IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2022-419-00356
[2024] NZHC 63

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review of a decision of the Hauraki District Council
BETWEEN	OURS NOT MINES LIMITED Applicant
AND	HAURAKI DISTRICT COUNCIL First Respondent
	OCEANA GOLD (NEW ZEALAND) LIMITED Second Respondent

Hearing: 13 November 2023

Appearances: T Mullins and A McDonald for Applicant
A Green and L Wansbrough for First Respondent
S V McKechnie and B S Clifford for Third Respondent

Judgment: 2 February 2024

JUDGMENT OF HARVEY J

This judgment is delivered by me on 2 February 2024 at 10 am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Solicitors:
LeeSalmonLong, Auckland
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Simpson Grierson, Wellington

Introduction

[1] On 15 September 2021, the Hauraki District Council granted a 40-year licence to OceanaGold (New Zealand) Ltd, a mining company, to occupy parts of an unformed Council owned road reserve (the licence). This is to enable the company to construct vents to facilitate its proposed mining in the area. The road is in Wharekirauponga Forest, within the area of Crown conservation land known as Coromandel Forest Park.

[2] Ours Not Mines Limited, an environmental interest group, brings a judicial review challenging the decision for illegality and improper purpose.[1] ONM argues:

(a) HDC's grant of the licence exceeds its power to control roads under the Local Government Act 1974 (LGA74).

(b) The licence purports to authorise a public nuisance, which HDC does not have the power to do.

(c) The licence purports to grant rights to the road that in fact amount to a lease. HDC has no power to grant a lease to the surface of the road.

(d) The powers that HDC has over roads must be exercised in accordance with the use of the land as a road and the proposed use is inconsistent with this. (ONM does not allege that the grant was made in bad faith, but that if there was power to grant a licence to occupy of this scope, the purpose was not within that power.)

[3] ONM seeks a declaration that the decision was unlawful and that it be quashed.

[4] HDC opposes the review. It says that the ability to grant the licence falls within its regulatory powers, which were properly exercised. HDC argues that there is no nuisance because the road is in the middle of dense bush and is infrequently, if ever, used by the public. In addition, HDC contends that the licence is what it purports to be and does not amount to a lease. OGL also opposes the review.

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[1] For convenience, the Hauraki District Council will be referred to as HDC, OceanaGold (New Zealand) Ltd as OGL, Ours Not Mines Ltd as ONM and the Department of Conversation as DOC.

Background

[5] The land in question is an unformed paper road reserve, established over 100 years ago, now owned and controlled by HDC. The wider area is covered by dense, mature bush, and there is nothing to distinguish the paper road from this surrounding area, which is Crown conservation land managed by DOC. The entire area is zoned Conservation (Indigenous Forest) under the Resource Management Act 1991 (RMA).

[6] The proposed mining site lies on the paper road. Its width at the proposed mining site is between 28 and 30 metres. While there is no vehicular access to the paper road, foot access is possible, but is challenging due to the terrain. Precise Global Positioning Systems (GPS) is needed to identify the location of the road. There are two walking tracks in the vicinity, the Wharekirauponga Track and the Old Track, but again, these are difficult to navigate.

[7] OGL prospects for gold and silver ore in New Zealand for the purpose of extraction and processing. It has been mining existing mines in the Waihi area since 2015. As part of its acquisition of those mines, it decided to invest into the expansion of mining operations in Waihi – called the "Waihi North Project". The Wharekirauponga mine is one of five main components of this project.

[8] OGL currently holds a mining permit for the Wharekirauponga mine under the Crown Minerals Act 1991 (CMA), issued on 5 August 2020. It also holds an arrangement from DOC for access to the Crown land at Wharekirauponga for exploration. This access arrangement is subject to comprehensive conditions to uphold and protect conservation and recreation values in the Coromandel Forest Park.

[9] Investigations were carried out in accordance with the access arrangement. In September 2020, OGL met with DOC. The need for vents to be established on conservation land was recorded in a briefing note prepared by DOC. It also noted that DOC expected an access arrangement application to be submitted for such a purpose in the near future.

[10] Instead, on 15 July 2021, OGL made a written request to HDC for a licence for the vent construction on the road. HDC received advice from DOC that it considered

granting the licence undermined its legislative mandate to conserve the Wharekirauponga ecosystem. Two months later, on 15 September 2021, HDC considered the application. The licence was approved at the meeting of HDC on 15 September 2021. That decision authorised the execution by an officer of HDC of a licence in that form. The licence was granted on 8 December 2022.

The proposed development

[11] The proposed development of the Wharekirauponga mine will require a 6.9 km long tunnel network and up to four ventilation shafts, in addition to other supporting infrastructure. The ventilation and escape shafts, said to be a necessary part of the infrastructure, are proposed to be built on the paper road area. To provide sufficient ventilation to the mine tunnel, installation of an approximately 8-metre-high funnel-like structure, called an evasé, at the top of the vents will be required.

