IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA223/2018
CA520/2018
[2019] NZCA 84

BETWEEN	PETER HOJSGAARD Appellant
AND	CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND First Respondent
	ROBIN PATRICK BRILL Second Respondent

Hearing:	17 and 18 October 2018
Court:	French, Clifford and Gilbert JJ
Counsel:	P H Thorp and M Singh for Appellant M J Bryant and D J Watson for First Respondent M C Harris and M J Hammer for Second Respondent
Judgment:	2 April 2019 at 11 am

JUDGMENT OF THE COURT

Appeal CA223/2018

A The appeal CA223/2018 is allowed to the extent that we find the High Court erred in declining to quash the decision of the first respondent approving the survey of the second respondent for integration into the cadastre under s 9 of the Cadastral Survey Act 2002.

B The decision of the first respondent is quashed and the first respondent is directed to reconsider the correctness of the second respondent's survey in light of all the evidence now available to the first respondent.

C In all other respects the decision of the High Court is affirmed.

D The first respondent must pay the appellant costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

E The appellant must pay the second respondent costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

Appeal CA520/2018

A The appeal in CA520/2018 is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Hojsgaard owns land in Omapere near the Hokianga Harbour. He challenges a recent survey of a neighbouring property which he says adversely affects him because the boundaries depicted in the survey do not allow for the location of an historic stream.

[2] The survey was undertaken by the second respondent Mr Brill and approved by the first respondent the Chief Executive of Land Information New Zealand (the Chief Executive).

[3] Mr Hojsgaard commissioned his own survey by another surveyor Mr Thomson which he considered accurately depicted the boundaries.[1] Mr Hojsgaard then issued proceedings in the High Court. He sought judicial review of the Chief Executive's decision approving the Brill survey. He also sought declarations under the Declaratory

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[1] The actual survey was conducted by a Mr Lee but under the direction of Mr Thomson and accordingly for ease of reference we refer to it in the judgment as the Thomson survey.

Judgments Act 1908 to the effect that the Thomson survey was correct and should be substituted for the Brill survey.

[4] The claim was heard by Jagose J. The Judge found that in deciding whether to approve the Brill survey, the Chief Executive had failed to consider a mandatory relevant consideration and directed him to reconsider his decision.[2] The Judge was not however prepared to quash the decision.[3] He was also not prepared to grant the declarations sought by Mr Hojsgaard.[4]

[5] Mr Hojsgaard now appeals. He also separately appeals a subsequent costs decision made by Jagose J.[5] The substantive appeal has been allocated the filing number CA223/2018. The costs appeal is CA520/2018.

[6] In order to explain the factual and legal issues arising on the appeals, it is necessary first to examine the statutory context.

The statutory context

[7] At the heart of this case is the Cadastral Survey Act 2002 (the Act). The term "cadastral survey" is not one used in common parlance. It means the determination and description of the spatial extent — including boundaries — of interests under land tenure systems.[6] The term "cadastre" which is also used in the Act means all the cadastral survey data held by or for the Crown and Crown agencies.[7] Under the New Zealand system of land tenure, the cadastre underpins the issue and guarantee of titles.

[8] The cadastre's integrity is therefore of paramount importance and this is reflected in one of the express purposes of the Act which is to promote and maintain the accuracy of the cadastre.[8] Section 3(a) states this is to be achieved by requiring

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2 *Hojsgaard v Chief Executive of Land Information New Zealand* [2018] NZHC 750, [2018] 3 NZLR 99 [High Court Judgment] at [105] and [110].
3 At [106]–[108].
4 At [109].
5 *Hojsgaard v Chief Executive of Land Information New Zealand* [2018] NZHC 2188 [Costs Judgment].
6 Cadastral Survey Act 2002, s 4.
7 Section 4.
8 Section 3(a).

cadastral surveys to be undertaken by licensed cadastral surveyors, who must meet certain standards before being licensed, and by making provision for the setting of standards for cadastral surveys and cadastral survey data. Both Mr Brill and Mr Thomson are licensed cadastral surveyors.

[9] As we go on to explain in greater detail, the standards include provisions about boundaries and water boundaries.[9] Land bounded by water boundaries is subject to specific legal and surveying considerations and as an expert witness put it in their evidence before the High Court, it is accordingly essential that surveys record current and former positions of relevant water body margins correctly, clearly and unambiguously.

[10] Under the Act, the function of approving a new cadastral survey for integration into the cadastre is reposed in the Chief Executive.[10] He or she must first be satisfied that the survey complies with the Act and with standards promulgated by the Surveyor-General regulating the conduct of surveys. The standards are contained in the Rules for Cadastral Survey 2010 (the Rules). The Rules have the status of regulations.[11]

[11] Boundaries including water boundaries are governed by r 6. Rule 6.1 stipulates that when a cadastral surveyor is defining a boundary by survey, they must:

> (a) gather all evidence relevant to the definition of the boundary and its boundary points;
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> (b) interpret that evidence in accordance with all relevant enactments and rules of law; and
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> (c) use that evidence to determine the correct position of the boundary and boundary points in relation to other boundaries and boundary points.

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9 A water boundary is a boundary set at the landward margin of a river bed or stream bed; a lake bed; or the common marine and costal area or other tidal area: Rules for Cadastral Survey 2010, r 2. Water boundaries can be marked against the present or former course or location of a waterway.

10 Section 9(a) and (d).

11 Section 49.

[12] Rule 6.2 lists the types of boundaries or boundary points which must be defined by survey. These include not only "a new water boundary or irregular boundary",[12] but also "an existing irregular boundary that has been converted into one or more right-line boundaries" and a "boundary where its extent and location as defined in an approved CSD [cadastral survey dataset] are insufficient for the determination of its compliance with the applicable accuracy standard."[13] A "right-line" boundary is defined as one that follows the shortest distance between two boundary points.

[13] Rule 6 goes on to say that when the margin of the water body defining a water boundary has moved but the boundary has not moved, that boundary must be converted to one or more right-line boundaries or may become an irregular boundary if it meets certain specified criteria.[14]

[14] Significantly for present purposes, r 3.4(a)(i) provides that the position of a water boundary or an irregular boundary, including one defined by adoption, must be determined to a sufficient level of accuracy to take into account the risk of overlap or ambiguity in boundaries including the water boundary on the other side of the water body.[15]

[15] Also significant for present purposes is r 8. It requires a cadastral survey dataset to include a survey report.[16] The report must amongst other things provide details of any conflict between the new survey being submitted for approval and an

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12 An irregular boundary is a boundary that is depicted as an irregular line but is not a water boundary. An irregular line is a line consisting of a series of connected vertices that are usually irregularly spaced and not on a single alignment. A right-lined boundary is a boundary that follows the shortest distance [in a straight line] between two boundary points. Right-line boundaries appear to be commonly drawn by surveyors where there is insufficient information to define the boundary with any more detail or complexity. See Rules for Cadastral Survey, r 2.

