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

SC 123/2024
[2025] NZSC Trans 17

BETWEEN

TONY JAMES SOFUS PASCOE

DEBBIE ANN PASCOE

Appellants

AND

MINISTER FOR LAND INFORMATION

Respondent

Hearing: 14 October 2025

Court: Winkelmann CJ
Glazebrook J
Ellen France J
Kós J
Miller J

Counsel: Appellants appear in Person
R L Roff and E S Harris for the Respondent
S R Gepp KC and M C Wright as Counsel to Assist

CIVIL APPEAL

MS GEPP KC:

May it please the Court. Ms Gepp appearing with Ms Wright as counsel assisting.

WINKELMANN CJ:

5 Thank you, Ms Gepp, Ms Wright. Mr Pascoe?

MR PASCOE:

Yes, Tony Pascoe with Marie Gibbs and my wife, Debbie.

WINKELMANN CJ:

Mr Pascoe, Ms Gibbs, Mrs Pascoe, yes.

10 **MR PASCOE:**

Thank you.

MS ROFF:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Roff ahau, for the Minister. Kei kōnei māua ko Mr Harris mō te Karauna.

15 **WINKELMANN CJ:**

Ā, tēnā kōrua Ms Roff and Mr Harris. So Mr Pascoe, I understand you want also to have Mr Russell, is it?

MR PASCOE:

Yes, Mr Russell Gibbs just to take notes. Is that okay?

20 **WINKELMANN CJ:**

Mr Russell Gibbs?

MR PASCOE:

Yes.

WINKELMANN CJ:

Right, to come up and take notes and sit alongside Mrs Pascoe.

MR PASCOE:

Would that be all right, your Honour?

5 **WINKELMANN CJ:**

Yes, that's certainly fine. You can come forward Mr Gibbs. So just a couple of preliminary matters. We have the application made by counsel assisting, Ms Gepp, to produce further evidence which is the contract between Terralink and the Minister – and NZTA and we're just proposing, the respondents are
10 neutral as to that, and we're just proposing to receive that de bene esse which means we'll make a decision about whether it's admitted as evidence after we've heard all argument and when we produce our judgment. Thank you, Ms Gepp.

15 The other issue is just timing. So you received a minute last week in which we set out timing which Mr Pascoe we've allocated 30 minutes for you, in total for you and Ms Gibbs, to make submissions on factual and contextual matters, and then Ms Gepp will address the Court dealing with the legal argument, and then you will have the opportunity to add any additional legal matters that you want
20 us to take into account before we then hear from the respondent. I think that's correct, isn't it, before we then hear from the respondent.

We think this appeal should be able to be dealt with well within the day so I don't know if there's been an opportunity for you all to discuss timing. No. The
25 awkward smile suggests not. We'll just monitor it as we go. Mr Pascoe?

KÓS J:

I mean we would need to have the Crown on by lunch time at the latest.

WINKELMANN CJ:

Yes. We'd like the Crown to be on by 12.30 I think, 12.30, right. So Mr Pascoe,
30 what you do is you come forward there and if you want Ms Gibbs can come

forward at the same time, you can both stand there, or you can stand off to the side.

MR PASCOE:

Thank you very much.

5 **WINKELMANN CJ:**

And you have to speak into that microphone in the middle. So that area is set up so that you can have your papers in front of you and I understand that Ms Gepp or her junior, Ms Wright, will be handling any document, if there's any, to what we call ClickShare, which puts documents up on our screen, Ms Gepp
10 will do that for you.

MR PASCOE:

Okay, thank you very much. The registrar handed up our oral things because I'll be, get very nervous.

WINKELMANN CJ:

15 Yes. Well you should relax. We're here to hear what you've got to say.

MR PASCOE:

Thank you.

WINKELMANN CJ:

And it's an important case so you've got our full attention.

20 **MR PASCOE:**

We know, your Honour. We've been in it a long time. My full name is Tony James Sofus Pascoe. This is not actually what's written at the start of this but I just want to explain something to you. I've lived in the valley at Mangapēpeke Valley all my life and I got married to Debbie in 1989. It's a very,
25 very special valley. It's an 18 hectare inland wetland and an ancient forest through the valley that hasn't been touched by man and it's got over 46 native species in it so it's very special. So, I will try and read our oral thing.

This appeal which my wife Debbie and I have brought is concerned with the approved question. That means the appeal concerns the law providing and protecting my wife Debbie's and my own and every other New Zealand citizen's rights to the land which is our home. This appeal concerns my wife Debbie's and my own and every other New Zealander, New Zealand citizen's right to our lives. The appeal concerns the law providing and restricting draconian power to take from citizens against their will by the use of force the land which is their home. The heart of that law is constitutional and human rights law. That fundamental law is stated in documents including the Magna Carta which remains in the heart of our statutory book and as follows: "I regard it as a principle of constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is especially authorised by Parliament and public interest decisively so demands... If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen."

This appeal shines a light on the Crown's approach to the constitutional and human rights of citizens who have created that government for the sole purpose of serving them all equally. For the reasons we have stated in our written submissions and for the further reasons to be set out, my wife Debbie and I submit that the Crown's approach to and purported use of the draconian power to take land by force profoundly breaches the law and the rule of law. When the law is applied to the approved question, the answer to the approved question is clearly "no." That means purported use by the Minister for Land Information of the draconian power to take from me and my wife Debbie against our will by the use of force the land which is our home, our life, is unlawful. The written submissions for the Minister breach the law and the rule of law and are fundamentally wrong.

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The submissions for the Crown in this appeal are in a sense that the Crown's relationship with New Zealand citizens is a commercial contract subject to commercial law. For example, the Crown submissions assert that the Court of Appeal judgment in *Wellington City Council v Body Corporate 51702*

(Wellington) [2002] 3 NZLR 486 (CA) is relevant to this appeal. That approach and attitude by and for the Crown could not be more profoundly wrong.

The relationship between New Zealand citizens and the Government the
 5 citizens have created for the sole purpose of serving them all equally is
 governed by the social contract which is a matter of constitutional and human
 rights law. The Crown Law Office 2021–2025 Statement of Intent states:
 “We have to...continue the principle of service to the Crown, to public service
 and to the rule of law.” A copy of that document is at authority 56.

10

We say those statements fundamentally breach the law, and the rule of law,
 including by relegating the rule of law to last place, and public service to second
 place, while – I'll struggle with this word – conceptualising service to the Crown
 as separate from service to the rule of law, and separate from public service,
 15 and putting service to that, fundamentally wrong, conception of the Crown
 before service to the rule of law, which given the foundation of the rule of law is
 service to every citizen equally.

20

The Government Legal Services Strategy 2022–2026 of the Solicitor-General
 Crown Law Office website states: “On occasion these obligations require us to
 demonstrate courage and independence by highlighting what the law and public
 interest require.” A copy of that document is at A57.

25

We say those statements epitomise the fundamental breach of the rule of law
 by the Crown (aka government) and the Crown’s law officers. Every person
 acting as or for government has the underpinning and overarching duty to
 uphold the rule of law. The duty requires every person acting as or for
 government, and above all the Solicitor-General and Attorney-General, to, at all
 times without fail and on every single occasion, highlight what the law requires.

30

We responded to the section 18 notice, including on the 8th of September 2020.
 There’s tabs all through that, as you’ll see. On the 7th of October 2020,
 9th of November 2020, 26th of November 2020, 4th of January 2021,
 10th of January 2021, 20th of January 2021, 21st of May 2021. The Minister and

his LINZ delegates refused our reasonably made request for a LINZ delegate to exercise and perform the Minister's section 18(1)(d) functions/duties/powers/discretions. The Minister and LINZ ignored our concerns about the unreasonable conduct of NZTA/NZTA's accredited contractor. The Minister and LINZ abrogated their functions/duties/powers/discretions including under section 18(1)(d) to NZTA/NZTA's accredited contractor. Nobody made every endeavour to negotiate in good faith with us in an attempt to reach an agreement for the acquisition of the land required.

10 The land in the Mangapēpeke Valley, which Minister Chris Penk has said he can take by force from me and my wife Debbie, is our home, our tūrangawaewae, our farm hub, our wetlands, our forest, our ancient land. We rely on this land for our spiritual and cultural life and well-being, our water source, our mahinga kai, and our ability to make a living. This land, our home,
15 is our life.

The land which the Minister asserts he can require and would be taken by force from me and my wife Debbie, is shown in the documents at the tabs you will see, and the other tab. The Environment Court found it will be untenable for us
20 to live in our home during construction. But NZTA and NZTA's accredited contractor, unbeknown to the Minister and LINZ and us, instructed the Government valuer not to consider, and not address, the construction effects on our home, such as a loss of occupation and injurious affection. Sorry. In contrast, the New Zealand Transport Agency gave an assurance to our
25 neighbours that the Minister will not compulsorily acquire our neighbour's land. Judge Doogan confirmed in 2023 in Tikanga and Environment Court – sorry.

WINKELMANN CJ:

We can take that as read. You can go through to that "NZTA made it."

MR PASCOE:

30 Thank you. Made it quite clear to the Court in July 2019 that if NZTA and NZTA's accredited contractor could not get our neighbours to agree to sell their land, NZTA could and would go to an alternative route. In other words, NZTA

could and would go back to one of the other alternative options. A copy of this document is at A32. NZTA tried unsuccessfully to get our neighbours' land, to agree to sell their land for four years.

- 5 NZTA/NZTA's accredited contractor did not tell the Minister or LINZ that NZTA could and would go to an alternative route, in other words, NZTA could and would go back to one of the other alternative options when NZTA/NZTA's accredited contractor asked the Minister and LINZ to issue a section 18 notice, and then proceed to compulsorily acquire our land.

10

NZTA's actions in giving the assurance referred to above established (as a matter of objective fact and law) government does not need, and have never needed to undertake the specific road improvement action for the public good. No lawful justification has, therefore, ever existed for the Government's actions in asserting it can and will use the draconian power to take our land which is our home, by force.

15

At the back of the things we've got there, on we aim to help government implement their policy choices it's got we have to face them, can Marie read that for me please?

20

WINKELMANN CJ:

Yes, you don't need to read the document out though, if you don't want to. If you just explain to us what it is?

MR PASCOE:

- 25 Thank you.

MS GIBBS:

It was quoted at paragraph – it's just a copy of the document referred to in paragraph 9. So we'll provide that authority in electronic form, but that's just the page printed out attached to the back.

5 **WINKELMANN CJ:**

So that's the Crown Law Office Statement of Intent?

MS GIBBS:

Yes your Honour, and then the next page is the Government Legal Services Strategy, which is referred to at paragraph 11.

10 **WINKELMANN CJ:**

Thank you.

MS GIBBS:

And the next page is the document Mr Pascoe referred to, so it's 302.0547, and it shows the land that the Minister said was required, which was attached to the section 18 notice.

15

WINKELMANN CJ:

Did you want to explain to us how that relates to the land, what it does to it? Or does Mr Pascoe want to explain that to us...

1020

20 **MS GIBBS:**

Do you want to talk to that? Do you want to talk about, and how some of it's been taken permanently.

MR PASCOE:

On that diagram.

25 **WINKELMANN CJ:**

Yes.

MR PASCOE:

That Ms Gibbs just dealt about, the dark piece is the permanent take for the road, and the checkered piece is the temporary occupation. The valley from **[Ms Gibbs: This is the designation down the...]**. The dotted black line round

5 the whole thing is the designation that was put in place in this proposed road.

[Ms Gibbs: Tell them where your house is.] At the start we've got the State Highway 3. You've got the permanent take on the right-hand side when you look at the page layout on the left-hand side the checkered piece. There's a small piece there on the left-hand side between the designation and the

10 temporary occupation. Our home is in there. It's very, very close to the temporary occupation.

KÓS J:

Just show us where exactly? Could you hold it up and show us?

MR PASCOE:

15 Just in there your Honour.

MS GIBBS:

So it's inside the designation but just outside the temporary occupation.

MR PASCOE:

It's only just outside.

20 **WINKELMANN CJ:**

So is it up by State Highway 3?

MR PASCOE:

Yes your Honour. State Highway 3 runs, yes, right through there.

MS GIBBS:

25 Perhaps while we're just looking at that map where State Highway 3 runs, if you've heard of option Z, option Z was a realignment of that existing road, but basically a – when Judge Doogan was talking about, NZTA made it quite clear

to the Court in July 2019 that if they couldn't get agreement from Mr and Mrs Pascoe's neighbours, that they would go back to one or the other of the alternative options. Option Z was one of those options and there was a couple of others as well.

5 **WINKELMANN CJ:**

Can you just explain in terms of getting from one side of the Pascoes, of your farm to the other, how is that managed in what is proposed after this roading?

MR PASCOE:

10 Very good question your Honour. There is no, because the land is going to be cut in half.

WINKELMANN CJ:

So it will be a roading thing of going around the road?

MR PASCOE:

15 Well because it's, the valley is from, the boundary from State Highway 3 down here back to the boundary back here, which is the land that was under the Treaty of Waitangi given to Ngāti Tama, which is a TRoNT, which is a subsection of Ngāti Tama. It is 1.8 k or 1.9 k from the State Highway 3 back to this boundary. The valley is a long winding valley. The whole valley through there is a wetland. For instance –

20 **GLAZEBROOK J:**

Sorry, I was going to ask you about the wetland. Can you point it out on the map?

MR PASCOE:

25 Most of the, actually all of the temporary occupation on the western side of that permanent take, is all wetland. Some of the proposed compulsory take is in wetlands as well. For instance I tell you back in 2002, 2001, 2003, 2002 sorry, Beca Carter was employed to look at Mt Messenger to maybe do a bypass or an upgrade. They did GPS coordinates at the front by a home. It was

17 metres above sea level. Right back at the boundary, which is 1.8 k, it was only 20 metres above sea level. So it's a very long, flat, winding valley. The stream just –

KÓS J:

5 And obviously very low.

MR PASCOE:

Pardon?

KÓS J:

Very low?

10 **MR PASCOE:**

Very low. When it rains heavy, because the catchment above here is another 2.5 kilometres, and there's two big gullies. One runs up to the left. The one that runs to the right, where this proposed road is to be, right into a massive gorge, a massive gorge. It rains. There's a massive ancient forest all up
15 through there. It is full of natives. It has got over 46. It's got the bach, it's got everything. But when it rains heavy, it comes down the valley, and it goes from wall to wall the water. In my lifetime I've seen it so many times. It goes round our house. In 2021 we had 70 ml of rain from half past nine to half past 11 that night, on a Sunday night in January, and it was that far from going in our home.
20 It was running across the existing highway just on our driveway just here. But the road in front, State Highway 3 in front, it works like a dam, and the reason why our home is going to be untenable to live in, one of the many reasons, is because of the construction, but because of, if this proposed road goes ahead, the massive amount of drainage, piping, earthworks, a massive
25 amount of forest, which is going to be well over 30 to 40 hectares to come off from right up the valley, is going to cause the water to come down the valley that fast. It's going to take all the left-hand side of the valley out, our home out, our sheds, it's all going to be flooded out. At the moment it doesn't go into our home, it goes through our sheds, but because it's such a winding, and it's full
30 of a wetland of sedges, rushes, native vegetation, it slows the water down, and

it doesn't go fast. Our massive worry is it's going to speed it up by 20 or 30 times with the amount of work, and it's an extreme worry. The forest at the back here is ancient. There's trees, thousands, 1,200 years old, and that's why there's so much wildlife in here, and it's so pristine in what it is.

5 **WINKELMANN CJ:**

So back to your argument, so is this the point at which you take over Ms Gibbs?

MR PASCOE:

Thank you your Honour.

MS GIBBS:

10 Yes your Honour. I just quickly wanted to show you the next page. So that was attached to the section 18 notice, that map we're looking at. That was the land requirement based on the land requirement plan H, or LRPH. The date of that LRPH you'll see there is the 8th of November 2019. This is based on NZTA's LRPH that they put in when we were in the Environment Court in August 2019,
15 and they served this notice, they signed the notice on the 15th of July 2020, and then NZTA and NZTA's accredited contractor sat on it for six weeks, and then they put it in Mr and Mrs Pascoe's letterbox. So this is the section 18 notice.

The next page shows the – the next page is out of the section 23 application
20 that NZTA and NZTA's accredited contractor submitted to LINZ. It was in March 2021. So you'll see, for example, area 3A, so page 302.0705, so it's...

WINKELMANN CJ:

Sorry, what's this next page, the one that's entitled "Title Plan", I've just lost...

MS GIBBS:

25 Yes, so it corresponds with the same areas of land that are on the LRP that was on the section 18 notice.

WINKELMANN CJ:

Okay.

MS GIBBS:

So this is the section 23 survey plan that was – when they served the section 18 notice, they also served a section 110 notice for a compulsory entry for a cadastral survey. They served it with the section 18 notice, and then Mr and
 5 Mrs Pascoe asked what that survey was for, and they wouldn't say, and then I think in around the 17th of December the surveyor finally admitted that it was for a section 23 survey, and they came in under that compulsory entry notice in the Christmas holidays of the Public Works Act 1981 on the 11th of January 2021, and it was to survey for a 23 notice the land that was shown in that section 18
 10 notice. This is the survey that that surveyor did, and it was, this survey plan was attached to the section 23 application provided to LINZ by The Property Group and NZTA.

So this map was provided to us, it's in tab 83, so it was provided to us as an
 15 OIA response, but it was from, if you go to tab 81, 81 shows the TP report to LINZ applying for a 23 notice, and this document was provided to LINZ at that time with that application and it was provided to us in the OIA.
 1030

KÓS J:

20 Might I just clarify one point. You know this map which is – am I right in thinking that Pascoes' farm is around the yellow sign that says "Mt Messenger Bypass" on that map. Have a look at it?

MR PASCOE:

Can I just answer that, your Honour?

KÓS J:

Yes, please.

MR PASCOE:

The yellow line going up through the – when it's got "Mt Messenger Bypass," the yellow line that goes up through the valley, that is our valley right up through
 30 there. On the right-hand side of that when you look at the screen is the spur on

the right-hand side which goes over to the next road which is the 75 hectares on the eastern side of the road and where the Mt Messenger Bypass sign is I think was 132 hectares on the right-hand side which goes up to a little terrace piece. So most of – the valley itself is a long valley, narrow long valley was, as

5 I said, is a wetland and there's a whole lot of side valleys but that's where the road, proposed road goes right up there, right into the gorge up to the top there but that is that –

KÓS J:

You own the land to the right of the white road?

10 **MR PASCOE:**

Yes, your Honour.

KÓS J:

Going down I think to about the bit that pops out a bit to the left. You see the sort of the –

15 **MS GIBBS:**

They own land on –

KÓS J:

– about an inch or so below the Mt Messenger Bypass sign.

MR PASCOE:

20 Yes.

KÓS J:

You see that bit that pushes out –

MR PASCOE:

There's a small piece –

25 **KÓS J:**

– your boundary is at the bottom of that I think.

MR PASCOE:

There's just a small piece inside there that's not our land.

KÓS J:

Yes.

5 **MR PASCOE:**

Other than that from the straight line across on this map here and, as you said, there's that small piece there on State Highway 3 roughly where the Mt Messenger Bypass was road reserve.

KÓS J:

10 That's good, I've got it, thank you.

MS GIBBS:

So that yellow line will be in the middle of the dark permanent occupation on that section 18 map.

MR PASCOE:

15 Yes.

MS GIBBS:

Mr and Mrs Pascoe also own land on the other side of the road in a different title. So option Z also required some land from Mr and Mrs Pascoe but it wouldn't have had the same effects as option E does because it wouldn't have
20 affected their home valley, their home and their farm hub, the wetlands. It would have required a little bit of land from their terrace.

MR PASCOE:

Of the existing home property as well as the property across the road. It would have still taken two pieces of two different properties of our land.

25 **MS GIBBS:**

And Mr and Mrs Pascoe also own, so the next valley over to the east, is the Maungaongaonga Valley, they also own land up there. So the Mangapēpeke

Valley, their home valley, is their farm hub. That's where their, you know, they've raised their calves and –

MR PASCOE:

It's all our sheds and all our implements. That's where – because my parents
5 had it before me back in the 1950s.

MS GIBBS:

So NZTA hired a farm consultant which advised them that taking out that home valley will affect their whole entire farming operation.

WINKELMANN CJ:

10 So just to be clear though we're not here hearing an appeal against the decision which option was pursued, et cetera. We're just focused on the negotiation point.

MS GIBBS:

Yes, so it's –

15 **WINKELMANN CJ:**

But it's helpful background. Thank you.

MS GIBBS:

Yes, your Honour, and it's relevant to what the Minister has to do under section 18(1)(d), what has to be done and who has to do it, because the Minister
20 and his delegates need to make every endeavour to negotiate in good faith. They need to be fully informed about what the project is, what the effects of the project are and that's the whole point of the requirement for them to get a registered valuation. That valuer is meant to also fully inform himself so that valuer will need all of the project documents. He will need to understand exactly
25 what the project is and the valuer's job is to assess what effect that project will have on Mr and Mrs Pascoe's land.

WINKELMANN CJ:

Yes, and Mr Pascoe says that the negotiator was instructed – sorry, the valuer was instructed to disregard the issue of impact?

MR PASCOE:

5 Yes.

MS GIBBS:

On the home.

MR PASCOE:

On the home, yes.

10 **MS GIBBS:**

So what does the Minister need to do in terms of, you know, being fully informed, fully inform himself, and he also needs to fully inform Mr and Mrs Pascoe about those exact things. LRPH, as I've explained, that was the section 18 notice. NZTA on the 25th of June 2020, which was before this
15 section 18 notice was issued, created a new LRP which was called LRPJ and NZTA decided not to tell the Minister or his delegate that there was an LRPJ.

LRPJ was created because originally this section 18 plan, the main construction yard, was intended to go in the front paddock here and on the 25th of June 2020
20 NZTA signed up an agreement with a landowner on the other side of Mt Messenger and that landowner agreed to let NZTA use his land on the other side for the main construction yard and that signed agreement was submitted, filed in the Environment Court because they extended the designation on that other side to allow for that main construction yard on someone else's property
25 on the other side of the mountain.

