IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001616
[2019] NZHC 1563

BETWEEN	SHANE DROMGOOL and DOROTHY DROMGOOL First Appellants
	ALAN DARVALL POULTON and JENNIFER POULTON Second Appellants
	NEWMAN FARMS LIMITED Third Appellants
AND	MINISTER FOR LAND INFORMATION Respondent

Hearing: 7 February 2019

Appearances: D M Salmon and A McDonald for Appellants
A N Isac QC, E M Jamieson and M C McCarthy for Respondent

Judgment: 5 July 2019

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 5 July 2019 at 3 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……

Introduction

[1] Top Energy Ltd (TEL) is a network utility operator under the Resource Management Act 1991 (RMA).[1] As such, it is entitled to apply to the Minister of Lands to have land required for a project acquired or taken under the Public Works Act 1981 (PWA).[2] In 2016, TEL applied to acquire easements over the appellants' land for the purpose of constructing a 110kV transmission line project. The Minister agreed. Efforts to acquire the land by negotiation were unsuccessful. The Minister issued notices of intention to take land (Notices of Intention to Take) pursuant to s 23(1) of the PWA.[3] The appellants' objections were determined by the Environment Court, which found against them.[4]

[2] This appeal against the Environment Court's decision alleges the following errors of law:[5]

(a) finding that the Minister had an unfettered discretion in determining TEL's application to have the land taken and was not required to consider any specific factors, including those identified in s 24(7)(b) and (d) of the PWA (alternative sites, routes or methods of achieving TEL's objectives and whether the proposed takings were fair, sound and reasonably necessary);

(b) treating the Minister's decision as valid when it was defective because TEL's route selection was based on improper and irrelevant considerations and that TEL had withheld material information from the Minister;

(c) finding that defects in the acquisition process could be cured at any point up to the date of the Environment Court hearing;

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1 Resource Management Act 1991, s 166.
2 Section 186(1).
3 Public Works Act 1981, s 23.
4 *S & D Dromgool v Minister for Land Information* [2018] NZEnvC 108 [*Environment Court decision*].
5 These grounds reflect the submissions made at the hearing rather than the Notice of Appeal.

(d) failing to consider that, as a matter of law, the Crown could have granted easements over its own land, thereby avoiding the need to acquire private land and failing to consider the fact that TEL had failed to challenge the Crown's decision not to grant an easement over its own land; and

(e) the Minister failed to provide sufficient statutorily required reasons for the taking of the appellants' land.

[3] Mr Isac QC, for the Crown, maintained that most, if not all, of the grounds of appeal raised are not questions of law and that the appellants are essentially seeking to re-litigate adverse factual findings in the Court below or have this Court substitute its opinion for that of the Environment Court.

Jurisdiction on appeal

[4] An appeal against the Environment Court's decision can only be brought on a question of law.[6] The distinction between an appeal and a judicial review is central to the arguments raised in this Court. This is not a judicial review. The Court is not required to assess what the Minister took into account, nor the legality of her decision, but rather whether the Environment Court itself erred.

[5] A number of the asserted errors in this case rested on process failings in the Minister's decision that was the subject of the objections in the Environment Court. While I accept that procedural unfairness could constitute an error of law,[7] the task of the Environment Court hearing an objection under s 24 of the PWA is not a review of the Minister's decision. Any alleged procedural fairness must therefore be that of the Environment Court, rather that the Minister. And any error of law must materially affect the result before relief will be granted.[8]

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6 Public Works Act, s 24(14); and Resource Management Act, s 299(1).

7 See for example *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council*, above n 10, at [40]–[49].

8 *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81–82.

[6] In *Countdown Properties (Northlands) Ltd v Dunedin City Council*, a full court of this Court considering an appeal from the Planning Tribunal on a question of law, considered that it would only interfere with the Tribunal's decision if it considered that the Tribunal had:[9]

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

[7] That decision is generally accepted as a helpful starting point, though some aspects of the formulation set out benefit from amplification by reference to the common law.[10]

[8] It is important to bear in mind that, in determining the objections before it, the Environment Court was relying on its specialist expertise, which this Court recognises in considering findings of fact made by the Environment Court.[11]

Statutory framework

The compulsory power of acquisition

[9] Section 16(1) of the PWA empowers the Minister to acquire any land required for a "Government work". Under s 186 of the RMA that power can also be exercised to take land that is not required for a "Government work" if it is required by a network utility operator that is a "requiring authority" under s 166.

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9 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; followed in *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]; and *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [90]–[91].

10 See for example *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343; *Skinner v Tauranga District Council* HC Auckland AP98/02, 5 March 2003; and *Smiturnugh Ltd v Auckland City Council* HC Auckland AP28/00, 6 July 2000.

11 *Environmental Defence Society Inc v Mangonui County Council (No 2)* (1987) 12 NZTPA 349 (HC) at 353; and *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

[10] Section 186 of the RMA provides:

> **186 Compulsory acquisition powers**
>
> (1) A network utility operator that is a requiring authority may apply to the Minister of Lands to have land required for a project or work acquired or taken under Part 2 of the Public Works Act 1981 as if the project or work were a government work within the meaning of that Act and, if the Minister of Lands agrees, that land may be taken or acquired.
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> (2) The effect of any Proclamation taking land for the purposes of subsection (1) shall be to vest the land in the network utility operator instead of the Crown.

