IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA34/2024
[2024] NZCA 616

BETWEEN	KAIMAI PROPERTIES LIMITED First Appellant	
	BARTONS KAIMAI FARM LIMITED Second Appellant	
AND	QUEEN ELIZABETH THE SECOND NATIONAL TRUST First Respondent	
	REGISTRAR-GENERAL OF LAND Second Respondent	

Hearing:	29 August 2024 (further submissions received 30 August 2024)
Court:	Cooke, Peters and Grice JJ
Counsel:	I C Bassett and T C Waikato for Appellants D M Salmon KC, T P Mullins and M J Parker for First Respondent E I S Botting for Second Respondent
Judgment:	26 November 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the first respondent costs for a complex appeal on a band A basis. We certify for three counsel.

REASONS OF THE COURT

(Given by Cooke J)

[1] The appellants appeal against a decision of the High Court declining their applications for judicial review, declarations, and other relief.[1] They have advanced a series of arguments directed to challenging the legitimacy of a Queen Elizabeth the Second (QEII) open space covenant — which is administered by the first respondent — established on land they now own which is adjacent to a quarry that they have operated for a number of years. In essence, the appellants want to expand their quarry activities into the area which is subject to the covenant and they need to challenge the legitimacy of the covenant to do so.

[2] This is the second set of proceedings in which they seek to achieve this outcome. In 2017, they took proceedings to seek a declaration that the terms of the open space covenant permitted them to carry out their expanded quarrying activities without the consent of the first respondent, or alternatively orders rectifying the terms of that covenant to allow those activities. Those claims were rejected by the High Court and subsequently by the Court of Appeal.[2]

[3] Following this unsuccessful litigation, the appellants took further advice, and now advance a series of new arguments that were not advanced in the first proceeding. A central feature of these arguments is that the open space covenant was never lawfully established in accordance with s 22 of the Queen Elizabeth the Second National Trust Act 1977 (the Act), although other claims are advanced. The amended statement of claim dated 26 August 2022 pleads seven new causes of action, or claims for declaratory or judicial review relief. By judgment dated 6 December 2023, Isac J rejected all of those claims.[3] The appellants now appeal. The appeal is opposed by the first respondent. The second respondent abides the decision of the Court.[4]

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1 *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2023] NZHC 3433 [Judgment under appeal].

2 *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2019] NZHC 1591; and *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2021] NZCA 10, (2021) 21 NZCPR 889 [Court of Appeal judgment].

3 Judgment under appeal, above n 1.

4 We note that Airways Corporation of New Zealand Limited and Lightwire Limited were granted leave to intervene. They did not file written submissions nor did they make oral submissions before us.

Factual background

[4] The relevant facts are largely not in dispute, and there is an agreed statement of facts between the parties. Like the High Court Judge, we consider the background facts were accurately summarised by this Court in its previous decision.[5] The following paragraphs represent a restatement of part of that summary.

[5] The two blocks of relevant land in issue are adjoining titles in the Kaimai Range: the main block, which includes the quarry, and a smaller adjoining block. The second appellant, Bartons Kaimai Farm Ltd (Bartons) operated a quarry on the main block from 1973 and then purchased that block in June 1979. In March 1982, it sold the land to Hiona Heights Ltd, owned by a Mr Ian Diprose. Mr Diprose already owned the smaller block. In September 1982, Bartons and Hiona entered into an agreement giving Bartons the right to operate the quarry in a defined area for a 40-year term commencing 21 December 1981 (the 1982 Agreement). During that term no royalties were payable on rock mined.

[6] In 1983, Hiona entered a Land Improvement Agreement with the Hauraki Catchment Board, whereby Hiona agreed that 100 ha of the mainly southern parts of the main block would be held as a reserve and protected from stock grazing.

[7] In 1986, the Swap family purchased Bartons. The first appellant, Kaimai Properties Ltd (Kaimai), is part of a group of companies owned by the Swaps.

