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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 32/2021

[2022] NZSC Trans 7

BETWEEN **SHANE DROMGOOL**

DOROTHY FELICIA DROMGOOL

First Appellants

ALAN DARVALL POULTON

JENNIFER POULTON

Second Appellants

NEWMAN FARMS LIMITED

Third Appellant

AND **MINISTER FOR LAND INFORMATION**

Respondent

Hearing: 22 March 2022

Coram: Winkelmann CJ (via AVL)
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: D M Salmon QC and A W McDonald for the Appellants (via AVL)
J M Prebble, E M Jamieson and M C McCarthy for

the Respondent (via AVL)

CIVIL APPEAL

MR SALMON QC:

May it please the Court, I appear with Adam McDonald for the appellants.

WINKELMANN CJ:

Tēnā kōrua, Mr Salmon.

MR PREBBLE:

E ngā Kaiwhakawā, tēnā koutou. Ko Jeremy Prebble ahau. Kei kōnei mātau ko Ms Jamieson, ko Ms McCarthy, mō te Karauna.

WINKELMANN CJ:

Tēnā koutou. Mr Salmon.

MR SALMON QC:

Yes, thank you, your Honour. Only minor housekeeping to begin with. I'm having trouble telling the other four members of the panel apart on our big screen, so if I have trouble hearing who is asking a question that's why. It's just not very good with the document display. But also I'll check whether I'm audible enough and my microphone is okay?

WINKELMANN CJ:

Yes.

MR SALMON QC:

Thank you. Also, my learned friend, as the Court will know, raised the possibility of an extended sitting to accommodate argument. For my part, I think that's pretty unlikely to be needed. I don't see my part of the argument taking an undue amount of time, but he's informed me he's just gone into isolation, hence where he's sitting, and I don't think that bears on his

particularly but obviously if he does need more time because he's removed from his offsiders then we would understand that completely. So I haven't had a chance to discuss that with him but that may bear on time.

WINKELMANN CJ:
Thank you, Mr Salmon. All right, so are there any other preliminary matters?

MR SALMON QC:
No, your Honour.

The appeal and the point on which leave is given raised questions about the nature of consideration a Minister is to have when facing an application under section 186 of the Resource Management Act 1991. This Court has previously considered parts of a related question in the *Seaton v Minister for Land Information* [2013] 3 NZLR 157 decision, which I expect the Bench will be more than familiar with, and in the context of that decision held that properly interpreted the Environment Court's enquiry under the Public Works Act 1981, under section 24(7), is to be read as having regard to the objectives, not of the Minister, but sensibly of the requiring authority. That interpretation, respectfully, is right and inevitable and not at issue here. What is at issue is the extent to which other parts of the section should be read as focusing on decisions or considerations undertaken by a private company, as opposed to requiring or focusing on the consideration given whether or not to initiate a Public Works Act compulsory taking by the Minister herself.

The appellants say that properly interpreted the Act requires a focus on the processes and substance of the Minister's approach. These are for reasons of plain statutory interpretation and natural and ordinary meaning of the words, but also for policy and purposive reasons.

We might have lost the Chief Justice.

WINKELMANN CJ:
I'm hoping I've re-joined.

MR SALMON QC:

You have your Honour. Purposive and policy reasons support such an interpretation, and I'll come back to these in more detail, but in short form it would be a striking legislative decision, oh. Is your Honour losing sound when that happens?

WINKELMANN CJ:

Yes. I'm losing everything.

MR SALMON QC:

I'll just pause when it happens and try to keep an eye on it, and Mr McDonald will tell me if I don't know.

WINKELMANN CJ:

Yes, hopefully it won't happen frequently. I'm not quite sure why it's happening at all.

MR SALMON QC:

In the only other one of these I've done with this Court, it happened to various out of Wellington practitioners a few times. So it seems to happen and we live with it.

MR PREBBLE:

Apologies for interrupting. It's just that I was also booted off. I don't know if that was an issue with your Honour as well, but I disconnected for a period of minutes there, but have successfully come back on again. Sorry for the interruption. I just thought it relevant to note because I'm not sure it's apparent to anyone that you're suddenly outside of the courtroom.

WINKELMANN CJ ADDRESSES REGISTRAR – TECHNICAL DIFFICULTIES
(10:06:13)

MR SALMON QC:
If it's a comfort to Mr Prebble, I don't think I said anything that he will regret missing, and I will also ask Mr McDonald to keep an eye on him and his offsiders and he'll let me know if he notices them disappear.

Purposively one submission is that it would be striking if the legislation governing the ability to coercively take private property, a right only enjoyed by the Crown, were to by sidewind so to speak, result in a delegation of the procedural and substantive obligations on the taker, the Minister, to a private entity, and for reasons I'll come to that reason matters here, but matters more generally everywhere. So we submit that whereas in *Seaton* where the question was, whose objectives should be looed at, it's self-evident that to make sense of an application under section 186, and then an enquiry by the Environment Court under section 24 of the Public Works Act, the objectives can only sensibly be those of the public work than the utility companies intended works. That does not apply to the balance of the interpretation task for section 24(7) where the proper approach, in our submission, is to look at the Minister's consideration of the original application under section 186, and of the Minister's substantive approach to the matters.

Why does that matter? Firstly because, and this is a material point I'll come back to here, as illustrated by this case, but in fact in many cases, the section 186 decision, although not perfecting the taking, the Public Works Act process had a number of stages which are well set out in the judgments below, inevitably in most cases results in it being a fait accompli in terms of the target of the acquisition, and that is because that although the target can negotiate with the taking authority about price, and although there is the theoretical possibility of a section 24(7) hearing, in most cases the latter doesn't happen and is too expensive, particularly for standard landowners, but more particularly the negotiation, such as it is, is purely about price with the inevitability of the taking, and that is not really a negotiation of which there's

free will in the true market sense. In other words, once a section 186 application is granted by the Minister, whoever is the target of (inaudible 10:10:02) –

WINKELMANN CJ ADDRESSES THE COURT – AUDIO ISSUES (10:10:09)

WINKELMANN CJ:
So you were at the point of you were saying that the negotiation is purely about price that's occurring in the context of the inevitability of a taking.

MR SALMON QC:
Yes, and that means that as a starting point for interpretation of section 24 and how it applies to the Minister's decision and in terms of an analysis of the Minister's decision-making at the 186 stage, the focus is properly on the information provided to and considered by the Minister and the Minister's approach to that decision-making. In that respect it is perhaps relevant that the Chief Justice in *Seaton*, the then Chief Justice, noted that amongst other features of section 24(7) was that it provided something of a procedural check on the Minister's approach, and I'll come back to that point too as an interpretive guide to what is required under section 24(7).

The final big-picture feature of section 24(7) I'll point to is that as well as fair, just and reasonable considerations for the Environment Court to apply there's specific provision in paragraph (b) requiring an enquiry "into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives".

Now we will put some emphasis on that specific identification of the choice of alternatives because in my submission it highlights and reflects the particular significance of the choice of site and the effect that it is in fact locked in in practical terms at the section 186 stage, and that's relevant in general terms but also to this case because the Environment Court in this case looked to a lot of, I don't mean it pejoratively, but backfilling, if I can say that, other evidence brought forward by Top Energy at the Environment Court hearing to

justify its choice of this route, relying on the material that wasn't before the Minister, leaving the Environment Court in a position not where that Court concluded that this was the best route but that it was somewhat close to and comparable to the alternative route in terms of amenity, et cetera. It's still the most expensive even on the Environment Court's conclusions but through a range of evidence not in existence nor available to the Minister the Environment Court Judge saw it as a closer run thing than Top Energy did when it applied to the Minister, and that backfilling, in my submission, is a problematic feature of the Crown's approach to this case because it sees a degree of fortifying of a procedurally flawed decision that is unsafe where there is a public interest and close scrutiny of coercive property-taking powers exercised by the state.

So against that –

WINKELMANN CJ:

Can I just ask, Mr Salmon, are you saying that it's not proper for the Environment Court to have looked at, in any scenario, to look at new information that's available about the routes?

MR SALMON QC:

No, I'm not saying that. It's accepted that the Environment Court will undertake and reflect the iterative process that the Crown points to to some degree and will look at more material. What I'm saying is that in relation to the procedural check as the Chief Justice described in *Seaton* but specifically in relation to subsection (7)(b) to enquire into the adequacy of consideration given to alternative sites by the Minister requires, as well as that post hoc iterative backfilling, requires a specific focus on the Minister's decision at the time because it has substantive and procedural consequences that harm rights. The selection of the target becomes in effect the only target once the Environment Court is reached, and one of the submissions –

WILLIAM YOUNG J:

Does it make a difference in substance where the issue does go to the Environment Court because the fundamental issue is then addressed? Now I understand what you're saying that most cases aren't going to get that far and in that circumstances it might be appropriate to be able to review the decision of the Minister, but when we know that the issue has been squarely addressed what's it really matter?

MR SALMON QC:

Yes, and the first point, for reasons I'll come to, is that it hasn't been squarely addressed in the way the Court of Appeal has summarised it nor that my friends have. The Environment Court findings are slightly different in the way they've been summarised. So it hasn't been squarely addressed. But secondly it matters because the way in which the Environment Court approached the matter is to perform an in-the-round substantive assessment of two competing alternatives. The Office of Treaty Settlements route put to one side, there is the FGT route as it's been called, or FGT/Sutcliffe route, and my client's route. At every point in every document in existence up to the time of the decision made by the Minister, except for the application itself, the FGT/Sutcliffe route was the better route. It's shorter, cheaper and better. Indeed, it was the fallback to the OTS route for some time before my client's land was even identified.

Now my learned friends say: "Well, the Environment Courts held it was a closer-run race than that," and that is the backfilling. But nevertheless the Environment Court has held not that the route – I'll call it the 186 route, my client's route – not that the 186 route is the better or more fair or more just route but that I think at its highest it can be put for the Crown it was a runner alongside the FGT/Sutcliffe route, and I'll come to the parts of the Environment Court judgment that say that.

WILLIAM YOUNG J:

So you say the Environment Court enquired into the adequacy of the consideration given by TEL rather than adequacy of the consideration given by the Minister?

MR SALMON QC:

I say a couple of things. One, it did that. Secondly, it wrongly disregarded a number of factors that led to its selection of what it put before the Minister and was not candid with the Minister about what it had done, but also that the Environment Court did not ask about the adequacy of the route selection at the time the route selection was made but rather in the round based on further supplemental evidence and further work whether one or both were okay and decided both routes were effectively okay, and the reason that matters, to answer Justice Young's question, is simple. That meant, and it's confirmed on the face of the Environment Court judgment, that had, for example, the Minister been asked to approve a section 186 application for the FGT route, my clients would never have been a target. They wouldn't have been required to brief lawyers, cite for discovery for documents out of TEL who's not a party and, indeed, get documents during the course of the hearing showing that there were gaps in what the Minister was told because they wouldn't have been a target. So not only would they not have had those costs and procedural pain but we can tell from the face of the Environment Court judgment that the FGT route would have been approved, and that is –

ELLEN FRANCE J:

I'm struggling, Mr Salmon, to see quite how that affects what you say about what the Minister's role should be because the Minister may have done what you say she should have done and, let's say, decided that your client's route was the best alternative. The Environment Court on your approach would still be able to consider further evidence and so on. I'm just struggling to understand quite how you say that affects the obligations on the Minister.

MR SALMON QC:

Well, it's a layered point, I guess, if I can seek to put it this way. First, what happens at the Minister stage effectively sets up a default objector who may or may not ever object but whose land is likely to be taken and if they can't afford to or don't realise they could object, whose land will be taken, and thus it's something of a link to say that the section 24(7) decision cures all errors at that early stage because it cannot reverse the selection of target, and to answer Justice France's question – if that's who it was speaking; I think it was –

ELLEN FRANCE J:

Yes.

MR SALMON QC:

– to answer the question in part, I say that that's one starting point for a contextual interpretation of section 24(7)(b). In other words, what are the policy drivers for how this Court should interpret the obligations on the Minister? Well, they start noting that 24(7)(b) requires a specific investigation into the adequacy of the consideration given to alternative sites, routes, or other means of achieving those objectives. Now –

WILLIAM YOUNG J:

Is this an argument – sorry, carry on.

MR SALMON QC:

I was going to say there will be cases where there is no difference because nothing emerges to show it to be problematic and there was a section 24(7) hearing. But for reasons I'll come to, in this case there's a serious problem with the selection of target, that because the Environment Court has not sought to look at the Minister's decision, selecting a target at that point in time because the Environment Court is focused on reflecting that Court's approach generally, a sort of planning view of whether the power lines work there, not a competing one of different applications but does this application work, because the focus was never, and never included a focus, on whether the

Minister's decision was properly made, which understates the significance of that decision, it chooses a target, lights it up with a heat signature and locks onto it and, absent something extraordinary, that remains the target, there is permanent prejudice to a wrongly selected party in a number of foreseeable cases, but in particular in this case, by being made the target. So –

WILLIAM YOUNG J:
Just pause there. Could you have reviewed the Minister's decision?

MR SALMON QC:
And that's a point that was ventilated, well, more in the High Court's judgment than in the hearing itself, but if I can recount the broad history because yes, there was a potential judicial review, but the point at which it became apparent it was available was after this proceeding was in train, in discovery and in a context where, rightly or wrongly, the appellants apprehended that they would be criticised for parallel judicial review proceedings where the Supreme Court had already held that 24(7) is a procedural check on the Minister's decision. So rightly or wrongly that was seen as a matter that was properly dealt with in the context of this proceeding on the basis that where there's a specific statutory route for challenge it's to be preferred to an ancillary judicial review. But in terms of the timing, Sir, to answer your question, the matters that emerged, show the Minister was not given a proper picture, came out slowly and once the proceeding was established and trundling towards trial. Some of them came out on the day of the trial starting. So by the time it became clear that there were grounds for a judicial review, one, there were indications from the Chief Justice that this procedure was a procedural check in part and plainly that's right in terms of route selection under 24(7)(b) but also the proceeding was live and about to run. So yes, that could be done but in our submission it's a set of concerns, the procedural fairness and so on, that are captured by 24(7)(b).

WILLIAM YOUNG J:
So subsection (7)(b) is in the passive tense, isn't it, "the consideration given"? It doesn't identify who the person considering it has to be.

MR SALMON QC:

No, it doesn't, and so it falls to us to determine, one, who that is and, two, what "adequate" means and, three, when the adequacy is to be assessed at, and in my submission putting aside the in-the-round iterative assessment the Judge did, which was not a procedural consideration at all per the Chief Justice's comments, it was ignoring procedural unfairness. Indeed, the transcript is riddled with the Judge suggesting he just doesn't regard it as relevant. It was –

WILLIAM YOUNG J:

Just pause. Given it's the Environment Court must do this, so isn't it relevant to consider any consideration given up until the time that the Environment Court hearing starts? Isn't that the point in time one's looking at?

MR SALMON QC:

It's certainly relevant when considering the substantive matters to look at the best and most updated substantive picture, so, and that's why I answered the Chief Justice's question were we saying that further infilling or backfilling was inappropriate? No, we're not. It is appropriate to look at the updated picture. But there's a feature of the selection of target that becomes permanent and irremediable at the time the Minister is briefed, and with the Court's indulgence because the *Seaton* decision, both the majority and the minority, asked the question in flat terms, does it matter? Does the approach there, which the majority found was wrong, and the minority did not, might not have made any difference on a question of interpretation, and I'd just briefly like to go through why this matters here if I may, it won't take long.

WINKELMANN CJ:

Can I just ask you one question Mr Salmon, are you saying it could've looked at, the Environment Court could look at updating information when it considered the substantive issues. When you say it's substantive issues do you mean the issue at (7)(d)?

MR SALMON QC:

Yes or, for example, if there was a way in which the inadequate consideration – let's say for example there's a problem with the consideration of alternatives at the section 186 hearing, but subsequent evidence shows it definitely not to matter, in other words in judicial review terms it was of no materiality, and could be just disregarded, which I think my friends are going to say, well this isn't material and we say they're wrong. But if that was the case of course that could be relevantly looked at because it would mean there was no problem. There was a no moment procedural slip. Here what I'm about to highlight is why it's a material procedural slip.

WINKELMANN CJ:

Is your point that really at (d) you're not really, the Court's no longer focusing on the best available route or is the Court? So is the Court directing itself at just the same question as you say the Minister should have directed itself to, under (d).

MR SALMON QC:

Well, yes –

REGISTRAR ADDRESSES THE COURT (10:26:37)

MR SALMON QC:

It might be Bernard Robertson dropping off from time to time, who's not visible, just in case that helps. I'm not sure if the Court wants to stop for that. Yes, in part, your Honour. I think for the purposes of this case zeroing into the mischief here there was a series of misapprehensions the Minister had about the necessity economy urgency and reasons for this route being chosen, that had she known about, would likely have changed everything, and changed who the objecting party was before the Environment Court, and that means it is material because the only reason my clients are here is because of the late, and for years inexplicable shift, to an inferior route that they couldn't understand.

So if I can begin briefly going through that because I do need to persuade the Court that this matters in the same way that the appellants in *Seaton* did. At paragraph 20 of our submissions we link to page, this is the bundle reference for the registrar, 202.0578, which is an aerial map of the relevant land.

WINKELMANN CJ:
Sorry, I'm just going to have to find that myself.

MR SALMON QC:
If your Honour goes to paragraph 20 of our submissions, it's the hyperlinked reference there. I think it's paragraph 20. It is apparently.

WINKELMANN CJ:
I've got it on my screen.

MR SALMON QC:
202.0607, it's –

WINKELMANN CJ:
Yes.

MR SALMON QC:
It doesn't require us to understand it in great detail but you'll see a lime green line beginning on the top right of the screen the way it's oriented for me, going over the Greenacre property, and then going through two OTS sites, and that was, and this is all set out in the judgments below in largely uncontroversial ways, that was what has been called by everybody the OTS route, the Office of Treaty Settlement route. Now it is true that that's been identified as containing land of cultural significance, although I note of no more cultural significance than the land underlying the other lines. In other words, there's not something unique about the OTS land in this region. All of the land in this region, on the evidence from Ms Hickey in the Environment Court, has the same cultural significance. The significance of the OTS land in that sense

was not its greater significance and greater offence being taken at the putting of power lines on it, but that the Crown happened to own it.

Now there's an interesting, but not relevant to this appeal, question about the extent to which the Crown, the Minister can initiate a Public Works Act taking where there is a better route over land the Crown already owns, but that's not an issue for this appeal, that's not one of the matters arising under the question for leave. But that initially puzzled my clients who include some people with iwi links who were confused on the cultural sensitivity point. The ultimate explanation was the Office of Treaty Settlements was not agreeing with the Minister and with Top Energy to a taking and thus the preferred most direct and simple route that had the least impact on land value, that being undeveloped scrubland, was put to one side. So the Crown wouldn't agree with itself to provide its land and chose to use public acquisition powers. As I say, an interesting question about the extent to which the Crown can do that but not one for this appeal.

The Crown then identified the departure from that light green dash line, being the dotted blue line, that still crosses, where that crosses the Greenacre site, cuts across a Cornelius site and then goes through the Sutcliffe and FGT sites, and that's been called pretty much everywhere either the FGT or the FGT/Sutcliffe route, so I'll call it that.

Now that remained the next best thing for some time as far as the Top Energy approach was concerned until an externally inexplicable move to the less direct route in dotted red which includes different sites gone over other parties' land but also Mr Sutcliffe's. You'll see the red line crossing Mr Sutcliffe's over near the Dromgool site, Dromgool being an appellant.

Now Mr Sutcliffe I'll come back to. The Environment Court and the Court of Appeal suggested that something could be taken from the fact that Mr Sutcliffe didn't object to the route in red. The evidence in the Environment Court was that Mr Sutcliffe's objection to the blue route was that it blocked his prized view of the Bay of Islands from his, I think, lifestyle block. The red

route didn't so he was pleased to have a move from the preferred route in blue to one that was on the back side of the site, not blocking the view and out of sight and that otherwise began interfering in the land with less of a view but therefore lands that my clients felt were more tarnished by having power lines running right through them, and they involved several small landowners who are the appellants as well as the Jones and Bedfords, who are amongst my clients but are not appellants, who are alongside a paper road portion of the power lines. The paper road portion I note only because the Environment Court Judge disregarded the costs of the paper road portion in comparing the relative costs of the FGT/Sutcliffe line and the line over my clients' land and yet still found that the FGT/Sutcliffe line was more expensive.

So in that context the picture facing my clients, and this is mentioned in the decisions and in the briefing paper to the Minister that I'll come to, was one of exasperation, I suppose, and confusion that a route that they could see as landowners was obviously inferior and that was sufficiently inferior that Top Energy for years had not identified it, was suddenly being seized upon when there were two better routes, the OTS one which is not a question for appeal today and the route over Sutcliffe and FGT, and the repeated concern from my clients is that they're being picked because they are on the poorer bits of land, they're not impressive people perhaps and they're being treated like the dirty linen.

Now that was just a concern they had throughout this process right up until they had filed their objection in which their original focus was firstly asking why doesn't the Crown use land it already owns, a point that's fallen away, but when discovery was sought and ultimately obtained from the non-party, TEL, and that's a point I'll come back to, the Minister is the party and many of these objections will happen without TEL's or the equivalent utility's material being seen, a very different picture emerged suggesting why this change might have been made, and as the Court of Appeal held, and as I'll come to, this material I'm about to come to was material that was conceded by the relevant person at TEL to influence the decision to apply to take my clients' land, or easements over my clients' land, instead of FGT/Sutcliffe. So that controlling

decision, and I'm about to come to it, was invisible to the Minister and would have been invisible to my clients but for the fact that as a community they rallied together and sought to object and sought to push for discovery.

So continuing then very briefly to the applications and what they said to the Minister. This is at page 302.0489. This is one of the applications because one was made for each piece of land to the Minister, and these deal with the need for the compulsory action. For example, at 0497, noting timings, construction dates and so on and the essentiality of the project. Now the hearing in the Environment Court was distracted by a range of discovery, including on the day the hearing began, in which it became clear that the project was less imminent and necessary and had not, in fact, been decided upon by the Top Energy board. I don't put major emphasis on that but it is a point where the Minister was left with the impression that this was a major utility project in need and where I anticipate my friends will understandably say: "This is holding up progress throughout the North Island. People need power." In fact, the internal documents that were only at the last minute obtained from Top Energy showed it's not even certain to happen, it's not urgent and the board decisions hadn't been made.

But more particularly the application for the section 186 decision from 505, 302.505 onwards, deals with the preferred transmission route and –

WINKELMANN CJ:

Can I just ask you, Mr Salmon, can I just ask you about that last point? So you're saying it's not – you're not taking the point though or have you? You've taken the point throughout that it's not reasonably necessary when they haven't decided they're doing it?

MR SALMON QC:

We've taken the point that it's a procedural and material omission in an application to the Minister. We are not and we don't have leave I think to argue that it's a reason why under 24(7)(d) the Environment Court should decline, so for leave reasons really my focus is only on that.

302.0505, the preferred transmission route begins on that page under the equivalent heading dealing with why the – dealings, attempting to get the OPS land and setting out in candid detail the communications with OTS, rightly leaving the Minister with the impression of candour and fullness on the issues.

Then over on 0508 is the current alignment dealt with in the heading near the top of the page, and then talking about two options, et cetera, and then in the last three paragraphs in that box: "Preliminary discussions were held with the owners of the land adjoining the western boundary of the OTS land. Two of the owners, FGT Farms and Sutcliffe (a lifestyle block with two residences) rejected the proposal and indicated that they would TEL. Also at this time Richard Taylor (an owner north of the Poulton property) was being unco-operative. It was clear that the only way TEL would secure this route was to undertake three section 186 RMA applications."

Now the Crown points to that in their submissions as explaining away the language and showing why the language about the 186 route being the only practicable one was not misleading to the Minister. In fact, as I'll come to, TEL knew it would have to make applications, three applications, also in relation to my clients' land.

But then the key words: "Subsequently, TEL determined that an alignment slightly further to the west (the current proposed line route)" – that's the 186 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."

Now firstly, practical is not correct. There is no sense on any of the judgments or on the materials in which the 186 route is more practical than the FGT/Sutcliffe one except if regard was had to the material that I'm about to come to. In any legitimate sense of the word "practical" both had people indicating they would object, three people, and the only differences between those people were the cost of their views and their economic and other might.

WINKELMANN CJ:

Is it – can I just say, do you say it's a legitimate consideration that someone's going to object?

MR SALMON QC:

I don't need to say this but in my respectful submission it's not because that, frankly, I know we say this phrase too often these days and me especially, but it's an access to justice point, isn't it? If the fact that someone would object is a legitimate consideration then one goes for the small fry, as they did.

So no, in my submission it is not legitimate to look at the fact that someone will object by application to the Environment Court because that just reflects resourcing. It's relevant whether they're unhappy with the proposal, but the economic means to bring an objection, no.

ELLEN FRANCE J:

Mr Salmon, sorry, I'm just losing the thread a little bit in the sense that the focus, in terms of leave as you know, is on the legal question, that is the obligations on the Minister, so where are you getting to in terms of this focus on the facts?

MR SALMON QC:

I'm getting to – well two points. One, illustrating the mischief of the Minister taking what has been described in evidence, and we talk about in each of our submissions, as a fundamentally passive approach, and that that bears, of course, on the Minister's proper enquiries, and the consequences of an interpretation of the legislative scheme that enables a misleading and incomplete application to be made without consequences. So I have limited leave, which is why I'll be brief about this, but it also answers the question which was addressed by each of the judgments in *Seaton*, why does it matter here, and thus I think bears on the leave question.

ELLEN FRANCE J:

Sorry, it would help me then if you would, which you'll no doubt come to, make it clear what it is that the Minister then was meant to do, on your approach, because otherwise that part is in a part of a vacuum.

MR SALMON QC:

Yes I will, and it's a slightly nuanced answer your Honour, without wishing to duck it, I think is most efficiently done once I've gone through these several further documents, it won't take long, so that I can do it in a concrete way, rather than purely abstract, because I think we'll end up looking at some of them.

GLAZEBROOK J:

Before we move from this, you say that that wasn't the case. That there was only one landowner who initially indicated they opposed the new route?

MR SALMON QC:

Which part wasn't the case your Honour?

GLAZEBROOK J:

Well they say we'll have an alignment slightly further, so that they say they had the three owners, three or – well two owners who were going to object, and then they said on the other route only one was going to object.

MR SALMON QC:

Your Honour, that's right. That's flatly wrong and indeed wrong, even if one looks at the facing page –

WILLIAM YOUNG J:

Just pause there. Was the only party initially to indicate they opposed the current line route?

WINKELMANN CJ:

I can't hear you Justice Young.

WILLIAM YOUNG J:

Sorry. The passage says the only, the landowner Poultons, was the only party initially to indicate that they opposed the current line route. Is that correct or not correct.

MR SALMON QC:

No I think it's not accepted to be correct at all. I don't want to spend a long time on the transcript on a point that becomes pretty peripheral to the question I have leave on, but I would note that certainly by the time that this was written, it was clear that there were five parties concerned, three owners and two others, because on the facing page it's set out that they think that they're not negotiating in good faith because they're asking the substantive questions about necessity and why their route. You'll see in the second article of that facing page, 302.0509, Mr McDonald was writing to TEL asking, saying he was acting for Poulton, Dromgool, Newman, Jones and Bedford, this is the –

WILLIAM YOUNG J:

Sorry, isn't it perhaps right that the word "initially", with the qualification "initially" that's there, that the proposition put was right?

