IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 32/2021
[2022] NZSC 157

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

Hearing:	22 March 2022
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	D M Salmon KC and A W McDonald for Appellants J M Prebble, E M Jamieson and M C McCarthy for Respondent
Judgment:	22 December 2022

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs of $25,000 plus usual disbursements.

REASONS

	Para No
William Young, Glazebrook, O'Regan and Ellen France JJ	[1]
Winkelmann CJ	[110]

WILLIAM YOUNG, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan J)

Table of Contents

	Para No
Introduction	[1]
Factual background	[7]
Legislative provisions	[17]
RMA	[17]
PWA	[24]
Environment Court report	[34]
High Court decision	[37]
Court of Appeal decision	[43]
Issues	[50]
Some preliminary observations	[52]
Good faith and reasonableness	[52]
Focus of s 24 process	[55]
No judicial review	[56]
The Minister's s 186 decision	[57]
Appellants' submissions	[60]
Respondent's submissions	[69]
Our assessment	[73]
Judicial review?	[87]
Our assessment resumed	[94]
Conclusion	[102]
Result and costs	[108]

Introduction

[1] Top Energy Limited is the electricity lines company in the Far North of the North Island. It initiated a project involving the construction of a new 110kV line between Kaikohe and Kaitaia, in order to upgrade its network to meet the increased demand for electricity in the north-east of the Far North and ensure security and reliability of supply. The proposed new line would cross lands owned by the appellants.[1]

[2] The appellants did not agree to grant the necessary easements to Top Energy for the line. Top Energy made applications to the Minister for Land Information (the

---

[1] The proposed line would include six electrical conductors, comprising a 110kV circuit and a 33kV circuit. As well, it would include an optical ground wire (a combination of an earth wire and fibre optic cable). The fibre optic cable provides an ancillary telecommunication facility for protection, control and safe operation of the transmission network. For ease, we simply refer in this judgment to the "110kV line" or the "proposed new line".

Minister) under s 186 of the Resource Management Act 1991 (the RMA) to initiate compulsory acquisition of easements over each of the appellants' land under Part 2 of the Public Works Act 1981 (the PWA).[2] In August 2016, the Minister agreed and directed officials of Land Information New Zealand | Toitū Te Whenua (LINZ) to commence the PWA process. The PWA process involves negotiations with the landowner with a view to an agreed acquisition, but if these fail the Minister may take the land compulsorily.

[3] Negotiation with the appellants did not lead to agreement and ultimately the Minister executed three notices of intention in June 2017 to take easements in relation to the appellants' land under s 23 of the PWA. The appellants exercised their right to object to the taking by filing notices of objection with the Environment Court under s 23(3). The Environment Court's report (issued under s 24 of the PWA) was largely in favour of the Minister's position that the taking of the easements was appropriate.[3]

[4] The appellants appealed against the Environment Court report to the High Court.[4] Their appeal was successful in part and the report of the Environment Court was set aside.[5] However, the Court of Appeal reversed the High Court decision and confirmed the report of the Environment Court.[6]

---

2 "Land" is defined in s 2 of the Public Works Act 1981 [the PWA] as including an interest in land. Section 186(8) of the Resource Management Act 1991 [the RMA] provides for the same. In the present case, the interest that Top Energy sought over each appellant's land was a 20 to 25 metre wide transmission easement and a right to access the easement corridor for the construction, operation and maintenance of the line and its supporting infrastructure. The easement would provide for three poles on the Dromgool and Newman properties and five on the Poulton property, holding the conductors comprising the transmission line and the ground wire.

3 *Dromgool v Minister for Land Information* [2018] NZEnvC 108 (Judge J A Smith, Commissioners Leijnen and Buchanan) [EnvC report]. As is apparent, the Minister, not the requiring authority (in this case, Top Energy Ltd), is the respondent to an objection heard by the Environment Court under s 24 of the PWA.

4 The appeal was an appeal on a question of law under s 299 of the RMA and s 24(14) of the PWA.

5 *Dromgool v Minister for Land Information* [2019] NZHC 1563, [2019] NZRMA 674 (Courtney J) [HC judgment].

6 *Minister for Land Information v Dromgool* [2021] NZCA 44, [2021] NZRMA 382 (Cooper, Clifford and Goddard JJ) [CA judgment].

[5] The appellants were given leave to appeal to this Court, but the grant of leave was limited.[7] The approved question was:

> Whether the Court of Appeal was correct in its interpretation of the role and obligations of the Minister for Land Information in deciding an application under s 186(1) of the Resource Management Act 1991 and, in particular, whether the Minister must be satisfied that the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the network utility operator or whether it is sufficient that the Minister is satisfied the proposed taking is capable of meeting that test.

[6] This Court refused leave on other questions in respect of which the appellants sought leave.[8] At times the argument drifted into these questions, but our focus is on the approved question only.

Factual background

[7] Top Energy considered that the proposed new line was required to meet the increasing demand for electricity in the relevant area and ensure security and reliability of supply.[9] It instructed an engineering consultancy to investigate potential routes for the new line. As part of the overall project, Top Energy investigated a potential route linking a new substation in Wiroa near Kerikeri to a substation at Pamapuria near Kaitaia. This route affects about 96 properties, but Top Energy was able to secure agreements to grant easements in relation to most of them. The area affecting the appellants is an approximately seven kilometre stretch known as the "Mangakaretu section".

---

7 *Dromgool v Minister for Land Information* [2021] NZSC 71 [SC leave judgment]. As mentioned above at n 4, the High Court appeal was brought under s 299 of the RMA. Section 308 of the RMA provides for appeals to the Court of Appeal from a decision of the High Court under s 299. Such appeals are treated as if they are brought under Subpart 8 of Part 6 of the Criminal Procedure Act 2011 which deals with appeals on questions of law in criminal proceedings. The Court of Appeal decision was therefore decided under that framework: see the CA judgment, above n 6, at [7], n 14. Further appeals to this Court are authorised by s 309 of the Criminal Procedure Act, meaning this Court has jurisdiction under s 71(a) of the Senior Courts Act 2016. For further discussion, see generally *Ortmann v United States of America* [2018] NZSC 125 at [30] which addresses similarly structured rights of appeal in the Extradition Act 1999.

8 SC leave judgment, above n 7, at [6]. One ground on which leave was refused but which featured in the argument in this Court was that the Environment Court should have found the Minister's s 186 decision was defective because Top Energy's route selection was based on improper and irrelevant considerations (including that an affected landowner for the "FGT/Sutcliffe Route", discussed below at [10], had political connections) and Top Energy had withheld material information from the Minister.

9 The proposed line forms part of a wider project to build a new transmission line between Kaikohe and Kaitaia. It is being built in three stages. Stages one and two are complete. Stage three would complete the connection. This appeal concerns land sought to be acquired for stage three.

[8] Initially the consultant identified a route for the Mangakaretu section passing over land held by the Office of Treaty Settlements, which was land-banked for the purpose of claims for redress under the Treaty of Waitangi.[10] The route also involved rural land owned by the Taylors, the Poultons (who are appellants in the present case) and a property known as "Greenacres". This route was referred to in the Courts below as the OTS route, and we will use the same name.

[9] Top Energy pursued the OTS route as its preferred route between 2012 and 2014, but it became clear that the Minister for Treaty of Waitangi Negotiations would not agree to easements being placed on the land in the face of objections by the potential Treaty claimants.[11] As there is no power to compulsorily acquire Crown land,[12] Top Energy began investigating alternative routes.[13]

[10] The two alternatives that are relevant to the present appeal were described by the Environment Court as follows (we adopt the same descriptors for this judgment):[14]

> (a) the **FGT/Sutcliffe Route**, slightly to the west of the [OTS] route and travelling through the length of the FGT and Sutcliffe properties, relying on the [agreement to grant an easement] with Poulton and the agreement of Greenacres eventually obtained. This route, of course, still involved crossing the Taylor property, who had already indicated they would not consent, and also further crossing of the FGT Farms Limited, Sutcliffe and Cornelius properties;

---

10 The Office of Treaty Settlements has now become Te Arawhiti | The Office for Māori Crown Relations.

11 The land-bank is a protective mechanism designed to ensure that successive governments retain land for return to Māori through the Treaty settlement process. Once transferred to the land-bank, the relevant property is held by the Crown in anticipation of transfer to a claimant group as part of the settlement of claims relating to historical Treaty breaches. Although the Crown retains the discretion to allow land-banked property to be used for qualifying public works of national interest, approval must first be obtained from the Minister for Treaty of Waitangi Negotiations, typically following consultation with the Māori claimant group likely to seek return of the land as Treaty settlement redress. The Minister of Māori Development also has decision-making powers in respect of land-banked land sought to be used for public works.

12 PWA, s 23(1) empowers the Minister to acquire land "other than land owned by the Crown" for a Government work. The same constraint applies in respect of land sought to be acquired using the RMA pathway: see the discussion of s 186(4) in *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157 at [61] per Chambers and Glazebrook JJ.

13 As will become apparent, the relevant statutory provision refers to consideration of alternative sites, routes, or other methods of achieving the project's objectives. For the purposes of the present appeal, the focus is on alternative *routes* for the proposed line. Such alternatives could include another route involving the use of the s 186 process or another route that did not require compulsory acquisition of land. For simplicity, we will refer to "alternatives" when discussing the statutory requirement and the consideration of alternative routes in the present case.

14 EnvC report, above n 3, at [14] (emphasis in original).

> (b) … the **Objection Route**, travelling through a different portion of the Poulton farm (for which there was no [agreement to grant an easement]), Newman Farms, Dromgool (the Objectors), Sutcliffe, Kearney and Cornelius properties. This utilised a section of public road between Newman Farms and the Jones property for around 1.5km. …

[11] The Environment Court also referred to another route further to the west that was considered but rejected, and it is not relevant to the issues before us.

[12] All of these routes are marked on the map reproduced in annexure C to the Environment Court report.

[13] Ultimately, Top Energy opted for the Objection Route. It obtained an agreement to grant an easement over the relevant part of the Sutcliffe property,[15] but the appellants did not agree to enter into agreements to grant easements. In May 2016, Top Energy made applications to the Minister under s 186(1) of the RMA to have easements taken under Part 2 of the PWA in respect of the appellants' properties. In August 2016, the Minister agreed to commence the compulsory acquisition process. The Minister's decision was, in each case, recorded in a decision sheet prepared by LINZ officials (the LINZ decision sheet). This set out a series of statements with accompanying explanatory text to be noted by the Minister and a number of questions, also accompanied by explanatory text, which the Minister needed to answer, before coming to the s 186 decision itself.

[14] In November and December 2016, the Minister issued Notices of Desire (under s 18 of the PWA) to acquire easements over the appellants' properties.

[15] The appellants did not agree to enter into agreements to grant easements. In June 2017, the Minister executed Notices of Intention to Take Easements in respect of the appellants' properties under s 23 of the PWA.

[16] In July 2017, the appellants filed their objections to the proposed acquisition of easements in the Environment Court. Amended objections were filed in May 2018.

---

[15] The location of the line over the Sutcliffe property for the Objection Route was less intrusive than it would have been if the FGT/Sutcliffe Route were chosen.

The hearing of the objections in the Environment Court took place in June 2018, with the resulting report issued on 11 July 2018.

Legislative provisions

RMA

[17] The focus of the present appeal is the decision made by the Minister under s 186 of the RMA to commence the compulsory acquisition process (we will refer to this as the s 186 decision). Section 186 relevantly provides:[16]

> **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.
>
> (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.
>
> …
>
> (5) Any claim for compensation under the Public Works Act 1981 in respect of land acquired or taken in accordance with this section shall be made against the Minister of Lands.
>
> (6) All costs and expenses incurred by the Minister of Lands in respect of the acquisition or taking of land in accordance with this section (including any compensation payable by the Minister) shall be recoverable from the network utility operator as a debt due to the Crown.
>
> …
>
> (8) For the purposes of this section, an interest in land, including a leasehold interest, may be acquired or taken as if references to land were references to an interest in land.

[18] The purpose of s 186 of the RMA is to provide a mechanism for a network utility operator that is not a central government or local government entity to engage

---

[16] Although the section refers to the Minister of Lands, it is the Minister for Land Information who is now the Minister responsible for the operation of s 186. Part 2 of the PWA refers to the Minister of Lands as well, but this too is treated as a reference to the Minister for Land Information.

in a process that provides for the compulsory acquisition of land, if that is required for a particular project or work.[17]

[19] In the present case, there is no dispute that (and the Minister was satisfied that) Top Energy is a network utility operator and it is also a requiring authority, having applied for and been granted that status under s 167 of the RMA. In many cases, the requiring authority will have given notice to the relevant territorial authority under s 168 of the RMA of its requirement for a designation for the work and the process for consideration of that notice under ss 168A–174 of the RMA will have taken place. That was not, however, required in this case because the applicable district plan allows for the construction of the proposed transmission line without a designation.[18]

[20] The mechanism chosen in s 186 for non-governmental requiring authorities to compulsorily acquire land is to provide that any acquisition must be undertaken by the Minister on behalf of the requiring authority, but in circumstances where, if the compulsory acquisition occurs, it is the requiring authority that is the transferee of the land not the Minister. So the compulsory acquisition process is undertaken by a Minister with public accountability, not by the requiring authority that will, in some cases, be a privately owned entity.[19]

[21] Section 186 does not, itself, provide statutory authority for the Minister to compulsorily acquire land. Rather, it provides for the Minister to trigger the process under the PWA that can ultimately lead to the Minister taking the land required by the network utility operator under s 23 of the PWA.

