Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

SHANE DROMGOOL AND OTHERS v MINISTER FOR LAND INFORMATION

(SC 32/2021) [2022] NZSC 157

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

Top Energy Ltd is the electricity lines company in the Far North of the North Island. It plans to construct a new transmission line between Kaikohe and Kaitaia. For that to occur, Top Energy must secure easements over the properties located on the transmission route. Most easements were successfully obtained by agreement. But the appellants (three landowners) did not agree.

Accordingly, Top Energy applied to the Minister for Land Information under s 186(1) of the Resource Management Act 1991 (the RMA) to have the easements acquired or taken under the Public Works Act 1981 (the PWA). The Minister agreed and initiated the PWA acquisition process. Efforts to negotiate with the appellants failed. They maintained Top Energy and the Minister had not properly considered alternatives that did not involve taking easements over the appellants' lands.

In June 2017, the Minister executed notices of intention to take the easements. The appellants objected to the Environment Court, alleging deficiencies in the s 186 decision-making process.

The Environment Court resolved the objection in favour of the Minister. The appellants then appealed on a question of law to the High Court and Court of Appeal. The Courts took different approaches. On 24 June 2021, the Supreme Court granted leave to appeal.

Issue

The PWA provides for a process under which land (or, as in this case, an interest in land such as an easement) can be acquired or taken for the purposes of a public work. Landowners can object to the Environment Court against the proposed taking. The Court assesses the objection

against the criteria listed in s 24(7) of the PWA. The Court must ascertain the relevant entity's objectives, enquire into the adequacy of consideration given to alternatives means by which those objects could be achieved, and decide whether the taking is fair, sound and reasonably necessary.

Approved network utility operators are empowered to apply under s 186(1) of the RMA to seek the exercise of compulsory acquisition powers by the Minister on their behalf. If the Minister agrees, that sets in motion the PWA acquisition process which itself includes several steps and may or may not result in compulsory taking.

Section 186(1) does not specify criteria for how the Minister should make decisions. The issue on appeal is therefore what the Minister's role and obligations are in deciding a s 186(1) application. That question involves several sub-issues, including:

(a) Must the Minister be satisfied before granting a s 186(1) application that the proposed taking meets the s 24(7) PWA criteria?

(b) Is the Minister obligated to personally consider alternatives, or is it sufficient that they be satisfied the network utility operator has adequately considered alternatives?

Decisions in the Environment Court, High Court and Court of Appeal

The Environment Court held that the Minister did not need to decide at the s 186(1) stage whether the proposed taking meets the s 24(7) test. Rather, the Minister's decision is fully discretionary. Consideration of s 24(7) is an obligation imposed on the Environment Court when hearing an objection. Applying s 24(7), the Court said Top Energy had adequately considered alternatives. The Minister was not required to personally consider alternatives. The Court also held that the taking was fair, sound and reasonably necessary.

The High Court found that the Environment Court erred. Relevantly, the s 186(1) decision is not an unfettered one. The power must be exercised consistently with the legislative scheme. Before making a s 186 decision, the Minister must personally consider alternatives. The Minister could not rely on Top Energy's consideration alone.

The Court of Appeal agreed the s 186 decision is not unfettered, but it adopted a different test. It held that the Minister need not be satisfied the proposed taking definitely meets s 24(7). Rather, it is enough if the Minister is satisfied the proposal is "capable" of doing so. The Minister need not personally consider alternatives; they can rely on the network utility's considerations.

Supreme Court decision

The Supreme Court dismissed the appeal by a majority comprising William Young, Glazebrook, O'Regan and Ellen France JJ. Winkelmann CJ would have allowed the appeal.

Majority approach

The majority concluded that the s 186(1) decision is not fully discretionary. The Minister must exercise the s 186(1) power reasonably and with regard to s 24(7) and the statutory scheme as a whole. The Minister must not grant a s 186(1) application unless satisfied it is appropriate to

set in train the PWA process that could ultimately result in a taking. For that to be appropriate, the Minister must be satisfied on the information available at the time that the network utility operator has articulated its objectives and adequately considered alternatives so that a taking, should that occur, would be fair, sound and reasonably necessary. That approach reflects that the s 186(1) decision does not itself result in a taking: it is only after the PWA process has been followed (including negotiations) and the Minister notifies their intention to take the land that a taking formally occurs.

In particular, the Minister is not required to personally consider alternatives before granting a s 186(1) application. The Minister need only be satisfied the network utility operator has done so. The Minister may, however, decline a s 186 application or ask for more information to ensure they are satisfied alternatives have been considered. Should an objection be lodged against a taking, the Environment Court's assessment under s 24(7) can embrace the consideration given to the alternatives by the network utility operator, too.

Deficiencies in the Minister's decision-making under s 186 do not fall within the jurisdiction of the Environment Court. Reviewing the Minister's decision-making process under s 186 would require the Court to exercise a judicial review jurisdiction not conferred upon it by s 24(7). The statutory mechanism in the PWA for objecting to a taking decision does not preclude judicial review in the High Court of the Minister's earlier s 186(1) decision. However, it is possible defects in the s 186(1) decision can taint the taking decision that is the subject of the PWA objection process.

Minority approach

Winkelmann CJ would have allowed the appeal on the basis that the Environment Court erred in its consideration of the objections under s 24(7) of the PWA.

On her approach, the Minister must be satisfied at the s 186(1) stage that the proposed taking is fair, sound and reasonably necessary. That obligation arises not from s 24(7), but from the overall statutory scheme and from the requirements upon those who exercise public power.

As to what that means for the issues in this case, Winkelmann CJ agreed the Minister need not personally consider alternatives. It is enough for the Minister to be satisfied, first, that the network utility operator has done so and, second, that there was a proper reason why the objection route was chosen by the network utility operator from amongst the alternatives considered.

Although the Minister may rely upon the network utility operator, the corollary is that any deficiencies in the network utility operator's consideration will taint the Minister's s 186(1) decision.

As to the timing of when the Minister must address these matters, the Minister must be satisfied the criteria are met before granting a s 186(1) application. It is not enough for the Minister to be satisfied the proposal is capable of meeting s 24(7). The Chief Justice saw this as implicit in the statutory scheme and appropriate given the nature of the power being exercised. Once the s 186 application is granted, the state's powers of compulsion are in play, even when negotiating for purchase. Fairness requires that result because otherwise landowners may be subjected to coercive state powers without the Minister being satisfied the legislative criteria for compulsory acquisition are met.

The Environment Court erred when it held that a deficiency in the s 186(1) application was not relevant to the Minister's decision or the Environment Court's task in resolving the objection. The deficiency was Top Energy's erroneous statement that the route was the only practical and economic route. That information was critical to the Minister being satisfied that the objection route was not selected on an improper basis. It was also relevant to the Court's assessment of whether the taking was fair, sound and reasonably necessary.

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