So that was the reason for LRPJ because that landowner had agreed that the main construction yard could go on his property. NZTA created LRPJ which took out the land that was on the section 18 notice where they had originally
30 intended that main construction yard to go. But they didn't provide that LRP to

the Minister or his delegate or tell them that it existed. They didn't provide the Minister and the delegate with the signed agreement from the other landowner. So when the Minister's delegate signed the section 18 notice, they were doing it without all the information they needed. It was the Minister and his delegate's

5 responsibility to decide whether the section 18 notice should be for LRPH or LPRJ and if the Minister or the LINZ delegate decided to use LRPH, which is the one that was used, then the delegate would have another decision to make under section 18(1)(d) –

WINKELMANN CJ:

10 Ms Gibbs, this is focusing on the issue in the section 18 notice and the focus of this appeal is on the negotiation so have you got some factual context relevant to that?

MS GIBBS:

Yes, your Honour. So what does the Minister have to do under

15 section 18(1)(d)? He was required to be fully informed, like fully inform himself and, if information was withheld from him, it was on the Minister and his delegate to root around and get the evidence from NZTA that he needed to make those decisions. That's basically referred to and increased and that's, you know, while the Minister says that section 18(1)(d) is silent on what needs

20 to be done, the constitutional and human rights law explains what needs to be done so –

WINKELMANN CJ:

So what do you say was the adverse impact on the Pascoes of the taking out from the section 18 notice of the construction yard space?

25 1040

MS GIBBS:

Because one of the blocks to reaching agreement was that NZTA made a decision under section 18(1)(d) to not offer a replacement house with what they called option 1 which was for the required land. So NZTA had an acquisition

30 strategy, which is referred to in the agreement between, you know, the contract

between TPG and NZTA. One of the first jobs that NZTA does is create an acquisition strategy, and we haven't seen that, but they made, NZTA made it clear to LINZ that NZTA's preference was to get the whole valley, except 11 hectares, they would leave Mr and Mrs Pascoe with 11 hectares, which is a terrace where a replacement house could be built. But that wasn't the required land. They didn't need it. What section 18(1)(d), what the Minister has to do under section 18(1)(d) is make every endeavour to negotiate in good faith with the landowner in an attempt to reach agreement for the acquisition of the land. So that starts off where land is required for a public work. It must be required.

10 The Minister's obligation is to make every endeavour to negotiate an agreement for that requirement. Not something else. Not NZTA's preferred, you know, 144 hectares. So when NZTA made that decision to not offer a replacement home to Mr and Mrs Pascoe for option 1, which was for the required land, that created a block to reaching agreement.

15

So that was one of the reasons why Mr and Mrs Pascoe asked to negotiate with the Minister and his delegate. It wasn't just that TPG did not hold a formal delegation, and neither did NZTA hold a formal delegation. There were other reasons including the conduct of NZTA, and so that is referred to in the letters – so the responses to the section 18 notice, and the references are in what what Tony has just read out at paragraph 13. So I will just take you to, just as an example –

20

GLAZEBROOK J:

25

Can I, just to put this in a, is the argument you're making that there couldn't have been a proper negotiation because of not having the full information?

MS GIBBS:

Yes.

GLAZEBROOK J:

30

But also, at least at a ministerial level, and also because of particular conduct of NZTA that precluded them negotiating in good faith. Is that essentially...

MS GIBBS:

Yes your Honour. At paragraph 53 of our submissions in chief, is some of the things which we say is required to be done under section 18(1)(d). The Crown have a term "pre-negotiations". Completing pre-negotiations. So the Crown

5 have processes they use, for example, when they're negotiating Treaty settlements, and they have certain things as pre-requisites to the negotiations which have to be completed before negotiations can commence. So some of those things are proactively providing information, for example, if the Minister and LINZ did decide to issue the 18 notice on LRPH, they've got a duty to say

10 there's also this LRPJ. NZTA say it's an alternative land –

WINKELMANN CJ:

Can I just ask you to clarify. The section 18 notice, however, was only for the land which is shown in that scheme, and that scheme found to be required in the other proceedings, is that correct?

15 **MS GIBBS:**

It was the Minister found it was required, that's why he issued the section 18 notice on that basis. He didn't know about LRPJ.

WINKELMANN CJ:

Are you saying it includes land which is no longer required for the construction

20 yard?

MS GIBBS:

That's right. So what Justice McQueen said was, she said LRPH was the current most up-to-date land requirement, and she said LRPJ was an alternative land requirement, or a provisional land requirement, and she said

25 therefore that it was lawful that they used LRPH for the section 18 notice. If that's –

ELLEN FRANCE J:

And that's the decision we declined leave on?

MS GIBBS:

Yes.

WINKELMANN CJ:

Yes, I was going to say, it's outside the scope of the appeal.

5 **MS GIBBS:**

So if that's right –

GLAZEBROOK J:

Well a direct appeal here.

MS GIBBS:

10 But if that's correct, so if Justice McQueen is correct that LRPH is the current
most up-to-date plan requirement, and option J, there's no dispute that other
landowner had signed up an agreement for his land to be used for that same
purpose. Justice McQueen said it was provisional or alternative LRP, that
LRPJ. If that's correct, the Minister and his delegate under section 18(1)(d) in
15 order to make every endeavour to negotiate, had to know about LRPJ.
Justice McQueen said Tony and Debbie get to negotiate LRPJ because they
asked to negotiate with the Minister instead of Mr Billing. But we say that
doesn't make any difference. We say before negotiations could commence the
Minister under section 18(1)(d) had to provide the alternative as
20 Justice McQueen calls it, or the provisional LRP that was in existence.
Justice McQueen said Tony and Debbie had a right to negotiate it, but it was
their fault somehow because they'd asked to negotiate with the Minister.
But the point being that it –

WINKELMANN CJ:

25 You're saying it's not negotiation, it shouldn't have been included, because it
wasn't required.

MS GIBBS:

We're saying...

WINKELMANN CJ:

The land shouldn't have been included in the section 18 notice because it wasn't required I think is your argument isn't it?

MS GIBBS:

- 5 Yes. But if Justice McQueen is right, that LRPH was lawfully used, then what we're saying is the existence of LRPJ had to be disclosed to the Minister, or his delegate, in order for him to perform his section 18(1)(d) functions, because how is Tony and Debbie able to negotiate for LRPJ.

KÓS J:

- 10 I'm just a little bit worried about this discussion about LRPH and LRPJ goes beyond the scope of the...

WINKELMANN CJ:

The scope of the appeal.

KÓS J:

- 15 The scope. It's not actually raised in the appellant's written argument, so I think may I make a suggestion, Chief Justice, which is we might park this point now and go to the law.

WINKELMANN CJ:

- 20 Yes, and just really you need to conclude. I think we've probably bypassed the time that was allocated, so I think we've got a sense of the factual set-up thanks, that's very helpful, and now we'll move, unless there's anything you want to say by way of conclusion, we'll move on to Ms Gepp?

MS GIBBS:

- 25 Thank you. We just wanted to say, finishing off, that in 2023 Judge Dwyer unlawfully ordered \$70,000 worth of costs against Tony and Debbie's PWA negotiator, and their PWA support people personally. Later in 2023 Judge Dwyer barred the Pascoes' PWA negotiator and support people from the objection appeal court assisted mediation. Judge Dwyer must have known he

did not have any jurisdiction to award costs against Tony and Debbie's PWA negotiator personally.

WINKELMANN CJ:

Again, I understand there's a lot of history, and a lot that you feel has been
5 wrong, but we can only hear the matters that are under appeal here.

MS GIBBS:

It's just a new decision that's come out by Justice Robinson from the High Court about a month or so ago. He deemed that costs award against Mr and Mrs Pascoe's negotiator was unlawful. They had no jurisdiction to
10 make it and he said the Environment Court had held, that was a longstanding position that was held by the Environment Court, that there was no jurisdiction to do that. Our point being that, even though the Environment Court knew there was no jurisdiction to do it, they did it anyway.

1050

15 **WINKELMANN CJ:**

All right, thank you. Got that, thanks.

MS GIBBS:

Thank you.

MR PASCOE:

20 Thank you.

MS GEPP KC:

Good morning. Does the Court have a copy of my oral outline?

WINKELMANN CJ:

Yes, thank you.

25 **MS GEPP KC:**

Thank you. There are a couple of discrete points that if the Court is happy I would like to ask Ms Wright to present. Is that...

WINKELMANN CJ:

That is fine. It's good. It's good even.

MS GEPP KC:

I'll let you know when we get to that point.

5 **WINKELMANN CJ:**

Thank you Ms Gepp.

MS GEPP KC:

Thank you. So skipping past the first issue which related to the admitting the Acquisition Services Agreement and starting with the narrative of facts, there's
 10 just a few documents that I'd like to work through it with respect to the narrative of facts. It's understood I'm sure that The Property Group is an external entity that was engaged by NZTA for the negotiation process. It's called an accredited supplier. That's a term that comes from the various standards and guidelines that LINZ has prepared and TPG was engaged to negotiate acquisition of
 15 interests in the Pascoe land.

I'll refer to the relevant parts of the standards when it arises rather than going through those all now but I would like to start with one delegation instrument. So the section 18(1)(d) duty, the negotiation duty, was delegated to LINZ
 20 officials and you have the delegation instrument at 301.0025. That's on the screen. So Ms Wright if you could just scroll up a page so we can see the heading of this document. This is the Schedule of Delegations and this is where the powers – this records the delegations that exist and then back on the page that we were on, the section, in about the fifth row, the section is the “18(1)(d) endeavour to negotiate” and there's a tick in the column to say that that's been
 25 delegated to the Chief Executive and then to the Deputy Chief Executive Crown Property and subdelegated to particular officials. So I'll just draw that to the Court's attention because –

KÓS J:

30 Sorry, those people – so “GML&P” is some sort of official?

MS GEPP KC:

Yes, all of those acronyms are names of various LINZ officials. And the – I just draw that to the Court's attention because section 18(1)(d) is treated here as a specific statutory duty that is capable of being negotiated, being, sorry, being
 5 delegated and is indeed delegated, and I'll come to that in a moment when I talk about how it's conceptualised as a standalone duty versus lead work or administrative work leading up to the section 23 function.

So the 23 power, section 23 power, is not in that delegation instrument because
 10 the Act does not – well perhaps not because but as a matter of law, the section 23 power to acquire land compulsorily is not able to be delegated and that's per section 4C(2) of the Public Works Act.

So the process involved The Property Group recommending and LINZ issuing
 15 first of all a section 18 Notice of Intention to Acquire, TPG seeking to negotiate, the Pascoes declining to negotiate with the respondent through TPG and then requesting to negotiate directly with the respondent or delegate, and when that was refused, ultimately TPG recommended that LINZ issue the section 23 notice and the section 23 notice you have, or the recommendation rather, to
 20 issue the section 23 notice is at 302.0552. And so if you, Ms Wright, if you could just scroll down a little, this is the – so you can see the dual branding of The Property Group and NZTA on the front page of this briefing and then underneath it is the report itself by The Property Group to Mr Knowles at LINZ recommending that the Notice of Intention to Take Land under section 23 is
 25 issued.

I'm not going to get into the detail of that notice because I don't think that the detail of it is material to the issues before the Court but that is the document that resulted in the section 23 notice and which provides the chronology
 30 et cetera of what TPG has done which was then relied on to say that negotiation, sufficient negotiation in order to satisfy section 18 has occurred.

So in terms of what Mr Knowles did with that information, if you could turn to Mr Knowles, or if we can put on the screen Mr Knowles' affidavit, and I'll start

at paragraph 19, he explains that the negotiations were "...undertaken by accredited suppliers, with the quality and outcome of the negotiations reviewed by a LINZ officer in the Clearances team with delegated authority under that section." And then that: "...the accredited supplier will provide information to the landowner at the outset of the negotiations..." and he's provided a copy of the information that was provided to Mr and Mrs Pascoe and that information explains that the accredited supplier's role is to negotiate with the landowner. And then in paragraph 21 he explains that: "The Clearances team is not involved" the Clearances team being a team within LINZ "is not involved directly in the day-to-day negotiations with landowners but is available to discuss issues arising with accredited suppliers" so that's The Property Group "and the Crown acquiring agency" so that in this case is NZTA "if required."

And just noting Crown acquiring agency is not a statutory term. That's a term used by LINZ to describe the Crown entity, whether that be another ministry or a Crown, a separate Crown entity, as NZTA is, that seeks to acquire land through the Minister of Land Information for works. So that the Crown acquiring agency is that non-statutory term used for those other Crown entities.

He explains at 22 that: "If, after a minimum of three months, the owner fails to respond to an invitation to [the owner] sell the land..." or negotiation is refused or agreement is not reached, then the accredited supplier provides a report to LINZ recommending that the Minister sign a notice pursuant to section 23, and that is the notice that I briefly took you to just before turning to this document. At 23 he just explains that the section 23 report is different to the section 18 report because it also includes a draft briefing to the Minister and it includes more detailed information and updates including a survey plan that's been prepared to support the section 23 notice. And then the last line of that page and over onto the next page he says: "One matter the team member reviewing the section 23 report needs to consider is whether the endeavours to negotiate required by section 18(1)(d) have been evidenced."

And so in my submission that's really the key issue before you is, is that approach of having a team member review a section 23 report and consider

whether endeavours to negotiate have been evidenced, is that the same as discharging a duty to negotiate, or to use all endeavours to negotiate in good faith. So moving down – sorry before moving on – just at footnote 5 on that page, there is a link through to the chronology requirements for that report on

5 section 23.

So the document that you can see on the screen now is the LINZ standards and that is setting out there what LINZ expects to see in a recommendation for a Notice of Intention to Take Land so that will presumably have guided the

10 report that The Property Group prepared in this case. So it needs to contain a chronology of interactions with the landowner, advice as to why the notice of intention is required, identification of registered interests, and so on. So that's useful to understand what LINZ is expecting to receive from the accredited supplier in their report.

15 1100

ELLEN FRANCE J:

Mr Knowles does say that he reviewed the material submitted, doesn't he?

MS GEPP KC:

Yes. So that's the next – so this is the, sort of the what happens, what's the

20 standard practice, then the next part of his affidavit is what happened in this case. So Ms Wright if you could go to paragraph 29 of Mr Knowles' evidence. So this is just setting out that there was a section 18 notice in this case the decision was made by another member of the Clearances team, and then at paragraph 30 the negotiations were unsuccessful, and on 20 August 2018 TPG

25 submitted a report recommending that the Minister issue a section 23 notice at that stage. This was the earlier process where that didn't happen.

So then moving down to paragraph 33, this is where the process that, the second section 18 notice process starts from paragraph 33. So that one was

30 the report on section 18 went to Mr Wright at LINZ, and Mr Wright decided to issue the section 18 notice, and then there's discussion of the section 110 notice in paragraph 34, but at paragraph 35 relevantly it says: "Negotiations...

were again unsuccessful and TPG submitted a report recommending a s 23 notice for Mr and Mrs Pascoe's land on 15 March 2021." That's the report that I took you to earlier.

- 5 Then at paragraph 36, this is his evidence about that review that your Honour asked about. He says: "From my review of the material submitted and held on the CPC file including the chronology... I concluded that the requirements of s 18(1)(d) had been met and included a statement to that effect in the briefing to the Minister." So that's his factual assessment of the sufficiency of that
10 review. He goes on in the subsequent paragraphs –

MILLER J:

And it's clear, isn't it, that the reason he was satisfied it had been met, was because the Pascoes, as he understood it, had refused to engage, so were in section 18(2) territory?

15 **MS GEPP KC:**

Yes. So the scope of this appeal before you, as I understand it, is related to the legal sufficiency of TPG doing the legwork, as the Court of Appeal called it, rather than the merits of the negotiation per se.

WINKELMANN CJ:

- 20 That's quite right Ms Gepp.

MS GEPP KC:

- So at paragraph 46, just to finish off this review, just noting that there was a, the section 23 notices were issued, there was a small error, there was a correction, and a new 23 notice was issued. So that's sort of the final step of
25 the process in this case. So, from my perspective, that's sufficient in terms of the narrative of facts, and I'll move on to the, just to note that there has been some evolution in the way that the issue has been framed.

- So starting with the High Court preliminary determination question, which was
30 set out at paragraph 8, I think. So the question that was approved for

determination in the High Court was whether section 18(1)(d) is complied with if the relevant negotiations with the landowner are undertaken by an entity accredited by LINZ as a Crown property accredited supplier such as, it should be TPG, rather than the Minister or his delegate, provided it is the Minister or his delegate who exercises the ultimate power to enter into an agreement to acquire or proceed to take the land. Now the reason I say that there's been a slight evolution, is that that question could be answered without looking at the negotiation step at all, and just looking at whether the Minister or delegate exercised the section 17 or section 23 power. The way that that's framed it would have been sufficient for the section 17 or section 23 power to be issued whereas – sorry, to be exercised by the Minister or delegate. But what has become more of the focus as this proceeding has made its way through is the level of oversight, and level of control that the Crown retains over the negotiation itself, not just whether it exercises the ultimate section 17 agreement or section 23 compulsory taking power.

So that's clear, so in the High Court's decision at paragraph 41. Sorry, I'll start at paragraph 39. So here the High Court's decision on this preliminary issue the Court says: "In setting up a system using accredited experts, with LINZ officials then acting as quality assurance, LINZ had put in place a system upon which it was entitled to rely as delegate under the Act to satisfy the requirements of s 18(1)(d)." So already more of a focus on what level of control and quality assurance is retained under section 18(1)(d), not just who makes the final decision under section 23 or 17.

Paragraph 41 refers to others cases which may or may not be similar, which I'll get to, but then at 41 the Court says: "I agree with the Crown's proposition that it was appropriate for the negotiations and attendant operational issues, such as the assessing of the value of the property, reviewing titles and negotiating, to be performed by a third party to ensure the required expertise was called upon. In addition, the quality assurance mechanisms in place in the system provided confidence that the process was appropriate and the services were 'fit for purpose.' The Minister was entitled to rely on the assurances provided by the appropriately delegated LINZ staff, which were in turn based on the

expertise and experience of TPG, to be assured that the requirements of s 18(1)(d) had been satisfied.”

So again that focus on section 18(1)(d), not just the final decision, and I'd just remind the Court at this point that the section 18(1)(d) function had been delegated to LINZ officials. It was not actually sitting with the Minister. The Minister had the section 23 power to issue the notice to take land, but the section 18(1)(d) function was actually sitting with the Minister – sorry, with the LINZ officials. But just noting again that focus on section 18(1)(d).

Then in the Court of Appeal's decision at 123, again it's not just about who makes that final section 23 decision. The Court found that: “It follows that we agree with the Judge that s 18(1)(d) of the PWA can be complied with if the relevant negotiations with the landowner are undertaken by an accredited supplier such as TPG, rather than by the Minister or the Minister's delegate, with oversight by the Minister or delegate...”. So again, what level of control, what level of oversight is retained over the section 18(1)(d) function, not simply who makes the final section 23 decision.

So with that context in mind, the submissions of counsel assisting is that the negotiation duty is a standalone duty, and not simply legwork or a supporting function for the section 17 or the section 23 ultimate statutory decision, and I'll start by distinguishing between those, the concept of it being a separate duty versus a step along the way to the section 23 decision. In my submission respectfully the respondent does at times treat the section 18(1) duty as being a preliminary or supporting operational task with the actual statutory function being exercised under either section 17 or 23, as it was framed by the High Court in its original preliminary issue question. For example, this is clear in the Crown's submissions at paragraph 3 which say: “...the respondent performed the duty to make every endeavour to negotiate...by providing the appellants the opportunity to negotiate directly with his...representative, maintaining oversight of the process through his delegate, and through his decision-making under s 23 of the PWA.” So bringing in that section 23 decision to the section 18 function.

1110

KÓS J:

Just there seem to be two preliminary points before this though. The first is in section 18 the premise is that the land is required for a public work so that
5 decision is already made.

MS GEPP KC:

Yes.

KÓS J:

The second is that section 18(1) is not a complete statement of all activities or
10 processes that have to be taken out. They are the sort of the mountains that, I mean, clearly before you make an endeavour to negotiate, you've got to acquaint yourself with the circumstances. That's not provided for. So there are activities hidden within this or implied within this that may well be undertaken by the people.

15 **MS GEPP KC:**

Yes.

KÓS J:

These are the mountain tops that the Minister or the Minister's delegate has to stand on.

20 **MS GEPP KC:**

There's no question that there are a range of administrative steps that can be undertaken by others and I don't dispute that this is essentially a function that has a bundle of underlying duties in it. I think that there's, and I think between myself and the respondent, that's probably in agreement. There's no question
25 that there are certain functions that can be undertaken by third parties. The question is, is negotiation in good faith one of those administrative functions that can be undertaken by a third party, and I draw a distinction between the duties that are so – have a character that makes, that is

so – contains a level of discretion that indicates that it is intended to be retained by the statutory decision-maker versus an administrative operational function that doesn't involve – a mechanical function that doesn't involve the exercise of discretion and can be allocated to a third party without that involving a delegation. So it's where the distinction lies rather than the concept of there being the ability to allocate out functions at all is where we differ.

I'll go to Mr Harris' affidavit briefly because this conceptualisation of the discretion coming at the section 23 stage is something that has been around for quite a long time and Mr Harris describes how "in 1996, LINZ established a warranting scheme for its internal staff..." and that was to "recognise those officials with the requisite knowledge and experience to undertake statutory decision-making on behalf of the Minister." So there is a recognition that this is – certain things are not mechanical. They do require a level of knowledge and experience. And then where an official held a warrant in that area that they were qualified to be the recipient of a ministerial delegation of a statutory decision-making power in the area in which they held warrants. And then at the same time LINZ established the accreditation scheme for its external suppliers and so it sort of did the same thing as the warranting scheme but it was for external suppliers and recognised the knowledge and competence of those private sector suppliers.

And over the page accreditation – so at 24: "Both warrants and accreditation were ways of recognising the knowledge and experience of individuals, enable them to undertake functions for the Crown in those specialist areas." Then at 25 he explains that: "The division of responsibility...remained that accredited suppliers undertook negotiations... however the power to agree or enter into a contract for the acquisition of land...or to issue a notice of desire...or to issue a notice of intention to take...remained with" either the LINZ delegate or the Minister.