[22] In *Seaton v Minister for Land Information*, McGrath and William Young JJ observed that s 186 was included in the RMA to fill a lacuna created by privatisation

---

17 Top Energy is owned by a trust for electricity consumers in its area of operation, but is not a local authority.

18 Subject to the qualification that Top Energy would (as it noted in its s 186 applications) be required to secure resource consents for the sections of the proposed line located in areas where electricity lines are not otherwise permitted, such as wetlands and river crossings. Top Energy was confident these could be obtained.

19 The Minister is not involved in the converse process under s 185 of the RMA, however. That section provides for an owner of land subject to a designation to apply to the Environment Court for an order that the relevant requiring authority buy or lease the land under the PWA.

during the 1980s and 1990s.[20] When the PWA was enacted in 1981, utilities were public entities and had direct access to the compulsory acquisition power in the PWA. Section 186 was enacted to allow for the newly private utilities to request that the government exercise its taking powers in the PWA for their ultimate benefit.

[23] In *Seaton*, the Minister had invoked the compulsory acquisition process in the PWA to acquire easements over land needed to relocate towers supporting electricity lines. The land was required because the New Zealand Transport Agency (NZTA) widened the state highway which meant the towers had to be relocated in a way that affected Mrs Seaton's land. The Minister invoked the PWA at the instigation of the NZTA on the basis Mrs Seaton's land was required for a Government work. Mrs Seaton argued her land was in fact required by the utility company for its towers, and therefore it should have invoked s 186 of the RMA. A majority of this Court accepted Mrs Seaton's argument was correct. *Seaton* did not raise the same issues as arise in the present appeal but its discussion of the s 186 power is of assistance in the analysis of the issues arising in this case.

PWA

[24] Once the Minister agrees to an application under s 186(1) of the RMA, the process for acquisition (including compulsory acquisition) of land under Part 2 of the PWA commences. Part 2 deals with acquisitions of land for public works by a Minister or a local authority. (For simplicity, we will deal with the power as it relates to a Minister only.) The Minister has a broadly expressed power under s 4A of the PWA to acquire land for a Government work, to settle the purchase price, to administer, develop or improve the land and to transfer or dispose of it. The detail in relation to the acquisition of land is set out in Part 2.

[25] Before we embark on the analysis of the Part 2 provisions, we reiterate that s 186(1) of the RMA says the acquisition or taking of land for a network utility operator that is a requiring authority is to be effected "as if the project or work were a government work" within the meaning of the PWA. This contemplates that the Part 2

---

[20] *Seaton*, above n 12, at [76]–[77] per McGrath and William Young JJ (although they disagreed with the conclusion reached by the majority on the merits, their characterisation of the purpose behind s 186 was not challenged by other members of the Court).

provisions have to be read with any necessary modifications to reflect the fact that the requiring authority is a non-governmental body and so the project or work is not (other than by the deeming provision) a Government work as defined in s 2 of the PWA.

[26] The scheme of Part 2 of the PWA is as follows:

(a) Section 16(1) empowers the Minister to acquire land required for a Government work.

(b) Section 18 requires good faith endeavours to acquire the required land by agreement. If these endeavours fail, s 18(2) allows the Minister to take the land compulsorily.

(c) Under s 23(1), where a compulsory acquisition is required, the Minister must publicly notify by Gazette their intention to take the land, setting out a description of the land, the purpose for which the land is to be used, the reasons why the taking is considered reasonably necessary and the period for the making of objections. Notice must also be served on the landowner of the Minister's intention to take the land (the notice in effect sets out the same points as those in the Gazette).[21]

(d) Section 23(3) provides that any person with an interest in the relevant land may object to the taking in the Environment Court.

[27] Section 24 deals with the objection process. It relevantly provides:

> **24 Objection to be heard by Environment Court**
>
> (1) On receiving a written objection under section 23, the Environment Court shall, as soon as practicable, send a copy of the objection to the Minister or local authority, as the case may require.
>
> (2) Within 1 month after receiving a copy of the objection or within such further period as the Environment Court may allow, the Minister or local authority, as the case may require, shall send to the Environment Court and serve on the objector a reply to the objection containing the following information:

[21] Section 23(1)(c), referring to the prescribed form set out in sch 1 of the PWA.

(a) the statutory or other authority under which it is proposed to take the land; and

(b) the nature of the work to be constructed or the purpose for which the land is required; and

(c) such other matters as may be appropriate having regard to the objections made and to any practice directions issued by the Environment Court.

(3) The Environment Court shall inquire into the objection and the intended taking and for that purpose shall conduct a hearing at such time and place as it may appoint.

…

(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 objectives:

(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 findings:

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

…

(10) The report and findings of the Environment Court shall be binding on the Minister or, as the case may be, the local authority.

…

(14) Subject to sections 299 and 308 of the Resource Management Act 1991, no appeal shall lie from any report or recommendation of the Environment Court under this section.[22]

22 See above at n 7 for discussion of the appeal provisions.

[28] As mentioned above, s 186(1) effectively deems the network utility operator's work to be a Government work for the purposes of the PWA. For that arrangement to make sense, Part 2 of the PWA must be read with necessary modifications to bring the PWA and RMA into alignment. Most relevantly, in *Seaton*, McGrath and William Young JJ for the minority observed:[23]

> Where s 186(1) of the [RMA] has been invoked, the references to "Minister" in [s 24(7)(a) and (d) of the PWA] 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).

[29] Similarly, Chambers and Glazebrook JJ reasoned that if the s 186(1) process had been invoked in *Seaton*, the Environment Court's focus in an objection hearing under s 24 of the PWA would be on the *network utility operator's* need for the relevant easements, rather than the objectives of the Minister.[24]

[30] The appellants accept that this is correct, although they argue these statements do not assist in resolving the dispute in the present case. We do not agree: in our view this is an important feature of the PWA process where a network utility operator that is a requiring authority is involved.

[31] Of particular importance in the present case are s 24(7)(b) and (d), which require the Environment Court to enquire into the adequacy of the consideration given to alternatives to the taking and to decide whether the taking is "fair, sound, and reasonably necessary for achieving the objectives" of the Minister. They are important because the appellants say the same obligations are imposed on the Minister when considering whether to exercise the power in s 186 of the RMA.

[32] Another matter to note in relation to s 24 is that it requires the Environment Court to inquire into an objection to the taking of land (as a result of a decision under s 23). The process is the same whether the taking is by the Minister for a Government work or by the Minister for a project or work of a requiring authority.

---

23 *Seaton*, above n 12, at [83]. This was, however, rejected by the High Court Judge in this case (HC judgment, above n 5, at [47]) but was accepted by the Court of Appeal (CA judgment, above n 6, at [79]–[80]).

24 At [66] per Chambers and Glazebrook JJ.

Section 24 does not expressly refer to any antecedent s 186 decision in cases where the proposed taking is at the behest of a requiring authority.

[33] If there is no objection or the objection fails, the Minister may initiate the process whereby the relevant land is taken by a Proclamation issued by the Governor-General under s 26. Where the Proclamation relates to land to be acquired for a network utility operator, the effect of the Proclamation is to vest the land in the network utility operator, not the Crown.[25]

Environment Court report

[34] As noted above, the appellants argued in the Environment Court that the Minister was required to be satisfied that the requirements of s 24(7) were met when making a s 186 decision. This was rejected by the Environment Court.[26] The Court described the Minister's s 186 decision as "fully discretionary".[27] Consideration of the s 24(7) criteria is an obligation imposed on the Environment Court (in the context of the objection hearing convened under s 24(3) of the PWA), not the Minister.[28] It noted the evidence of a LINZ official that, because LINZ dealt with the application, "no alternatives were before the Minister".[29]

[35] The Court concluded that the requirements of s 24(7) were met. It was satisfied for the purposes of s 24(7)(b) that the alternatives had been considered on a reasonable basis, and that the choice of the Objection Route was reasonable.[30] It found that Top Energy had given consideration to the FGT/Sutcliffe Route as an alternative.[31] The Court found that it was not required to conclude that the Objection Route was superior to the FGT/Sutcliffe Route. Rather, it was required to be satisfied that the alternatives had been considered and that the chosen route was reasonable.[32] The Court noted it had power to remit the matter to the Minister for further consideration

---

25 RMA, s 186(2).
26 EnvC report, above n 3, at [53].
27 At [40].
28 At [35].
29 At [42].
30 At [127].
31 At [126]. The Court rejected the appellants' allegation that the assessment of this alternative was influenced by threats to Top Energy by Mr Sutcliffe (involving Mr Sutcliffe's claimed political connections): at [113].
32 At [127].

if the consideration of alternatives was inadequate.[33] It considered there was no reason to do that in this case.

[36] The Court also concluded ("by a strong margin") for the purposes of s 24(7)(d) that the taking of easements over the appellants' land was fair, sound and reasonably necessary for achieving the objectives of Top Energy and the Minister.[34] It was satisfied that the takings were appropriate and that the Minister could proceed with the takings by Proclamation if necessary.[35]

High Court decision

[37] On appeal to the High Court, the appellants alleged the Environment Court had made five errors of law. Three of these related to the issues on which this Court refused leave to appeal and are therefore irrelevant in the present context.

[38] The first of the two relevant alleged errors was the Environment Court's conclusion that the Minister had an unfettered discretion in determining Top Energy's applications under s 186 of the RMA and was not required to consider any specific factors including those identified in s 24(7)(b) and (d) of the PWA.

[39] The High Court Judge accepted the appellants' argument that the s 186 discretion is not unfettered. She said a statutory power is subject to limits, even if conferred in unqualified terms, and Parliament must be taken to have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the legislation.[36]

[40] She did not, however, consider that the Minister was required to take into account s 24(7) in itself. Rather, the requirement was that the Minister had to consider alternatives, as provided for in s 24(7)(b).[37] This was because s 24(7)(b) requires the Environment Court to enquire into the adequacy of the consideration of alternatives, which contemplates that the alternatives had already been considered by someone else.

---

33 At [56].
34 At [165].
35 At [170].
36 HC judgment, above n 5, at [42].
37 At [48].

The Judge said the "someone else" was, self-evidently, the Minister.[38] The High Court Judge rejected the observations made by three of the Judges of this Court in *Seaton* to the effect that when undertaking the compulsory acquisition process for a requiring authority, the Minister was acting, in effect, as an agent for the requiring authority.[39] She reasoned that s 186 was not the source of the power to take land: s 16 of the PWA was. Since that power was vested in the Minister, she considered that it must be the Minister alone (not Top Energy) who has the obligation to consider any relevant factors.[40] Therefore, the Environment Court had erred in concluding that there was no obligation on the Minister to consider alternatives.[41]

[41] The second alleged error was the Environment Court's conclusion that any defects in the acquisition process could be cured at any point up to the date of the Environment Court hearing. That finding was significant because the evidence in the Environment Court was that no alternatives were before the Minister before she granted the s 186(1) applications.[42] The High Court Judge's interpretation of that finding was that there was no consideration of alternatives by the Minister herself before she made the s 186 decision.[43] This was because s 186 applications were dealt with by staff at LINZ, who relied on the evaluations undertaken by Top Energy, and the briefing papers provided to the Minister contained no details of alternatives.[44] As consideration given to alternatives by Top Energy was, on the High Court Judge's approach, not relevant, the Judge found that the Environment Court had to examine what consideration had been given to alternatives by the Minister herself.[45] As there had been none, it was not open to the Environment Court to find there had been

---

38 At [49].

39 *Seaton*, above n 12, at [76] per McGrath and William Young JJ and [24] per Elias CJ. Chambers and Glazebrook JJ did not deal with this point as it was not necessary to do so on the view they took. We discuss this below at [76].

40 HC judgment, above n 5, at [47].

41 At [53].

42 See above at [34].

43 The Environment Court report did, however, find there was adequate consideration of alternatives (albeit not by the Minister personally): EnvC report, above n 3, at [109], [126], [127], [129] and [174].

44 HC judgment, above n 5, at [59]. The briefing papers did, however, note that alternatives had been considered by Top Energy. Further, the s 186 applications prepared by Top Energy that were appended to the briefings given to the Minister by LINZ staff did indicate the background information to how the route selection was made by Top Energy (this was noted in the EnvC report, above n 3, at [42], but the Environment Court said that material cannot bind the Minister at the s 186(1) decision stage).