13 Rules for Cadastral Survey, r 6.2(a)(i), (iii) and (vii).

14 Rule 6.7(a).

15 Defined by adoption means that an existing boundary or boundary point has not been defined by survey or accepted: Rules for Cadastral Survey, r 2. That is, a surveyor has defined an existing boundary or boundary point using information from either, a prior cadastral survey dataset that has already been integrated into the cadastre or, in the absence of such information, from an estate record held by the tenure system manager. The surveyor must have ensured that the adopted work meets accuracy tolerances and that there is no known evidence of conflict.

16 Rule 8.2(a).

existing survey in the cadastre.[17] The survey report is also required to provide details of how the surveyor resolved the conflict.[18]

[16] In a previous judgment — *Chief Executive Land Information New Zealand v Te Whanau O Rangiwhakaahu Hapu Charitable Trust* (*Otito Reserve*)[19] — this Court held that if there is a conflict between surveys, compelling evidence is required before the decision maker can conclude the earlier plan is in error and should be replaced, notwithstanding the consequential prejudice that might otherwise be caused to those with interests in the land.[20] A very "high standard of satisfaction" as to the existence of error was said to be required.[21]

[17] The Court's statements reflect long established surveying practice. In the present case, for example, all the expert surveying witnesses agreed as a matter of surveying practice that existing survey plans are presumed to be correct once approved as to survey (the presumption of correctness). They also agreed that compelling evidence is required to move boundaries established by such survey plans. Certainty is important for obvious reasons.[22]

[18] Once a survey is integrated into the cadastre, it is not however set in stone. The Act provides a mechanism for correction in s 52. Section 52 empowers the Surveyor-General to correct errors in a cadastral survey dataset affecting title. The provision features large in this case and accordingly we set out its text in full.

> **52 Correction of errors in survey**
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> (1) If an error is found in a cadastral survey dataset affecting any title under the Land Transfer Act 2017 or any title or tenure under any other Act, the Surveyor-General may, in writing, require the cadastral surveyor responsible for the error to undertake, or arrange to be undertaken, the work necessary to correct the error within a time that the Surveyor-General considers reasonable.
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> (2) Subsection (1) does not limit—

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17 Rule 8.2(a)(v).

18 Rule 8.2(a)(v).

19 *Chief Executive Land Information New Zealand v Te Whanau O Rangiwhakaahu Hapu Charitable Trust* [2013] NZCA 33, [2013] NZAR 539 [*Otito Reserve*].

20 At [91] and [107].

21 At [107]. The Court preferred the formulation of "high standard of satisfaction" to high standard of proof".

22 It was common ground in this case that the compelling reason standard and presumption of correctness applies whether title has issued in reliance on the survey or not.

(a) the powers granted in sections 7 and 46 of the Crown Grants Act 1908:

(b) the powers of the Registrar under section 21 of the Land Transfer Act 2017, or the provisions of section 226 of that Act:

(c) the powers of any court under any enactment.

(3) In subsection (1), **cadastral surveyor** includes a former licensed cadastral surveyor and a person who was a registered surveyor under the Survey Act 1986.

[19] *Otito Reserve* confirmed that in exercising the power of correction under s 52, the Surveyor-General must adopt the same standard as applies to the Chief Executive when making decisions at the approval stage.[23] That is to say, he or she should only find error if there is compelling evidence of error.[24]

[20] In the *Otito Reserve* litigation, the then Surveyor-General gave evidence that in order to exercise the s 52 jurisdiction he considered he needed to be satisfied that the effect of the error was sufficiently serious to warrant correction and that a correcting survey was the best mechanism of correcting the cadastral survey, having regard to any impact on the tenure systems that depended on the cadastre.[25] The trial judge (Heath J) endorsed those propositions as did (impliedly) this Court.[26] They are consistent with s 7(2)(b) of the Act which stipulates the factors the Surveyor-General must consider when exercising any of his or her statutory functions.

[21] We turn now to address the background of the case before us in more detail.

Background of this case

[22] The legal description of the land owned by Mr Hojsgaard at issue is Lot 1 DP 146636 contained in Certificate of Tile CTNA87B/961. Deposited plan DP146636 was a survey undertaken in 1991 by a Mr Wright ("the Wright survey").

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23 *Otito Reserve*, above n 19, at [127].

24 At [91] and [107].

25 At [78].

26 At [90] citing *Te Whanau O Rangiwhakaahu Hapu Trust v Department of Conservation* HC Whangarei CIV-2008-488-548, 22 December 2010 at [104].

[23] The neighbouring block of land which was surveyed by Mr Brill is Māori freehold land known as Omapere B. It is to the north and west of Mr Hojsgaard's land as shown in the map attached to this judgment.

[24] The Brill survey of Omapere B was commissioned by the Māori Land Court as part of its Māori Freehold Land Registration project. A key step in the creation of Māori freehold title is a survey plan approved as to survey by the Chief Executive. Title is created when the Māori Land Court approves the plan and issues the title.[27]

[25] Mr Brill's survey depicted the southern and eastern boundaries of Omapere B as abutting directly against the northern and western boundaries of Mr Hojsgaard's land.

[26] Mr Hojsgaard contends this was contrary to the earlier Wright survey of his property which he says correctly depicted his western boundary as the left hand bank of a former stream. Further, according to Mr Hojsgaard, the Wright survey's depiction of the boundaries was consistent with a series of surveys of the general area. He says too that the Wright survey featured in another unrelated High Court judgment in which the Judge noted there was no challenge before the Māori Land Court to Mr Wright's plotting of the former course of the stream.[28]

[27] Mr Hojsgaard claims the error in the Brill survey adversely affects him because it dispossesses him of riparian rights and prevents him from marketing the sale of his land as "waterfront".[29]

[28] It is common ground that there used to be a stream in the area running out to the Hokianga Harbour and also common ground that in 1907 the stream dramatically and suddenly changed course as the result of heavy rains in the hills behind Omapere. What is disputed is exactly where the pre-avulsion stream used to flow before 1907. [30]

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27 Māori Land Court Rules 2011, rr 2.5 and 7.7(4).

28 *Pennell v District Land Registrar* HC Auckland M187/79, 16 July 1998.

29 Riparian rights are the bundle of rights of landowners whose property runs into or along the present or former course or location of a river.

30 Avulsion means the sudden separation of land from one property and its attachment to another, especially by flooding or a change in the course of a river.

[29] Contrary to Mr Hojsgaard's contention, Mr Brill is of the view that the stream never separated what is now Mr Hojsgaard's land from Omapere B, but rather flowed through a gully located within Mr Hojsgaard's land.

[30] An added complication is that Mr Wright's survey plan, on which Mr Hojsgaard relies and which he says should have been afforded the presumption of correctness by Mr Brill and the Chief Executive, does not explicitly depict the bank of the dried stream bed as the north-west boundary of the Hojsgaard land. The stream is only mentioned in a survey report written by Mr Wright in which he records "originally the property had frontage to the stream along the western boundary and this would have been used for access".

[31] Mr Wright's survey relevantly refers to three previous surveys in the area and their relationship with Lot 1, now Mr Hojsgaard's land.

[32] The first of these in time was an 1859 survey of land said to be gifted to a Mr Martin by the local hapu Ngati Korokoro through the Crown. In relation to this 1859 survey, Mr Wright concludes that part of the land surveyed in 1859 included Lot 1. The significance of this is that the 1859 survey shows most of the western boundary of the land it was surveying as a blue wash strip labelled "creek."