MR SALMON QC:

I think it's not accepted to be right by my clients who gave evidence about how strongly they expressed concern and alarm when they were visited by the consultants. So I think it's certainly, from my memory, and Mr McDonald or Ms McCarthy will remember perhaps better than me with their younger brains, it's at least wrong that it was only one who was upset, but there was some dispute from Top Energy as to the extent to which they said, well we'll look at the plan, or whether they said, no way. So it's possible that Top Energy legitimately believes there was only one at that time, but it's not accepted that there was only one, if that answers your Honour's question. It's an evidential point I don't think we can solve here because there was, from my memory, disagreement between witnesses about what was said at those early meetings.

GLAZEBROOK J:

You also were giving a slightly nuanced answer to Justice France and unfortunately I just got slightly nuanced answer, but I now can't remember whether you were going to come to that later or whether you were giving us a heads up.

MR SALMON QC:

I am going to come to it later. Yes, what I intend to do, if I may, is just complete a quick review of documents and then answer Justice France's question against the context of the known facts in this case. The settled facts.

GLAZEBROOK J:

Okay, it's just usually better before we look at facts to know what we're looking at them for, which I think was the point of Justice France's question, because otherwise we're looking at them in a vacuum not knowing why we're doing so.

MR SALMON QC:

Right, and in that case I'll give a general heads up now. That's a helpful, perhaps, steerage your Honour.

GLAZEBROOK J:

Thank you.

MR SALMON QC:

I was about to also note, it's not only practicality it's economics. The only economic route is flatly wrong on all documents and on the Environment Court's conclusion, which shows that the routes, the 186 route, is more expensive. So for reasons I'll come to these were wrong, and wrong in ways that are in public and private law terms alarming. I'll come to those. The submission that we make is that any standard that allows the Minister to be as passive as the Minister was in this case, and allows incomplete disclosure by utility who is plainly motivated to avoid litigating with well-funded parties, which I'll come to, is on polity and purposive grounds, unlikely to have

been intended, and so we are submitting that in terms, in particular of the selection of sites and consideration of alternatives, which is as noted specifically identified in 24(7)(b) as requiring a specific investigation, what is required is a level of procedural propriety and fairness at the Ministerial stage, to be considered by the Environment Court under 24(7)(b) but at the Ministerial 186 decision stage, because all of the claims that everything can be cured later, are to some degree either wrong or at least weak, because nothing can cure having been the target if one doesn't know that one could have challenged, or one couldn't afford to, and nothing can cure the distress and stress of litigation where one is forced to object. So even if further work might show that a procedural error is less objectionable, if it results in a party being a target who otherwise would not have been, then that fails to let the standard required of the Minister on a contextual interpretation of section 24(7) and of 186.

ELLEN FRANCE J:

Well I don't want to take you off the route you are going down, but you talk about a level of procedural propriety and fairness. Well I understand that, but what I'm interested in is the Minister gets this briefing paper, for example, what is she meant to do? What I want is a clearer idea about – I mean are you saying she undertakes her own, her officials undertake their own investigation or quite, how does it work in a practical sense?

MR SALMON QC:

Well there are several ways of unpacking that, and I will engage with it now rather than doggedly insisting to the sequence I had in mind, because obviously it'll be helpful. We've just lost one camera. Justice France your camera disappeared, I don't know if you could hear me or not?

ELLEN FRANCE J:

Yes, yes.

MR SALMON QC:

Engaging with that, one of the approaches argued in the Environment Court is that if the TE – to the extent that the Minister was entitled to rely on TEL's selection, the Minister's decision had to live with any taint in TEL's decision. In other words, if it failed any tests of procedural or substantive fairness, then the Minister's decision would fail as well. So one answer is, it's not the Minister's fault per se, but it taints the decision that TEL was incomplete.

In terms of our primary case on what the Minister should do, in terms of selection, because the granting of the 186 application is particularly irreversible in relation to that aspect of the decision, because that's the incurable part, that one is being brought into the fray, possibly wrongly. The Minister needs –

GLAZEBROOK J:

Can I just go back. What is the procedural and substantive impropriety or propriety that has to be undertaken by the requiring authority then?

MR SALMON QC:

The impropriety did your Honour say?

GLAZEBROOK J:

Well it's really what procedural and substantive matters does the requiring authority have to take into account then?

MR SALMON QC:

Well the requiring authority I think accepts that it needed to look at alternatives and needed to address the Minister on it. In my submission it needed to accurately do so, which it didn't, and it needed to make selections based on legitimate considerations, and the ones I'll come to were not, and inarguably not legitimate. The only argument is whether they were material or not. But we would say that TEL, in making its decision, is required to objectively and without regard to improper considerations, present the Minister with a proper picture of what the competing economies and practicalities are and with an

accurate description of reasons as to why the particular route has been chosen, and in terms of what the Minister is required to do. In our submission the Minister is required to ask such questions as are necessary to get a proper picture of whether this is the best route by reference to relevant criteria for route selection.

WINKELMANN CJ:

Can I just ask for clarification on that last point. I mean suppose that the RA had presented a very full account of what they had done et cetera, and it looked like a credible fair process with detailed information as to why they'd considered and discounted the alternatives. Would the Minister be required to ask questions, or if there was goof information before them, could they just proceed on the basis they were satisfied the process on its face looked proper and fair?

MR SALMON QC:

The information would have to be adequate in both senses, your Honour. It would have to appear, in our submission, appear adequate, in other words be full and properly convey what is meant by, in this case, only practical and economic route, and explain candidly the reason for the changes. But also as well as looking adequate it would need to, in fact, be adequate. In other words if there is a misleading feature in the information provided, then that would disqualify the Minister's decision in a way that must be relevant under section 24(7)(b).

ELLEN FRANCE J:

That would suggest, then, the Minister having t make her own enquiries, wouldn't it? I mean I don't –

MR SALMON QC:

Usually it would your Honour, if this level of information were given. If a proper level of information was given, then the Minister I think could legitimately say well there's proper accounting there and proper full explanation rather than just a bunch of unanswered questions. If it turned out it was wrong, on our

view of the world, TEL's incomplete disclosure or misleading application would taint the Minister's decision through no fault of the Minister. In other words, the Minister, having relied on TEL because it appeared to be complete, would not thereby have a correct and sustainable decision. The Environment Court would and should hold under (7)(b) that the enquiry was inadequate because unwittingly the Minister was relying on bad data.

GLAZEBROOK J:
So even with an iterative process, the Environment Court would have to invalidate the decision because of an earlier issue about misleading information?

MR SALMON QC:
Yes.

GLAZEBROOK J:
Okay. That wouldn't usually be the case, would it, if in fact the information showed that was the best route, and I know you say it didn't here, and that wasn't the decision of the Environment Court.

MR SALMON QC:
Well I think that would, I would accept that there's some degree of materiality threshold if the procedural slip had no consequence and it was plain on the evidence that the same site would have been selected no matter what, then it would be held that it was so immaterial as not to justify referral back. The point we make here, and why I will now turn to the documents, is that's not the case here and my learned friends elegantly in the Court of Appeal, and again here, seek to say that the Environment Court has said the choice of route was fine in every sense, when in fact the Environment Court has said something quite short of that, which is looking at it in, with almost a planner's mind, it looks okay and not far off the FGT/Sutcliffe route, which is not a subtle difference, it's a profound difference if one is the target.

WILLIAM YOUNG J:

But there's no requirement to show that this is the best route, is there?

MR SALMON QC:

No there's not.

WILLIAM YOUNG J:

It's just that the requirement is that adequate consideration has been given to alternatives?

MR SALMON QC:

That is under (b). I was about to say "no, but" to your Honour's question though. Under (d) I think if it was not the best route and nevertheless there was adequate consideration and there was just some completely better route then that would be a ground under (7)(d) and that was our original, and this is not a point for today, but that was the original argument in relation to the OTS land. The Crown wanted to use that land because it happened to have it and didn't want to buy more culturally significant land to return or take other steps. Not out of sympathy for the cultural significance but more it's all culturally significant land. If the argument was under 20(7)(d), the Crown wasn't able to choose this land inter alia because it had land of its own.

WILLIAM YOUNG J:

Yes, but to come back to the point, under (d) it's not required for acquisition to proceed that the route is the best route.

MR SALMON QC:

No, that's right but it might be that the extent to which it's not or the fact that it's not, absent explanatory factors, brings it within (d) independently of whether it's captured by (7)(b), if your Honour follows.

WILLIAM YOUNG J:

Yes, but there's a factual finding on that of the Environment Court, isn't there?

MR SALMON QC:
On which point, Sir?

WILLIAM YOUNG J:
On (d).

MR SALMON QC:
Yes, there is, albeit pivoting off a view about the irrelevance of the misleading statements because the Judge does find, did find as a matter of fact that the passage I was on just before was wrong. So yes, he does find that he's happy with it, or the Court found that it was happy with it. It's a court, not a judge.

WILLIAM YOUNG J:
So it's a court, not a single judge?

MR SALMON QC:
Yes. In my memory it was only the one person in the room but there were three of them. The finding was that was misleading. I think it's paragraph 55 of the judgment. I'll come to it. But it didn't trouble the Judge because he was able to comfort himself that this was a legitimate route. He was not interested in undertaking the counterfactual exercise I'm going to try to persuade this court of which is to consider what would have happened had that error not been made, and the rhetorical question I'll come to is what would happen if the Minister was told of the points that I'm about to go through and the fact that they influenced the change in route selection, and the answer in my submission is the Minister would have said: "No, go away and do more work," and –

WINKELMANN CJ:
So you're suggesting an exercise a bit like we do when we review warrants where we strike out the application, et cetera, and test for ourselves whether the Minister would have made that section 186 decision?

MR SALMON QC:

Yes. Well, the proposition I'm coming towards is the Minister was told it was the only practical and economic route, falsely. There's a factual finding on that. Just as I'm bound by all the factual findings I don't like, that's a fact. Worse than that, the Minister was not told of facts that influenced the change in route selection. Now the Environment Court Judge conflates, or the Court, conflated in the decision a number of post hoc considerations with the facts as they existed at the time of the 186 application. As at the time of the 186 application, the change from FGT/Sutcliffe was inexplicable on the record until it was seen that they made unpalatable threats, and the question is not, as the Environment Court Judge put it, did we prove that the Minister would have a made a different decision had she known? That's not the threshold. The threshold is were those things the Minister should have known and, if so, might she have approached this differently, and I'll come to what they are because her Honour, Justice Courtney, in the High Court, inherently spent some time on these but she held ultimately she couldn't look at the documents. The Court of Appeal did but pointed to findings by the Environment Court that I'll come to and say were not in fact factual findings of the points the Court of Appeal decided. But they are documents that my clients have discovered that to them explain why their land is being targeted and not the wealthier people on the ridge for the first time and that warrant ventilation.

WINKELMANN CJ:

So your essential submission is then that someone has to follow a proper and fair process and if the RA follows a proper and fair process then it doesn't really matter what the Minister does but the reality is the Minister is going to be fixed with that process, flawed or otherwise, but the Minister can fix it up by doing their own fair and proper process?

MR SALMON QC:

Yes, and recognising the rail of politics that if someone provides detailed accounts and credible material and full disclosure to the Minister it might be legitimate for the Minister to say that looks like adequate information. The

criticism would not be of the Minister but that the Minister's decision is – I don't know what the right metaphor is – tainted by the fruit of the poisonous tree.

O'REGAN J:
The question on which leave was given was just essentially did the Minister have to do their own inquiry or not. You seem to now be saying maybe or maybe not.

MR SALMON QC:
No, well, I'm saying on the face of this they had to. I'm trying to give a complete answer to the statutory interpretation questions that are being posed, Sir, albeit some of them will go beyond the scope of leave in this case. In this case I'm submitting that the Minister had to go further and that information of this level where wrong in material respects taints the Minister's decision which, in my submission, is within leave.

Turning then very briefly to the documents I'm talking about, and I do need to go briefly to them, the Court will have absorbed the process that's followed once a decision under section 186 was made by the Minister. There's a notice of desire under section 18 of the Public Works Act, following which there's three months to negotiate. I think my friends say that shows the Minister's decision is not a decision to take, there's still negotiations. As said in our submissions, those negotiations are somewhat like a Russian vassal state negotiating for its independence. There is the knowledge that force is right around the corner and it's only about price, and this is clear from the page I was just on in the application which regarded trying to ask why it was their land being characterised as bad faith negotiation. The only question was price because otherwise it was being taken.

Following those three months, a notice of intention is issued under section 23 and then the objection under section 24, and our short point over that process is throughout that time the die is cast in terms of target.

That brings me then to the discovered documents, the first being at 304.1629 which is a file note by the relevant person on the ground who was investigating route possibilities for TEL prior to deciding to move away from FGT/Sutcliffe, and you'll see he has file-noted at 5 April 2013, second paragraph, arriving at the Sutcliffe residence the meeting was totally dominated by Matt Sutcliffe who expressed a great deal of –

WINKELMANN CJ:
Can you just pause for a moment, Mr Salmon, because I don't think – well, on my screen it hasn't had time to adjust and it's extremely blurry to say the least.

MR SALMON QC:
It's all blurry to me, your Honour.

WINKELMANN CJ:
It's all blurry to me too. I don't know if that's a – can you just give me the document number again and I might just look it up for myself.

MR SALMON QC:
304.1629.

WINKELMANN CJ:
Thank you, go ahead.

MR SALMON QC:
And this and the next document I'll come to were the subject of the cross-examination which the Court of Appeal was referring to when it talked about the concession from the witness that the decision was influenced by these matters. So they are material and that concession is fact.

5 April, meeting was dominated by Matt Sutcliffe who expressed antagonism, et cetera, refused several times to set out the reasons for his opposition, "became angry when I asked about any concerns they had", et cetera. "We explained that the line shift was necessary because OTS had blocked TEL's

preferred route…" "Matt's reaction was 'I know Chris Finlayson'", and then words that he didn't use. My learned friends suggest it was his Treaty status that was the relevant feature but I don't think that's right. The words used were just: "I know Chris Finlayson personally." "MS insisted many times during the meeting that he was a successful and powerful person and would 'throw 300,000 into opposing the line route over their farm'. He would make life very hard for TEL if it persisted with this plan."

Now the evidence shows –

GLAZEBROOK J:
Why wouldn't he be referring to the OTS because that was the subject of the conversation, wasn't it?

MR SALMON QC:
No, it wasn't. The subject of the conversation was them coming to talk to him because OTS wasn't working. You'll see on 4 April –

GLAZEBROOK J:
Well, I understand that but isn't that the context then is saying: "Why mine rather than OTS land?" isn't it?

MR SALMON QC:
Well, it was saying that in part but it's also saying: "I know a powerful person" –

WINKELMANN CJ:
It doesn't really matter though, does it?

MR SALMON QC:
It doesn't matter what he meant. What matters I think is what TEL took from it and how it influenced TEL which I'll come to.

So the next document is a memorandum from the key individual who made the selection change decision which is a Mr Baker. Now the CEO of Top Energy gave evidence and said that he was not privy to the reasons and this decision was made by Mr Baker, and that I should ask all questions about it of Mr Baker, so I did. He moved somewhat away from accepting it was all him, but that was Mr Shaw, as CEO's, evidence and Mr Baker is the person who wrote this memo that I'm coming to, which is 301.0185.

WINKELMANN CJ:
Can I just ask, his file note was the one we were just looking at Mr Salmon?

MR SALMON QC:
That was someone called Peter Port I think, so that's the PP in there. He was a contractor doing the consultation for Top. Not a witness but someone who got serious stiff headwinds from my clients as well. It mustn't be the most fun job in the world. So I'm sure people say lots of things. What matters is how this then fed into the decision. So then at 301.0185, the 4 March 2014 memorandum from Ross Baker, who's the witness who was identified by the CEO as the decision-maker, to two other personnel within TEL. He summarises all the problems with the OTS land over several pages, and then on 301.0189, under the heading "Possible Deviations" refers to progress in some areas but then in the second and third paragraphs under that heading "Western Deviation", so the western deviation is FGT/Sutcliffe: "It is most likely that any deviation closer or onto the FGT Farms property will result in a compulsory acquisition requirement. The land south of Mangakaretu Road… is owned by Sutcliffe, whom has National Party connections. The land to the south of Sutcliffe but adjoining Greenacres is owned by Cornellis. Cornellis recently blew himself up in a 'P' lab explosion."

I'm not sure what the significance of the P one was, and the judge didn't want it addressed in the Environment Court, but the two prior features, the fact that there will need to be a compulsory acquisition and that Mr Sutcliffe has political connections, were confirmed to be relevant and indeed just in case it's relevant, I note over the page on 301.0190 still a hope to talk to the

Minister in his Treaty context over at recommendation 1: "… to take the matter to Chris Findlayson at a Ministerial level and attempt to secure support for OTS to deal directly with Top Energy." That failed but at this point on the facing page there was still no section 186 route.

Then just in case, for completeness it's of assistance to the Court, the 186 route rears its head at 301.0194 where in a 25 August 2014 email Mr Bridson of Top copying in the same Mr Baker, refers to: "Ross and his team…" Ross is Mr Baker "… have been searching for an alternative route round TS and have come up with a few options, one of which they would like you to do a high level appraisal of please." And that is sent to Boffa Miskell, who then proceed to develop the 186 route, and you'll see on the facing page, if you've got a hard copy bundle, or on the next page otherwise, 0195, the route drawn out of the first time in yellow. So that's when that route arose on 25 August 2014, three months after the memorandum we were just at referring to concerns about Sutcliffe objections and directly recording the National Party connections.

Now the Environment Court has held that we did not establish that the Minister was influenced by this. What has not been held in such a crisp way is what impact it had on TEL's selection of route, and that's because TEL confirmed it was influenced by this in cross-examination, and very briefly I will go to the transcript because it's referred to by the Court of Appeal concerning the Court's interpretation of it as involving that concession. But if I can begin at 201.0233, and the witness is being asked on 0233.

GLAZEBROOK J:
Just wait until we get there please.

MR SALMON QC:
Yes your Honour. So scrolling down a bit the witness is being asked about the documents I've just been to.

WINKELMANN CJ:
Which witness?

MR SALMON QC:
This is Mr Baker. So the witness who wrote the report recording the Sutcliffe claim political connections and he's being asked about that, and at this file note at 304.1629, which was Mr Port's file note saying that Mr Sutcliffe was I know Chris Findlayson personally, insisted many times that he was a successful and powerful person and would throw $300,000 –

GLAZEBROOK J:
So he's been asked about the Peter Port file note and his 4 March memo, is that right?

MR SALMON QC:
Correct. They're the top of this cross-examination over the next few pages, which I'll try to work through reasonably efficiently. Down at line 28 or so he's asked: "Given that you could remember it off the top of your head, I take it it's something that was on your mind at the time as factor when dealing with Mr Sutcliffe, he was a certain type of character I take it?" A. "We were aware that he was completely unhappy with the FGT Sutcliffe route from, I think that's pretty obvious from that CV1969 file note." And that's that file note.

Over the page: "Yes, but it was something that was reduced to writing by Mr Port in which you read and remembered, obviously, so thus something to keep in mind in your considerations I take it?" A. "Yes, certainly." Quite candid about that and taken beyond that over the following pages. If we could go to 201.0237, at the bottom of that page.

GLAZEBROOK J:
Can you give me the page number again please?

MR SALMON QC:
201.0237 where the witness is then being referred to the Baker memorandum.

GLAZEBROOK J:

Of 4 March, is that right?

MR SALMON QC:

Correct your Honour, 4 March 2014, and the heading "possible deviations" which is the section, this is at line 29, the section that deals with the reasons for shying away from the FGT/Sutcliffe route, at least initially. He's asked about the western deviation at line 31, being the FGT/Sutcliffe one at the time. So at the time that was the western-most. My clients' route is more western but didn't exist then. Then over the page and scrolling down a bit, he talks about the fact that he wrote it at line 5, and then asked, "But this is based presumably on Mr Port's report of what's said to him by Mr Sutcliffe or other knowledge?" And he says at 10: "Yes, well the ownership was known through the public LINZ data base but the other comment, yes."

And he's asked in relation to the final five words, is this something that he knows has: "…only come to light in this disclosure of documents by Top Energy in the course of discovery in this proceeding, in other words this memorandum was not something shown to the Ministry…". "A. It was not part of our s 186 application." He's asked then at line 20 onwards it's right that: "… intending to put down the major points in your mind in this memorandum as to the hurdles and merits of each option. It's not a quick email, for example…" et cetera.

WINKELMANN CJ:

Can you just pause please. The screen is out of sync with what we're – so are we at…

MR SALMON QC:

Line 23, line 25, he's asked it's a deliberate memorandum and not just some casual thoughts. He says: "Well I think they're summarised in the conclusion section…". Asked again: "But my question is whether you'd agree that you were careful to include all of the information you saw as key as to why you thought it was appropriate to look further afield." A. "Yes I believe so." Q.

“And that means, doesn’t it, that the passage that we were just looking at, which refers to connections that Mr Sutcliffe said he had, was something that you thought was relevant?” A. “It was for me just a known fact, as was the paragraph below it.”

Then over the page: “But you knew all sorts of facts that you chose to leave out of this such as Mr Sutcliffe’s personal appearance or what care he drives. You were putting in things here relevant to your conclusion that you might need to look elsewhere?” A. “Well the relevance was to this relationship with the Honourable MP linked with the preferred transmission route.”

Then further down the page at line 20: “We’re slightly at cross-purposes.” He’s asked about his meeting with Mr Shaw once he’d prepared a spreadsheet of five options, and he thought that Shaw said pick 5. Shaw denies that he was involved in the selection of route. So it’s just like a wrinkle between them as to who really carries the decision.

Then he’s asked: “I understood you now to confirm you mentioned the relevance, or you mentioned that those items in front, saying out loud, but the connections that Mr Sutcliffe claimed, you mentioned them because they’re relevant in this memorandum?” “Yes.”

And that’s a memorandum he says he discussed with Mr Shaw before Shaw decided the route. Shaw says Baker decided the route. Either way, they clearly regarded it as relevant, and over finally at page 240, line 13, 12: “So that was relevant to your framing of that memorandum and to your subsequent work leading up to the meeting with Mr Shaw?” “It was a piece of information that was put into this memo and yes led up to it as you say.”

Now the –

GLAZEBROOK J:
Can we please go back and see exactly what passage he was being referred to?

MR SALMON QC:

Yes. It's at 301.0185, and over at 301.0189 is the relevant page. The witness was referred to the heading "Possible Deviations". If the registrar can scroll up a little bit I think we might be able to fit the entire "Possible Deviations", sorry, scroll down, the entire "Possible Deviations" section on screen. It has one more line, or two more lines, at least on my screen, you can see most of it now. That's all of it in short for Justice Glazebrook.

So the witness was asked to deal with the matters under the heading "Possible Deviations" and then the "Western Deviation" is the FGT route. In terms of reasons not to proceed with it, we have the entirety of the reasoning such as is clear on the record there. It will need to have a compulsory acquisition requirement, ie, he won't agree, and he claims connections.

Now also in that cross-examination, of course, the witness confirmed that he'd gone to Mr Port's file note and relied on that, so we have I guess the combined influence of what's recorded about Mr Sutcliffe's wealth, the evidence that the Court had that Mr Sutcliffe was in a nice lifestyle block with a good view of the Bay of Islands he didn't want blocked and his claimed political connections. It's not over-egging to say that there aren't other explicable reasons that are on the record at the time. Now as I'll come to, the Environment Court has said, well, there was bigger impact on Mr Sutcliffe's view than on, say, Mr and Mrs Dromgool's view. But that's a backfilling of reasons developed as TEL and the Ministry put its case together for the section 24(7) hearing. At the time we have a witness saying even if there were other considerations and perhaps there's something somewhere that also controlled it apparent on the record, but at the time he was influenced by these facts and that's not surprising because they're really the only reasons mentioned explaining why one would change.

So I began this section by saying that my clients have been perplexed and bewildered. They're not people of means and they don't live in lifestyle blocks with grand views but to them their land has family and indeed pre-European connections for some of them and amenity that matters dearly to them. They

are bewildered why TEL asked the Minister to take their land and not the rich people's land on the hill, and it would be one thing if the power lines were the same length or cost the same to build but they're not, and as it was either Mr Dromgool or Mr Poulton gave evidence, it's just so self-evident once one walks around the land that they're is the worst route, a point confirmed by the fact that TEL didn't even think of it until it got pushed back from Sutcliffe. It's literally not identified in any documents as a possibility until after these memoranda and after Mr Baker confirmed he was influenced by Mr Sutcliffe's claims. They couldn't understand why one would choose a more expensive route.

Now just on the more expensive point, we had a bit of time in the trial analysing and cross-examining on the difference between the costings at the time of applying to the Minister when the 186 route was materially more expensive and costings that TEL had done to backfill or update its cost estimates in which the difference was more moderate and the Judge disregarded the costs of building along the paper road. I'm not sure why because, of course, total cost to TEL one would think is the key question. But even disregarding that and making the 186 route seem cheaper, the Environment Court held that the 186 route is $260,000 more expensive, that's a finding, than the FGT/Sutcliffe route.

So as the Court of Appeal notes, those concessions seem to be material in terms of TEL's thinking and the first question is why don't they matter and I guess the second question is the one the Court raised with me before. What should the Minister have done? And the first answer is the Minister should have been told this because otherwise, in our submission, the decision is tainted and it's abhorrent, respectfully, and I don't use the word lightly, for people to see their land being taken for reasons of wealth and political connections in their eyes.

So a question that can be asked rhetorically is what would the Minister have done if Mr Baker had given in submission with the 186 application the explanation that was ultimately prised from TEL, that they hadn't considered

this route at all until Mr Sutcliffe said that he was wealthy and could afford litigation and that he was friends with the Attorney-General?

Now the obvious answer –

ELLEN FRANCE J:

I'm still struggling, Mr Salmon, to understand quite how it is that the Minister would have got to the point of getting that information in the context of the type of process that is followed. So you have a briefing paper, it's a standard sort of briefing paper, it attaches the 186 application, et cetera, goes through and identifies the things that the Minister has to consider. I'm just not sure how, without making some inquiry starting from scratch, that the Minister gets this sort of information.

MR SALMON QC:

Yes, can I deal with that problem in two parts. Firstly to say to the extent that the Minister doesn't have more information and relies on wrong information, as here, through no fault of the Minister's, in my submission the decision is tainted. It can never meet the test under 24(7)(b) –

WINKELMANN CJ:

I mean your essential submission, Mr Salmon, is that the Minister's fixed with any deficiencies in process, proper process and fairness, by, on the part of the RA.

MR SALMON QC:

That's the first submission. The second was going to be there's enough in here such that the Minister was in a position where a proper decision would have involved asking some more questions and –

WILLIAM YOUNG J:

Just pause there. If you accept that the Minister's fixed with the approach taken by TEL then presumably you would accept that adequate consideration of alternatives by TEL is sufficient.

MR SALMON QC:

Well, I'm accepting, Sir, that not that the only argument that gets the appellants home is if TEL has poisoned the pill, so to speak, but rather that is one path. The other is if the Minister should have asked more questions and didn't, because your Honour has put his finger correctly on one of the issues I have to face which is there is a finding that TEL adequately considered alternatives, not that the Minister did, that's never been found, but that TEL did, and the Court of Appeal points out that's on one view a factual finding that I face problems with. I say it rather comes in as a question of – a question captured by the leave on appeal question for today, so I'll come back to that, but the two parts to the answer are, one, if TEL has a fatal error in its decision, which the Environment Court has erroneously regarded as not an unlawful consideration, which is not a finding of fact but of law, that that poisons the pill all the way down the chain and disqualifies the Minister's decision. But independently of that, in my submission, it's incumbent upon the Minister to enquire as to whether routes have been adequately looked at. Now the Court of Appeal said all the Minister needs to do is look at whether the application is capable of meeting the test under section 24. We do contest that and argue that a higher standard is needed. But in particular a higher standard needed in relation to route selection because that is de facto final the route selection.