45 At [63].

adequate consideration of alternatives.[46] Consideration of the alternatives by the Environment Court itself could not cure the Minister's failure to do this.[47]

[42] Before leaving the High Court decision, we note in passing that the Judge rejected a ground of appeal based on alleged defects in the Minister's decision-making in relation to the s 186 applications on the basis that such alleged defects were properly within the ambit of judicial review of the Minister's s 186 decision, not an appeal to the High Court from the Environment Court.[48]

Court of Appeal decision

[43] The Court of Appeal endorsed the High Court's finding that s 186 did not confer an unfettered discretion on the Minister.[49] It considered the Minister must exercise the power in s 186 in accordance with the relevant provisions of the RMA and the PWA. This meant it must be exercised on the basis that, if the relevant land is compulsorily acquired and that is challenged by way of an objection, the issue of whether or not the land should be taken will be determined by the Environment Court.[50] The Court continued:

> [72] We consider this means the Minister must be satisfied that the proposed taking is capable of meeting the statutory test in s 24(7)(d) that the Environment Court would apply if there was an objection: namely that it is fair, sound and reasonably necessary for achieving the objectives of the network utility operator that the land should be taken. That requires the Minister to have sufficient information to ascertain what the objectives are, and also that there has been appropriate consideration of alternative sites, routes or other methods of achieving those objectives. But we do not consider it is the Minister's role to decide which of a number of alternatives should be pursued. Rather, it is for the Minister to decide whether the proposal which is the subject of the s 186 application can meet the statutory test.

[44] Later, the Court returned to this issue and commented:

> [85] We do not consider that in deciding whether or not to agree to a request under s 186(1) of the RMA the Minister is required to be satisfied that the proposal will definitely meet the requirements of s 24(7) of the PWA. It will be enough if the Minister is satisfied it is capable of doing so. The

---

46 At [63].
47 At [65].
48 At [4], [5] and [68].
49 CA judgment, above n 6, at [70] citing this Court's decision in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].
50 At [71].

> s 186(1) decision occurs prior to the matter being considered by the Environment Court. If the legislative intent was that both the Minister and the Environment Court were required to be satisfied of the same matters it would be surprising if the statutory regime specified the criteria to be applied at the subsequent stage, but not the former. We think that if that was what was intended, the legislature would have stipulated the considerations relevant to the Minister's decision, and then said they should also govern the Environment Court's decision. The Environment Court could then have been placed in a role analogous to its role in determining an appeal in exercise of its functions under the RMA, but that is obviously not what s 24 of the PWA contemplates.

[45] The Court considered that the inquiry into the adequacy of the consideration of alternatives under s 24(7)(b) of the PWA "must embrace the consideration of alternatives by the network utility operator".[51] It said this Court's decision in *Seaton* supported that view.[52] The High Court's conclusion that the Minister must personally consider alternatives was not in accordance with the statutory scheme.[53] Rather, where a network utility operator is involved, it will assume primary responsibility for considering alternatives.[54] This meant that, while it was open to the Minister to decide there had been inadequate consideration of alternatives, the Minister was not obliged to consider the alternatives.

[46] Accordingly, the Court of Appeal found that the Environment Court's obligation under s 24(7)(b) was to enquire into whether there had been adequate consideration of alternatives, but not whether the Minister personally had given them adequate consideration.[55] It considered that the summary given by LINZ officials to the Minister of the consideration of alternatives by Top Energy was adequate for the Minister to reach the view that the s 186 applications were capable of achieving a favourable report from the Environment Court in the present case.[56]

[47] As mentioned earlier, the High Court rejected allegations of defects in the Minister's decision-making because such allegations were properly within the ambit of judicial review, not an appeal to the High Court from the Environment Court. The Court of Appeal considered that it would be possible for the Environment Court to

---

51 At [81].
52 At [77]–[81].
53 At [82].
54 At [91].
55 At [91].
56 At [106].

consider the processes in relation to the Minister's s 186 decision in an appropriate case (for example, if the unfair process meant there had been inadequate consideration of alternatives). For that to be appropriate, however, it would need to be shown that what had occurred at the s 186 stage had a material impact on the decision to take land that was under consideration by the Environment Court.[57] The Court did not consider any such material impact had been demonstrated.

[48] The Court also rejected the appellants' arguments on issues in respect of which this Court declined leave.[58]

[49] The Court of Appeal therefore allowed the appeal and referred the matter back to the Environment Court to finalise the terms of the easements.

Issues

[50] The approved question on which leave was given sets out the key issue in the appeal: what are the role and obligations of the Minister in deciding an application under s 186(1) of the RMA?

[51] That, in turn, gives rise to some more specific issues:

(a) Must the Minister be satisfied at the time of making the s 186 decision that the best of the available alternatives has been selected (having personally considered the alternatives) and that the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the network utility operator?

(b) Is it the function of the Environment Court when considering an objection to a taking of land under s 24 of the PWA to consider and rule on any alleged defects in the process leading to the Minister's s 186 decision?

(c) Is judicial review of a s 186 decision an available option?

---

57 At [110].
58 At [111]–[112]. See above at n 8.

(d) If the Minister's s 186 decision was unlawful, did the Environment Court report process cure any defects in that decision?

Some preliminary observations

Good faith and reasonableness

[52] In *Deane v Attorney-General*, Hammond J said powers of compulsory acquisition must be strictly construed, exercised in good faith, and even-handedly.[59] He quoted the observation of Upjohn LJ in the England and Wales Court of Appeal in *Simpsons Motor Sales (London) Ltd v Hendon Corp* as follows:[60]

> The underlying assumption of Parliament is that in conferring compulsory powers upon statutory authorities for public purposes, the acquiring authority will act reasonably in the public interest, that is, not only in the interests of their own ratepayers or shareholders, as the case may be, but with due regard to the interests of the person being dispossessed.

[53] We agree with Hammond J and the observation in *Simpsons*. Relying on both *Deane* and the statutory text of s 16(1) of the PWA, the Court of Appeal held in *Seaton* that the Minister's land acquisition power is limited by the concept of reasonableness.[61] Takings must be supported by a clear justification to reflect the significant incursion, authorised by the PWA, on private rights. Although this Court arrived at a different conclusion from that of the Court of Appeal in *Seaton* on the merits in that case, it adopted a similar view of the parameters of the Minister's power. Land can be "acquired if *reasonably* required" or "reasonably necessary" for the specified Government work.[62]

[54] These values are reflected in the requirement in s 24(7) that a taking of land be fair, sound and reasonably necessary for achieving the objectives of the proposed

---

59 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC) at 191.

60 *Simpsons Motor Sales (London) Ltd v Hendon Corp* [1963] Ch 57 (CA) at 83 per Upjohn LJ.

61 *Minister for Land Information v Seaton* [2012] NZCA 234, [2012] 2 NZLR 636 at [31] and [53], referring to *Deane*, above n 59, at 191.

62 *Seaton*, above n 12, at [47]–[48] per Chambers and Glazebrook JJ. See also at [24] per Elias CJ (holding that the "clear meaning" of s 16(1) is that it is "confined strictly" to takings that are "reasonably necessary for a Government work"). McGrath and William Young JJ wrote that the concept of "required" for the purposes of s 16 must "encompass what is reasonably, and not just absolutely, necessary": at [73]. The minority's interpretation of "reasonably necessary" was broader than that of the majority: in the situation that applied in *Seaton*, the minority considered a taking by the Minister followed by a later transfer to the network utility operator was reasonably necessary.

transferee of the land and, more generally, the powers of the Environment Court as independent reviewer of the process in dealing with an objection under s 24, including a power to, in effect, overrule the Minister's decision.[63]

Focus of s 24 process

[55] This appeal derives from the Environment Court's report under s 24 of the PWA. So it is that report that is the focus of the present appeal. The principal focus of the Environment Court's report is the proposed taking of the relevant land under s 23 of the PWA, rather than the Minister's decision to initiate the PWA process under s 186 of the RMA. The appeal to the High Court was an appeal on a question of law, as is the appeal to this Court. The limited question on which leave to appeal to this Court was granted reflects this. At times, counsel for the appellant, Mr Salmon KC, appeared to challenge factual findings made in the Environment Court's report. However, when this was put to him, he accepted that the factual findings were not able to be challenged before us.

No judicial review

[56] The appellants did not challenge the Minister's s 186 decision by way of judicial review. However, the appellants argued that the Environment Court's consideration of an objection under s 24 of the PWA allowed for an analogous challenge to the Minister's s 186 decision. We revert to that aspect of the case later.

The Minister's s 186 decision

[57] Section 186 does not give any guidance as to the matters that must be taken into account by the Minister in making a decision on an application made under that section.[64] However, we agree with both the High Court and the Court of Appeal that

---

63 PWA, s 24(10).

64 Other than its description of the qualifying criteria for applicants (a "network utility operator" that is a "requiring authority" in relation to the proposed project or works). For the Minister's s 186(1) discretion to be engaged, the Minister must first be satisfied that the applicant meets the relevant criteria. However, as noted previously, Top Energy's qualification as a requiring authority is not in dispute. We therefore focus on the factors relevant to the discretion in s 186(1) ("if the Minister of Lands agrees") to permit the commencement of the PWA process under which land may be acquired or taken.

this does not mean that the decision is fully discretionary, as the Environment Court suggested.

[58] In *Unison Networks Ltd v Commerce Commission*, this Court made it clear that public bodies must exercise statutory powers in accordance with the statutes which confer them.[65] The Court added:

> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole.
>
> …
>
> [54] Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.

[59] We apply that approach here. The s 186 decision must be made in accordance with and to promote the policy and objects of s 186 and the statutory scheme of which it is a part. And the Minister must act reasonably. We will address these factors in more detail later.

Appellants' submissions

[60] Mr Salmon argued that, in making a s 186 decision, the Minister must decide whether to exercise his or her discretion to take or acquire land for the purpose of vesting the land in the requiring authority. He said that requires active engagement with the proposal and required the Minister, at a minimum:

(a) to ascertain the objectives of the requiring authority;

(b) to consider alternative sites, routes or other methods of achieving the relevant objectives; and

---

65 *Unison Networks Ltd*, above n 49, at [51].

(c) to be satisfied the proposed taking would be fair, sound and reasonably necessary for achieving the relevant objectives.

[61] As can be seen, this is effectively a submission that the Minister's decision under s 186 is a decision to compulsorily acquire land, rather than just to commence the process where that is one possible outcome. And that the Minister must, at the s 186 decision stage, undertake essentially the same exercise as the Environment Court undertakes pursuant to s 24(7) of the PWA when considering an objection to the taking of land.

[62] Mr Salmon emphasised two aspects of the statutory scheme.

[63] The first is that Parliament did not give a power of compulsory acquisition to requiring authorities. Rather, the power was given to the Minister. Mr Salmon argued that Parliament must have assumed that the Minister would take an active role in the process. He said that, when considered in this context, the Minister's s 186 decision should be focused on the requirements of s 24(7). However, he acknowledged that the Minister will be making a decision based on the information available at the time of the s 186 decision, whereas the Environment Court may be better informed because of information that may have come to light during the processes leading up to the s 24 hearing in the Environment Court. Mr Salmon emphasised that it is the Minister who makes the order for the compulsory acquisition of land under s 23 of the PWA and, if an objection is made, it is the Minister who defends the order in the Environment Court in the hearing under s 24. The requiring authority is not a party to the Environment Court process.

[64] The second aspect is that, even if the s 186 decision is regarded as, broadly speaking, a decision to merely initiate the PWA process, it has important consequences for the landowner concerned. Mr Salmon said once a s 186 decision is made, the landowner is drawn into the PWA process, which can be stressful, time-consuming and costly. While there is provision in Part 2 of the PWA for an agreed sale, the negotiations faced by the landowner are against the background of a potential compulsory acquisition, and so are not willing-buyer/willing-seller negotiations. If an objection is made to a compulsory acquisition order under s 23(3), the

Environment Court process under s 24 is costly and can be beyond the means of many affected landowners.

[65] Mr Salmon argued that, in the present case, the Environment Court would have approved the FGT/Sutcliffe Route if that route had been selected at the s 186 decision stage (because the Court considered one of the FGT/Sutcliffe Route and the Objection Route was reasonably necessary to achieve Top Energy's objectives).[66] He argued that this demonstrated the significance of the s 186 decision in the overall process.

[66] All of this led to Mr Salmon's submission that, in making a s 186 decision, the Minister must personally undertake a consideration of the alternatives and must satisfy him or herself that, on the information available at the time of the s 186 decision, the taking would be fair, sound and reasonably necessary. Put another way, he argued that s 24(7) applies to the Minister at the s 186 stage and in reviewing an objection, the Environment Court should treat s 24(7)(b) as if it reads, "enquire into the adequacy of the consideration given *by the Minister*" to alternatives.

[67] However, in response to questions from the bench, Mr Salmon appeared to accept that it may be legitimate for the Minister to accept the information provided by the requiring authority about its consideration of alternatives if the requiring authority provided detailed and credible information and full disclosure to the Minister and the Minister relied on that assessment.[67] But he said that if it transpired that the process undertaken by the requiring authority was flawed, then the Minister's decision would be tainted. However, he submitted that, given the information before the Minister from Top Energy was not adequate in the present case, the Minister was obliged to make her own inquiries in the present case rather than rely on Top Energy.

[68] Failure to adhere to the above obligations at the s 186 stage may invalidate any subsequent decision by the Minister to take land under the PWA, even if the

---

66 EnvC report, above n 3, at [136].

67 On that view, the Minister is not personally obliged to consider alternatives and can rely on the considerations of the requiring authority. In this case, there was a finding by the Environment Court that the requiring authority's considerations were adequate: EnvC report, above n 3, at [127]. This means that the Minister's decision cannot be faulted by reference to s 24(7)(b). However, we will focus in these reasons on the primary submission advanced for the appellants — that the statutory scheme requires the Minister at the s 186(1) stage to personally consider alternatives.