[11] Land cannot be taken until there have been negotiations with those having a registered interest in the land and the Minister is obliged to endeavour to negotiate in good faith in an attempt to reach an agreement for the acquisition of the land.[12] If negotiations do not result in an agreed acquisition after three months the Minister may proceed to take the land.[13] This stage of compulsory acquisition requires the Minister to publicly notify and serve the affected landowner with a notice that gives, among other things, "a description of the purpose for which the land is to be used" and "the reasons why the taking of the land is considered reasonably necessary".[14]

[12] A notice of intention to take land ceases to have any effect on the expiration of one year after the date of publication in the Gazette unless, among other things, "the intention to take is the subject of an inquiry by the Environment Court or an Ombudsman, or of any application for a judicial review".[15]

[13] Any person with an estate or interest in the land intended to be taken, may object to the taking of the land and such objections are determined by the Environment Court.[16] If an objection is made, s 24(3) of the PWA requires the Environment Court to "inquire into the objection and the intended taking".[17] Specifically, s 24(7) requires that:[18]

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12 Public Works Act, s 18(1).
13 Section 18(2).
14 Section 23(1)(b)(ii) and (iii).
15 Section 23(4)(c).
16 Section 23(3).
17 Section 24(3).
18 Section 24(7).

(7) The Environment Court shall—

(a) ascertain the objectives of the Minister or local authority, as the case may require:

(b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objects:

(c) in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court;

(d) decide whether, in its opinion, it would be fair, sound and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:

(e) prepare a written report on the objection and on the court's finding:

(f) submit its report and findings to the Minister or local authority, as the case may require.

History of the project

[14] TEL acquired the 56 kilometre-long 110kV transmission line between Kaikohe and Kaitaia in 2012. The line delivers electricity to some 11,000 customers. It is about 60 years old and requires maintenance in the short term and replacement in the medium term. In the Environment Court, there was evidence about the maintenance work and repairs that have been ongoing since TEL took over the transmission line. Some parts of the line are particularly vulnerable. Between 2013 and 2017 there were some nine outages which reflected a loss of power for over 40 hours to substantial parts of the network. The estimated economic impact on the Far North economy of those outages is over $13 million.

[15] Over time, the pattern of demand for electricity in the Far North has shifted. Kaikohe and Kaitaia used to be the hubs for economic and population growth in the region. The existing grid design and infrastructure, including the transmission line which currently follows a straight route between the two towns, were intended to cater for this. However, the population of Kaikohe has declined and the population on the eastern seaboard area has increased, including in the Karikari Peninsula and Bay of Islands. The transmission line is a significant distance from the eastern seaboard

area. Given these changes and the issues with the transmission line, TEL has engaged in a project to upgrade the network and build a second line using the termination points in Kaikohe and Kaitaia.

[16] This case is concerned with the part of the project that relates to the section of the line linking the newly constructed substation in Wiroa, near Kerikeri, to the existing substation in Kerikeri. TEL engaged engineers to investigate a potential route linking these two points which runs through the eastern side of the region (that is, where the region has experienced growth). The proposed route would affect about 96 properties. TEL secured easements over most of the properties through agreements to grant easements (AGE's) which were registered under the Public Works Act. This case relates to the route options for an approximately seven-kilometre stretch known as the Mangakaretu section for which agreement could not be reached.

[17] For present purposes, three routes were identified by TEL for the Mangakaretu section of the transmission line. The first would have crossed land owned by the Office of Treaty Settlements (the OTS route). It was the shortest of the three proposed routes but not by a significant margin. It ran across land owned by Koropewa Farm Ltd, across the Taylor property, the Poulton property, the OTS land and the Greenacre property. This was TEL's preferred route. However, it would have required permission from the Minister for Treaty of Waitangi Negotiations and permission was not forthcoming without the agreement from the Treaty claimants, which they would not give.

[18] The second proposed route ran immediately to the west of the OTS route, predominantly over land referred to as the Sutcliffe and FGT Farms land and along a legal (but paper) road before re-joining the original OTS route over the Poulton, Taylor and Greenacre properties (FGT/Sutcliffe route). This route was also reasonably direct and was the second preferred choice after the OTS route. It would, however, have had a quite intrusive effect on the occupants of the Sutcliffe and FGT properties.

[19] The third route deviated significantly from the OTS route, running well to the west of both the OTS and FGT/Sutcliffe routes and traversing land referred to as the Kearney, Sutcliffe (in a different part of the property to the FGT/Sutcliffe route),

Dromgool, North Star, Newman Farms Ltd, Conelius, Greenacres, Poulton and Koropewa Farms land, as well as running along the paper road adjoining the Bedford, Jones and Newman Farms Ltd properties (the Objection route). This route is the subject of the appeal.

[20] Eventually, an AGE was executed in relation to part of the Objection route. But the Dromgools, Poultons and Newman Farm did not agree. In May 2016, TEL made applications to the Minister for her agreement to have these properties on the Objection route taken, which she gave.

The case in the Environment Court

[21] The Environment Court identified its task as follows:[19]

> [56] … to consider each of the matters in s 24(7) and report on these to the Minister for Land Information. In the event that we cannot identify appropriate objectives under s 24(7)(a), or that adequate consideration of alternative sites, routes or methods to achieve those objectives has been undertaken, we have a discretion to revert the matter to the Minister for further consideration.
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> [57] Given the placement of s 24(7)(d) as to the fair, sound and reasonable necessity of the works after ss (c), it is not clear whether this is intended to be a separate process. In this case aspects of adequacy of consideration of alternatives, fairness, soundness and reasonable necessity do have some degree of overlap. We have thus concluded that the discretion to this Court is one given in light of all of the evidence available and its findings as a result. In our view, the discretion to refer the matter back is a power that can be contained within the report and findings to the Minister under s 24(7)(f).