So the reason I've asked the Court to indulge me by allowing me to go through those documents is, those documents, combined with the Environment Court's finding that this is $260,000 more expensive than the other routes, with a bit of arbitrage about whose view is best, both would be okay by him. I can come to the paragraphs after the break, but he finds both would be okay. It is not a stretch to say, had TEL applied in relation to 186 because it had not been wrongly influenced by unlawful considerations if it were a public law decision-maker, my clients would never have had a notice, they would never have had lawyers, they would never have had a hearing, and they would definitely not have their land being taken, because the Environment Court's decision shows us that the Environment Court would have approved a taking of FGT/Sutcliffe.

WINKELMANN CJ:

Can I just say, you say there's two propositions I've got down, just tell me if that's correct, because I want to ask you if there's a third proposition you make. If the RA has a fatal error in its decision, then that poisons the decision-making tree all the way. That's your first proposition?

MR SALMON QC:

Yes, that's one, yes.

WINKELMANN CJ:

The second proposition, but independently of that, it's incumbent on the Minister to be satisfied that a proper process has been followed?

MR SALMON QC:

In relation to route selection in particular, yes.

WINKELMANN CJ:

Yes, and is the third – because that's not a correctness standard, that just means that the Minister has to conduct enquiries. Is the third limb of it then that if there's anything on the face of the application that suggests that a proper process is not being followed, then the Minister must make enquiry?

MR SALMON QC:

Correct. A proper process has not been followed or paucity of information such that the Minister can't judge the adequacy of the consideration of alternatives. The companion piece to that point is we do submit that there's enough in here to force a reasonable Minister, in the statutory context, to ask why have you abandoned the prior route.

Now we're nearly at the break. I'll mention just one –

GLAZEBROOK J:

Can I just, probably just also with the Chief Justice working out what that means. So what's the next stage? So the Minister should have asked

questions and then what? If the Minister didn't ask questions what's the result of that?

MR SALMON QC:

A failure to meet the obligations of the Minister to consider relevant material bearing on the section 186 application and therefore a matter that the Environment Court should have held disqualified the application under 24(7)(b).

GLAZEBROOK J:

So it actually gets rid of it all together even if later –

MR SALMON QC:

Yes.

GLAZEBROOK J:

So you can't backfill, as you call it, on that.

MR SALMON QC:

You can't, I'm not arguing that one can never back-solve, rather one can never back-solve material prejudice that can't be cured by back-solving, if that makes sense.

GLAZEBROOK J:

You're really saying you can't back-solve at all then. If the Minister didn't make enquiries, and that wasn't adequate at the time, then that's the end of it, and they can't present further information to say well this is the reason, this is the best route.

MR SALMON QC:

No I'm not quite saying that your Honour. I don't think I need to go that far. I'm saying that this particular –

GLAZEBROOK J:

Well you mightn't need to, but I just need to know what you are saying, because you said the failure to make – it was a failure to consider relevant material and the Environment Court should have turned it down.

MR SALMON QC:

Correct, and that's because the particular failure here is one that determines the target. So –

GLAZEBROOK J:

Well that's going to be the case, always, isn't it? If we're looking at something like this.

MR SALMON QC:

No, with respect your Honour, we might have a set of findings in which it was clear that –

GLAZEBROOK J:

Well what you're really saying is you can never backfill anything that's determined the target.

MR SALMON QC:

No, I'm not submitting that your Honour. I'm saying –

GLAZEBROOK J:

Okay, what is the submission?

MR SALMON QC:

The submission is one of materiality. That the nature of this decision between the two targets is one where on the facts as we have them in this case, and the findings in the courts below, the information was material to the choice of target, in a way that the counterfactual is very real and which FGT/Sutcliffe was the target. There would be conceivable errors in other cases where there was a procedural error that the Court held had no materiality because target A

was always going to be the target, even though there was a procedural blip, and so in that (inaudible 11:31:08) judicial review way in which section 24(7)(b) is engaged, the Court would say there was a blip in the adequacy but it was non-material and non-causative. Here we happen to have a case –

GLAZEBROOK J:
So there can well be a blip and then later somebody can find that actually it was the best route. So here they've found it was less expensive, and there were real practicalities, otherwise are you saying it would still be set aside?

MR SALMON QC:
Not if the Minister had open-mindedly considered that again, because that would explode my materiality arguments. So if, in fact, this was cheaper when, in fact, it's more expensive and, in fact, it was more practical when, in fact, it's not and, in fact, it was urgent –

GLAZEBROOK J:
When does the Minister get to consider this again?

MR SALMON QC:
Well my friends say the Minister gets to issue a notice of desire and then a notice of intention, and so I think the submission is at various points the Minister locks in the decision to compulsorily acquire and this was just preamble to section 186 stage.

GLAZEBROOK J:
Okay.

MR SALMON QC:
The submission I'm making in response to my question, I understand the question and it's a good one, is there might be decisions with the facts your Honour's hypothesised. If it was the other way around, and FGT/Sutcliffe was more expensive where the back-solving effectively showed the consequences

to be immaterial, and the Minister became aware of it, and resolved to continue, that would be one thing. Here where the Minister has doubled down because of a sense of momentum, and disregarded the new facts, new to the Minister as well and one understands why these things have momentum and, bird in the hand and so on, that materiality can't be cured in this case. I've taken us past 11.30 though.

WILLIAM YOUNG J:

Can I just ask one question. Does that mean that you would construe section 24(7)(b) as in this case requiring the Court to inquire into the adequacy of consideration by both the Minister and requiring authority, so that we should read those words in?

MR SALMON QC:

By the Minister and to the extent the Minister relies upon the requiring authority. In other words if the Minister did an entirely full de novo investigation of adequacy, and didn't rely on the requiring authority for data, then the requiring authority would be by-the-by, I think, to the Minister's decision. But where the Minister has just flatly relied upon it in what a witness called a fundamentally passive way, then yes the requiring authority's procedural defects have poisoned the well or the fruit.

WILLIAM YOUNG J:

But you're saying consideration, the statute should be read as requiring consideration by the Minister as well as the requiring authority.

MR SALMON QC:

Yes.

WILLIAM YOUNG J:

So section 24(7)(b), okay, thank you.

MR SALMON QC:

Yes. But even if not it's still defective because the requiring authority's decision was defective.

WINKELMANN CJ:

All right. So we'll take the morning adjournment now thanks.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.52 AM

WINKELMANN CJ:

Mr Salmon, in terms of timing, when do you intend to finish?

MR SALMON QC:

By around 12.30 I would have thought, your Honour, subject of course to –

WINKELMANN CJ:

And does that leave adequate time for the respondent? Have you discussed it with the respondent?

MR SALMON QC:

Not over the break, your Honour. I think I said to him I thought I'd be done during the first half of the day subject to questions. We did discuss it last week. He had that concern and sought an extra hour.

WINKELMANN CJ:

That's okay, then. I think we're sitting until five and you'll finish by 12.30. That's fine.

MR SALMON QC:

I may be quicker than that, your Honour. My sense is you don't need to hear a lot from me on the details. Submissions were made in writing on the statutory analysis.

WINKELMANN CJ:

I do have one question for you though. When we go through your points of reasoning where does that leave you if there's this finding that the requesting authority did comply with the obligation to consider alternative routes?

MR SALMON QC:

It's – in terms of whether that's something we can appeal? I –

WINKELMANN CJ:

Well, no, because if someone has to do it right and in fact they've done it right doesn't that leave you without any complaint?

MR SALMON QC:

If they had done it right, yes, it might, your Honour. They haven't and no amount of – well, they haven't –

WILLIAM YOUNG J:

There is a finding effectively of fact by the Environment Court that adequate consideration was given.

MR SALMON QC:

Yes, it is a finding of fact, albeit based on a view of the –

WILLIAM YOUNG J:

Yes, but I didn't understand you to have leave to appeal against that.

MR SALMON QC:

No, we don't. The point I was going to make though, Sir, is in terms of what I do have leave to appeal on, the finding as to what was adequately considered is one based on the full up to the date of the hearing factual position, in other words the backfilled position. So in terms of what I have leave on, I'm rather focused on the adequacy of the Minister's decision as at the time of the 186 decision, what the Minister needed to have regard to and what Top Energy needed to have regard to then, rather than the question the Judge directed

himself at which was very much to view the 186 decision as just the beginning of an iterative process that he'd view in the round at the end. So –

GLAZEBROOK J:

So it's – worry, I was just going to say that therefore the submission that you're making that that taints the whole of the process is essential for your argument therefore?

MR SALMON QC:

It's essential for the argument to the extent that the Court rejects the submission that the Minister knew enough to ask questions and should have or to undertake further investigations. I would add too that there are two facets to what the requiring authority did. One is it relied on what we say are improper considerations and I'm not sure that there's a finding of fact that quite displaces that proposition but that's by the by. The other is that it said things to the Minister that were false and that the Environment Court has held were false, and that's a factual finding that I can rely on and need not displace and if the Court accepts that the Minister materially misled undermines the Minister's decision and respectfully the only answer to that in my submission would be if it were not material, but practicality economics are almost at the front of the list of material factors. Absent somehow disrupting that finding of fact, a good question is, well, why wouldn't that tip over the Minister's decision unless it's not material?

ELLEN FRANCE J:

Mr Salmon, I don't understand quite how that fits in with the grant of leave which you'll remember in relation to the specific factual matters that you wanted to rely on and declining leave then in turn refers to various factual findings in the Courts below, so are you now challenging those, trying to challenge those factual findings?

MR SALMON QC:

No, I'm not. I'm about to just seek to house them or characterise them in what I say is an accurate way of understanding what has been factually sound. I accept I don't have leave to –

ELLEN FRANCE J:

That sounds like the same thing to me but – it sounds like a challenge to those factual findings.

MR SALMON QC:

If it is it's because I've put it clumsily, or I hope that's why your Honour – to take, for example, the notion that the Minister has adequately considered matters, if TEL has been shown to adequately consider matters but has also – I'm bound by that factual finding, such as it's factual; if it proceeds on a legal error that I have leave on, it's different – but if TEL has then misrepresented the position to the Minister, which there is a factual finding of, then that is not a challenge to a factual finding by the appellants at all. That's relying on a fact that's been found which was the Minister was misled and a legal submission, within the terms of leave, that the Minister was required to understand facts correctly such as she looked at them, and that respectfully I think would go through even the Court of Appeal's test of whether the material was capable. It can't be right, even in the Court of Appeal's formulation, that a factually false application, false in a material respect, legitimately meets the Court formulation of material that the Minister can judge is capable of justifying an application.

GLAZEBROOK J:

Can you just take us to the finding that you're relying on in terms of factually wrong?

MR SALMON QC:

Yes, I can. I think it's 55 of the…

WILLIAM YOUNG J:

54 and 55.

MR SALMON QC:

54 and 55, thank you, Sir. Now this provides something of a clue as to how the Environment Court formed the view that it didn't matter which is that it formed a legal view, second line of 55, that the statement was otiose and irrelevant, and I accept that I need to persuade you that that's wrong but as a matter of law that, in my submission, is wrong.

WINKELMANN CJ:

I don't seem to see that on the screen. I don't know what's wrong with the document that's shown on the –

MR SALMON QC:

Scroll down a bit, please, Mr Registrar. First few lines of 55 there. Does your Honour see that?

WINKELMANN CJ:

Right, now I do.

MR SALMON QC:

So it is true that the judge held that TEL undertook an adequate consideration of alternatives applying his test of what was adequate, which included regarding practicalities and economics as irrelevant, as a matter of law, and in my submission that must be wrong. They were stated to the Minister because they were relevant and the Minister justifiably assumes they were right one suspects –

WILLIAM YOUNG J:

I took what the judge was saying is that there was no requirement for the objection route to be the only practical and economic route.

MR SALMON QC:

There's no over legal requirement –

WILLIAM YOUNG J:

No, sorry, just looking at what the judge said. I took the judge to be saying that because there is no requirement for the route to be the only practical and economic route, the challenged section in their document was otiose any statutory requirement.

MR SALMON QC:

Yes, and if the sentence ended there I would accept your Honour might be right, but the Court goes on to say it was irrelevant and the relevance to the examination under section 24(7)(b).

WILLIAM YOUNG J:

Well it could be a rhetorical flourish, but it went beyond what Top Energy had to say to get the reference – to get the Minister to act. That's what they're saying. That's what the judge is saying I think.

MR SALMON QC:

Respectfully I think it could be what he was saying if the sentence ended after statutory requirement and it was quite an extraordinary hearing that was had with the judge and his views and what was irrelevant. The way I have read 55 in its natural and ordinary meaning is that he had held that that statement is irrelevant to the Minister and irrelevant to the examination under section 24(7)(b) and part of the reasons for the latter part of that, is that the judge has viewed it as by-the-by what happened before the Minister, and this was a big focus of his in the hear – in the court rather, because it can all just be looked at afresh in the 24(7) hearing. But respectfully Sir I do think that he is holding that as a matter of law what he has held as a matter of fact was false is irrelevant to the Minister, and it plainly isn't.

WILLIAM YOUNG J:

It's also something perhaps an evaluative statement, it's an evaluative assessment.

MR SALMON QC:

Well, factually evaluative rather than a legal position.

WILLIAM YOUNG J:

This is, a statement, this is the best outcome we can get. Well you may disagree with it but it's not necessarily a false statement in the sense that it implies moral turpitude on the part of the person making it.

MR SALMON QC:

Oh no I don't think I need to say there was moral turpitude by anyone. I don't think I have by anyone saying –

WILLIAM YOUNG J:

No, but it's the continued references to the slightly ambiguous words such as "false statement" and "mislead" which carry sometimes an implication of intention, that you are suggesting that.

MR SALMON QC:

No, my apologies, I'm not suggesting that there was an intention to deceive the Minister. I'm saying that the statement was in accurate or false, in fact inaccurate is less capable of seeming pejorative and –

WINKELMANN CJ:

Wrong would do. Wrong.

MR SALMON QC:

Wrong. And it was a wrong statement and misleads in the same sense that one does in the Fair Trading Act, whether one intends to or not, and the judge has held it's misleading or inaccurate, wrong. So respectfully I think that takes it beyond merely a challenge to fact and one on a question that goes directly

to the core of the question on which leave was given. Should the Minister look at such issues? If the Minister should then the appellants say the Minister was given wrong facts on key issues, which the Environment Court wrongly held were not relevant, and the Minister's decision is thereby tainted.

Now my friend's say it, one mention in a long document, this is in the second cell of their, or one of the cells in their appendix A in their submissions, I just note it is not a reference that just was overlooked by the Minister. The only practical and economic option was repeated in the Ministerial decision tree for the decision itself. So the Minister, when making the decision and following one of those tick box decision trees was, in fact, expressly being reminded it was the only practical and economic route. So we do say that's an error of law in the judge's decision and that to the extent there are findings of fact that matter, it's the finding of fact that that statement was wrong that's material. In case the Court wants to go to it, the decision sheet is at 303.1247. Sorry, 1240, and the relevant page is 303.1247

WINKELMANN CJ:
So does this get you to the point where you say that it doesn't matter what factual findings the Environment Court made because they had the wrong legal framework, so it has to start again?

MR SALMON QC:
Well I do say that in relation to the adequate consideration finding, but I don't think respectfully I need to because there is a factual finding which is plainly right, and not one dependent on a wrong legal interpretation. That wrong facts were given to the Minister and so taken at the easiest end of the propositions, I guess, or from my perspective, the easiest of propositions I'm advancing today. If the Minister has been told a materially wrong fact, and that wrong fact is material in the decision to route A over route B, that irremediably poisons the Minister's decision under section 186, and I say irremediably because the facts, as found by the Environment Court judge, show that that same Environment Court would have approved the FGT/Sutcliffe route if the Minister had decided to approve it.

WILLIAM YOUNG J:

Where's the passage in the decision tree you're relying on?

MR SALMON QC:

1247 my note was. At the top of 1247, end of the first paragraph.

WILLIAM YOUNG J:

Is that necessarily incorrect? I mean it is part of a narrative, isn't it? And secondly it may reflect Top Energy's view.

MR SALMON QC:

Well it doesn't reflect Top Energy's view because Top Energy knew, and confirmed in evidence, that it was more expensive to build the 186 route than the FGT route, and the judge –

GLAZEBROOK J:

But all it is saying here is because it wasn't able to secure agreement in relation to the easements, it looked at a realignment.

MR SALMON QC:

Well it's not just saying that, your Honour, because as you recall the application itself made clear there would be no agreement on either route. So the reference to not being able to get agreement was a theme that applied equally to FGT/Sutcliffe and to the 186 route. The distinguishing feature between them was not that an application was required. It was that the 186 route was characterised as more economic and practicable.

WILLIAM YOUNG J:

I haven't got clearly in my mind the actually document that Top put up but reading this is looks a bit like part of a narrative. They ran into trouble with the Sutcliffes and: "As a consequence Top Energy determined a realignment including the subject land as the only practicable and economic alternative route available."

MR SALMON QC:

Yes, I think it is a narrative, but it's a narrative capturing in narrative form the reasons why Top Energy has landed on the 186 route.

WILLIAM YOUNG J:

And then just going a little bit further down, the question is put to the Minister on the decision tree, she's not asked to determine whether, or asses the claim that it's the only reasonable practical and economic route is she?

MR SALMON QC:

Well that's, we're going to decide that in this forum, I think, Sir, whether she is to do that as a matter of law.

WILLIAM YOUNG J:

No, sorry, the decision tree that she's given doesn't direct her attention to the question whether the objection route is the only economic and practicable route, or have I missed something? I haven't got the whole document in front of me.

MR SALMON QC:

Yes, I think there is a heading for adequate consideration, but –

WILLIAM YOUNG J:

Of course there's a heading for adequate consideration, because it's a statutory requirement.

MR SALMON QC:

Yes. The point I'm seeking to make, Sir, is just that in terms of what explains the adequate consideration on the most key point, we have the statement, the wrong statement, but it's the most practicable and economic, and it's not, with respect, I think an answer to that to say it's presented in narrative form. It was a key plank of the application and why the application focused on the 186 route. It was the only practicable and economic route. So if it's a statutory requirement that the Minister have regard to it, then the Minister is having

regard to wrong facts, and there aren't other reasons identified in this decision tree for this land over the other, and that returns us to the question on which leave is granted. Does that meet the requirements of the Minister when determining the target.

WILLIAM YOUNG J:
Do you say that the Minister has to directly address herself in this case to whether the right target property was chosen?

MR SALMON QC:
Yes.

WILLIAM YOUNG J:
Even though that's not a question for the Environment Court or it's not identified in section 24(7).

MR SALMON QC:
Sorry, whether it's the right in some, absolute term no, whether there has been adequate consideration, and the choice of target is one that's made on legitimate lawful and logical grounds.

WILLIAM YOUNG J:
So where is the requirement in the statute for the choice of target to be itself able to be justified otherwise than by having regard to adequate consideration of alternative sites and the matters referred to in section 24(7)(d)?

MR SALMON QC:
It doesn't expressly say it elsewhere Sir. The submission from us is the fact the Environment Court is directed specifically to enquire into the adequacy, carries with it an implication that the original decision-making must be adequate, and adequacy I'm filling in the meaning of adequacy in the answer I gave to your Honour a minute ago. Adequacy requires lawfulness, sufficient information, and no materially false acts, for example, and that's not really me legislating off the hoof, those are just the features of a publicly lawful decision.

So the submission from me is, 24(7)(b) makes clear that normal standards of public law and proper decision-making would apply. We would say they apply stringently because this is the coercive use of State power, and that requires care. That's one of the sort of higher end alert areas in public law, and that the Minister's decision in deciding that which is permanent, and the selection of target, needs to be, in that basic public law sense, proper, and that it is not an answer for the Crown to say, well, one should've judicially reviewed section 24(7)(b), putting aside the fact the proceedings were starting when some of this information was coming out. Section 24(7)(b) makes clear that adequacy is to be considered then, and I think it's hard to envisage what adequacy would mean if it did not carry those standards, implications of a proper publicly lawful decision. Not relying on false facts, or wrong facts, relying on relevant considerations, ignoring irrelevant ones, and so on. Here Top Energy has confirmed it was influenced by irrelevant considerations. Financial –

O'REGAN J:

But all of those are judicial review grounds, aren't they? This is an appeal against the Environment Court. If you wanted to judicially review you had to judicially review, whether it was too late or not.

MR SALMON QC:

Well Sir, had I judicially reviewed, I would have faced the standard answer that I already had live proceedings in which the Supreme Court had said section 24(7) involves the procedural check on the Minister's process, and that as is often said, where there's a specific statutory framework that –

O'REGAN J:

Yes, but your case is that the section 186 selection is, in fact, an immutable decision that can't be changed by the Environment Court, and if that's right, you had to judicially review it.

MR SALMON QC:

No I'm not saying that can't be changed. I'm saying the judge erred in not changing it as a matter of law by misappreciating what the Minister had to do and have regard to. The reason it couldn't be changed –

O'REGAN J:

No, you said this morning once the decision is made to select the target it can't be changed. It is something which commits the people to a process, which they would otherwise not have been in, if the Minister had decided the case properly.

MR SALMON QC:

Yes, but that's, and my apologies if I wasn't clear Sir. I'm not meaning to say that the Environment Court could not have said, properly directed, because there was an improper process, I am declining this outright because the target was subject to an injustice. What I'm meaning by them being caught and locked in and unable to get out, is unless and until they get to that stage in an Environment Court hearing, they are locked in as a target. It's a submission designed to point to the fact that there is material consequences, the target decision, that is more irremediable than other aspects of the decision.

WINKELMANN CJ:

So your essential submission is that section 24(7)(b) is, in fact, a procedural, provides procedural protection. You're picking up on the former Chief Justice's comments in *Seaton* and you're saying that it's a procedural section effectively, the adequacy of consideration must import, or the standard, you know, public law kind of obligations on a decision-maker, you can't take into account illegitimately considerations, irrelevant considerations, you have to have sufficient consideration so that that opens up almost on this aspect a public law enquiry and that was why you took the decision or for a multiplicity of reasons, you haven't got judicial review, but you don't need it.

MR SALMON QC:

That's right your Honour, and I'd supplement that summary with a submission as to other reasons why I say that. Firstly, if adequacy doesn't encompass standard judicial review considerations, what does it mean. It's very difficult to give it a useful, coherent and clear meaning, unless it connotes what the former Chief Justice took it to connote, which is adequate in a legal sense, and unsurprisingly it would be in a public law sense because the section is directed at the Minister's decision-making. Secondly, it would be anathema in a context where the concern is to protect against unlawful taking of private property by coercive means. It would be surprising if the legislation were intended to carve out judicial review from section 24(7)(b), impliedly somehow, and require two sets of proceedings to be brought, rather than one. The answer, and I put it badly to Justice O'Regan, but the answer one faces usually when bringing judicial review proceedings where there's a provision such as this, is that they are otiose because Parliament has provided for a mechanism to judicially review in a particular specialist framework, as it has here. In my submission it's a very strained reading of the Act that excludes from enquire into the adequacy, lawfulness, bias, irrelevant considerations, and all of the other touchstones of public law. There would be nothing left to enquire into in 24(7)(b) if that were the case.

ELLEN FRANCE J:

But that doesn't really answer the question as to whose adequacy of whose consideration you're talking about.

MR SALMON QC:

Correct and that's part of the hard work I'm about to do if I may.

GLAZEBROOK J:

Why is inadequacy looking at what I would have thought it meant in terms of, I mean basically doing the sort of job that you would expect somebody to do if they're looking at different alternatives. So mapping out routes and saying that one doesn't work 'cos there's a hill in the way, this one doesn't work because of whatever the – this is going to cost a lot of money to put it here. I

mean why have you got public law considerations in there when, in fact, you're looking at something that is, doesn't really look like a public law issue in terms of – it looks like an operational issue to me.

MR SALMON QC:
Well my submission would be that it's both. It's essentially –

GLAZEBROOK J:
Okay.

MR SALMON QC:
– looking to make sure that the decision was safe, but on your Honour's question on whether it would be just those things, it of course fails on that too for the reasons I've –

GLAZEBROOK J:
I understand your point it's just I don't quite see – well. It was probably your submission that it was just public law considerations because I think it's primarily operational considerations surely.

MR SALMON QC:
My apologies, yes, I have caused this exchange. By "just" I didn't mean "just" in that they're narrow. As I said, regard to relevant considerations and disregarding irrelevant ones, the ones your Honour has mentioned I would say are relevant considerations in the adequacy context and –

WINKELMANN CJ:
You actually started out earlier by saying the first thing is adequacy of the – is the sufficiency of a factual inquiry. So you did head your submission some time ago with that.

MR SALMON QC:
But I think I was a bit high-speed on the judicial review comments, the public law comments, so I hope I've clarified that.

I did want to just deal with what the Environment Court did and didn't hold. Given my timing estimate and given I thought I was about to start on that, through my fault I've led us down a detour but I'll try and briefly cover this. The Court of Appeal has summarised findings by the Environment Court that I've partly gone to, and in its paragraphs 106 through to I think 111, it refers to the Environment Court at 109 and 113 as making certain findings that it regards the appellants as held by.

So at 109 of the Court of Appeal's decision it's held that the Environment Court, this is part-way through 109, rejected the contention that there had been influence of the political connections, noting that the landowner concerned had in fact signed an agreement to grant an easement in respect of a property, although in a different location and for a shorter distance than had been proposed.

The Court of Appeal's identified there, paragraph 113 of the Environment Court's decision, as, on its reading in 109, as disposing of the question of whether the relationship had been considered in route selection.

The Environment Court's decision at 113 which is referred to there doesn't quite go that far and it's worth reading – I'm not sure we have time to do it now – but worth reading from the Environment Court's decision from about 108 which deals with consideration of alternatives, in 108 noting Mr Sutcliffe has indicated his relationship with the ruling government party and his fighting fund. "It is clear to us that the objectors considered that they had been treated unfairly, and that the route had been discounted for these reasons… The late discovery documents" –

GLAZEBROOK J:
Where are you reading from? Okay, end of 108, yes.

MR SALMON QC:
108 of the Environment Court. But then goes on to say: "We have concluded that there has been extensive consideration of alternatives, not only in the

route selection by Boffa Miskell…but also by TEL." No doubt they would have preferred OTS. Doesn't say there was adequate investigation regarding FGT but goes straight into considering OTS, and it's true that a lot of work was done considering OTS.

Then refers at 110 to the identification of the FGT route.

At 12 he finds although a number of witnesses were pursued on the basis of lack of consideration of FGT/Sutcliffe, "we have concluded that the evidence satisfies us that this route was considered." Now, of course, it was. It's whether it was adequately considered by the legal standards that this Court holds apply to the Minister and implicitly to TEL.

But then at 113, which is the paragraph relied upon by the Court of Appeal, all the Judge does is note that Mr Sutcliffe has signed an agreement for an easement in respect of that corner of his property that I took the Court to earlier, the one out of his view. "It cannot therefore be argued that TEL was unwilling to deal with Mr Sutcliffe, given they were eventually able to" agree on that easement. "Rather, what this demonstrates is the robust nature of discussions in relation to the route, and the need to take a responsive approach to concerns…" Now the short point is that is not a finding that TEL wasn't influenced in choosing the alternate route by what Mr Sutcliffe said. They moved to that route immediately following him saying he had friends in high places and funds and would sue, and said that they were influenced in doing so, that they agreed another route that went through the back of his land is what he wanted, but materially the Judge has not held at 113 what the Court of Appeal's 109 suggests it has, and the same applies to the Court's characterisation of the, at 111 in the Court of Appeal, the "fatal omission" premised on urgency and necessity and so on. The relevant pages of the Environment Court decision fall somewhat short of what's relied upon in the Court of Appeal's decision.