Environment Court considered the s 24(7) test was met in relation to the decision to take the land under s 23 of the PWA by reference to up-to-date material(s). Mr Salmon submitted that a defect in the s 186 process that materially influences the decision to commence the PWA process (meaning that a different decision at the s 186 stage might have been reached but for the defect) should lead the Environment Court to set aside or refer back the Minister's decision to take the land under s 23 of the PWA. Procedural slips or non-material defects having no impact on the s 186 decision will not, on the other hand, justify such a result. In this case, Mr Salmon sought to argue that the Minister's decision suffered from a material error.

Respondent's submissions

[69] In his written submissions, counsel for the respondent, Mr Prebble, agreed with the Court of Appeal that the Minister must take account of the factors in s 24(7) when making the s 186 decision. He said the areas of disagreement between the parties were how certain the Minister must be that those criteria are met and what the Minister had to do in relation to the consideration of alternatives. He argued that it was not for the Minister to consider alternatives and determine which was the better of the two alternatives that remained in play at the time of the s 186 decision. Since the requiring authority has the institutional knowledge, expertise, financial information and responsibility to meet the costs of the project and will be undertaking the work required to implement the project, the legislation must contemplate that the requiring authority, rather than the Minister, will evaluate alternatives and choose the better alternative. However, he accepted that, before granting the s 186(1) application, the Minister must be satisfied the requiring authority has adequately considered alternatives.

[70] Mr Prebble supported the Court of Appeal's formulation of the s 186 power (that the Minister must be satisfied the proposed taking is capable of meeting the statutory test in s 24(7) of the PWA). But he said "capable" could be expressed differently. In his written submissions, he suggested that the Minister must be satisfied, on the basis of the information available to him or her at the time of the s 186 decision, that the proposed taking *would* be fair, sound and reasonably necessary. In oral argument, he reformulated this in various ways.

[71] Mr Prebble pointed out that the LINZ Standard for the Acquisition of Land under the Public Works Act 1981, which sets out the information that must be provided to the Minister in a s 186 application, requires the applicant to address factors that align with those in s 24(7) of the PWA.

[72] Mr Prebble said the s 186 decision is only the first step the Minister takes, because, under the PWA, there is a required process involving good faith negotiations with the landowner under s 18. If that process does not lead to an agreement then the Minister has to determine whether to exercise the power under s 23 of the PWA. If any information comes to light between the time of the s 186 decision and the time at which a s 23 decision has to be made indicating the requiring authority has not properly considered alternatives or that the taking is not fair, sound and reasonably necessary, then the Minister would not commence the process set out in s 23(1). That process includes publishing a Gazette notice which, among other things, must set out the reasons why the taking of the land is considered reasonably necessary.[68]

Our assessment

[73] Although s 186 is a provision of the RMA, the statutory scheme of which it is a part includes Part 2 of the PWA. Part 8 of the RMA, in which s 186 appears, is principally about designations for public works and heritage orders. Section 186 stands apart from the other provisions, with the exception of the provisions dealing with application for approval as a requiring authority, a status that is required to access the compulsory acquisition regime.[69]

[74] More can be learned about the statutory scheme by an analysis of the process under the PWA that is triggered by a s 186 decision. As noted earlier, the process involves attempts at achieving an agreed outcome, and, in the event that this is not

---

68 PWA, s 23(1)(b)(iii).

69 Section 167. However, in most cases the s 186 decision will relate to land subject to a designation. The process for obtaining a designation will involve consideration of alternatives by the requiring authority, and the adequacy of the consideration given may be assessed by the relevant territorial authority: s 171(1)(b). The process may also involve an appeal to the Environment Court, which is also required to have regard to whether adequate consideration has been given to alternatives: s 174(4). All of these steps will have been completed before the application under s 186 is made. So, in such cases, the Environment Court may have decided that there has been adequate consideration of alternative routes before the s 186 process has commenced.

possible, the Minister is empowered to make a decision to take the relevant land under s 23. Section 24 is an important element of the statutory scheme, involving an independent review of the Minister's decision to take the land by the Environment Court. When making a s 186 decision, the Minister will be aware that the matters of which the Environment Court will need to be satisfied if a compulsory taking eventuates and an objection to the taking is made are those set out in s 24(7), the most relevant of which in this context are the adequacy of the assessment of alternatives and the question as to whether the taking is fair, sound and reasonably necessary.

[75] As noted earlier, and as with any Ministerial decision of this nature, the Minister must exercise the s 186 power reasonably and in accordance with the statutory scheme. The Minister must be satisfied that the party requesting that a s 186 decision be made is, in fact, a requiring authority.[70] But more importantly, the Minister must have regard to s 24 (and, in particular, s 24(7)), which is an important element of the statutory scheme. So in making a decision to set in train the process under Part 2 of the PWA, the Minister has to be satisfied that alternatives have been duly considered. But that does not mean the Minister has to consider alternatives personally or second-guess the consideration of alternatives that have been undertaken by the requiring authority. We accept Mr Prebble's submission that, given the requiring authority's expertise and the detailed work it will have undertaken in relation to the project, it would make no sense for the Minister and his or her officials to be obliged to undertake a parallel process involving a reconsideration of alternatives and of the reasonableness of the proposed acquisition. That is not to say that the Minister and his or her officials should not insist on comprehensive and complete information from the requiring authority before engaging with a s 186 application.

[76] As is apparent, we disagree with the High Court Judge's conclusion that the Minister must personally consider alternatives and her rejection of the observation in *Seaton* that the Minister is, in effect, acting as agent for the requiring authority.[71] We do not think the reference to "agent" was intended to indicate any formal agency relationship: rather, it reflected the fact that the acquisition of the land in question,

---

70 For further discussion, see above at n 64.

71 See above at [40].

although effected by the Minister, is for the benefit of the requiring authority and to achieve its objectives.

[77] The High Court Judge's first reason for her conclusion that the Minister must personally consider alternatives was that the power to take land was granted by s 16 of the PWA, not s 186 of the RMA. She reasoned that, because this power was vested in the Minister, it must be the Minister alone who has the obligation to consider any relevant factors. Even if that were correct, the Minister's consideration would be at the stage of a decision under s 23 of the PWA, not the antecedent s 186 decision.

[78] Her second reason was that s 24(7)(b) required the Environment Court to determine whether adequate consideration had been given to alternatives. The High Court Judge said this contemplated that the alternatives must have been considered before the matter reached the Environment Court, and she thought that this, self-evidently, meant the Minister must undertake the consideration.

[79] We disagree. Section 24(7)(b) is expressed in the passive voice: what the Environment Court is asked to review is the adequacy of the consideration given, but this does not say anything about the party required to give the consideration. As long as the consideration has been adequate, the requirement of s 24(7)(b) will be met. So, while it is open to the Minister to personally consider the alternatives at the time of the s 186 decision, we do not consider that s 24(7)(b) provides a basis for a conclusion that the Minister *must* do so. A Minister may decide to decline a s 186 application or ask for more information about alternatives to satisfy himself or herself that they have been considered sufficiently, for example where the information presented to the Minister is deficient or there is an indication that the consideration by the requiring authority involves bad faith.[72]

[80] This reflects Mr Prebble's submission that the Minister has to be satisfied that there has been adequate consideration by the requiring authority of alternatives, but does not have to form any judgment about which alternative is better. In making that decision, the Minister knows that, in the event there is a taking and it is subject to challenge, there may be a subsequent review, which will involve the

[72] CA judgment, above n 6, at [82]–[83].

Environment Court considering the adequacy of the consideration of alternatives in more detail.

[81] It also reflects the Court of Appeal's view that the adequacy of the consideration of alternatives under s 24(7)(b) of the PWA "must embrace the consideration of alternatives by the network utility operator".[73]

[82] It would be odd if the Minister had to give greater consideration to the merits of the assessment of alternatives than the Environment Court has to do when considering an objection under s 24 of the PWA. In its decision in *Kett v The Minister of Land Information*, the Environment Court adopted a submission by counsel for the Minister as follows:[74]

> … that the scope of the consideration of alternatives that is required in each case is determined by the Minister's objectives;[75] that the enquiry is limited to the adequacy of the consideration given to alternatives, and it is not for the Court to select the alternative that the Court thinks best;[76] and that the Court has to be satisfied that the taking authority has not acted arbitrarily nor given only cursory consideration to alternatives.[77]

[83] *Kett* was a case involving a Government work and therefore did not involve a network utility operator making a request under s 186. So the reference to "the Minister's objectives" needs to be read as "the requiring authority's objectives" in a case like the present. Defining adequacy of consideration of alternatives as an absence of arbitrary action or cursory consideration indicates that the Environment Court is not

---

73 At [81]. See above at [45].

74 *Kett v The Minister of Land Information* EnvC Auckland A110/2000, 15 September 2000 at [45] and [54]. The test from *Kett* was also adopted by the Environment Court in *Brunel v Waitakere City Council* EnvC Auckland A82/2006, 21 June 2006 at [29] (reversed on appeal but not in relation to the test for s 24(7)(b): see *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC)). In its judgment on appeal (*Kett v Minister for Land Information* HC Auckland AP404/151/00, 28 June 2001), the High Court rejected a challenge to the correctness of this test: at [29]–[30]. Later, the High Court said s 24(7)(b) of the PWA required the Environment Court "to consider whether the Minister [when deciding to proceed with a taking under s 23(1) of the PWA] sufficiently and with due regard, chose the route, after taking into account circumstances which were reasonably relevant relating to that route and alternative routes": at [32].

75 *The New Zealand Guardian Trust Co Ltd v The Auckland Regional Council* PT Auckland A54/90, 26 October 1990.

76 *Crimp v Invercargill City Council* (1991) 1 NZRMA 165 (PT) at 168.

77 *Waimairi District Council v Christchurch City Council* PT Christchurch C30/82, 13 July 1982 at 41.

making a merits assessment in relation to alternatives.[78] It is hard to see why a higher standard than this should apply to the Minister's decision at the s 186 stage, given it is clearly a preliminary point in the overall process, compared to the consideration the Minister must give at the s 23 stage and the consideration to be given by the Environment Court under s 24(7) if an objection to the taking is made.

[84] It should also be noted that there is authority to the effect that, under s 24(7), the Environment Court may allow a taking to proceed even if the consideration of alternatives has been inadequate or there has been no assessment of alternatives. The Court may find there has been inadequate consideration (s 24(7)(b)), refuse to exercise its discretion to refer the matter back to the Minister (s 24(7)(c)) and then go on to find that the taking is fair, sound and reasonably necessary (s 24(7)(d)).[79] If that is correct, it means that failure to give consideration to alternatives is not an automatic basis for setting aside a s 23 decision. That supports the view that there cannot be an absolute requirement on the Minister to consider alternatives at the s 186 stage either.

[85] As noted earlier, the Environment Court made a finding of fact (not appealable in an appeal limited to questions of law) that there had been adequate consideration of alternatives, including the FGT/Sutcliffe Route.[80] Mr Salmon accepted the appellants were bound by this, but argued the Environment Court's finding was based on what he called "the backfilled position" (that is, on the basis of information that included matters that were before the Environment Court but had not been before the Minister at the time of the s 186 decision). He said the Environment Court had to consider whether there had been adequate consideration of the FGT/Sutcliffe Route by the Minister at the time of the s 186 decision.

[86] In effect, this proposition assumed that the Environment Court process under s 24 involved a de facto judicial review of the Minister's decision under s 186. Before proceeding further, we pause to consider that proposition.

---

78 In the present case, the Environment Court applied a more demanding test: it was satisfied that alternatives had been considered "on a reasonable basis" and that the choice of the Objection Route was "reasonable in the Wednesbury sense": EnvC report, above n 3, at [127].

79 *Re Hatton* EnvC Auckland A25/98, 24 March 1998 at [54]–[55]; and the Environment Court report in *Brunel*, above n 74, at [24]–[25].

80 EnvC report, above n 3, at [112], [129] and [174].

Judicial review?

[87] As mentioned earlier, the appellants did not seek judicial review of the s 186 decision. Mr Salmon argued that the consideration of the appellants' objections by the Environment Court needed to focus specifically on the s 186 decision and the information available to the Minister when that decision was made.

[88] Mr Salmon was asked during the hearing whether the appellants could have applied for judicial review. He accepted that judicial review was potentially available, but said there were two reasons why judicial review proceedings were not commenced. The first was that the possibility of judicial review only became clear after the receipt of material provided to the appellants in discovery for the purposes of the s 24 objection hearing. The second was that the appellants apprehended that they would be criticised for parallel judicial review proceedings (given that they had already triggered the objection process under s 24) in circumstances where this Court had described the objection process as a check on the proper process in the compulsory acquisition of private land.

[89] The authority given for the "check on proper process" observation is the statement made by Elias CJ in *Seaton*.[81] We do not see Elias CJ's observation as a statement that the s 24(7) process as a whole was a check on proper process. Rather, she observed that the assessment by the Environment Court of alternatives was concerned only with the adequacy of the consideration that has been given to those alternatives, after which she added: "In other words, it is a check on proper process where road-widening is the objective."

[90] As we read it, Elias CJ was saying the Environment Court had an obligation to consider the adequacy of consideration of alternatives; it had to check they had been considered, but it did not have to assess the alternatives itself. She was not, as Mr Salmon suggested, making a generic comment about the objection process.[82]

---

81 *Seaton*, above n 12, at [16].