[33] The second survey cited by Mr Wright is an 1886 survey of another nearby parcel of land claimed by Māori interests. This 1886 survey shows the stream as the boundary between the land claimed by Māori and the Martin land surveyed in 1859. Mr Wright's survey plan depicts the 1886 survey as an abuttal to Mr Hojsgaard's Lot 1.

[34] The third survey plan referred to by Mr Wright is a survey undertaken in 1951 by a Mr Hosking. It was of a piece of land abutting the eastern boundary of the Wright survey. As it happens, Mr Hojsgaard owns this land as well as the land surveyed by Mr Wright. Mr Wright mentions the Hosking 1951 survey in his report. The reference comes as part of the sentence in which he states that originally the Hojsgaard property at issue had frontage to the stream along the western boundary. The full sentence reads:

> Originally the property had frontage to the stream along the western property and this would have been used as access; *the present situation is that [the Hosking 1951 survey] deprived them of this*. (emphasis added)

[35] The obvious ambiguities in the Wright survey have generated arguments as to its interpretation and consistency with the previous surveys. At the High Court hearing, the expert witnesses used illustrations of the 1886 and 1951 surveys overlaid on a 1942 aerial photograph to undermine or to support the Wright survey. Mr Brill's position is that if the Wright survey does depict the stream as forming the boundary then it was an error. In his view, the survey was not created with reference to any objectively reliable indication of the stream's historic path.

[36] This is very much disputed by Mr Hojsgaard. He contends the evidence primarily relied upon by Mr Brill is a category of evidence which surveyors consider to be at the bottom of what they call "the hierarchy of evidence". As explained by this Court in *Otito Reserve*, the hierarchy of evidence is a principle or guideline that accords varying weight to different types of evidence when determining disputed boundaries.[31] The generally accepted order is to attach greater weight to the points on which the parties were least likely to be mistaken at the time.[32] Thus, evidence of natural boundaries comes first in the hierarchy followed by monumented lines such as original pegs, undisputed occupations, then abuttals and finally calculations based on stated figures, deeds, grants and titles.[33]

[37] The Court however also stated that the hierarchy of evidence is a guide rather than a straitjacket.[34] If the circumstances make it clear that a piece of evidence further down the hierarchy is a more reliable indication of the parties' intention then it may take precedence.[35]

[38] Another argument between the parties is whether a survey report as distinct from a survey plan is in any event capable of attracting the presumption of correctness.

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31 *Otito Reserve*, above n 19, at [111].
32 At [112].
33 At [111]. Monumented lines are boundaries marked by survey or other defining marks, natural or artificial.
34 At [112].
35 At [112].

[39] Returning to the narrative of events, the Chief Executive acting through a delegate approved the Brill survey on 16 December 2010. It was then integrated into the cadastre. It is not clear whether the Chief Executive's delegate was aware of Mr Wright's survey report (as opposed to his survey plan) although it was acknowledged it would have been possible for the delegate to have obtained a copy.

[40] Mr Hojsgaard engaged Mr Thomson in 2015. Mr Thomson considered the Brill survey contained two errors. The first was that he had overlooked a partition order made by the Māori Land Court and as a result had wrongly included in Omapere B another block of land known as Omapere A. All parties including Mr Brill himself and the Surveyor-General agree this was an error. In response to a direction from the Surveyor-General under s 52, Mr Brill has prepared a replacement survey, depicting Omapere A as a separate parcel of land.

[41] The second error alleged by Mr Thomson was the placement of the eastern boundary of Omapere B as abutting Mr Hojsgaard's western boundary. As already mentioned, Mr Brill does not accept this was an error.

[42] Mr Thomson's firm prepared a survey plan of the Hojsgaard land at issue and the nearby block of land surveyed by Mr Hosking in 1951 which as mentioned is also owned by Mr Hojsgaard. The Thomson survey plan is what is called a "redefinition survey".[36]

[43] The Thomson survey depicts a hydro-parcel separating the Hojsgaard land at issue and Omapere B at the western boundary of the former.[37] The hydro-parcel is claimed to represent the historical location of the stream.

[44] The Thomson survey was submitted to the Chief Executive for approval in September 2015. This was declined on the grounds that, because it was a boundary-marking cadastral dataset of the two Hojsgaard blocks, it was not permitted to create new parcels nor to affect the definition of Omapere B. The benefit of the Thomson survey to Mr Hojsgaard was of course solely in the hydro-parcel and if this

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[36] Specifically a "Boundary Marking – Full Cadastral Data Set (Conflict) Cadastral Data Set".
[37] A hydro-parcel is the area between two water boundaries.

were disallowed, the only effect of the survey would be to confirm the undisputed boundaries of his two blocks of land.

[45] Mr Hojsgaard then made three separate requests to the Surveyor-General to exercise his powers under s 52 and require Mr Brill to amend his survey so as to depict the hydro-parcel. The requests were supported by a large quantity of information. This was considered by the Surveyor-General along with other material which he obtained of his own initiative.

[46] The Surveyor-General declined to exercise his s 52 power on the grounds he was not satisfied to the requisite standard there was an error in Mr Brill's survey as alleged.

[47] Finally, in this recital of the background history, we record that the Brill survey has not yet been approved by a Judge of the Māori Land Court and accordingly a computer freehold register has not yet been issued in relation to Omapere B.

The High Court proceeding

The statement of claim

[48] After his first request to the Surveyor-General was declined, Mr Hojsgaard issued proceedings in the High Court. The statement of claim underwent a number of iterations.

[49] Initially, the claim was against the Surveyor-General and Mr Brill. As against the Surveyor-General, Mr Hojsgaard sought judicial review of the decision to approve the Brill Survey and an order quashing that decision.[38] As against Mr Brill, the proceeding sought declarations that his survey was wrong and also alleged negligence. Damages were sought against Mr Brill and an injunction directing him to re-submit a survey replicating the Thomson survey.

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[38] The Surveyor-General was not the correct defendant as the decision being impugned was made by the Chief Executive.

[50] Following a case management conference, the claim was amended in January 2017 so as to remove the Surveyor-General as a defendant and replace him with the Chief Executive. The claim for judicial review and the negligence claim were also removed. Declarations were sought that the location and area of the hydro-parcel in the Thomson survey was correct and that the only survey entitled to be approved was one that corresponded with the Thomson survey.

[51] During the hearing in August 2017, Jagose J expressed misgivings about the application under the Declaratory Judgments Act. The Judge granted leave to Mr Hojsgaard to reinstate the judicial review cause of action and to seek an order quashing the decision to approve the Brill survey for integration into the cadastre.[39]

[52] In its final version, the statement of claim pleaded the relief sought in the following terms:

(a) The review and quashing of the approval decision (the approval decision being defined as the decision to approve the Brill survey for integration into the cadastre).

(b) A declaration that the location and area of the hydro-parcel in the Thomson survey is correct and in compliance with the standards.

(c) A declaration that only a cadastral survey dataset that identifies the southern and eastern boundary of Omapere B as corresponding with the right bank of the hydro-parcel in the Thomson survey and excludes Omapere A is entitled to be approved as to survey in substitution for the Brill survey.