So, again, it's treating negotiations as that pre-step but that the power is actually issued at the section 17 of the section 23 stage, whereas in my submission there is a statutory duty being exercised at the section 18(1)(d) stage and it's

the outcome of that negotiation that determines whether you end up in a section 17 situation of acquisition by agreement or a section 23 area of compulsory acquisition because negotiation may well lead to agreement but it may well lead to negotiation failing and it resulting in compulsory acquisition but

5 it –

GLAZEBROOK J:

Can I just check, what do you say is wrong with that or is nothing wrong with that? Sorry the accreditation and warranting schemes.

MS GEPP KC:

10 So the – okay so the most – the reason I refer to it at this point is to illustrate that it has been seen by LINZ as a long time that the statutory, the point at which you need to have a statutory decision-maker is at the section 23 stage because that's when the actual statutory power or function is being exercised. Whereas I say that there's a statutory duty being exercised in the
15 section 18(1)(d) negotiation point.

GLAZEBROOK J:

So you say they've left that out, is that the –

MS GEPP KC:

They have failed to recognise that the negotiation function is itself a duty, a
20 statutory duty, not an administrative mechanical function.

WINKELMANN CJ:

So they've seen the section 23 powers effectively the kind of protective power?

MS GEPP KC:

Yes.

WINKELMANN CJ:

And also if there's negotiation, just remind me of the statutory scheme, if there's a successful negotiation to acquire, what statutory, what provision is the Minister buying the land under?

5 **MS GEPP KC:**

Section 17.

WINKELMANN CJ:

Section 17.

KÓS J:

10 You're not suggesting that the section 18 process has to precede every section 17 acquisition though are you?

MS GEPP KC:

No, no, you could get to a section 17 acquisition with no section 18 notice of intention and no negotiation. It could simply be a "Can we acquire this?

15 Yes you can." But one outcome of negotiation, you don't negotiate simply to tick the box and get to the point of compulsory acquisition. The point of negotiation is to attempt to acquire by agreement and it's only if that fails that you then, or if the period of negotiation expires, that you then move to the compulsory acquisition.

20 **WINKELMANN CJ:**

But a negotiation that takes place under the section 18 notice is given is quite a different negotiation to one that occurs earlier?

MS GEPP KC:

25 There's no, there's no statutory scheme around what – there's no statutory provisions around how that discussion without the section – the, yes, yes, that's correct.

WINKELMANN CJ:

And also it's not occurring against a backdrop of a notice given of an intention to acquire?

MS GEPP KC:

- 5 That's right. So you've had that notice of intention and that's when the statutory duty in section 18(1)(d) kicks in but it can still go in one of – it can still go in different ways and, in fact, I've described it as a decision tree essentially because each micro decision that's made along the way of the negotiating path can lead to a different outcome and there's many of those outcomes that could
- 10 result in agreement. There's one of those outcomes that is going to result in compulsory acquisition but it's not a simple – you don't simply do it in order to show you've done it in order to get to the section 23 stage of being able to compulsorily acquire. So to –

KÓS J:

- 15 So the fact that the section 18 route is an in terrorem one where the landowner has to realise that if they act unreasonably they're going to face a compulsory acquisition, it means that constrains their negotiating ability, right? That must be so because you're against the section 18 as you've just said.

MS GEPP KC:

- 20 Yes, you know that –

KÓS J:

So you –

MS GEPP KC:

- You know that there is the, as Parliament said in passing the Act, that that
- 25 compulsory acquisition is hanging like an ogre over the so-called, over the negotiation so it's not a –

KÓS J:

So without –

WINKELMANN CJ:

It's actually on the title, isn't it, it's on the title at this point? It goes on title.

MS GEPP KC:

Yes, it is, yes.

5 **KÓS J:**

So, without trying to put words in your mouth, Ms Gepp, because I gave that up 25 years ago, you might say that that made the section 18(1)(d) responsibility perhaps more significant given that limitation on the landowner's ability to negotiate?

10 **MS GEPP KC:**

More significant than what, Sir?

KÓS J:

Well, more significant than a section 17 negotiation process, for instance?

MS GEPP KC:

15 Absolutely, absolutely. It is a statutory negotiation. It's a requirement to use every endeavour. It is to be done with good faith. There are all of those aspects that have been put into that provision have been done because of the compulsory coercive nature of the power that can be exercised at the end of the process.

20 **WINKELMANN CJ:**

Well, arguably, it's already been exercised given you're negotiating against the background of the...

MS GEPP KC:

Has in a, in a, yes.

25 **WINKELMANN CJ:**

Well not quite. Yes.

MS GEPP KC:

A preliminary step of that process has been taken.

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WINKELMANN CJ:

- 5 That's not quite correct to say it's already been exercised but that is the context in which the negotiations are occurring.

MS GEPP KC:

Yes.

WINKELMANN CJ:

- 10 Can you just take us to the statutory scheme in respect of pre-section 18 negotiations? You've said there's nothing –

MS GEPP KC:

Yes, so if we could go to section 17.

MILLER J:

- 15 This creates the power to acquire land for public works.

WINKELMANN CJ:

And your point is there's no reference in the pre-section 18 world in the statute to negotiations.

MS GEPP KC:

- 20 As far as I'm aware if there's a power to enter into an agreement, and it's only the statutory envelope of what you need to do, and how you need to do it only applies if you, if the Crown, if the Minister issues the section 18 notice of intention to acquire. At this point if you're simply acquiring by agreement then there's no fixed way of doing that as far as I'm aware.

25

But while we're in the statute if we could just perhaps scroll down to section 18. So this section 18 only applies where the Minister, only applies before

proceeding to take the land under the Act. So section 18 doesn't apply if the land is – it doesn't have to apply if the land is being acquired by agreement. It's only required where the Minister is going to proceed to take.

- 5 So, as his Honour Justice Kós has said, the Minister starts by serving notice of their desire to acquire the land, lodging that notice of desire with the Registrar-General who registers it without fee against the record of title and then invites the owner to sell the land. A valuation needs to be carried out. The Minister advises the owner of the estimated amount of compensation that
- 10 they would be entitled to under the Act or the betterment that the Minister [*sic*] would be liable to pay and then at (d): “make every endeavour to negotiate in good faith with the owner in an attempt to reach agreement for the acquisition of the land.” So at that stage agreement is still on the cards but you are negotiating within this framework of the backdrop of compulsory acquisition.

15 **WINKELMANN CJ:**

And, of course, at that point the world knows that there is a backdrop for compulsory acquisition so the Minister is probably the only possible purchaser in this circumstance.

MS GEPP KC:

- 20 That may well be correct.

KÓS J:

Well, the Minister certainly is going to be a purchaser if he wants to be.

MS GEPP KC:

- So I think if we could just also go to section 23. This is what the Minister has to
- 25 do where the Minister is proceeding to take the land: “cause a survey to be made and a plan to be prepared”; “cause a notice to be published in the Gazette”; “serve a notice on the owner of, and persons with a registered interest” and just carrying on down probably the only other provision that I'd refer you to here is the (3): “Every person having any estate or interest in the
- 30 land intended to be taken may object to the taking” in the Environment Court

and that is the process that has happened in this case and which goes to the respondent's notice of intention to support the decision on other grounds but I'll come to that later.

- 5 I think also if we could just, while we're in the statute, it would be useful to have a look at section 60 which is, when we're talking about compensation, what that means. I just refer to this because I started my presentation by saying, by submitting to you that this is, this negotiation in good faith is a high discretion activity, not a low discretion administrative mechanical activity and I think that
- 10 is underscored by the way in which compensation is assessed in the statute. There's a lot of considerations that go into this. If we can just scroll through those.

- The assessment of compensation in 62, the principles within that and the way
- 15 in which those are informed by the jurisprudence on those provisions that demonstrates that there is a high level of discretion involved in those, in assessing each aspect of that. So it's not a simple case of valuer, the Crown's valuer, the landowner's valuer, split the difference and there you've got your answer and I think that was really underscored by the image that the Pascoes
- 20 showed you earlier showing the way in which this, if this land is taken, it essentially runs through the middle of their land and there's obviously going to be a large difference of opinion about the extent of compensation that should follow from that. So, respectively, when my friends say landowners get the compensation that they're entitled to so there's not a high discretion here
- 25 because they get what they're entitled to under the Act, well that is exactly what is being negotiated, is what they're entitled to and there is a lot of discretion in that assessment.

GLAZEBROOK J:

- Are you suggesting the negotiation is limited to what they would be entitled to
- 30 under the Act because that doesn't seem to me to be the – they would get more than they're entitled to under the Act under a negotiation, couldn't they?

MS GEPP KC:

They could, yes, but they're going to be certainly –

GLAZEBROOK J:

Because that's the point of a negotiation in a way.

5 **MS GEPP KC:**

They will get whatever the Crown decides they're entitled to, yes.

GLAZEBROOK J:

The bottom line would be what they're entitled to under the Act.

MS GEPP KC:

10 But they may well be able to get more than that and landowners may have creative or unusual options that they see as being what they would like.

GLAZEBROOK J:

That are valuable to them but may not be counted as compensation as such under the Act, is that...

15 **MS GEPP KC:**

Yes, that's correct.

KÓS J:

But there's also great discretion in what land. I mean the Minister says: "I require this land" and may be persuaded to the view that he requires less than
20 that land.

MS GEPP KC:

Yes.

KÓS J:

And for perhaps different periods of time.

MS GEPP KC:

Acknowledging that there will have been already formed the notice of intention and that will be based on what is considered to be required but if there is a – if there's something in the negotiation that influences that decision, that's something that could come, could have an influence.

KÓS J:

Well and because the Minister knows that he's going down the route of section 23 in the objection process and so it'd be stupid to leave it until then to negotiate about the extent of the land when you're going to have to face that issue, he may as well face that issue sooner.

MS GEPP KC:

Yes. So this discussion has probably cut through quite a lot of the points that I wanted to take the Court to. The primary submission is just that the extent of control retained and the nature of the tasks determines whether something can be simply allocated to a third party to do, or whether a formal delegation is required which brings with it, if it was going out to a non-public service recipient of the power, would also need to bring within it the Public Service Act additional safeguards that apply for delegations outside the Public Service and the public sector.

20 WINKELMANN CJ:

So would you say that that would – so what is your submission? That a delegation of something which is a defying statutory task requires the Public Service Act 2020 protections. Is that your submission here?

MS GEPP KC:

25 So two parts. The first submission is absolutely the Crown can hand over, allocate mechanical tasks without a delegation but when it is delegating and if it is delegating outside the public sector, then the Public Service Act requirements for such delegations would kick in –

GLAZEBROOK J:

Sorry. So they can hand over mechanical tasks without a delegation but where it's not mechanical, where it's a core duty, is that then if you were handing it to a third party, you have to have the additional safeguards? Sorry, I just was
5 trying to make sure I'd got the submission.

MS GEPP KC:

Yes, sorry. I'm sorry, yes. You would have to if you were handing over – it goes to whether it is a delegation or not because obviously getting somebody to post your letter doesn't require a delegation but getting somebody to do
10 something that has a high level of discretion in it in my submission requires a delegation, and I think that the Crown appears to agree with that because they do say that some tasks are so inherently discretionary in nature that formal delegation is required at paragraph 33. So I think we agree on that in principle.

GLAZEBROOK J:

15 I suppose I'm having some difficulty with it just being because of a high level of discretion. I thought your submission was simpler than that. It just says that this is a separate statutory duty.

WINKELMANN CJ:

Aren't they mutually reinforcing? I thought it was too.

20 **MS GEPP KC:**

Yes.

GLAZEBROOK J:

Well, I mean, it may be that it's a separate statutory duty with a high level of discretion which makes it even more necessary but –

25 **MS GEPP KC:**

It's that, Ma'am, yes, because there's a separate statutory duty to serve notice but I don't say that that must be undertaken by the Minister because –

GLAZEBROOK J:

No, but the decision would have to be, wouldn't it, by the Minister or a delegate?

MS GEPP KC:

Yes.

5 **GLAZEBROOK J:**

You could deliver it, that's a postperson analogy, but the decision would have to be taken to serve notice.

MS GEPP KC:

And that's the discretionary aspect of that.

10 **GLAZEBROOK J:**

Well it's not really discretionary. I suppose it's – a notice isn't particularly discretionary. It's just that it is a requirement to serve a notice and to make the decision to serve that notice.

MS GEPP KC:

15 But the decision to serve a notice under section, for example, the decision under section 18 to serve a notice of intention is a discretionary decision. It's not mechanical because the Minister needs to decide or the delegate needs to decide I want to take the step –

GLAZEBROOK J:

20 I think that's what I was saying but I don't think it's a discretion. It's not. Well I wouldn't have put it as a discretion –

MS GEPP KC:

It's a requirement of the Act –

GLAZEBROOK J:

25 – because having made that decision then you are required to serve a notice before you can implement the decision.

WINKELMANN CJ:

There's two questions there, isn't there? So you're saying there's the decision to give notice and then there's the service of it but we're dealing with this situation here. So the question then is well okay if we accept your argument

5 it's a statutory duty entailing a high level discretion, there's still more to that though, isn't it, because what happens if you retain sufficient controls so that you can just say well this person is being used by me as my, you know, as the sort of the means by which I am doing the negotiation but I'm in complete control.

10 **MS GEPP KC:**

Yes.

WINKELMANN CJ:

So what's the evidence about that?

MS GEPP KC:

15 So my submission on that is that the – having a day-to-day, having a person who is in the room with you and assisting you, such as a lawyer, to understand the Act and how it applies to the negotiation is – there would be no difficulty with that because that is analogous to the information gathering or the advice concepts that come through in the cases around where you have one of these

20 ministerial decisions with input from others. But to send somebody away for three months and say “negotiate and then provide a report to me of how that negotiation went,” and I accept my friends will say that's a simplification, I accept it, I accept that it happened as it's set out in the affidavit. But ultimately what happens is The Property Group, which is engaged by NZTA, goes and

25 does the negotiation and then reports to LINZ and LINZ decides based on that report is that – has negotiation in good faith occurred and in my submission that is not retaining the core element of negotiation because negotiation is not a one-step process in that way. It is a series of decisions that take you along a path-dependent process with a range of outcomes possible.

WINKELMANN CJ:

So we had –

GLAZEBROOK J:

Well what – I mean we're near the morning tea adjournment.

5 **WINKELMANN CJ:**

We are, yes.

GLAZEBROOK J:

But there is a middle ground, isn't there, to say well you're entitled to negotiate, we've had our valuation, you're entitled to negotiate up to 10 per cent over the
10 valuation, go away and do it. But if they come back with either five per cent plus something else because that could be – or anything that deviates from that, then I need to be informed and give you further instructions.

WINKELMANN CJ:

Yes, so we're interested to hear you after the break about just what is the
15 evidence about the extent of control.

GLAZEBROOK J:

Well it's not so much evidence I'm thinking about but actually as a concept could you say well go away and negotiate within these parameters.

WINKELMANN CJ:

20 So it's evidence and conceptual framework.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Right. Let's take the break.

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.55 AM

MS GEPP KC:

5 So before the adjournment you had asked me about both the concept in the
evidence about first of all a conceptual envelope or authority to settle, and
whether that would be consistent with good faith negotiation in principle, and
then about the evidence about the extent of control. In my submission good
faith negotiation requires hearing from the person whose land may be
compulsorily acquired, and hearing the propositions that they put forward about
10 what they consider would be fair, and the basis on which they would be willing
to agree.

KÓS J:

Do you mean directly?

MS GEPP KC:

15 Directly.

KÓS J:

Why?

MS GEPP KC:

20 Because it is intended to be good faith, and if you don't hear from them, then
you are not necessarily getting the nuance of what they, how they're affected
by it, and why they say that something alternative to what you are putting
forward is needed.

KÓS J:

It could be reported to you, though, couldn't it?

25 **MS GEPP KC:**

And that would be my second proposition, is if I'm wrong that it needs to be you
hearing from them personally, as the negotiator, then you need to hear from

them at each stage of the negotiation, and not by way of a chronology at the end of the negotiation.

WINKELMANN CJ:

So you're saying effectively you have to be, the decision-maker, or at least
 5 LINZ, has to be along, travelling along in terms of reports, not there personally, but travelling along with the negotiation.

MS GEPP KC:

That would be my fallback position. If I'm wrong, that they need to be heard from – that they need to be personally involved in the decision-making. I'd like
 10 to just look at the Court of Appeal's decision briefly to illustrate my point. At 116 to 117 the Court is dealing with essentially the same issue and says that all of these things "go to how the negotiations are conducted, not to by whom they are conducted." It's common for "negotiations to be conducted... through an authorised representative who does not have delegated authority to enter into
 15 any resulting agreement."

Then in paragraph 117 the Court appears to accept the concept that "negotiations are a fluid and path-dependent process" but says that doesn't mean it needs to be the Minister or their delegate, rather it suggests there may
 20 be certain matters: "...which are so fundamental to the shape of the negotiation that they should be referred back to the relevant decision-maker along the way. Or, at the least, they should be expressly identified in any final report to the decision-maker as material decisions made in the course of the negotiation process that may have shaped the ultimate outcome (successful or
 25 unsuccessful)."

So starting with the first concept that says, it suggests there may be certain matters which are so fundamental they should be referred back, the difficulty I have is that that would be The Property Group deciding whether a matter was
 30 so fundamental that it should be referred back to the relevant decision-maker. That, to me, is part of the negotiation discretion, is deciding is this something where I need to decide to take a different course, and if The Property Group

reaches the view that this wasn't a fundamental matter, this is something that we can disregard as an option, then that process doesn't happen.

5 Then the second option the Court of Appeal says: "Or, at the least, they should be expressly identified in any final report to the decision-maker as material decisions made in the course of the negotiation process." That, in itself, it illustrates that negotiation is a process of decisions along the way to an outcome. So it illustrates the level of discretion that's involved.

WINKELMANN CJ:

10 So your point is that negotiation, which is referred to in section 18(1)(d), is inherently back and forth.

MS GEPP KC:

Yes.

WINKELMANN CJ:

15 It's a conversation and you can't delegate the conversation because you are responding, there's a response to the form of your communication, and then it comes back, and if you can delegate it, you must do so with a high level of involvement.

MS GEPP KC:

20 Yes.

WINKELMANN CJ:

So you're saying when you have that conversation go and say this, and then you're told what they've said back.

MS GEPP KC:

25 Yes that's very, thank you Ma'am, that's how I would have liked to have put it.

ELLEN FRANCE J:

Why is that not conflating whether you've acted in good faith with who has the ability to carry out the negotiations?

1200

5 **MS GEPP KC:**

When you get to that stage of the fallback of saying "can somebody else do it," then it is conflating the two because you're then talking about the how not the who. But the process here where you have somebody go off and do it and then they report to you with a chronology at the end, the reason that happens is because you have engaged someone who you see as the expert in negotiation to go off and do it. So the how has been informed by the who and vice versa.

10

ELLEN FRANCE J:

Yes, but if ultimately it's not, if the ultimate result is it's not undertaken in good faith, you've got a separate remedy for that.

15 **MS GEPP KC:**

Which is the Environment Court objection process but the Environment Court – well this issue in this particular case the way that negotiation occurred was affected by the Pascoes' view about who they were entitled to negotiate with.

20 **ELLEN FRANCE J:**

I understand that. I'm just trying to understand conceptually how you see all of this working.

MS GEPP KC:

And whether the blow-by-blow of the negotiation process was if it's acceptable for the Minister to use, or the Minister's delegate, to use TPG to do the negotiation and a person says: "I object to the taking. I object to the Environment Court because TPG didn't go back to the Minister and get instructions on this point that I raised" the answer would surely be: "Well they didn't need to because TPG was the entity appointed to negotiate with you by

25

the Minister.” So the question that is before you would directly influence how the Environment Court would find – whether the Environment Court would find that to be good faith or not if that was the issue.

ELLEN FRANCE J:

5 I'm not sure I understand the distinction you're making.

WINKELMANN CJ:

Justice France is saying to you, if this contractor is doing it in good faith so what because if – and if they're not, then it can be taken to the Environment Court and corrected on the challenge process there. So the ultimate – the protection,
10 you don't need the protection of a public official doing it, you've got the protection of the challenge process.

MS GEPP KC:

And that may be the, in terms of policy and in terms of what the law could say, then that may be an option that the law could say: “You don't need to negotiate
15 with the Minister because you have the option to challenge the actual substance of the negotiation and that's your place to go.” But what the law does say is that the Minister has to negotiate in good faith, and if the question is what we're looking at, is the question of can you give – can the Minister negotiate in good faith by giving somebody authority to settle within parameters and then
20 checking that that has been done, I can't separate out those two concepts because you would be – if that was acceptable then that would be in good faith.

ELLEN FRANCE J:

Well what do you see as the mischief you're trying to guard against in terms of focusing on who the delegate is, assuming that they are a delegate – I'll put it
25 this way, on the idea that it is a delegation, what's the mischief you're trying to guard against?

MS GEPP KC:

Having a non-public sector entity exercise a Crown function without the safeguards of the Public Sector Act that apply to formal delegations outside

the public sector which are around avoiding conflicts of interest and other – the applicability of the Ombudsmen Act 1975, the applicability of the Official Information Act 1982. There are a whole raft of additional considerations that would occur if this was a formal delegation and you are – so

5 you're taking – that's one aspect of it is you're giving a function or a task to a person who doesn't, isn't subject to those normal safeguards because there has been no formal delegation, but coming back it's the concept that the Minister, and if I can draw on the *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 decision, which talks about

10 when you have given a broad decision-making power to a specialist entity, it's anticipated that they would bring a wide range of public policy considerations into their decision. This task has been given to the Minister because you're anticipating that a Minister of the Crown, or their delegate, is going to consider all of the things that we would expect a Minister of the Crown or their delegate

15 to take into account in a negotiation, not what we would expect a commercial entity that's appointed to take into account in their negotiation. So to have that commercial company exercising the discretions that need to be made all along the way of the negotiation, rather than a publicly appointed Minister or their delegate, is the bigger picture issue of the mischief.

20 **KÓS J:**

But all those protections in relation to the Ombudsman, the OIA Act and so forth, conflicts of interest apply to the decision-maker –

MS GEPP KC:

Yes.

25 **KÓS J:**

– the Minister or LINZ and must –

MS GEPP KC:

At the section 23 stage.

KÓS J:

Correct. Well, yes, but there must be the capacity to apply those also to the section 18 stage to their agent. I mean the agent can't immunise them from that challenge.

5 **MS GEPP KC:**

Well they're not an agent. They're expressly not an agent.

KÓS J:

Well they've been described in a number of different ways. Agent for limited purposes I think is how Ms Roff put them.