[22] The Court then proceeded to consider the factors it saw as relevant to each of the routes. It canvassed, broadly, the difficulties facing a compulsory acquisition of the OTS land.[20] That block had been part of a larger block taken by the Crown and the subject of historical dispute by Te Whiu. The current OTS block had significant cultural value and was said to be the only remnant of the land still available to the tribe, which heightened its importance in the context of future Treaty settlements.[21] The Court did not accept the objectors' argument that TEL should have acquired this

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19 *Environment Court decision,* above n 4.
20 At [64]–[65].
21 At [65(d)].

land from the Crown.[22] Moreover, there were difficulties securing an AGE with the owner of the Taylor property over which the OTS route would have traversed.[23]

[23] In relation to the matters it was required to consider under s 24, the Court first ascertained the objectives of the Minister and TEL.[24] It did so on the basis that under the statutory framework the Minister was effectively TEL's agent. Based on the notice of intention to take and the notice of interest, the Court concluded that:[25]

> (a) the objective is to provide for an electricity distribution lines system (network);
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> (b) its objective is to improve the capacity, security and reliability of the existing network;
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> (c) that it is to enable further growth and provide for demand in the region; and
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> (d) to remedy underlying network weakness, which will provide a more secure supply.

[24] The Court then moved onto its inquiry into the adequacy of the consideration given to alternative sites, routes and methods of achieving the objectives identified. In doing so, it proceeded on the basis that when the Minister agreed to the s 186 application she was not required to consider in detail the impact on particular landowners.[26] It was satisfied that most of the work in relation to the design and consideration of alternative sites, routes and methods had been undertaken prior to TEL applying to the Minister under s 186 but noted that both the Minister and TEL sought to engage with parties affected by the acquisition.[27]

[25] The Court was satisfied that there had been extensive consideration of alternatives by TEL.[28] The OTS route, being the preferred route, had been carefully considered but could not be achieved because of the refusal of the Minister of Treaty Settlements to grant an easement over the land and there being no power for

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22 At [67].
23 At [68].
24 At [74] and [93].
25 At [77].
26 At [95].
27 At [98].
28 At [109].

compulsory acquisition of Crown land.[29] The FGT/Sutcliffe route was identified in March 2014 and was considered (together with another route to the far west which did not proceed) over the course of that year.[30] However, that route was identified as problematic because of its significant impact on the amenity of both the FGT and Sutcliffe landowners and their homes and the resistance from the Taylor landowner.[31] The Court accepted that the impact on the FGT and Sutcliffe land of the FGT/Sutcliffe route would have been significant.[32]

[26] It considered that the impact of the Objection Route on the landowners affected (including Sutcliffe and FGT) would have been significantly less than the FGT/Sutcliffe route. It described the Objection Route as a "reiteration and refinement of a western deviation from the preferred OTS Route".[33] The Court acknowledged that the Objection Route represented an increased impact on the Poulton's land over an alternative route in respect of which the Poultons had signed an AGE but noted that the major impact was the crossing of the QEII reserve and TEL had adapted the monopole design to avoid direct impact on the reserve area.[34] The Court's finding as to alternative routes and sites was as follows:

> [125] We are satisfied that, at the time of the Minister's agreement under s 186, three takes were required on the Objection route and three takes (Taylor, FGT and Sutcliffe) would have been involved in the FGT/Sutcliffe route.
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> [126] We are in no doubt that consideration had been given by TEL to the FGT/Sutcliffe route, and that this is demonstrated not only by the Sutcliffe's agreement to an alternative route but by a consideration of the impact upon the other route upon the Sutcliffe and FGT properties. It is likely that the impact upon the Taylor property was considered by TEL to be acceptable, but concerns had been identified as to the impact on the FGT and Sutcliffe properties.
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> [127] We are satisfied that the Western Deviation of the Maungakaretu Alignment was developed in an iterative process, including consultation with landowners. It is not for this Court to reach a conclusion as to which is the best route alternative. We are satisfied that alternatives have been considered on a reasonable basis, and that the choice of route is reasonable in the *Wednesbury* sense. Our finding is that there has been an adequate consideration of sites and routes to achieve the objectives.

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29 At [109].
30 At [110] and [111].
31 At [112].
32 At [114].
33 At [114].
34 At [115].

[27] As to consideration of alternative methods, the Court considered that, to the extent possible, TEL had sought to use a method to minimise impact, including "the careful placement of the monopole structures, adjusting pole and line height to avoid conflict, and utilising sensible access methods to minimise disruption to farming".[35] It anticipated that further refinement of the proposed easements would be required and could be addressed through finalisation of the wording. As to the s 24(7)(b) factors, the Court made the following overall finding:

> [129] Given the nature of our duty under s 24(7)(b) is to inquire into adequacy, we find that adequate consideration has been given to alternative sites, routes and other methods. We recognise that there could be improvement to the wording of the easement to more directly reflect the arrangements in prospect, but consider this is a matter that can be the subject of further report by this Court rather than send the matter for further consideration to the Minister at this stage. Accordingly, we conclude that the matter can be the subject of an interim report to the Minister under s 27(7)(f), with a further report in due course on the easements if necessary.