[53] The pleaded claim for relief did not differentiate between the two defendants, but obviously "the review and quashing of the approval decision" applied only to the Chief Executive.

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[39] *Hojsgaard v Chief Executive of Land Information New Zealand* HC Auckland CIV-2016-488-000012, 23 August 2017.

Evidence at the hearing

[54] The hearing lasted eight days. The evidence called included evidence from previous occupiers of the area, a local kaumatua, surveyors, geologists, an archaeologist, a property consultant and a forester.

[55] In accordance with common practice, a panel of expert surveying witnesses was convened and gave evidence concurrently in a "hot tub" format.[40] The panel included Mr Brill and the surveyor from Mr Thomson's firm who had carried out the Thomson survey under Mr Thomson's direction.

[56] Significantly, the panel agreed that although the Wright survey plan does not explicitly depict any stream at the western boundary, it did inferentially. The panel drew this inference having regard to the indication of a water boundary or body in the 1859 survey, the depiction of the stream in the 1866 survey, Mr Wright's references to those two surveys and the statement in his report about Lot 1 originally having frontage to the stream. In surveying terms, the panel interpreted the statement in his survey report (quoted above at [34]) as meaning he had defined the north western boundary by right-lining the former course of the stream.

The High Court judgment

<u>The unsuccessful application for declaratory relief</u>

[57] As already mentioned, during the hearing the Judge expressed misgivings about the application for declaratory relief. Those misgivings were subsequently confirmed and explained in the judgment.[41]

[58] The Judge acknowledged the Court had a supervisory jurisdiction over both the Surveyor-General and the Chief Executive.[42] However he considered it would be an inappropriate exercise of that jurisdiction for the Court to substitute its determination for that of the Surveyor-General and the Chief Executive, which he said

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40 As noted by Jagose J at [22], the "hot tub" format is explained in *Commerce Commission v Cards NZ Ltd (No 2)* (2009) 19 PRNZ 748 (HC) at [5].

41 High Court Judgment, above n 2, at [65]–[77].

42 At [70].

was effectively what Mr Hojsgaard was asking the Court to do.[43] To accede to that request would in the Judge's view be to cut across the statutory regime and create a right of general appeal where none existed.[44] Parliament had provided a statutory mechanism for error correction (s 52) and its clear intention was to locate responsibility for the cadastre's desired accuracy in the two statutory office holders.[45]

[59] Secondly, the Judge said another reason for refusing the declaratory relief sought was that almost the entire dispute rested on heavily contested facts and that in itself rendered exercise of the declaratory jurisdiction inappropriate.[46]

Review of the Chief Executive's approval decision

[60] Notwithstanding the agreed position of the panel, the Judge was not prepared to find one way or the other whether the western boundary of the Wright survey was depicted by a right-lined former water boundary.[47] It followed he did not make a finding as to whether the Brill survey (which did not claim any movement of a water boundary or conversion to a right-lined boundary) was in conflict with the Wright survey. In Jagose J's assessment, the Wright survey report was not as definitive as the panel thought.[48]

[61] However, the Judge found it was incumbent on the Chief Executive to have considered the issue in order to be able to determine as required whether the Brill survey was in conflict with the Wright survey and if so how that conflict should be resolved.[49] There was no evidence the Chief Executive had turned his mind to the potential conflict and accordingly in judicial review terms the Chief Executive had failed to take into account a mandatory relevant consideration.[50]

[62] As regards other criticisms of the Chief Executive advanced by Mr Hojsgaard, the Judge said that none of these amounted to reviewable error. He also considered

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43 High Court Judgment, above n 2, at [74].
44 At [71]–[73].
45 At [72].
46 At [76].
47 At [104].
48 At [104].
49 At [95]–[96].
50 At [97] and [105].

that quashing the decision would not be a proportionate response to the error he had identified.[51]

[63] The Judge therefore declared in relation to the Chief Executive's determination of the Brill survey's compliance with the Rules:[52]

(a) The Brill survey adopted as its eastern boundary the western boundary of the Wright survey.

(b) A mandatory relevant consideration for the Chief Executive was whether the western boundary of the Wright survey is depicted by a right-lined former water boundary.

(c) The Chief Executive failed to have regard to that consideration.

The Judge then directed the Chief Executive to reconsider and determine whether the Brill survey complies with the Rules by reference to whether the western boundary of the Wright survey is depicted by a right-lined former water boundary.[53]

[64] Dissatisfied with that outcome, Mr Hosjgaard filed this appeal. Execution of the Judge's order directing the Chief Executive to undertake a limited reconsideration has been stayed pending the outcome of the appeal.[54]

[65] There is no cross-appeal by the Chief Executive. She accepts there was a failure to take into account a mandatory relevant consideration as identified by the Judge.

Grounds of appeal in CA223/2018

[66] The Notice of Appeal pleads two grounds of appeal. First, that the Judge was wrong not to quash the approval of the Brill survey and, secondly, that he was wrong to refuse to make any declaration based on the merits of the underlying survey dispute.

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51 High Court Judgment, above n 2, at [106]–[108].
52 At [105].
53 At [110].
54 *Hojsgaard v Chief Executive of Land Information New Zealand* [2018] NZHC 1563 at [10].

[67] The judgment sought from this Court is an order quashing the Chief Executive's decision to approve the Brill survey and a declaration that only a cadastral survey data set that identifies the southern and eastern boundary of Omapere as corresponding with the right bank of the hydro-parcel in the Thomson survey and excludes Omapere A, is entitled to be approved as to survey in substitution for the Brill survey.

[68] Mr Thorp, counsel for the appellant, acknowledged that in so far as the appeal concerns the issue of relief, it was an appeal against the exercise of a discretion. He alleged the judgment contained several errors.

[69] In addressing the key submissions, it is convenient to first consider an argument that relates to both grounds of appeal and which concerns the Judge's approach to the facts.

Analysis

Did the Judge err in failing to address the merits of the underlying surveying dispute

The argument

[70] This issue relates to both the Judge's refusal to quash the approval decision and his refusal to grant the declaratory relief sought.

[71] Mr Thorp contends that the limited relief ordered by the Judge was a direct result of his failure to make factual findings that were available on the evidence and should have been made. In particular, Mr Thorp submits, the Judge should have made a finding the Brill survey was in conflict with the Wright survey and therefore did not comply with the standards. He should also have made a finding that the Thomson survey correctly located the historic stream in accordance with the Wright survey. Had those findings been made, then the remedies sought would have followed.

[72] Mr Thorp further submits that a key reason why the Judge failed to engage in the merits of the underlying dispute was because he took an unduly narrow view of the Court's supervisory jurisdiction and was therefore led into error. In particular the

Judge was wrong to consider that the scheme of the Act precluded access to the Court to resolve the correct survey outcome in the case of a dispute between surveyors.

[73] In Mr Thorp's submission, the hands off approach taken by Jagose J was at odds with the approach taken by Heath J and this Court in *Otito Reserve.* In that case, a declaration was made that the wrong test had been applied in approving a survey plan and that it should not have been approved for survey purposes. Mr Thorp acknowledges the Courts in *Otito Reserve* did not formally quash the approval decision, but he says that was only because a new certificate of title had been issued in reliance on the impugned survey which is not the case here.