[12] There are two drill sites on the paper road area for which OGL presently holds land use consents to undergo exploratory geotechnical drilling. The two sites are within the four areas permitted by the licence. Depending on the outcome of the exploratory drilling, OGL proposes to construct the paper road vents where the drill sites are located. However, further consents will be required before any substantive works commence and the location of the final sites for the vents will be confirmed by these future land use consents.

The licence

[13] As mentioned, the licence permits OGL to access the land and carry out exploration and mining-related activities in the licenced areas.[2] The licence provides for two stages: first, the "construction period", where "temporary permitted use" (construction of the vents and shafts and associated activities/infrastructure) may take place in the "temporary licensed areas", constituting the "temporary licence"; and second, for OGL to surrender the temporary licence and carry out the "permitted use" (that is, operate the vents) on the more limited "licensed areas".

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[2] It also constitutes an access arrangement, pursuant to s 54 of the Crown Minerals Act 1991, to the licensed areas.

[14] The vents and associated infrastructure (such as fencing) are licenced for a term of 40 years, unless the licence is terminated or surrendered earlier. This period covers the duration of the project, and provides for the closure of the mine, including the occurrence of remediation and rehabilitation works, and post-closure monitoring. The fee is $1 per annum.

[15] The temporary licensed areas constitute up to four areas, each with a maximum area of 400 metres squared (a nominal dimension of 20 metres by 20 metres). Clearance of 12 metres by 12 metres of vegetation is permitted under the licence for exploratory activities. It is also a condition of the licence that a five-metre unobstructed margin from the boundary of the infrastructure in the temporary licenced areas is provided for safe public passage within the paper road. Clause 6.1(c) requires OGL to erect fences and gates in or around the temporary licensed areas and the licensed areas to prevent access by animals or people. It is also envisaged that staff accommodation buildings will be constructed and a helipad placed above that facility.

[16] Once construction is complete the intended final surface expression is up to four areas with a maximum of 100 metres squared (being approximately 10 metres by 10 metres). The final locations of both the temporary licenced areas and the licenced areas will be confirmed by resource consent. The licence is conditional on OGL holding both the appropriate resource consent(s) and mining permit(s). If the consents and permits are not held the licence is automatically suspended and HDC is entitled to terminate the licence with written notice.

[17] As foreshadowed, effectual use of the licence to carry out any works on the paper road is subject to OGL obtaining additional permissions. These include further land use consents from HDC under the RMA to enable the licenced works, and a Wildlife Act Authority from DOC under the Wildlife Act 1953. No works can commence under the licence until such permissions are granted.[3] The land use consents were applied for in June 2022 and were still under consideration at the time of hearing.

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[3] Apart from exploratory drilling activities that are authorised by an existing land use consent.

[18] Clause 5.3 provides that the licensee shall ensure its "officers, employees, customers, contractors and invitees" carry out activities: (a) in a manner that minimises nuisance; (b) in compliance with all relevant consents and permits; and (c) in a manner that does not prevent HDC and the public to pass and repass over the road.

[19] Clause 19 states that there is no lease:

> **19. NO LEASE**
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> 19.1 The Licensee has a right of occupation of the Licensed Areas for the term of this Licence only and has no interest in the Licensed Areas.
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> 19.2 This Licence does not create any lease, tenancy or interest in the property. The legal right to possession of the Licensed Areas and any structures erected on the Licensed Areas prior to the date of this Licence, remains vested in the Council throughout the term or any renewal of it.

Does HDC have the power to issue the licence?

What is HDC's source and scope of authority to grant a licence to occupy on a road?

[20] HDC owns the paper road by virtue of s 316 of the LGA74. Section 316 vests "all roads and the soil thereof, and all materials of which they are composed" in fee simple to the council in the district in which they are situated (here, HDC). "Roads" includes land which is "vested in [HDC] for the purpose of a road as shown on a deposited survey plan", in other words, paper roads.[4] Section 317 provides all roads are under the control of HDC. Specified general powers relating to roads are set out in s 319, but do not include the power to grant licences.

[21] ONM argued that the LGA74 is essentially a code as to HDC's powers in relation to roads within its control. However, I agree with HDC's submission that the power to grant a licence is a right any landowner has over their land and is not a regulatory function. A landowner may grant a licence over its land which grants the licensee permission to do actions which would otherwise be unlawful (such as entering

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4 Local Government Act 1974, s 315(1)(d).

or doing other acts contrary to a landowner's rights).[5] In this regard, the HDC is no different from any other landowner.