10 **MS GEPP KC:**

Whether the Official Information Act could reach through the Minister and into the private entities that have been appointed by the Minister I –

KÓS J:

Well to act for the Minister. I can't see how the Minister could exclude the OIA's
15 application when it's his function that's being conducted.

MS GEPP KC:

I don't know the answer to that, Sir. It's got to be information held by the Minister and you would have to consider whether the agent held the information but it's perhaps not a key point for my –

20 **WINKELMANN CJ:**

But your fundamental submission is that having a public actor undertaking negotiations is in itself protective and it is an additional protection in terms of the statutory scheme to the Environment Court's challenge which, of course, not many people will ever take a matter to the Environment Court. So you're
25 saying the procedural protection of having a negotiation conducted by a public actor who's bound by the public law protections et cetera is in itself part of the statutory scheme?

MS GEPP KC:

Correct, yes, and the Environment Court's enquiry, of course, is only if you reach the compulsory acquisition stage. So if you – the Environment Court is not enquiring into what, if you will, to reach agreement grudgingly, the
 5 Environment Court is not enquiring into the good faith of that agreement, it's only enquiring if you don't reach agreement and the compulsory taking occurs.

KÓS J:

But the Environment Court is absolutely there for people like, I mean, the very things we heard Mr Pascoe say this morning. That's exactly what the
 10 Environment Court is for.

MS GEPP KC:

Yes.

KÓS J:

It's to deal with people who are fundamentally opposed to the taking of land
 15 that's deeply important to them.

MS GEPP KC:

Yes. But it's a different issue to the question of the negotiator and who – and what set of values and discretions they are bringing to their negotiation.

KÓS J:

20 One problem with this case is it's not a very good test case in some respects for what could or should have happened. If the Pascoes had negotiated but had, for instance, said: "This point is so fundamental we require you to go and get your principal, the LINZ official delegated, to express a view on it," then you might have had that to-and-froing but you never had it in this case because of
 25 the tack they took.

MS GEPP KC:

Not through TPG but they did write directly to LINZ and say: "We would like to put these propositions to you" and LINZ said: "We are not negotiating with you." So it did happen, that did happen –

5 **KÓS J:**

In that way. Right.

MS GEPP KC:

– but in a slightly different way.

MILLER J:

10 One thing is notably missing in this case and it's the absence of any complaint really about the previous process because one can understand that where the Minister delegates the functions say to the Chief Executive of LINZ but says, "You must operate within certain parameters", you would say there's nothing wrong with that.

15 **MS GEPP KC:**

Yes.

MILLER J:

Right. One basis on which the Pascoes might have said this was never going to be a good faith negotiation is because of their previous experience where
20 they did negotiate. They might have said it was clear that LINZ was never going to curtail their demand for land, the amount that was required, or the location of the road through their property, or that it was never prepared to pay the right price, but there's no complaint of that nature. So we're left with a kind of a vacuum really in terms of there being any breach by the Crown.

25 1210

MS GEPP KC:

Of what the substance of the issue is.

MILLER J:

Of what the substance of it was, yes.

MS GEPP KC:

I think that it is fair to say that they do say that the position that was being taken
 5 by the negotiator was entirely being driven by NZTA, by NZTA's timeframes, by
 NZTA's desires for how it wanted to progress things, and they did start to speak
 about some of those things this morning.

MILLER J:

Well that comes down to a complaint about the delegation in the end, doesn't
 10 it?

MS GEPP KC:

Well it becomes hypothetical to know whether they would have had a different
 hearing if they'd heard from, been able to negotiate with LINZ. But they felt that
 it was NZTA's objectives very much driving this, and that there were other
 15 objectives that weren't being factored in in the same way, from their
 perspective.

I think if I can just, I'm just conscious of time, I'd like to make just a few other
 points, and hand over to Ms Wright to make a couple of points as well. In terms
 20 of the, my friends have submitted that there was a lacuna left in the statute
 when the – through the legislative history the Act was amended to remove the
 operational functions of the Ministry of Works, and that that left a lacuna. In my
 submission the legislative history doesn't indicate a lacuna, it indicates a
 moving of that function from the Ministry of Works to the Minister, and so if I
 25 could perhaps just give some references to those. You have the Public Works
 as originally enacted in A9 of the appellant's bundle and then the, at section 16
 the Minister was empowered to acquire any land for a government work and for
 essential works was required to make every endeavour to negotiate in good
 faith under section 18, and the Minister could delegate their functions and
 30 powers to the Commissioner, but not the function to direct the Ministry to

undertake negotiations for land acquisitions. So the Minister had to decide whether to direct the Ministry to undertake negotiations, that was section 14.

5 Then when the Public Works Act was amended in 1987 the Ministry's acquisition function and the negotiation function related to government subsidised works were both deleted, and the Minister's functions were amended to instead expressly provide for the power to acquire land in 7(2)(g). There was no equivalent function relating to directing the Ministry, or anyone
10 else, to undertake negotiations, but the Minister's delegation powers were amended and at that stage the Minister was prevented from delegating both a section 18(1) and a section 23(1) notice, and in the same legislative amendment the obligation to negotiate in good faith, which had originally applied only to essential works, was extended to apply to all public works.

15 So it was at that point that the allocation of the negotiation function to the Minister, rather than to the Ministry, began. Then that separation and that specific allocation of responsibilities continued in the Public Works Amendment Act 1988, which we have in five of the bundle. So rather than, as Mr Harris says, he says that the Department of Survey and Land Information was
20 established by Cabinet, and Order in Council, and that the department was established to replace the Ministry as the agency responsible for acquiring land under the Public Works Act, but the department didn't have that function. That had already been taken away from the Ministry and allocated to the Minister in that earlier amendment.

25 So those exclusively acquisition focused functions which had previously existed for the Minister of Works, were allocated to the Minister of Lands, and that's in section 4A. So in my submission it's, rather than a lacuna being left, there is the express move of that power to, and its allocation, to the Minister.

30 My friends also say that this is just like section 186 of the Resource Management Act 1991, which fills the lacuna for requiring authorities to be able to trigger a Public Works Act acquisition. In my submission the very clear

distinction is that section 186 is a statutory power, whereas there is no statutory power to allocate the negotiation function to somebody other than the Minister.

5 This was, I won't go to the *Dromgool v Minister for Land Information* [2022] NZSC 157, [2022] 1 NZLR 716 decision, but I just note again at paragraph 123 of that decision it's highlighted that the Minister exercises the acquisition power no matter which Ministry requires the land, and that part of the statutory scheme is important because it illustrates the part of the personal nature of that function is that if it was something that any Ministry, or any Minister could do, why not
10 just have the requiring authorities and other Crown entities doing their own acquiring. Why is that acquisition sitting with the Minister. It's because it's intended that that Minister of Lands brings their statutory objectives to the table when they are deciding whether to acquire and negotiating to acquire.

KÓS J:

15 Well doesn't that make a practical point though. Plainly if that's the case it's always going to be a LINZ delegate. The idea that the Minister is going to sit down and engage in negotiations all over the country for all Crown agencies is absurd.

MS GEPP KC:

20 Yes.

KÓS J:

And you're not suggesting it.

MS GEPP KC:

No.

25 **KÓS J:**

So we're immediately one stage removed, aren't we? So there's always going to be an agent of some sort, a delegate of some sort?

MS GEPP KC:

But within LINZ and within the functions of LINZ and the Minister, yes.

KÓS J:

So we go back then I guess to the question, Justice France's question, what's
5 the mischief when we're already removed one stage from the Minister, what's
the mischief of a second removal?

MS GEPP KC:

The fact that there is no statutory objective for TPG as a commercial entity to
be acting as the Crown. It is employed as – it is a commercial entity exercising
10 a function without a delegation, and that makes it bring different values and
objects to the table, compared to a delegate of the Minister.

I'm going to just skip to the final part of my section, which is about the NZTA
and LINZ, the additional element of this that is brought in by the Acquisition
15 Services Agreement, and acknowledging that the Court will decide whether to
admit that document. I accept my friend's submission that whether the
accredited supplier scheme, well they have said that whether the accredited
supplier scheme is sufficient to meet the respondent's obligations under
section 18(1)(d) has never been part of this proceeding, and is not an issue
20 before the Court. I disagree with that submission. The extent of control
exercised by the Minister through the accredited supplier scheme is part of why
the Courts below have found this section 18(1)(d) power to be sufficiently still
within the Crown's domain, and therefore being lawfully exercised. So that must
be a relevant matter for, that must be part of the question that is before you.

25

The accredited supplier scheme is the relationship between LINZ and
The Property Group, but then the Acquisition Services Agreement is the
contract between NZTA and The Property Group, and the essential issue, in
my submission, with TPG being engaged by NZTA, is that NZTA is not subject
30 to the same good faith negotiation requirement that LINZ and the Minister are.
So automatically TPG is being engaged by an entity that is not subject to that
same obligation that the Minister is, and –

WINKELMANN CJ:

So it's NZTA who is engaging The Property Group to do this negotiation?

1220

MS GEPP KC:

5 Yes, yes, and the Acquisition Services Agreement is the contract and that's the document that hasn't been before the Courts below. So the Court of Appeal at least understood it to exist but didn't have a copy of it and so that seemed to me to be a missing piece of the puzzle that I have sought to put before you.

10 So if we could just go, Ms Wright, if we can just go to page 842 of the bundle and clause 1.2.11. So just noting that this provides that the interpretation of this agreement, the contract between Waka Kotahi, NZTA and The Property Group: "It is the intention of the parties that this Agreement shall be interpreted in a manner that best furthers Waka Kotahi's property requirements..."

15

And then moving down to clause 2.2.1 on 0845 so here these are – this is NZTA's "Property Purpose and Principles" why we do what we do, and scrolling down to the bottom of that page is, I'll just note this table and there is the value for money, there is an express linking of work allocation and fees. So work allocation to The Property Group and fees of The Property Group is expressly linked to achieving NZTA's value for money objective which is a statutory objective for NZTA to achieve and that's in the second column or second box under the heading "Value for Money" and the fourth point there.

20

WINKELMANN CJ:

25 So it could be said against you well value for money is not inconsistent with fair and reasonable because if it's fair value then that's fair and reasonable.

MS GEPP KC:

NZTA's value for money objective, I submit, is different to what the Minister needs to achieve in the Minister's obligations under the Public Works Act.

30 The Minister is under an obligation generally to ensure that the Crown's resources are managed effectively and efficiently but that is a different concept

to the value for money concept that NZTA is seeking to achieve and it's seen further down when this is seen across all of the portfolios. So it's not just about how does this work in the concept of one landowner and one transaction. It's how does NZTA achieve its task of building its projects within the national and transport fund bucket of funding. So, further down at 0883 clause 1(f)(i) –

WINKELMANN CJ:

So, for instance, if you could get this property cheap then you might be able to spend more money on your preparation for the underpinning of the road or something like that, or another road?

10 MS GEPP KC:

Or another road in the South Island. So that was 0883 when you're ready. So this is the “Appendix 1 Objectives and Obligations” specific to a given property discipline and dealing with property requirements clause 1(f)(i) Waka Kotahi’s property requirements. Again value for money: “Value for money will be obtained...by ensuring acquisition...is undertaken promptly and

15 money will be obtained...by ensuring acquisition...is undertaken promptly and to programme” is probably the main one. Some of the others relate more to the fees and so on of The Property Group.

And then page 0889 please, this is appendix 2, “Property Acquisition Strategy”.

20 The Pascoes mentioned a Property Acquisition Strategy this morning. The goal of the Property Acquisition Strategy is to enable Waka Kotahi to achieve its outcomes. And at clause 4(c)(i) so just a little further down: “In contributing to the draft Property Acquisition Strategy the consultant” so that’s The Property Group “will have regard to the purpose of the agreement and will consider the

25 following items” and (ii) is: “the nature and consequences of known risks for strategically significant properties including an outline of the recommended negotiation tactics to acquire the same.”

I just note there is a lot more going on here in terms of what is being factored

30 into The Property Group’s negotiation and this information doesn’t go to the Minister or the Minister’s delegate when they are making, deciding whether to approve the property. So TPG can have a negotiation tactic in mind, LINZ

doesn't get to see that and approve that that's appropriate, so I submit that this demonstrates that something has gone wrong in this process even if it is acceptable for The Property Group to be the one doing the negotiation.

WINKELMANN CJ:

- 5 Do we know they don't get to see it, generally know that there was – we don't?

MS GEPP KC:

We know – well we know that, we've seen the report that went to, that The Property Group provided to LINZ and that report doesn't have a section on the Property Acquisition Strategy and the negotiation tactics in it.

- 10 **KÓS J:**

But isn't Waka Kotahi just the project manager as it were? I mean if you're compulsorily acquiring land, the Crown is always going to be thinking about the project, the project as a whole, and you know when it was Ministry of Works, you would have been thinking about the Ministry of Works' budget.

- 15 **MS GEPP KC:**

Yes.

KÓS J:

- And now it's a Crown entity Waka Kotahi, you're going to be considering their budget. You can't simply shear off LINZ and say they have some completely
20 separate fiscal function. It must be related to the project surely.

MS GEPP KC:

- Yes, yes, absolutely but this is not just LINZ running the process and considering NZTA's objectives and budget. This is NZTA running the project through its process and through its Acquisition Services Agreement and its
25 contractor and LINZ simply reviewing a report on how that all played out or how – but not all of it because they don't have that negotiation tactics element. So LINZ factoring in the objectives of its Crown partnering entity that seeks to do the project is absolutely unobjectionable but that other entity which doesn't

have the power to acquire land essentially running the project through or through the acquisition process through its contractor and this agreement is not what's provided for in the Act.

MILLER J:

- 5 I can understand your complaint about who does it but I must say reading this document I struggle to see the misalignment between it as a whole and the Minister's obligation to negotiate, use best endeavours to negotiate in good faith and so on because timeliness of the outcome is one of the KPIs, isn't it?

MS GEPP KC:

- 10 Yes.

MILLER J:

And managing risk, so avoiding court proceedings for instance, might be one of the things that was important for them. In other words, it's important for them to get an agreement, is it not?

- 15 **MS GEPP KC:**

Yes.

MILLER J:

- And there's nothing in this to suggest that they're required to not disclose relevant information or that it's permissible to not discuss relevant information
20 to the owner of the land.

MS GEPP KC:

No, no, there's not. No, there's nothing that would expressly say "do not act in accordance with the good faith obligation that sits in the Act." No, there's not.

WINKELMANN CJ:

- 25 And in the accreditation is there any obligation on The Property Group which would make, require them to disclose any information that's relevant to the Minister so should they have other obligations?

MS GEPP KC:

They would need to themselves act in good faith. So yes the accreditation sits alongside this. It's the extent to which, and if we could just go down, the last point I'd go to is 0897 and this is very much focused on, so the first box, on the

5 left "properties acquired on time, optimised whole of life costs." There's a whole, there's very much a focus on NZTA's whole programme and year-to-date variation so that under the heading: "Target Measure. YTD *variation* to be +/- 10% of Baseline...100% of properties available to project when required" and so on and then there is a: "Supplier consequence" of "work

10 allocation, future contracts, portfolio scope, and renewals at risk" if all of that is not achieved. So there is – all of this comes with using an external contractor to undertake a negotiation function that is by statute applied, given to the Minister. It maybe that TPG can do all of that, and do that in a way that is consistent with the Minister's good faith obligations, but there is a lot in that that

15 appears to create tensions with the Minister's objectives.

1230

WINKELMANN CJ:

You're saying it introduces private profit into the equation for The Property Group.

20 **MS GEPP KC:**

Yes.

WINKELMANN CJ:

Because they, in a kind of a broad brush way, they've got incentives recorded here, and KPIs, and this is part of it.

25 **MS GEPP KC:**

Yes.

GLAZEBROOK J:

But that would apply even if there was a delegation to NZTA itself, wouldn't it?

MS GEPP KC:

There couldn't be a –

GLAZEBROOK J:

So it's nothing to do with...

5 **MS GEPP KC:**

There's no power to delegate this to NZTA.

GLAZEBROOK J:

Well, no, to a particular official within the NZTA.

MS GEPP KC:

10 Within LINZ?

GLAZEBROOK J:

It has to be LINZ?

MS GEPP KC:

It has to be LINZ.

15 **GLAZEBROOK J:**

Is that the argument?

MS GEPP KC:

There's no power for NZTA to undertake the negotiation or to do the acquiring.
That could only be delegated to an official within LINZ.

20 **KÓS J:**

But they would have to operate with reference to the project, interest of the project. Isn't this simply...

MS GEPP KC:

The LINZ official would.

KÓS J:

Yes.

MS GEPP KC:

Yes.

5 **GLAZEBROOK J:**

I thought you did accept that there could be ongoing delegation, but it would have to be in accordance with the Public Sector Act provisions. Do you say there just can't be any further delegation?

MS GEPP KC:

10 Delegation to NZTA to do the acquisition using the public sector –

GLAZEBROOK J:

Well it would be to a particular official presumably.

MS GEPP KC:

Delegation to an official of NZTA?

15 **GLAZEBROOK J:**

I don't know. I had understood your argument to say, at least in the second, that they'd have to have been an official delegation, taking into account the Public Sector Act requirements if it was going to an external third party, which assumes that you could delegate to an external third party. If that's not the

20 argument, that's fine, I just –

MS GEPP KC:

No, I actually, I hadn't turned my mind to the concept of it being delegated to somebody at NZTA. That's just not a scenario that I had considered. It has been, there's no question it can be delegated within LINZ –

GLAZEBROOK J:

No, no I understand that. I had understood that you had accepted there could be a further delegation on to a third party, maybe not even associated to NZTA, but...

5 **MS GEPP KC:**

Yes, so The Property Group, there could be a delegation to The Property Group in accordance with the Public Sector Act.

GLAZEBROOK J:

All right. That's what I'd understood you to say.

10 **WINKELMANN CJ:**

But your simple point is that the arrangements for the NZTA and The Property Group, which are so far as we know undisclosed, create competing interests for The Property Group which are personal to them, which they would not have if they are an employee of LINZ.

15 **MS GEPP KC:**

Yes, that is my point, and that's exactly, if they were an employee of LINZ, and an officer of LINZ, that would not arise, but also they are also trying to achieve NZTA's whole project objectives, not just considering this particular project, and this particular acquisition, and I submit that that is an important distinction,
20 because they're being, they're considering here how they can make this, they're bringing in essentially those considerations relating to other projects, and the whole project, the whole budget for the Land Transport Fund, rather than simply the negotiation with this property owner.

WINKELMANN CJ:

25 So that whole project objective includes other roading projects.

MS GEPP KC:

Yes. The baseline concepts that's in the target measure and so on is about the yearly project, the yearly, what NZTA is trying to do across to the course of a year, not just a project.

5 **WINKELMANN CJ:**

Right.

MS GEPP KC:

So I think that's probably a document that I would...

WINKELMANN CJ:

10 Invite us to read.

MS GEPP KC:

Invite you to read, thank you, and I note that it's 12.30.

WINKELMANN CJ:

So we need to have your junior now, don't we.

15 **MS GEPP KC:**

Thank you, and I'm happy. On my last point about the notice of intention to support the decision on other grounds, I'll just rely on my written submissions on that point unless the Court has any questions.

KÓS J:

20 Precisely what is Ms Wright addressing us on? It's never been clear what that is.

MS GEPP KC:

It's the top of page 3 of my oral outline, Ms Wright was going to address you on the cases cited by the respondent, the other good faith requirements in the
25 Marine and Coastal Area (Takutai Moana) Act 2011 and Resource Management Act concept, and then the other jurisdictions. So it maybe that you just want, you may have questions, or otherwise she can briefly...

WINKELMANN CJ:

Ms Wright, if you aim for about, no more than 15 minutes.

MS WRIGHT:

Your Honour, I think I can probably be shorter than that.

5 **WINKELMANN CJ:**

That will be excellent then, Ms Wright.

MS WRIGHT:

Kia ora your Honours. As Ms Gepp has said, I'll address you briefly on three points. The first of those is in relation to the case law relied on by the
 10 respondent at paragraph 53 of the written submissions. The respondent has referred to five judgments in that paragraph which they say is analogous to the circumstances in this case.

The respondent has not delved into those judgments in its submissions, and in
 15 my submission when one does it becomes apparent that they are not analogous to the circumstances before the Court in this case.

WINKELMANN CJ:

So they're distinguishable.

MS WRIGHT:

20 They are, indeed, distinguishable your Honour, and I don't propose, in particular with the time constraints applying, to go through each of those decisions. One can think about them essentially in two groups. So the first group would be *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022]
 2 NZLR 356, and that it's. The respondent's bundle at 9, just for the record.
 25 *R v Thompson* [1990] 2 NZLR 16 (CA), the respondent's bundle at 21, and then *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358.

Those judgments are distinguishable on the basis that they involved only the exercise of a single statutory power, and the collation of evidence, or information to inform the exercise of that statutory power, in contrast to the situation before the Court here, where you're dealing with an express statutory duty sitting in between the exercise of two powers.

What I'd allocated into the second group of the other two judgments, which are *McInnes v Minister of Transport* HC Wellington CP240/99, 3 July 2000, and that's in the respondent's bundle at 16, and then the judgment in *R (on the application of Reckless) v Kent Police Authority* [2010] EWCA Civ 1277, which is in the respondent's bundle at 31. Those both did relate to the exercise of statutory function ahead of a statutory power of decision, but they're distinguishable for two different reasons. The first in *McInnes* you're dealing with a statutory function of consultation, and that is a different statutory function, and there are numerous judgments in the bundle, for example, the *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) decision, *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 touches on it, that distinguishes the concept of consultation from that of negotiation, which is an issue before the Court.

20

The *Reckless* decision is one that's a little bit more complex, but ultimately what the Court was dealing with there was a statutory process at issue that was being undertaken by the body with that express statutory responsibility, and it was about whether they had gone beyond the extent of their power, not whether somebody else could step into the shoes of the entity that had been given the role of that statutory responsibility.

25

WINKELMANN CJ:

So does *McInnes* deal with the distinguishing between consultation and negotiation, or do you refer us to cases that distinguish that?

30 **MS WRIGHT:**

McInnes itself does not, it just explains what consultation is, and links that to the information gathering exercise. The *Wellington Airport* decision, which is in

the bundle of authorities for counsel assisting, that is where there is a discussion about how consultation and negotiation are different things.