[74] The jurisdictional arguments relating to the scheme of the Act centre around s 52 which it is now necessary for us to address in more detail.

[75] It will be recalled that s 52 provides:

> **52 Correction of errors in survey**
>
> (1) If an error is found in a cadastral survey dataset affecting any title under the Land Transfer Act 2017 or any title or tenure under any other Act, the Surveyor-General may, in writing, require the cadastral surveyor responsible for the error to undertake, or arrange to be undertaken, the work necessary to correct the error within a time that the Surveyor-General considers reasonable.
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> (2) Subsection (1) does not limit—
>
> (a) the powers granted in sections 7 and 46 of the Crown Grants Act 1908:
>
> (b) the powers of the Registrar under section 21 of the Land Transfer Act 2017, or the provisions of section 226 of that Act:
>
> (c) the powers of any court under any enactment.
>
> (3) In subsection (1), **cadastral surveyor** includes a former licensed cadastral surveyor and a person who was a registered surveyor under the Survey Act 1986.

[76] It was common ground that the phrase "the power of any court under any enactment" must include judicial review proceedings and proceedings under the Declaratory Judgments Act. In this case, Mr Hojsgaard chose not to seek review of the Surveyor-General's refusal to exercise his powers under s 52, but only sought judicial review of the Chief Executive's approval decision. However it was also common ground that although s 52 was concerned with the Surveyor-General,

decisions of the Chief Executive under the Act were also amenable to judicial review as a matter of general law.

[77] Section 52 is new in the sense that the previous legislation — the Survey Act 1986 — did not have an identical provision. The Survey Act did however contain s 63 which provided:

> **63 Disputes may be referred to Surveyor-General**
>
> Any surveyor who is involved in a dispute with a Chief Surveyor relating to the application of this Act or any regulations made under this Act in respect of any survey may require that the dispute be referred to the Surveyor-General, who shall inquire into it and communicate his decision to the surveyor and Chief Surveyor concerned.

[78] The Judge described s 63 as affording "surveyors a dispute resolution mechanism",[55] and appears to have considered the absence of a similar dispute resolution mechanism in the Act as narrowing the scope of the courts' supervisory jurisdiction. Like the Judge, Mr Thorp also considers the absence of s 63 in the current legislation has significance but for the exact opposite reason. He says the absence of s 63 leaves a gap which the court must step in to fill as there is no other procedure whereby surveyors who disagree with each other about the correct location or nature of a boundary can achieve an adjudication of their differing views.

[79] Mr Thorp urged us to make the factual findings that Jagose J declined to make. He said we were in as good a position as the High Court to do so.

Our view

[80] In our view, in so far as Mr Thorp's submission relies on the absence of s 63, it is misconceived. It overlooks the critical fact that under the Survey Act, it was the Chief Surveyors of each land district that undertook the approval of surveys.[56] Contrary to Mr Thorp's submissions, s 63 of the Survey Act was not about disputes between surveyors but was expressly limited to disputes between a *Chief Surveyor* and surveyors. The new Act disestablished the position of Chief Surveyors and conferred

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55 High Court Judgment, above n 2, at [62].
56 *Otito Reserve*, above n 19, at n 29.

the power of approval and integration into the cadastre on the Chief Executive.[57] It was that change which prompted the need for a different provision.

[81] In those circumstances, we do not discern in the absence of s 63 and the enactment of s 52 any intention to affect the scope of the court's supervisory jurisdiction as it had applied under the Survey Act. That view is supported by our reading of the background legislative material. There is no suggestion of any such intention, which one might reasonably expect if such a significant change had been intended. The only relevant reference we could find was a Departmental Report to the Select Committee in which it was stated that the clause which was later to become s 52 "substantially re-enacted a key provision" of the Survey Act and recommended no change.[58]

[82] It follows we also consider that if the Judge did consider the absence of s 63 of the Act had narrowed the court's jurisdiction and that he was thereby precluded from adjudicating on the merits of the surveying dispute, then that was an error. As *Otito Reserve* demonstrates, in appropriate cases the court may be able to make findings that a survey was defective and should not have been approved or should be corrected. However, it all depends on the circumstances and the cogency of the evidence.

[83] In this case, as Mr Harris — counsel for Mr Brill — pointed out, there are over 1,750 pages of contested highly technical and complex evidence from 17 experts. It is not a case where an appellate court can efficiently or appropriately be the first court to undertake an analysis and assessment of the evidence. Nor do we consider, notwithstanding the Judge's views on s 63, that he can be criticised for declining to make the factual findings sought. It was not possible on the material provided for the Judge responsibly to make definitive findings. It follows we would not be prepared to remit the matter back to him. For completeness, we also record that, like the Judge, we would not attach any weight to the reference to the Wright survey in *Pennell*. The

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57 Cadastral Survey Act, s 9.

58 Land Information New Zealand *Land Transfer and Cadastral Survey Legislation Bill Departmental Report* (PP 2/9/3 BILLS/LTCS LI 3, 21 February 2001) at 47.

interpretation and correctness of the Wright survey was not a contested issue in that case.

[84] Conscious of these difficulties, Mr Thorp argued that although it may not be possible on the evidence to say one survey was wrong and the other right, resolution of the dispute was still possible by simply applying the presumption of correctness. Existing surveys are to be respected and there was insufficient evidence to show the Wright survey was wrong and therefore insufficient evidence to show the Thomson survey was wrong. As Mr Thorp put it, there is no need to do any more than assess whether any of the evidence is capable of being sufficient to defeat the presumption.

[85] However, there are two major flaws in that approach.

[86] First, it still needs to be determined what it was the Wright survey depicted and that too in our assessment is not as clear cut as Mr Thorp suggests. The Judge was not bound to accept the view of the panel. We acknowledge the Judge wrongly said a plan attached to Mr Wright's survey plan was not in evidence.[59] It was. But even with the assistance of the plan, we like the Judge, are not persuaded Mr Thorp's interpretation of the Wright survey is necessarily correct. We note too that the plan which the Judge overlooked appears to depict the course of the stream in a location that is different from the location of the hydro-parcel on the Thomson survey.

[87] Secondly, the argument assumes not only that the Thomson survey is faithful to the Wright survey as interpreted by Mr Hojsgaard (which is debatable as mentioned above), but that a hydro-parcel is the inevitable consequence of establishing the stream formerly ran along his western boundary.

[88] However, that is not the case. It was common ground that in order to sustain a hydro-parcel, Mr Hojsgaard must still establish some sort of proprietary right. He says he can do so on the basis of the stream being either tidal or navigable. If tidal, ownership of the dried river bed would vest in the Crown, but he would have riparian rights. If navigable, it may also be owned by the Crown as part of the

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[59] High Court Judgment, above n 2, at [28].

Hokianga Harbour or it may be owned by no-one. But again, if it was navigable, he has riparian rights.

[89] We pause here to interpolate that in proceedings currently before the Waitangi Tribunal, descendants of the owners of Omapere B contend that if the stream is found to have been where Mr Hojsgaard asserts it was, they claim ownership of the stream bed and not solely on the basis of customary rights.