[22] Section 357, an offence provision which prohibits interference with roads without authorisation from the council, does not create this power but recognises its existence. Similarly, s 341(3) supports the existence of but does not create the right to grant a licence to occupy a road.[6]

[23] If there is a statutory overlay to the power to grant a licence to occupy, I agree with HDC that it would fall with the powers of general competence found in s 12 of the Local Government Act 2002 (LGA02), which would arguably bring any decisions HDC makes as a landowner into the LGA02 and make them subject to the s 14 principles. It provides that a local authority "has full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction".[7] However, s 12 is not the source of HDC's power to grant a licence to occupy, but merely supports the ability for HDC to exercise powers held by a landowner.

[24] Further, there is the Hauraki Nuisance Bylaw 2019 promulgated in accordance with s 145 of the LGA02. The bylaw requires permission before any building or structure is placed upon a road.[8] Once again, this does not create but recognises the existing landowner power of authorisation through agreements such as licences. In *Mayor of Christchurch v Shah*, the Court referred to the subject road having been vested in the local authority in fee simple and stated, "the power to make by-laws is auxiliary to and in extension of its right as owner (as trustee for the public)".[9]

[25] Therefore, I do not accept ONM's argument that the power to grant a licence to occupy a road derives from the LGA74. To the extent the LGA74 provides for other, more specific, functions in relation to roads this is because it enables HDC to

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5 See DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at [18.001], citing *Thomas v Sorrell* (1674) Vaugh 330 at 351, (1674) 124 ER 1098 at 1109 per Vaughan CJ.

6 "Nothing in this section shall be construed so as to restrict any right a council may have to permit any person to use for a temporary period any part of the surface or of the airspace above the surface of any road."

7 Local Government Act 2002, s 12(2)(a).

8 Hauraki Nuisance Bylaw 2019, cls 2, 3.2(b) and 3.5.

9 *Mayor of Christchurch v Shah* (1902) 21 NZLR 578 (SC) at 583.

do something specifically to carry out its functions as a road controlling authority (that is, actions that are regulatory); regulatory powers need to be clear and certain; and it confers broad powers on HDC to undertake works in respect of the roads that would go beyond the types of things landowners can do without regulatory approval.[10]

[26] However, HDC's landowner rights are limited by its public responsibilities, under statute and common law, including those relating to the character of the land as a road (albeit here only a paper road).[11] As noted by the Court of Appeal:[12]

> Although all streets and the soil thereof are by s 170(1) [of the Municipal Corporations Act 1954] vested in the local corporation they nevertheless retain their character as highways so that the ownership by the corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners.

[27] ONM submitted there is a common law public right to pass and repass over "all parts" of a road and HDC's power must be limited to acts which are consistent with this right. HDC contended that the right to pass and repass does not apply to the whole of the road and the question is essentially whether the infringement creates a public nuisance.

[28] There is in principle a right to pass and repass over any part of the road.[13] For instance, it is no absolute answer to a charge of public nuisance that the public may still go around the obstruction.[14] However, it is axiomatic that all rights have limits. HDC's powers as landowner and road controlling authority cannot sensibly be limited to actions which do not interfere at all with the public's right to pass and repass. The more specific and explicit statutory functions recognise and reflect this. For example, HDC may form footpaths[15] or cycle tracks[16] that prevent vehicular traffic over that part of the road; add barriers, dividing strips, sign posts, pillars, markers, hedges, lawns and gardens onto the road;[17] close part of the road as a pedestrian safety area;[18] lay out

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10 As noted by HDC, these powers are now subject to any RMA requirements.
11 *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA) at 188.
12 At 188.
13 *R v United Kingdom Electric Telegraph Co* (1862) 31 LJ (MC) 166 at 167.
14 At 168.
15 Local Government Act 1974, s 331.
16 Section 332.
17 Section 333.
18 Section 334(1)(a).

gardens on the road;[19] erect monuments or statues;[20] put up power poles;[21] create a pedestrian mall;[22] authorise the laying of pipes on the road;[23] build bus shelters;[24] permit the construction of swing gates and cattle stops across the road;[25] and lease the subsoil and airspace of the road.[26]

[29] All of these, to some degree, interfere with the right to pass and repass. But common to these powers is that the HDC cannot *unduly* interfere with the right to pass and repass. For instance, s 334, referring to the erection of monuments, et cetera, and provision of facilities on or under roads provides that "no such construction, erection, laying out, or planting shall be carried out, unless in the opinion of the council the construction, erection, laying out, or planting will not unduly impede vehicular traffic entering or using the road". Another example is provided for in s 341 dealing with leases of airspace and subsoil which states HDC must "ensure that sufficient airspace remains above the surface of the road for the free and unobstructed passage of vehicles and pedestrians lawfully using the road." Other provisions more implicitly justify their limitation on the right by having a clear public safety purpose.

