso is to be construed.

*Discharge of contaminants and emission of noise*

[87] The rights conferred in easement E provide for the discharge of contaminants to air, soil, and water, and the emission of noise in accordance with any relevant resource consent. This easement is linked to the other easements as it permits the discharge of noise and contaminants from the activities on the reserve, including the exercise of easement A3. But it is also linked to the operation of the boatyard on the boatyard land, and enables noise and contaminants produced by that activity to be discharged on the reserve.

[88] It is common ground that it is possible to grant an easement for what otherwise might constitute a tort against the servient owner.[49] The right to discharge noise can be an easement, and so too can a right to discharge contaminants.[50]

[89] The Society argues that the right is too ill-defined to be the subject matter of an easement. We do not accept that to be so, as the necessary definition is provided by the reference in the easement to the relevant resource consent and the management plan developed thereunder. These provide the constraints that allow the servient owner to ensure the owner retains control and possession of the site notwithstanding the right to discharge contaminants. They control the level of noise, and the permissible contaminants to ensure that noise and contaminant discharge is consistent with continued public use of the reserve.

[90] We conclude that easement E is valid, in so far as it supports the operation of easement A3 and the operation of the boatyard on boatyard land.

*Conclusion on validity of easements*

[91] We have identified the following rights conferred pursuant to the easements consented to in 2015 as capable of a valid grant of easement if separated out from the other invalid grants:

(a) A right to allow overhang of boats located on the boatyard land onto the reserve (part of easement A6, condition 2(a)).

(b) Construction of a wash-down area and contaminant system (easement A3).

(c) A right to wash down boats on the beach slipway prior to their being moved up the beach onto the boatyard land (part of easement A4).

---

[49] See *Re State Electricity Commission (Vic) & Joshua's Contract* [1940] VLR 121; *Wright v Macadam* [1949] 2 KB 744; and *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476 (PC).

[50] *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822.

(d) The noise and contaminant easement (easement E).[51]

[92] Other rights conferred under the easements as consented to in 2015 cannot properly be characterised as giving rise to an easement as that term is understood in the common law, and it follows, in the Act. The right to store boats on cradles located on the reserve and to work on them in that location (easement A6) does not accommodate the dominant tenement but rather confers benefits personal to Mr Schmuck and his business. So too the right to haul out boats for the sole purpose of washing them on reserve land (easement A4).

[93] The rights to enter onto the reserve to work on boats beyond washing them down (easements A6 and C) are too broad and ill-defined, giving rise to issues of joint occupation over the servient tenement. As we have noted, it is possible that some of the easements could be redrawn more narrowly to constitute the valid grant of an easement. But the issues on this appeal are to be determined in accordance with the easements as currently registered.

*If the rights amount to easements, are they the type of easement contemplated by s 48(1)(f) of the Reserves Act?*

[94] A further argument advanced by Mr Bennion for the Society is that in light of the language, statutory context and purpose of the legislation, the word "easement" in s 48(1)(f) should be given a context specific meaning. This flows from the particular examples of easements given in s 48(1)(f), which are easements allowing distribution or transmission of materials to the servient property. Further, other provisions in the Reserves Act regulate the circumstances in which reserve land can be leased (s 61) or licensed (s 74), or in respect of which concessions can be granted for non-public uses (s 59A). It would be wrong, argues Mr Bennion, to allow the granting of easements to subvert this statutory scheme.

[95] Both Heath and Fogarty JJ rejected an argument that the language of s 48(1)(f) supports reading down the ordinary meaning of the word "easement". We agree. If it had been intended to constrain the type of easement in the manner Mr Bennion

---

[51] Easement E continues to be necessary to allow the discharge of contaminant and noise generated by boatyard activities on the boatyard land and by the exercise of easement A3.

contends, then Parliament would have used words of limitation and not the expression "or for any other purpose connected with any such land". We also see it as relevant to the exercise of interpretation that to give the words of s 48(1)(f) their ordinary meaning does no violence to the scheme or purpose of the Reserves Act. As we have explained, there are limitations upon the rights capable of being granted through an easement. One of the limitations is the requirement that the right created relate to and accommodate the dominant land. And as we have already mentioned, there is the added protection that in considering whether to grant consent, the Minister would have to consider whether the grant of the easement was consistent with the purpose of the reserve and the overall purpose of the Act.