[90] As regards Mr Hojsgaard's asserted riparian rights based on the stream being tidal or navigable, the problem he faces is that the evidence in the High Court on the point tends to suggest the pre-avulsion stream was neither navigable nor tidal.

[91] Undaunted, Mr Thorp submitted as a back-up position that even if the stream was neither tidal nor navigable, Mr Hojsgaard can still claim rights arising out of a conveyancing presumption that the owner of land on the banks of a non-tidal river has ownership of the river bed to the mid-point of the river.[60] The effect of this presumption is that it is assumed that someone conveying riparian land has no interest in retaining a strip of riverbed when parting with the frontage land.[61]

[92] However, the Supreme Court has held the presumption does not apply to land subject to Māori customary interests.[62] In the present case, those are still to be investigated, as are the claims to ownership independent of customary use. As Mr Harris pointed out, there was nothing in the material before the High Court suggesting that at the time of the Martin acquisition in 1859, Ngati Korokoro had no interest in retaining a strip of riverbed. On the contrary, there was evidence it was an important local Tauranga waka and storage area.

[93] For all these reasons, we conclude the Judge did not err in declining to determine the merits of the underlying survey dispute.

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60 The presumption is known as ad medium filum acquae or the mid-point presumption.

61 *Paki v Attorney General* [2014] NZSC 118, [2015] 1 NZLR 67at [23], see further [60]–[66].

62 At [60]–[72] per Elias CJ, [173] per McGrath J, [223] per William Young J and [318] per Glazebrook J.

[94] That conclusion effectively disposes of the ground of appeal that the Judge was wrong to refuse to make any declaration based on the merits of the underlying survey dispute. The declarations sought from this Court differed from those sought in the High Court in that Mr Hojsgaard did not seek from us a declaration that the location and area of the hydro-parcel in the Thomson survey was correct. However, the claim for declaratory relief even in this Court was directed at securing a hydro-parcel and for the reasons articulated above must fail.

[95] We should add that in addition to arguments about the merits of the competing surveys, Mr Thorp also submitted it was unreasonable of the Judge to refuse to make a declaration when, at a case management conference before the hearing, another High Court judge (Heath J) had indicated the Court would exercise its discretion to resolve the matter by a declaration based on the merits. Mr Thorp even went so far as to say this meant it would also be unreasonable of this Court to refuse to grant declaratory relief.

[96] The argument is untenable. The "indication" from Heath J may have prompted Mr Thorp to amend the statement of claim. But the indication was just that, an indication. It was not binding. A trial judge's discretion cannot possibly be fettered by a Judge at a case management conference making a suggestion for counsel to consider.

[97] We now turn to consider the other ground of appeal — that the High Court was wrong not to quash the Chief Executive's approval of the Brill survey. We do so on the basis that it is not for this Court but for the Chief Executive to determine on her reconsideration whether the Brill survey complies with the Rules by reference to whether the western boundary of the Wright survey is depicted by a right-lined water boundary.

Was the Judge wrong not to quash the Chief Executive's decision to approve the Brill Survey

[98] Mr Thorp submitted it is a cardinal principle of public law that relief should rarely be refused where an error of law such as a failure to consider a mandatory relevant consideration has been established. He referred us to statements in

Air Nelson v Minister of Transport where this Court said there must be extremely strong reasons to decline to grant a remedy.[63] Mr Thorp contended that in this case there was no reason for Jagose J to decline to quash the approval decision, and strong reasons for quashing it.

[99] In response, Mr Bryant – counsel for the Chief Executive – argued that the law had moved on since *Air Nelson*. He submitted courts now take what he described as a "more nuanced" approach and have regard to other factors such as whether the error identified in the context of the whole of each decision was minor, whether the applicant's fundamental challenge had failed and whether the applicant would suffer substantial prejudice if the impugned decision was allowed to stand.[64]

[100] Mr Bryant said it was possible the error identified by the High Court was minor in the context of the approved decision. The Chief Executive could still conclude, after undertaking the reconsideration ordered by the Judge, that the Brill survey complied with the Rules for Cadastral Survey. This was a possibility alluded to by the Judge.[65]

[101] As to prejudice, Mr Bryant denied the Judge's limited relief had prejudiced Mr Hojsgaard. He also disputed claims quashing the decision would have no effect on anyone other than Mr Hojsgaard, because that he said "completely ignores" the interests of the Māori owners of Omapere B.

[102] We accept it is appropriate to take into account the factors identified by Mr Bryant. We also accept it is possible the reconsideration may not have any substantive consequence for the Chief Executive's determination as to the Brill survey's ultimate compliance with the Rules for Cadastral Survey. But equally, it might. After all, the Judge would not have ordered the limited reconsideration if he was certain it would make no difference.

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63 *Air Nelson v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61].

64 Citing *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2017] NZCA 613, [2018] 2 NZLR 453; and *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408.

65 High Court Judgment, above n 2, at [109].

[103] If the Chief Executive were to conclude the Brill survey was non-compliant, that would mean it should not have been approved for integration into the cadastre. However, that would be a pyrrhic victory for Mr Hojsgaard because, as was common ground, the Chief Executive has no power to direct Mr Brill to do anything and no power to remove a survey from the cadastre once it has been entered. The Judge appears to have contemplated that, in those circumstances, there could still be a meaningful remedy for Mr Hojsgaard because the matter would then go to the Surveyor-General for consideration under s 52. The Judge stated that if the consequence of the Chief Executive's reconsideration was that an error was found in the Brill survey, "the statutory scheme provides the Surveyor-General may require its correction".[66]

[104] However, that assumption overlooks the point that if the Brill survey remains in the cadastre, it will attract the presumption of correctness for the purposes of a s 52 consideration,[67] even though it should never have been there in the first place.

[105] This to us seems patently wrong and in our view negates any suggestion that the Judge's refusal to quash the approval decision will not prejudice Mr Hojsgaard. Unless the approval decision is quashed, Mr Hojsgaard's ability to achieve the substantive outcome he seeks is unfairly hampered as the result of a decision found to be unlawful. In fairness to the Judge, it should be noted the point was not taken in the High Court, but raised for the first time before us.

[106] We are mindful of the concerns expressed by Mr Bryant that were this Court to quash the approval decision, that could be seen as undermining the statutory scheme, in particular s 52 and the certainty of the cadastre. Those wishing to challenge approved surveys would be encouraged to achieve by judicial review what they might not be able to achieve under s 52. Section 52 would be side-lined.

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66 High Court Judgment, above n 2, at [109].

67 The Brill survey would not attract the presumption of correctness for the purposes of the reconsideration of the approval decision directed by the Judge. The Chief Executive would be deciding whether there was a conflict between the two surveys in relation to the boundary and if so whether compelling evidence existed to show the Wright survey was in error.

[107] The concerns are valid but, in our view, overstated. Apart from anything else, not all errors are amenable to judicial review, including errors that only come to light because of new evidence not available to the Chief Executive. And, of course, there is always the safeguard of the court's residual discretion. Not every judicial review proceeding will result in an order quashing the approval decision. The statutory scheme must be respected but we are confident Parliament could never have intended to render the courts powerless in the face of an unjust "Catch 22" situation.