[30] In my reading of the statute, these sorts of provisions are set out to prevent any dispute over the council's ability to carry out such activities, in particular, any allegation they constitute a public nuisance for interference with the right to pass and repass (and in some cases frontage rights).[27] As mentioned, I consider these specific provisions do not preclude HDC's more general right to deal with the road as landowner but give specificity and certainty where required.

[31] This is supported by the Court of Appeal's analysis in *Lower Hutt City Council v Attorney-General ex rel Moulder*:[28]

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19 Section 334(1)(b).
20 Section 334(1)(c).
21 Section 334A.
22 Section 336.
23 Section 338
24 Section 339.
25 Section 344.
26 Section 341.
27 See for instance *Halsbury's Law of England* (5th ed, 2024, online ed) vol 55 Highways at 355 setting out that at common law several of these activities constitute a nuisance. See also *The Queen v The Mayor, Councillors, and Citizens of The City of Wellington* (1896) 15 NZLR 72 (CA) at 88 and following.
28 *Lower Hutt City Council v Attorney-General ex rel Moulder*, above n 11, at 190.

> It is, however, clearly established by *The Queen v Wellington City Corporation* (1896) 15 NZLR 72, being the case referred to by Chapman J in *Attorney-General v New Plymouth Borough*, that the fact that streets are vested in and are under the control of the local authority does not entitle a council to erect or authorise the erection of a structure in a street if that structure amounts to what is technically described as a "public nuisance". … At common law a permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the obstruction constitutes an appreciable interference with the traffic in the street: see *R v Bartholomew* [1908] 1 KB 554. It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public.

[32] Thus, the specific powers provided for in the LGA74 serve to override the common law position that publicly beneficial obstructions placed by a council are or may be a public nuisance. The power to grant a licence to occupy is a common law power and does not have statutory "protection" against potentially constituting a public nuisance. Obviously, the public right will be a relevant consideration for HDC in making its decision but its power is not bounded in the manner argued by ONM.

[33] Accordingly, I prefer HDC's statement of the issue – whether the licence to occupy authorises a public nuisance. I accept that HDC cannot authorise a public nuisance,[29] and if the licence has that effect, it will be ultra vires. Whether or not that is so on these particular facts is considered in the next section.

[34] Secondly, ONM contended that the effect of s 341 of the LGA74 was that HDC may not lease the surface of the road. Section 341 specifically provides that a council may lease the airspace above a road and the subsoil beneath the road. The exclusion of reference to a lease to the surface of the road, therefore, ONM submitted, suggests that it is not permissible. Subsection (3) states the provision does not restrict any right a council may have to permit use of the surface "for a temporary period", which ONM submitted supported the argument no lease was permissible (only "temporary use" which invokes the common law concept associated with public nuisance). ONM argued that the license here was in name only and in substance amounted to a lease, which was impermissible.

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[29] See *The Queen v The Mayor, Councillors, and Citizens of The City of Wellington*, above n 26, at 90: "An obstruction by or with the authority of the Council is therefore legal unless it is a public nuisance …". See also Local Government Act 2002, s 191.

[35] I accept, as did HDC, that a council cannot lease the surface of a road but can permit temporary use (such as through a licence). That seems to be a plain reading of s 341 and is consistent with the common law. It is supported by the second proviso in s 341(1) that when granting a lease to the airspace the council must "ensure that sufficient airspace remains above the surface of the road for the free and unobstructed passage of vehicles and pedestrians lawfully using the road". In addition, there is a general rule that persons cannot acquire an interest in road which derogates from the local authority's title, unless authorised by law.[30] Whether or not the licence in question amounts to a lease on its particular facts is considered below.

[36] As a final note, any activities carried out on the land will have to comply with the relevant regulations — HDC has no power through the licence itself to authorise these activities if consents or permits are required. For instance, as mentioned, OGL will need to obtain and retain the relevant resource consents and mining permits.[31]

If there is a power, was it exercised properly?

Is the proposed development a public nuisance?

[37] ONM argued that the licence was improperly issued because under the legislation, HDC must not issue a licence allowing a public nuisance. As foreshadowed, its submission was that the licence interfered with the public right to pass and repass over all of the road and was therefore a public nuisance.

[38] OGL submitted this argument was a contradiction in terms because a public nuisance is an unlawful activity. The activity here is authorised by the licence so it cannot logically be a nuisance. However, this position is a mischaracterisation of the law of public nuisance and does not warrant detailed discussion. In *Smith v Fonterra Co-operative Group Ltd*, the Court of Appeal noted that:[32]

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30 Land Transfer Act 2017, s 55.

31 See licence cls 5.3(b) (which requires the licensee's agents to carry out the temporary and permitted uses pursuant to "all applicable resource consents and the appropriate mining permit"), 6.1 (which requires works to be carried out "in accordance with all applicable consents and permits"), 13 (which suspends the licence if the appropriate resource consent is not held) and 18 (which suspends the licence if the appropriate mining permit is not held).