[8] In 1993, Hiona and Bartons reached an agreement under which Bartons retained its entitlement to operate the quarry within a defined quarry area until 2021 with no payment of royalties to Hiona (the 1993 Agreement).[6] The 1993 agreement provided for a right of renewal for a further 40 years at a royalty rate to be agreed. It also contemplated the expansion of the quarry beyond the existing southeastern boundary. Clause 6 provided that expansion outside of the quarry area, if necessary, would be subject to further negotiations between Hiona and Bartons, as would the question of any additional royalty payments.

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5 Court of Appeal judgment, above n 2, at [3]–[24].

6 The 1993 Agreement was reached in 1993 but executed in 1995.

[9] In April 1998, the Matamata-Piako District Council granted a certificate of compliance for the quarry operation. This confirmed existing land use rights. These provided for expansion of the quarry to the east.

[10] In 2003, Hiona reached an agreement with the Matamata-Piako District Council regarding the proposed establishment of a green belt. A Development Concept Plan was developed and agreed in April 2003. The plan allowed quarrying, as well as conservation and commercial forestry, in the quarry area. The proposed expansion of the quarry, at least for that 10-year timeframe, was again to the east.

[11] In November 2004, Mr Diprose began looking for ways to reduce his rates burden and get some fencing assistance. The Waikato Regional Council suggested he place parts of the land under covenant and put him in contact with Mr Hamish Dean of the first respondent, the Queen Elizabeth the Second National Trust (the QEII Trust).

[12] In February 2005, Mr Diprose met with Mr Dean and Mr Rien van de Weteringh of the Waikato Regional Council at the blocks to discuss the possibility of covenanting the land. Messrs Diprose and Dean met several times subsequently.

[13] The QEII Trust board subsequently approved two open space covenants over 151.2 ha of land in the blocks on 18 May 2005. The Diproses signed the covenants in September 2005.

[14] The covenants, featuring agreed boundaries depicted in aerial plans, were registered over the blocks on 15 October 2007. The economic benefits of the covenants to Mr Diprose were modest: a sum of approximately $11,000 from the QEII Trust for surveying, fencing, and planting, and approximately $7,000 from the Waikato Regional Council for the latter two, together with a modest annual rates remission in respect of the land (which was less than $150).

[15] The most relevant clauses of the covenants are cls 2.1, 2.2(g), and 4.1 of sch 2:

> 2.1 No act or thing shall be done or placed or permitted to be done or remain upon the Land which in the opinion of the Board materially alters the actual appearance or condition of the Land or is prejudicial to the Land as an area of open space as defined in the Act.
>
> 2.2 In particular, on and in respect of the Land, except with the prior written consent of the [QEII] Trust, or as outlined in Schedule 3, the Owner agrees not to:
>
> …
>
> (g) Carry out any prospecting or exploration for, or mining or quarrying of any minerals, petroleum, or other substance or deposit.
>
> …
>
> 4.1 If notified by any authority, body or person of an intention to erect any structure or carry out any other work on the Land, the Owner agrees:
>
> (a) to inform the authority, body or person of this Deed;
>
> (b) to inform the [QEII] Trust as soon as possible; and
>
> (c) not to consent to the work being done without consulting the [QEII] Trust.

[16] Schedule 3 of the covenants recorded special conditions relating to the use of the land. Both covenants allowed the continued use of farm tracks and water for farming purposes, and cl 3 of sch 3 of the main block covenant allowed the continued use and expansion of communications and radar facilities located in the southeast corner of the main block. There is no special condition allowing expansion of the quarry into the covenant areas.

[17] In 2009, Hiona (and Mr Diprose) agreed to sell both blocks to Kaimai. During negotiations, the Swaps first became aware of the open space covenants. Following legal advice, the sale proceeded in September 2009 with ownership of the blocks transferring to Kaimai.

[18] In 2012, the Swaps determined the quarry would soon need to expand south, thereby affecting 40 ha of the covenanted area. Following a formal proposal by its sister company, Bartons, to expand the quarry, Kaimai advised the QEII Trust of the

request in October 2015. Kaimai took the position that cl 4.1 only obliged it to consult with the QEII Trust, but the QEII Trust had no right of veto over the expansion.