[108] The Catch 22 situation in this case is particularly unjust because the error identified by the Judge goes to the heart of Mr Hojsgaard's challenge. When it comes to considering prejudice to third parties, it is also relevant that title to Omapere B based on the Brill survey has not yet issued. We accept that quashing the decision approving the Brill Survey will prejudice the Māori owners of Omapere B but only in terms of delaying the issue of freehold title. It will not in any way prejudice claims currently before the Waitangi Tribunal including claims relating to ownership of the dried stream bed.

[109] We are satisfied that in exercising his discretion whether to quash the Chief Executive's approval decision, the Judge erred by failing to take into account the effect of the presumption of correctness were the decision not quashed. Having now considered the issue afresh, we conclude the Chief Executive's decision should be quashed and so order.

[110] For completeness, we record that we have considered whether the Chief Executive's approval decision was vitiated by other errors, that is, other errors in addition to the error identified by the Judge. These other alleged errors primarily relate to the Chief Executive's lack of consideration of the historic surveys and in particular the 1866 survey. However, the evidence shows the Chief Executive did have regard to a number of the old plans and deeds including the 1866 survey. We agree with the Judge that, correctly analysed, the alleged errors are simply a claim that the Chief Executive did not interpret the 1866 survey in the way Mr Hojsgaard thinks it should be interpreted. We consider there is nothing in this further argument.

Result in appeal CA223/2018

[111] The appeal is allowed to the extent that we find the High Court erred in declining to quash the decision of the first respondent approving the survey of the second respondent for integration into the cadastre under s 9 of the Cadastral Survey Act 2002. That decision is quashed and we direct the first respondent, the Chief Executive, to reconsider the correctness of the Brill survey in light of all the evidence now available to her.

[112] In all other respects the decision of the High Court is affirmed.

[113] As regards costs on the appeal, there is no reason why costs should not follow the event. The second respondent, Mr Brill, only opposed the ground of appeal relating to the claim for declaratory relief and did not ask to be heard on that part of the appeal relating to the judicial review proceedings. He was therefore entirely successful, and we accordingly order the appellant to pay the second respondent costs for a standard appeal on a Band A basis with usual disbursements.

[114] As between the appellant and the first respondent, the appellant was successful and we accordingly order the first respondent to pay the appellant costs for a standard appeal on a Band A basis with usual disbursements.

[115] In both costs awards, we certify for second counsel.

[116] We now turn to the costs awards that were made in the High Court and which Mr Hojsgaard also challenges.

The appeal in CA520/2018 – costs in the High Court

The High Court decision

[117] In his costs judgment, Jagose J described the result of his substantive decision as being (a) that Mr Brill was successful in defeating Mr Hojsgaard's primary case for substantive declaratory relief, on which the Chief Executive abided and

(b) Mr Hojsgaard was successful on "the rump" of his judicial review case against the Chief Executive, on which Mr Brill abided.[68]

[118] Turning to Mr Brill's costs claim, the Judge said that the complexity and contended significance of Mr Hojsgaard's primary case — in particular engaging in factual, scientific and technical disputes about the state of the subject land in periods predating 1907, including principally by way of concurrent evidence from each surveyors and scientists — required counsel with special skill and experience in the High Court.[69] The Judge also said he was satisfied a comparatively large amount of time was reasonable for the preparation of evidence and trial preparation.[70]

[119] The Judge did not however accept that Mr Brill was entitled to increased costs,[71] but ordered that Mr Hojsgaard pay scale costs calculated on a 3B basis together with disbursements of $150,000. The actual disbursements amounted to $210,000 but Mr Brill had offered to reduce them by $60,000.[72] The Judge certified for second counsel,[73] and also ordered Mr Hojsgaard to pay costs of $1,115 to Mr Brill on his costs application.[74]

[120] As between Mr Hojsgaard and the Chief Executive, the Judge held that the Chief Executive should contribute one third of Mr Hosjgaard's scale costs and disbursements, the costs to be calculated on a 2B basis.[75] The Judge was not prepared to certify for second counsel.[76]

Grounds of appeal

[121] On appeal, Mr Thorp accepted that an appeal against a costs decision is an appeal against the exercise of a discretion. He identified numerous alleged errors in the Judge's reasoning and argued he should have awarded both Mr Hojsgaard and

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68 Costs Judgment, above n 5, at [2]–[3].
69 At [8].
70 At [8].
71 At [4] and [11]–[12].
72 At [10].
73 At [17].
74 At [13] and [22].
75 At [21].
76 At [17].

Mr Brill one third of their scale costs using the same cost category, as well as their general disbursements and either all of their expert witness fees or just the surveying costs.

[122] The key errors alleged are:

(a) The Judge mischaracterised the outcome of the proceedings. Correctly analysed, the result meant that like Mr Hojsgaard, Mr Brill was also only partially successful. There was no finding his survey was correct. Mr Brill should not therefore have been awarded full costs and disbursements, but his costs award should have been reduced by one third as it was for Mr Hojsgaard.

(b) Mr Brill could have chosen not to produce the evidence he did.

(c) Further, because neither was any more successful than the other on the underlying surveying dispute (the Judge having declined to make any findings), each should receive all of their expert witnesses' fees or only the fees of their surveying experts.

(d) Contrary to the view taken by the Judge, the expert evidence called by Mr Hojsgaard was not disproportionate. It was necessary because Mr Brill refused to accept that Mr Hojsgaard's surveyors were in any way correct.

(e) Nor was it correct to say as the Judge did that the great bulk of Mr Hojsgaard's disbursements were not relevant to the judicial review claim.

(f) The Judge failed to take into account relevant factors such as the refusal of the Chief Executive or the Surveyor-General to resolve the dispute thereby preventing Mr Hojsgaard from being able to settle with Mr Brill, Mr Brill's substantial contribution to the flaws found in the approval decision, the role of the Court in steering Mr Hojsgaard to

include a claim for declaratory relief, and the fact the underlying dispute had arisen through no fault of Mr Hojsgaard.

(g) It was unfair and wrong to apply category three to the costs award in favour of Mr Brill, when the parties had agreed to category two.

(h) If category three were to be applied, it should have applied to the judicial review proceeding as well. Similarly, there was no reason to certify for second counsel in relation to one proceeding and not the other.

(i) It was an error of principle to apply the two thirds rule to disbursements.

(j) There was no justification for departing from the usual practice of not awarding costs on costs applications. Alternatively, if Mr Brill was to receive an award of costs on his application for costs, it would be unreasonable for Mr Hojsgaard to not also receive such an award.

[123] We are not persuaded there has been any operative error on the part of the Judge.

[124] In particular, we do not agree that Messrs Brill and Hojsgaard enjoyed equivalent success. As Mr Harris submitted, Mr Brill's case was that the declarations sought by Mr Hojsgaard should not be made and Mr Brill succeeded in every sense that matters. In contrast, Mr Hojsgaard advanced numerous arguments against the Chief Executive but only succeeded on the single proposition that the Chief Executive had failed to take into account one mandatory relevant consideration.