[28] The Court considered the question of reasonable necessity for achieving the objectives of the Minister separately from whether the taking was fair and sound.[36] It said that elements relevant to the question of reasonable necessity were essentially the same as those relating to the question of adequate consideration, which it had already determined:

> [132] This approach is unsurprising given the similarity of the activity involved. A notice of requirement requires a wider consideration of relevant policies and objectives and effects. A Public Works Act taking of the land does not authorise the works, but simply acknowledges the status of the requiring authority and the necessity for the land to be involved.
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> [133] In this case, neither a notice of requirement nor a resource consent is required, and to that extent the tests for adequate consideration, and for reasonable necessity, can be regarded as similar. Certainly, neither of the counsel disputed that the test as to the reasonable necessity involved a test between expedient and essential.

[29] The Court rejected the objectors' argument that the Crown had it within its own power to grant an alternative route because it was not reasonably necessary to take their land.[37] It considered that the Crown was essentially holding the OTS land as trustee pending the resolution of the Treaty claim in respect of it. Taking into account

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35 At [128].
36 At [130] and [131].
37 At [134].

the reluctance of the Minister of Treaty Settlements to use the land for public works against the objections of Te Whiu and the unsuccessful attempts to secure that agreement, it could not be said that a route involving OTS land was reasonably necessary.[38]

[30] The Court considered that it was reasonably necessary to pursue either the FGT/Sutcliffe or the Objection Route and that:[39]

> Given we have concluded that there was adequate consideration of alternatives, then the route chosen is reasonably necessary to achieve that objective, given that TEL has not pursued the alternative route.

[31] The Court specifically referred to and rejected the argument put for the objectors that alternative technology may obviate the need for the line at all.[40] The Court considered that the question of reasonable necessity could accommodate that risk through a sunset provision requiring the easement taken to be used within a reasonable time.[41]

[32] The Court considered that the issues of fairness and soundness involved a "sense of equity and balance to the takings".[42] The effect on the Newman and Dromgool properties were regarded as short and well away from the objectors' houses. The impact on the Poulton's land would be greater but still sought to avoid impact on the QE2 area and on existing housing on the land.[43] The Court concluded that:[44]

> [145] Nevertheless, overall … TEL has been fair in its dealings with the parties, and has attempted as far as it is possible to avoid impact on the QEII area by placing the monopoles outside the area itself and using extra height to gain clearance over the bush area, and agreeing to line placement by helicopter.
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> [146] It also appears that the Objection Route alignment was chosen to allow proper use of the balance of the site, given the need for the alignment to reach the public road. In using the public road, we conclude that TEL and the Minister have been fair in seeking to minimise the taking of land by way of easement. It has proffered to the Joneses and Mr Bedford an easement to assist them, and further minimise impacts. The Joneses have not wanted an

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38 At [135].
39 At [136].
40 At [139].
41 At [140].
42 At [143].
43 At [144].
44 At [145].

> easement on their land, and the Bedfords have not been prepared to consider an easement to supply the Public Works Act claim. Given the impact is permitted under the Plan and there is no Take involved, we conclude TEL have been fair in their approach.
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> …
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> [149] We are unable to see anything in the actions of TEL or the Minister that can be described as bad faith. We conclude that the Objection route chosen is a reasonable and sensible alignment, making use of the public road to minimise the taking of easements. Furthermore, we conclude that TEL has acted fairly in:
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> (a) attempting to use the OTS land, even when the circumstances of that would suggest that that may be subject to criticism on the basis of it being fair to the treaty partners Te Whiu;
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> (b) TEL continuing to negotiate with Sutcliffe in light of his original objections, and securing an AGE over his property, albeit on a different alignment;
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> (c) the offer to move the alignment onto the Jones' property if agreed, or take an easement from the Bedfords by agreement, to enable a claim under the PWA.

[33] The Court then turned to consider "sound" on the basis of it having a meaning of "both technically workable and [representing] appropriate action by the requiring authority to fulfil the objective" as opposed to the alternative meaning as "equivalent to reasonable"[45] On this basis, the Court considered that, given that the only two practical choices were the FGT/Sutcliffe and the Objection Route, and that the distinctions between them was mainly in relation to the impact on amenities with the Objection Route preferable because of the available use of a public road to reduce the easement length required, the choice of the Objection Route was to be regarded as sound.[46]

[34] Finally, the Court considered the "fair, sound and reasonably necessary" criteria as a single overlapping concept.[47] It viewed the essential complaint by the objectors as being that TEL should have utilised the OTS land but reiterated its conclusion that TEL had gone to exhaustive lengths to reach accommodation with the Minister and Te Whiu and its conclusion that even leaving aside the fact that Crown land cannot be taken under the Public Works Act, the refusal by the Minister

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45 At [151].
46 At [152].
47 At [141] and [160].

of Treaty Settlements to agree was reasonable.[48] In those circumstances, the next available public land that could be used without significant deviation was the public road between the Jones, Newman and Bedford properties which did not require a taking of land and which formed part of the Objection Route.[49] In these circumstances, it was fair, sound and reasonably necessary to adopt the Objection Route.[50]

First and third grounds of appeal: what did the Minister have to consider and could defects in that process be cured in the Environment Court?