[96] The Society is of course right that the broader statutory context is relevant to the interpretation of s 48. In this regard, we note that the Council has very broad powers to lease the reserve. It has powers conferred under the Public Bodies Leases Act 1969 and powers conferred by s 61(2A) of the Reserves Act. The leasing powers conferred by the Public Bodies Leases Act are, as Mr Browne submits, relatively unconstrained in terms of that Act. But constraint comes from the provisions in the Reserves Act. Section 40 requires that the Council administer the reserve under its control "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". Section 61(1) provides that in fulfilling the role conferred on it by s 40, the Council may "do such things as [the Council considers] necessary or desirable for the proper and beneficial management, administration and control of the reserve and for the use of the reserve for the purpose specified in its classification".

[97] The power to grant licences is more constrained than the leasing power. Like the power to lease, licences are to be granted only where necessary for the management of the reserve for the purpose for which it is classified. Even then, the types of licence possible are limited to the following:

**74 Licences to occupy reserves temporarily**

…

(2) Where, in the opinion of the Minister or, as the case may be, the administering body or the Commissioner, it is necessary or desirable for the management of the reserve for the purpose for which it is classified, licences to occupy any recreation, historic, scenic, scientific, government purpose, or local purpose reserve, or any part of any such reserve, may be granted for the following purposes:

(i) grazing, gardening, or other similar purposes:

(ii) cutting, felling, or removing timber or flax, or to win and remove timber or flax or to win and remove kauri gum.

…

[98] The power to grant an easement under s 48 is of a different order. The Council is authorised to grant easements beyond those necessary for the management of the reserve for the purpose for which it is classified, such as easements for the transmission of gas and electricity, or the supply of water to other land. That is why the section provides for public notification of proposed easements which in the long term affect the rights of the public in respect of the reserve, or which materially alter or damage the reserve.[52]

[99] The power to grant easements is therefore less constrained than the power to lease or license the land, in the sense that it need not be exercised for the purpose for which the reserve is classified. If rights more consistent with the grant of a licence are treated as rights granted under an easement, that does tend, as Mr Bennion submits, to subvert that scheme. None of this justifies reading down the meaning of the word "easement" for the purposes of s 48(1)(f). But it does highlight how important it is to uphold the distinctions that exist in the common law between the concepts of lease, licence and easement. In particular, the requirement in the existing law that the easement accommodate the dominant tenement. It is the existence of a broader public purpose,[53] as each can be seen as enabling the grant of easements for a broader public purpose, and the need to accommodate nearby land which underlies the

---

52 Reserves Act 1977, s 48(3).

53 Reserves Act, s 48(1)(a),(c),(d) or (e).

exception s 48 represents to the requirement that Council exercise its powers for the management and control of the reserve only for the purpose of its classification.

*Conclusion on first ground of appeal*

[100] To conclude on this issue, we are satisfied that some of the challenged rights granted to Mr Schmuck were not capable at law of being granted as easements. The Council, as the Minister's delegate, proceeded upon an incorrect view of the law when consenting to those grants. We think it important to observe that in doing so Council relied upon a decision of the High Court, and Council's error in this regard is to be seen in this context.

[101] The first ground of appeal is allowed and the Minister's 2015 decision to consent to the grant of the challenged easements is quashed, save in respect of easements A3 and E.

**Second ground of appeal: did the Minister fail to take into account relevant considerations?**

[102] The notice of appeal raised a variety of grounds under this heading but by the time of the hearing, the issue reduced to this point: did the Minister fail to take into account a mandatory consideration — the administration of the Act for the purpose of ensuring that, as far as possible, there be no unnecessary development of the reserve?