32 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [72].

> [I]n those cases where there was on the facts underlying illegality, there is almost always no discussion of that being a pre-requisite to liability in tort. The weight of authority is to the contrary, that is to say, it is not necessary for the act or omission to be in itself a legal wrong separate from nuisance. That position in our view is more consistent as a matter of principle with the essence of the tort. What matters is that the act or omission causes common injury. To put it another way, the focus as a matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect.
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> (footnotes omitted).

[39] HDC contended first, that the right to pass and repass was not over any and all parts of the road but merely required that the public can get past the obstruction. Secondly, it submitted that the right did not practically apply to a paper road in an area of dense bush, which could not in any case be easily navigated.

[40] ONM's response to HDC's second submission was that the public right to use the road is not subject to it actually being used. It pointed to the fact the land was vested in the HDC for the purpose of it being a road. The activity authorised is not in line with the purpose of HDC holding that land. If HDC maintains there is no possible use as a road, then ONM submitted that HDC should not be authorising anything in relation to that land. Counsel opined the logical conclusion of HDC's argument that there is no practical use as a road was that HDC should be stopping the road and perhaps vesting it in the Crown (that is, consolidating it with the surrounding conservation land).

[41] An obstruction on a road will be a public nuisance where it unreasonably interferes with the right to pass and repass.[33] Some intrusions on the right to pass and repass are permissible without amounting to a public nuisance.[34] For public nuisance to be established there must be an inconvenience, and it must be unreasonably prolonged and/or taking up an unreasonably large area.[35] An obstruction is not a public nuisance if it is "occasioned in the reasonable and lawful user of the [road] as a [road]".[36] In *Lower Hutt City Council and Another v Attorney-General ex rel Moulder* the Court of Appeal formulated the test:[37]

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33 *Harper v Haden & Sons Ltd* [1932] All ER Rep 59 at 63 per Lawrence LJ.
34 *Harper v Haden & Sons Ltd,* above n 33. See also *The Queen v Russell* (1854) 118 ER 1394.
35 *Harper v Haden & Sons Ltd.*
36 At 64.
37 *Lower Hutt City Council v Attorney-General ex rel Moulder*, above n 11, at 190.

> At common law a permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a public nuisance if the obstruction constitutes an "appreciable" interference to the use of the road.

[42] The legal principles apply equally to paper roads as they do established ones. HDC cannot do whatever it likes with a road simply because it is unused. However, context, as always, is relevant.[38] There are no plans for the road to be formed or used in the foreseeable future. Vehicle access is currently impossible. Pedestrian access is infrequent and difficult. These are all relevant factors to considering whether the licence makes the road "less commodious" and whether the infringement is reasonable in duration and severity.

[43] An excerpt from the 1938 case of *Attorney-General v Wilcox* is surprisingly apt despite the passage of time.[39] After setting out the public right to pass and repass over all parts of the road, Farwell J went on to state:[40]

> Therefore, prima facie, anything which is placed in the defined area in question which obstructs in any smallest possible degree the right of the public to use the whole of the way is an obstruction. Nevertheless, it does not follow that, because there is, or may be, something which is an obstruction, in the sense that thereby a member of the public cannot put his foot on that particular portion of the highway which is now occupied by the post or pole, but was formerly unoccupied by such post or pole, that of itself entitles the highway authority to any relief against a person who has caused that particular obstruction. As I have said, prima facie, it is an unlawful act to put on a public way anything which obstructs in the smallest degree the exercise by the public of their rights. On the other hand, the court will not interfere where what has been done is something which is of so trivial a nature as not really to interfere with the proper exercise by the public of their rights.

[44] According to the evidence, the road is difficult to navigate and can only be accessed on foot. Construction of the vents and infrastructure will not change that. Instead of dense bush and vegetation obstructing travel, in the temporary licensed areas there will be a structure and fencing obstructing travel but a clear passageway of five metres which is ample for a pedestrian. Once the construction period is over there will be a structure and fencing taking up at most 10 metres of a 28-30m wide road. So

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38 *Harper v Haden & Sons Ltd*, above n 33, at 64 per Lawrence LJ: "A temporary obstruction of the highway may or may not constitute a public nuisance *according to circumstances.*" (emphasis added).

39 *Attorney-General (at the relation of Esher Urban District Council) v Wilcox* [1938] 3 All ER 367.

40 At 371–372.

although the intrusion is in one sense relatively severe, because the infrastructure will cover the majority of the road in the temporary licenced areas and a great deal of the road in the licenced area, again this assessment must be alive to the context. The inconvenience to the public will be limited, if any.