Error of law

[35] Mr Salmon acted for the objectors in the Environment Court and also on the appeal. In the Environment Court he argued that, in agreeing to a s 186 application, the Minister was required to consider certain factors, including those set out in s 24(7) of the PWA and the relevant Standard for Acquisition of Land under the Public Works Act 1981 (LINZ Standard).[51] The Environment Court rejected this argument.[52] It considered that the Minister had an unfettered discretion and was not required to take any specific factors into account.[53]

[36] In relation to the s 24(7) factors, the Environment Court held that the opening words of s 24(7) "[t]he Environment Court shall" made clear that the factors for consideration under s 24(7) are for the Environment Court, not the Minister.[54] It considered that:

> [36] To suggest that these obligations are imposed upon the requiring authority when they seek the Minister's permission to commence the public works process would, in our view, subvert the entire process envisaged in terms of both the Resource Management Act and the Public Works Act. We are confirmed in our view by reference to the discussion of the process in the *Supreme Court v Seaton*,[55] which decision is clearly binding upon us.

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48 At [160]–[161].
49 At [162].
50 At [163] and [165].
51 Land Information New Zealand *Standard for the acquisition of land under the Public Works Act 1981* LINZS15005 (2 June 2017) [LINZ Standard].
52 Environment Court decision, above n 4, at [39].
53 At [40].
54 At [35].
55 *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157.

[37] As to what obligations Minister did have:

> [37] It is clear from the wording of s 186 that there is no explicit requirement on the Minister to take into account any particular matters. This appears to recognise the policy considerations that may be at play, and the recognition that negotiation and the notice of desire (s 18 PWA) and intention (s 23 PWA) processes may resolve differences without a formal hearing. We note in particular, that there is no particular obligation for identification by the Minister beyond the land being required for the project or work.

[38] Nor did the Court regard the Minister as bound by the LINZ Standard. It considered that they were "for the information of the Minister rather than a requirement on the Minister" and "simply a guide to assist applicants in putting information in a cohesive form before the Minister to enable consideration".[56] Therefore:

> [40] We have concluded that the decision of the Minister under s 186 RMA (and under s 16 PWA) is fully discretionary. No question has been raised in the evidence before this Court suggesting that the decision of the Minister was unreasonable in the *Wednesbury* sense.

[39] The Court added:

> [43] The adequacy of the consideration of alternatives process is a matter to be examined as part of the s 24(7) procedure, if an objection is maintained to the Environment Court. *Thus the actions or failures of a requiring authority are likely to be relevant to the report and findings of the Environment Court under s 24(7), but not at the s 186 agreement stage.* For the sake of completeness, we conclude also that it is not for TEL itself to comply with s 24(7) of the Act, although at the time of the hearing before this Court it would need to establish that each of the grounds had been covered.
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> [44] So, while it is helpful for both the Minister and the requiring authority to keep in mind the requirements under s 24(7) in case an objection is mounted to the Minister, we have concluded that there is no obligation upon either the Minister or the requiring authority to comply with s 24(7) at the time that it advances its project or in applying for or agreeing to take land under s 186 (or s 16 PWA for that matter). We conclude this is entirely consistent with the Iterative Approach anticipated under both Acts.
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> (emphasis added)

[40] On appeal, Mr Salmon argued that the Environment Court's approach was wrong in principle because no authority has an unfettered discretion in the exercise of

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56 At [38]–[39].

a power. At the least, a broadly framed discretion must be exercised to promote the policy and objects of the statute.[57] This submission laid the foundation for the further submission that, in considering the s 186 application, there were a number of implied mandatory considerations that should have been taken into account, including the requirements of LINZ Standard, the contents of the s 186 applications themselves and the statutory threshold identified in s 24(7)(b) and (d) of the PWA.

[41] This issue clearly raises a question of law, namely the nature and scope of the Minister's discretion.

The nature and scope of the Minister's discretion

[42] I do not accept that the broadly framed discretion under s 186(1) was entirely unfettered; in *Unison Networks Ltd v Commerce Commission* the Supreme Court made it clear that a statutory power is subject to limits, even if conferred in unqualified terms and that Parliament be taken to have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the legislation.[58]

[43] The following issues therefore arise:

(a) What was the Minister required to consider? The appellants say that she was required to consider the LINZ Standard and the factors identified in s 24(7)(b) and (d) but the Crown say that neither had to be considered.

(b) What is the significance of TEL's knowledge? The appellants say that TEL's knowledge is not relevant to the Minister's decision-making except to the extent it was disclosed in the s 186 application. The Crown says that all the relevant factors were considered by TEL and its knowledge is attributable to the Minister

(c) Could the deficiencies in the decision-making process be cured through the hearing of the objection in the Environment Court? The appellants

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57 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].
58 At [53].

say that the defects in the decision-making process cannot be cured but the Crown says that the Environment Court was entitled to satisfy itself of the relevant factors and did so.

Relevance of TEL's knowledge

[44] It is convenient to deal with the second point first. Mr Isac argued that TEL had given extensive consideration to alternative routes and that its knowledge ought to be attributed to the Minister, as TEL's agent. This submission rested on dicta in *Seaton v Minister of Land Information New Zealand* to the effect that the Minister could be regarded as the agent of a utility operator for the purposes of s 186 of the RMA.[59] In *Seaton* William Young J, giving reasons for himself and McGrath J, explained that when the PWA was enacted in 1981 utilities were generally in public ownership with powers of compulsory acquisition available in relation to them. However, the subsequent corporatisation and privatisation of many utility functions reduced the scale of central and local government utility activities and with it the potential scope for compulsory acquisition.[60] The "resulting lacuna" is now addressed by s 186 of the RMA,[61] and:[62]

> Where s 186(1) of the Resource Management Act has been invoked, the references to "Minister" in [s24(7)(a) and (d) of the Public Works Act] must be read as a reference to the network utility operator (because the proposed taking will be to give effect to its objectives, rather than those of the Minister). …

[45] Likewise, Elias CJ described the Minister as acting "in effect as agent for the utility".[63]

[46] Self-evidently, however, s 186 of the RMA is not the source of the Minister's power to take or acquire land. That power arises from s 16 of the PWA; s 186 of the RMA merely allows a network utility operator to request that the Minister exercise the power. The act of acquisition or taking at the behest of a network utility operation under s 186(1) must still occur "under Part 2 of the Public Works Act", which can only

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59 *Seaton v Minister of Land Information New Zealand*, above n 55, at [76].
60 At [76].
61 At [77].
62 At [83].
63 At [24].

occur through the Minister's own action, since only the Minister has the power to acquire or take.