[103] Section 3, the purpose section, relevantly provides:

> **3 General purpose of this Act**
>
> (1) It is hereby declared that, subject to the control of the Minister, this Act shall be administered in the Department of Conservation for the purpose of—
>
> (a) providing, for the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing—
>
> (i) recreational use or potential, whether active or passive; or
>
> (ii) wildlife; or
>
> (iii) indigenous flora or fauna; or

(iv) environmental and landscape amenity or interest; or

(v) natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, community, or other special features or value:

(b) ensuring, as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape which in the aggregate originally gave New Zealand its own recognisable character:

(c) ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands, lakeshores, and riverbanks, and fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.

(2) In the exercise of its administration of this Act, the Department may take any action approved or directed from time to time by the Minister so far as it is consistent with this Act or is provided for in any other Act and is not inconsistent with this Act.

[104] This ground of challenge was pleaded but the detail of it was not addressed by Fogarty J in the High Court. As earlier discussed, he did however consider the approach to be taken by the Minister, or Minister's delegate, to the grant of consent. He said:[54]

> [82] Mr Brown pointed out that the requirement of s 48(1) for the consent of the Minister is, as I have just pointed out, a check, not a full consideration starting again as it were. That is the way it is presented in the internal advice within Government, and in my view, that is the correct interpretation of the relationship between the powers vested in the administering body and the powers vested in the Minster or the Minister's delegate in s 48(1).
>
> [83] The consequence of this reasoning is that to succeed the plaintiff must be able to impugn the original reasoning of the administering body by finding an error which should have been picked up in the review by the Minister's delegate. There are a number of arguments which I will note and answer.

[105] There are three issues that arise under this ground of challenge. The first is whether the purposes identified in s 3 are a mandatory consideration for the Minister under s 48(1). The second is whether the challenged easements are properly assessed as permitting development for the purposes of s 3 of the Reserves Act. The third is

---

[54] High Court judgment, above n 1.

whether the Council, as the Minister's delegate, considered that issue when deciding whether to grant consent.

*What are mandatory considerations for the Minister?*

[106] While we agree that the scheme of s 48 makes it clear that the Minister is not required to undertake a full merit-based assessment of the proposed easements, 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.

[107] In determining what matters are to be considered by the Minister under s 48(1)(f), it is necessary to identify precisely the nature of the statutory task set.[55] The classic statement of this principle is that of Lord Greene MR:[56]

> The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

[108] It is also necessary to distinguish between mandatory considerations and discretionary considerations — between those which the decision-maker must take into account and those which the decision-maker may take into account. As was said by Cooke J in *CREEDNZ Inc v Governor-General*: [57]

> … it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked.

[109] In this case, there is no listing of mandatory or discretionary considerations for the Minister. The scheme of the Act however provides clear indications as to relevant considerations and as to those which are mandatory.

---

55 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183 and 197; and *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252 (HC) at 261.

56 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 228.

57 *CREEDNZ Inc v Governor-General,* above n 55, at 183.

[110] The Act requires Council to give notice of its intention to grant an easement and it is the Council, not the Minister, that is required to consider any objections under s 48(2). 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.

[111] We think it a necessary implication of the overall statutory scheme and s 48 in particular that, in exercising the s 48(1) discretion, the Minister must have regard to the legal constraints upon the rights that can be conferred under the Act and the purposes of the Act. These are, we consider, mandatory considerations for the Minister.

*Do the challenged easements permit development for the purposes of the Reserves Act?*

[112] It is at this point we feel we must comment upon the way in which this proceeding has developed in the High Court and before this Court. The nature of the issues pursued by the Society has shifted a number of times. Some matters have been conceded which in our view might have usefully been explored (such as the delegation to the Council) while others have been conceded only to be reopened, such as whether the approach Fogarty J took to the role of the Minister was correct. The Judge's description of the Minister's role was agreed to be correct in the statement of issues, but opened up again in argument, inevitably we think.