5 So in my submission these decisions don't actually point you in the direction of legislation that deals with an equivalent statutory duty to the one before the Court, and in fact the only analogous duty that Ms Gepp and I have been able to identify in the New Zealand statutes is in the Marine and Coastal Area (Takutai Moana) Act, and this brings me onto the second point I'll briefly address you on, and that is again a duty that's attributed to the Minister of Land
10 Information, as in this case, and in that case where the Minister receives an application for a deemed accommodated activity, which would detract from the rights afforded to a customary marine title group. The Minister must negotiate in good faith with that group in an attempt to compensate for the waiver of those rights.

15 1240

KÓS J:

What section is that?

MS WRIGHT:

And that is in Schedule 2 clause 6(c). What I want to highlight is that this
20 underscores the uniqueness of this obligation and, in particular, the importance of the matters to which this obligation on the Minister to negotiate in good faith applies.

WINKELMANN CJ:

What underscores it? The rarity?

25 **MS WRIGHT:**

The rarity and, in particular, the specific matters to which it applies. So we have it on one hand in the case before you applying to government taking of private land for a public use, and under the MACA Act we have it applying to government taking of a customary right that has been established through a
30 complex process, again for a public good. We say this was an indicator of

Parliament's intent (a) that the negotiation, the requirement to negotiate in good faith is itself a separate statutory duty that needs to be exercised independent from the agreement or the acquisition power, as Ms Gepp has explained, and it also underscores, to use your Honour's words, the importance of the conversation as part of that negotiation. And I won't repeat Ms Gepp's submissions on what we say are the characteristics of negotiation.

Moving to the third point, at paragraph 61 to 65 of the written submissions for counsel assisting, there's also a brief analysis of statutory frameworks for agreeing compensation prior to compulsory acquisition in other Commonwealth jurisdictions and we look at this for similar reasons that we looked at other New Zealand statutes. It was essentially an exercise to try and aid understanding of Parliament's intent when it decided to allocate the negotiation function to the Minister in the text of section 18 and that was particularly in light of the legislative history that Ms Gepp took you to just before.

I also note that the respondent has referred to a number of international statutes in their written submissions and that's at paragraph 24 and those particular statutes aren't before the Court. We're happy to provide those in PDF form should your Honours decide you would like them also.

In my submission those statutes also indicate an intent that the duty to negotiate is of a character that is intended to have personal involvement by the Minister and that is actually as a result of the differences between those statutes and this statute and, again, I'll put those into two groups. The first are two of the Australian statutes, the New South Wales and the South Australian statute, and also the United Kingdom statute. They all provide for acquiring authorities to be able to undertake the process of acquisition and negotiation going alongside acquisition. Where, in contrast, in New Zealand, the legislative changes Ms Gepp has just taken you through show that that expressability was removed and instead acquisition was put squarely with the Minister.

The other grouping is in relation to expressly providing for someone else to undertake the negotiations and this is provided for in the Canadian statute

which is in the bundles, the Expropriation Act 1985, and in that statute the Minister, or the person who is having their land acquired, have the ability to decide to appoint a negotiator. So there, there is an expressed statute ability to bring someone in like TPG and have them play that role and have them report
5 back and, in our submission, these contrary examples to what we have, highlight what one might expect our statute to show if it was intended to provide for the process that has been adopted.

WINKELMANN CJ:

That's excellent, thank you. A model of brevity.

10 **MS WRIGHT:**

Unless there are any other questions from the Court I'll just refer you back, without speaking to it, to paragraph 4 of the written submissions, and that provides the summary for counsel assisting on the questions that were asked to be addressed.

15 **WINKELMANN CJ:**

Thank you.

MS WRIGHT:

Thank you.

WINKELMANN CJ:

20 So Mr Pascoe and Ms Gibbs, did you have any legal matters you wish to add to those submissions?

MS GIBBS:

Yes, your Honour.

WINKELMANN CJ:

25 We'll need to keep them quite brief.

MS GIBBS:

Okay. I just wanted to address a couple of things that come up about whether TPG is an agent. At tab 59 is the "Procedures for Becoming a LINZ Crown Property Accredited Supplier" and that says LINZ confirm that: "The accredited
 5 supplier...is not permitted to hold itself out to any third party that it is entitled to exercise any statutory function" and that: "The accredited supplier is not an agent or employee of LINZ" and that: "LINZ does not accept any responsibility for work undertaken by accredited suppliers." So they are expressly not an agent of LINZ or the Crown.

10

I haven't got the reference but the transcript to the LINZ hui in April 2021, when Mr Sheppard and Mr Knowles and Mr Williams came, they confirmed that the accredited suppliers have no basis in statute or regulations, and that LINZ expressly prohibit LINZ from, sorry, prohibit TPG from exercising any statutory
 15 functions.

At the affidavit of Craig Harris affirmed on the 8th of July 2022 at paragraph 10 it states that: "LINZ does not engage accredited suppliers to undertake Crown property work related to land acquisition."

20

I just also wanted to take you to the tab 64 and it's the landowner rights booklet May 2017 and that was what was given to Tony and Debbie and at page, in the common bundle 301.0409, LINZ have laid out organisations who can use the Public Works Act and it states: "In the 1980s and 1990s many of the activities
 25 previously carried out by the Crown...became the responsibility of statutory organisations such as state-owned enterprises ... other Crown entities ... These organisations are neither government departments nor local authorities, and do not have the power to compulsorily acquire land in the same way as the Crown or local authorities. They must therefore buy land on the open market.
 30 The exception is any network utility operator which the Minister for the Environment, through a notice in the Gazette, has classified as a 'requiring authority' under the Resource Management Act." So this is the information that LINZ provided to Tony and Debbie in 2017.

Over the page on page 301.0412 there's a section called "Compulsory acquisition" and it says: "This power will be exercised only after an acquiring authority ..." which is not a statutory term as Ms Gepp pointed out, "This power will be exercised only after an acquiring authority (through an accredited supplier) has made all reasonable endeavours to negotiate in good faith the sale and purchase of your land, without reaching an agreement." So that demonstrates that the test LINZ are applying when they tell the Minister that section 18(1)(d) is being satisfied, they are only, their test is whether NZTA has made reasonable endeavours, not every endeavour, and in our submission they're very different things.

1250

There is a question that came up about whether NZTA could receive a delegation. If you go to tab – if we start off with tab 54. So in 1997 Ernst & Young carried out an independent review of LINZ property systems. So tab 54, page 301.0184.

WINKELMANN CJ:

What year is this?

MS GIBBS:

1997. So this was when they were sort of implementing or considering this accreditation, accredited supplier scheme et cetera. So at (a) there on the screen: "It is recommended that" so Ernst & Young recommended that, "the core business definition be reviewed with the view to shifting the acquisition and disposal of surplus Crown land from LINZ to client government owned organisations."

So if you go to tab 56, hang on, tab 55, and page 301.0190, Ernst & Young advised Cabinet on the legislative implications, which was: "Legislative amendment will be required to change the assignment of statutory responsibilities currently residing with the Chief Executive, LINZ, to the chief executive of any government owned agency for acquisition and disposal of their land. This will require priority and a suitable legislative vehicle."

Then down the bottom of that page they're asking I think Cabinet to agree in principle to restructuring the LINZ property systems based on the following principles: "i. Outsourcing of non-core functions relating to property acquisition, management and disposal to accredited agents." Number 2 at the bottom of that page: "From 1 July 1998, acquisition and disposal of surplus crown land on behalf of other government-owned agencies should no longer constitute a core function of Land Information New Zealand and be transferred to those organisations."

However, there has never been a delegation to NZTA, whether it can be done, or whether it can't be done, it hasn't been done. So that responsibility still sits with the Minister of Lands.

We just handed up a, we've got some submissions in reply, and attached to the back of that –

WINKELMANN CJ:

Well you've got nothing to reply to at the moment because we haven't heard of the respondent. Or are you doing it in advance of the respondent?

MS GIBBS:

Yes Ms Gepp, and we won't read them all out, but I just wanted to highlight the key points, but attached to that Ms Gepp rightfully pointed out that the Public Works Act has conferred powers on the Minister of Lands. The respondent is not the Minister of Lands. The respondent is the Minister for Land Information, and the meaning of the word "land" and the meaning of the words "land information" are very different. The Public Works Act is what confers powers on the Minister of Lands to acquire lands. At the back of the submissions in reply there's the Ministerial warrants for the Minister for Land Information and since 2009, so they cover the period that relate to the delegations in the common bundle. The first delegation from the Minister of Lands to the Chief Executive is 2009, and then there's some other delegations in the common bundle as well. So these warrants cover that whole period. So these warrants show warrants

provided to, for example, the Honourable Eugenie Meryl Sage appointing Minister Sage as the Minister for Land Information. It doesn't say anything in these warrants about the powers of the Minister of Lands. It doesn't mention the Minister of Lands, and it doesn't confer any ability on the Minister for Land
5 Information to exercise the powers of the Minister of Lands.

WINKELMANN CJ:

But that's not part of the appeal that we're considering, the proper designation of the Minister et cetera. So you just need to keep some focus on the issues.

MS GIBBS:

10 So I think they're relevant to the delegations. So the delegations that Ms Gepp showed, or referred to before when they're delegating to those –

WINKELMANN CJ:

You're saying the delegations themselves are improper, are you, because it's the wrong Minister –

15 **MS GIBBS:**

Well we're just saying we thought we needed to bring that to the Court's attention and you may deem it to be relevant to your considerations your Honour.

WINKELMANN CJ:

20 I understand your point.

MS GIBBS:

Of who has to do section 18(1)(d) your Honour.

WINKELMANN CJ:

Yes.

MS GIBBS:

So the points we want to respond to, there's eight points in our submissions in reply. The first point is that the submissions for the Minister did not state the public –

5 **WINKELMANN CJ:**

So we haven't heard yet from the Minister so your submissions in reply you do after. We hear from the respondents, because it would help you, otherwise you're going to have to do it again, because they might say other things in submissions. So if this is your reply to the Minister, you'll have a chance to
10 reply after the respondents have spoken. So this is the order.

MS GIBBS:

Okay.

WINKELMANN CJ:

So I think you've covered the additional legal point you wanted to make, which
15 was that the delegations themselves referred to are wrong.

MS GIBBS:

I've got a couple of other points. One thing I just wanted to say, when the Public Works Bill was enacted in 1981, Hansard records Mr Schultz, a member of the National Government, stating: "In effect the Bill retains the philosophy of
20 a greater consideration of the rights of property owners. Although most local authorities in some government departments sought relaxation, the Bill does not give it." So there was the intent of Parliament for section 18(1)(d) to be exercised by the Minister, and obviously he can delegate that so.

25 I just wanted, we'll do those after. I just wanted to take you to the authority, which is number A34 in our bundle of authorities. It's "Compulsory acquisition of land and compensation" from the United Nations, and on page 39 the human rights provisions provide that: "People whose families have been farmers, herders or gathers for generations may have little ability to do otherwise.
30 Resettlement may be the only way for them to maintain their livelihoods."

1300

So with regard to the compensation that is being negotiated during the section 18(1)(d) negotiations, the Minister's discretion is not just about, well, you know, will he offer another 10% on the valuation. His considerations, for example, are about what type of compensation he's prepared to offer or negotiate. Does the landowner need reinstatement? Do they need a land exchange? Do they need a replacement home? Those sorts of things are the discretions which the Minister's delegate needs to exercise and I think this is the right test case to hear this case because there has been two section 18 processes.

Like I know, I realise that the judicial review is for the second, you know, for the first section 23 notice that applied to the second section 18 notice but it's important and relevant, your Honours, to bear in mind that Mr and Mrs Pascoe did go through a full section 18 process in 2018 and it's also important to remember that while Mr and Mrs Pascoe are fundamentally opposed to the option they've taken for this project, they're not fundamentally opposed to the project itself, only the option that was taken, and they have always also been realistic about the option, you know, once that first section 18 notice was served, and even the second one. They're not refusing to negotiate. They're not refusing to engage. They've been co-operative right from the start and they engaged with TPG who were under NZTA's direction since 2016 and by 2020, it's important to bear in mind, that NZTA had forbidden TPG to negotiate a replacement home in return for the land required. NZTA had forbidden TPG to negotiate a land exchange. So by the time the second section 18 notice was served, one of the reasons Mr and Mrs Pascoe asked the Minister's delegate to negotiate with them was because that was the only way they were going to get offered a home, a replacement home –

WINKELMANN CJ:

You say that's the only way they thought they could get around this roadblock, no pun intended, that NZTA was creating with the negotiation with these rules?

MS GIBBS:

And TPG did not have a choice. So TPG don't make decisions about that they're not going to be offered a home for the land requirement. Those decisions are made by NZTA and we're saying that those decisions are

5 the exercise of an unlawful delegation by NZTA and it would be wrong to say that Tony and Debbie refused to negotiate with the Minister because they did the opposite. In terms of that –

WINKELMANN CJ:

So it's lunchtime. Do you have much more to say Ms Gibbs because I think

10 you've covered your main point and that last point is an important one. The Crown will have to respond to that.

MS GIBBS:

I just wanted to make one more point if that's okay.

WINKELMANN CJ:

15 Yes.

MS GIBBS:

We think that the Minister's obligation to make every endeavour to negotiate required him to address the concerns that Mr and Mrs Pascoe brought to him. The respondent has said the question of delegations has never arisen before.

20 It arose in 2020. Mr and Mrs Pascoe raised it. It was a valid concern, so valid that your Honours have kindly granted leave to hear it, and we think that under section 18(1)(d) the Minister was obligated to make every endeavour to reach agreement. So what he could have done was apply for a declaration to the Court at that time and get a ruling. He didn't have to make Tony and Debbie

25 go through the whole objection process and judicial review and that sort of thing. We think the Minister's obligations under section 18(1)(d) is to remove any blocks that stand in the way of reaching agreement and if he had applied for a declaration and then thought actually these urgent –

GLAZEBROOK J:

And the declaration would have been what sorry? What declaration?

MS GIBBS:

Whether the Minister's delegate needs to exercise the section 18(1)(d) function
5 himself or whether TPG can do it or NZTA.

GLAZEBROOK J:

That's what I'd assumed you'd said.

WINKELMANN CJ:

Yes, I think I've got your point, Ms Gibbs. I think we've got your point.

10 **MS GIBBS:**

And then if he was in a hurry, Mr Knowles, you know, for this particular acquisition and didn't want to, you know, if that was an issue, then Mr Knowles could have actually come and negotiated. Mr Knowles has given evidence that he knew all about the Mt Messenger project, he was familiar with all the issues,
15 he even admits considering carrying out those negotiations himself and he admits he chose not to and to us that is not making every endeavour to negotiate, your Honours.

WINKELMANN CJ:

Thank you.

20 **MS GIBBS:**

Thank you.

WINKELMANN CJ:

Right, thank you, and then after the lunch break we'll hear from the Crown. Now in terms of timing what do we think about the time the Crown has left.

25 **MS ROFF:**

Well the Court is sitting until 4 o'clock, isn't it, today?

WINKELMANN CJ:

Yes.

MS ROFF:

And we don't have an afternoon adjournment.

5 **WINKELMANN CJ:**

No. So would it assist you if we came back at two although we're now at 1.06.

KÓS J:

Shall we come back at two?

WINKELMANN CJ:

10 We will come back at two. Would that help?

MS ROFF:

Thank you, Ma'am, yes.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.03 PM

15 **WINKELMANN CJ:**

Ms Roff?

MS ROFF:

Tēnā koutou. We've sent through an outline of my oral...

WINKELMANN CJ:

20 We have it.

MS ROFF:

Thank you, excellent. I'm not intending to take your Honours to all of the documents in there. It's been hyperlinked. An electronic copy has come through, so that if you need to access those documents you can.

WINKELMANN CJ:

That's very helpful, thank you.

MS ROFF:

I want to just address at the outset in response to the helpful submissions from
 5 my learned friend counsel assisting where the difference is I think with our
 submissions, and our position is that we don't think there's anything in the
 language or the scheme of the Public Works Act that requires the Minister or
 the delegate to carry out the day-to-day negotiations. And when I say "the
 day-to-day negotiations" I'm talking about the mechanical on the ground
 10 face-to-face with the landowner aspect of what I say is a standalone duty at
 section 18(1)(d).

So I agree with Ms Gepp that section 18(1)(d) is a standalone duty and that
 duty rests with the Minister. There is no disagreement there. And we say there
 15 has been no – that that remains with the Minister, notwithstanding that he has
 relied on support from the accredited supplier to undertake those day-to-day on
 the ground negotiations. So that's it. We're in agreement in that sense at the
 outset just to make that clear.

WINKELMANN CJ:

20 So you're in agreement that it's a standalone duty under section 18(1)(d) and
 that it is the duty of the Minister?

MS ROFF:

Yes, that's right. That it resides with the Minister and we say it remains with the
 Minister even where we have the situation here where we've got he's getting
 25 support to assist him discharge or perform that duty by an accredited supplier.
 So, even though the negotiations are being conducted through an agent of
 sorts, we say there's nothing wrong with that, that relying on assistance and
 help for supporting functions that don't involve any exercise of a statutory power
 or function is absolutely in line with the common law principles on delegation.

GLAZEBROOK J:

Although if you say it's a statutory duty or function, how do you say they can delegate – well they can have support for those day-to-day negotiations when they're actually not conducting them at all, I mean the Minister is not conducting,
 5 the Minister or delegate, actual delegate, is not conducting them themselves?

MS ROFF:

We say that the duty, and that I think focusing on what section 18(1) actually says, it says: “The Minister must make every endeavour to negotiate in good faith with a landowner in an attempt to reach an agreement” and we say that is
 10 a statutory duty which means that the Minister must make sure every endeavour has been made to negotiate in good faith with a landowner. That doesn't require the Minister to personally undertake the operational or supporting aspects of that duty under section 18(1)(d).

KÓS J:

15 So is that –

WINKELMANN CJ:

May I just ask you this? You say it's not a statutory power?

MS ROFF:

It's not a statutory power, no.

20 **WINKELMANN CJ:**

Why is it not a statutory power when it is an obligation to negotiate? So it's a duty to negotiate, fine it's a duty, but it's occurring within the context of the exercise of the statutory decision to take so it's an unusual – it's not just a duty

to negotiate, it's freestanding, it's more powerful than that. There is the background compulsion sitting there.

MS ROFF:

Yes, that's right. This duty or statutory function, if you want to call it that, I'm
 5 not sure that makes a difference to our case, whether it's a statutory duty or a function in terms of –

WINKELMANN CJ:

Or a power.

MS ROFF:

10 – power, the overriding obligation or responsibility under that particular provision. I'm not sure that –

WINKELMANN CJ:

So I'm trying to understand if you are saying there is a distinction between a duty and a power?

15 **MS ROFF:**

No, I don't think so. I don't think it matters what label you give to it but what I'm saying is that our case is that, whether it's a duty or a power or a statutory function, that resides and remains with the Minister and it's for the Minister to discharge that function or perform that function, and we say he does that, he
 20 does that here by (1) providing landowners with the opportunity to negotiate with a qualified person, (2) by establishing and managing the accreditation scheme –

GLAZEBROOK J:

Can you perhaps just slow down because –

25 **MS ROFF:**

Sorry.

GLAZEBROOK J:

So he does that here by providing the landowners?

MS ROFF:

With a qualified person to meet and to negotiate with so that's the operational
 5 side of it, providing someone who is knowledgeable and qualified to conduct
 the negotiations; (2) by establishing the accreditation scheme and managing
 oversight of that process through his delegates and –

GLAZEBROOK J:

Well that's related to the first point so it would only be those people who come
 10 under that accreditation scheme that could be qualified or is it –

MS ROFF:

Yes. No, that's what our case is, yes.

GLAZEBROOK J:

Sorry, I was just going to say I think there's another question on that, so I was
 15 going to say is there another point but...

MS ROFF:

There is. I have actually said at the road map at 6 so that's there. I've probably
 added in there providing a qualified and knowledgeable representative but then
 otherwise it's: "...establishing and administering the accredited supplier
 20 scheme, with its delegate's oversight and thorough review acting as quality
 assurance...".

1410

WINKELMANN CJ:

So that's the difference, that's probably the difference, isn't it, (b) and, well, the
 25 difference would be that Ms Gepp would say that you cannot delegate to
 someone who is outside the public service something which is a public duty and
 she would also say that there is a meaningful review.

MS ROFF:

Yes, well, we do, we differ on that.

WINKELMANN CJ:

Meaningful supervision and review.

5 **MS ROFF:**

Yes.

WINKELMANN CJ:

I'm very interested to hear from you about supervision and review.

MS ROFF:

10 So I can come onto that, your Honour, thank you.

KÓS J:

But before you do, over here.

MS ROFF:

Sorry.

15 **KÓS J:**

You're putting a lot of weight on the words "making every endeavour to," I think. If those words were not there in section 18(1)(d), your case would be harder, wouldn't it?

MS ROFF:

20 Okay, so it would be, sorry, I didn't catch that, Sir.

KÓS J:

Harder.

MS ROFF:

Harder.

KÓS J:

Harder, the argument that they can basically – I mean I’m not sure what the Minister, well the Minister didn’t do any negotiating and I wouldn’t expect him to.

5 **MS ROFF:**

No, that’s right, not personally.

KÓS J:

But LINZ didn’t do any either really. They received a report, thought about it and said: “Yes, tick.” I mean, no doubt, they thought about it quite hard, but
10 that’s what they did.

MS ROFF:

Well, I can take you through. What I might do is first of all just talk about at a higher level I guess in a more general way.

KÓS J:

15 Absolutely.

MS ROFF:

And then, because it is useful to take you through the actual documents of what happened here and you’ll be able to see by way of example the steps that were gone through and the level of oversight and that’s the only example we’ve got,
20 that we’re dealing with the facts of this case. So I can take you through that, absolutely.

WINKELMANN CJ:

But does Mr Knowles give, I mean because he says something about how it’s done, which doesn’t suggest a high level of oversight.

25 **MS ROFF:**

There is evidence in his affidavit absolutely. He talks about – it’s not like – I disagree with my friend that it’s just a matter of receiving and reading a report

and looking at a chronology. Mr Knowles does, in his affidavit, refer to, he explains at the beginning of his affidavit expert evidence, the files that LINZ set up in terms of how they managed documents and information coming through and he refers there to the CPC file that the Clearances, that's his particular
5 department.