[47] It follows that it must be the Minister alone who has the obligation to consider any relevant factors. The exercise of the statutory power of compulsory acquisition process involved a recognised decision-making process beginning with a formal application by the requiring authority under s 186 and the provision of the usual briefing material from Ministry officials. The statutory power and the decision-making process are the antithesis of an agent acting for a private entity. Such an approach could, as Mr Salmon pointed out, result in deficiencies and inaccuracies being attributed to the Minister, with no apparent recourse by those affected. I therefore do not accept that the Minister acts as TEL's agent in the true sense so that the Minister is impressed with TEL's knowledge for the purposes of making a decision to take land under the PWA.

What was the Minister required to consider?

[48] Section 186 does not specify any particular facts that the Minister is required to consider in determining an application and making the consequent decision to take. Neither the RMA nor the PWA specifies criteria for the decision to acquire or take land in the context of a s 186 application. Mr Salmon argued that the Minister had to consider the statutory threshold in s 24(7)(b) and (d). I do not consider that the Minister was required to take into account s 24(7) in itself. But it is both implicit and obvious from s 24(7)(b) that the Minister is required to consider alternative routes and methods.

[49] In the absence of specific criteria the considerations to be taken into account are to be inferred from the PWA as a whole.[64] Given that the power conferred results in the taking of private land and, having regard to the matters that the Environment Court is charged with determining in the event of an objection to any proposed taking, it must unquestionably be that the existence of alternative sites or routes is a matter that the Minister must consider. Section 24(7)(b) requires the Environment Court to determine whether adequate consideration was given to alternative sites, routes and

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64 *Keam v Minister of Works and Developments* [1982] 1 NZLR 319 (CA) at 327.

other methods. Plainly, that requirement contemplates that someone will have considered those factors before the matter reaches the Environment Court. That person must, self-evidently, be the Minister.

[50] This is apparent from the cases involving objections under s 24(7). In *Re Application by Hatton (Hatton)*, for example, the Environment Court, considering an objection to the intended taking of land by the Far North District Council, observed that:[65]

> [52] A duty for the taking authority to give consideration to alternative routes or methods is to be inferred from the direction to the Court to consider the adequacy of that consideration.[66]

[51] In *Kett v Minister for Land Information*, Patterson J considered that the obligation of the Environment Court under s 24(7)(b) to inquire into the "adequacy of the consideration" means the following:[67]

> If this phrase is given its normal plain and dictionary meaning, the Court was required to consider whether the Minister sufficiently and with due regard, chose the route, after taking into account circumstances which were reasonably relevant relating to that route and alternative routes. I see no reason, from the context of the Act or statements made when the Bill was introduced, to give the term any other meaning … The Court was not itself required to determine whether the route was the most suitable of the available alternatives. Its role was to ensure that the Minister had carefully considered the possibilities, taken into account relevant matters and come to a reasoned decision.

[52] Baragwanath J cited that passage in *Waitakere City Council v Brunel*, in the context of a compulsory acquisition by a local authority under s 189 of the Local Government Act 2002 which permitted a local authority to purchase or take land "in the manner provided in the Public Works Act 1981".[68] In the context of an appeal from an Environment Court decision determining an objection under s 24 of the PWA, Baragwanath J emphasised the difference between the Environment Court's role of factual review of the appropriateness of the Council's decision and the role of

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65 *Re Application by Hatton* EnvC Auckland A25/98, 24 March 1998.

66 *Davis v Wanganui City Council* (1986) 11 NZTPA 240; and *Ngatikahu Trust Board v Mangonui County Council* PT Auckland A57/89, 16 August 1989.

67 *Kett v Minister for Land Information* HC Auckland AP404/151/00, 28 June 2001 at [32].

68 *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [29].

the Council itself.[69] The Judge made it clear that the Council had the obligation to adequately consider alternatives.

[53] It follows that the Environment Court made an error in concluding that there was no obligation on the Minister to consider relevant factors in making the decision to compulsorily acquire easements over the subject land. The relevant factors are those identified at s 24(7)(b). I do not, however, accept that the Minister was required to determine whether the taking of the relevant land would be fair, sound and reasonably necessary in accordance with s 24(7)(d). On the plain wording of s 24(7)(d), that is a question for the Environment Court, not the Minister.

[54] Given these conclusions it is not necessary to consider the argument regarding consideration of the LINZ Standard in any detail.[70] The foreword of the LINZ Standard acknowledges that the PWA ensures that both landowners and acquiring agencies are treated fairly by the process of land acquisition, and states the Standard's purpose as setting out the processes and procedures to be followed and the minimum levels of information that must be provided to enable the Minister to assess whether land acquisitions comply with the law.

[55] Clause 2(b) directs that:

> Any network utility operator that is a requiring authority must use paragraph 3.6 and Appendix A: Information required in an application under section 186 of the Resource Management Act 1991 of this standard when applying to the Minister under s 186 of the Resource Management Act 1991 (RMA).