82 We note that in *Seaton*, Mrs Seaton objected under s 23(3) to the notice of intention to take as well as bringing judicial review proceedings challenging the lawfulness of the Minister's decision to take the land. The hearing of her objection in the Environment Court was put on hold to allow her judicial review (and subsequent appeals) to first be resolved. Given *Seaton* was itself a judicial review, it would therefore be surprising if Elias CJ's comments had the effect Mr Salmon sought to ascribe to them.

[91] In any event, we do not think that the observation, even if it had the meaning ascribed to it by Mr Salmon, properly leads to a conclusion that judicial review of a s 186 decision would be improper in circumstances where an objection has been made under s 23(3) in relation to the decision to take land under s 23 of the PWA.[83] So we do not consider that the commencement of the objection process stood in the way of judicial review proceedings in this case. The objection process focuses on the Minister's decision under s 23, whereas the judicial review proceeding would have focused on the antecedent s 186 decision.[84] It may have been appropriate for one or other of these processes to have been stayed pending the resolution of the other, but we do not see them as mutually exclusive.[85]

[92] On the facts of this case, we do not think it was open to the appellants to seek a review of the Minister's s 186 decision in the context of their objection under s 23(3) of the PWA. It was, in effect, asking the Environment Court to exercise a judicial review jurisdiction that it does not have. We consider the Environment Court was right to concentrate its attention on the decision to which the objection related, namely the proposed taking under s 23, and to consider the s 24(7) factors on the basis of all of the information that was before it.

[93] Our conclusion that there was no impediment to applying to the High Court for judicial review should not, however, be taken as an indication that such an application would have succeeded in the present case.

Our assessment resumed

[94] Our conclusion on judicial review does not mean the s 186 decision is irrelevant in the Environment Court process, however. We agree with the Court of Appeal that it would be possible for the Environment Court to consider the processes in relation to the Minister's s 186 decision if what had occurred at the s 186

---

83 Section 296 of the RMA, which provides that no application for judicial review of a decision in respect of which there is a right of appeal or reference to the Environment Court may be commenced until after that right has been exercised, does not apply to s 186 decisions because there is no such right of appeal or reference in relation to s 186 decisions.

84 Section 23(4)(c) of the PWA specifically refers to the possibility of a judicial review application in relation to the intended taking of land under s 23.

85 See generally the discussion in *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [586]–[589].

stage had a material impact on the decision to take land that was under consideration by the Environment Court.[86] For example, in some instances it may be that consideration is only given to alternatives at the s 186 stage. Where the Minister makes a decision to take land under s 23 on the basis of the earlier considerations which are later shown (following an objection) to be defective, the Environment Court may find that the s 24(7) criteria are not met. Such a possibility is not because the s 186 decision is reviewable, however. Rather it is because the s 186 decision-making tainted the resulting s 23 decision that is the subject of the objection. But that falls far short of what the appellants contend for in the present case.[87]

[95] The appellants' argument, if accepted, would require the Environment Court, when considering an objection under s 23(3), to determine whether alternatives had been adequately considered (a) on the information before the Minister at the s 186 decision stage, and (b) on the information before the Minister at the s 23 decision stage and (c) on the information before the Court itself at the s 24 hearing. There is nothing in s 24 to indicate that the Court is required to address (a) above in the context of a s 24 hearing. The requirements of s 24 are the same for objections to takings for Government works, where there is no equivalent of a s 186 decision, and objections to takings for a requiring authority, where there is a s 186 decision. If Parliament intended the Environment Court to follow a different approach to s 24 hearings where a requiring authority is involved from that applying to takings for a Government work, it could be expected that the legislation would say so.

[96] If the appellant was correct that the Environment Court was required to address (a) above, it is unclear what it would do if it found inadequate consideration of alternatives at the s 186 stage. If the Court finds inadequate consideration on the information before it at point (c) above, the logical remedy is to remit the matter to the Minister for further consideration under s 24(7)(c). But if it finds inadequate consideration at the s 186 stage, but adequate consideration on the information before it, it would be a nonsense to remit the matter to the Minister to reconsider the s 23 decision. And inadequate consideration at the s 186 stage would not provide a

---

86 CA judgment, above n 6, at [110].

87 See also below at [100]. We do not address extreme situations such as bad faith or corruption in the context of a s 186 decision. In practical terms, it is unlikely that a compulsory acquisition following such conduct would satisfy the requirements of s 24(7) of the PWA.

jurisdictional basis for a negative report under s 24 (which requires the Court to find the taking is not fair, sound and reasonably necessary in terms of s 24(7)(d)). All of this indicates the appellants' argument is unsustainable.

[97] The Environment Court's inquiry into the adequacy of the consideration of alternatives for the purposes of s 24(7)(b) necessarily involved reviewing the consideration by someone other than the Court itself when the s 23 decision to compulsorily acquire the land is made. The provision does not require the Court to determine the best alternative; rather it has to enquire into the adequacy of the consideration of the alternatives by others.[88] We have already determined that this consideration of alternatives does not need to be undertaken by the Minister personally.

[98] The appellants argue that, even on that interpretation, the Minister was misled in this case. The Top Energy applications for decisions under s 186 (copies of which were provided to the Minister for the purposes of her consideration of the s 186 applications) said that, having had to reject the OTS Route and having met resistance in relation to the FGT/Sutcliffe Route, the Objection Route was the only practical and economic route available in the area, and this led to discussion with the owners of land affected by the Objection Route. The application then says that, based on those preliminary discussions with those owners, Top Energy decided to adopt the Objection Route. The appellants say this was a misrepresentation, because the FGT/Sutcliffe Route was also practical and economic (and they argued in the Courts below that the OTS Route was, in fact, the best route).

[99] In the decision sheet provided to the Minister by LINZ officials, the discussion of Top Energy's assessment of alternatives (recorded in the three s 186 applications) was repeated in these words:

> Top Energy discussed its preferred transmission route with the affected landowners but it was not able to secure agreement for all the easements it required. As a consequence Top Energy determined a realignment including the Subject Land [i.e. the land affected by the Objection Route] as the only practicable and economic alternate route available.

---

[88] A failure to consider alternatives adequately (or at all) does not necessarily lead to a negative report from the Environment Court or to the Court sending the matter back to the Minister for further consideration: see above at n 79.

[100] The appellants argue this meant the Minister had to make further inquiries at the s 186 decision stage. The Environment Court accepted the Objection Route was not the only practical and economic route, but considered this was not material because the Minister (at the s 186 decision stage) and the Court (at the s 24 stage) had to focus on whether alternatives had been adequately considered, not whether the best solution had been adopted.[89] Both the High Court and the Court of Appeal considered this argument was not relevant to an appeal against the Environment Court report.[90] We agree. It is also outside the scope of the leave granted in this Court.

[101] As the Court of Appeal noted, it is unlikely that the Minister was required to undertake the same exercise at the s 186 decision stage as the Environment Court undertakes under s 24(7).[91] If Parliament had envisaged that, it could be expected it would have said so.

Conclusion

[102] In summary, as we see it, the Minister must not accede to an application under s 186 unless he or she considers it is appropriate to set in train the process under Part 2 of the PWA that could ultimately lead to the compulsory acquisition of the land concerned for the benefit of the requiring authority, which, if it happens and is subsequently challenged, has to meet the s 24(7) criteria . This takes into account the fact that s 186 does not result in a taking: it is only after the PWA processes aimed at a consensual acquisition have been followed and, if unsuccessful, a s 23 decision has been made by the Minister, that a taking occurs.

[103] The Minister must be satisfied, on the information then available, that there is sufficient indication that the requiring authority has articulated its objectives in relation to the proposed work; has given adequate consideration to alternatives to meet those objectives; and that the compulsory acquisition of the land, should that occur, would be fair, sound and reasonably necessary to meet those objectives to justify setting in train the process in Part 2 of the PWA. That recognises that the s 186 decision is the first of many steps, that the Minister would be required to make a further

89 EnvC report, above n 3, at [55].
90 HC judgment, above n 5, at [68]; and CA judgment, above n 6, at [112].
91 CA judgment, above n 6, at [85].

decision under s 23 before a taking can occur, and that there will be feedback from the affected landowner that can be taken into account together with updated or corrected information about costs, land value and the like when the s 23 decision is made.

[104] It is not the function of the Environment Court to review the exercise by the Minister of the s 186 power. The Environment Court's jurisdiction is created by and limited to the terms of ss 23(3) and 24 of the PWA. It may consider what occurred at the s 186 decision stage if that is relevant to the determination of the s 24(7) factors. But a challenge to the legality of the Minister's s 186 decision should be by way of judicial review proceedings in the High Court.

[105] The appellants' position on the approved question for which leave was granted was that the Minister must personally consider alternatives and decide on the best one and be satisfied the proposed taking would be fair, sound and reasonably necessary for achieving the requiring authority's objectives.[92] We have found that to be wrong. There was no requirement for the Minister to do this and the fact that she did not do so does not impugn the s 186 decision in this case. Even if there had been a defect in the Minister's s 186 decision, it would not have been a matter for review by the Environment Court under s 24 of the PWA, unless the defect had materially affected the Minister's s 23 decision, which was the focus of the Environment Court report. There was no such defect in this case.

[106] Although our formulation of the role and obligation of the Minister in relation to a s 186 decision differs from that of the Court of Appeal, the difference does not lead to a different outcome. On our approach to the Minister's s 186 decision in the context of an appeal from the Environment Court's report under s 24, there is no basis to interfere with the Court of Appeal's decision to reinstate the Environment Court's report and remit the matter to the Environment Court to finalise the terms of the easements.

[107] Our conclusion that there was no defect in the s 186 decision that materially affected the subsequent s 23 decision means it is unnecessary to consider whether any

---

92 See above at [60].

defects in the s 186 decision process were cured by the Environment Court's decision dealing with the appellants' objections to the taking of easements over their land.

Result and costs

[108] The appeal is dismissed.

[109] The appellants must pay the respondent costs of $25,000 plus usual disbursements.

WINKELMANN CJ

Table of Contents

	Para No
Introduction	[110]
Statutory scheme	[120]
Part 2 of the PWA	[120]
Section 186 of the RMA	[125]
Decisions in the lower Courts	[127]
Environment Court	[128]
High Court	[130]
Court of Appeal	[134]
The approach of the majority	[139]
First issue: What must the Minister be satisfied of and when?	[144]
When must the Minister address the statutory criteria?	[144]
What are the statutory criteria for decision-making?	[153]
Second issue: To what extent must the Minister personally assess alternative sites, routes or other methods of achieving objectives?	[164]
Third issue: Did the Environment Court err in its consideration of the appellants' objections under s 24?	[174]
The Ministerial decision-making process	[175]
The Environment Court's role and decision	[184]

Introduction

[110] The appellants object to a decision of the Minister for Land Information to compulsorily take easements over their land. The easements will enable Top Energy Limited, an electricity generation and distribution company, to place high voltage overhead transmission lines and related structures there. This will enable a second transmission line to be established between Kaikohe and Kaitaia, and thereby reduce the incidence of unplanned outages on the existing, single line.

[111] The appellants do not dispute this is a worthy objective but argue that the statutory test under Part 2 of the Public Works Act 1981 (the PWA) for the taking of land was not met, either because the Minister did not address what the appellants characterise as a mandatory consideration (namely what alternatives there were to the taking of the subject lands), or because the Minister received inadequate and misleading information from Top Energy which suggested that the route that took the second line through their land was the only practicable and economic alternate route.

[112] They have pursued an objection to the Environment Court,[93] and then appeals against the Environment Court's report on that objection to the High Court[94] and Court of Appeal[95] arguing that the Environment Court erred in its assessment of the Minister's decision to take the land. At each stage of the objection and then appeal process, the Courts have taken a different view of what is required of the Minister.

[113] The approved question on this appeal is whether the Court of Appeal was correct in its interpretation of the role and obligations of the Minister for Land Information in deciding an application under s 186(1) of the Resource Management Act 1991 (the RMA) and, in particular whether the Minister must be satisfied that the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the network utility operator or whether it is sufficient that the Minister is satisfied, as the Court of Appeal found, that the proposed taking is capable of meeting that test?[96]

[114] As to this question, the appellants argue the answer lies in the first proposition in the approved question — that at the s 186 stage, the Minister must be satisfied that the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the network utility operator. The respondent argues that the Minister need only be satisfied that the proposed taking is capable of meeting that test, leaving

---

93 *Dromgool v Minister for Land Information* [2018] NZEnvC 108 (Judge J A Smith, Commissioners Leijnen and Buchanan) [EnvC report].

94 *Dromgool v Minister for Land Information* [2019] NZHC 1563, [2019] NZRMA 674 (Courtney J) [HC judgment].

95 *Minister for Land Information v Dromgool* [2021] NZCA 44, [2021] NZRMA 382 (Cooper, Clifford and Goddard JJ) [CA judgment].

96 *Dromgool v Minister for Land Information* [2021] NZSC 71.

the substantive consideration to be undertaken by the Environment Court hearing an objection under s 24 of the PWA.

[115] My answer to the question for which leave was granted is yes, the Minister must be satisfied that the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the network utility operator, and it is not sufficient that the Minister is satisfied that the proposed taking is merely capable of meeting that test. Ultimately, however, the answer to this question does not dictate the disposition of the appeal nor, as the argument in this case revealed, is it particularly revealing of the nature of the questions the Minister must ask him or herself at the s 186(1) stage.