[19] In November 2015, the QEII Trust advised it considered it had a veto right and did not consent to the expansion. Kaimai commenced their first proceeding in 2017.

Effect of s 22 of the Act

[20] As indicated, the appellants advanced seven causes of action in an amended statement of claim which extends to some 75 pages. The first through to the fifth and seventh claims all involve arguments that the appellants had an interest in the land that was made subject to the QEII covenant, and as a consequence the QEII covenant was not lawfully established. The High Court Judge found that the appellants did not have such interests in the land.[7] But he also found against the appellants on the interpretation of s 22,[8] and we address this issue first as it is a pre-condition for many of the arguments advanced.

[21] Section 22 of the Act relevantly provides:

> **22 Open space covenants**
>
> (1) Where the board is satisfied that any private land, or land held under Crown lease, ought to be established or maintained as open space, and that such purpose can be achieved without the Trust acquiring the ownership of the land or, as the case may be, the lessee's interest in the land, the board may treat and agree with the owner or lessee of the land for the execution by the owner or lessee in favour of the Trust of an open space covenant on such terms and conditions as the board and the owner or lessee may agree.
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> (2) In the case of any private land, where the person with whom the board is treating is an owner by virtue of being a lessee of the land, the consent of the lessor (and, if the land is Maori land, of the Registrar of the Maori Land Court) shall be required to the execution of the covenant, and any such consent may be given subject to the inclusion in the open space covenant of any conditions that the person giving his consent thinks necessary.

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7 Judgment under appeal, above n 1, at [59]–[61]. The Judge accepted that the appellants had interests in the land at the time the QEII open space covenant was registered in terms of a registered second mortgage, and an unregistered interest in the form of a right to quarry rock at the quarry site.

8 At [95]–[96].

(3) In the case of a Crown lease, the consent of the person or authority charged with the administration of the land shall be required to the execution of the covenant; and that person or authority may consent subject to the inclusion of any conditions in the open space covenant, and may agree to a reduction in rent if, having regard to the basis for fixing the rent, it appears fair and equitable to do so.

(4) The effect of an open space covenant shall be to require the land to which it applies to be maintained as open space in accordance with the terms of the covenant and, subject always to those terms, in accordance with the other provisions of this Act relating to land to which open space covenants apply.

(5) An open space covenant may be executed to have effect in perpetuity or for a specified term, according to the nature of the interest in land to which it applies and the terms and conditions of the agreement between the Trust and the owner.

(6) Notwithstanding any rule of law or equity to the contrary, every open space covenant shall run with and bind the land that is subject to the burden of the covenant, and shall be deemed to be an interest in the land for the purposes of the Land Transfer Act 2017.

(7) On application by the board, the Registrar-General of Land must note the covenant on the register.

(8) Where the burden of the covenant applies to land comprising part of the land in a record or other instrument of title, the Registrar-General of Land may require the deposit of a plan in accordance with section 224 of the Land Transfer Act 2017; or, in lieu of such a plan, the Registrar-General of Land may accept a document incorporating the covenant, so long as the document is accompanied by a certificate given by the Surveyor-General, or the Chief Surveyor of the land district in which the land is situated, to the effect that the covenant is adequately described and properly defined—

(a) for the nature of the covenant; and

(b) in relation to existing surveys made in accordance with regulations for the time being in force for the purpose; and

(c) in accordance with standards agreed from time to time by the board and either the Surveyor-General or the Chief Surveyor, as the case may be.

[22] Critical to the appellants' argument is the definition of "owner" provided in s 2:

owner, in relation to any private land, includes any person having any interest in that land

[23] At its heart, the argument of Mr Bassett for the appellants is straightforward. The appellants contend that they had interests in the land at the time the covenant was created, they were accordingly an "owner", and they did not agree to the creation of the covenant as was required by s 22(1). The covenant was unlawfully established as a consequence.