[113] We have decided not to address this ground of appeal because of the unsatisfactory way the appeal grounds shifted during the proceeding and even during hearing. We are not satisfied that we had available to us the argument and evidence necessary for proper consideration of the issues. Nor are we even satisfied that argument addressed the true issues raised by the facts of this case.

[114] This aspect of the appeal focused on whether the easements permitted development, and whether that development was necessary. We were taken to cases said to be relevant as to what was "necessary". It seems to us that a better focus is upon the broader purpose, of which protection from unnecessary development forms only a small part: the purpose of "fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development".[58] Whether or not these easements entail development of the land, the conduct of a boatyard business on the reserve and the presence of workers carrying out noisy work which releases contaminants into the environment detracts from the natural environment. Before granting an easement with that effect, the Council and Minister would have to consider whether the grant was necessary to support the dominant tenement. Alternative solutions which would avoid this impact upon the reserve would have to be considered.

[115] Having decided not to further address this ground of appeal as formulated, we proceed to consider the third and fourth grounds of appeal.

**Third and fourth grounds of appeal: easement to discharge contaminants**

[116] The third and fourth grounds of appeal can be shortly dealt with.

[117] The Society's argument in respect of each ground can be reduced to this: the Council, as the Minister's delegate, should have limited the discharge easement granted so that it was no broader than the resource consents. The Council argues that we should not address these grounds as they were not pleaded or argued before Fogarty J. We do not address this procedural point because the grounds are so shortly dealt with. The grant of easements is subject to compliance with any resource consent. In that case the exercise of the rights conferred is subject to the resource consents and constrained by them. These two grounds are therefore without merit.

---

58 Reserves Act, s 3(1)(c).

## Conclusion

[118] Several of the easements challenged in this proceeding could not be the subject of the grant of an easement to Mr Schmuck in the form registered.

[119] The Minister's 2015 consent to that grant, given by the Council acting as the Minister's delegate, was unreasonable in these circumstances as it was informed by an error of law. Accordingly, the Minister's decision of 5 June 2015 consenting to the grant of easement is quashed, save in respect of easements A3 and E.

[120] In light of the fact the easements at issue in this proceeding are registered, we reserve leave for the parties to apply for consequential orders if required.

**Result**

[121] For these reasons, the appeal is allowed.

[122] The Minister's decision of 5 June 2015 to consent to the easements is quashed, save in respect of easements A3 and E.