[56] Clause 3.6(b) provides that:

> The network utility operator's submission to the Minister must include the information specified in Appendix A.
>
> (Footnote omitted.)

[57] Appendix A sets out the information required in an application under s 186 of the RMA and includes "the network utility operator's objectives for the project or

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69 At [30].

70 Currently the standard for the acquisition of land under the Public Works Act is LINZ 15005 effective date 2 June 2017, which supersedes but is the same in all relevant respects as the predecessor LINZ 2001, published in 2005.

work", and "details of the assessment of any alternative sites, routes or methods of achieving the applicant's objectives".[71]

[58] Mr Salmon argued that the LINZ Standard was designed with the requirements of the statutory test at s 24(7)(b) of the PWA in mind and that it would not make sense for the Standard to require information that replicated that test other than to allow the Minister or TEL to consider the requirements of s 24(7). It does seem likely that the LINZ Standard was intended to reflect the statutory test. Perhaps more importantly, it appears that the LINZ Standard is expected to be, and is, complied with by applicants under s 186.[72] There appeared to be no evidence as to how the LINZ Standard is treated during the decision-making process. However, it seems very likely that the applicants, the Ministry and the Minister all expect that applications will be made in accordance with it. In those circumstances it must be arguable that the LINZ Standard is a matter that the Minister should take into account. However, argument was not directed along those lines and, given my earlier conclusion, I do not see any need to go further.

Can the Environment Court cure obvious defects in the decision-making process?

[59] The position, therefore, was that the Minister was required to consider alternative routes and the Environment Court was required to examine the adequacy of that consideration. However, the evidence in the Environment Court was that there was no consideration of alternatives by the Minister because "no alternatives were ever before the Minister".[73] This was because s 186 applications were dealt with by staff at the Ministry of Land Information (LINZ), who relied on the evaluations undertaken by TEL, but the s 186 applications and the Ministry briefing papers contained no details of alternative sites. The Minister did not provide an affidavit as to the decision-making process.

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71 LINZ Standard, above n 51, at Appendix A [3(b)] and [4(b)].

72 Mr Isac pointed out that TEL had followed the LINZ Standard when making its s 186 application but the appellants says that it contained statements that were untrue, including the existence and cost-effectiveness of alternative routes and methods of meeting its objectives.

73 Environment Court decision, above n 4, at [42].

[60] Nevertheless, the Environment Court held that there had been adequate consideration.[74] This decision was reached on the basis of the information provided by TEL, on which it had based its evaluation. The Environment Court examined the extent to which TEL itself had considered alternative sites, routes and methods to achieve the objectives. It identified evidence from TEL that, following the lack of progress made with the OTS route, it had made assessments of various other routes.[75] At that stage, there had been five options, two of which were on OTS land.[76] This left the three remaining routes that I have already described: the FTG/Sutcliffe route, the Objection Route and a further route much further to the west which was not pursued. The Court noted that the FGT/Sutcliffe and the Objection Route:[77]

> … appear to have been explored in more detail. It was clear that the FGT/Sutcliffe would encounter strong opposition from both of those parties and Taylor, who had already refused to enter into an AGE for the OTS route. The subject route avoided some properties and less length of easement by using the road, but had implications for the Bedford home, which was situated on a small block close to the road. It involved a longer section through the centre of the Poulton property, and a crossing of the QEII area. At this point we are satisfied that TEL sought permission from the Jones' to move the line onto their property to give a greater separation to the Bedford home, and/or enter into an agreement with the Bedfords to take an easement over a very small strip of their land so as to ensure that they would obtain compensation under the Public Works Act.

[61] When the Court reached its conclusion regarding consideration of alternatives it did so against the background of disclosure by the Ministry at the start of the hearing of relevant documents that should have been discovered earlier and the acknowledgement by a TEL witness during cross-examination that TEL had failed to disclose documents that were potentially relevant.[78] Ultimately, the Court declined to allow those documents to be produced.[79] It then referred to the "extensive consideration of alternatives"[80] by Boffa Miskall (environmental and engineering consultants) and TEL before discussing the substance of the alternative routes and concluding that:[81]

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74 At [129].
75 At [68].
76 At [69].
77 At [72].
78 At [94]–[108].
79 At [105].
80 At [109].
81 At [127].

> We are satisfied that the Western Deviation of the Maungakeretu Alignment [that is, the Objection Route] was developed in an iterative process, including consultation with landowners. It is not for this Court to reach a conclusion as to which is the best route alternative. We are satisfied that alternatives have been considered on a reasonable basis and that the choice of route is reasonable in the *Wednesbury* sense. Our finding is that there has been an adequate consideration of sites and routes to achieve the objectives.

[62] Mr Isac argued that the process of objection to the Environment Court was an iterative one under which the Environment Court could consider all information that becomes available after the Minister's approval of the s 186 application up to the determination of the objections, thereby curing previous defects in the decision-making process. He relied on the Environment Court's decision in *Hatton*, in which the Environment Court found that the District Council had failed to consider alternative routes in its decision to take private land for roading but nevertheless declined to remit the matter for consideration by the local authority because it considered that there were no realistic alternatives and remitting the matter back would therefore be futile.[82]

[63] The present case is different from *Hatton* in that, here, alternatives did exist. It could not be said that remittance back would be futile. Whilst I accept that the process in the Environment Court is iterative, I do not accept that this approach overcomes the errors in the decision-making process in this case. The Environment Court was entitled to take into account information that became available following the making of the s 186 decision but in expressing itself satisfied as to the level of consideration of the alternatives, relied on the consideration by TEL which, as already discussed, was not relevant; it was consideration by the Minister that the Court was required to examine. In these circumstances, the process was not so much iterative as a substitution of the Court's view for that of the Minister.