[116] The content and effect of the test to be applied by the Minister having been fully discussed in the lower Courts, and in this Court, and a variety of answers having been given, it is helpful to attempt some clarity, especially as to what applying that test requires in practice in terms of decision-making, as I come to.

[117] The issues that seem to me to arise from the approved question in the context of disposing of this appeal are as follows:

(a) What is the test for the Minister to apply? I have formulated this issue as what must the Minister be satisfied of and when.

(b) To what extent must the Minister personally assess alternative sites, routes or other methods of achieving the relevant objectives?

(c) Did the Environment Court err in its consideration of the appellants' objections under s 24?

[118] I conclude that before exercising the acquisition powers under Part 2 of the PWA (whether acquiring or taking the land), the Minister must be satisfied that the proposed acquisition is fair, sound and reasonably necessary for achieving the objectives of the network utility operator. This entails obligations to act reasonably, in the public interest, even-handedly, in good faith, and with regard to the interests of the land holder. In practice this requires that the Minister be satisfied that alternative

routes have been adequately considered, and that the route or site which necessitates the acquisition of the subject land has been selected from amongst any alternatives upon a proper basis. This does not however require that the Minister personally, or through Ministerial staff, investigate alternatives, or select amongst them. This is the decision-making model which applies irrespective of whether the proposed acquisition is by a Crown agency or by a requiring authority under s 186.

[119] It is the last issue, issue (c), which is dispositive of the appeal. This issue focuses upon the nature of the statutory objection process before the Environment Court.[97] I find that the Environment Court was wrong in law to find that Top Energy's erroneous statement to the Minister, that the s 186 route was the only "practical and economic route", was irrelevant to the Minister's consideration and to its own consideration of whether proposed acquisition was "fair, sound and reasonably necessary". And for that reason, the appeal should be allowed. If necessary, I would have allowed amendment of the leave question to enable this question to be addressed by this Court.

Statutory scheme

Part 2 of the PWA

[120] A brief piece of historical context assists in interpreting the relevant provisions concerning the status afforded to private property in English laws. English law has long afforded high status to rights of private property. This is reflected in ch 29 of the Magna Carta — "NO freeman shall be … disseised of his freehold, or liberties, or free customs … but … by the law of the land".[98] Blackstone wrote in 1765 that "the law permits no man, or set of men, to [acquire another's land even for public benefit] without consent of the owner".[99] Blackstone described the need for legislative authority to take land, and for "full indemnification and equivalent".[100]

---

97 See majority reasons above at n 4 and n 7, setting out the nature of this Court's jurisdiction on appeal in relation to a report of the Environment Court issued under s 24 of the Public Works Act 1981 [the PWA]. Appeals are limited solely to questions of law.

98 Magna Carta 1297 25 Edw 1 c 29.

99 William Blackstone *Commentaries on the Laws of England: A reprint of the first edition with supplement* (Dawsons of Pall Mall, London, 1966) vol 1 at 135.

100 At 135.

[121] The industrial revolution led to changes in society, which in turn led to demand for the rapid development of infrastructure. In England this produced a flood of piecemeal legislation addressing the issue, before consolidating legislation in the mid-19th century. The pressures of industrialisation and urban development were felt much later in New Zealand enabling this country to pick up the consolidated model in The Lands Clauses Consolidation Act 1863. The right to compulsorily acquire land has, since that time, been a statutory power in New Zealand; the 1981 Act provides the most recent iteration of that statutory power.

[122] The relevant part of the PWA is Part 2, which deals with the acquisition of land for public works. This Part of the Act is administered by Land Information New Zealand | Toitū Te Whenua (LINZ). Section 15A states that in Part 2, unless the context otherwise requires, "Minister" means the Minister of Lands. The Minister of Lands' powers under the PWA are presently exercised by the Minister for Land Information.

[123] The majority has helpfully set out the relevant provisions at [24]–[27] and I do not repeat that detail here. It suffices for my purposes to highlight two aspects of that scheme. First, in relation to s 16, it is the Minister for Land Information who exercises this power of compulsory acquisition for the Crown, no matter which Ministry requires the land for Government work. In other words, no matter which Crown agency has objectives which require the acquisition of the land — by way of example, whether it be the Police, or the Ministry of Education — it is the Minister for Land Information who is empowered under the PWA to acquire the land. There is good reason for this. The decisions to be made involve the exercise of public power to acquire or take private property. They involve appropriately onerous processes for the Ministry and have significant consequences for the landowner.

[124] Secondly, it is only after negotiations to acquire the land have failed, and the notice of intention to take is issued that those with any estate or interest in the land have a right to be heard in the Environment Court under s 24.[101] If no objection is made within the time allowed, the Minister will be the only decision-maker.[102]

---

101 Section 23(3).
102 Section 26.

Section 186 of the RMA

[125] The background to the enactment of s 186 is discussed by the majority at [17]–[23]. As is apparent from the section, the power that the network utility operator that is a requiring authority seeks the benefit of is the Minister's power under s 16 of the PWA to acquire or take private property. In other words, the requiring authority seeks the exercise of public power on its behalf. On receiving that application, the Minister has a decision to make whether to use the powers under Part 2 of the PWA as if the project or work were a Government work. If the Minister so decides, when the land is acquired or taken it will vest in the requiring authority rather than the Crown.[103] Although any claim for compensation is to be made against the Minister for Land Information, that compensation together with any other costs and expenses, is recoverable from the requiring authority.[104]

[126] The effect of this provision then is to place the network utility operator in the same position as any Crown agency in being able to access public powers of compulsory acquisition through the Minister for Land Information.

Decisions in the lower Courts

[127] Rather unhelpfully, none of these provisions, s 186 of the RMA, or the relevant provisions of the PWA set out criteria the Minister is to address before granting a s 186 application and beginning the process of acquiring or taking the land. A range of views has been reached in the Courts below as to what is required of the Minister.

Environment Court

[128] The Environment Court found that the Minister had an unfettered discretion under s 186 of the RMA to utilise the power to take and did not have to consider any of the factors in s 24(7) of the PWA before granting a s 186 application. The Court did, however, observe that it might be useful for the requiring authority and the Minister to keep those factors in mind when making/granting s 186 applications respectively.[105]

---

103 Resource Management Act 1991 [the RMA], s 186(2); and PWA, ss 20(2) and 26(3).
104 RMA, s 186(5) and (6).
105 See, in particular, EnvC report, above n 93, at [40]–[44].

[129] The Environment Court also commented on its role under s 24(7) of the PWA should an objection to a taking be maintained. The Court proceeded on the basis that for the purposes of s 24(7)(b), the relevant enquiry was whether Top Energy, as the requiring authority, had given adequate consideration to alternative sites, routes or other methods. The Environment Court was satisfied that it had.[106]

High Court

[130] In the High Court the Judge said that the Minister's s 186 power was fettered, as are all statutory discretions, by the statutory scheme. In the absence of specific criteria the considerations to be taken into account are to be inferred from the PWA as a whole. She noted the s 24(7)(b) requirement that the Environment Court determine whether adequate consideration was given to alternative sites, routes and other methods, and concluded: "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."[107]

[131] The Minister was not, the Judge concluded, required to determine at the s 186 stage whether the taking of the relevant land would be fair, sound and reasonably necessary in accordance with s 24(7)(d), because on a plain reading of the section that was a question for the Environment Court, not the Minister.[108]

[132] She noted the Environment Court's findings first that there was no information of alternative routes before the Minister, and secondly that there had nevertheless been adequate consideration of alternative routes, because Top Energy had considered them.[109] The Judge said that it was consideration of alternatives by the Minister the Environment Court was required to assess, and Top Energy's knowledge could not be attributed to the Minister.

[133] For the purposes of a s 24 objection proceeding, the Judge considered that the Environment Court was entitled to take into account information post-dating the s 186

---

106 At [109] and [125]–[129].
107 HC judgment, above n 94, at [49].
108 At [53].
109 At [59]–[60].

decision. In that sense, the s 24 objection process in the Environment Court can "cure" defects in the decision-making leading to a taking. However, the Judge found that any curative effect was not available here because as noted above, the Environment Court relied on Top Energy's consideration of alternatives rather than the Minister's.[110]

Court of Appeal

[134] The Court of Appeal decision is supported by the Minister for Land Information. The Court of Appeal saw this Court's decision in *Seaton v Minister for Land Information*[111] as implying that where s 186 of the RMA has been invoked, the required enquiry into the adequacy of the consideration of alternatives under s 24(7)(b) of the PWA must embrace consideration of alternatives by the network utility operator.[112] That was supported, it said, by the language of s 24(7)(b) which does not stipulate who must have given consideration to the alternative sites, routes or other methods of achieving those objectives.

[135] The Court of Appeal held that the Minister was not required to decide that a s 186 proposal would directly meet the requirements of s 24(7) of the PWA. It was enough if the Minister was satisfied that the proposed taking was capable of meeting that test. The Court of Appeal saw it as significant that the s 186(1) decision occurs prior to the matter being considered by the Environment Court because:[113]

> If the legislative intent was that both the Minister and the Environment Court were required to be satisfied of the same matters it would be surprising if the statutory regime specified the criteria to be applied at the subsequent stage, but not the former.

[136] The Court said there were also practical matters why requiring the Minister to be satisfied the proposal would definitely meet the s 24(7) requirements would not work. The Minister would not have the benefit of the information from objectors which might be relevant to that assessment, and moreover, s 18 negotiations might result in modifications to the proposal by the time it reached the Environment Court. The Court continued:[114]

---

110 At [59]–[63].
111 *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157.
112 CA judgment, above n 95, at [81].
113 At [85].
114 At [86].

> It is consistent with this that the Environment Court is the body which actually exercises the power to decide whether or not the land of the objector may be taken.

[137] The Court also said it was not accurate to describe the Minister's s 186 decision as involving a decision to exercise the compulsory acquisition powers, because if the affected landowners agree, or if the objection is successful there would be no compulsory acquisition and no use of the Crown's coercive powers.[115]

[138] Therefore, on the Court of Appeal's view, the Environment Court's consideration in relation to s 24(7)(b) of the PWA is simply whether there has been adequate consideration of alternatives, not whether the Minister has considered them.

The approach of the majority

[139] The majority concludes that the s 186(1) decision is not fully discretionary — rather the Minister must exercise the s 186 power reasonably and with regard to s 24(7) and the statutory scheme as a whole.[116] The Minister must not grant a s 186 application unless satisfied it is appropriate to set in train the process under Part 2 of the PWA that could ultimately, lead to a taking. For the granting of the s 186 application to be appropriate, the Minister must be satisfied on the information available at the time that the requiring authority has articulated its objectives, has adequately considered alternatives and that any taking, should that occur, would be fair, sound and reasonably necessary.[117] Importantly, the majority characterises the s 186 decision as the first of many steps — it triggers the PWA process which may lead to a s 23 taking if acquisition by negotiation is unsuccessful.[118]

[140] The majority consider that in making the s 186 decision, the Minister does not have to personally consider the alternatives or otherwise second-guess the consideration of alternatives undertaken by the requiring authority.[119] In an *informal* sense, the Minister is acting as an agent for the authority in this process.[120] It is

---

115 At [90].
116 See majority reasons above at [57]–[59] and [75].
117 See above at [102]–[103].
118 See above at [102]–[103].
119 See above at [75].
120 See above at [76].

significant that s 24(7)(b) is expressed in passive terms which can incorporate consideration of alternatives by the requiring authority, not just the Minister personally.[121]

[141] The majority also relies upon the appellants' acceptance in oral argument that it is legitimate for the Minister to accept information provided by the requiring authority about its consideration of alternatives if that information is sufficiently detailed and credible, although noting the qualification that such reliance would taint the Minister's decision if the information provided was flawed.[122]

[142] Nonetheless, in the majority view, the Minister may personally consider the alternatives, although is not obliged to, and may decline an application or ask for further information to satisfy themselves that alternatives have sufficiently been considered, but do not have to judge which alternatives are better.[123] The s 186 decision occurs with the Minister's knowledge that a more comprehensive consideration of adequacy will be undertaken by the Environment Court if there is a taking that is the subject of an objection.[124]

[143] Finally, the majority concludes the Environment Court's role under s 24(7) is limited to considering the proposed taking under s 23 and does not extend to reviewing the Minister's antecedent s 186 decision. The latter is only permitted in judicial review proceedings, a jurisdiction the Environment Court lacks. Deficiencies in the s 186 decision-making process will only be relevant to the Court's function in an objection hearing when those deficiencies have a "material impact on the decision to take land" that is the subject of objection.[125]

---

121 See above at [79].
122 See above at [67].
123 See above at [79]–[80].
124 See above at [80].
125 See above at [86]–[94].

First issue: What must the Minister be satisfied of and when?

When must the Minister address the statutory criteria?

[144] As has been observed, the PWA does not provide a neat statement of what matters the Minister must have regard to. Nor is the statutory framework of the PWA clearly set out in decision-making terms, even though the process creates a series of decision points. By this I mean that after the initial s 186 application is granted, the process moves along through a series of notices expressing the Minister's intentions, and ultimately, to the advice to the Governor-General to issue the Proclamation taking the land. The site of actual decision-making is distributed across the sections of Part 2 as opposed to being clearly concentrated in one place. In this sense, s 186 becomes a part of that dispersed decision-making framework, in a taking pursued by a requiring authority.