WINKELMANN CJ:

Yes, so what I'm really interested in is who is actually giving, who is giving the parameters for the negotiation because Ms Gibbs submitted that it was the LTA who is making the, Waka Kotahi is setting the parameters of the negotiation
10 which doesn't seem consistent with a negotiation being conducted by LINZ.

MS ROFF:

Well, I would disagree with Ms Gibbs. Of course there is, in my submission, yes, NZTA, are involved in providing information informing those negotiations and that's only proper because the negotiations themselves of course are going
15 to be constrained by the scheme of the Act, what is provided for under the Act by way of compensation under Part 5, but it's also constrained by the requirements for the particular project itself and NZTA are the experts when it comes to that in terms of what the nature of the land that is required, how much land is required, whether perhaps some proposals that are put forward by
20 landowners, whether or not they are actually workable in the scheme of the project itself. So I don't see any issue at all with NZTA?

WINKELMANN CJ:

Well, that's certainly true on the land requirement side.

MS ROFF:

25 Yes.

WINKELMANN CJ:

Not necessarily in the, well not on the compensation side.

MS ROFF:

No, no. With the compensation, that would, that's LINZ, of course, because the Minister has ultimate responsibility to –

KÓS J:

5 Well, I'm not sure I agree with the Chief Justice on that point because –

WINKELMANN CJ:

Can we just have Ms Roff answer it?

KÓS J:

Well –

10 **MS ROFF:**

I was just going to say that in terms of the Minister has ultimate responsibility in terms of exercising compulsory powers for government work under Part 2, so ultimately, he is responsible.

KÓS J:

15 Well, I mean, NZTA has a budget for a project.

MS ROFF:

Yes.

KÓS J:

20 There are clearly going to be difficulties if the budget is exceeded by overly generous compensation offers.

MS ROFF:

But even in terms of that, of course, they will have a budget, yes, absolutely. But in terms of I don't see any, I don't understand how there could be a conflict of interest between NZTA and the Minister and LINZ in respect to the
25 Government work. They are both working according to their statutory obligations to enable that government work to be completed.

KÓS J:

Yes. I was disagreeing with the Chief Justice, not with you.

MS ROFF:

Okay.

5 **WINKELMANN CJ:**

Well, I was simply asking if the Minister was responsible for the fiscal side, which he is in terms of the legislation.

MS ROFF:

10 And I would say that he's responsible for, ultimately responsible because only the Minister or his delegate can approve any agreement. So even if the – and this is in terms of signing a section 17 agreement, if there is agreement. If there is a voluntary agreement, sorry. That needs to be approved and signed by, delegated to the LINZ now, so they can sign it off. So, in my submission –

WINKELMANN CJ:

15 So why is the Minister given this responsibility then?

MS ROFF:

For?

WINKELMANN CJ:

20 Rather than the requiring authority, why is it the Minister who has this responsibility?

MS ROFF:

Under the statute, Ma'am, the Minister has that, yes.

WINKELMANN CJ:

Yes.

25 **MS ROFF:**

So ultimately it is –

WINKELMANN CJ:

But as a matter of policy, why is it the Minister rather than the requiring authority?

MS ROFF:

- 5 Well, I guess it just shows the importance of the powers that are exercised and making sure that they're made at a ministerial level because of the –

GLAZEBROOK J:

Well, it also might be an all of government approach.

MS ROFF:

- 10 Could be.

GLAZEBROOK J:

Rather than allowing somebody to overpay for something because they want a project rather than having an overview of government.

MS ROFF:

- 15 Yes.

GLAZEBROOK J:

Which is sort of partly in your favour and partly in the favour of the appellants I think in the sense that if it's an all of government approach it's actually different from the approach that the NZTA might be taking.

- 20 **MS ROFF:**

But ultimately I would say NZTA have, they have the statutory duties. They are, and as does the Minister, you've got the accredited supplier who is bound by the accreditation scheme and the conditions that they sign up to when they become accredited. Part of those obligations under remaining accredited is
25 that they comply with the law, that they comply with the Public Works Act and I just noticed when Ms Gepp was taking your Honours through to the service agreement between TPG and NZTA and the – I haven't got the note, sorry, the

page where you are looking at the value for money, the obligation for NZTA to achieve that. But even that obligation is subject to, I notice, to making sure that they are mitigating risk and then if you look at the footnote on that page and I will give you the note for that, but it does say there that that requires complying
 5 with obligations under the Public Works Act and other statutory obligations. So it's very much front and centre in the mind of all of the actors that are involved here that they are obviously, no matter what their contractual arrangements are, they are obliged to comply with the law and with the Public Works Act.

10 **MILLER J:**

All of this would be a good point if you were talking about a negotiation function that was actually delegated to TPG, but I'm struggling to see where in the process that you describe if the Minister is performing the function, there is any negotiation at all.

15 **MS ROFF:**

Yes, Sir, well, what I say –

MILLER J:

It seems to be a case, and the contrast seems to be that of all quasi-judicial decision making. You get a report from one of your agents or servants and you
 20 make a decision about it.

MS ROFF:

Based on their advice.

MILLER J:

There's no give or take on the part of the Minister.

25 **MS ROFF:**

Yes, Sir.

MILLER J:

Or the actual LINZ person who is making the decision. None at all. It's just a decision made. So you're bifurcating a process that the statute envisages is in the hands of one person with the result that the Pascoes complain about.

5 **MS ROFF:**

My response to that would be that the fact that the Minister is responsible and we say he is, we accept he is for discharging or performing the duty or function under section 18(1)(d). That doesn't mean that he can't look to, for support for preliminary prerequisites, if you like, or information and functions that are not
10 statutory functions but supporting tasks. That doesn't mean that he can't rely on other individuals to perform those supporting tasks.

WINKELMANN CJ:

Do you accept that there will be a point at which he's no longer discharging a duty and he's just actually having someone else perform his role? At what point
15 does he have, or she have, inadequate control to be able to say: "Well, look, I'm discharging my duty under section 18(1)(d)"?

MS ROFF:

What the common law, what the cases, what they establish is that it's sufficient to have, as long as the decision-maker has ultimate responsibility for the
20 particular function or duty, then it's up to that decision-maker on how they implement that in terms of how they, I think the cases talk about how they get the work done. So as long as the Minister, the ultimate responsibility remains with him, it's then – that doesn't require him to undertake every operational aspect of that duty or power.

25 1420

WINKELMANN CJ:

But what about when it is the process that the Minister is being charged with doing is itself a protective process?

MS ROFF:

I would accept it's a protective prerequisite. So those particular tasks or steps at section 18, 18(1), if you look at those, they are, you could call them protective prerequisites that the section says shall be, I guess, carried out before the

5 Minister moves to take the land. So in terms of they are, but they are still preliminary to that next step, whether it be the Minister making a decision at section 23 or whether the Minister or his delegates are considering and approving a voluntary agreement and signing it under section 17. So there's two pathways.

10 **WINKELMANN CJ:**

When I said "protective" I meant protective in the sense that it gives the person who is subject to the section 18 notice an opportunity to negotiate for their sale and the protection there for them is that they know they're not going to be dealing with unscrupulous individuals, they're going to be dealing with a public

15 official who will be negotiating in good faith with them and to give them fair compensation.

MS ROFF:

Yes, but at the outset that's right. I think Ms Gibbs referred to a letter that goes out to the landowners right at the outset. That's a copy that's in the bundle

20 there and that straightaway the landowners are notified and informed about how the process will take place and who they will be negotiating with and they are negotiating with the Crown. In essence, the negotiations are with the Crown. Only the Crown can approve and sign the contract.

WINKELMANN CJ:

25 So you say it doesn't matter that the Crown, in this case, the Minister, the particular Minister, is not setting the parameters of the negotiation, it's enough that they've delegated someone else who has been informed about material things by this requiring authority?

MS ROFF:

LINZ has, there is a process where LINZ is involved as well. We say they do have oversight of the conduct of the negotiations because of the accreditation scheme.

5 **WINKELMANN CJ:**

So that's where you're going to take us to later?

MS ROFF:

Yes. Where I think I started from was just in terms of the statutory scheme itself, we don't think the wording used in section 18 or the surrounding
 10 provisions is particularly helpful. It doesn't take us very far, in my submission. That then means that we look to the common law of delegation to look and see what is required and who, we're looking at the who question, who is required to actually undertake the negotiations themselves and again, I'm not talking about the duty or the overriding duty that I say resides with the Minister, I'm talking
 15 about the mechanical operational side of sitting down with the landowner and discussing proposals. So it's that aspect that we say is a supporting ancillary function that can be done by someone other than the Minister or the delegate.

KÓS J:

So just going back to Justice Miller's question, precisely what part of negotiating
 20 good faith is undertaken by LINZ?

MS ROFF:

What part is undertaken here?

KÓS J:

Yes, of that section 18(1)(d).

25 **MS ROFF:**

Well, LINZ oversee the negotiations themselves. They don't undertake the actual sitting down and negotiating with the individuals themselves.

WINKELMANN CJ:

Well, you had better show us how they oversee it, I think.

MS ROFF:

Yes. Well, perhaps I could take you to the accreditation document. Mr Harris,
5 in his affidavit, explains about the accreditation scheme and how that was set
up. That is provided for at 201.011 and then at paragraphs 9 to 14.
So, Mr Harris, there explains about how the accreditation scheme works.
He explains there that it is not LINZ who engaged them, it is instead the Crown
acquiring agency. Here that's NZTA and you'll see there at 12: "Once engaged,
10 the accredited supplier will provide information and advice to both the Crown
acquiring agency and to LINZ's Clearances team."

So throughout this process, as soon as the section 18 notice is served, LINZ
will set up particular files and the information flow will come from the accredited
15 supplier through to NZTA and to LINZ and then it is LINZ, the Clearances team
who is responsible for processing reports and requiring further information and
sending work back if it doesn't meet their standards.

The regulatory team, which is what Mr Harris is in charge of, he is the team that
20 develops the standards and guidelines for the acquisition and the accreditation
itself and so this is the team that has put in place systems and processes for
making sure that only the qualified individuals who have got the necessary
knowledge of the Public Works Act, valuations, all the necessary information
and negotiations are accredited and meet the standards that LINZ requires in
25 order for them to conduct negotiations for the Minister.

MILLER J:

So tell us what happens in the event that you get a report from TPG which says
the landowner wants \$150,000, we haven't reached agreement because I think
it's only worth 125,000, does the LINZ person then get involved and take over
30 the negotiation, or do they just go with the recommendation?

MS ROFF:

They wouldn't get involved in the negotiation in terms of sitting down and talking to the landowner face-to-face. But if there was – what, in terms of that process, what's happening, once LINZ will have received a report from the accredited
 5 supplier at the point where there has already been negotiations early on but in terms of recommending to LINZ that they provide a section 18 notice and so the recommendation that comes through, and I can take you to show you.

Perhaps it might, sorry, it might be that Mr Knowles' evidence is perhaps a bit
 10 more because Mr Knowles is the official who is in the Clearances team who actually undertakes and reviews the particular reports that comes in. But if, what Mr Knowles says and Mr Harris say as well, that if there is, for example, if a report comes in, section 18 report, and it says, recommends that the Minister issue a section 18 notice of desire in respect of the land, as part of their
 15 document process, they required, at that stage even early on to attach a chronology of negotiations even though the section 18 notice hasn't been served yet and at that stage the Minister's delegate will still want to know what interactions NZTA and the accredited supplier have had with the particular landowner and once, if there is not sufficient information that the LINZ delegate
 20 thinks that to move to issuing a section 18 notice or a section 23 notice at the next stage, then the LINZ delegate will go back to the accredited supplier and ask them for further information. So they won't issue a section 18 notice –

MILLER J:

You are treating this as entirely a question of process. I asked you a question
 25 of substance. What happens if the person who has been assigned the responsibility for doing the negotiations comes back and says: "We can't agree. I think the price is X. The vendor thinks it's Y." What happens?

MS ROFF:

If there is no agreement between the Crown representative and the landowner,
 30 then after three months the Minister can move to take the land. But there is –

MILLER J:

There is no further negotiation then between the LINZ person and the landowner?

MS ROFF:

- 5 Here there was meetings between, there was a hui. I think Ms Gibbs referred to the fact there was a hui.

MILLER J:

Mr Knowles attended.

MS ROFF:

- 10 Sorry?

MILLER J:

Mr Knowles attended that.

MS ROFF:

- 15 Mr Knowles attended and the Deputy CE. That wasn't for the purpose of negotiations, but that was for the purpose of explaining the roles and the responsibilities under the Act and it was an opportunity for LINZ to understand –

MILLER J:

I was asking you a question of principle really.

MS ROFF:

- 20 Yes.

MILLER J:

In terms of this process you're describing, where is the substantive negotiation that happens between LINZ and the landowner in the scenario where they don't simply reach agreement with TPG?

- 25 1430

MS ROFF:

There doesn't need to be negotiation between the landowner and the Crown.

WINKELMANN CJ:

And LINZ.

5 **MILLER J:**

So the Crown just proceeds to take it at the price that it thinks is reasonable.

MS ROFF:

Well it would – well the price that is reasonable is the price is as is provided for in section 16 as principles of compensation. So that's what the LINZ delegate
10 will be looking at and looking at the report from the accredited supplier if they've provided details and this is – that will often happen. We've gone to get a valuation showing the market price. We've provided a seller and owner. We say our valuation says the land is worth \$1 million, the landowner wants \$5 million.

15 **WINKELMANN CJ:**

So the question I have for you is, at what point does LINZ set the parameters for the negotiation or check the parameters for the negotiation because at the moment on your account it's an entity which is engaged by the acquiring authority not LINZ, which is instructed by the acquiring authority as to what it's
20 prepared to pay and what it's prepared to negotiate. At what point does LINZ set the parameters or say check the parameters before it moves to acquisition?

MS ROFF:

LINZ does check the parameters because it would go to LINZ and I think I said that in terms, and I am referring to the process, I'm sorry, but in terms of the
25 process would be the – if there were issues or concerns the accredited supplier would come back to – would ask questions of LINZ or of NZTA. If we're talking about now within that three-month period –

WINKELMANN CJ:

That's too vague to help me with, sorry. Are we talking about if there are issues that arise in negotiation as to parameters?

MS ROFF:

5 Yes.

WINKELMANN CJ:

So is that in Mr Knowles' evidence or?

MS ROFF:

Yes, that's in Mr Knowles' affidavit and it's also in Mr Harris' affidavit as well.

10 So he would say we are – and I think Ms Gepp referred to that – he says we are available to answer any questions, to be contacted –

WINKELMANN CJ:

I'm just trying to get a picture because you say there's sufficient oversight but you've only explained really the oversight end where they get the report and
15 they see if they're happy with it but negotiation as a process there's a lot that happens along the way which –

MS ROFF:

Yes.

WINKELMANN CJ:

20 – and it can go off different ways depending on negotiators and decisions that are taken and the parameters that are set. I'm interested in LINZ's involvement in setting those parameters or checking the parameters along the way of the negotiation.

MS ROFF:

25 And I would say that the parameters are built in by the principles of compensation that are provided for in the Act and built into the accreditation

scheme itself, which requires the accredited suppliers to conduct the negotiations in good faith and to comply with the Act.

MILLER J:

We've conveniently assumed that the dispute may be one about price but, of course, it may be about many other things, mitigation, the precise area to be taken, how long any land is to be held for.

MS ROFF:

Yes, that's right, so it could –

MILLER J:

10 All of those are things for which there must be considerable room for movement, even if your metric is market value?

MS ROFF:

Yes, that's right, so it's not just compensation, I accept that absolutely but – and I'm not saying that the accredited supplier would be exercising no discretion at all. There is some discretion in there absolutely but what I'm saying is that that discretion is not unlimited and it is constrained by the project itself and the requirements, the compensation requirements of the Act but it has to be workable in terms of what the project requires.

20 Perhaps I could take you to – I wanted to take you to the conditions of accreditation. That is at document 301.0362 and, in particular, I wanted to take you to page 301.0368. So when accredited suppliers, in order to be accredited, they have to sign these conditions and agree to comply with them and you'll see there at paragraph 4 “Accredited Supplier's Obligations.” This is my submission around how does LINZ or the Minister oversee the negotiations themselves, and I would say well it is built into the accreditation system the requirements and obligations that the accredited suppliers are required to form and adhere to, and you'll see there in terms of having to – all applicable legislation, statutes and regulations. And then, importantly, for our case down at (p) and (q), this is over the page: “Ensure that all its nominated persons are

aware of, and comply with, these conditions, all current Crown property standards, technical documents and instructions” and those documents set out the documents that are required to be used, the information that the accredited suppliers are required to provide to LINZ. And then (q): “Ensure that it does not

5 bind LINZ by contract or otherwise and does not hold itself out to any third party that it is entitled to exercise any statutory functions.” In our case that is key in terms of what – in terms of looking at the task that has been undertaken by the accredited supplier. They did not exercise, in my submission, any statutory power or function. They're not a –

10 **GLAZEBROOK J:**

But if they exercise the power of negotiation, which you say they do, why aren't they exercising a statutory power, function or duty, or whatever it's called? Because you say it doesn't matter what it's called?

MS ROFF:

15 Yes, and because the actual negotiations themselves I say that's not the power or function. The power or function or duty, whatever you call it, is making every endeavour to negotiate in good faith with a landowner and that can be achieved and satisfied without sitting down and actually doing the legwork or the actual mechanics of it yourself.

20 **WINKELMANN CJ:**

You're not actually placing weight, as Justice Kós has suggested, on making every endeavour as giving a right to have somebody else do it? You're just saying that –

MS ROFF:

25 No, I'm –

WINKELMANN CJ:

Even if it just said “negotiate with” you'd still have the right?

MS ROFF:

Yes.

WINKELMANN CJ:

Right.

5 **MS ROFF:**

The Act doesn't require negotiations obviously to take place and I think that's why the wording is making every endeavour because in most cases it may be that the landowner doesn't want to negotiate –

WINKELMANN CJ:

10 And you've got to make your best efforts.

MS ROFF:

Yes, yes, that's how I'd explain it, best efforts. And under section 18(2) being able to move to that next step and take the land and make a decision under section 23 there is no requirement –

15 **GLAZEBROOK J:**

If the landowner wants to negotiate then you do have to negotiate, don't you? I can't see there can be any way of saying you don't have to. If you've got a willing negotiator on the other side that you can say: "I'm not going to bother."

MS ROFF:

20 That wouldn't be making every endeavour to – they wouldn't be making every effort to negotiate if he didn't – saying he didn't turn up and he just said: "No, I'm not going to."

KÓS J:

Or good faith.

25 **MS ROFF:**

Yes, but again that's the fact, that's the how question and whether or not you meet the standard but, yes.

GLAZEBROOK J:

I just am having trouble how you can negotiate, even use best endeavours to negotiate, when you're not negotiating at all but you're having somebody else do it on your behalf.

5 **MS ROFF:**

Well perhaps I'll just work through the submissions and we'll go through perhaps what happened in this case so you can see –

GLAZEBROOK J:

That's not going to help me because it's a matter of principle, not what
10 happened in this case.

MS ROFF:

Yes, I accept that.

GLAZEBROOK J:

As I understand it, you say you can fulfil that duty by appointing someone to
15 negotiate and supervising standards?

MS ROFF:

Yes.

GLAZEBROOK J:

Is there anything else because I think at one stage you said there was
20 something, there was a 3 there?

WINKELMANN CJ:

It was the quality assurance at the tail end, isn't it?

MS ROFF:

That's right.

25 **WINKELMANN CJ:**

The report at the tail end.

MS ROFF:

The report at the tail end is when the Minister or the delegate come in because there are two outcome – and makes a – reviews –

GLAZEBROOK J:

- 5 Well, perhaps, can you go through why you are negotiating when you're delegating. So, one, you say you fulfil a negotiation by appointing a suitably qualified person, that's number 1?

MS ROFF:

Yes.

10 **GLAZEBROOK J:**

What was number 2?

1440

MS ROFF:

- 15 Number 2 is establishing a system, the accreditation system, but it doesn't have to be the accreditation system. Just a robust system for oversight and, I guess, control of the negotiation process and that's what I say the accreditation system does. So sufficient oversight and control...

GLAZEBROOK J:

- 20 But you say that's established because you look at the accreditation system and in that accreditation system they have certain obligations under the contract.

MS ROFF:

Yes.

GLAZEBROOK J:

- 25 Is there anything else?

MS ROFF:

There is review and quality assurance, so where they provide particular reports, or they're coming back and speaking to LINZ delegates. At that point then LINZ reviews the –

5 **GLAZEBROOK J:**

Because my understanding is that the accredited scheme isn't limited just to negotiation.

MS ROFF:

No, it's not. Shall I take you to the – I'll take you to the particular –

10 **ELLEN FRANCE J:**

Sorry, Ms Roff, just in terms of the quality assurance, what Mr Knowles says, and this is, as I understand it, in the context of reports and so on in coming in: "If needed, issues are discussed with the accredited supplier and at times further information can be sought from them. Issues arising are also discussed with the relevant Crown acquiring agency as needed." Is that the sort of thing you are relying on?

MS ROFF:

Yes, I am, Ma'am, yes. So –

WINKELMANN CJ:

20 I find that a little bit hard to understand what it means "if needed, issues are discussed." Does that mean the initiation has to come from the accredited agent, not agent, accredited supplier, because they wouldn't tend to come to LINZ because it would be going to the transport – I keep on getting confused.

MS ROFF:

25 NZTA.

WINKELMANN CJ:

NZTA. I'm terrible with initials. NZTA, they'd be going to NZTA, so they wouldn't necessarily be coming to Mr Knowles, would they?

ELLEN FRANCE J:

- 5 Well this is in the passage I'm referring to is in the context of material being provided by the accredited supplier being reviewed by a member of Mr Knowles' team who undertakes quality assurance and I was just checking that that's the sort of thing you are talking about.

MS ROFF:

- 10 I am talking about that, thank you. But I take the point around – well that could be – I mean it wouldn't always necessarily be just coming from TPG in this case, sorry, or from the accredited supplier, it could also be from the LINZ delegate as well because –

WINKELMANN CJ:

- 15 Could it also be from the people who are concerned about the negotiation, the property owners?