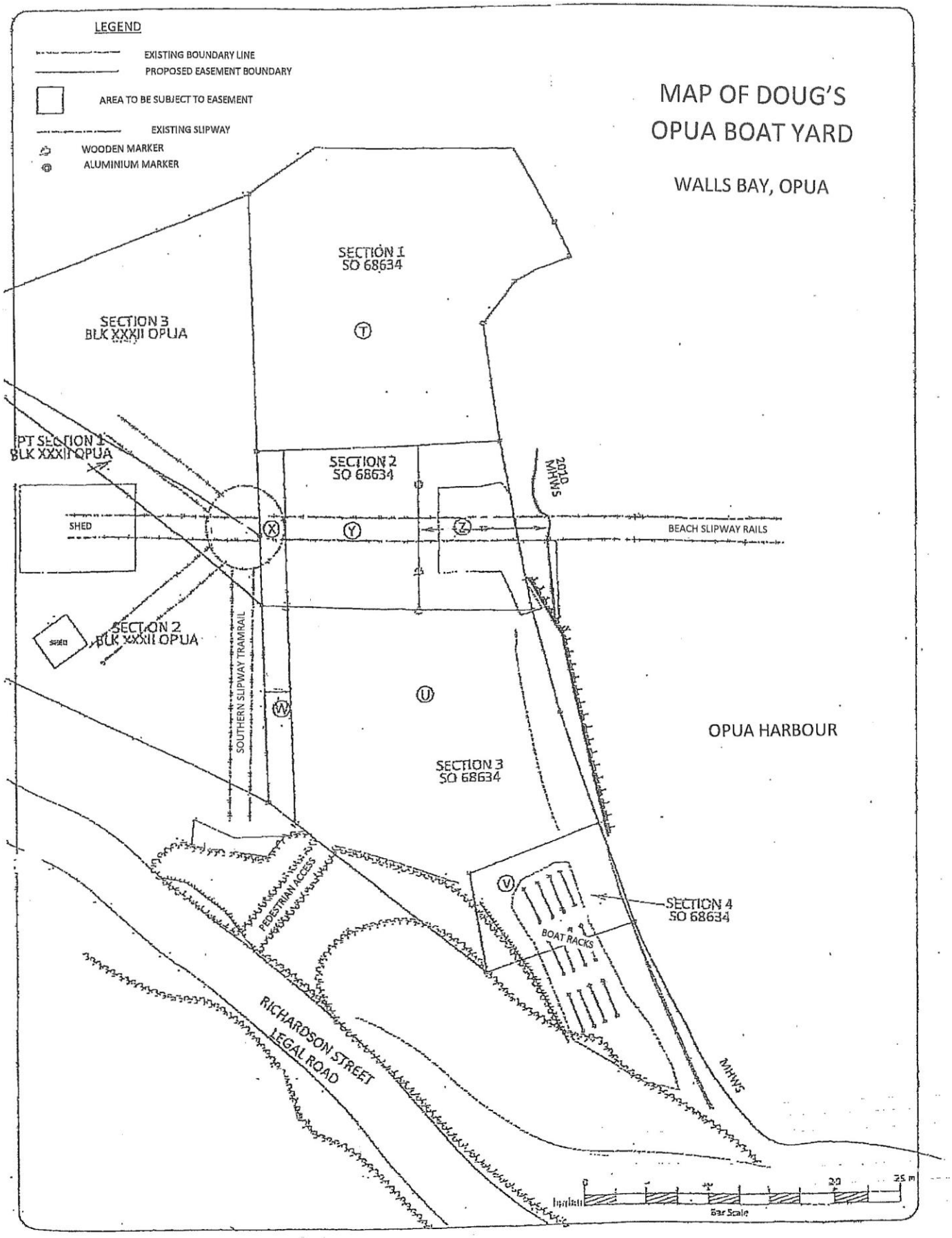
[123] The Society has been successful in this appeal and is entitled to its costs. However the second respondent took no part in the appeal other than to appear to provide assistance to the Court on one narrow point, otherwise abiding by the decision of the Court. We do not consider the second respondent should be liable for costs on this appeal.

[124] The first and third respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[125] Costs in the High Court are remitted back to that Court for determination.

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

## ANNEXURE I


LEGEND
EXISTING BOUNDARY LINE
PROPOSED EASEMENT BOUNDARY
AREA TO BE SUBJECT TO EASEMENT
EXISTING SLIPWAY
WOODEN MARKER
ALUMINIUM MARKER
MAP OF DOUG'S
OPUA BOAT YARD
WALLS BAY, OPUA
SECTION 1
SO 68634
SECTION 3
BLK XXXII OPUA
T
PT SECTION 1
BLK XXXII OPUA
SECTION 2
SO 68634
2010 MHWS
SHED
X
Y
Z
BEACH SLIPWAY RAILS
SECTION 2
BLK XXXII OPUA
SOUTHERN SLIPWAY TRAMRAIL
W
U
OPUA HARBOUR
SECTION 3
SO 68634
V
SECTION 4
SO 68634
BOAT RACKS
PEDESTRIAN ACCESS
RICHARDSON STREET
LEGAL ROAD
MHWS
0
20
35 m
Bar Scale