[145] Some things do however clearly require a Ministerial decision. The first is the decision to use the Part 2 process. I consider this is best characterised as a decision under s 16 to use the PWA processes to acquire the land, either through negotiation or taking, and that it is the decision to use the Part 2 processes that is the critical decision.

[146] The Court of Appeal considered that the State's coercive powers are not in play at the point of issuing the notice of desire to acquire the land prior to negotiation, as the landowner may agree to sell at this point, or the Environment Court may later uphold their objection.[126] On its analysis, the critical decision is that of the Environment Court which is only made after the issue of the notice of intention to take. I disagree. Once the Part 2 processes are set in motion, the powers of compulsion that the State has under that Part are in play. Although it is true that the Minister is obliged to first negotiate with the owner to purchase the land, that negotiation occurs against the backdrop of all parties' knowledge that if the owner does not agree to a sale, the land can be taken. This is not then a standard willing-buyer/willing-seller transaction. That this is so is emphasised by the fact that when the Minister issues a notice of desire to acquire the land, that will be noted on the title of the land,[127] and so

---

126 CA judgment, above n 95, at [90].
127 PWA, s 18(1)(b).

is publicly searchable — a notice, it is safe to infer, which would have implications for the saleability of that land.

[147] I also disagree that the Environment Court is the key decision-maker. The statutory scheme gives the power to invoke Part 2 to the Minister. It is only if there is a challenge to that decision (relevantly expressed in the s 23 notice of intention to take) that the Environment Court comes into the picture.

[148] The Court of Appeal says that since Part 2 envisages an iterative decision-making process, the Minister would not have the relevant information they might obtain following negotiation or receipt of any objection to enable them to make a substantive decision as to acquisition at the point of the initial decision to use the Part 2 processes.[128]

[149] It is undoubtedly possible that the negotiation and objection processes will provide information relevant to the decision to acquire. If that happens, the Minister can revisit the decision. But in my view fairness requires that before the Minister agrees a site or route might be acquired under Part 2 processes and proceeds to notify a desire to acquire the land, the Minister should first have addressed the relevant statutory criteria for compulsory acquisition and satisfied themselves they are met. Once the Part 2 processes begin, and even though they begin with negotiation, the landowner will be put to the cost and anxiety of dealing with negotiations. These are negotiations that take place against the backdrop of compulsory acquisition if no sale is agreed and with the presence on the title of the Minister's desire to acquire the land.

[150] If a requiring authority seeks to access Part 2 through a s 186 application, as is the case here, the Minister must decide whether to use the Part 2 processes for the requiring authority's benefit. Logic dictates that the initial decision under s 16 whether to invoke the Part 2 processes should also be taken at this stage.[129] This again highlights the distributed nature of the decision-making across the statutory scheme, as opposed to it being neatly contained in one key provision.

---

128 CA judgment, above n 95, at [87].

129 Where the matter proceeds by way of s 186 process the Minister will also of course wish to be satisfied that the applicant is a requiring authority for the purposes of the works that are the object of the request (a point also noted in the majority reasons above at n 64 and [73]).

[151] There is another decision point collectively under ss 18(2) and 23. Section 18(2) provides that if after 3 months from the issuing of a notice of desire an agreement for sale and purchase is not made the Minster may "proceed to take the land". Section 23 provides the mechanism for that taking by requiring the Minister to publish and give notice of the intention to take the land. Further, under s 26 the Minster may recommend to the Governor-General that a Proclamation taking the land be issued.[130] As the language of the provisions makes clear, this is the continuation of a process begun with the s 16 decision to acquire the land through negotiation or taking. These related decision points provide an opportunity to revisit the decision to use Part 2 to acquire the land. But this does not mean that the Minister does not have to address the statutory criteria at s 186; the opposite must be true because s 186 puts in play the State's coercive power.

[152] It follows that I differ from the Court of Appeal and the majority in that I consider that the decision taken at the s 186 stage to invoke Part 2 to acquire the land, whether that be by negotiation or taking, is the critical decision taken by the Minister. It is the critical decision because it is the decision to use statutory processes to acquire private land for public purposes.[131]

What are the statutory criteria for decision-making?

[153] The Minister's s 186 power to invoke Part 2 of the PWA is expressed in broad terms. However, I agree with the majority that the Minister's discretion is not unfettered as the Environment Court suggested. The question on which leave was granted asks whether the Minister must be satisfied in deciding to grant a s 186 application that the proposed taking is fair, sound and reasonably necessary for achieving the objectives of the network utility operator. I agree that is an appropriate formulation of the test for the Minister. However, as this case has shown, just what that means in practice has proved elusive. Consideration of the case law and of the statutory scheme sheds some light on this.

---

130 Alternatively the process may come to an end where the Minister withdraws or fails to progress the acquisition after one year from the issuance of a notice of desire or notice of intention: ss 18(3) and 23(4).

131 Contrast the majority reasons at [102]–[103].

[154] The statutory powers conferred upon the Minister must be exercised in accordance with the statutes conferring them. I would add also, that since they are public powers, they must be exercised in accordance with principles of law which guide the exercise of public power.

[155] As noted earlier, statutory compulsory acquisition schemes have operated in England, and then later New Zealand, for approaching two centuries. Significant assistance can therefore be gained from the case law as to the principles that should guide the exercise the Minister under Part 2 of the PWA. The leading case on how such powers are to be exercised is the High Court decision *Deane v Attorney-General*.[132] In that case Hammond J described the general approach to construing statutory powers to compulsorily acquire land as follows:[133]

> The power of the Crown to compulsorily acquire land derives from the ancient notion of eminent domain. It is today a draconian – but necessary power – in a complex, and collective society. But to the extent that the Crown's powers are a direct interference with individual property rights, our Courts – in company with Courts elsewhere in the British Commonwealth – have insisted that, always bearing in mind the purpose of any given powers (*Chilton v Telford Development Corporation* [1987] 1 WLR 872, at p 878 per Purchas LJ), powers of this kind are strictly construed; must be exercised in good faith (*Manukau City v Attorney-General ex relatione Burns* [1973] 1 NZLR 25 (CA), at p 32); and even-handedly. That last consideration has (with respect) never been better expressed than by Lord Upjohn (as he later became) in delivering a judgment of the Court of Appeal in *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1963] Ch 57, at pp 82 – 83:
>
> > "The underlying assumption of Parliament is that in conferring compulsory powers upon statutory authorities for public purposes, the acquiring authority will act reasonably in the public interest, that is, not only in the interests of their own ratepayers or shareholders, as the case may be, *but with due regard to the interests of the person being dispossessed*." …

[156] The powers conferred are then to be exercised reasonably, in good faith, even-handedly, in the public interest (in the sense that they are exercised to promote a public and not a private benefit) and with due regard to the interest of the person being dispossessed. And because the power enables the State to compel the transfer to it of private property the extent of the power will be strictly construed.

---

132 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC).
133 At 191 (emphasis in original).

[157] The requirements to act in good faith, even-handedly and in the public interest are implicit requirements for the exercise of public power. They can also be seen to flow out of this statutory scheme. The scheme exists to enable projects in the public interest. In a standard application of Part 2 the Minister must be satisfied the land is required for the public good. A precondition to the exercise of the power by the Minister is that it is required for a "Government work", and Government work is defined by reference to projects for a public purpose.[134] When it is used by a requiring authority, it is used to enable the construction of infrastructure for the public good.

[158] The concern for the private interest affected is also present in the scheme. It is present in the carefully worked out scheme of negotiation before compulsory taking, and in the requirements for compensation. Constraints are also placed upon the exercise of the power. Section 16 empowers the Minister to use the Part 2 processes only when the Minister is satisfied that the land is "required" for a Government work. As to what required means, assistance can be gained from s 23, which provides that in the notice to take, the Minister must state the reasons why the taking of the land is considered reasonably necessary. It is sensible then, to read "required" in s 16 as meaning "reasonably necessary".[135]

[159] Consideration of whether there are "alternative sites, routes, or other methods of achieving" the objectives is in my view part and parcel of the Minister satisfying themselves that acquiring private land is required (reasonably necessary) for the purposes of s 16. If there are reasonable alternative means of achieving the objective that do not entail the acquisition of private land, then that is clearly relevant to whether the land is "required" for public works.

[160] As such, the Minister must be satisfied that there is a proper basis for selecting the subject land from amongst the alternatives considered — a requirement that is important in this case. Again, this requirement is implicit in the notion that the acquisition is required or rather, reasonably necessary. It is implicit also in the requirement that the power to take be exercised fairly and even-handedly. A proper basis is one that is consistent with the reasonable, good faith and even-handed exercise

---

134 PWA, s 2.

135 See majority reasons above at [52]–[53].

of the power. Examples of an improper basis may be if there were suggestions of bias towards certain public or private interests, illogical (unreasonable) reasoning or bad faith.

[161] The Court of Appeal formulated the test for the Minister at the s 186 stage as being whether the Minister was satisfied that the proposed taking was capable of meeting the test in s 24(7). It follows from my discussion that I disagree with this formulation of the issue for the Minister. Having said that I acknowledge that the Court of Appeal was responding to the appellant's argument that the Minister had to be satisfied that the s 24(7) criteria had been met. I agree that the considerations for the Minister are not determined by s 24(7) but rather by the overall statutory scheme and by the nature of the decision being taken. However, it is no coincidence that the matters the Environment Court is required to "check" under s 24(7) as I have formulated them map quite neatly onto the issues for the Minister when deciding to use Part 2 to acquire the land.

[162] As noted, the statutory scheme and fair process require that the Part 2 process only be invoked where it is reasonably necessary to acquire the land, as discussed above. That requires that the Minister be satisfied that alternatives to acquisition under Part 2 have been addressed before granting the s 186(1) application. This task is primarily that of the Minister. The Environment Court only acts as a check, and then only if objection is taken.

[163] To summarise to this point. Before deciding to invoke Part 2 of the PWA to acquire land (whether acquiring or taking the land) the Minister must be satisfied that the proposed acquisition is fair, sound and reasonably necessary for achieving the objectives of the network utility operator. This entails obligations to act reasonably, in the public interest, even-handedly and in good faith, and with regard to the interests of the land holder. In practice this requires that the Minister be satisfied that alternatives have been adequately considered and that the route or site which necessitates the acquisition of the subject land has been selected from amongst any alternatives upon a proper basis. This is the test the Minister must apply whether the acquisition is for a Crown agency or for a requiring authority under s 186.

Second issue: To what extent must the Minister personally assess alternative sites, routes or other methods of achieving objectives?

[164] In the context of this case the particular issue is the extent to which the Minister must personally assess alternatives or rather rely upon the requiring authority's assessment, in order to be satisfied that the taking is reasonably necessary. Mr Salmon KC argued that the Minister must:

(a) ascertain the objectives of the requiring authority.

(b) consider alternative sites, routes, or other methods of achieving the relevant objectives; and

(c) satisfy themselves that the proposed taking would be fair, sound and reasonably necessary for achieving the relevant objectives.

[165] He accepted that in undertaking these steps the Minister can rely upon information provided by officials and by the requiring authority but must personally make the decision to acquire on the basis that the taking of the land was required. And he maintained that any deficiency in the material relied upon could affect the validity of the Minister's decision. In this case, Mr Salmon argued, the deficiency was that the Minister was misled as to the basis upon which the subject land had been selected amongst alternative routes.

[166] Mr Salmon was correct to concede that the Minister could rely upon information obtained from officials and from the requiring authority. It is a principle of public law that Ministers may be assisted in their statutory role by departmental officials. Where there are errors in the information provided by officials and relied upon by the Minister, the decision can be impugned on that basis. This includes where the information is collected by officials from a third party.[136]

[167] As I have outlined, the statutory scheme and the related case law makes clear that the Minister must personally make the decision to use Part 2 to acquire the land,

---

[136] Although in the different context of judicial review, see *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 149 per Cooke J.

whether by agreement or taking, and to do so must be satisfied that the acquisition of the land is reasonably necessary for achieving the public objective (and all that entails — see above at [160]–[163]).

[168] In compiling this advice officials are not required to undertake their own enquiries as to alternative means of achieving the objectives but are entitled to rely upon information collected from Crown agencies, or collected from a requiring authority, as to the processes undertaken to identify and assess alternative routes, and as to the basis for the selection. That they may do so is an inevitable consequence of the subject matter with which officials will be dealing — inevitable in terms of efficiency of process, and the quality of the outcome, given the broad areas over which LINZ officials will be required to range when advising their Minister for the purposes of Part 2. But, as discussed above, deficiencies in the material provided by other Crown agencies or by requiring authorities may be a basis for impugning the Minister's decision if they undermine or negate a key relevant consideration to the assessment of alternatives.