[24] We accept that, if the use of the word "owner" in s 22(1) includes any person having any interest in the land, this aspect of Mr Bassett's argument must be right if the appellants are able to establish that they had such an interest. But we do not agree that this is the correct interpretation of the section.

[25] The defined terms in s 2 of the Act apply "unless the context otherwise requires".[9] The approach to this qualification on the applicability of defined terms was confirmed by the Supreme Court in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* in the following terms:[10]

> [65] … where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While we accept Mr Jagose's point that the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

[26] Here, we consider that the contrary intention is identified from the immediate context provided by the language of the provision.

[27] Section 22(1) contemplates the QEII Trust achieving the purpose of maintaining land as open space for the public benefit in one of two ways. The first is by the QEII Trust acquiring ownership of the land (or in the case of leasehold land, the lessee's interest in the land). The second is by the QEII Trust securing agreement to a covenant with the owner (or in the case of leasehold land, the lessee).

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9 Queen Elizabeth the Second National Trust Act 1977, s 2.

10 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212.

[28] Given that this is what the section provides, we consider it clear that the word "owner" in the subsection does not mean every person who has an interest in the relevant land. Rather, it is referring to the owner of the land earlier identified in the subsection — that is, the person from whom the QEII Trust could have acquired the land. So, when the section refers to two alternatives — the QEII Trust acquiring ownership, or the QEII Trust agreeing with the owner to a covenant — it is clear that Parliament contemplated the "owner" to be the owner of the estate that could be so purchased. That is the owner of the freehold estate.

[29] The subsection also addresses a complication arising with respect to leasehold land. With leasehold land, s 22(1) contemplates the QEII Trust either acquiring the lessee's interest, or the lessee agreeing to the covenant. The statute is referring to the QEII Trust dealing with two categories of owner — the person holding the freehold estate, and the person holding the leasehold estate. Seen in those terms, the word "owner" cannot have been intended to include everyone with an interest in the land. The context requires the words to be given the meaning identified by their use within the provision.

[30] This is then further confirmed by subs (2) and (3). In subs (2), Parliament is providing that when the QEII Trust is dealing with a lessee, the consent of the lessor is also required. If it is Māori land, the lessor's consent is given by the Registrar of the Māori Land Court. If the appellants' argument was correct this subsection would be entirely redundant — all persons having an interest in the land would have to agree to the covenant under s 22(1). What subs (2) does is expressly address when the consent of another person having an interest in the land is required. In particular, when the QEII Trust seeks to obtain a covenant with leasehold land, the lessee must agree, and the lessor must consent. There is no such requirement for consent with respect of those holding other interests in the land.

[31] A further elaboration is then addressed in subs (3). When the lessee's interest arises from a Crown lease, then it is the consent of the person or authority charged with administering the land that is required. Again, if the appellants' argument was correct this subsection would be redundant, as the Crown would have had to have agreed to the covenant under s 22(1) by virtue of its interest in the land.

[32] As indicated in *AFFCO New Zealand Ltd*, context can also be provided by the legislative history.[11] When the Bill which became the Act was reported back from the select committee, it was noted that Federated Farmers had submitted that the definition of "owner" could include a lessee. But QEII covenants were supposed to be in perpetuity, yet some leases would be only of a limited period of time. The Department of Lands and Survey responded to this submission by proposing that the Bill be amended to add the following provision:[12]

> In the case of a lease, the consent of the freehold owner shall be necessary for the execution of the covenant and the owner may give his consent subject to the inclusion in the open space covenant of any conditions that he thinks necessary.

[33] That change was then incorporated in the legislation in terms of what is now s 22(2) and (3). It might be said that the architects did not grapple with the full implications of the defined term "owner" when these changes were proposed and agreed. But it is clear from this legislative history that the only additional person whose consent was contemplated was the owner of the freehold estate when the lessee agreed to the covenant. That is consistent with the interpretation that we consider arises from the plain meaning of the enactment.