So in terms of what was actually said by the Environment Court, the Court of Appeal's paragraph 106 cited paragraph 109 for adequacy of consideration of

others. I've been through that and it doesn't in fact involve a finding that there was adequate consideration of the FGT route. That's the one as noted that says there was consideration of OTS.

Then 113 –

ELLEN FRANCE J:
Sorry, Mr Salmon, but in 109 the Environment Court says: "We've concluded there has been extensive consideration of alternatives."

MR SALMON QC:
Yes, but that's not adequate consideration of FGT/Sutcliffe which is the allegation here. It –

WILLIAM YOUNG J:
But they must have concluded there was adequate consideration of FTG/Sutcliffe. Isn't that – they must have – I mean it's inconceivable they didn't consider that there was a –

MR SALMON QC:
So I'm being unclear. The Judge by the time of the hearing on his definition of adequacy held that including – because of evidence subsequently collated and obtained after the 186 decision that the Environment Court's definition of adequacy was met, yes.

GLAZEBROOK J:
Okay, so what do you say the Environment Court's definition of "adequacy" was?

MR SALMON QC:
I'm frankly not able to characterise in a helpful way quite what the Environment Court thought it was because it rather saw the matter as the Crown does as one where all could be cured subsequently, but one thing it did mean is however consequential the decision on the 186 application was, it

didn't need to be reviewed in any procedural sense as of the material then because the Environment Court in the round would undertake an in the round assessment based on updated material. In other words, there was, provided the Environment Court was happy, it could look at the land and the alternatives in its own way. Whether or not they were better or slightly worse was untroubled by the adequacy of what was put before the Minister.

WINKELMANN CJ:
Is another way of saying what you've just said, Mr Salmon, that on the approach the Environment Court took to the process under section 24(7), it didn't actually squarely address the adequacy of the consideration at the point of the section 186 decision?

MR SALMON QC:
Correct.

WILLIAM YOUNG J:
But hadn't all of this consideration occurred within TEL prior to the section 186 decision?

MR SALMON QC:
No. The decision to lock on to these properties to the 186 route had happened but a lot of the material that emerged during the course of the hearing included the updated costs, for example, that the Judge relied upon as –

WILLIAM YOUNG J:
I see.

MR SALMON QC:
It was supplemented and expanded. There were planners' views of site and amenity and things that just weren't before the Minister and were before TEL. So my learned friend says, well, look, there were good reasons for preferring 186 route to the FGT route because the FGT route had a good view that

would be harmed, to some degree some of that was backfilled in witness briefs, and I accept that that might be relevant on the fair, just and reasonable to backfill in that way, but in terms of a process check on the Minister it's not, and so the point I'm seeking to make about the Judge is he hasn't found that on a process level what happened to the Minister was okay. His position at the hearing was none of it matters. In his decision he seems to –

GLAZEBROOK J:

Can we just have a look at what the Environment Court is sup – because I can't see quite where the requirement is the – I can see a decision – I can see an argument that the 186 decision might taint what comes further but I can't see an argument, I can't see specifically where you're getting a requirement for the Environment Court to review the Minister, in relation to the material that's there at the time. So what statutory basis do you have for that?

MR SALMON QC:

The statutory basis is an interpretation of section 24(7)(b) and –

WINKELMANN CJ:

Isn't the argument you're about to get to now, Mr Salmon, really what we've stopped you getting to to this point?

MR SALMON QC:

I'm not sure you – I think I've stopped me, your Honour. But it is. It is. I was going to briefly round out the Environment Court and then try to deal with that, but to answer Justice Glazebrook's question, partly an incidence of the wording in section 24(7)(b). It's designed to be "the check", not "a check", with judicial review being first and foremost. It's the statutory check.

GLAZEBROOK J:

But at what period is that supposed to be. I would have thought it's at the time of the Environment Court decision, not an earlier time, but you say it's at the time of the Environment Court – sorry. At the time of the Environment Court decision not at the time of the Minister's decision.

MR SALMON QC:

I say, and this is nuanced, so forgive me if I don't put it well, but I think it's coherent. I say it's at all times. It's adequacy in toto for many aspects of the decision it might not meet the material that there was a problem or a deficiency in the Minister's stage because it can be without prejudice to anybody filled in by the Environment Court's decision. But four procedural problems that have consequence at the Ministerial stage, it should look at the procedural position and the lawfulness or propriety of the decision at the Ministerial stage, and that's why I was indebted to emphasise the Environment Court's own finding that FGT/Sutcliffe would have met its standards means had a proper application been filed that told the Minister what we now know, a properly directed Minister would have said those aren't proper reasons for abandoning your priority choice.

WINKELMANN CJ:

Can I perhaps have a go at answering Justice Glazebrook's question for you Mr Salmon. Isn't your argument in relation – that you focus on the Minister's decision at the section 186 point because the Environment Court was asked to enquire into the adequacy of the consideration given to alternative sites, and the critical time at which you decide alternative sites is at that point, because once you've made the decision to accept the application from the RA, you've gone down one route.

MR SALMON QC:

Yes.

WINKELMANN CJ:

So the critical point is your 186?

MR SALMON QC:

That's right, and that's much better put your Honour, with respect, the reason I was accommodating the prospect that one would look at backfilling afterwards in relation to site selection is if let's say the defect in the Ministerial process was that no one had done seismic surveying to see whether there was

earthquake risks for drilling foundations. That's something that can be backfilled because there's not the same consequence as the Ministerial decision, and the defect in the Ministerial decision. Here –

WILLIAM YOUNG J:
The point is a simple one, isn't it, you are saying that section 24(7)(a)(b) in a case where the Minister is acting on behalf of the requiring agent should be construed as requiring adequacy of the consideration by interpretation alia the Minister given to alternative sites.

GLAZEBROOK J:
And at the time of the Minister's decision.

MR SALMON QC:
Yes, inter alia, yes, that's right.

WILLIAM YOUNG J:
So then that's the point I really put to you slightly differently before the adjournment. Now if that's right, then presumably you win. If that's wrong, you lose, isn't it? Isn't it as simple as that?

MR SALMON QC:
Provided your Honour's proposition is the various ways in which the decision is infected by error, whether that's because TEL –

WILLIAM YOUNG J:
No, no, if it's, if we don't read inter alia the Minister into section 24(7)(b), the Environment Court's got no business conducting a sort of quasi-judicial review of what the Minister did. If there is a requirement to – if the Minister was required to address alternative sites then, of ,course that's right within the purview of the Environment Court.

MR SALMON QC:
Yes.

WILLIAM YOUNG J:
isn't it as simple as that?

MR SALMON QC:
I think it maybe, I'm just trying to process what your Honour said, and I'm not sure I caught every word –

WILLIAM YOUNG J:
What I'm saying you, I mean confess to a preference to construing the language as meaning what it says, and that is that providing consideration has been given it's fine, it doesn't matter by whom. But I understand your argument to be that the adequacy of the consideration requirement has to be construed as requiring adequate consideration by inter alia the Minister of alternative sites.

MR SALMON QC:
Ah. I'm saying one, that, and secondly, if your Honour is right to read it as accepting adequacy of consideration by the requiring authority, adequacy still requires that it comply with those standards –

WILLIAM YOUNG J:
But we haven't, you didn't get leave to appeal on that, did you?

MR SALMON QC:
I think we did Sir, if the Court accepts the view of the world. The Minister, if simply adopting TEL's consideration, must be adopting TEL's reasoning and source, and that's not a startling public law proposition, that's how we view the defects that sit in a decision where a Minister has relied upon wrongful advice, for example.

WILLIAM YOUNG J:
But this assumes that there's a role for the Environment Court in judicially reviewing the Minister's decision, and that only really arises if you read

"Minster" into section 24(7)(b) which of course you normally would because it's normally the Minister's initiating decision, but it's not here.

MR SALMON QC:

Well if I can take that in steps Sir. The Act definitely contemplates judicial review, in this very wide sense of the word, of the consideration given to alternative sites, and that rather suggests that that involves reviewing whether the decision was soundly made to pick this site, and –

ELLEN FRANCE J:

Well the Environment Court is not normally the first point of call for that, is it?

MR SALMON QC:

For a process check?

ELLEN FRANCE J:

No, for a straight judicial review in that sense?

MR SALMON QC:

No, not in other contexts, but it is the port of call for assessing the adequacy of consideration, and the answer I started to give to Justice Glazebrook earlier is, I'll give it now, as to why it's difficult to back out all of the judicial review type concerns is enquiring into adequacy while ignoring probanda such as relevance or irrelevance, bias, improper purpose, error of law, hollows out adequacy into a meaningless shell.

WILLIAM YOUNG J:

But that's not the point on which leave to appeal was granted. It was granted in terms of whether the Minister must be satisfied the proposed taking was fair, sound and reasonable and necessary, and I think it's really, it's focusing entirely on the role and obligations of the Minister.

MR SALMON QC:

Yes, and I –

WILLIAM YOUNG J:

Now if the Minister – sorry, if the Minister doesn't have a role in anticipating the issues addressed in section 24(7) in the way in which you propose, which is at least a good look at the issues, not necessarily a hard look, then the point falls away, doesn't it?

MR SALMON QC:

No, in my submission it doesn't because in my submission the point on which leave was granted captures a Ministerial decision that is tainted because it is an adoption of a tainted process, and I think we're on, resisting your Honour –

WILLIAM YOUNG J:

You and I may have to agree to differ on that.

O'REGAN J:

That isn't what the leave question says.

MR SALMON QC:

Yes, I'm just trying to pull it up.

WILLIAM YOUNG J:

It's the role and obligations of the Minister. It's not a question of looking at the actions of Top.

WINKELMANN CJ:

Well I mean I think it probably does fall within it because if the obligation of the Minister was to check the material and we have to consider what the consequence of the fact the material was flawed, so, I mean, in the facts of the case it has, it's granted that I imagine.

MR SALMON QC:

I have read it as such, just confronting Justice Young's point. The question is whether the Court was correct in its interpretation of the role and obligations of the Minister, and in particular whether the Minister must be satisfied that those

taken et cetera, et cetera. If the Minister has simply relied upon TEL, my reading of that question had been that reliance on a procedurally flawed aspect of the decision-making, in other words one that could be caught by 24(7), would in any view of decision-making and process, poison the Minister's decision, such as that it is the Minister's proper decision-making that's impugned, and it is caught by the question on which leave was given.

WILLIAM YOUNG J:
You shouldn't assume that I agree.

O'REGAN J:
I think when you look at paragraph 4 of the leave judgment as to what was excluded, it's pretty hard to sustain that submission.

MR SALMON QC:
Firstly, I wasn't assuming that Justice Young agreed with me.

WILLIAM YOUNG J:
No, no I just didn't want you to give up at that point saying everyone agrees, because I, for one, don't.

MR SALMON QC:
No, I'll give up when my camera turns off Sir. Justice O'Regan mentioned paragraph 4, which I just have to have a look at.

O'REGAN J:
Well it talks about deficiencies in Top's application and its route selection process. Those were points you wanted to raise and the Court said you didn't have leave to do that, and you've spent the whole morning doing it.

MR SALMON QC:
No, I do say that is legitimate, Sir, because we ran those arguments as standalone disqualifications independent of the ministerials role. So, respectfully, I do submit that whatever the Court finds the Minister's role to be,

unless that role is one that allows for unlawful decisions to be passively rubber-stamped by the Minister then those considerations are relevant to the question on which leave was given for the same reason that that sort of discussion was had in *Seaton* which is to illustrate why it matters.

So to answer Justice O'Regan's point, I'm not seeking to use this as a Trojan horse to litigate points on which leave wasn't sought but to illustrate materiality of the problem and thus in the way that the majority and minority decisions in *Seaton* did to pose the question in a heading: "Does it matter?" as at least one of them did. In here, in this case, does it matter? It does because the nature of the decision, we submit, is one that controlled choice of target and brought my clients wrongly into play.

So I accept, Sir, I have to persuade you and Justice Young and others that the question captures a defect if the Court decides that the Minister is entitled to that passive approach. I have to persuade the Court that defects that tell effectively gifts to or implants in the Minister's decision are caught by the question. But perhaps it's most helpful for me to turn to why I say the statute is properly interpreted that way without getting into granular detail because we've gone past 12.40.

Firstly, this is a legislative scheme which allows for coercive use of state power to take property and thus should be interpreted with the presumption that there are more protections rather than fewer.

Secondly, the 186 decision effectively allows a private profit-seeking entity to pick a target for taking where the Court needs to interpret the legislative as either providing for safeguards or not, and in my submission the starting presumption is that where two interpretations are available the one that has greater safeguards of targets' rights is to be preferred.

In my submission, that's a strong starting point and one that the Crown will struggle to argue with because there is no protection, as illustrated in this case, for a party in the position of my clients who cannot afford to litigate.

They will never know, never, that they're wrongly picked unless the Minister has an obligation to at least do something, and they'll never succeed in getting out of it if the Environment Court takes the legal view it did that it doesn't matter that the target was wrongly chosen. There needs to be a power line somewhere and the Court would have been happy with it here or there. None of that cures the front to procedural propriety of an inherently passive approach by the Minister to a tainted application, and that's not to suggest bad faith in the application, just that it was wrong and that people with the best will in the world decided that one target was scarier than another.

The next point is that it is the Minister who is the counter –

GLAZEBROOK J:
Could it be that one target might be more expensive than the other? I'm taking all the point about people who can afford and not and the issues generally with access to justice but I'm not sure that – well, I'm not sure the extent to which that's relevant here.

MR SALMON QC:
In my submission it must be relevant because the purpose of the Act is to ensure –

GLAZEBROOK J:
No, well, is it relevant that some could be more expensive because it could hold matters up and might be more expensive in terms of litigation costs in taking another route?

MR SALMON QC:
In my submission, if it was more expensive for reasons decoupled from the societal and socioeconomic status of the target then I think that would be legitimate. If, for example, the litigation in one involved geotechnical or seismic issues that were projected to take a year longer or more experts or costs, I would accept that's legitimate. Where it is simply that these people

are less likely to be able to afford to challenge us, then in my submission that is contrary to the purpose and scheme of the Act. The Act is designed to –

WILLIAM YOUNG J:
There isn't a finding that that was the reason though, is there?

MR SALMON QC:
No. No, there's not because the Judge held that we hadn't established the Minister was influenced by it. But of course we couldn't because the Minister was told wrong –

WILLIAM YOUNG J:
There's no real basis, is there, other than the material you took us to for the suggestion that Top Energy was influenced by the social status and political connections of one of the potential targets?

MR SALMON QC:
No, the Judge recites it but doesn't conclude either way on it so it didn't –

WILLIAM YOUNG J:
I mean it's like – isn't it possible, and perhaps I suppose a more plausible interpretation, that the costs of litigation were a relevant consideration, particularly if the power lines would affect a particular view?

MR SALMON QC:
Well, we only have the evidence we have, Sir, and your Honour's right that because the Environment Court recited it but found reasons to disregard it based on a view that it hadn't been established that the Minister was influenced, we just have what the evidence is, but the evidence doesn't support, respectfully, what your Honour says. The evidence is simply what I've taken your Honour to that the witness was influenced by those facts and so that is what it is.

I don't want to leave the impression that that's the only point. We also have, subject to a finding, the one that it was not the most practicable and economic route.

Returning, if I may, to interpretive guides, the next is that, unsurprisingly, the private party is not given the powers of the state, the requiring authority, nor the conduct and control of the litigation, but rather this remains a ministerial decision which one would presumptively see as requiring normal standards of proper ministerial conduct, particularly, though, because the requiring authority isn't a party and because in the normal course these matters are resolved either with (inaudible 12:47:27) hearings or without happening to pull on the loose thread that led to this discovery. In many cases the Minister will not have the documents that show that the Minister was misled unless the Minister is required to exercise a greater level of care at the decision-making point. In other words, there is a risk of a sustained injustice if a requiring authority can withhold material information to find the easy way through from a Minister. That, of course, is not to suggest that that happened deliberately here but it is to suggest that there is a public policy problem if the Minister is entitled to effectively rubber-stamp material presented by requiring authorities and they are not compelled, because there are no consequences of not doing so, to provide full and accurate information, and that is the consequence that has, under the status quo in this case, has emerged. TEL has told the Minister something incorrect and an Environment Court has said: "Well, we're not really going to look at that at that point in time. We're going to look in the round at whether with all the new information this is okay," not what would have happened in the counterfactual had FGT had been chosen, but plainly they would have gone ahead, but in this way which defuses any problem that began the process, and that is a problem. It's a public policy problem that risks gaming and poor incentives for requiring authorities.

So in our submission there are multiple pointers and multiple public policy drivers as to why a proper standard of inquiry and decision-making should be exercised by the Minister and that to the extent the Minister is entitled to rely on what is said by the requiring authority for material defects in what is put

forward by the requiring authority to be the cause of the decision failing for lack of adequate consideration, and in that context it is said that adequate consideration must mean something that captures inter alia the normal judicial review concerns and once one endeavours to characterise it as meaning something that excludes them all it becomes very quickly clear that it can't have an alternative meaning. Too much is taken out of play.

The next point on interpretation is the Court of Appeal's view that what the Minister must be satisfied of is not that there has been adequate consideration, but that the application is such that it's capable of establishing at the Environment Court stage that there's been adequate consideration. Now firstly that would mean that the Minister is excused from a normal standard of public decision-making by meeting a lower standard of (inaudible 12:50:34) capability, but more particularly the word "capable" requires at least a little consideration of what it really means. Is it something like to strike out standard, that the application looks tenable on its face? Or something more that requires a bit of probing, and it's not a standard that has an established and coherent and readily applied meaning in the way that public law standards in decision-making do, and thus as well as other problems with it, risks leaving a Minister unclear what testing of ideas or submissions should be made at all. It also, on its face, effectively allows for, and has no consequence for, wrong facts in applications. It enables this to happen again because all of the reasons that my clients can point to as to why it shouldn't, are captured by the views that the Minister's only decision need to be whether it's capable and nothing more, and that would be, I think, an answer on the judicial review front as well if that's the statutory nature of the decision because whatever else might be said about the requirements of a lawful public decision, it would be said that there was no materiality to any defects because it would all be sorted out in the wash.

That is, mindful of timing, that is where, subject to any questions, I will close, as to emphasise, this can never be sorted out in the wash for my clients. They have a decision that never made any sense to them until they saw abhorrent reasons for changing focus, and it could be said that they might not

be the controlling reasons, but as thing stand they haven't properly been explored. They haven't been explored in the Environment Court, because the Environment Court was really concerned with putting to one side what happened then, apart from a suggestion there wasn't *Wednesbury* unreasonableness. The judge in the Environment Court spent little time on it. Justice Courtney held that it wasn't within the framework of the appeal, and the Court of Appeal put it to one side, partly in reliance on the findings of the Environment Court, which I've gone to and which don't, in fact, conclusively dismiss it as a matter of fact. But principally because the Court of Appeal held that all that was required was that passive assessment of capability, and that, in our submission, is at odds with the standards that one would expect to apply to a Minister (inaudible 12:53:11) approaches of coercive State power, but which do apply on a natural and ordinary contextual reading of section 24. The Environment Court is tasked with testing whether this is adequate, and adequacy in this context connotes the norms of procedural and substantive sense.

Unless the Court has further questions, mindful of timing, those are my submissions,

WINKELMANN CJ:

Thank you Mr Salmon. Go ahead Mr Prebble.

MR PREBBLE:

Your Honours, the current 100 kilowatt system from Kaikohe to Kaitaia is taking a direct route. That line is old. It needs to be reconducted by 2030. Due to its path not being able to service increasing population on the eastern seaboard of the Far North, there is therefore a proposed 110 kilovolt line, which will improve the capacity, security and reliability of the electricity distribution in the Far North, and will meet the growth and increasing demand for electricity and remedy the underlying network weaknesses.

The proposed line for this project is 68 kilometres long. It covers 96 properties. There were only three Public Works Act objections to that entire

route and by way of update, if I may, I am informed from TEL that agreement is now in place for all 93 properties. We can provide a memo for the Court on that, if the Court would like. It's just that obviously as time has gone on since the Environment Court decision there has been more easements agreed with the landowners across that route, so it's now down to these three properties.

The properties in question in this case are on a seven kilometre stretch and there's a convenient map at the back of the Crown's submissions, which hopefully your Honours have, which shows the various routes that we've been talking about this morning.

WILLIAM YOUNG J:
I don't know that I have actually.

WINKELMANN CJ:
No, nor do I.

O'REGAN J:
It's the very last page of the Crown submission.

WILLIAM YOUNG J:
Can't have printed the back of it. Don't worry, that's fine.

MR PREBBLE:
It should look something like this.

WILLIAM YOUNG J:
I'll find it in the submissions.

WINKELMANN CJ:
Those of us who printed the submissions out, will just have to get that up on the screen.

WILLIAM YOUNG J:
It's not on my electronic version either.

GLAZEBROOK J:

Yes, I haven't got it.

ELLEN FRANCE J:

I've got it.

O'REGAN J:

Yes, I've got it.

ELLEN FRANCE J:

I've got appendix B to the respondent's submissions.

WILLIAM YOUNG J:

No. Never mind. Don't worry, I think I can visualise it.

WINKELMANN CJ:

Was it a later – because I think I had the same as Justice Young. Is it a later version? Did you file it updated or something?

GLAZEBROOK J:

If we can get it on screen that would be ideal, because I certainly don't have it at the moment.

O'REGAN J:

The last page of the Crown submission, it's not on…?

ELLEN FRANCE J:

It's not on that version. I can email mine.

MR PREBBLE:

We can come back to that perhaps after the break, but it is a useful map just in terms of visualising the parcels of land.

O'REGAN J:

It's quite similar to the one Mr Salmon took us to this morning, though, isn't it?

MR PREBBLE:

I am informed it's at 101.0129. It's just helpful for your Honours to orient because it shows clearly the land parcels affected. It shows the OTS parcels of land in red. It shows the objectors and appellants in this proceeding in yellow, blue and green. It shows the OTS route that goes through the red OTS land, and then it shows the FGT/Sutcliffe route, as it has been referred to, in the light blue, and it has a red dotted line, on my map at least, for the objection route that was ultimately chosen. We may come back to that map, but I thought it would be useful just to orient that for the Court.

Now the properties on this seven kilometre stretch obviously TEL spent years negotiating the route for that over the OTS land, which was ultimately not successful. TEL considered options over private land and was judged by the Environment Court to have considered the alternatives exhaustively, and while it's still fresh in our minds in terms of what we were just talking about in terms of the Environment Court findings, I would like to take your Honours just briefly in this mini introduction of mine, to a series of findings on the alternatives. Firstly, starting at para 125 of the Environment Court decision, where it says that: "We are satisfied that, at the time of the Minister's agreement under s 186, three takes were required…"

And at 126 it starts with: "We are in no doubt that consideration had ben given by TEL to the FGT/Sutcliffe route, and that this is demonstrated not only by the Sutcliffe's agreement to tan alternative route but by a consideration of the impact upon the other route upon the Sutcliffe and FGT properties."

And they say at 127: "We are satisfied that the…" actual route chosen "… was developed in an iterative process, including consultation… It is not for this Court to reach a conclusion as to which is the best route alternative. We are satisfied that alternatives have been considered on a reasonable basis, and that the choice of route is reasonable in the Wednesbury sense. Our finding is that there has been an adequate consideration of sites and routes to achieve the objectives."

I just then turn over the page, the Court confirms again that there's been adequate consideration under 24(7)(b) at para 129, and the Court also finds at paragraph 149, given some of the allegations we've heard, that the Court is: "… unable to see anything in the actions of TEL or the Minister that can be described a bad faith. We conclude the objection route chosen is a reasonable and sensible alignment, making use of the public road to minimise the taking of easements."

The last paragraph I just want to draw your Honour's attention to before the break is 165 where it says: "We have concluded, by a strong margin, that the actions of the requiring authority and the Minister (including those attributed to him as agent for TEL) accordingly are fair, sound and reasonably necessary to achieve the objective."

I just draw those points to your Honours' attention because really these points that we have heard today are, many of them are points of factual dispute that have been found against the appellants in the Environment Court already. Part of the reason the Crown sought a little bit more time today was we thought we might need to go through those points after traversing the law, and certainly I would like to go through the law with your Honours in terms of 186 and what we say the decision should be at 186 in terms of the leave question, but we also would like to respond to the various factual allegations that have been made, because the Crown strongly disagrees with some of those, particularly the two that seem to feature in terms of it being chosen for political reasons, or that there was a material defect that somehow influenced the Minister and the Environment Court decision on materiality about whether or not it was the only practical and economic route.

So I would like to come back to those allegations and look at the decisions in more detail, but at this point I just wanted to outline that the Environment Court decision did find against the appellants on these points, and so what we would like to do now is address the Court on the consideration as to the role and the scope of the Minister under 186, which is the question that the Court has granted leave over.

WINKELMANN CJ:

Thank you. We'll take the luncheon adjournment. Starting at two?

MR PREBBLE:

I think starting at two should be fine, if that's okay.

WINKELMANN CJ:

Thank you Mr Prebble. We'll adjourn.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.03 PM

MR PREBBLE:

I just want to check before I start, your Honour, that the Court has the respondent's outline of oral argument which we filed yesterday.

WINKELMANN CJ:

We do.

O'REGAN J:

Yes, we do.

MR PREBBLE:

So go to the summary and in terms of the legal issues the Court of Appeal found that 186 requires the Minister to be satisfied the proposed taking is capable of receiving a favourable report and the Supreme Court granted leave only on whether the Minister must be satisfied the proposed taking is fair, sound and reasonably necessary.

The Crown understands therefore –

WINKELMANN CJ:

Is that right? I thought the leave was a little bit – a couple of –

WILLIAM YOUNG J:

It's slightly – it says to "the role and obligations of the Minister" – isn't it?

WINKELMANN CJ:

Yes, I think it's got a prequel to it, hasn't it, and also when you read the lead judgment it refers to the relationship between section 186 and 24.

MR PREBBLE:

Yes, your Honour, the role of the Minister. I mean we understand and the Crown understands that the key issue between the parties is what the Minister must do under 186 to agree a requiring authority approved under the RMA access to the Public Works Act to acquire or take land, and we understand that there are two key issues to that. One is does the Minister have to consider the alternative sites through its methods and make a decision on what is the best alternative or does the Minister consider the adequacy of that consideration, and the second is does the Minister apply the criteria that the Environment Court will apply in a de facto manner with regard to fair, sound and reasonably necessary such that the Minister must confirm the taking is fair, sound and reasonably necessary at that point.

The Crown's position with respect to "capable of meeting 24(7)", what that means is based on the information available at that stage of the process the Minister enquires into the adequacy of TEL's consideration of alternative routes to achieve the project's objectives. The Minister's role practically and legally is not to assume responsibility for the project work. The Minister does not review and substantively determine the alternatives, no more than the Environment Court does under 24(7)(b).

The Crown also says that the Minister satisfied himself that the acquisition, and what I mean by "acquisition" is the proposed acquisition at that point, is fair, sound and reasonably necessary at the point of making the 186 decision.

There's no taking at that stage obviously but the Crown accepts that the obligations under 24(7) inform the role of the Minister under 186.

What I propose to do –

WINKELMANN CJ:
Mr Prebble, could you just repeat that last sentence?

MR PREBBLE:
So there's no – the Minister satisfies himself that the acquisition, and what I mean by proposed "acquisition" is, sorry, that it's a proposed acquisition, not an actual acquisition, but the Minister satisfied himself that what is –

WINKELMANN CJ:
Herself.