[125] Further, Mr Brill cannot properly be criticised for defending the whole of the claim that was brought against him, no matter how misguided that claim might have been. He was entitled to do that and, in our assessment, and that of the Judge, his conduct of the case was reasonable. As is apparent from our conclusions in the main appeal, we share the Judge's view that the declaratory claim was misguided.

[126] In our assessment, there is also no basis for disturbing the costs category adopted by the Judge. It appears Mr Brill did himself propose category two but that was at an early stage and, as our summary of the history of the proceeding demonstrates, the complexity and scope of the litigation kept changing over time.

[127] We are further satisfied the Judge cannot be held to have erred by assigning a different costs category to the judicial review claim. We accept that is not usual practice. It is usual to allocate a costs category to the proceedings as a whole, not individual claims within it. However as r 14.1 of the High Court Rules makes clear, ultimately all matters relating to costs are at the discretion of the trial Judge and in our view the approach the Judge took was open to him. The two claims were not equivalent in complexity. The judicial review proceeding was relatively straightforward, unlike the claim for declaratory relief. It follows we also agree it was open to the Judge to make a distinction between the two when certifying for second counsel.

[128] As for the factors which the Judge is said to have overlooked, we consider that they are either not relevant to costs or not substantiated. In particular, we do not consider there has been any disentitling conduct on the part of either respondent such as to impact on costs.

[129] We are further satisfied that the extensive evidence produced by Mr Hojsgaard was not reasonably necessary to enable him to pursue and succeed in the judicial review part of the proceeding.

[130] We agree that the so-called "two thirds rule" relates to costs, not disbursements and therefore the Judge was wrong to refer to that rule when considering the quantum of Mr Thomson's surveying fees. However, under the High Court Rules, the Court does have a discretion to reduce disbursements if they are disproportionate in the circumstances,[77] and essentially that was what the Judge did. His assessment that the expert expenses were disproportionate was a view that was open to him in the circumstances and is a view which we share. As for the awarding of costs on the costs

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[77] High Court Rules 2016, r 14.12(3).

application, that was something another Judge may not have done but it was plainly within the scope of the Judge's discretion to do so.

[131] We conclude that although Mr Thorp has taken every possible point, there are no grounds for revisiting the Judge's costs decision.

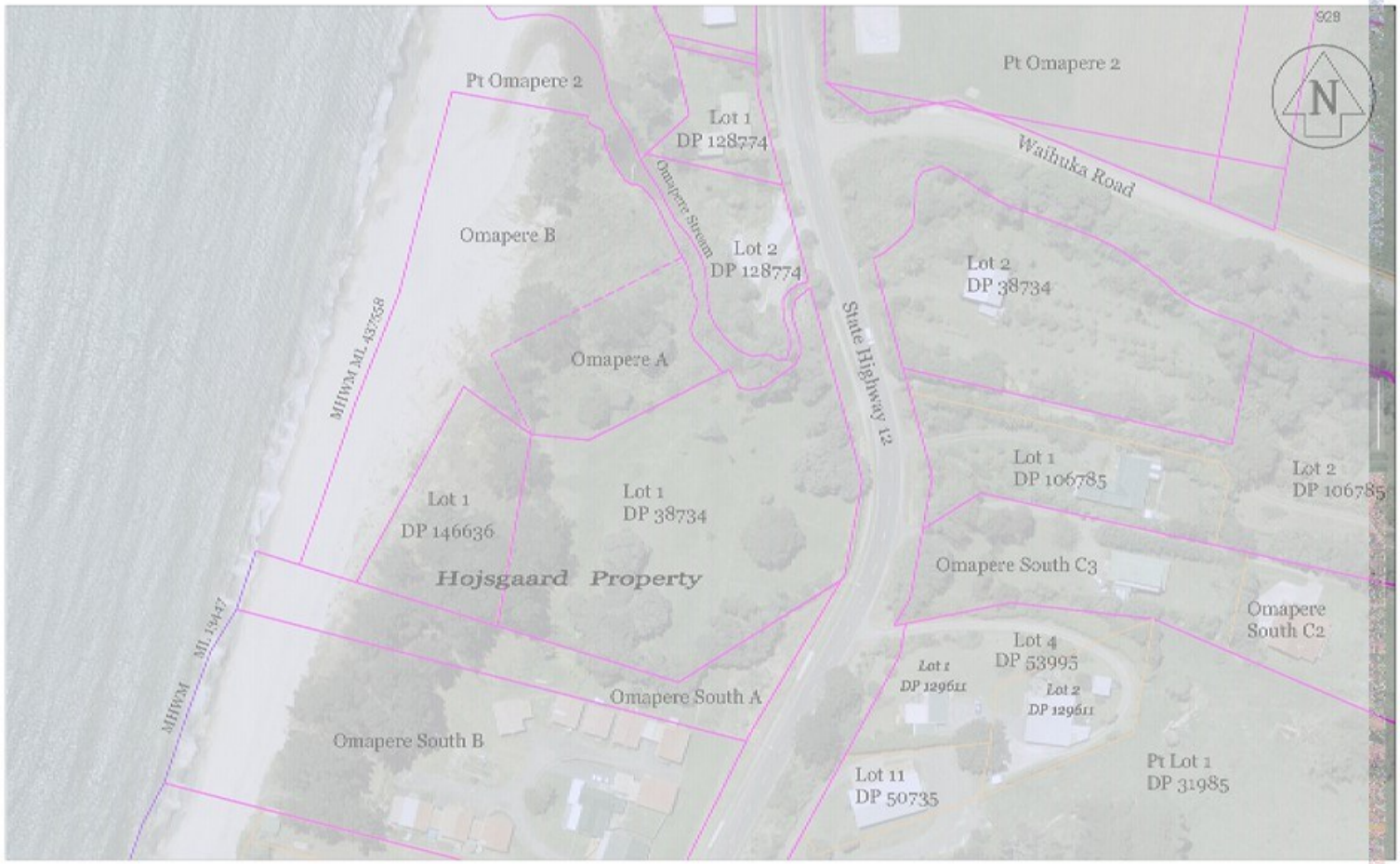
[132] In reaching that conclusion, we have of course taken into account the fact that Mr Hojsgaard has succeeded in this Court against the Chief Executive on an important issue on which he failed in the High Court. However, while important, we do not consider that the quashing of the Chief Executive's decision should have costs implications for the costs awards made in the High Court. The issue did not occupy significant hearing time in the High Court and Mr Hojsgaard's success in this Court is because of an argument not raised in the High Court. The reasons for the costs decisions made by the Judge remain valid including the finding that the expert evidence was disproportionate. Mr Hojsgaard has succeeded in this Court not because of a wealth of technical evidence but because of the presumption of accuracy confirmed in *Otito Reserve*. Appellate intervention in the costs decision is not warranted.

Result in appeal CA520/2018

[133] The appeal is dismissed.

[134] In light of the costs awards made in CA223/2018 and the fact the costs appeal occupied virtually no hearing time, we have decided to make no costs award on this appeal.

Solicitors:
Glaister Ennor, Wellington for Appellant
Crown Law Office, Wellington for First Respondent
Gilbert Walker, Auckland for Second Respondent



Properties Involved

Scale 1:1000

Aerial photography dated 2010

Dated 26 May 2017