[34] The references in the Parliamentary debates are also consistent with the view we take of the provision. During the second reading of the Bill, the Minister of Lands, the Hon V S Young stated:[13]

> It may be helpful to the House if I explain in more detail how the open space covenants are to be negotiated. *The covenant is simply an alternative to the outright acquisition of land* when, for example, the requirement is to preserve a representative and aesthetically pleasing area of existing landscape from some form of detrimental development. A covenant will be for a specific period or could be in perpetuity and can be registered against the land title. It will be a purely voluntary matter. *Landowners can approach the trust or vice versa.* If either party does not wish to negotiate, the matter lapses at that point. The question of the amount of consideration to be paid will be dependent on the uses the landowner might forego in permitting the trust to take out a covenant. Public access, use, or even some development may be involved, or alternatively the covenant may simply protect the land from detrimental

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11 At [65].

12 Department of Lands and Survey *Queen Elizabeth II National Trust Bill: Report to Lands and Agriculture Select Committee* (Departmental Report, October 1977) at 8.

13 (1 December 1977) 416 NZPD 4923–4924 (emphasis added). See also (4 August 1977) 412 NZPD 1918.

> development. *The Bill uses the words "treat and agree", and this has been inserted to be deliberately flexible to allow both parties to come to any kind of mutually agreed arrangement.*

[35] This further confirms what is apparent from the terms of the provisions themselves. The provision allowing for the creation of a covenant involved an alternative technique to achieve the purposes of the Act. The QEII Trust could, instead of purchasing the land, reach agreement with the landowner for a covenant. So, the term "owner" in s 22(1) refers to that landowner.

[36] The parties, and particularly the appellants, advanced a number of more complex and sophisticated arguments addressed to this interpretation question, but we respectfully consider they do not need to be addressed to identify the correct interpretation. Parliament's intention is clear. It has identified precisely which persons the QEII Trust should deal with, and precisely from whom consent is required.

[37] Once the required process is followed, the Registrar-General of Land is obliged to register the covenant under s 22(7), and it then runs with the land.[14] It is possible that the creation of a covenant would be inconsistent with a registered or unregistered interest in the land held by a third party. If so, the owner could potentially be acting in breach of obligations by entering the covenant, and could be exposed to liability. Given that possibility, it may well be a matter of good practice for the QEII Trust to have procedures to check that the creation of the covenant is not inconsistent with third-party rights. But these matters are not regulated by s 22 which contemplates a more limited process for securing agreement and consent for the establishment of a covenant, which the Registrar-General must then register. We also consider s 22(7) exists in these terms to ensure the covenant is registered notwithstanding any such arguments.

[38] Given these conclusions, we do not need to address the detailed arguments advanced by the appellants to establish that they had an interest in the land. These arguments were largely rejected by the High Court Judge, and we see no reason to reassess them given the conclusions we have reached.

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[14] *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [43].

Challenge to variation decision

[39] In a sixth cause of action the appellants advanced a separate judicial review challenge to the decision made by the QEII Trust not to vary the covenant in accordance with its powers to do so under s 22A of the Act, which provides:

> **22A Variation of open space covenants**
>
> (1) Subject to subsections (2) and (3), the board and the covenantor may, by a memorandum of variation executed by them both,—
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> (a) make to any of the terms and conditions of an open space covenant executed under section 22 any variation that is not contrary to the purposes and objectives of the covenant; and
>
> (b) correct any error of description in the covenant (whether with respect to the boundaries of an area of land or otherwise).
>
> (2) Notwithstanding section 9(10), the board shall not enter into any memorandum of variation under this section unless all of the members of the board agree to the proposed variation.
>
> (3) Any consent required by section 22 to the execution of an open space covenant shall also be required in the case of any variation of that covenant under this section.
>
> (4) On application by the board, the Registrar-General of Land must note the variation instrument executed under this section on the register.
>
> (5) Where the variation of a covenant alters the area of the land to which the covenant relates and that land comprises part of the land in a record or other instrument of title, the Registrar-General of Land may require the deposit of a plan in accordance with section 224 of the Land Transfer Act 2017; or, in lieu of such a plan the Registrar-General of Land may accept a document incorporating the variation, so long as the document is accompanied by a certificate given by the Surveyor-General, or the Chief Surveyor of the land district in which the land is situated, to the effect that the variation is adequately described and properly defined—
>
> (a) for the nature of the covenant; and
>
> (b) in relation to existing surveys made in accordance with regulations for the time being in force for the purpose; and
>
> (c) in accordance with standards agreed from time to time by the board and either the Surveyor-General or the Chief Surveyor, as the case may be.