MR PREBBLE:
– herself, in that case, I think it's now a he, but herself in that case – sorry, your Honour – satisfied that the proposed acquisition is fair, sound and reasonably necessary at the point of making the 186 decision, and while there is no taking at 186 the Court's obligations in 24(7) do inform the role of the Minister under 186.

What I was proposing to do is address your Honours on the –

WINKELMANN CJ:
You're saying that's the – that's not your argument, that's the argument you're meeting?

MR PREBBLE:
Sorry, your Honour, I didn't quite catch that –

WINKELMANN CJ:
I'm just finding it hard to understand what you're saying. You're saying the Minister satisfies herself the proposed acquisition is fair, sound and reasonably necessary at the point of making the section 186 decision?

MR PREBBLE:

Yes, what we're saying "capable" means, so we're really supporting the Court of Appeal decision in its formulation of "capable" but what we say that means though, and if it's capable of meeting – and this is a little bit nuanced – but if it's capable of meeting 24(7) at that point when the Court's looking at it, what we're really saying is therefore the Minister when making her decision is satisfied that there's enough to say that the proposed acquisition, because it's not a taking at that stage, but that the proposed acquisition is fair, sound and reasonably necessary at that point of the decision-making, and that's what we say "capable" means. You could either say it's got to be capable of meeting 24(7) which is the forward, future decision of the Environment Court or you say, well, the equivalent of that is if you say it's capable of meeting that, you're saying really: "I had enough information at this stage of the process," knowing that more steps are going to come, "that what is before me is fair, sound and reasonably necessary."

That's really what we say "capable" means in these circumstances and so we think there are two issues to this. The first is the inquiry into adequacy of consideration and for that we say the Minister is inquiring into TEL's adequate consideration of alternatives. The Minister is not taking over the consideration of alternatives herself. That's the first key issue, and the second key issue is that the Minister is assessing in light of the later criteria that the Environment Court will apply: "Am I satisfied that what is proposed at this point in time based on the information that I have, am I satisfied that that is fair, sound and reasonably necessary?" And you could use that "capable" formulation or you could say the "capable" formulation essentially puts the Minister in the position of being able to make a robust decision substantively at that time, when you know that there are more steps to come and there's going to be more information, because it is an iterative process.

WINKELMANN CJ:

So you wouldn't necessarily use that language of "capable" you'd say "make a robust decision"?

MR PREBBLE:

Yes, I am saying that you can use that language, or you could say what capable really means, and I, in my submission the Court of Appeal really is suggesting this too, and that it's accepting that the Minister is not simply in a supervisory fashion when it comes to the actual acquisition, and I think what the Court is really saying is by using the formulation of capable, it's a means to measure that at this point, based on the information that you have at this stage of the process, are you satisfied, is the Minister satisfied that this is fair, sound and reasonably necessary, this proposed acquisition, because there is no actual acquisition, there's no actual taking, but the capable test is useful in terms of formulating what the Minister is trying to do here for the 24(7)(d) type consideration, which is about the actual acquisition of property and, as I say, there are two parts to it. The first part is the consideration of alternatives and what we say the Minister is doing at 186 for alternatives, is to consider the adequacy of TEL's consideration of alternatives, as the requiring authority, not to assume control over the project or work and do its own analysis of alternatives. It's looking at the adequacy that TEL has given to considerations of alternatives at that point, and I think it is important to stress that –

WILLIAM YOUNG J:

Just pause there. Why does the Minister have to form a concrete view as to the adequacy of the consideration? Isn't it sufficient that the Minister sees the application as, you know, to put it colloquially, a goer, it's a starter. It's not silly.

MR PREBBLE:

That is –

WILLIAM YOUNG J:

I mean you're going into quite an elaborate debate about what the word "capable" means, but that's not a word that's in the statute. That's…

MR PREBBLE:

No your Honour, I accept that, and I guess in some ways it's an explanation for what the Court of Appeal has done with the use of the word "capable". I think what I will take the Court through is why that, in a way the Minister is very responsibly looking forward to the fact that if the Minister lets this particular proposed acquisition into the Public Works Act , it will be measured ultimately in the case of an objection against the criteria in 24, and in the event that occurs if the Minister was seriously of the view that let's say at the point of 186 it just wasn't going to measure up, then the Minister would say, actually this isn't something that I want to, it's not a goer as your Honour says, I'm not going to let this in because you're putting people to unnecessary expense and the threat of compulsion when you don't consider the proposal is sufficiently robust. So what the Court of Appeal has used by this "capable" formulation is it's really used it as a way to measure the reasonableness and the substantive inquiry that the Minister undertakes at 186 to ensure that at least you have enough information at that point to know you're letting something in that is credible, and you're letting something in –

WINKELMANN CJ:

Mr Prebble, it is the Minister who is making the decision to commence the process, which is – so she is making the decision to acquire, to compulsorily acquire the property, and that leaves someone to object to it. So it's an important decision.

MR PREBBLE:

It is absolutely –

WINKELMANN CJ:

Aren't they really deciding that the land should be compulsorily acquired?

MR PREBBLE:

Well I –

WINKELMANN CJ:

Isn’t that the direction of their decision?

MR PREBBLE:

I think you could look at it in different ways. The first point I would say in response to that is obviously this decision lets it into the Public Works Act in the sense that part 2 of the Public Works Act will then apply to it, and I was going to take your Honour through the Public Works Act provisions because there’s no, it’s not a fait accompli. It’s not guaranteed that there will be a taking at that point. The first step is a mandatory three month negotiation period if the Minister puts in place a section 18 notice then the Minister has to, after that negotiation, and assuming the parties have agreed, make a decision under section 23(2) compulsorily acquire the land, and at that point the Minister has to be sure that the land is reasonably required, and that’s written into section 23, I will come to that. So you have this process by which 186 certainly does let it into the Public Works Act, part 2 acquisition processes, but at the point that decision is made there is no actual acquisition, it’s just a proposal, and the Minister then takes over the acquisition and engages directly, so it’s the Minister at that point taking over from the requiring authority, negotiating directly with the landowners, in a good faith manner as required, and at the end of that process the Minister is going to have to then make the final decision, which is what is objected to, to the Environment Court, as to whether or not to take the land under 23. I think that really just goes back to this point that when I'm talking about “capable” I'm just trying to provide a bit of an explanation, really, as to the Court of Appeal’s test because it does make sense, capable makes sense in that the Minister is looking ahead and saying: “Is this proposal robust? Is it going to meet those tests in the future?” And I think that measure provides the Minister with sufficient certainty that at the point the Minister is making a decision under 186 the Minister can be confident that it’s fair, sound and reasonably necessary to the extent that this isn't actually taking property.

WILLIAM YOUNG J:

So the next step after – the first step the Minister takes is under section 18, is that right?

MR PREBBLE:

Yes it is. I will come through those later steps. If it's helpful, your Honour, I had planned first to outline, because there are two – this provision sits between both the RMA and the Public Works Act, and what I had planned to take your Honours through was that kind of nexus, that it sits between these two regimes, because I think it's worth understanding the nature of the RMA provisions that would have applied before it, and then to look at the provisions of the Public Works Act that come after it, in order to fully understand the scope and nature of the Minister's decision, if that would be helpful.

WILLIAM YOUNG J:

Yes, thanks.

WINKELMANN CJ:

Go ahead Mr Prebble.

MR PREBBLE:

Thank you. In terms of the outline I've got, I'm talking at paragraph 2 about in a way this nexus it sits between the RMA and the Public Works Act and it has a dual nexus, and that reflects the fact that, from the RMA's perspective at least, it sits within part 8 of the RMA dealing with designations and as has been recognised, the decision of *Seaton*, privatisation essentially has reduced access to the Public Works Act for works that are in the public interest, and what 186 is therefore doing is it's essentially enabling work to be consider as a government work and therefore expanding on what government work is in order to let something into the Public Works Act. Now section 186 is a consent power and it will generally arise at the end of the RMA processes. So in terms of those processes I do need t point your Honours to the fact that under the RMA, and this is in the bundle of authorities, the appellants' bundle of authorities at tab 2, is important to see there that the definition first of

"network utility operator" at 166, which really outlines the nature of the infrastructure that is potentially privileged enough to access the Public Works Act and certainly the first six or so of those listed are linear projects of some significance, dealing with gas, telecommunications, radio communications, electricity operators, which is how TEL fits in, it fits in under (c), it's also supply of water, irrigation, drainage, sewage, rail and road, and I do want to point to those because obviously these are entities that are undertaking, in a broad sense, public works that are beneficial and they're beneficial for the public, and what the RMA provisions provide is that those entities can then apply to become a requiring authority under 167 of the RMA. So when they apply to become a requiring authority, which then aids, and we'll get to this in terms of 186, which also aids to the designation provisions, the Minister for the environment under subsection (4) has to consider these very entities and be satisfied that at: "(a) the approval… is appropriate for the purposes of carrying on the project, work, or network utility operation," and (b), that they will: "… carry out all the responsibilities (including financial responsibilities)… and will give proper regard to the interests of those affected and to the interests of the environment."

I think it is worth just outlining that sequence of decision-making where the Minster for the Environment makes that decision so these entities can move from being simply network utility operators to being requiring authorities, because it does outline that the Minister then, the Minister for the Environment has a role in ensuring that they are suitable to carry on the functions that are being given to them under the Act for requiring authorities, and there's provision in there at 167(5) if they fail to meet that standard the Minister can take that approval away.

The reason for outlining this is coming back to the purpose of this provision, 186, and the fact that, yes, there's been privatisation and I've heard my friend talk about this being a private entity and I understand the submission that somehow, therefore, greater scrutiny is going to be put on or brought to bear on this entity. The regime itself is providing suitable checks in terms of this

entity and it's not something which is just available to any private entity. These are privileged entity –

WINKELMANN CJ:
Well, is it really providing suitable checks? It's simply something up, is up front. There's no – yes, where are the suitable checks apart from that?

MR PREBBLE:
Well, this – there are suitable checks –

WINKELMANN CJ:
There's no direct ongoing regulation of them being decent individuals who always, corporate entities which always do everything absolutely right, is there?

MR PREBBLE:
With respect to the processes in terms of the RMA and then the PWA, there are suitable checks throughout, your Honour, in my submission, and what this is really doing is ensuring that these entities are being certified at that point as ones that are going to adequately consider the interests of the environment and the interests of those affected and I mean these are – it's in their interests to obviously do that because, as we'll come to see in talking about what then happens with 186 in the later steps, if there ever was an issue then that would obviously come back to them and all I'm pointing out here is the Minister, if was of a view that these requirements weren't being met, could revoke that and that's quite a powerful mechanism because then at that point it reverts back to the Minister for the Environment the whole project or work and the responsibility for it.

The point in outlining that though is that these entities do have to be of that public nature in terms of 166, they have to be approved under 167 and once they are approved under 167 they're obviously then a requiring authority under the RMA. That enables them to apply for designations and I will come to the designations provisions in a moment, but it also means that in terms of

186, and if we go to the wording of 186 itself, then what that is then doing is it's a pre-requirement, it's a requisite requirement in order to access being able to apply for consent under 186. So 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 as if the project or work were a government work within the meaning of the Act. The simple submission is that what this does is enables them to apply as if they are essentially extending the definition of government work in those cases where you're dealing with network utility operators that are requiring authorities, and that's simply because the Act and particular over the '80s it contracted what the Crown did and what was being done by private entities and 186 is therefore a mechanism to expand again the government works definition for these particular entities, given the significance of what they are doing.

The other reason for just talking about this in terms of the overall purpose of 186 being to enable them to gain access to the Public Works Act is that the Crown does accept that obviously consent, and this is I think your Honour's point, that consent under 186 will enable access to the Public Works Act and that provides a process for the potential of acquisition of land. That's obviously a significant decision. So the Crown accepts that the Minister should be satisfied that the land is reasonably required. Well, that's wording used from the Supreme Court in *Seaton*. But what does that actually mean, and as I've been outlining, because the Public Works Act sets out what the Environment Court considers in the case of an objection, obviously that criteria in 24(7) should guide the Minister when considering whether to let in an entity with a proposal into the Public Works Act, and I think I've made this point but it would make no sense and it would be unfair to a landowner to let in a project the Minister knew at the time was not capable of meeting those criteria, and that's why I come back to logically therefore the Minister should be satisfied at the time based on the information available that it's fair, sound and reasonably necessary.

WINKELMANN CJ:

So do you say that section 24(7) is the full extent? I mean does that circumscribe the Minister's – does that draw a full line around the Minister's responsibilities under section 186 or are they more extensive than that?

MR PREBBLE:

I would say that obviously the Minister is considering both is this entity complying, and that's the check on is it a network utility operator that's a requiring authority and is it undertaking a project within its powers. I would also say that it obviously looks at 24(7). But as the Court of Appeal explained and I would also accept that doesn't mean the Court is limited from possibly considering other matters that might be of relevance at a high level to the government's particular policies of the day but they would obviously need to be able to fit squarely within the purposes of the legislation, and that might be, for example, Treaty considerations that might come to bear on that particular decision at 186.

WILLIAM YOUNG J:

Mr Prebble, I may be mishearing you but did you say the Minister has to be satisfied that it's fair, sound and reasonably necessary for achieving the objectives, et cetera, for the land of the objector to be taken?

MR PREBBLE:

You didn't mishear me, your Honour. I understand that you might be slightly confused as to are we therefore almost at the same point to some extent but what I'm saying is there's actually some closeness potentially between –

WILLIAM YOUNG J:

Well, then you are – so you're saying the Minister has a direct responsibility to address and apply for himself or herself the section 24(7) criteria?

MR PREBBLE:

No, not – sorry, your Honour, that's obviously my poor explanation. Not to apply 24(7) directly but 24(7) does guide the Minister's decision and so the Minister should be satis – this is what I say –

WILLIAM YOUNG J:

Isn't it just – is this too complex? Isn't it just a matter of saying the Minister shouldn't grant, it shouldn't exercise section 186 powers unless of the view that the proposed taking is a goer?

MR PREBBLE:

Certainly the Crown would accept that is –

WILLIAM YOUNG J:

I mean is it any more complex than that?

MR PREBBLE:

Well, we are here supporting the Court of Appeal decision and the Court of Appeal decision was to find that capable means –

WILLIAM YOUNG J:

But you don't have to support the Court of Appeal decision.

MR PREBBLE:

No, you're right.

WILLIAM YOUNG J:

I mean we're getting the language of the Court of Appeal accreting onto the language of the statute and if we go along your line we'll be putting some more accretions onto the Court of Appeal approach. Can't we just go back to the statute?

MR PREBBLE:

Absolutely, and it is – I mean that's fair. It's a bare consenting. It is broad. It doesn't have any criteria in there. I can see how you would get to that point. I don't think –

GLAZEBROOK J:

Can we please go back to 186? Thank you.

WINKELMANN CJ:

Of course, the point is that the words "a goer" also are accreting onto the statute.

MR PREBBLE:

There is some – what we're saying is there's some substantive evaluation that occurs at 186, I guess, and what I was submitting to your Honours was that if the Minister was of a view that it's not a goer, ie, it just patently wouldn't stack up, ie, you're kind of letting in something that really just didn't measure up in terms of how obviously the Environment Court looks at it, that would tell you something as to whether the Minister could reasonably make that decision at that point in time.

WILLIAM YOUNG J:

Well, absolutely. But you do keep on saying "the test is" and using language that suggests that it's the Minister to form a view whether you – you normally refer to subsection (7)(d) – whether the taking would be fair, sound and reasonably necessary.

MR PREBBLE:

And I think the point that I obviously haven't stressed enough is it isn't about the taking and that it's therefore at a point of the process where there is no taking. It's a proposal only, and that goes to how sure and how robust that process needs to be at that point in time but –

WILLIAM YOUNG J:

I think there are two alternatives. One is that the Minister has to form a view on adequate evidence at the time that the subsection (7) criteria are met. That's the view that's advanced by Mr Salmon. The other view is that no, it's a rational approach to whether or not the section 86 power should be exercised. Plainly it shouldn't be exercised if it's obvious that the taking won't be able to take place. Now there may be a lot of room for debate about exactly the content of that obligation but that's not really the issue that arises in this case because it's not suggested that the Minister, there was any – the only failure attributed to the Minister is premised on the view that the Minister has to form a view himself or herself of the application of these criteria.

MR PREBBLE:

Yes, I will come – I understand your two formulations and, if anything, perhaps we are more on the side that you're talking about in terms of it won't be able to, it just plainly won't be able to meet those criteria so you wouldn't let it in.

WINKELMANN CJ:

I find some difficulty with that because isn't the Minister – it's not – section 186 doesn't allow the requiring authority to make that decision. It's saying the Minister is doing it. So why is the Minister not sitting there in a protective manner in the sense that he or she is exercising public power in a way that's conventionally understood? So their exercise of public power in a conventional sense is a protective mechanism.

MR PREBBLE:

So the Crown's submission is that to the extent we're concerned with the implications for landowners that its interpretation does meet that and that's because we're really saying using the capable language or even if you just depart from capable what does that actually mean for the point at which the Minister makes a decision? We are saying the Minister is essentially having a look at what is before her at that stage based on the information available, knowing the Minister has yet to take over any proposed –

WINKELMANN CJ:

Yes, I understand. I mean as you formulated it, Mr Prebble, I was understanding your submission but then you seemed to accept Justice Young's articulation that it only just has to be rational for the Minister to proceed at that point.

MR PREBBLE:

Well, I accept it does have to be rational as well. I'm using "capable" as a yardstick essentially to say therefore –

WINKELMANN CJ:

So you're not using reasonableness, you're using capable?

MR PREBBLE:

Well, it would – it would – yes, I accept that too, your Honour, in that we are building in essentially a – looking at the scheme of the legislation you're saying it's not just there's nothing there. We're saying that no, the decision does need to take account of the fact that it's going to be held against these criteria and that tells you something of the scope and nature of the Minister's decision at 186. I do accept that, your Honour. I also consider that if the decision is made on that basis then it would be defensible from a reasonableness rationality perspective because the Minister would be saying: "I'm looking at this proposal before me and in terms of what I have right now, knowing that it's yet to be an acquisition, I consider there's sufficient information to demonstrate that it's fair, sound and reasonably necessary."

WINKELMANN CJ:

Yes, but can I just hear from you squarely? Are you accepting Justice Young's proposition that it's really reasonableness and nothing more or are you accepting there is something more than that base requirement?

MR PREBBLE:

I am accepting there's something more. I am accepting that whether you use the "capable" language or you just simply say it's fair, sound and reasonably

necessary at that point of the process that there is something more and I would say those are basically interchangeable and that the Court of Appeal clearly thought a good way of determining what the kind of legal constraint of that discretion should be looking at the scheme is to say: "Is what is before the Minister capable of meeting the 24(7) criteria?" and –

WILLIAM YOUNG J:

You keep on slipping between it though. You say "capable" then but about two minutes ago you said: "Is the Minister satisfied that on material then available that it's fair, sound and reasonably necessary?"

MR PREBBLE:

You are right, your Honour, because I am saying that they are meaning the same thing. So I'll try and be as crystal clear –

WINKELMANN CJ:

That's your position. That is your position. I understand your position.

MR PREBBLE:

Yes, I'll –

WILLIAM YOUNG J:

I confess to not understanding it at all.

MR PREBBLE:

I'll try –

WINKELMANN CJ:

I think it was – Mr Prebble, Justice Young is not accepting that those are the same things. "Fair, sound and reasonably necessary" doesn't sound like "capable".

WILLIAM YOUNG J:

"Of being held to be fair, sound and necessary". I mean they're…

MR PREBBLE:

I understand that. If I can try one more time, your Honour. The Court of Appeal's formulation is "capable" in the sense that it's looking forward to the decision of the Environment Court, and so it's saying it's capable of meeting that at this point at 186, and there is a temporal aspect to this, so when –

WILLIAM YOUNG J:

But there's nothing, as I understand the Court of Appeal judgment, to say that the Minister must be satisfied that at the time on the material available it does meet that test, or am I wrong? Have I misread the Court of Appeal judgment?

MR PREBBLE:

It doesn't say that that is our interpolation of what "capable" means, and so what we're saying is what does "capable" mean in terms of what needs to be before the Minister when making her decision under 186, and if you are –

WINKELMANN CJ:

Can I –

WILLIAM YOUNG J:

Can't it be capable – sorry, Chief Justice.

WINKELMANN CJ:

Can I just say I might ask a question that might clarify. I think on Justice Young's hypothesis it might be capable but also there might be indications that it won't cross the threshold. So for instance there might be questions unresolved in the factual material that might raise the possibility of another route. But you think that the Minister looks at it and thinks: "Oh, well, it's capable of making it and there's going to be further investigations. They can chase down those other threads. So I'm going to grant the application at this point." Would you accept that as reaching the threshold?

MR PREBBLE:

If the Minister has doubt, as in it might or it might not, we're saying that's not what the "capable" test is providing. We're saying that when you look at it you're saying it's capable and that there's nothing here to indicate that it wouldn't meet those tests at this point in time.

WILLIAM YOUNG J:

I think you've lost me at that point, I'm afraid.

WINKELMANN CJ:

With his argument as opposed to you don't understand it, Justice Young?

WILLIAM YOUNG J:

No, I just don't, for the moment, I can't see why the Minister couldn't say the ultimate decision whether section 24(7)(b) and (d) are met is for the Environment Court. It seems to me that the Environment Court, it is possible, likely, whatever, probably level that's required, that the Environment Court will conclude that those criteria are satisfied. That's an issue for the Environment Court. There's nothing in the statute that says: "I've got to form a judgment on that myself."

GLAZEBROOK J:

But there's a difference between "possible" and "likely" so…

WILLIAM YOUNG J:

Well, that's why I because I don't – I suppose my view is, assumption, is that there really are two alternatives. One is perhaps uncertain. What level of scrutiny does the Minister have to give it, which is, as I say, open to debate. The other view which is the view that was taken by Mr Salmon, and somewhat to my surprise at least partly adopted by Mr Prebble, is that the Minister has to form his own view or her own view on whether something is fair, sound and reasonable rather than looking at it in terms of whether a Tribunal constituted for these purposes will itself form that judgment.

MR PREBBLE:

There's no question that the Environment Court will have to make those decisions. We are using what the Environment Court will have to do in terms of informing I guess the scope of the discretion and assisting with ultimately what is the legal test that the Minister should have in mind when –

WILLIAM YOUNG J:

To give you another illustration, a prosecutor laying a charge doesn't have to be satisfied that the defendant is guilty. It's sufficient for a prosecutor to be of the view that a court will, and this is, there are probability issues here, is likely to conclude on the evidence then available that the defendant is guilty. It's the pre-judging in your proposal that troubles me a bit.

MR PREBBLE:

Well, I guess the reason we are considering this is –

WILLIAM YOUNG J:

I'll leave it at that. I think we've got to a point of departure, I'm afraid, and I'm in a slightly different intellectual frame here than you.

WINKELMANN CJ:

It might be that the confusion is caused by the notion that the Minister is somehow casting forward to the section 24(7) hearing but the point of the Minister's decision at section 186 is not to make sure what the outcome of the section 24 hearing is going to be, is it?

MR PREBBLE:

That's correct.

WINKELMANN CJ:

It's to make the decision to commence a whole process which puts a whole lot of people to a lot of expense and distress if they're opposing, and it's commencing a process which ends with someone's property being taken compulsorily from them.

MR PREBBLE:

Possibly.

WINKELMANN CJ:

Yes. So Mr Prebble –

MR PREBBLE:

Possibly, your Honour.

WINKELMANN CJ:

You were going to take possibly, yes. So that's what I was going to ask you. Perhaps it would be helpful for us all if we went through the – because I'm interested in your point about section 23.

GLAZEBROOK J ADDRESSES THE COURT – AUDIO ISSUES (14:38:44)

MR PREBBLE:

Your Honour, I was planning on firstly addressing, and we've got quite far down talking about what "capable" and – "capable" means in terms of fair, sound and reasonably necessary. I did want to address particularly the consideration of alternatives because I think that that may be a slightly more straightforward place to start and then we come back to "fair, sound and reasonably necessary" just because there's at least still – it wasn't entirely clear from the submissions today as to whether or not the other side accepts that alternatives can be considered and that it's the adequacy that the Minister also considers or whether or not the Minister is considering alternatives in making an actual decision on alternatives. But I did want to address your Honours on that and then perhaps we come back to this "capable" question.

WINKELMANN CJ:

Yes, go ahead.

MR PREBBLE:

So in terms of the assessment of alternatives, that's at para 3 of that outline, and the Crown's position is that the Minister considers the adequacy of the requiring authority's consideration of alternatives at the point of 186 and there's a number of reasons that are outlined in that oral summary as to why that is the case.

The first one obviously is that where 186 applies we're dealing with an application for a particular parcel, specific parcel of land to obtain access into the Public Works Act and it is not therefore an assessment of alternatives for a broader project. So the broader project may well be as we saw at 166 a linear project of some kind for the public work that will be undertaken by the requiring authority but when it comes to making a decision under 186 this is very much a binary decision as to whether or not the Minister agrees or not, ie, provides consent or not, to enable that particular parcel of land into the Public Works Act and so the Minister is not taking over the assessment of alternatives which could span a whole number of other properties and in this case we would say they – I can actually say they span 96 properties and we've got 90, there's only three, three that are the subject of 186 applications, but the point being that those assessments of alternatives are at a broader scale and relate to the overall project. What the Minister deals with under 186 is simply does this particular property, can this property be able to enter into the Public Works Act powers, and so that's a "yes" or "no" decision which logically means that the Minister is not taking over the kind of decision-making on the actual broader consideration of alternatives.

That fits with the second point I make that practically speaking the Minister of Land Information does not have the institutional knowledge, expertise, or the financial information known to the requiring authority. It doesn't carry the financial responsibility for the project or work. The requiring authority does and it will have been most likely through earlier, including RMA, processes to get to the point of then applying to have this particular parcel of land enter into the Public Works Act and furthermore –

WINKELMANN CJ:

So what can they – Mr Prebble, so what do they need to be satisfied as to in relation to the adequacy of the consideration by the requiring authority?

MR PREBBLE:

Well, that is addressed in the decision of *Brunel v Waitakere City Council* [2006] NZEnvC 210 which is in the bundle and that draws on – there's quite a number of Environment Court cases as to what "adequacy" means. *Brunel* is – if I just take you to that, your Honour. It's at tab 3 of the appellant's bundle and it talks about this at 29, and it says the "scope of consideration" is, and a quote here which –

ELLEN FRANCE J:

Just pause a minute, sorry.

MR PREBBLE:

So the quote that's there has been accepted in a number of other decisions. There's a number of decisions in the Crown's bundle as well. But that essentially it's a check that the taking authority or the requiring authority "has not acted arbitrarily nor given only cursory consideration to alternatives", and that's a test that –

WILLIAM YOUNG J:

But this doesn't deal with the issue in this case where we've got the Minister acting on behalf of a utility. It addresses what's required. It doesn't address who has to do it.

MR PREBBLE:

No, and the Crown's submission on that though is that at the point of 186 in terms of, you know, this idea of being capable of meeting 24(7) criteria, at the very most the Minister is looking at the adequacy of the requiring authority's consideration. It is not the –

WILLIAM YOUNG J:

But that's what the Environment Court looks at, isn't it?