[45] Similarly, in a frequently used street the removal of the road surface and construction of mining shafts for 40 years would be unlikely to be considered "temporary". That said, it has previously been recognised, in the context of landlocked land, that urban roads and rural roads are so different that firm principles cannot be laid down that apply to both, and the particular circumstances must be considered.[41] The same could be said of cases relating to activities constituting a nuisance on an urban street and their application to infrequently used unformed roads in dense bush. Here, there is the existing infrequency and physical difficulty of public use. In addition, after the licence term expires, OGL is required to infill the mining shaft, remove all the structures and fencing and replant the ground. In other words, the intrusion will not be permanent and in time the road will be restored to its former state.

[46] Accordingly, the intrusion caused by the works would not, in principle, amount to a public nuisance because there is little or no inconvenience to the public use of the road owing to the highly infrequent use.[42] If there is such inconvenience, in light of the context, the obstruction is reasonable in size and duration. That is not to say the use of the land for mining is in all senses reasonable. Nuisance measures only the impact on people, and in this limited context their right to pass over the road. It is inapt to consider wider environmental effects that are properly and fully assessed under the RMA, which will be done in due course.

[47] For completeness, in light of OGL's argument as to lawful authority, a resource consent does not qualify under the defence of statutory authority which exempts an activity from being a nuisance by reason of it being explicitly or implicitly authorised

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41 *Cooke v Ramsay* [1984] 2 NZLR 689 (HC).

42 I have not considered, as it was not argued, any issues of noise, vibration and dust. Additionally, in light of the way the case was pleaded and my finding that there is no nuisance in fact I have not considered the second limb requiring particular injury to the claimant, but I have some doubts about whether that could be established if a claim in nuisance was brought.

by Parliament.[43] Nor does the licence itself, because the power to grant the licence does not arise from statute.[44]

Does the licence amount to a lease?

[48] ONM submitted that the licence should be quashed because it was a licence in name only, and in substance amounted to a lease over the land, which is impermissible under the LGA74. It pointed to the fact OGL was permitted to erect fences and physically remove parts of the road for shafts, which would necessarily exclude use of that part of the land by others. There is a fixed term of occupation of 40 years. Therefore, ONM contended OGL was granted exclusive possession of those areas of the road. Clause 19 of the licence agreement, which purported to state that there was no lease, was a fiction and of no effect in the face of the true nature of the agreement, in ONM's submission.

[49] HDC argued that there was no lease. By analogy, an access arrangement granted under s 93 of the Crown Minerals Act does not confer an interest in land. The licence is broadly equivalent to an access arrangement. In addition, HDC argued the focus was on the use of the land, not the exclusive possession of it; for any licence to occupy there would be an element of exclusive use. Further, a physical barrier is not the same as the ability to lawfully exclude someone from the land (part of exclusive possession).

[50] The key inquiry is whether OGL has exclusive possession.[45] Whether the parties intended that the agreement confer exclusive possession is relevant insofar as interpreting the effect of the agreement.[46] I agree with HDC that there is no lease. Eight points are relevant in this context.

[51] First, "[e]xclusive possession allows the occupier to use and enjoy the property to the exclusion of strangers."[47] Here, OGL is required to facilitate use of the land by

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43 See *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601 (HC) and *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC) at [19]–[20].
44 *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC) at 233.
45 *Fatac Ltd (in liq) v Commissioner of Inland Revenue* [2002] 3 NZLR 648 (CA).
46 At [61].
47 At [38].

the public including by allowing a 5-metre access way which is to be "*within* the boundary of" the temporary licensed areas. Therefore, the public has the right to pass over the temporary licensed areas. Further supporting this interpretation is cl 5.3(c) which requires OGL to use the licenced areas and temporary licenced areas "in a manner that such usage does not prevent the ability for the Licensor [HDC] and the public to pass and repass over the Land". "Land" is defined as the entire road reserve, including the licensed areas.

[52] Clause 9.3(ii) provides that OGL must immediately comply with HDC's requests to eliminate any nuisances "which interfere with the lawful public use of the Licenced Areas". HDC has clearly not granted OGL the power to legally exclude the public, or HDC, from the licenced areas. Although in some cases a lease may be subject to an agreement that the public can access the land for limited purposes, the thrust of these provisions points towards OGL not having exclusive possession of the licensed areas and temporary licenced areas.[48]

[53] Secondly, the terms of the agreement are more consistent with HDC retaining exclusive possession (subject to public rights). HDC retains its control over the land and could, for example, grant further licences. This is demonstrated by cl 4.2 which states that OGL may have to pay for a portion of outgoings "which are shared with other Licensees or persons using the Land or the Licensed Areas or the Temporary Licenced Areas". It retains the right to access the land, which is also supported by cl 5.3(c) referred to in the previous paragraph.