[40] By letter dated 6 May 2021, the appellants applied to the QEII Trust to vary the covenant in certain respects, including reducing the covenant area. By letter dated 19 August 2021, the QEII Trust declined that application.

[41] The appellants allege the QEII Trust applied the wrong legal test when doing so, and that it made mistakes of law and fact. The QEII Trust argued that its decisions were not susceptible to review other than grounds analogous to bad faith or corruption and that there was no substance to the appellants' arguments in any event.

Assessment

[42] We deal first with the QEII Trust's argument that its decisions are not susceptible to review except on narrow grounds. Isac J indicated that he would be slow to conclude that a decision on an application to vary a covenant under s 22A of the Act was not amenable to judicial review, but he did not determine that point, and addressed the arguments on their merits.[15]

[43] We accept the appellants' argument that decisions of the QEII Trust under the Act are amenable to judicial review. Under the Judicial Review Procedure Act 2016, an applicant may bring judicial proceedings under that Act to challenge a "statutory power of decision" as defined in s 4. A "statutory power" includes a power or right conferred by or under an Act.[16] We consider that it is clear that the decisions under ss 22 and 22A fall within these definitions, and that they can accordingly be judicially reviewed. After referring to these definitions in the legislative predecessor (the Judicature Amendment Act 1972), this Court said in *Royal Australasian College of Surgeons v Phipps*:[17]

> One broad purpose of the [legislation] was to remove technical problems which had until that time bedevilled applications for judicial review by way of the prerogative writs and declarations. Rather, the attention of the parties and of the Court should be focused on the issues of substance, especially the issues of what actual exercises of power are reviewable and on what grounds. In that inquiry the origins of the power and the various characteristics of the decider would often be very important, indeed frequently decisive. But that would not necessarily be so. Over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or

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15 Judgment under appeal, above n 1, at [148].
16 Judicial Review Procedure Act 2016, s 5.
17 *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11.

> have important public consequences, however their origins and the persons or bodies exercising them might be characterised …

[44] Here the QEII Trust was exercising statutory powers of decision under ss 22 and 22A, and was doing so under legislation existing to promote a public interest.[18] We accordingly consider that the QEII Trust's decisions are reviewable.

[45] The approach explained in *Phipps* also responds to the QEII Trust's argument — relying on the decision of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand* — that its decisions are not susceptible to review other than on grounds of fraud, corruption, bad faith, or analogous grounds,[19] which raises the concept of varying intensity of review.

[46] The short point is that the powers of the QEII Trust are expressly controlled by the terms of the statute. If the QEII Trust fails to exercise these powers in accordance with the statute, then judicial review is available and we do not consider it necessary for an applicant to show fraud, bad faith, or analogous circumstances.[20] Equally, judicial review under the Judicial Review Procedure Act is just that — a procedure. The fact that judicial review is available does not necessarily open up all grounds of judicial review. Here, we consider it would likely be necessary for the appellants to show a failure to exercise the power in accordance with the statutory requirements before an application for review could succeed.

[47] In any event, we agree with the High Court Judge that no grounds of judicial review are made out here, and that the QEII Trust considered the exercise of power under s 22A as required.[21] The argument that the QEII Trust erred in law is based upon the interpretation of s 22 that we have not accepted for the reasons outlined above. To the extent that the appellants were contending that there was insufficient formality in the QEII Trust's s 22A decision, we do not accept the argument — the

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18 The long title of the Act says it is: "An Act to commemorate the Silver Jubilee of Her Majesty Queen Elizabeth the Second by establishing a national trust to encourage and promote the provision, protection, and enhancement of open space for the benefit and enjoyment of the people of New Zealand".