MR PREBBLE:

That's also what the Environment Court looks at, correct, under 24A and B, and the reason I'm saying that is that the role of the Minister for Land Information is not to assume responsibility for the project or work. The project or work will have been through, and often, this is not always the case, but often designation hearings where the requiring authority makes a decision on linear projects to put in place a designation corridor and that's then the subject of potentially an objection to the territorial authority. The territorial authority considers the adequacy of the requiring authority's consideration of alternatives. That can be appealed to the Environment Court which then considers under 174 of the RMA the adequacy of the consideration of alternatives. In all of those cases when you're putting in place a designation for the corridor for that particular work, it's the consideration by the requiring authority that is tested and the actual territorial authority and the Environment Court on appeal do not take substantive ownership or consideration of alternatives. They do not consider which is the best one. They just consider whether or not there's been adequate consideration, and the reason for outlining that is, coming back to 186, you'll often have that requiring authority then saying: "Right, I've got my designation, my corridor. There's one piece of land from within that corridor I have not been able to secure agreement with the landowner of. I want to apply therefore to acquire that land. I qualify. I'm a requiring authority. I can apply to the Minister to have it then compulsorily acquired," and the Minister comes into the decision-making at 186 and says: "Has the requiring authority adequately considered alternatives?" because the Minister is not at that point going to say: "I'm going to substantively make a decision on alternatives" –

WILLIAM YOUNG J:

But that's all – I suppose I'm going to have to stop actually because you do keep on putting it as though the Minister has to address exactly the same issues as the Environment Court later will have to address.

MR PREBBLE:

I am saying that. I am saying that 24(7) criteria inform the discretion of the –

WILLIAM YOUNG J:

Well, of course they inform the discretion of the – the decision of the Minister. But what is not clear is, well, was far from clear to me, is that the Minister has to carry out the same enquiry that the statute casts on the Environment Court.

MR PREBBLE:

Yes, I'm not saying it's identical. I'm just saying that those later tests that the Environment Court consider, and they have to consider under 24(7), inform the nature of the discretion of the Minister when coming to look at "is this something that I should let into the Public Works Act", and so the Minister should be looking at it and being able to think has there been an adequate consideration of alternatives at this point, knowing that there's going to be further steps and knowing that there's going to be more information to come before a decision of the Minister to actually take it. So the Minister is saying that that later test and the specific test that the Environment Court apply assist with informing the scope of the legal discretion that the Minister has under 186.

GLAZEBROOK J:

Are you –

WINKELMANN CJ:

Mr Prebble, isn't there another way of looking at this which is that section 24 really is just capturing the kind of considerations that the general law has established that public authorities have to – the general approach they have to take when they're compulsorily acquiring it? So the Minister would have these duties whether or not he'd had section 24(7). If they're going to set in train a compulsory acquisition process they would have to be satisfied of – turn their minds to good process, consideration of alternatives, et cetera.

MR PREBBLE:

Absolutely agree except I think the main point I want to make is it's not for the Minister to take over responsibility for the work, so it's not –

WINKELMANN CJ:

I understand that point. I'm just dealing with the – Justice Young is challenging you in relation to why section 24(7) is, you're bringing it into it, and I suppose – and using section 24(7) to shape the Minister's responsibilities does tend to maybe confuse what really you're asking the Minister to do. You're not asking the Minister to anticipate challenge and make sure he or she can beat it. You're actually asking in section 186, you're asking the Minister to undertake a responsibility to ensure that public power is exercised in accordance with in a fair and proper fashion.

MR PREBBLE:

That's another way of –

GLAZEBROOK J:

Well, it must be partly substantive too though, isn't it, because surely you have to – the Minister would have to, just in a public law sense, have to decide that initiating this process is necessary.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

So it's further than that because if it's just: "Well, we'd quite like to do this but there's absolutely no need for us to do so, we just think that would be a good idea" –

WINKELMANN CJ:

I may have misspoken but I mean it's substantive as well and it's longstanding principles that apply in relation to compulsory acquisition.

GLAZEBROOK J:

Can I just check in terms of – just so that I can get the submission, and I'm just picking up on *Brunel* and your other submission. So are you saying that the Minister would just have to decide that the requiring authority had not acted arbitrarily or just given a cursory consideration to alternatives?

MR PREBBLE:

Correct.

GLAZEBROOK J:

Right. Which is a relatively low threshold, I would suggest. In accordance with what *Brunel* says is the threshold.

MR PREBBLE:

I think when you come to look at some of those decisions it's actually resulted in some fairly intensive scrutiny as to whether the consideration has been adequate, and I think the Courts are really just wanting to make sure that it's not getting into the actual decision-making of the route itself, where the Court is being very careful, and it has in a number of decisions, to say the best alternative is not for us. We are simply wanting to ensure that the requiring authority has adequately considered it, and the test that many cases have settled on is acted arbitrarily and not given only cursory consideration to alternatives, which logically would therefore apply to 186 to the extent we're using these considerations to inform the scope of the discretion of the Minister.

GLAZEBROOK J:

And is that at a relatively early stage?

MR PREBBLE:

Absolutely.

GLAZEBROOK J:

And can take into account this is merely the start of the process, not the finish of it.

MR PREBBLE:

That's absolutely right, and it's something which I probably am at risk of over-stating because it is important –

WINKELMANN CJ:

You haven't taken us to provisions yet Mr Prebble.

MR PREBBLE:

Okay, but it is at that point of not actually making a decision to acquire or take property, and I think therefore your adequate before the Crown has actually engaged with the owners and heard from the owners before, or under the process in the Public Works Act, which I will come to, but I did want to talk about alternatives and I wanted to talk about the fact that that key point is designations and the designation process under the RMA for requiring authorities, enable them to put in place these designated corridors, and in considering designations it's the requiring authority that considers where the route goes, the Environment Court and the territorial authority under 171 and 174 of the RMA do not get involved in the actual decision-making for the route selection, and the point of outlining why that's important is that for many instances the land which is then subject of a 186 will be from within the designation corridor, but obviously we're not dealing with a series of alternatives over one parcel of land, we're just dealing with one parcel of land with a much broader project, and when you look at it with that in mind it makes sense that the Minister for Land Information is not coming to take over the consideration of those alternate routes, sites or methods.

The other point that I did want to make which supports this, well two points – sorry, three points, is that the vesting of the land at the end under 186 goes back in the entity. So that's under 186(2), so it's clear that the Minister of

Land is being involved for the acquisition of the property, not for the responsibility of the project or work. The other point I want –

WINKELMANN CJ:
Carry on.

MR PREBBLE:
Sorry, the other point I did want to make is that the definition of "government work" in the Public Works Act makes it very clear that the responsibility for government works resides outside of the Minister for Land Information. It resides with the responsible Minister. So, for example, in the case of a prison, corrections, in schools, Minister for Education, that's the nature of how the Public Works Act work. The responsible Minister who maintains oversight in terms of that government work is the one that considers where it should go and considers therefore the alternate sites, routes and methods, and the Minister for Land Information is just providing the procedural check that, yes, there has been adequate consideration of those factors, before then lending essentially the ability to have it come under the Public Works Act.

WILLIAM YOUNG J:
Mr Prebble, could you look at the decision tree, 303.1269. Can we bring that up please? There's a similar document for each of the three properties.

MR PREBBLE:
1269 did you say your Honour?

WILLIAM YOUNG J:
1269. You may just want to go back a page just to see how we got there. There are a whole lot of questions, go back a page earlier, there are a whole lot of questions that are not problematic so it really starts to get, for instance is Top Energy a network utility operator, et cetera, et cetera. Then what I'm interested in is where you get to point 11 at 1269: "Has there been an assessment or any alterative sites, routes or methods of achieving Top Energy's objectives?" Then if you go down it then gives the Top Energy

story, including the only practicable and economical alternate route available, then the LINZ comment. It referred to section 24(7) and then if you read that and then go over the page.

MR PREBBLE:
Yes your Honour, I'm familiar with…

WILLIAM YOUNG J:
Then it says at the top of the next page: "While these provisions are not applied at this stage of the acquisition, based on the application and the matters already considered relating to it, there is no prima facie reason why they could not be met." Do you say that that was an appropriate approach to take.

MR PREBBLE:
Yes.

WILLIAM YOUNG J:
Because it's rather close to mine, is the application a goer if it's assessed in terms of section 24(7), not very close to yours. I am satisfied that there has been adequate consideration of alternatives.

GLAZEBROOK J:
Well not acted arbitrarily or only cursory consideration of alternatives.

WILLIAM YOUNG J:
Yes, so it's addressed, I mean to my way of thinking this is probably appropriate. Section 24 – the Minister's –

GLAZEBROOK J:
What I just said or what?

WILLIAM YOUNG J:
Well what's said in here, that –

GLAZEBROOK J:

No, I understand, but would you accept the not acted arbitrarily or cursorily –

WILLIAM YOUNG J:

Yes, yes.

GLAZEBROOK J:

Okay. Sorry for my cross-talk, I just wanted to make sure that I…

WILLIAM YOUNG J:

So if you're saying the Minister's got to square up to these issues herself in this case, she hasn't done that, all she's done is said, well there's no prima facie reason –

MR PREBBLE:

What I was, and I don't want to take your Honour to that –

WILLIAM YOUNG J:

So there's no prima facie why they could not be met.

MR PREBBLE:

Yes, so we say that is, in substance, the same as saying that the proposed acquisition –

WINKELMANN CJ:

Just pause a moment. Sorry about that, my computer just started printing. Carry on.

MR PREBBLE:

So we say that stating there's no prima facie reason why 24(7) criteria could not be met is in substance saying that the proposed acquisition is capable of meeting those later requirements and the prima facie definition is equivalent to, you know, meet in principle. It recognises that there are several further decisions. There's the section 18 one and then there's the 23 one with an end decision in the case of an objection to the Environment Court, and it's

imply a recognition, in our submission, that it's measured against the information, it's a way or a mechanism of ensuring that there's adequate information at that point in time to say that at that stage –

WILLIAM YOUNG J:

The Minister hasn't squared up to that issue at all. There's no – the briefing note doesn't say, are you satisfied on the information available now that there has been adequate consideration given to alternatives. Quite the reverse. It says, it's not directly applicable at the moment but you could take these into account…

MR PREBBLE:

Sir, I would submit, your Honour –

WILLIAM YOUNG J:

Sorry, while the provisions are not applied at this stage –

GLAZEBROOK J:

Can we perhaps get the whole of – even if we have to make it smaller. Thank you.

WILLIAM YOUNG J:

So this briefing paper says, "these provisions are not applied at this stage of the acquisition" you disagree with that?

MR PREBBLE:

The provisions by the Environment Court are not directly applied because obviously they're applied at a later point by the Environment Court, but in having considered whether or not there's sufficient information to prima facie meet them, you are acknowledging at that time that the Minister can be satisfied that what is being proposed is fair, sound and reasonably necessary, is our submission. If she didn't have sufficient information at this point in time to make that assessment ie, that it's prima facie able to meet that, then that would –

WILLIAM YOUNG J:

You've got it back to front. It's not saying it's prima facie able to meet it. It's the other way round. It is – there's no prima facie reason why they could not be met.

MR PREBBLE:

Correct. There's nothing in the application material. I mean there's 300-odd pages and I didn't want to take your Honours to the application as well but there's nothing in the application to indicate that those tests aren't met. If you're able to say that at that –

WILLIAM YOUNG J:

They could not be met.

MR PREBBLE:

Yes.

WILLIAM YOUNG J:

The language is quite important. I don't read that as an assertion that prima facie they are met now.

MR PREBBLE:

I read it as implicit that if you are able to say that prima facie there's no reason why they could not be met later, there's nothing that has come out in the material to indicate that what you have before you is anything other than fair, sound and reasonably necessary, otherwise you would say it's not fair, sound and reasonably necessary at this –

WINKELMANN CJ:

That's an incredibly low threshold. So unless – so they don't need to be satisfied there's prima facie evidence that it is reasonably necessary, just that there's nothing that shows that it's not.

MR PREBBLE:

I think there's a number of factors to say about this that in terms of this we are going off something that hasn't been subject to scrutiny. So this is drafted by an official in LINZ who didn't give evidence because this hasn't been judicially reviewed and the material that this person prepared was based on the application material but it's based on the application, it's based on possibly other material. We don't know because there's no evidence from that official. There's no ministerial affidavit because this decision itself is not subject to judicial review. But what I am saying is that by looking at all of the material before the Minister at that point and the official saying, well, there's nothing – there's – when you look at all of that there's no reason prima facie why they could not be met. It is really an acknowledgement that from the information that they have to hand there's nothing that would indicate those tests are not met at that point in time which goes back to the submission that we make that therefore the Minister is looking at it at that point and saying: "It's a means to use that prima facie, or whether you say capable, it's a means to assess whether or not there's enough information to say this is something that's credible and can be let in because although I'm looking forward to the future tests I'm therefore satisfied at this point that it's fair, sound and reasonably necessary."

WINKELMANN CJ:

You said that there was no Minister giving evidence or official giving evidence but there was an issue before the Environment Court about whether or not these alternative routes had been considered and one assumes that this was the best evidence that you could put forward about that.

MR PREBBLE:

This was –

WINKELMANN CJ:

The decision presumably was yours as to what evidence you put forward to meet that.

MR PREBBLE:

Well, the decision on this is that there's an objection to taking. So the 23 decision is what is then objected to the Environment Court, and so what at least my understanding of how the Crown then presented its case is it's focused on those tests as the Environment Court considers them. It's not focused on a judicial review of the earlier 186 decision. It's an objection to the section 23 decision under the Public Works Act.

WINKELMANN CJ:

Yes, but we're now considering an appeal from that and that has as – I think it's (b), you know, where the alternative routes were – exact words which section 24(7)(b)…

ELLEN FRANCE J:

"Enquire into the adequacy of the consideration given to alternative sites" –

GLAZEBROOK J:

Which given it's an iterative process I think Mr Prebble's submission is the whole of that evidence is relevant and not merely what the Minister had. This is my understanding.

WINKELMANN CJ:

Yes, that might be the position but you are accepting that the Minister had an obligation to be satisfied of these things and I think you're accepting that so therefore the Court could look into that under section 24(7).

MR PREBBLE:

What the Court's doing under 24(7) is to enquire into the adequacy of TEL's consideration of alternatives. So 24(7)(a), where you look at (a), it's essentially TEL's objectives, and I did want to come to this too, your Honour, but briefly on that the –

WINKELMANN CJ:

So your concession in relation to the Minister, what the Minister had to do, are you saying if this was a judicial review this is what we would be looking at but we're not in a judicial review or what are you saying? How do you –

MR PREBBLE:

I am saying that but I don't want to overstate that because the decisions themselves I say are robust when you look at them in the round as to what was required of the Minister at that point in time, but certainly this is an appeal from an Environment Court decision. The Environment Court when looking at it under 24(7) considers really the objectives of the requiring authority under 24(7)(a), it considers the assessment of alternatives which is by and large going to be the requiring authority's assessment of alternatives for the very reasons I've been going through with 186, and then it will form its own view at 24(7)(d) as to whether the proposed taking at that stage, because it is the taking at that stage, is fair, sound and reasonably necessary. So the Minister is making very much an earlier decision which comes back to why we're saying "capable" is right and what "capable" actually means in practice because there isn't an acquisition at that point. It's just a decision to enable acquisition to the Public Works Act.

WINKELMANN CJ:

Well, when I read section 24(7)(b) I read it about – it's talking about the time at which you're considering whether or not to proceed down this pathway which is the pathway in respect of this property. So it's the point in time at which a section 186 decision is taken that you address yourself to alternative routes because it's that point in time in which you're turning your mind to whether you should commence compulsory acquisition, isn't it?

MR PREBBLE:

So the consideration of alternative –

WINKELMANN CJ:

It's in the past tense. It's not since – it's not the Environment Court satisfying itself about it. It's the past tense.

MR PREBBLE:

No, no, it's satisfying itself as to whether or not and I would say whether or not the requiring authority has undertaken an adequate assessment of matters.

WINKELMANN CJ:

And you don't accept that at (7)(b) the Environment Court looks at what the Minister did?

MR PREBBLE:

No, the Minister's not, and for the purposes – so for the reasons that I was giving in terms of 186, the Minister does not assume, it's the Minister for Land Information, the Minister does not assume responsibility for the project or work, and the entity –

WILLIAM YOUNG J ADDRESSES THE COURT – AUDIO ISSUES (15:07:11)

WINKELMANN CJ:

So you were just saying that it's the requiring authority that the Environment Court looks into under section 24(7)(b) and then do you say –

MR PREBBLE:

Yes, not the Minister.

WINKELMANN CJ:

– it doesn't have regard, doesn't matter what the Minister did, the Environment Court is not concerned what the Minister did. Do you say –

MR PREBBLE:

Well, the Minister –

WINKELMANN CJ:

– under section 24(7)(b) the –

MR PREBBLE:

So what happens, your Honour, is if the Minister looks at the consideration of alternatives at 186 and considers that there's been adequate consideration by the requiring authority and on the basis of the information available considers it's capable of meeting or prima facie of meeting 24(7) criteria which we say means that there's enough information at that point to go forward with a proposal, then the next step is for the Minister to consider it under section 18 of the Public Works Act and at that point the Minister undertakes good faith negotiation and the Minister has to negotiate for three months with the effective landowners and at that point it's fair that there could be an issue raised by the landowner with the particular taking of their property. They might raise an issue that does cast some doubt on whether or not the consideration of alternatives has been adequate. If the Minister following that negotiation hasn't had any further information from the landowner, and it could be also that the requiring authority comes forward and says: "Actually, I've undertaken more work and actually in the process of acquiring a number of other properties we've got to change our current" –

WINKELMANN CJ:

Carry on.

MR PREBBLE:

But if the requiring authority hasn't come forward with anything between 18 and 23 and let's just say the negotiation hasn't been successful, then it's the Minister's job to at that point make a decision as to whether to proceed with the taking of the land, and section 23 of the Public Works Act specifies that the Minister must specify that the taking is reasonably necessary, and again, you know, you could claim, and I'm sure perhaps his Honour, Justice Young, might say: "Well, there's no reference there to fair, sound and reasonably necessary, it's just reasonably necessary that the Minister must be sure of." But what the Minister is doing at that point is it's saying: "Right, I've heard

from the land owners, I've tried to negotiate, we haven't been able to secure agreement, I've got to make a decision. Am I sure this land is reasonably required at this point? Because the next step, if I make this decision and I give reasons to say why it's reasonably necessary, the next step is the Environment Court or consider it." And at that point, when the Environment Court considers it –

WINKELMANN CJ:
Can I just ask, can you take us to that piece of legislation? It's section 23 of the Public Works Act, is it, you say that it imposes on the Minister the obligation to be sure?

WILLIAM YOUNG J:
It's section 23(b)(iii), which doesn't actually quite say that.

MR PREBBLE:
Yes, I know, you're quite right, it says that the Minister has to give reasons why the taking of the land is considered reasonably necessary, and I guess…

WILLIAM YOUNG J:
Yes. Just going back a little bit, when section 18 is engaged does there have to be in an ordinary case where the Government rather than a local authority or requiring authority is in behind it, does the Minister have to have regard at the section 18(1) point to section 24?

MR PREBBLE:
I would say that the Minister's already made a decision that let's that particular piece of land in, either through section 16 in the case of –

WILLIAM YOUNG J:
No, I'm not interested in section 186, I'm just interested in a case where the, you know, I suppose, they want to take some road for a highway. At the section 18 point does the Minister have to have regard to section 24?

MR PREBBLE:

I think it's not obvious that that would be a mandatory consideration for the Minister at that stage, given the Minister is only putting a notice in place to enter into negotiations to hear from the landowner and to hopefully secure agreements for the acquisition of that property. I mean, it's a long –

WILLIAM YOUNG J:

So it's a case, it's where section 186 applies, the section 186 decision antecedes the section 18 point in the process, doesn't it?

MR PREBBLE:

Yes. And it's interesting to compare this with *Seaton*, because *Seaton* was looking at section 16 and 16, there's no, it's not actually obvious that there's a comparable provision to 186 for core government work. All you've got is section 16, although the decision in *Seaton* talks at various points about the need for the Minister to be satisfied the land is reasonably required for a government work, and that was in the decision of her Honour Justice Glazebrook and I think it was Chamber, Justice Chamber, and they said it's got to be reasonably required for a government work. So in *Seaton* the core issue, as your Honours no doubt will be aware, was whether or not they could use 186 or whether or not they could use 16, and the kind of the case fell over on the fact that Transit or Waka Kotahi didn't actually need the land because it was just moving the power lines from Orion onto another adjoining block and so the acquisition of the adjoining block was really so the objectives of Orion, not for Waka Kotahi. But in going through that decision the Court makes a number of quite helpful, I would say, observations, and one of them is that in terms of exercising your 16 power you're using that, you're embarking as the Minister of Land Information in circumstances where the land is reasonably required. Now you might say, your Honour, that that's close to what you're thinking because it doesn't talk about fair, sound and reasonably necessary, it's just simply saying, well, is the land reasonably required by, in this point, Waka Kotahi, or whoever it might be in terms of the core government work, and if it's reasonably required then away you go and the Minister undertakes the next steps in the process, the most obvious next

one being section 18, negotiating with the landowners in good faith for at least three months.

But the reason just for outlining that is that that process, you're letting it in at 6, so the Minister for Land Information has a role in letting into the Public Works Act for acquisition purposes where a government work or effectively, like, a deemed government work under 186, needs a particular parcel of land, and so the Minister for Land Information is, we say, responsibly considering: "Will this pass muster, will this measure up if I go forward with this? Is there anything concerning about it at this point, particularly given that I know it will be ultimately measured against 24?" And if the Minister's not concerned about it in that sense, the Minister lets it in and goes forward and the next obvious step is that section 18 decision –

WINKELMANN CJ:
Can I just stop you there, Mr Prebble? You keep on saying that section 186 is very preliminary, it's just setting in motion, but it isn't actually when you read these sections fairly characterised in that way, is it, because that's the last time that the Minister is required to engage with the possibility that there are other properties that might be a better choice or there might be better alternatives than acquiring this piece of land, because there's no requirement for the Minister or process for the Minister to receive submissions on that, is there? What's next is negotiation.

MR PREBBLE:
That's right but what I am saying about the public work, yes, to an extent, your Honour, in that I am saying the Public Works Act process does enable this circulation of issues, so, for example, the next obvious step being 18 if in good faith it was negotiating with the landowner and the landowner raised, for example, a very significant issue that hadn't been on the table already in terms of, I don't know, Treaty-related grounds or something culturally significant about that piece of land, that could require the Minister to reflect on whether there had been adequate consideration of alternatives and so –

WILLIAM YOUNG J:

What about at the section 23 stage?

MR PREBBLE:

That as well and that –

WILLIAM YOUNG J:

The Minister has to provide the reasons why the taking of land is considered reasonably necessary. Wouldn't that be quite a good point in which to think about what's going to happen under section 24(7) if there's an objection?

MR PREBBLE:

Absolutely agree with that, your Honour, and that's –

WILLIAM YOUNG J:

So isn't perhaps a logical point at which section 24 might come into play in the Minister's mind?

MR PREBBLE:

Yes, although – yes, accept that too, I do accept that.

WINKELMANN CJ:

But the problem with that is that there's nothing in the process to suggest any new information is expected to have come to light to make, to, on relation to what, reasonable alternatives. There's no investigation of reasonable alternatives that's going on in that intervening period.

MR PREBBLE:

The submission I'm making is that at least that's possible because there's a good faith negotiation with the Crown and the landowners so if there's any issues they could be circulated. But coming back to –

WINKELMANN CJ:

So you're saying the Minister would then take over responsibility for investigating reasonable alternatives?

MR PREBBLE:

No, if the information – once the Crown negotiates in good faith for three months, if there were concerns that were raised, that could put the Crown on notice that its consideration of whether there'd been adequate consideration of alternatives by the requiring authority might be in doubt and the Crown could then halt the process. So that's what we mean by it's an iterative process in that 18 and 23 enable decisions to be paused or stopped if there's information that comes to light that puts in doubt the process that's been undertaken.

WINKELMANN CJ:

Well, I mean I know you're dancing around on the head of a pin but when you look at this, section 186 is the obvious point in time at which to consider whether there is any, for the Minister to consider whether there are other alternative routes because that's a point in time in which they're receiving the information from the requiring authority as to what investigations they've undertaken. There's nothing in the statutory scheme to suggest that there is going to be any more information on that received by the Minister.

MR PREBBLE:

Yes, I do accept that. What I'm saying is that there could be information that comes that just puts in doubt the earlier consideration by the requiring authority and it could be also, as I mentioned, that the requiring authority itself comes forward and says: "We've been doing further work and therefore we consider that actually what we have come to you is now no longer fit for purpose." But the main point I do want to stress is that when we're looking at 186 and what the Minister does, the Minister isn't taking over the consideration of alternatives. The Minister is checking that the requiring authority has considered alternatives, and that's why I drew your Honours to the Resource Management Act designation provisions which have a profound effect on the ability for people to utilise their land, and that designation corridor is where the requiring authority considers alternatives and even in that situation both the territorial authority and the Environment Court consider the adequacy by which the requiring authority has covered those alternatives, and

it's from within that broad corridor most likely that a particular parcel of land will come to the Minister under 186 and that proposition then as the Minister for Land Information is not about taking over ownership and responsibility of the project or work and saying: "Well, I'm going to consider these alternatives. I know where they should actually go. I'm going to undertake a constraints analysis. I'm going to consider environmental factors, cultural factors, economic factors. I" –

WINKELMANN CJ:

Mr Prebble, can I just ask you to clarify, are you submitting that the reasonable alternative that the Minister is considering is not between OTS and the FGT route and this route, but rather having, that route having been selected it's whether it's reasonable to go around the outside of these peoples' property. Is that what you were submitting, or were you not submitting that?

MR PREBBLE:

What I'm submitting is that at 186 the Minister will consider the adequacy of TEL's consideration of alternatives.

WINKELMANN CJ:

Okay.

MR PREBBLE:

And the Minister, therefore, will not actually assess the alternatives herself. It'll look at whether or not there's been an assessment of alternatives by TEL. As TEL undertakes the assessment of alternatives over the FGT/Sutcliffe option over the OTS option, over the land that was ultimately required, and so it's the requiring authority that undertakes the actual assessment of alternatives. The task of the Minister at 186 we say is to enquire into the adequacy of that assessment. So the Minister –

ELLEN FRANCE J:

Sorry Mr Prebble. If there's something obviously lacking on the face of the briefing to the Minister, how does the Minister resolve that?

MR PREBBLE:

Yes, the information could say I need further information on this aspect, but it is, as our outline provides, the 186 decision itself is binary in that you're either giving consent or you're not, but if the Minister is concerned about an aspect of the application, then the Minister can say I need more information. But the Minister, the point being the Minister, the fundamental point, and the point of difference, as I understand it, although it's not entirely clear to me from earlier, but the point of difference between the Crown and the appellants is that they say the Minister considers alternatives and should actually choose a recommended alternative, and we're saying: "No, the Minister doesn't chose the alternative. The Minister decides whether or not alternatives have been adequately considered by TEL and if it appears that consideration was given to those alternatives, then that's enough to satisfy that aspect of the decision at 186.

GLAZEBROOK J:

I'm not sure whether they are now saying should choose alternatives but, as they were quite a number of things said, I'm not sure that it's very much use unpicking any further.

MR PREBBLE:

No well at least in terms of what the Crown is saying.

GLAZEBROOK J:

Yes, I think concentrate on that.

MR PREBBLE:

Hopefully that is clear. I'm not sure I –

WINKELMANN CJ:

Can I just clarify Mr Prebble. I think I'm not clear on this, which is what do you – I think you're very clear about what you say the Minister's responsibility is, and you're very clear the Minister is not to take on responsibility of the project, but I can't understand, at this point, is what you say is the connection between what the Minister's responsibility is and the Environment Court's assessment under section 24(7).

MR PREBBLE:

So what I say is that the Environment Court under 24(7)(a) will be considering the objectives, and they will be the objectives of the requiring authority, and although it refers to "Minister", it's really just a reference to the Minister taking it on behalf of the requiring authority.