MS ROFF:

- It could, it could absolutely because in this case there is, using just as an example, evidence of Mr and Mrs Pascoe writing personally to the Minister and
20 writing personally to Mr Knowles so there could be –

GLAZEBROOK J:

And being told they're not going to engage though, weren't they?

MS ROFF:

- There was correspondence, Ma'am, with them. So their concerns, the concerns
25 that they had were raised with LINZ and raised with the Minister as well, and in I think in Mr Harris' affidavit, he says the Minister will be kept abreast as well of information as well if there is direct correspondence from a landowner to the Minister. So the Minister will be kept informed of information that comes in as

well if issues arise during the course of the negotiations. But a lot of this is – it's a much bigger scheme as well in terms of just this – once the section 18 notice is issued. Often there is conflict between –

GLAZEBROOK J:

5 What paragraph number was that?

MS ROFF:

I'm just trying to find that now, Ma'am. It's paragraph 61 of Mr Harris' affidavit and I can give you the page number is 201.0032. It says: "While LINZ holds delegations to make decisions, it updates the Minister as necessary on
10 particular cases, or provides advice to the Minister if he receives any correspondence directly from a landowner or other affected party. Where the Minister needs to directly consider a matter (such as issuing a notice of intention ...)" that's under section 23 "... LINZ will finalise a briefing ... LINZ will engage with both the accredited supplier, and if necessary, the Crown acquiring
15 agency as these briefings are finalised." And then: "LINZ can require –

KÓS J:

Not the landowner?

MS ROFF:

No, but I mean they will respond to – but there is correspondence in this case,
20 I don't know in every case though, but there is correspondence in this case from LINZ to the landowners.

MILLER J:

But that correspondence really all takes the form of "we will not negotiate with you."

25 **MS ROFF:**

There is – I can just take you to one particular letter, Sir, I'm not sure whether you've had a look at this one, and that is at 302.0774 and it's a letter from LINZ to the Pascoes I think, 22nd April 2021. So here, this is obviously after the

section 18 notice has been, the second section 18 notice has been served because that was the 31st of August 2020 and it wasn't until July or August that the section 23 notice was delivered or issued to the Pascoes. So there was 11 months before the Minister moved to issue the section 23 notice here.

- 5 This letter was written following the hui that I referred to between the officials and Mr and Mrs Pascoe and their whānau.

GLAZEBROOK J:

And what date was the hui, is that there?

MS ROFF:

- 10 I think it was the 7th of April. It was earlier that month, Ma'am, and the minutes from that hui are in the case on appeal as well and they are at tab 86, 87 and 88 of the case on appeal, 302.0722, 302.0750 and 302.0765.

- 15 Could we bring up that letter again please? The reason why I wanted to bring up this letter is just because it does, it references the concerns, that LINZ were listening to the concerns that the Pascoes had I guess, the LINZ delegates, even though that wasn't negotiation for the purposes of the Act but it was still access to LINZ officials so that Mr and Mrs Pascoe could share their concerns and LINZ here say that they went, that they actually sought advice from NZTA
20 in terms of the problems.

WINKELMANN CJ:

- So it tends to suggest though, doesn't it, that actually Waka Kotahi is driving it because "Waka Kotahi have confirmed that they are open to receiving information on this matter, as well as engaging on the overall compensation for
25 the acquisition of part of your property."

MS ROFF:

As I said, Ma'am, NZTA are involved in informing the negotiations because they are the project managers of the work itself.

WINKELMANN CJ:

Yes, but this is meant to be LINZ negotiating.

MS ROFF:

Well LINZ is still overseeing and making sure that those negotiations are
 5 conducted in accordance with the Public Works Act and that is what they're
 doing, Ma'am, in my submission.

MILLER J:

The middle paragraph suggests it's all about process rather than substance.
 In fairness to LINZ here, it is clearly focused on what was they understood to
 10 be the Pascoes' concern which is that their land should not be taken at all.
 This is all about choosing another route, not about the terms of a negotiation,
 but I agree with the Chief Justice this seems to still not be about the substance
 of a negotiation between the Minister or the Minister's delegate and the
 Pascoes.

15 1450

MS ROFF:

Perhaps I can take you to the case law that we rely on to say that as long as
 the responsibility for the functional duty rests with the decision-maker, then it's
 up to the decision-maker to decide how I would say the supporting or
 20 reparational aspects of that duty or function is undertaken, and that is – because
 that is our case, we are saying here that there is no delegation. There's no
 unlawful delegation because there's delegation at all because of the nature of
 those tasks. The fact that we say because the task of negotiating with a
 landowner, although we accept there is some discretion involved in terms of
 25 considering proposals, that that's not completely unfettered, and I think I said
 that in terms of being constrained by the Act.

GLAZEBROOK J:

Well how is it constrained by the Act?

MS ROFF:

It's constrained by the Act, your Honour, in terms of the compensation that is allowed under Part 5.

WINKELMANN CJ:

- 5 But your negotiation, you can pay more than that, can't you? You're not constrained by that?

MS ROFF:

- 10 I think you are constrained Ma'am. If the section 18, not before the section 18 notice has been issued, then that would, then not, but once the section 18 notice has been issued to a particular landowner, then you are within Part 2 of the Act, and I say yes there is. While you can be paid more there is a limit on what you can be paid. It must come within the principles within the Act.

WINKELMANN CJ:

- 15 There seems to have been some flexibility upward in this negotiation, which would be surprising if they'd formed a view about what those principles, the number those principles created, or set.

MS ROFF:

Are you referring to Mr and Mrs Pascoe, sorry, in this case, or some other...

WINKELMANN CJ:

- 20 Yes, so there's reference to Waka Kotahi taking into account historical connection to the land and the injurious effect calculation. There's also reference to considering rebuilding a house and then providing temporary accommodation.

MS ROFF:

- 25 I think it might be helpful if I take you, I was going to take you to case law, but what I might do first, Ma'am, is just take you to the briefing that went to the Minister before he issued the section 23 notice, because some of those options are explained in that document.

WINKELMANN CJ:

It's 302.0552? Is that a different one?

MS ROFF:

There's a different one, because because what we've got is there's TPG
 5 reports, which are informing LINZ officials, and then we have actual briefings to
 the Minister, and there were two briefings in this case. We have a specific
 briefing that relates just to the Pascoe land. That is at 302.0783. Then there is
 a general overview briefing that went to the Minister to give more detail about
 the project itself. That is at 302.0806, but first of all I just want to take you, thank
 10 you Mr Harris, that is the Pascoe's specific briefing.

So this was, I think I mentioned before, so we had the second section 18 notice
 served on the Pascoes on the 31 July, I think it was, 2020. There is evidence
 that there was a report in March, sorry, March 2021, that TPG sent a
 15 recommendation because there'd been no agreement for the Minister to issue
 a section 23 notice. Mr Knowles considered that report, and then a briefing
 went to the Minister in July. This sets out the background to – this is the actual
 briefing that was sent to the Minister.

20 You'll see there relevantly at paragraph 2: "LINZ consider the requirement to
 negotiate in good faith for a period of three months has been satisfied.
 The Crown has been seeking to negotiate with the Owners for the
 acquisition ... since 2017 ... service of the notice of desire ... 11 months
 ago ... [they] have not been willing to negotiate to reach agreement for the
 25 acquisition of the Land ...".

GLAZEBROOK J:

Is it relevant, in terms of the negotiation since 2017?

MS ROFF:

No. We say that – well not irrelevant in terms of if there is a likelihood I guess
 30 that the landowners are going to, if they're going to reach agreement at this
 stage in the – and whether it's time, I guess, to issue the section 23 notice.

Only that it goes to that. It's probably less likely that the landowner is going to agree at this stage, if it hasn't already. But for the purposes of looking at our purposes today, we're looking at the three-month period from 31 July 2020.

- 5 Mr Harris, could we just scroll down in that document please. So here it's informing the Minister about the actual land, what land is required for the project, what is the land required to be taken, and if we just scroll down a bit further, you'll see the various interests of land that are required. If we go over the page please.

10 **MILLER J:**

Before you do that, this refers to 11.1715 hectares to be taken. Am I correct that that's a smaller area than was originally proposed?

MS ROFF:

- 15 That's right Sir, it was. In the notice of desire, and I think Mr Pascoe referred to that this morning, and I just noted that, so the notice of desire that was issued, Mr Knowles talks about this in his affidavit when he was reviewing the section 23 notice as well. He noticed that the land required in the section 23 was a smaller amount in terms of the temporary occupation area, and that is because there was a change, and it was because it enabled the alignment of
20 the road to be moved further away from Mr and Mrs Pascoe's house, because originally at the very outset the new road was something like 20 metres from Mr and Mrs Pascoe's dwelling.

MILLER J:

So it became 120 metres?

25 **MS ROFF:**

It was 100 I think, something like that, so there was some other property, I think, that they were able to acquire in the meantime, which meant that they needed less of the temporary occupation area, and that meant that that could be reduced in size.

MILLER J:

So just to go back to Mr Pascoe's point, and I appreciate this is not really what the appeal is about, but I just wanted to understand the context. Do you say at this point they've taken into account the fact that some part of the staging area
5 for the contractors has moved to another property?

MS ROFF:

I think it was, I'd have to go back and check Sir, and I should know this because it came up at various times, but it was because they were able to use another area as part of a storage area that meant that they could, that's right, there's no
10 storage area.

WINKELMANN CJ:

Sit on the other side of Mount Messenger?

MS ROFF:

Yes. Well if this is –

15 **MILLER J:**

So that's the other landowner's property?

MS ROFF:

And that meant that – and this was done to take into account the impact on the Pascoes, and try to lessen the impact.

20 **MILLER J:**

Sure, I'm just wanting to establish that this issue has been taken into account at this juncture, at the section 23 stage.

MS ROFF:

Yes. So in terms of what the Minister has been advised that's still, that is the
25 land, that is the bare minimum of land that is required for the project, and of course we had the, these issues have all been raised in the context of the Environment Court, and also the judicial review proceedings. This is the judicial

review proceedings but the other causes of action that were argued and determined by Justice McQueen.

5 Sorry Mr Harris, can we go back. I feel like I want to touch that screen but it's not doing anything. Just the one point I wanted to make –

WINKELMANN CJ:

One day it may. That'll be a good thing.

MS ROFF:

10 The point that I wanted to find, is where it sets out the detail of the offers that have been made to Mr and Mrs Pascoe at that point in time, I thought there was a table.

KÓS J:

Next page.

MS ROFF:

15 It's the next page? That's exactly what I'm looking for, thank you. So you'll see there that the Minister has been advised and updated about the nature of the offers. I'm just picking up on the Chief Justice's point about that you understood there was sort of perhaps a larger, in terms of the offers that had been made, but what I wanted, in terms of this one here you'll see that this, because there
20 were RMA proceedings going on at the same time, so designation and the resource consent litigation was ongoing at the same time, there were various options put to Mr and Mrs Pascoe during this period, but you'll see the options are defined in terms of compensation assessment under the PWA, and then it refers to its RMA mitigation issues and the PWA acquisition.

25 1500

So there were various options put together that combined in some way some of the options to mitigate the impacts of the project on Mr and Mrs Pascoe, which were conditions that were offered by NZTA during the course of that
30 litigation and that involved various options of alternative housing. So there are,

that is, those were outside the PWA. That was part of the conditions that were agreed to by the Environment Court during, sorry, as a part of that process, and perhaps we could just go over to page 302.0787, if your Honours have finished looking at that, and this is key in my submission here at paragraph 16. It says

5 there: "Multiple attempts have been made to meet with the owners since August 2020 [so that's since the service of the notice] to negotiate the acquisition of the land and lease, however, none have been successful."

And so that really is because of the wording of section 18(2), could we just go to that now please Elliott, thank you, that's tab 3 I think of the respondent's bundle of authorities. So we have, just looking quickly at section 18(1) so that is what I've referred to what the steps, if you like, procedural steps are required and then at section 18(2) you'll see there: "If, after a period of three months, the owner" and these are, any one of these, can apply "if the owner fails to respond

15 to any invitation issued under subsection (1)" so that's an invitation to sell their land. In this case that invitation is embodied in the text of the section 18 notice that was served on Mr and Mrs Pascoe. And then we've got: "(b) the owner refuses to negotiate with the Minister or the local authority, as the case may be; (c) or an agreement for the sale and purchase of the land is not made with the

20 owner under section 17."

So in this case in some ways the fact that Mr and Mrs Pascoe refused to negotiate with TPG or, you know, we would say the Minister's chosen and authorised representative that doesn't actually matter in terms of –

25 **KÓS J:**

But not delegate.

MS ROFF:

But not delegate.

KÓS J:

30 Not agent and not delegate but some –

MS ROFF:

"An agent of sorts" I think we've said. It's an authorised representative, Sir. It's not a form or agency relationship because the accredited supplier can't bind.

KÓS J:

5 Precisely.

MS ROFF:

But regardless, and I think this is the wording in the Environment Court Judge Dwyer uses for the actual objection hearing regardless of, you know, he said the legalities or the issues around delegation at the end of the three-month
10 period there was no agreement. There was no agreement under section 17 and on the face of section 18(2) that is sufficient for the Minister to move to take the land and whether or not the Minister has satisfied that duty under section 18(1)(d) in my submission that is a matter to be – the merits of the entire acquisition and, in particular, whether or not that's been complied with is a
15 matter for the Environment Court under the objection proceeding, sorry, procedure under section 24(7).

GLAZEBROOK J:

So if, in fact, no agreement has been reached because the delegate, and by extension the Minister, has totally refused to engage or has not engaged in
20 good faith, you say nevertheless if agreement isn't reached, you still go onto the next stage because that just cannot be the case, can it?

MS ROFF:

Well it would be, it wouldn't be the case I'm sure in reality because what I would say is what happens is that LINZ would make sure that's not the case because
25 obviously the Minister himself will be looking and ensuring that's the case when he's making a decision under section 23, and if there is an agreement, then the LINZ delegate will be looking and ensuring that's the case even in terms of a section 17 agreement if that's reached after a section 18 notice has been issued on the landowner because, in terms of the information that LINZ require under
30 the accreditation scheme, they require as well any agreement that's been

agreed to in principle between the representative and the landowner. It must be drafted as an offer to the Minister for the Minister to consider. Only the Minister or the delegate can sign that and it must also have information about negotiation on that, even a voluntary agreement. So even at that stage the

5 LINZ delegate is satisfying themselves that every endeavour has been made to negotiate in good faith, and I think that my friend, it may be that we disagree on this because I think she said that wouldn't be required if a voluntary agreement had been entered into, but I guess once the section 18 notice is issued at that

10 point you don't know what the end result was going to be at the end of the three months. So from the time that a section 18 notice is served on a landowner, the Minister or his delegate will be, and the accredited supplier, through the accredited supplier, will be making every endeavour to negotiate and will be recording and making sure there's evidence for LINZ and the Minister to rely on that it has actually taken place.

15 **GLAZEBROOK J:**

Or they mistakenly think they've done it and they haven't.

MS ROFF:

Well that would be for the Environment Court to determine.

GLAZEBROOK J:

20 So the Environment Court can look at whether there's negotiation prior to the – because I don't actually understand that to be the Environment Court's task and I'm not sure that it understood it to be its task, or do you say it did understand that?

MS ROFF:

25 Yes, it did, yes, absolutely, your Honour. Perhaps we could go to the – would you like me to take you to the Environment Court decision?

WINKELMANN CJ:

Well if you just give us the paragraph reference.

MS ROFF:

Yes, paragraph 95 of the Environment Court objection decision which is in the counsel assisting's bundle of authorities.

GLAZEBROOK J:

5 Well I'm just wondering what we're doing here.

MS ROFF:

Perhaps I could move – shall I move on because I'm just conscious of the time.

GLAZEBROOK J:

10 I mean you say we shouldn't be here because actually it should be on the appeal from the Environment Court decision.

MS ROFF:

It has been on the appeal from the Environment Court decision, your Honour. In terms of good faith, in terms of whether as a matter of fact good faith negotiations have occurred, absolutely the Environment Court has said it
 15 considers good faith negotiations under the fairness of the acquisition. So under section 24(7) the all-encompassing, we would say, sort of merits-based enquiry that the Environment Court makes is whether or not the proposed acquisition is fair, sound and reasonably necessary, and under part of that enquiry we say, and the Court agreed with the submissions that the
 20 Crown made on that, is whether or not in terms of fairness whether section 18(1)(d) has been satisfied. So, as a matter of fact, in this case the Environment Court has found that the Minister complied with his statutory obligations under the Act and that the Minister's authorised representative, I think he calls him independent accredited contractor, made every endeavour to negotiate in good
 25 faith with.

WINKELMANN CJ:

Okay, so you were going to take us to the authorities I think before we went to the – because you were just taking me to those documents to show me the extent, the parameters of the offers.

MS ROFF:

That's right.

WINKELMANN CJ:

But then you were going to go to the authorities which you say shows basically
 5 the Minister can do what they like in terms of getting someone else to help them
 do the job.

MS ROFF:

In terms of supporting them.

WINKELMANN CJ:

10 And you need to relate that submission to schedule 6 of the Public Service Act
 2020 clause 2 which is Ms Gepp's submission.

MS ROFF:

I don't understand why I need to but I can go – I'm going to go and take you to
 the authorities but –

15 **WINKELMANN CJ:**

Well go to the authorities then.

1510

MS ROFF:

Okay, let's do that. The authority that I want to take your Honour to first is
 20 *Thompson* and that is in the respondent's bundle at tab 21. *Thompson* is a
 case, it's about the Evidence Act actually, the issue of admissibility, and I'm
 taking you to it because it's the general principles that I want to highlight to
 your Honours. So there was an issue in this case about a rule in the
 Evidence Act, no doubt your Honours are familiar with it, where if an undercover
 25 officer gives evidence, that the Deputy Commissioner must file a certificate
 signed, setting out the offences to which the undercover officer has been
 convicted.

WINKELMANN CJ:

That's the predecessor to the Evidence Act.

MS ROFF:

Yes. So here the –

5 **WINKELMANN CJ:**

I have some vague recollection, yes.

MS ROFF:

Here the certificate was signed by the Deputy Commissioner under the delegated authority but what, the information that went in, I guess that he signed
 10 it on the basis of information provided to him, and enquiries made by a senior police officer, and so the complaint was that whether or not the Deputy Commissioner was personally required to undertake those enquiries, given that only he had delegated authority to sign the certificate itself. If I can take you to page 20, the foot of that page please in that penultimate paragraph
 15 there that I want to highlight. The Judge just said: "But this is not a case of the delegated exercise by the Commissioner of a discretion or a power. He is required to certify certain facts. He has done so. How he arrives at those facts is a matter for him to determine in keeping with the responsibility reposed in him by the statute. [There is] no element of his blindly rubber-stamping any such
 20 certificate." And he talks there about: "Each inquiry starts with a statement by the particular undercover police officer ...".

Then skipping over, sorry, to the next paragraph: "This is not a case in which there was a delegation or a devolution of power as by a Minister of State to
 25 responsible officers ...". And he's relying there on *Carltona Limited v Commissioner of Works* [1943] 2 All ER 560. So it doesn't come under *Carltona* which we say, of course, doesn't apply here either.

Then over to page 21, and this is in response to Ms Gepp's point as well about,
 30 I think her submission was, well, why has the Minister been named here for this duty, why is that, and I think Ms Gepp's submission was well that must be

because it's his discretion that must be brought to bear in terms of negotiation, and I say no. What I think this is very apt in our situation if you see at line 15: "This legislation singles out the Commissioner of Police as opposed to any lower ranked officer to perform a particular function." In making, certifying that, it doesn't, in our view, require him to make any such, to personally or undertake those ones himself.

Then further down, what is important, I think the Judge says, is that is the importance of the exercise itself, and here absolutely negotiation is important. So it's important that the Minister oversees and is responsible for –

WINKELMANN CJ:

Yes, so this proves the Commissioner is overseeing. It's his systems that he's ultimately responsible. *His* staff were making the inquiries, and *he* then certifies it, which is quite a different situation to the present.

MS ROFF:

Well I'd say your Honour that in terms of the systems that are in place, it's not just a matter of, that the staff reviewing a report. It's that there have been robust systems put in place in order to oversee the process that is undertaken by the individual that come within the accreditation scheme.

20

There are other cases as well that we rely on in terms of *New London College*. That is at tab 30 of the respondent's bundle. That was a judicial review case about the revocation of licences for educational sponsors. It's a UK Supreme Court case. There was a delegation issue in that around – it was immigration I guess in terms of whether the sponsors, education sponsors could, whether the Secretary of State had delegated decision-making power under the Immigration Act to those sponsors. You'll see at page 2367, paragraph 19: "The claimants first argument is that... the Immigration Rules constituted an unlawful delegation ...". Then further down: "But the short answer to the suggestion –

25

GLAZEBROOK J:

It's not up on the screen.

30

MS ROFF:

Sorry, I beg your pardon.

WINKELMANN CJ:

What page is that?

5 **MS ROFF:**

It's page 2367. So one of the challenges was that there had been unlawful delegation of the Minister's power under the Immigration Act, or the Regulations and Immigration Rules. Then just in terms of: "But the short answer to the suggestion that this involved an unlawful delegation is that leave to enter or
10 remain continues to be the responsibility of immigration officers and the Secretary of State, who retain the last word in each individual case ...".

So again that's similar, I would say similar here. In terms of the extent of the discretion that is exercised by the accredited suppliers, the fact that they don't
15 exercise, in my submission, any statutory power then that, and responsibility for that remains with the Minister. That that is similar to the situation that we have here your Honour.

WINKELMANN CJ:

So my reference to Schedule 6 of the Public Service Act was the reference to
20 the provision that Ms Gepp took us to, and I think that highlights for us, and I think the authorities you've referred us to highlight for us a question about, well is this actually a delegation dressed up as something that's not a delegation, is this dancing around what is actually a delegation of what you accept is a separate statutory obligation. Because if you look at clause 2(5) of Schedule 6
25 of the Public Service Act, it provides: "A chief executive may also delegate a clearly identified function or power to a person outside the public service, but only after—(a) obtaining the appropriate Minister's prior approval; and (b) being satisfied that any potential conflicts of interests ... managed."

30 And the fact that this is a delegated, so what is said against you by Ms Gepp is that, look, this is a distinct obligation, and it is so distinct it has been delegated

and subdelegated, but then there's this further delegation which is outside the scheme of the legislation and the PSA.