[169] When making the decision to use the Part 2 processes to acquire or take, the Minister would need to have before them information as to how the issue of alternatives has been addressed, what alternatives were identified and the basis upon which the subject site has been selected from amongst the alternatives. There must be sufficient information before the Minister to show that the selection of the subject site amongst alternatives has been undertaken on a proper basis and of course, disclosure of any information that suggests that it has not.[137]

[170] It is significant to this analysis that the Minister is a public decision-maker accountable to the public — through Parliament, and through the courts. The same cannot be said for the requiring authority.[138] While the officials may, indeed should, obtain information from the requiring authority for the purpose of advising the Minister whether the taking is reasonably necessary, they cannot simply accept the requiring authority's assessment that it is. Rather they must obtain sufficient

---

137 See above at [160].

138 Although I acknowledge that there is a regulatory framework provided for requiring authorities to ensure that such entities satisfactorily perform their statutory obligations under the RMA.

information to enable them to advise the Minister that alternatives have been considered, and to inform the Minister of the basis upon which the subject land was selected. This advice may include a recommendation as to what the Minister decides, but the ultimate decision-making nonetheless lies with the Minister.

[171] It is not entirely clear from the appellant's written submissions whether they argue for anything different to this standard model — at times they seem to, and at other times not. Their fundamental proposition — that the Minister had been misled by the requiring authority — does not seem to necessitate an argument that the Minister, or the Minister's officials must personally undertake an identification and assessment of alternatives. But since much ink has been consumed in discussion of whether that is necessary, I make clear that in my view an investigation into and analysis by the Minister of alternative means of achieving the objectives is not required. Of course, as the majority observes, a Minister is free to insist upon more investigations and more information but that is a very different thing to being required to undertake that work personally.

[172] In short, I see nothing in the statutory scheme to suggest that anything other than conventional public decision-making is contemplated when it is a requiring authority seeking to have the land acquired or taken by the Minister. To the contrary, the fact that the decision-making is placed with the Minister suggests Parliament's intention that standard Ministerial decision-making is required in order to ensure proper balance between the public interest and the interests of the landowner, perhaps especially when it is a private entity that requires the landowner's land.

[173] Finally, I note that the Court of Appeal and to a lesser extent, the majority, seem to rely upon *Seaton* in their analysis. In my view that case establishes little of relevance to this case. It simply stands for the proposition that when the land is being acquired for the requiring authority, it is the latter party's objectives that are relevant for the purposes of s 24(7).

Third issue: Did the Environment Court err in its consideration of the appellants' objections under s 24?

[174] To address this issue it is necessary first to set out the Ministerial decision-making process that was followed in this case, before addressing the task in s 24(7).

The Ministerial decision-making process

[175] Top Energy applied under s 186 in respect of the subject land — this entailed three applications in respect of the three appellants' land. The applications utilised a standard form provided by LINZ for s 186 applications as an appendix to the LINZ Standard for the acquisition of land under the Public Works Act 1981. The purpose of the Standard is expressed to be to enable the Minister for Land Information to assess whether land acquisitions comply with the law. This form required information as to the applicant's objectives, the requirement for the land and also details of the assessment of any alternative sites, routes or methods of achieving the applicant's objectives, and public consultation undertaken by the applicant (if any) concerning the project or work. The applicant was also required to provide full details of negotiations to agree access, and advice "on why the applicant considers it is necessary that the Minister exercise powers under s 186 of the RMA to acquire this land at this time".

[176] The form for each application as completed by Top Energy detailed its objectives. The applications detail the work done to identify alternative routes and outline the three alternatives discussed in the majority's reasons — the route over land held by the Crown for use in Treaty settlements (the OTS route), the FGT/Sutcliffe route, and the route which is the subject of the appellants' objections. Very full information was provided as to why the OTS route was not available and was not selected. As to the FGT/Sutcliffe route, it is noted that two owners had indicated they would fight Top Energy, and another was being uncooperative. The application detailed "[i]t was clear that the only way [Top Energy] would secure this route was to undertake 3 s 186 RMA applications". The application regarding the Poulton land continued:[139]

---

[139] Emphasis added.

> Subsequently, [Top Energy] determined that an alignment slightly further to the west (the current proposed line route) as the only practical and economic route available in this area. Accordingly, preliminary discussions with the affected landowners on this deviation alignment took place. *The Landowner (Poultons) was the only party initially to indicate that they opposed the current line route*.
>
> Based on the preliminary feedback, [Top Energy] decided to adopt the current line route *as it was deemed better to potentially progress one s 186 RMA applications than three*.

[177] The other two applications (for Newman Farms and the Dromgool land) included essentially the same statement but omitted the detail in italics. Of course, as it turned out three s 186 applications were required for the objection route.

[178] In July 2016 LINZ officials provided briefings for the Minister, appending the applications. They noted that the decision under s 186 was for the Minister — it had not been delegated to LINZ. They set out a checklist to take the Minister through issues relevant to the decision. One of the issues addressed was whether there had been an assessment of any alternative sites, routes or methods of achieving Top Energy's objectives.

[179] The advice directed the Minister to the relevant parts of the application document. The Minister was advised that if she agreed to the application then the acquisition and taking provisions of the PWA applied from that point onward. Any objection to the taking of the land would be heard by the Environment Court which would apply the provisions of s 24(7). The advice continued:

> While these provisions are not applied at this stage of the acquisition, on the application and the matters already considered relating to the application, there is no prima facie reason why they could not be met.

[180] The advice summarised the issue of alternative routes as follows:

> Top Energy discussed its preferred transmission route with the affected landowners but it was not able to secure agreement for all of the easements it required. As a consequence Top Energy determined a realignment including the Subject Land as the only practicable and economic alternate route available.

The advice also detailed why Top Energy had not been able to acquire the interest it sought in the land without resort to the PWA processes. It stated that all three owners

opposed the proposed route and had instructed (the same firm of) lawyers. It recorded that the lawyers were arguing that the s 186 application was deficient as it did not disclose all relevant information in relation to the OTS route. Top Energy saw little prospect for agreement.[140]

[181] In October 2016 officials provided a separate briefing for each of the three pieces of land on the issue of a "Notice of Desire to Acquire an Easement in Gross". The briefing recapped the advice already provided in connection with the s 186 applications, adding a recommendation that the Minister sign the attached Notice of Desire. Those notices were issued in November and December 2016.

[182] Attempts to negotiate an agreement with the three appellants were unsuccessful. In May 2017 officials prepared briefing notes on the issue of notices of intention to take easements. The briefing recapped earlier briefings, adding that at least three months had passed since the service of the Notice of Desire to Acquire without an agreement being reached and it was unlikely that a negotiated agreement could be secured. Officials recommended that the Minister sign the Notices of Intention. The notices were issued in June 2017 with the owners then filing objections in the Environment Court.

[183] As will be apparent from my discussion of the test to be applied by the Minister, and of the Minister's role as the key decision-maker, I consider that the officials' advice to the Minister as to how she should approach the decision (whether there was any prima facie reason why the s 24(7) criteria could not be met), was not correct. But as the majority note, this is not a judicial review but rather an appeal from the Environment Court's report on the appellants' objection. It is an appeal shaped by the nature of the objection process, and the rights of appeal that flow from that. I therefore turn to the final issue: did the Environment Court err in its consideration of the appellants' objections under s 24(7).

---

[140] As will be apparent, I consider that there are issues as to whether this advice set out the correct legal test or approach for the Minister. But since this is not a judicial review I comment no further.

The Environment Court's role and decision

[184] Section 24 provides for the Environment Court to hear an objection to the proposed taking. It is not an appeal against that decision. Although it undoubtedly is intended, as Elias CJ observed in *Seaton*, to act as a check on process,[141] it allows for a review of the decision to take, a review which is shaped by the terms of the section, and not by the principles of judicial review.

[185] Under s 24(7)(b) it is the Court's task to enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving the Minister's objectives (the latter of course encompass the objectives of the Crown agency or requiring authority, as recognised in *Seaton*).[142]

[186] The majority says that s 24(7)(b) is not confined to the consideration given by the Minister to alternative sites, routes, or other methods of achieving the s 24(7)(a) objectives. I agree. The section provides for a check on the statutory processes. The nature of that check is itself defined by statute. While the statutory processes are structured around decisions to be made by the Minister, the Minister does not directly address alternatives — simply addressing whether alternatives have been adequately considered, and whether the route or site which necessitates the acquisition of the subject land has been selected from amongst any alternatives upon a proper basis, such as to satisfy the Minister that the taking is reasonably necessary.[143] It follows that the Environment Court should be able to consider the material compiled by the Crown agency or requiring authority in relation to alternative sites, and in relation to how the objection route was chosen. However, as I come to shortly, there are limits on the purposes to which they can put that material.

[187] If, contrary to what has been represented to the Minister, the requiring authority has not adequately considered alternatives, or the alternatives were not fairly placed before the Minister, or the basis for the choice of the objection route has been misstated, then the Minister's decision will have proceeded upon a factually incorrect basis. It is for this reason that s 24(7)(c) empowers the Environment Court to send the

---

141 *Seaton*, above n 111, at [16].
142 At [83] per McGrath and William Young JJ.
143 See above at [160] and [169].

matter back to the Minister for further consideration in the light of any directions given by the Court.

[188] The section is strangely expressed in that the Environment Court is left with a discretion in this situation, whether to send the matter back to the Minister. However I expect that in practice the Environment Court would send the matter back for reconsideration by the Minister unless there were good reason not to do so — given that the Minister is the principal decision-maker in the statutory scheme. As to what might constitute good reason not to send the matter back for reconsideration, Mr Salmon conceded that it might not be necessary for the decision to be remitted in circumstances where the deficiency in the process was technical, but where it is clear there was a proper reason for that route having been otherwise selected.

[189] In this case the Environment Court was therefore correct to include within its enquiry as to the adequacy of consideration of alternatives, the requiring authority's consideration of alternatives.

[190] The Environment Court accepted that the Objection route was not the only practical and economic route. But it said that this misstatement by Top Energy in its s 186 application was irrelevant as it was not a statutory requirement that it be the only practical and economic route, and in any case, on examination the misstatement could not be said to have influenced the Minister's decision, and nor was it, it said, relevant to its own decision.[144] It then undertook its own analysis of the Objection route as against the FGT/Sutcliffe route, concluding that the impact on the owners affected by that route would be significant. It also found that there had been adequate consideration of sites and that the choice of route was reasonable in a *Wednesbury* sense.[145]

[191] In my view, there are errors in this analysis, which would justify allowing the appeal. Had others seen the issue in this way, I would have allowed amendment to the

---

144 EnvC report, above n 93, at [55].

145 At [127]; see also *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

question upon which leave has been granted, to allow these errors to be addressed, and would have allowed the appeal.

[192] The Environment Court made an error of law when it treated Top Energy's assertion that it had chosen the Objection route as the only practical and economic route as "otiose any statutory requirement" and as irrelevant to the Minister.[146] That information was critical to the Minister's consideration of whether the Objection route had been selected on a proper basis.

[193] As the discussion of the statutory scheme makes clear, adequate examination of alternatives to acquisition under Part 2 of the PWA and the choice of which of those alternatives to proceed with, are key aspects of the process. Once that choice is made, it is the owner whose land is chosen who is left to resist acquisition or compulsory taking. The other owners whose land was not chosen leave the picture. If the process is initiated based on a wrong belief held by the Minister as to how the Objection route was selected, that is a serious error that goes to whether the taking is fair and sound, and perhaps even to whether it is reasonably necessary. In other words, the Environment Court finding that the taking was fair was tainted by its own legal error because it did not appreciate the legal significance of the incorrect information given to the Minister as to the basis on which the Objection route had been selected.

[194] As already noted, I accept that there may be cases where an error in the information provided to the Minister (and held in the Ministerial decision-making process) does not require reference back to the Minister, with all the delay and expense that entails. Section 24 does require the Environment Court to undertake its own assessment of whether the taking of the land is fair, sound and reasonably necessary. It could be for example, that there is clear evidence of proper reasons for the choice which did in fact justify it at the time it was made, and clear evidence also of how the incorrect representation came to be made to the Minister. But even in such a case, the error in process is something the Environment Court would have to weigh in determining whether the taking was nevertheless fair, sound and reasonably necessary. In my view, because the Environment Court misunderstood the significance of the

---

146 EnvC report, above n 93, at [55].

incorrect information provided to the Minister, there can be no confidence in its subsequent determination that the taking was fair, sound and reasonably necessary. I would therefore have allowed the appeal based on this error of law.

[195] Finally, there is one further issue raised by Mr Salmon in argument. He argued that the Environment Court had concluded that the taking was fair, sound and reasonably necessary on a different factual basis to that relied upon by the Minister. He described this as backfilling by the Environment Court. I agree that it is not open to conclude that the taking was fair, sound and reasonable on a different basis to that put to, and relied upon by the Minister. That would make the Environment Court the primary decision maker in the process, which is inconsistent with the statutory scheme. As Elias CJ said in *Seaton*, the Court's role is to act as a check on process.[147] It would also be unfair — leaving the owners to meet a whole new case for taking.

[196] It seems that the Environment Court did "backfill' the reasoning in this way — finding that the objection route was not the most practical and economic route, but nevertheless that its taking was fair, sound and reasonable. It seems the latter view was based upon assessments of the impact upon amenity values associated with the different routes — not a basis put forward to the Minister. However, since my views are not dispositive of the appeal, I do not consider the issue further.

[197] For these reasons, I would have allowed the appeal on the basis of an error of law in the Environment Court. As this is a minority view, I do not need to address the issue of relief.

Solicitors:
Lee Salmon Long, Auckland for Appellants
Crown Law Office, Wellington for Respondent

147 *Seaton*, above n 111, at [16].