First and third grounds of appeal: summary

[64] The Environment Court erred in holding that the Minister's discretion was unfettered. It should have approached the question of consideration of alternatives under s 24(7)(b) on the basis that this was a factor (among others) that the Minister was required to consider.

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[82] *Re Application by Hatton*, above n 65, at [52] and [56].

[65] In examining the adequacy of the Minister's consideration of alternative sites, the Environment Court found that there was no information of alternative routes before the Minister. As TEL's knowledge cannot be attributed to the Minister, it is clear that the Minister's consideration of any alternatives was inadequate. It follows that the Court's conclusion that, notwithstanding the lack of any consideration of alternatives by the Minister, there had been adequate consideration was an error. For the same reason, the Environment Court's iterative approach proceeded on the wrong premise that there had been adequate consideration of alternatives.

[66] These grounds of appeal therefore succeed.

Second ground of appeal: did the Environment Court err in treating the Minister's decision as valid when it was defective because TEL's route selection was based on improper and irrelevant considerations, and TEL failed to disclose material information?

[67] The appellants say that, even if the Minister had considered the s 186 applications properly, she could not have reached a valid decision because the applications themselves were founded on irrelevant considerations and omitted material information.

[68] This ground does not raise an appealable question of law. The appellants are effectively trying to review the validity of the Minister's decision. As I noted at the outset, however, the Minister's decision-making process cannot bear on an appeal against the Environment Court's decision.

Fourth ground of appeal: did the Environment Court fail to consider the OTS land was legally available?

[69] Crown-owned land is not subject to compulsory acquisition under the PWA.[83] If a requiring authority seeks to acquire Crown land, that land may be set apart for that purpose only with the consent of the Crown, but such a request does not trigger the Minister's powers of acquisition under the PWA in the same manner as an application under s 186(1) to acquire private land.[84]

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83 Public Works Act, s 23(1).
84 Resource Management Act, s 186(4).

[70] In the Environment Court the objectors argued that TEL should have acquired the OTS land from the Crown. The Court considered that, since the PWA does not permit compulsory acquisition from the Crown, there was no means of obtaining the OTS property short of agreement from the relevant Minister.[85] The Court went on to say:

> [66] Overall, it is not our place to review the decision of the Minister for Treaty Settlements. However, there was a reasonable basis for that Minister to refuse to allow an easement, given the objections of Te Whiu and the history as cited to us by the witness for the Office of Treaty Settlements.

[71] Mr Salmon argued that the Environment Court erred in (1) failing to consider that, as a matter of law, the Crown could have granted easements over its own land and (2) failed to consider that TEL had not challenged the Crown's refusal to do so. In his submission, the efforts by TEL to negotiate with iwi representatives were hardly relevant, given that the land did not belong to iwi but to Crown and it was the Crown that had refused to grant an easement. Mr Salmon argued that the Crown's reasons for not granting an easement over the land bank land were policy driven and therefore irrelevant.

[72] Mr Salmon relied on the decision in *Dannevirke Borough Council v Governor-General*, in which this Court held that it was an improper use of ministerial discretion to decline to compulsorily acquire land for a public work on the basis of political policy and not to allow the compulsory acquisition of Māori land.[86] Mr Isac accepted the statement of principle but did not see it as relevant to the present case because the land in issue is not Māori land, but, rather, held by the Crown. Therefore, it is not available for compulsory acquisition under the PWA in the same way the Māori land was in *Dannevirke*.

[73] In my view the Environment Court approached this issue correctly. There was no challenge by the appellants in relation to the exercise of the discretion not to make the OTS land available for construction of lines. The Environment Court was entitled to proceed on the basis that the decision of the Minister of Treaty Settlements not to

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85 Environment Court decision, above n 4, at [64].

86 *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129 (HC) at 134–135. See also *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NLZR 670 (HC) at [129].

grant consent was a valid one. This ground of appeal falls outside the scope of an appeal against the Environment Court's decision.

[74] In respect of the second argument, the Crown responds that a requiring authority need not exhaust its legal pathways in respect of each alternative prior to focussing on another route. The language of s 186 does not require network utility operators to seek consent from the Crown before making an application under s 186(1). In respect of alternatives, the Court does not need to be satisfied there is no alternative to the option in order to be satisfied that the consideration of alternatives has been adequate.[87]

[75] Moreover, the Crown does not dispute the fact that the OTS route was the preferred route. But it says that the extent to which the OTS route is objectively better is a question of fact and not a question of law. The Environment Court thoroughly reviewed the merits of each route, finding that there had been adequate consideration of each site and route to meet the objectives of s 24(7)(b).

Fifth ground of appeal: Minister's failure to provide reasons

[76] This ground does not raise an appealable question of law. Errors in the Minister's own decision-making are within the ambit of judicial review, not appeal.

Result

[77] The appeal succeeds in part. The first and third grounds of appeal succeed. The other grounds of appeal fail.

[78] The report of the Environment Court is set aside.

[79] Declaratory relief is declined.

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87 *Kett v Minister of Land Information*, above n 67, at [29].

[80] Counsel may address the issue of costs by memorandum filed on behalf of the appellant within 14 days and on behalf of the respondent within a further seven days.

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Courtney J