WINKELMANN CJ:

Can I just be a little bit more pinpoint. Do you say that even if the Minister didn't do what you're saying in terms of looking at their own assessment of the adequacy of consideration of alternative routes, it doesn't matter in terms of section 24(7), are you saying that?

MR PREBBLE:

If your Honour is suggesting that – sorry, I think, perhaps if you wouldn't mind –

WINKELMANN CJ:

So you've accepted that it's part of the Minister's task to assess the adequacy of the consideration of the alternative routes by the requesting authority.

MR PREBBLE:

Yes.

WINKELMANN CJ:

Not take it on themselves, but consider the adequacy.

MR PREBBLE:

Yes.

WINKELMANN CJ:

Their processes et cetera. Say the Minister didn't do that. How does that sound in the section 24(7) review by the Environment Court?

MR PREBBLE:

Well I would say that it doesn't matter because the Environment Court then considers the adequacy of the requiring authority's assessment of alternatives, and it's obvious when you look at 24(7)(c) that the Environment Court has a discretion, even if the Environment Court is of the view that there hadn't been adequate consideration of alternatives to decide on whether or not to proceed, so it can refer it back, or it could proceed to decide whether it would be fair, sound and reasonably necessary to allow the taking. And there is a case in the bundle, *Re Application by Hatton* EnvC Auckland A25/98, 24 March 1998, which considered that very point and said – obviously it's a lower level court, I think it might be Environment Court – that said that if the Environment Court was confronted with a situation where there just hadn't been any consideration of alternatives it's still possible that the Court might decide that in its discretion to carry on, because it's just so obvious that this is required, and consider it under 24(7)(d). So there is a discretion there for the Environment Court at (c) in those circumstances where there's been a deficient consideration under 24(7)(b). Is that answering your Honour's question?

WINKELMANN CJ:

Yes. So really your answer is that the process, issues that Mr Salmon has identified in terms of the adequacy of the Minister's consideration, which are both as to the adequacy of what the Minister has done, as Justice Young's identified, this fair argument that on your test the Minister hasn't actually done that, what do you say the Minister should do? And also Mr Salmon's suggestion that there was a non-disclosure or non-disclosure disclosure of

wrong information provided to the Minister, you say that all doesn't matter under section 24(7), that's just judicial review?

MR PREBBLE:

Yes. But I would like to respond to those points because not only does it not matter – and that goes to this question of relief – but I would also like to say that they aren't actually findings of fact that have been made against the Minister or the actions of TEL in this case, in fact it's the opposite.

GLAZEBROOK J:

Can I just check, because what I think you're saying is the Environment Court makes that decision itself. Now process issues may come into that decision in terms of if, I assume, but you say they're just not controlling, do I understand that? Because obviously the Environment Court, looking at everything in front of it, will also be looking at what was in front of the Minister and whether there were any – so, I mean, just to take an absolutely extreme example, if the Environment Court finds out later that the route was chosen because there was bribery, even if there was adequate consideration of alternatives, it may well say: "Well, it's not fair, sound and reasonably necessary to take this land," that it's been tainted by the fact there's been bribery or corruption or bad faith.

MR PREBBLE:

Yes, that's right, I think I agree with that, your Honour, in that the end decision clearly rests with the Environment Court in the case of an objection.

GLAZEBROOK J:

So looking at absolutely everything, including what was done at the Ministry, that's what I've understood you, it's the Environment Court's decision, that's what they're looking at, and they look at whatever is relevant to that decision.

MR PREBBLE:

Yes. And without wanting to – I absolutely agree with that, the Environment Court looks at obviously the objectives of, we say, requiring authority, and looks at the consideration of alternatives as to whether or not

it's been adequate. We say by and large that is going to be the requiring authority's consideration of alternative, and then the Court makes its decision, assuming the Court thinks what it's seen is adequate at that point, it moves on and exercises its discretion under (c), so it either can refer it back if there's a problem or not, and then at (d) it makes an assessment of the entire process, and I did want to note there that it's fair, sound and reasonably necessary, and these concepts are also in the cases. But "fairness", for example, is about procedural issues, and some of the cases talk about it possibly involving issues of equity, "soundness" talks about solid or substantial and reasonableness, and then there's "reasonably necessary", and they're conjunctive in the sense they often overlap. But I think the one thing you can say is that the Environment Court is reviewing the whole process, including the Minister's decision, but it's reviewing the whole process, and all I'm saying in terms of alternatives is that by and large the assessment of alternatives will rest at the feet of the requiring authority, not the Minister, for the reasons I've outlined about the way the RMA works and what is presented to the Minister under 186, and I hope that's clear.

WINKELMANN CJ:

So the nature of the – because the Environment Court in this case did in fact address the nature of the Minister's responsibility and, Mr Salmon would say, got it wrong.

MR PREBBLE:

The Environment Court looked at whether there had been adequate consideration of alternatives but in doing that – and it looked at objectives – but as I've explained those objectives and that consideration of alternatives were those that really you attribute back to TEL rather than the Minister because although it's looking at the whole process, most of the consideration of alternatives was undertaken by TEL and actually before the decision at 186, and the –

WINKELMANN CJ:

I was just trying to recall that passage that Mr Salmon took us to where he said that, I think it was about 110 maybe, where the Environment Court said that that was irrelevant, that that…

MR PREBBLE:

55 perhaps, your Honour?

WINKELMANN CJ:

Yes, 55.

MR PREBBLE:

So we address that in the outline. So we say that that – there wasn't a misleading statement and that practical and economic doesn't actually mean the cheapest and the only route in our submission.

WILLIAM YOUNG J:

Just pause there. It might be helpful if you put it up on screen. It's 303.1023. You can see the statement in context.

GLAZEBROOK J:

Sorry, what are you…

WILLIAM YOUNG J:

303.1023. This is the statement, the reference to the only practical…

WINKELMANN CJ:

What document is that?

WILLIAM YOUNG J:

303.1023.

WINKELMANN CJ:

Yes, but what document is it?

WILLIAM YOUNG J:

It's their application to Minister or whatever the document was.

MR PREBBLE:

So the position that the –

GLAZEBROOK J:

Whereabouts do you want to –

WILLIAM YOUNG J:

It's at the top. It's on the screen. So there's a reference to the alternative operations. Two of the owners, FGT Farms and Sutcliffe (a lifestyle block) rejected the proposal. Richard Taylor was unco-operative. It was clear that the only way TEL would secure this route was to undertake three times 186 RMA applications, and then subsequently TEL determined that an alignment slightly further to the east is the only practical and economic route available in the area.

So that's the passage. It's a narrative explanation, perhaps rather unhappily worded.

MR PREBBLE:

Yes, your Honour. I agree that it's a narrative statement and also at para 11 of our oral outline –

WINKELMANN CJ:

Can I just ask you to clarify what you understand by the word "narrative statement" because I'm not quite sure what I understand.

WILLIAM YOUNG J:

Well, what I was suggesting to him is that it's an explanation as to why the decision was taken to move a little to the west. They themselves thought that the – if it's an assertion that the western route, the objection route, was the

only practical and economic route, which is what it says, then it's plainly wrong, but if it's an explanation as to why they shift from one to another.

MR PREBBLE:

That's how we see that statement and that what we say about that statement, which is at para 11 of our outline, is that it doesn't – it's not actually quite accurate to say: "Oh, therefore it's the cheapest and only route available." It was another way of framing this could have been it was the best economic route practically available from TEL's analysis, and the reason for saying that is when you actually look at the evidence, the evidence shows that TEL did look at all of the constraints with those properties.

WILLIAM YOUNG J:

So just go back a little bit. Can we just go back to the document, because the next thing that happens is there are preliminary discussions with the effective landowners on the objection route. So it comes between the Taylor/Sutcliffe/FTG land and the decision to move to the objection route. Now it's certainly unhappily worded.

MR PREBBLE:

But what I think TEL means there with "practical" is that they're really saying that once they had constraints analysis of these routes they reached the view that the only route that practically could be defended was the one that wasn't over the FGT/Sutcliffe properties, and I do want to take your Honours through – because this also lines up with the allegation about the improper purpose because I think it's important to rebut some of these. I just wonder if it would be helpful to, before coming to that, just come back to the actual decisions themselves and look at what the decisions considered.

GLAZEBROOK J:

I think we might have been going to take an adjournment if we're going to be…

WINKELMANN CJ:

Yes, we'll take the afternoon adjournment at this point. Sorry about that.

COURT ADJOURNS: 3.35 PM

COURT RESUMES: 3.50 PM

WINKELMANN CJ:

Mr Prebble.

MR PREBBLE:

Thank you, your Honour. I'd like to go through some of the paperwork, and that includes the decision of the Minister, before then responding directly to what are the two key, I say, factual allegations that have been raised around particularly the improper purpose, which is obviously a serious allegation, and the other one being around the only practical and economic group, which we were discussing. But if your Honours' are okay with divulging me a little bit of time I will go through the standard and the decision-making first and then come back to those two points.

WINKELMANN CJ:

Okay.

MR PREBBLE:

In terms of the standard for acquisition of land, this starts 304.1633, and it's a LINZ standard which provides guidance for acquisition of land under the Public Works Act, and I'd like to go straight to appendix A of that document, because appendix A, which is at 304.1664, so this is what is required in order to put in an application to the Minister under 186 that LINZ has put together, given that there's no other obvious criteria or guidance in 186 itself, and it provides the details by which an applicant must fill out, so obviously you've got the name, the details of the applicant, the details of the land to be acquired, and then you've also got at 3 the details of the project, and that includes the network utility operator's objectives for the project, which is

obviously things that later will be looked at by the Environment Court under 24(7)(a), you also have to have written confirmation, at 3(g) – I'm just checking, do people have this on their screen?

WINKELMANN CJ:
Yes, but we don't have that page on our screen – ah, we do now.

MR PREBBLE:
So this is 304.1665 now, just over the page, and at 3, "Details of the project" which, as I say, includes their objectives for the project or work, that's at (b), and then at (g), "written confirmation that the applicant's requiring authority status applies to the project", which goes right back to the starting point that I made about being sure therefore that you can treat this as a government work, because you've got a network you tell the operator that's the requiring authority and it's within their scope of what they are gazetted to do by the Minister for the Environment. Then you've got at 4 "Analysis of requirement", and that includes at (b) "details of the assessment of any alternative sites, routes or methods of achieving the applicant's objectives", and obviously that helps with, as we say, being able to be satisfied, at least so far as you can, at the point of 186 that there's been an adequate assessment of alternate sites or its methods, and then at 5 –

WINKELMANN CJ:
What is the appendix setting out?

MR PREBBLE:
So the appendix A sets out at 4 "Analysis of requirement", which includes 4(b) "details of the assessment of any alternate sites, routes or methods for achieving the applicant's objectives".

WINKELMANN CJ:
I know, but I'm just asking what's the headline of this appendix, what is it?

MR PREBBLE:

Oh, sorry, the headline of it is the standard for acquisition of land under the Public Works Act 1981. Is that what you mean, your Honour?

WINKELMANN CJ:

Ah…

WILLIAM YOUNG J:

It's LINZ' advice to requiring authorities as to what they need to do if they want section 86 to be triggered, that's right, isn't it?

MR PREBBLE:

Absolutely, yes.

ELLEN FRANCE J:

So every application has to contain this information, as I understand it.

MR PREBBLE:

Absolutely. And then at 5 it just – I won't spend much longer on this – it just has "Negotiations", and there you've got to identify that you've been unable obviously to negotiate agreement with the applicant and advice on why the applicant, so the requiring authority, considers it necessary for the Minister to exercise powers under 186 of the RMA to acquire this land at this time, and so in my submission these are points that are required for a requiring authority to provide an application to LINZ, a fulsome application to LINZ, assist with then a decision by the Minister insofar as at that point in time it's relying very much on this material from the requiring authority, but it assists with the Minister making a decision that it's fair, sound and reasonably necessary and that the requiring authority has adequately considered alternatives.

I will now go to the actual decisions. We have looked briefly at those but we'll come back to them. I think the one that your Honour, Justice Young, was looking at started at 303.1263.

WINKELMANN CJ:

These are the briefings, aren't they?

MR PREBBLE:

These are the briefings and it contains the Minister for Land Information's decision, Honourable Louise Upston, as she was at that time. So the briefing, I think one of the things to note immediately at 303.1264 is that it includes the appendix from Top Energy under 186. At the bottom of that page it includes correspondence from the lawyers for the landowner and then it includes some maps and other material. The main point is that that appendix is put together to comply with the LINZ standard which is then fully attached to the decision of the Minister at that point in time, and then the decision has some general comments at the beginning, context about the project, the land subject to the acquisition, and over the page at 303.1266 it has: "We have reviewed the application and consider that sufficient information has been provided for you to consider it. This includes," and then they say the information required by the LINZ acquisition standard, details of the project line, details of the subject land affected, summary of negotiations, and so obviously there's an official who has been going through this in some detail including all of the material that comply with the standard.

Then we move across the page to 303.1267 and we've got a decision sheet, and the first two points there again are assisting with that point about the prerequisites as I've described it in terms of being able to comply with 186 and get in the door you've got to be a requiring authority, so, or a network utility operator that is a requiring authority, and does the status apply to the project or work? So you're finding that it does, therefore that Top is essentially in a privileged position to put in an application under 186.

And then it goes on to look at things such as has it identified the interest it requires in the land, which is over the page. Has it assessed the location of the easement, because it's only an easement being sought in this instance. At point 8, does the easement and access sought meet the requirements of the project or work?

Then you will see it comes down to 11. Has there been any assessment of alternative sites, routes, methods, for achieving Top Energy's objectives and this is the point that your Honour, Justice Young, took me to earlier but it's also referring to the actual applications there in terms of the parts of the application to go to with the description as to what alternatives have been considered by the requiring authority, and then it has a description about Top advising that during 2011 it undertook a number of alternate – considered a number of alternatives. It's consulted with and received support from regional groups, including district and regional councils, and then it's got the LINZ comment that if you agree to this then the proposed acquisition and taking provisions of the Public Works Act apply. If there's an objection then obviously it's measured against the points from section 24, and the statement at the end: "While these provisions are not applied at this stage of the acquisition," which is correct, it's not actually a taking, there's no actual acquisition or taking, "on the application and matters already considered," so on everything that has been considered by the official pulling this together, there's no prima facie reason why those could not be met, and I think we've already talked about obviously that and what that means but we say that's essentially a measure to ensure that there's nothing in the material that the Minister has before her at that stage to suggest there's anything that would say it's not fair, sound and reasonably necessary to acquire the land, and that the requiring authority has obviously enquired into the adequacy given to alternative sites, routes and methods.

Then at 12 it's got more information on the actual negotiations that have been undertaken, and there's the comment there, the LINZ comment, that obviously one of the big concerns by the landowners at that stage was in relation to the OTS land, and it is stated there that if you agree to use the Public Works Act, so this is towards the middle to the bottom of 303.1270 there's a comment: "If you agree to use PWA, LINZ will comment new negotiations with the owners. The owners and those landowners subject to applications to you will in all likelihood seek to revisit the natter of the OTS land."

So it's dealing, indicating that it's not the end of the matter. That if Public Works Act provisions apply, it's likely there's going to be further issues raised. At that point the understanding was at least a key concern was why isn't the OTS property being used for the line.

The last thing I do want to take your Honours to is at the back of that decision is a letter from Lee Salmon Long, which is at 303.1276. This letter sets out their concern that they consider at that point, I would say their core complaint, is that there hasn't been a full explanation as to why the work must deviate from its preferred transmission route, which is over the OTS properties at that stage, and they set out their reasons for why they consider that not to be reasonable in the circumstances. That because they don't an adequate reason for why the OTS route is being given up on, that essentially they're being seen, as they say, soft targets, and they represent the path of least resistance, and that instead really they're angling for the Crown land to be used rather than their own. It's at that point of the process obviously things then move on by the time you get to the Environment Court, but that was all before the Minister. The Minister therefore knew, she was aware of the fact that they were concerned about the deficiencies in the decisions, and still made her decision, and it's worth coming back to the final decision of the Minister, which is at 303.1270, and the Minister says there: "On the basis of the above considerations," and I think it's, that obviously includes the consideration about 24(7) and the face that prima facie there's advice that there's no reason why they could not be met. That they agree to the application being made under 186 of the RMA to use the Public Works Act, and that's the decision.

I just briefly want to go to the application and then I want to come to some of the allegations that have been made, particularly the two that have really stood out. So before we come to those I just take, unless there's any questions at this point, otherwise we'll go on to the applications that sat underneath this.

So by way of example the first one in my bundle, 302.0489, so these were the applications, there's roughly around 300 pages here, but they set out in response to the LINZ appendix A they provide the information, and as I have shown your Honours that briefing indicated that they had been trawled through by the officials and thought they complied with this LINZ standard. I just note there at 1.9, which is at 302.0495, at the bottom of that page there's "Investigation of alternative routes." Then there's advice there that: "During 2011 TEL undertook a comprehensive constraints identification analysis to identify environmentally and economically viable line route options between the Kaikohe substation and the proposed substations at Wiroa, Kaeo and Taipa" through Kaitaia.

Then there's information about how that work was undertaken and the experts get involved in that. Then we have more information on the alternatives if we come across to 302.0505, so that was very much the constraints.

If I just explain that statement. There was a constraints analysis really between, as I've explained in opening, this is obviously a long piece of linear infrastructure and that constraints analysis was undertaken in terms of the entire 68 kilometer length, all of those 96 –

WINKELMANN CJ:
Just scroll down to the next page of that, the alternative routes, because we only just saw the introductory paragraph on the screen.

MR PREBBLE:
Sorry, which page was that?

ELLEN FRANCE J:
What page, Chief Justice?

WINKELMANN CJ:
That was the page that we were just on before, which was…

MR PREBBLE:

Sorry?

WINKELMANN CJ:

302.0495, and I was assuming you'd scroll to 0496 I think it was, which was about the investigation of alternative routes, because you were taking us through what it said, Mr Prebble, but it wasn't up on the screen.

MR PREBBLE:

In fact it's, yes: "This work was undertaken by TEL staff and consultants Boffa Miskell and Sinclair Knight Mertz (now Jacobs), which included *inter alia* experts in archaeology, ecology, landscape architecture, electricity line design and land stability," and: "The outcome of this work produced preferred transmission route (PTR), which was introduced to the affected landowners from whom property rights would be required." And by way of explanation of that, that initial constraints exercise is what was used to consider the alternate sites, routes and methods for the entire project between Kaitaia and Kaikohe and that that's what's, in terms of the initial preferred transmission route, included the OTS land after they'd settled on looking at that, as after looking at all those constraints in terms of ecology, archaeology, landscape architecture, et cetera they got to a preferred transmission route and that's then when they negotiated with OTS in particular for acquisition of that property because that was within the preferred transmission route at that point in time. And there were several years of negotiation over the OTS property, so that's why I was taking your Honours to 302.0505…

WINKELMANN CJ:

So that consideration, investigation of alternate routes you've just shown us, only rates up to the OTS point?

MR PREBBLE:

He had identified – it was a broad constraints-based analysis, there's evidence in the bundle from Ross Baker about how in more detail that was undertaken. But it assisted to effectively design a corridor of what was the

required land between Kaitaia and Kaikohe, and at that point the land that was on the preferred transmission route included the OTS land and that was their preferred transmission route, and they then negotiated for several years to obtain the land on that preferred transmission route but were unsuccessful with the Office of Treaty Settlements, and that process of negotiation and the alternatives that were being considered at that time is set out at 302.0505, and that talks about the various dialogues that had been going on between TEL and OTS, and it goes over to 302.0508, there's several pages there dealing with the OTS alignment and then they get to the current alignment at 302.0508 and that's where really they're obviously getting to a point where it's becoming obvious that they're not able to secure the agreement for the use of the OTS property and there's no ability to acquire that given it's outside of the ability for a requiring authority to acquire land that is Crown owned. So they're looking at a current alignment and that's where they look at, there's actually four options that they look at at that point in time. They look at deviations to the far east and the far west, which is outlined there, and that there are obvious problems with those two deviations because that would result in their going through Māori ownership and significant Landcorp land, property, so they were concerned I think about similar issues coming up as they'd faced with the OTS property and the concerns about redress, et cetera for the Ngāpuhi settlement. And so they got to a position that they worked out that a deviation to the west was the most likely option and that's when they held preliminary discussions to the immediate west of the OTS option, they took that as far as they could and they investigated that over the FGT Farms and Sutcliffe option, and that's not to say they discounted it. The evidence and the Environment Court decision makes that clear. They just took it as far as they could and then they continued to investigate a line further to the west again, and that's where they subsequently determined that for all the reasons that are in the Environment Court's decision that was, and they say the only practical and economic route, but really what they are saying there is that that's the best economic route practically available. That's our submission on that. That they were, after they had looked at those options, and as the evidence in the Environment Court clearly shows, they reached a decision that the preferred transmission route was not over the FGT/Sutcliffe

properties, and it wasn't for improper purposes, it was reached because the other route that was not on their properties was the only one realistically that they could defend and carry on with.

Now I do want to come back to that briefly, but that outline then provides the information that was provided to the Minister, plus whatever other interaction we had between the officials and Top at that time, preparing this report. Now I don't want to overstate that but I'm just saying, because obviously this is not a judicial review and that material has all gone to the Minister, but we haven't heard from the official who put it all together, nor have we heard from the Minister in terms of what she considered at the time. But that clearly shows that alternatives were before the Minister at that stage, and that she was able to then on that basis make a decision as to given at that point, given that the LINZ standard had been complied with, had there been adequate assessment of alternatives, given that it's also going to go, carry on in the process, and if there's obviously an objection it will be considered again by the Environment Court, so at that point in time the Minister had enough to make a robust decision, we say, at 186 to enable it to the Public Works Act.

In terms of, I'm coming back now to the outline, so I've gone through the LINZ standard, which is paragraph 7 of our outline. I've gone through paragraph 7 which is the application briefing material and the decision tree. Then at para 8 the response there is the Minister was not passive in considering the material and alternatives considered. As I've already shown, there were alternatives before the Minister. She did read that. She did consider those 27 tests, albeit those are not applied at that point, but it informed whether there was sufficient information before the Minister to make her decision. We say: "The Minister continued to make active enquiries after the decision," and there's a reference there. I won't take your Honours to all of this because there's references to the bundles. The Minister undertook further consideration again prior to the Environment Court hearing, where obviously there was evidence that was put together on the alternatives for the Environment Court once there'd been an objection.

WINKELMANN CJ:

Didn't you say the Minister had to give her reasons – can you just give us the document reference for her reasons, section 23 reasons?

MR PREBBLE:

Certainly.

WINKELMANN CJ:

If you don't have it to hand you can give it to us earlier.

MR PREBBLE:

There were three section 23 decisions, if that is what your Honour means, and one of them, for example, is at 304.1473.

WINKELMANN CJ:

Thank you.

MR PREBBLE:

That's the point at which the Minister makes the final decision as to whether or not to take the land after the negotiations have been unsuccessful. The other point, just in terms of the passive consideration that is relied upon by my learned friend, that's a reference to a wrong statement, we say, by a LINZ official, and there's a reference there, that's at para 8 of my oral outline, whereby Mr Sun, who didn't put together the 186 application, he put together the section 18 and section 23 applications, and he was cross-examined by the Environment Court, but he responded to a question that really he was saying it's passive in a sense that a 186 application usually receives the material from the applicant, it doesn't rely on a whole lot more material. That's how those decisions are made, and that's entirely appropriate at that point to, at the start of a process, when there's going to be a later process with the Public Works Act and potentially a contested hearing where there are actual criteria under 24, 186 doesn't provide any of that machinery. 186 doesn't provide a contested hearing. 186 doesn't require the Minister to be absolutely certain that the taking is fair, sound and reasonably necessary. I mean if, just putting

it in that kind of counterfactual language, if 186 required the Minister to be sure about the taking, you would presumably skip sections 18 and 23 and you'd just then have an appeal to the Environment Court to hearing it all again under section 24. You wouldn't bother with it just being a bare consenting decision that enables you to go into the Public Works Act.

WINKELMANN CJ:

Sorry, can I just ask you to repeat that point, Mr Prebble? I'm finding it hard to follow.

MR PREBBLE:

Just in terms of what was appropriate at that 186 stage and the level of information that was before the Minister, the submission I'm making is that relying on an application that complies with the LINZ standard is entirely appropriate given that it's a consenting decision that doesn't have criteria actually listed, that doesn't have a contested hearing process built into it, that doesn't have anything which provides the machinery for, say, submissions or from hearing from applicants. Instead it's a consenting decision that enables access into the Public Works Act acquisition powers and I guess the counterfactual that I'm putting forward is if 186 – if what the appellants are saying 186 means in terms of how sure the Minister must be is that the Minister must be sure that 24(7) criteria are me. If that was really what you required at 186 you wouldn't go through then an acquisition process under 18 and 23. You'd just say the land can be taken and I'm going to skip that and we're going to go straight to the Environment Court who has an appeal right, or you would expect some further machinery built in to and leading up to 186 in terms of hearing from people and having a contested hearing, and that obviously has deliberately not been done in this case.

WINKELMANN CJ:

Mr Prebble, I just suggest to you that the acquisition process is not because the Minister is not sure. The acquisition process is because you would always prefer to negotiate and agree to take someone's property rather than just to exercise state power to take it. Isn't that the case?

MR PREBBLE:

Yes, I agree with that, that the acquisition process is there to, if possible, get agreement, but it also provides forms of protection in that it's – I mean it's finely calibrated in terms of providing protection for the landowners but also enabling important public infrastructure to proceed, and so the protection really on the – that are built in through the Public Works Act, and I'm just making the submission that if we are really wanting something more from them to be sure at 186, you would expect that decision to be an appealable decision to the Environment Court rather than then further machinery and steps under the Public Works Act.

I now wanted to address the point about the route selection being improperly influenced by political connections and that is not accepted at all by the Crown, and that's at para 9 of the outline.

The application, the first point we make is the application did not include political connections precisely because they were not relevant to the route selection, and I've got a reference there to the Court of Appeal which rightly held, and that's footnote 7, that "it would need to be shown that what had occurred had a material impact on the decision. There is no basis upon which we could reach that view in this case," was their conclusion, and these are obviously very significant allegations, and they looked at it and came to that conclusion that there's no basis upon which we could find that in this case.

The second point is, and worth going to these particular paragraphs from the Environment Court because the lower Courts confirm that it wasn't relevant and there was no bad faith. So if I take your Honours to paragraphs 112 to 113 of the Environment Court decision. We've obviously been here already but I'll try to be as brief as possible. There's the statement that: "Although Mr Salmon pursued a number of witnesses on the basis of lack of consideration of the FGT/Sutcliffe route, we have concluded that the evidence satisfies us that the route was considered. It appeared that the same difficulties arose with Mr Taylor in relation to the FGT/Sutcliffe as for OTS," and that it was identified the route would have a significant impact not only on

the amenity of both FGT and Sutcliffe owners and their homes, but also through having an easement right through the middle of the land, dividing the land and limiting activities upon it."

Then at 113, this is where the Court directly addresses this: "Although the objectors relied upon Mr Sutcliffe's threats to Top Energy Limited, it is clear that Mr Sutcliffe has signed an AGE… albeit for a route to the southeast of his home, and over a significantly shorter distance. It cannot therefore be argued that TEL was unwilling to deal with Mr Sutcliffe, given that they were eventually able to enter into an AGE.. Rather, what this demonstrates is the robust nature of discussions in relation to the route, and the need to take a responsive approach to concerns, to see if these can be addressed and agreement reached."

Then the Court goes further at 114: "We have looked at the proposed alignment… and consider that this would have had a significant impact on both these property owners. Although there is an increase in impact upon the Poultons… the objection route," which is the one obviously that is now before your Honours, "is significantly less than would have been the case upon the Sutcliffe and FGT properties. As the TEL witnesses noted, the objection route involves a balanced impact upon the various landowners in the area. Overall, we are satisfied that the objection route is a reiteration and refinement of a western deviation from the preferred OTS routes."