19 *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC). Reliance was also placed on *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

20 See also *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

21 Judgment under appeal, above n 1, at [156], [164] and [173]–[174].

members of the Board agreed that they did not unanimously agree to the variation as required by s 22A(2). To the extent that the appellants were pursuing their argument that there was an obligation for the QEII Trust to give additional reasons for not varying the covenant under s 22A, we do not accept this argument either. Given the nature of the power and the nature of the covenant, it was clear why the QEII Trust was not prepared to grant the variation sought. We address the alleged natural justice obligations below.

[48] For these reasons, we agree with the High Court Judge that there is no basis to set aside the decision of the QEII Trust not to vary the covenant under s 22A, and the appeal related to this ground is also dismissed.

Natural justice

[49] The appellants argued that the decision implementing the covenant under s 22 was susceptible to judicial review, and should be set aside by the Court for breaches of natural justice or unreasonableness. The essence of this argument was that the QEII Trust should have inquired into the existence of other interests in land such as those claimed by the appellants, including because of circumstances it was aware of, and that the QEII Trust's decision involved breaches of natural justice, procedural impropriety, or analogous judicial review error. Natural justice breaches were also alleged in relation to the s 22A decision.

[50] For the reasons addressed above, we accept that the decisions of the QEII Trust can be susceptible to judicial review. There is considerable difficulty, however, with the Court addressing a judicial review challenge in circumstances where the relevant decisions under ss 22 and 22A were made many years ago, and proceedings have already been brought to this Court before the challenge is brought. Judicial review remedies are discretionary and can be withheld if there has been delay, particularly if the claim affects third parties.[22] It may well be that the discretion in relation to relief would be withheld in these circumstances even if a judicial review error had been identified.

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[22] *Turner v Allison* [1971] NZLR 833 (CA) at 850–854 per Turner J; and *Hill v Wellington Transport District Licencing Authority* [1984] 2 NZLR 314 (CA) at 321 citing *Reid v Rowley* [1977] 2 NZLR 472 (CA) at 483.

[51] But in any event, we consider that the arguments are without merit. It is axiomatic that the requirements of natural justice are flexible, and vary depending on the circumstances.[23] Any requirements need to be considered in light of the relevant statutory provisions.[24] Such requirements should be consistent with the purposes of the legislation.[25] Here, we consider it significant that s 22 identifies, with some particularity, with whom agreement must be reached by the QEII Trust and from whom consent must be obtained when there are other interests in land that may be affected, before a covenant can be lodged. The legislation strikes a balance in that respect. We accept the QEII Trust's argument that a duty to conduct inquiries into the possibility of other relevant interests in land, registered and unregistered, would impede the apparent legislative policy. For this reason, we agree with the High Court Judge that there was no natural justice or other duty for the QEII Trust to make such inquiries, and that there was no breach of any duty to the appellants.[26]

[52] That does not mean that there can never be such an obligation. One could potentially arise if it were not inconsistent with the apparent legislative intent. Whether there could be circumstances where it might be said to be unlawful for the QEII Trust to seek to register a covenant when it knows that it would be defeating a proprietary interest of another person who is not consenting is not a matter that we need to decide. Any such limitation may need to involve an allegation that there was an abuse of the statutory power to establish a covenant under the legislation. Notwithstanding the arguments advanced by the appellants along these lines, this case falls well short of a situation where the QEII Trust was knowingly depriving a property owner of their property rights.

Other issues

[53] We consider that the above conclusions mean that the High Court Judge's conclusions are correct, and the appeal ought to be dismissed. We do not consider it

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23 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 132 per Cooke P.

24 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11], citing *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

25 *Daganayasi v Minister of Immigration*, above n 24, at 141; and *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120] per McGrath and Blanchard JJ.