[54] Thirdly, although a lease may be granted which limits the use of the land,[49] here the rights granted to OGL are far more consistent with a licence. As the Court of Appeal explained:[50]

> A tenant enjoys those fundamental, if temporary, rights of ownership that stem from exclusive possession for a defined period. Stipulated reservations stem from that premise. The reverse is true for a licensee. Lacking the right to exclusive possession, a licensee can merely enter upon and use the land to the extent that permission has been given. It is this reversal of starting point that

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48 *Whangarei Harbour Board v Nelson* [1930] NZLR 554.
49 *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 (PC) at 408.
50 *Fatac Ltd (in liq) v Commissioner of Inland Revenue,* above n 45, at [38].

> provides the rationale for recognising an estate in the land, in the one case, and a mere personal right or permission to enter upon it, in the other[.]

[55] Clause 5.1(a) provides that OGL shall during the construction period "only" use the temporary licensed areas and licensed areas for the temporary permitted use; similarly cl 5.1(b) states OGL shall "only" use the licensed areas for the permitted use following this period. OGL is prohibited from using the licenced areas or temporary licenced areas or any part thereof for any other purpose without HDC's consent.[51] It may not erect any improvements on the licensed area nor dig up, excavate or lay cable or pipes or "anything else" without HDC's written consent. The starting point, taking these clauses together, is that OGL can "merely enter upon and use the land to the extent that permission has been given".

[56] Fourthly, I do not consider HDC directing OGL to put up fences and signage demonstrates OGL has exclusive possession. The clauses relating to fencing clearly have a public safety focus and in that way are primarily related to HDC's safety obligations albeit it is requiring OGL to carry out the tasks. HDC has the right to exclude the public for safety reasons.[52]

[57] Fifthly, I do not consider the construction of vents and shafts means OGL has exclusive possession of the entire licensed areas/temporary licensed areas merely because there is practical physical exclusion of others. In *Waimiha Sawmilling Co Ltd v Howe,* the Court of Appeal considered whether a sawmilling agreement constituted a lease.[53] Relevantly the agreement also allowed for the establishment of a mill (with worker's accommodation) and the laying of tram lines and establishment of dams. The Court of Appeal reasoned that the overall purpose and character of the agreement was the sale of growing timber. Although the Company essentially had exclusive possession over the mill site, and arguably the tram lines and dams, the Court found this could not make the whole agreement a lease:[54]

> The fact that there may be an incidental demise of a small portion of the land to which the transaction relates cannot be treated as altering the substance of the transaction and making that a lease which is not a lease.

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51 Clause 5.2 of the licence.
52 *Police v Abbott* [2009] NZCA 451, [2009] NZAR 705.
53 *Waimiha Sawmilling Co Ltd v Howe* [1922] NZLR 339 (CA).
54 At 703.

[58] *Waimiha* was considered by the Court in *Fatac Ltd v Commissioner of Inland Revenue.* The Court of Appeal found that one "refinement" to the exclusive possession test could be where there is "exclusive occupation of an area that is small in proportion to the total area affected by the agreement".[55] Turning to the facts of that case, the Court of Appeal found the quarrying company did not have a lease because (a) other companies had the right to quarry different materials on the land and (b) the location of the residual basalt areas was not fixed. Thus "it could not be said that there was any clearly defined area of which Atlas would have the exclusive use, let alone an area that was substantial in relation to the licensed area as a whole".

[59] It is not known precisely how large the drilling sites in the temporary licensed areas will be, but as a matter of common sense they must not take up the whole of the area. That much is evident from the fact OGL is permitted to clear only 12 m by 12 m of vegetation within the maximum 20 m by 20 m site; I doubt drilling and construction activities could take place on the uncleared areas of what has been described as dense bush. Even if OGL was considered to have exclusive possession over the areas of the ground which are dug up and therefore physically impassable, I consider the above two authorities apply. Exclusive possession of a small area of the whole cannot convert what is fundamentally not a lease into a lease.

[60] Within the final licensed areas (which are 10 m by 10 m), the space taken up by the evasé on each is more significant (the resource consent application proposes one type four metres in diameter and another five and a half metres in diameter, plus fencing). It is more difficult to say this is a "small in proportion" to the licenced area (although it would be small in proportion to the land as a whole). Even so, I cannot see that in this situation, in light of the rest of the surrounding context and the licence terms, the physical inability for HDC or the public to access the land which the evasés cover, means that OGL has legal exclusive possession over those areas. It must be possible for a landowner to authorise the construction of structures on its land via a licence without the land below those structures being considered leased to the licensee.

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55 *Fatac Ltd (in liq) v Commissioner of Inland Revenue,* above n 45, at [55] and [68].