There's a couple of things that can be said about this. Firstly, it can't be seriously suggested that the Environment Court thought there was some improper basis for the decision yet went on and made those findings. The second point is, that the Environment Court confirms that really the reason why the FGT/Sutcliffe was discounted is because it didn't involve a balanced impact upon the various landowners. It was the opposite. It had a significant and adverse effect on the FGT and Sutcliffe properties such that the more balanced option was the one that's now presently before your Honours. So the Court really confirmed that that was a sensible route to choose, and if there had been something improper in that, I suggest it would

be extraordinary the Court would simply overlook that after hearing the evidence.

WINKELMANN CJ:

Is there anything in the documentation from the RA to suggest that that is, in fact, what they were proceeding on the basis of?

MR PREBBLE:

I'll come to that documentation your Honour, because the short answer is no. I just want to, one further point on the Environment Court decision, at 149 it says: “We are unable to see anything in the actions of TEL or the Minister that can be described as bad faith.” Again, I would suggest that if the Court actually considered there was anything to this allegation, it wouldn’t have made that statement.

WILLIAM YOUNG J:

Actually I'm slightly puzzled as to why we’re dealing with this, because leave wasn’t – it’s not really within the grant of leave.

MR PREBBLE:

I'm not going to contest that point about leave, but I am wanting to address this because it’s obviously a very serious allegation and in the Crown’s perspective we didn’t want to leave it hanging. If your Honours were to tell me that I should move on, then I can, but I didn’t want to leave it hanging.

WINKELMANN CJ:

Just finish. I don’t think it’s proper to move on when it’s been raised by Mr Salmon.

MR PREBBLE:

I will come briefly then to in terms of that outline I say that the Sutcliffe, at that point 3, granted an easement –

GLAZEBROOK J:

When you answered the Chief Justice to say there was nothing in the written papers to say that was what had happened, presumably there was, however, in the evidence before the Environment Court discussion of all of this?

MR PREBBLE:

Yes, I just really want to highlight those points actually, and so let's go there, because I want to highlight the things that have been said by my friends to illustrate that this was a factor that was taken into account, because I think that indicates the opposite, and they're all outlined at point 5 of para 9, and 11, which is a rather large footnote sorry, but I think let's start with the Peter Port chronology, and that's at 304.1629. The point I'd like to make there is that simply this is a record of a conversation that occurred between Mr Port and Mr Sutcliffe, and really he's just recording, as a matter of fact, a mutual matter of fact, a conversation that occurred. So you cannot take from that, that there's anything evaluative or that somehow that's influencing the decision of TEL in terms of the route it's chosen. Obviously he's said that and he's faithfully recorded it. I think probably the upshot of this note if anything is that it's obvious that Mr Port is very unhappy with the route being over his property.

O'REGAN J:

Mr Sutcliffe you mean?

ELLEN FRANCE J:

Mr Sutcliffe.

MR PREBBLE:

Sorry, Mr Sutcliffe. Sorry, your Honours. Absolutely.

I go to the next document which has been relied on by my friends which is the 4 March 2014 memo, and that starts at 301.0185. This memorandum was really outlining where they were getting to at that point in 2014. It's nearing the end of the negotiations with OTS. They're outlining the difficulties they're

having with OTS. As a result they're looking at possible deviations, and at 301.0189 they look at possible western deviations, and it's recorded, as has been pointed out –

WILLIAM YOUNG J:
Sorry, you were going to read out the eastern deviation section.

WINKELMANN CJ:
What was that question, Justice Young? I couldn't hear you.

WILLIAM YOUNG J:
Sorry. There's a discussion about, that I think captures the point that was made earlier, about the impact of a power line, the transmission line, on the amenities of the properties on the western side of the objection route. The eastern deviation I take it is Mr Sutcliffe's land and Mr Taylor's land?

GLAZEBROOK J:
No, I think that's, that is – no –

MR PREBBLE:
No. Sorry, your Honour. What eastern deviation means is, going back to that map at the back of our submissions, that's everything to the, well, to the east but I'm trying to say almost to the right of the OTS property, and what happened is they discounted deviations, eastern deviations, and so they were focused on, if possible, western deviation. If you look actually at 301.0191 which is just at the back of this memo, it's got "eastern deviation" there which goes around - that big block is the OTS –

WILLIAM YOUNG J:
I see. Sorry, I see, yes.

MR PREBBLE:
And it's good to be on that particular map because the point is at this point in time the only option that was being identified is on that map the Sutcliffe

western deviation, and if you look at page 301.0190 just before that map, it talks about them negotiating further with or taking it to Chris Findlayson in terms of the OTS one and then they say, well, if that fails, which is the OTS route, so they're still wanting to pursue OTS but if that fails to secure necessary support that Networks designs a deviation to the west of the Puketotara Block as generally marked –

WILLIAM YOUNG J:
Is that the Sutcliffe land?

MR PREBBLE:
Yes.

WILLIAM YOUNG J:
All right, I see, sorry.

MR PREBBLE:
And so they're actually saying at this point in time we know about, I mean it's recorded in here, his National party connections, but they're then saying, well, we should secure a negotiation over that land if necessary, and so it's obvious that at that point at least, while they might know about that as a matter of fact, they're still willing to consider putting a transmission line across those properties. Obviously, you know, it's hard to know what was going on in the minds of people at the time but part of the reason that perhaps Mr Sutcliffe was raising the connection with Chris Findlayson was the thought he might be able to convince Chris Findlayson that it should go back over the OTS property.

In any event, the next document I do want to briefly take your Honours to is the evidence, the cross-examination we have heard. There isn't much further on this. The first point I'd like to take your Honour to is 021.0227.

UNIDENTIFIED SPEAKER:
Sorry, could you repeat that please?

ELLEN FRANCE J:

201 I think you mean, Mr Prebble?

MR PREBBLE:

201.0227. The reason for taking you here is this is the witness for TEL providing his evidence as to how they went about considering the relative impacts to this property and the FGT/Sutcliffe route and then the actual route that they selected, and you'll see throughout this they looked at the impact to the Sutcliffe dwellings, they looked at the high impact to the FGT property, including dwellings and the ability to manage the farms – I'm just going to say these things, I'm happy to go through it in more detail – but they were considering at this point environment factors, the vista, the financial factors, Taylors' opposition as well, as we're coming down towards line 24. And then at the very bottom, from line 28 onwards, they're also aware that the impact value-wise on those properties was significant: "And as those two properties were higher than any valuations on the current alignment, first iteration, we considered that the iteration we were looking at in option 5, which avoids the Waipapakauri marginal strip was more finely balanced," which ultimately was the option they decided to go with, they say the line was more hidden from the public view and the impact was more spread rather than greater impact on two or three properties. And so what you're really seeing here is consistent with what the Environment Court found at para 2 1 14 that I took your Honours to, that they selected the route ultimately because it had less impact on any one property. Sure, it went over more properties, but it actually balanced the impacts overall and that was the reason why they selected it, not for improper purposes such as political connections.

And I do want to just finally address on this particular point the ones that have been gone to by my friend at page 201.0233, and at the bottom of that page he says he was certain type of character and the answer is: "We were aware that he was completely unhappy with the FGT/Sutcliffe route, I think that's pretty obvious from the file note," and then the question is: "But it was something that was reduced to writing," recorded "by Mr Port in which you read and remembered, obviously, so something to keep in mind in your

considerations?" and he said "Yes". But what he's really saying there is he was obviously completely unhappy with the route. So, yes, of course, we considered that he was unhappy with the route.

And then the cross-examination continued and at 201.0238 at the bottom there they've said in questioning: "My question is whether you'd agree that you were careful to include all information you saw as key to why you thought it was appropriate to look further afield?" Now it's worth remembering at this point that that file note that we are talking about, that 4 March file note, recorded that he had National party connections, so recorded a comment about Mr Cornelius and his property, and I won't go into that, but it's obviously something that they recorded there as well about and explosion, and he says: "And that means that the passage we were looking at, which refers to connections that Mr Sutcliffe said he had, was something that you thought was relevant?" and the answer, which is really the answer all the way through, is it was just a known fact, as was the paragraph below it, and the paragraph below it was the one about Mr Cornelius. And then there's an attempt to say: "Well, you knew all sorts of things about," well, appearance and the car he drives and so on. And he said: 'Well, the relevance was to his relationship with the Honourable MP linked with the preferred transmission route." Now, as we know, the preferred transmission route is the OTS route and so has nothing to do with whether or not they're choosing the Sutcliffe route or another route, it's just that he had a connection to the preferred transmission route. I mean, it's impossible to speculate about that but, you know, you could say, well, maybe – actually, I'll just leave it there, but it clearly isn't relevant to an assessment of whether or not it should go over the FGT/Sutcliffe route or whether it should go over the route that was ultimately selected.

And then we've got across the page, he says: "It was a piece of information that was put into the memo," and he says yes. The reality is, in my submission, that at this point in time what the witness is saying in that exchange is it was a simply a factual piece of material which was recorded but it wasn't relevant to the route selection and instead the paragraphs I took you from the Environment Court and the page from the transcript earlier is actually

what happened with the route selection process, which was about ensuring that there was a more balanced route for the transmission line, and that involved not going forward with the FGT/Sutcliffe property. That does bring me back to the point about whether or not this was misleading because it was stated as the only practical and economic route, and as I say at para 11, it's not misleading because in our submission it doesn't mean cheapest and only. It was really the best economic route practically available, at least from TEL's analysis, and it's worth noting also that the Environment Court, and we've talked about para 55, but it did find there that it didn't influence the Minister's decision, and it's also consistent, really, I think the reason the Court is saying that is because it's not about choosing the best route. It's about ensuring that there had been adequate consideration of alternatives, and there's no legal requirement that it be only the cheapest or the most practical. There's no statutory requirement. The statutory requirement is that TEL has adequately assessed the alternatives.

I can take any questions on that. I was just going to move on now actually and talk about relief, because I am aware that it's, time is marching on.

WINKELMANN CJ:
Go ahead Mr Prebble.

MR PREBBLE:
So the appellants are seeking a relief quashing the Minister's decision and setting aside the Environment Court decision, and we say there are strong grounds in this case to not grant the relief sought. Firstly, if the Court was of the view that a sufficiently robust review was not undertaken by the Minister, then there's not a basis to grant relief because as I have already outlined, the Environment Court considers the matter and has a discretion to send it back, even where there's been a deficient consideration of alternatives under 24(7)(c), not that we accept there's been one, and not that the Environment Court accepted there'd been one as a matter of fact. Parliament, therefore, has provided that discretion which the Court could do but it didn't, it went on and considered it as to whether it was fair, sound and reasonably

necessary, and therefore to the extent it's gone and done that you would say the Environment Court has certainly cured any defect, both with any issues with the 186 decision, or generally any issues with the decision in terms of fair, sound and reasonably necessary, because the Environment Court's decision was of the whole process at that point. It included everything in total and considered whether or not the acquisition or the taking was fair, sound and reasonably necessary and found that it was fair, sound and reasonably necessary by a strong margin. That's at 165 of the Court's decision.

I just want to say, to the extent the Court has any concerns at all with the consideration of alternatives, while none of the actual allegations of fact, and they are allegations of fact, and I do support the comment from your Honour Justice Young that these aren't actually matters that were granted relief. We assumed they might come up, hence why they're in the outline, and hence why I've gone through some of them, but none of them have been upheld in any of the below courts, and to suggest, therefore, that there has been a problem with a consideration of alternatives based on one of those failings, we really require and invite the Supreme Court into having to undertake its own assessment of the facts, and overturn or find differently to what the Environment Court found in this case.

I know, I don't rely on this in the sense that we say the decision of the Minister was robust and appropriate to what we say is required at the point of 186, but we do say that this decision could well have been pursued as a judicial review, and it hasn't, and the fact that there's comments now being made that the Environment Court has somehow got to undertake a judicial review type assessment, is confusing what the Environment Court actually does under 24(7)(b), as well as, if those are the serious concerns, then it could have brought that judicial – the appellants could have brought that judicial review as a 186 decision and challenged it in terms of illegality, failure to consider relevant considerations, improper purpose, failure to take account of the correct matter of fact. They could have challenged it in any number of ways, but they're now seeking to say, well this is somehow infected the process, and they're saying it's infected the process both when the Environment Court has

gone and found against them on all those points, but also where the Environment Court cures this process, in any event, on the 24.

I mean this case has now been going on for some six years since it started. As I've outlined, and I also invite the Court if it wishes to have this in writing, I am informed that there are now only these three landowners left for this significant infrastructure for Northland. The issues – and I haven't taken your Honour to all of the issues but I note in the outline we talk about they say the application was misleading because of the use of diesel and various other factors which meant that it wasn't actually urgent. Well, we address all of that. The reason this has been delayed –

WINKELMANN CJ:
I don't think we need to hear about the question of urgency because that wasn't really something Mr Salmon was pursuing anyway. It was just by-catch.

MR PREBBLE:
Okay, your Honour. Just to outline that obviously this has been going on for some time and the decision-making by TEL has been necessarily delayed because of the objections. In those circumstances, we say the Environment Court decision should stand even if somehow the Supreme Court formed the view that the intensity of review by the Minister at 186 was in error.

WINKELMANN CJ:
Even if? Sorry, what was the last bit, Mr Prebble?

MR PREBBLE:
Even if the Supreme Court formed the view that the intensity of review by the Minister at 186 was in error.

WINKELMANN CJ:
That the approach of the Minister to her task in 186 –

MR PREBBLE:

Yes.

WINKELMANN CJ:

– was wrong?

MR PREBBLE:

Yes.

WINKELMANN CJ:

And really that means, for the purposes of the appeal, that the Environment Court was wrong about what the Minister was required to do, if we were satisfied of that.

MR PREBBLE:

Well, that goes to my point that possibly not, your Honour, in that the Environment Court will have potentially cured that process through making its own assessment of alternatives and has a discretion under 24(7)(c) to remit it back if it thinks it necessary, otherwise it goes on and makes its own decision under 24(7)(d). So the Environment Court decision does come at the end of that entire process and looks at the fairness, soundness and reasonably necessary nature of the taking and –

WINKELMANN CJ:

Well, that was one of Mr Salmon's submissions that really if because he says section 186 is so critical that it sets off this process and it's an unfair process in that if it's wrong at that point it means that these people are there defending it on their own rather than having, being able to be, you know, say FTG and Sutcliffe defending it. So he says it's not capable of being fixed by Environment Court and you say it is because they look at everything that the…

MR PREBBLE:

I say it is and that the Court has a discretion at 24(7)(c). Well, I say a few things. Firstly, none of the allegations which they say are issues are borne out in the evidence, even if you suggested there was some problem that the Environment Court does then consider everything in terms of the adequacy of TEL's consideration, and the Environment Court has a discretion under 24(c), obviously in this case none of the allegations were made out, it went on and considered it anyway under 24(7)(d). In those circumstances it's really impossible to see how you could say there's a need to refer it back because no other decision would realistically be made.

Sorry, your Honour, you might be waiting for me. Those are the submissions for the Crown unless you have any further questions.

WINKELMANN CJ:

Thank you, Mr Prebble. Mr Salmon, do you have submissions in reply?

MR SALMON QC:

Yes, I do. I'll try to be brief. Dealing with just the last couple of points, first it is not the case that the Environment Court has cured the prejudice for the reason which the Chief Justice has just put to my friend and this is a very real problem because what is very clear from the Environment Court's decision is that had the application been to approve the taking of FGT's land the Environment Court would have approved that too. So a decision that both would be fair, just and reasonable doesn't cure the prejudice at all of being the elected target.

In terms of referring back and what would the utility of relief be, it's evident that the question is not to ask what the Environment Court would have done based on what it did on what we say is a wrongly directed ground but perhaps to ask first what would the Minister have done if properly informed and not given wrong information?

That leads me to my second point which is my learned friend has leaned quite hard on the submission that the appellants are seeking to relitigate factual findings. (inaudible 16:44:52) not intending to. My learned friend, however, went to some lengths to characterise what was meant by only practicable and economic route, which a backfilling of meaning that is entirely submission but more particularly not available to the Crown because the Environment Court held that those words were wrong. That's at paragraph 55 of the Environment Court decision. That is a factual finding in favour of the appellants which the crown cannot litigate.

So a useful rhetorical question would be, what would have been the case had the Minister been told the correct position in that sentence. This is not the only practicable or economic route. There is a cheaper route, and the only reason it's held to be practicable is, and first, and this is non-contentious, the reason it's said to be not practicable is there might be objections, but there would be the same number of objecting parties under the 186 route. Possibly the practicable is the improper considerations. Now my learned friend says that's seeking to subvert a factual finding of the Environment Court. It's not for a reason I'll come to. But on any view if this Court accepts that the proper question, in terms of curing prejudice, to ask what would have happened if the Minister were not told something wrong, and wrong I might note that was repeated in the decision tree for the Minister, and then repeated in the section 23 decision that my learned friend gave the Court the reference to when the Chief Justice asked about it, the only reason recorded for this route selection was it was the only practicable and economic route. So that wrong submission, wrong statement of fact, whether we describe it as just narrative or anything else, is a representation of fact that was wrong, and that has been found to be wrong, and there is no escaping that for the Crown. If this decision subsists, it does so having been made on a wrong basis.

The next point just briefly on political connections in my learned friend's paragraph 9 of his additional speaking notes, and his comments around them. The problem, and my learned friend said, it wasn't put in the application that there was a threat of political connections and the like. That is the problem.

The problem is that a witness conceded that this influenced the decision and did not tell the Crown it was a factor. So a useful thought experiment is to ask what would have happened had the Minister been told it was a factor? And on any view the likelihood is that there would not have been a decision to grant the application.

Also, I would note on the question of what the witness said, and my learned friend's review of the cross-examination, he stopped short, for some reason, at the bottom of 201.0239 and didn't go to the next question and answer, and over the page to the Q and A in the middle of the page, where the witness is asked to confirm the thrust of prior exchanges, and we all know sometimes these don't read as striking as they are in court. But it was striking, this can be seen from the attempt to capture it to make sure the language is caught, at the bottom of page 0239: "I understood you just now to confirm that you mentioned the relevant of, or you mentioned that those items in front, saying out loud, but the connections that Mr Sutcliffe claimed, you mentioned them because they're relevant in this memorandum?" A. "Yes."

Then the Q and A, also not referred to by my friend, over the page under the cross-examination continues. It was put into a memo because it was relevant, confirmed. So as well as the prior references to influencing the decision, there can be no escaping what was said, unless there were a factual finding that what was said in that cross-examination didn't happen, or didn't mean what it says, and there is not. I have been through, in my earlier submissions, the passages in the Environment Court's decision about this. They do not make that finding. So these things were said, the concession was made, and for what it is worth the Court of Appeal regarded it just as a clear concession that came from the witness at paragraph 109 of the Court of Appeal's judgment.

In that context my learned friend's characterisation of only practicable and economic is justifiable because it was the only route that the applicant, Top Energy, felt it could defend is not only not based on evidence, but not helpful. If it really means it was the one that thought it could defend because

the people were not resourced as well, then we might be on common ground. But in either case it gave the Minister a wrong impression.

Only four other brief topics. One is my learned friend has at the beginning and just now offered to give evidence from the Bar, or to tender evidence, that 93 agreements have been signed. The more pertinent evidence, lest the Court be left with the impression that there's urgency, would be concerning the lack of any imminence of this plan and the fact that there is ample time in the pipe for the FGT route to be explored if the Minister decided to re-visit the point. In other words, there is no pressure, there's no need to get the job done or to think big that should trammel the appellant's rights, there is time for this to be done right and for sunlight to be shone on the Minister's decision and process.

Next topic, judicial review and process. I perhaps skated over part of what we say about judicial review slightly too quickly, it's jumbled in our submissions, but given the criticisms for not bringing a judicial review I will make these points.

Firstly, and in our subs in paragraph 94, we refer to the High Court decision of *Kett v Minister for Land Information* HC Auckland AP 404-151-00, 28 June 2001, and paragraph 32 of that decision is quoted there, it's tab 5 in our bundle, in that the High Court held that the normal plain and dictionary meaning of section 24(7)(b) is that the Court, quote: "Was required to consider whether the Minister sufficiently and with due regard chose the route after taking into account circumstances which were reasonably relevant relating to that route and alternative routes," et cetera, and then at the balance of that paragraph 32: "It's role was to ensure that the Minister had carefully considered the possibilities, taken into account relevant matters, and come to a reasoned decision." And this has been taken not just by the appellants and their advisors but by the Environment as meaning that section 24(7)(b) and the process generally is a process check akin to judicial review.

The other reference, again in our submissions, with the citation at footnote 32, is the case *Olliver Trustee Ltd v Minister for Land Information* [2015] NZEnvC 55 in which the Court rather put it the other way round at 105 and said that they concluded that: “Considerations of fairness, soundness and reasonable necessity under s 24(7)(d) are not confined to matters of procedural fairness and freedom from illegality,” “but go to issues of substance and merit,” as well. Now that’s a framing for the criticism that the appellants should have judicially reviewed and could have at the start. Firstly, they had no idea of the documents showing procedural impropriety until discovery prior from TEL in this proceeding, some of it’s still being looked at on the day the trial began. Secondly, they would have been told, had they commenced parallel judicial review proceedings to the proceedings at this time, that the High Court binding the Environment Court had determined that process issues were to be considered at the Environment Court stage.

So it is, as well as being schematically messy to suggest that people put, through no acts of their own, in this crosshairs of litigation and the costs of it, should have to commence parallel proceedings, the unlikelihood of the Act requiring that, the way the courts and the Environment Court itself had proceeded to that time, were that these judicial review-type questions *were* to be dealt with by the Environment Court.

The next point – and the pleadings are in the bundle – but the failures to comply with procedural requirements at 186 were amended in the notices of objection and expressly pleaded by the appellants, 101.0141 for example, so they were pleaded issues before the Tribunal, and that is why my friend has criticised the failure to bring a judicial review is somehow resulting in a decision-maker’s affidavit not being given. One was given. It wasn’t in affidavit form, it was a brief, because this was a witness trial, and it wasn’t the Minister because it never is, but it was Mr Sun and his two briefs are in evidence. And he specifically addresses the section 186 decision-making process because it was pleaded, and also the Minister agreed to make discovery of matters relevant to the section 186 decision because it was pleaded. It is surprising to hear it said that somehow it was not an issue and

that it's a default of the applicants, that the Crown considers it should have called, as a responsible litigant, that more decision-maker evidence. So it's not suddenly now taking a position by the appellants. They have pleaded and run exactly this case in the courts below, initially because that was the settled view of what the Environment Court should do.

Turning then to why we say that as a matter of necessary statutory interpretation, this is my second to last point, the Act properly interpreted does involve that process enquiry, and why my friend is wrong to say judicial review is the only place.

Section 24(7)(b) is different from the example Justice Young gave in his question to my friend about a prosecutor's decision to charge being not one of deciding whether the person is guilty, but a threat of question of propriety of bringing a charge. That's a useful example because it highlights a difference here which is that a prosecutor doesn't have an equivalent provision to that in subsection (7)(b). In other words the Court is not charged in a criminal prosecution with enquiring into the adequacy of the prosecutor's decision to prosecute. That's the key difference we have here in (7)(b) a direction that the Court shall enquire into the adequacy of the consideration given to alternative sites. Now linguistically that must mean that it is enquiring into the adequacy of someone other than the Environment Court itself. If it was really all by the by, and the Environment Court did all of the consideration of alternatives and solved all possible perils, pitfalls and wrinkles in the decision-making process, then the subsection should, in fact, read, the Environment Court will consider alternatives and decide whether the route is acceptable, or that will make an adequate enquiry into alternatives. But it's not that. It is direct to enquire into the adequacy of the consideration given by other parties.

So it is not a situation where the Environment Court can say a complete answer to (7)(b) is that the Environment Court has gone off and looked at alternatives, and I note that because my learned friend went to a part of Mr Baker's evidence where he backfilled the original decision with new comments

about amenities. The question of adequacy of a consideration must be looking back in time, and it must pre-date the material that the Environment Court has that the prior decision-makers did not, and it has always been interpreted as a process check. Based on the way in which it has been interpreted to date, it had been, or rather taken the question before this Court to be one of the extent of enquiry that a Minister must make and the extent to which she is entitled to rely upon what TEL serves up. But on any view the appellants' case is not one as has been suggested this afternoon, of imposing the same duty upon the Minister as is imposed upon the Environment Court under 24(7)(b), and that is because the Minister is charged, by implication, on 24(7)(b) with adequately enquiring into the – sorry, with adequately considering alternative sites et cetera. The Environment Court is to enquire into the adequacy of the Minister's consideration. In other words, they dovetail. Although it's not expressed, the Minister is to do what one would expect her to do in her public role, and that is to undertake adequate enquiries before exercising a coercive statutory power. (7)(b) records that the Environment Court is then to enquire into that adequacy. So dovetailed –

GLAZEBROOK J:

So you don't accept that it's to enquire into the requiring authority adequacy of consideration. So you are actually now, which you didn't, or I certainly didn't understand you to do in your main submission, say the Minister has to do all that herself.

MR SALMON QC:

No, I'm coming to that, and I do say she has to do it herself, or reasonably rely on sufficiently detailed correct evidence, albeit being pregnant with any of the problems that infect the requiring authority's report. So the exchange with the Chief Justice to the effect that if there is a problem, if there's a poison pill in the requiring authority's position, and it's manifestly apparently expensive but somehow tainted, the Minister may rely upon it, but nevertheless suffer the same taint. So it's not to say that she must, or should've been expected to

reconsider and turn over every stone. I will come to questions she could and should have asked but –

WINKELMANN CJ:
Well you better come to it pretty quickly Mr Salmon because it's not an entire re-submission, it's your reply.

MR SALMON QC:
Absolutely, your Honour. I'm nearly done. I was just seeking to answer the question then.

So the final point then is the fair, sound and reasonably necessary versus capable versus it's a goer, the various attempts to formulate a test if it's not a public law test. Very briefly, those are all accretions to the statutory language, whether fair, sound, reasonably necessary, capable, or "it's a goer" to be more casual in terms. The latter two in particular do not have a settled meaning and don't provide – are less likely to be an intended statutory touchstone than well-establish public law considerations.

The related point is if the Minister is to be such a light touch as to effectively see that what's presented is tenable or looks like it might be a goer, then the reverse of my friend's question applies. Why bother having the Minister as a gateway decision-maker at all? If it is to the extent of rubber-stamping and my friend is right that everything's solved at the section 186 point, it rather begs the question why the Minister is being applied to at all then. The Minister is being applied to at the section 186 stage because she was making an important decision and exercising an important statutory power and we say the Act requires it to be substantively and procedurally fair.

The final point on this topic and it is my final point is if the approach taken in the Minister's assessment, and this was the approach, is to ask whether there's any prima facie reason why the statutory tests would not be met, then the Minister has erred. On any view the Minister has erred, we say, because it is looking for not information but for any disqualifications in treating the more

brief and devoid of information the application the better because it will have fewer pimples and wrinkles. So interpretation of this that allows the Ministry or Minister to say: “Look, unless there’s a prima facie reason not to, it should be green lit,” is an approach that encourages a lack of candour and proper information, it encourages one-pagers rather than detail and it is, in our submission, at odds with the legislative scheme and purpose.

That is my reply. I’m sorry for taking us past five.

WINKELMANN CJ:

Thank you very much, Mr Salmon. Well, thank you, all counsel, for your submissions. We’ll take some time to consider our decision, and we will now adjourn.

COURT ADJOURNS: 5.02 PM