26 Judgment under appeal, above n 1, at [173].

necessary to address all of the appellants' other arguments, but we indicate that we do not agree with them. In terms of the particular causes of action advanced:

(a) The first cause of action, that the covenant was void for non-compliance with s 22, was rightly dismissed by the High Court given the correct interpretation of that section.

(b) That is also so in relation to the appellants' second cause of action that the covenant was an illegal contract under the Commercial Contracts Act 2017.

(c) The third cause of action for judicial review is dismissed for the reasons addressed above.

(d) The fourth cause of action, that the covenant was inoperative for failure to comply with one of its terms — that it must comply with the provisions of the Act — was rightly dismissed not only because of the interpretation of s 22, but also because the relevant clause of the covenant contemplates ongoing obligations under the Act, not the statutory requirements for establishing the covenant.

(e) For the same reason, the fifth cause of action for declaratory relief for continuing breach of the covenant was also rightly dismissed.

(f) The sixth cause of action for judicial review in relation to the s 22A decision was rightly dismissed for the reasons addressed above.

(g) The seventh cause of action for breach of fiduciary duty was also rightly dismissed. Given our conclusion on the meaning and effect of s 22, one of the key elements of this claim falls away. In any event, for the reasons outlined by the High Court Judge, we consider that the QEII Trust did not breach a fiduciary duty to the appellants arising from any knowledge of the appellants' rights. We see no basis for this claim either as a matter of law, or as a matter of fact.

[54] Given these conclusions, we do not need to address the QEII Trust's affirmative defence on the basis of indefeasibility of title. We observe, however, that it may be that indefeasibility would not be a barrier to the Court providing relief with respect to a judicial review claim had the statutory powers under s 22 or 22A not been lawfully exercised. The indefeasibility arising because of s 22(7) may depend on the process specified by s 22 being followed. But indefeasibility may also be a factor relevant to the discretion as to relief with respect to such a claim. In relation to private law causes of action, indefeasibility would have provided a defence unless a recognised exception, such as those arising for an *in personam* claim were established.[27] Given our conclusions above, we do not consider such claims existed.

[55] Neither do we need to address the point referred to, but not ultimately pursued by the QEII Trust, that this proceeding was an abuse of process in accordance with the principles outlined in *Henderson v Henderson*, an issue first raised by the High Court Judge.[28] As Isac J said in *LMCHB Ltd v Buller Coal Ltd*:[29]

> [123] Litigation should not be undertaken by instalment. It is therefore generally incumbent on a party to litigation to raise every point that is relevant to the issues before the court in that litigation. Except in special circumstances, the courts will not permit litigants to later re-open the same subject on a different basis. The rule promotes finality and alleviates the burden on defendants who might otherwise face successive waves of litigation concerning the same subject matter. It also promotes public confidence in the administration of justice by ensuring economy in the allocation of public resources to the question between the parties.

[56] The appellants have now pursued this litigation in two sets of proceedings, appealing both decisions. It may well be that the principle outlined in *Henderson* could have been applied if the QEII Trust had squarely relied upon it. We note, however, that the sentiment underlying this principle can also be relevant to the costs award in any further proceedings.[30] No uplift was sought by the QEII Trust in relation to this appeal, however.

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27 Land Transfer Act 2017, ss 52–57. See *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [157]–[160], and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust*, above n 14.

28 Judgment under appeal, above n 1, at [193]–[196], citing *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) at 319.

29 *LMCHB Ltd (formerly L&M Coal Holdings Ltd) v Buller Coal Ltd* [2023] NZHC 633, [2023] 2 NZLR 680 (footnotes omitted).

30 See, for example, High Court Rules 2016, r 14.6(3)(b) and (4)(a).

Result

[57] The appeal is dismissed.

[58] The appellants must pay the first respondent costs for a complex appeal on a band A basis. We certify for three counsel.

Solicitors:
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LeeSalmonLong, Auckland for First Respondent
Airways Corporation of New Zealand, for First Intervener