[61] In addition, although the proportion of the licensed area taken up by the vents is large, the licenced area is purposefully smaller than the temporary licensed area, I infer to protect to the fullest extent possible the public right to pass and repass. HDC's choice to restrict OGL to a smaller area once construction is complete could not be said to demonstrate the final licence is in the nature of a lease where the temporary licence is not. In any event, the fact the final licence does not fall within the *Waimiha Sawmilling* exception does not make it a lease but merely means that particular exception does not apply.

[62] Sixthly, the licence contains an access arrangement under s 54 of the Crown Minerals Act (cl 2.1(c)). Section 93 provides that an access arrangement does not confer an interest or estate in land. That is not determinative of the character of the parts of the licence to occupy and use the licenced area (cl 2.1(a)) and the temporary licensed area (cl 2.1(b). However, the fact it sits alongside them in the agreement colours the parties' intentions that no exclusive possession was to be provided to OGL.

[63] Seventhly, the Court will refuse to recognise a tenancy where the right to exclusive possession "can be terminated pursuant to some legal relationship extraneous to that of landlord and tenant".[56] Here the agreement is conditional on OGL holding the appropriate consents and permits. If the lodged land use consents are not granted or any of the existing permits are revoked, the licence is suspended and HDC may terminate the licence. This is a factor which also points against exclusive possession.

[64] ONM also pointed to cl 10.2 which states HDC shall not be guilty of trespass or conversion if it expels OGL following termination of the agreement. It argued this clause would be unnecessary if the agreement were in fact a licence because a licensee has no standing to claim trespass, not having exclusive possession. However, *Hinde McMorland and Sim Land Law in New Zealand* suggests that "a licensee with a right of occupation of, and sufficient rights of control over, land has a right to bring proceedings in trespass".[57] Without commenting substantively on that proposition, it is possible cl 10.2 was simply inserted for the avoidance of doubt by a cautious public

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56 *Fatac Ltd (in liq) v Commissioner of Inland Revenue,* above n 45, at [43].
57 *Hinde McMorland and Sim Land Law in New Zealand*, above n 5, at [18.001].

body. Taken altogether, my conclusion is that the agreement points towards HDC maintaining exclusive possession and not granting it to OGL. Therefore, the agreement is a licence.

Was the licence granted for an improper purpose?

[65] ONM submitted that even if there was power to grant the licence, it was improper for HDC to do so to permit the construction of mining infrastructure. A statutory power must be exercised in pursuit of the purpose for which it has been granted, otherwise the exercise of the power will be invalid. If roads are not needed, it was argued that they ought not be given over to private use.

[66] This argument was tied to the proposition that HDC must only exercise powers in relation to the road for roading-related purposes. However, I have found that the power to issue a licence to occupy is not a statutory power under LGA74 but a landowner right under the common law. As such it is not restricted to being exercised for a particular purpose, except possibly by the LGA02 ss 12 and 14 principles. However, ONM did not plead any breach of general obligation of HDC under the LGA02.

[67] ONM made something of the point that it considered OGL had deliberately circumvented the statutory access regime for mining on conservation land and HDC had assisted it in that endeavour. It is said that if the licence had not been granted, OGL would have needed to obtain an access arrangement from the Minister of Conservation under the CMA. ONM set out in some detail the alternative process which OGL would have had to go through if it had treated with DOC rather than HDC.

[68] The allegation is concerning, but ONM did not advance any grounds of review which would link that allegation to any error in HDC's decision to grant the licence. It was at pains to emphasise that it was not alleging bad faith on the part of HDC. The allegation is denied by HDC which says DOC was aware of its decision and the position of the vents is dictated by the existing tunnel infrastructure.

[69] As foreshadowed, like any landowner, the activities carried out on HDC's land must be properly consented and permitted. In granting a licence to occupy HDC has

not allowed for mining activities and construction to happen in a regulatory sense.[58] In addition, the public policy issues associated with those activities are not readily assessed in the framework of the present case, although I accept it was properly brought.

[70] The issue of whether it is appropriate for HDC to authorise the use of public land – a road – for a private person and/or non-roading related uses, is better considered when the decision of whether to grant that use is substantively made, that is, during the resource consent process. Even more so the question of whether mining is appropriate at all in the area, which I infer to be the underlying impetus for this case. Given the public nature of the land and its character as a road, notwithstanding its apparently sensitive ecological characteristics, I make the observation, but as obiter only, that it *may* be appropriate for the consent application(s) to be publicly notified (if it is not otherwise required to be) under the "special circumstances" provision in s 95A of the RMA.[59]

Decision

[71] The application for judicial review is declined.

[72] Failing agreement on costs, counsel may exchange then submit memoranda of up to five pages within two months from the date of this judgment.

Harvey J

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58 See *Royal Forest & Bird Protection Society of New Zealand Inc v Southland District Council* [2023] NZHC 399 at [70]–[71].

59 Resource Management Act 1991, s 95A(9).