MS ROFF:

Well we say it's not a delegation Ma'am.

5 **WINKELMANN CJ:**

And that comes down to, you say, the level of controls.

MS ROFF:

Yes.

WINKELMANN CJ:

10 And that's really the whole thing.

MS ROFF:

Yes, there probably is, in terms of, because I think we probably do agree in terms of looking at the nature of the task, absolutely, but in the context of the statutory scheme. What is it, that's the question, what is the accredited supplier
15 actually doing, and key for me is are they exercising a statutory power or function. Are they exercising something that the decision-maker is required to do for themselves. What is the nature of the task itself. Is it something that either the level of control and oversight. Is the decision-maker still responsible for that.

20 **WINKELMANN CJ:**

Well we sort of know the negotiation is something the decision-maker has to do for themselves, because it's been the subject of the delegation and the subdelegation, but your point is that they are doing it for themselves –

MS ROFF:

25 Well, they are.

WINKELMANN CJ:

– when they're doing it within this scheme. Isn't that your argument?

MS ROFF:

Well, in terms of the delegation there does seem to be a number of delegations, and I rely on the comments, and I agree with the comments by the Court of Appeal on this, there are a number of delegation instruments that have been
 5 signed in respect of, I would say, tasks or functions that are not statutory functions that are required to be delegated under the scheme. So under section 18(1), if we could just bring up the...

WINKELMANN CJ:

So you're saying there was no need for those delegations?

10 **MS ROFF:**

No, I don't think – not in my submission your Honour, no. Probably the best one is 301.0122. So this is where the Deputy Chief Executive of LINZ has delegated... So yes, in my submission there are a number of these, what do you call them, tasks or functions, that are not required to be formally delegated.
 15 So for example section 18(1)(b), lodging notice with RGL, there doesn't seem to be a statutory power or function involved in that. Inviting an owner to sell. Then section 18(1)(d), endeavour to negotiate. We would say as well, there's no requirement for that to be formally delegated.

1520

20 **GLAZEBROOK J:**

And why is that?

MS ROFF:

I'm saying, your Honour, there are a number of –

WINKELMANN CJ:

25 No but this particular power, why is there no obligation for this to be delegated?

MS ROFF:

Because these particular tasks and functions I say are administrative, mechanical, that there's no requirement –

GLAZEBROOK J:

So the whole – well that's not what you seem to have said earlier when you accept that it's a duty to endeavour to negotiate.

MS ROFF:

- 5 I was referring to (a), (b), and (c) your Honour. Sorry if that wasn't clear.

GLAZEBROOK J:

Well I'm not really interested in those, I'm only interested in the, why endeavour to negotiate does not need to be formally delegated.

MS ROFF:

- 10 Going back again to my submission around the mechanical operational aspect of negotiating.

WINKELMANN CJ:

So you're saying it's mechanical, that's why it doesn't lead us to delegation.

KÓS J:

- 15 I find that astonishing. I mean (a), (b), and (c) are the prerequisite to the negotiation process. I mean that's the notice of requirement.

MS ROFF:

That is...

KÓS J:

- 20 I mean that's not mechanical.

MS ROFF:

- No, that's a notice of desire Sir, that's not the notice of intention. The notice of desire is, with a serving sorry. The physical serving. The power to issue the notices, yes, absolutely, sorry, I didn't make that clear. So in terms of issuing
25 the notice, that is delegated, and that is of course exercising a power, and that has, absolutely does affect the interests of the landowner so yes, that is something –

WINKELMANN CJ:

I find it a hard submission to accept that it's administrative or mechanical. As a matter of statutory interpretation it's – the Minister has to deal with it. But also because it's actually negotiating to purchase land within a statutory scheme
5 against a statutory notice which is now on their title. It doesn't seem like it's administrative or mechanical. It's going to affect fundamental rights.

MS ROFF:

The issuing of the section 18 notice?

WINKELMANN CJ:

10 No, the negotiation itself.

MS ROFF:

The negotiation itself Ma'am?

WINKELMANN CJ:

Mmm.

15 **MILLER J:**

You say the only things that really are statutory powers are the acquisition by agreement under section 17, or the taking under...

MS ROFF:

Section 23.

20 **MILLER J:**

Section 23.

MS ROFF:

Yes.

MILLER J:

25 And everything else, yes, I agree this is a hard submission to accept.

GLAZEBROOK J:

Maybe you should move on. Put your best point up.

KÓS J:

There's another practical point though, which is that (a), (b), and (c) are pretty
 5 small discrete activities. I'm trying to work out how you would delegate (d), the
 face-to-face negotiations which, as you can see in the case of the Pascoes, is
 a long-running difficult series of face-to-face or attempted face-to-face
 negotiations. Now if LINZ are to do that in accordance with the Pascoe's
 10 argument, then LINZ is going to have to have a large department of negotiators,
 and they'll have to do that in every case, unless there's some way of further
 delegating beyond then. It's kind of hard to try and imagine that you could have
 someone in LINZ doing part of the negotiations, and someone else below them
 doing the rest of the negotiations. It's kind of, inherently that's a person on
 person thing.

15 MS ROFF:

Yes, and that has been separated. Over the, in terms of historically how that's
 worked as well, the person who is the face-to-face negotiator is not the person
 who makes the decisions. It's not the decision-maker in terms of signing,
 you know, making a decision to sign the section 17 notice, or making a decision
 20 to sign the section 23 notice. That's always been separated in terms of the
 operation –

KÓS J:

No that might be true, but making a decision in terms of what the deal to be
 done is. The compensation, on which bits of land, on whether there's to be a
 25 house somewhere else, all those things are decisions that have to be made as
 part of negotiations. So you can walk away and say: "Yes Mr Pascoe, yes
 Mrs Pascoe, we're agreed on that point, subject to the Minister signing off on
 it."

MS ROFF:

Well it would be an agreement in principle, but it always is, yes, and that's what the requirements under the accreditation scheme says when, if there is an agreement in principle, any contract for sale and purchase must be drafted as
 5 an offer to the Minister so that the Minister is not bound by that. So then it really is up to the Minister, or his delegate, to decide whether or not to approve the acquisition.

WINKELMANN CJ:

So I think we've probably covered all your submissions have we. Have we?

10 **MS ROFF:**

You sound hopeful your Honour. The only part I haven't, and I am really conscious of time because I know that there needs to be time for reply, perhaps was there any questions –

KÓS J:

15 Well we did say short focused replies.

MS ROFF:

You did.

WINKELMANN CJ:

So don't let us cut – if you've got other key points to make.

20 **GLAZEBROOK J:**

I think you were going to take us to what actually happened in this case.

MS ROFF:

Yes, thank you. I will do that.

GLAZEBROOK J:

25 I mean if you've got other points of principle of course, but I'm certainly interested in your submissions on what actually happened that we didn't get to because we said let's look at the points of principle first.

MS ROFF:

Yes and perhaps the easiest way of doing that efficiently...

WINKELMANN CJ:

We've done it a little bit all along the way, haven't we, I think.

5 **MS ROFF:**

We've done bits and pieces along the way. But in the road map at paragraph 14 you'll see there the heading is "How the accreditation scheme works in practice." It maybe that this is not, you know, it maybe in other cases there may not be quite as much, such a long process, or it might be a slightly different
10 process, but this is a key example so your Honours can understand how the process works.

So first if we could go to the section 18 TPG report, and that's 302.0523. So this is the process that was followed. In this case obviously we have the
15 recommendation –

THE COURT ADDRESSES MS ROFF – ADJUST MICROPHONE (15:27:02)

MS ROFF:

This is the – so what happens is a matter of process, and what occurred here is often the NZTA will engage in an accredited supplier early on in the process
20 because they will be undertaking a range of different property services for the Crown acquiring agency, and there will be an attempt to negotiate with the landowner at that point, so that will occur, so this is outside before the PWA Part 2 compulsory acquisition process starts. But if it gets to a point where – well at this point I'm thinking it is a second one isn't it, of the notices,
25 so it'll be clear that the land is acquired, and if there has been attempts to negotiate, and it hasn't progressed to a point that is acceptable, then the accredited supplier will make a report to the LINZ official that a section 18 notice of desire should be issued, and this is the report that was sent. It actually addresses an additional landowner, two additional landowners, so at this point

there were three landowners where TPG are recommending that a notice of desire be issued in respect of them.

GLAZEBROOK J:

What did you say the date of this was?

5 **MS ROFF:**

This is the 2nd of July.

GLAZEBROOK J:

The second...

MS ROFF:

- 10 The second section 18 notice, yes. I'm not taking you to any of the documents that are referred, or in respect of the first process, so this is the second notice, and this is what signals to LINZ, and this is the decision-maker will be deciding whether or not it's appropriate to issue a section 18 notice. So there is that. You see the amount of information here about the nature – we'll talk about the
- 15 negotiations to date, you see at the top of page 302.0525. "there have been lengthy amicable negotiations with representatives of Ngāti Tama who have agreed in principle to the acquisition of part of their land... for the Project." And the submissions from the Pascoes around this, in terms of enabling the project to go ahead, it did require the land from Ngāti Tama, that land, the
- 20 Crown had agreed not to take that land compulsory, or use the compulsory acquisition powers, because it was land that was returned to Ngāti Tama as part of the Treaty settlement process. So it's giving background information around where that was, where that was at.

1530

25 **MILLER J:**

In the end agreement was reached with Ngāti Tama about –

MS ROFF:

That's right, yes. And that's why there is a bit of a delay between the issuing or service of the section 18 notice because it was waiting until that had been signed off and that was around mid-July, I think it was, 2020. You see there his

5 explanation of the project itself and what is required and in order that the improvements can be made to the alignment, setting out the objectives and project's benefits there over that page 302.0526 and talking about the alternatives, the alternative routes that were considered by NZTA and the different options and you heard Ms Gibbs refer to those this morning. All of that

10 has been considered very carefully by the Environment Court obviously as part of their enquiry under 24(7) about whether or not there was adequate consideration of alternatives by the Crown acquiring authority.

So attached to this you see, I'm going over to the back, it's 302.0531, is

15 conclusions about their recommendations as the accredited supplier, the Notice of Desire to Acquire the land be issued and then attached to that you will see a schedule at this point which sets out information about Mr and Mrs Pascoes' land, the land that's required at that stage, and the affected interests, and then at 302.0536 there's a schedule of negotiations. So the negotiation and the duty

20 to negotiate, make every endeavour to negotiate, hasn't been triggered at this point because there's no section 18 notice being, sorry section, yes, 18 notice hasn't been issued yet, but there's still detail on the negotiations that have occurred to date so that the LINZ official is aware of the situation and the need and requirement for the land and I guess in terms of what has – the interactions

25 between the landowner and NZTA at this stage.

MILLER J:

Just tell us because you – I ask this because you said that the fairness of the process is part of the Environment Court proceeding, what's the status of the appeal to the Court of Appeal on this, the matter for which we refused leave,

30 that's still live?

MS ROFF:

Yes, that is still live, Sir.

MILLER J:

And that will be an issue before the Court of Appeal?

MS ROFF:

5 It is an issue before the Court of Appeal. We had a minute from the Court on just Friday, I think it was, to say that they had granted the respondent's urgency application and the leave application for an – there's an extension of time and an application for leave to appeal will be heard. There's a hearing date been scheduled I think for the 17th of November.

10 There is also, Sir, just to update you in terms of the other strands of litigation because, of course, this is just, this particular issue and question relates to the cause of action 1 and 2 and 6, even though that's not being pursued, of the judicial review proceeding and that proceeding was determined by Justice McQueen. The other causes of action were dismissed. So that has
15 been also appealed by Mr and Mrs Pascoe. That's been filed in the Court. They didn't need leave obviously.

WINKELMANN CJ:

Right, so have we covered the application for this case?

MS ROFF:

20 Have we covered the?

WINKELMANN CJ:

Well where are we with your submissions.

MS ROFF:

Sorry, yes. So that's the, sorry, that's the beginning, that's the section 18 notice.
25 You'll see at 302.0544 is the schedule 18 notice. If I can just take you there, your Honour, and I will speed along. That is the notice that was served on Mr and Mrs Pascoe. You'll see there that, and what I wanted to point out to you, if we could just scroll down Mr Harris please, so the terms, you'll see there just under subparagraph (d) "on the terms set out in the schedule to this notice"

but I just wanted to point to you the “pursuant to section 18(1)(c)” there, that’s the invitation to sell the land. So that’s the step at section 18(1)(c) where it says the Minister will invite the landowner to sell the land. That is the invitation and that is the valuation compensation under the PWA that has been offered to
 5 Mr and Mrs Pascoe.

So the next document, if I can take you to quickly, so the next in this stage, so that we move through to the section 23 TPG report. So after a number of months TPG provide a report to LINZ recommending that a section 23 notice
 10 be issued. This is in March, I think it is, 2021. And so there is further information provided here, an updating about what has progressed I guess since the Notice of Desire was issued. So there is a number of updating reports there especially in terms of the litigation that was going on at that stage and the appeals that Mr and Mrs Pascoe were involved in in respect of the Environment Court’s, the
 15 RMA proceedings, sorry, in the RMA. If we just scroll down please Elliott, thank you. So this is a much more comprehensive report because obviously this is the information that LINZ and the Minister need to be satisfied that there’s evidence that it’s very sound and reasonably necessary for the land to be taken, that the acquiring agency has undertaken adequate consideration of
 20 alternatives, really the Minister turning his mind so that he can work to make sure there’s sufficient evidence for the Minister to rely on when assigning the section 23 notice if that’s what he decides to do.

And attached to the back of the report – sorry if we just go, sorry, I’ve just seen
 25 a map that might be quite useful for your Honours there on page 302.0561. We can see there a map of Mr and Mrs Pascoes’ property with the roading, land and the designation there. But attached to that report is the chronology that Ms Gepp referred to and in my submission it’s more than, in this case especially, it wasn’t just reading this report and looking at the chronology of
 30 interactions between the landowner – here we go, this is the chronology here. Mr Knowles also says that he reviewed all the information in the CPC file which is all correspondence between NZTA and TPG and TPG and the landowner, reports in the judicial review decision by Justice McQueen because one of the causes of action in that was about the adequacy of the information that was

provided to the Minister. There is more detail and findings by her Honour in respect of the steps that were taken for Mr Knowles to satisfy himself that every endeavour had to be made to negotiate with Mr and Mrs Pascoe. So that's in the bundle, it's the Pascoe and the judicial review decision from
 5 Justice McQueen –

KÓS J:

References please?

MS ROFF:

July this year and the reference is at the respondent's bundle of authorities, tab
 10 18, and just highlighting for your Honours paragraphs 24 to 34 and then 101 to 108 and also in the Pascoe High Court objection appeal as well that was determined by Justice McQueen. That is in the counsel assisting's bundle of authorities. I can get the tab but the paragraphs for that are paragraph 5 to paragraph 40 in terms of findings of fact and, of course, those findings of fact
 15 are not able to be challenged in this litigation obviously.

So that is the section, then we have the actual notices themselves. I'll give you the reference –

KÓS J:

20 So can I just say that schedule that you've just taken us to it's not much of a schedule of negotiations but reading the content would be informative.
 1540

MS ROFF:

Yes, absolutely, but also, of course, Sir, there wasn't a lot of contact probably
 25 at that later stage as well in terms of – and that could be the reason why as well.

KÓS J:

Well perhaps but it's hardly evaluative. It wouldn't give me, if I was the Minister, much of an idea of how the negotiations had gone since there'd be a schedule of interactions.

5 **MS ROFF:**

Well you would need to have a –

KÓS J:

You'd need to read the underlying material.

MS ROFF:

10 Yes.

KÓS J:

Which you say it has been done.

MS ROFF:

Mr Knowles did. And then just giving you the reference because I want to move
15 quickly through that for –

WINKELMANN CJ:

Well we really do need to move quickly.

MS ROFF:

Yes. Actually I don't need to because it's in the overview those document
20 references, so I don't need to do that.

WINKELMANN CJ:

No, I don't think so.

MS ROFF:

Perhaps the question too, is there any questions your Honours wanted to ask
25 of me quickly in terms of the next –

WINKELMANN CJ:

Yes. Well I did want to ask you this question. Should we find that the Minister was obliged to more directly, either himself, I think Ms Gepp – well whether LINZ was involved more directly itself to discharge the Minister's duty as
 5 subdelegate, so that it was an error not to engage when asked to negotiate, what would you say is the consequence in terms of relief or should be a consequence?

MS ROFF:

Well I say there is no – well first of all, just making sure I understand. In terms
 10 of whether or not there was, whether or not that duty was satisfied here, that obviously is not a question for this Court, that's a question that's been determined by the Environment Court and the Court of Appeal will be considering when they determine whether or not Mr and Mrs Pascoe have leave –

15 **WINKELMANN CJ:**

Well, no, the question about who was required to do the –

MS ROFF:

But who, yes.

WINKELMANN CJ:

20 Yes.

MS ROFF:

But in terms of who, if the wrong person, if the Court decides that TPG were exercising a statutory power or function unlawfully because they didn't have delegation, we obviously don't agree with that, but if that's where your Honours
 25 landed, then we would say well, first of all, we say that does not invalidate the Minister's decision and the resulting section 23 notice so – and the reason for that is because we say well the failure to comply with a statutory requirement doesn't automatically vitiate all the following steps, and relying on *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) for that, and it would

require the Court to look at and take into account the consequences of the non-compliance and that must be looked at in the context of the statutory scheme. So in the context of the Public Works Act here, and factors such as degree of seriousness and the prejudice that has occurred and whether

5 Parliament intended non-compliance would result in invalidity, and in my submission there isn't sufficient basis to set aside or invalidate the section 23 notice in this case and that is because of, in substance, the duty being satisfied as a matter of fact because of those findings by the Environment Court and being upheld on appeal and –

10 **WINKELMANN CJ:**

Well it would be said against you by the Pascoes that it wasn't discharged if they were right to say that they should be able to negotiate with LINZ.

MS ROFF:

But I would think that I – failing to understand or struggling to understand the prejudice to them in terms of what has happened in this case. They were

15 provided with the opportunity to negotiate with the Crown through the Crown's authorised representative. I understand what you're saying, your Honour, in terms of whether that's the right person but in terms of the substance of the offers that were made and in terms of the attempts to negotiate every

20 endeavour was made –

MILLER J:

This is if one accepts your premise that this land was properly taken, in other words the choice of this land, then yes you're right the rest of it is...

MS ROFF:

25 That has been determined, yes, that is my case, Sir. I mean that is on appeal now to the, as you pointed out, to the Court of Appeal but the Environment Court has approved this, has allowed this taking effectively by its decision.

WINKELMANN CJ:

Well there's another point of view of this which is that they were right to say that LINZ was obliged to negotiate with them, and so the fact that LINZ was wrong in its position, this is assuming that finding –

5 **MS ROFF:**

Yes, sure.

WINKELMANN CJ:

– so why should they be prejudiced by this, they've lost their right to negotiate?

MS ROFF:

10 But they haven't lost their right to negotiate, your Honour, because they still had, in terms of what the Environment Court has found as a matter of fact, there was every attempt to negotiate with them because they decided they didn't want to –

WINKELMANN CJ:

15 I think you and I must be at cross-purposes.

MS ROFF:

I understand what you're saying.

WINKELMANN CJ:

They were right that they didn't have to negotiate with TPG, they should have
20 been entitled to negotiate with LINZ.

MS ROFF:

But in my submission there's no prejudice by not negotiating with LINZ and perhaps I could just refer, I'll just refer you to the reference, because I probably need to sit down very soon, *Seaton v Minister for Land Information* [2013]
25 NZSC 42, [2013] 3 NZLR 157. It's the minority decision in *Seaton*. That's at the respondent's bundle, tab 23. That was a judicial review case. In that case the Supreme Court did set aside, or it reinstated the High Court decision which

made a declaration validating the section 23 notice in that stage but there's a comment by the majority which is, in my submission, is relevant here that there was no prejudice suffered because in that case it was about a section 186 case and the landowner wanted to negotiate with the network utility provider and

5 thought they – because they didn't go through the section 186, the landowner says she was prejudiced by not having the opportunity to do that and what the minority said was there is no prejudice –

WINKELMANN CJ:

The minority?

10 **MS ROFF:**

Yes. And the reason why, even though it's the minority judgment, it's still relevant here because in that case the objection hearing hadn't taken place. So there'd been no findings in that case by the Environment Court. There'd been no factual findings in that case like we have here.

15 **MILLER J:**

Is a negotiated outcome still technically possible?

MS ROFF:

You'll see in the document, Sir, even in the briefing itself, is that the briefing to the Minister, the officials say "we will still continue to make every endeavour to

20 negotiate with Mr and Mrs Pascoe."

WINKELMANN CJ:

And what about costs?

MS ROFF:

Costs to lie where they fall in the usual way, your Honour.

25 **WINKELMANN CJ:**

Thank you.

KÓS J:

Why is that the usual way? Sorry?

MS ROFF:

Just, sorry, just costs do not lie where they fall, just to be in the usual way.

5 Sorry.

KÓS J:

Yes, not at all lie where they fall.

MS ROFF:

No, no, I didn't mean that. Sorry.

10 **KÓS J:**

You seek costs?

MS ROFF:

Yes, yes, yes. Sorry. We would seek costs, yes. Apologies.

WINKELMANN CJ:

15 Thank you, Ms Roff. So Mr Pascoe, Ms Gibbs, if you have any particular points in reply. This is not – you do not need to repeat your arguments, just things that you haven't said before to reply to the respondent's arguments.

MS GIBBS:

20 Thank you, your Honour. We just wanted to check everybody's received the submissions in reply that were handed up at the –

WINKELMANN CJ:

Yes, we have. You gave us those this morning and we can read through those so you don't need to take us through them.

MS GIBBS:

Thank you, your Honour, and with that there was a sort of an additional one. I'm pretty sure it's with it. It starts off: "We submit that the meaning of required...".

5 **WINKELMANN CJ:**

Yes, we've got that.

MS GIBBS:

And that one, thank you.

MR PASCOE:

10 Can I just butt in for a second, your Honours, please.

WINKELMANN CJ:

Yes, Mr Pascoe.

MR PASCOE:

I'd make it very, very clear to this Court we never ever stopped negotiating.
15 We asked to negotiate with the Minister's delegate because of TPG, with Mr Andrew Hopkirk to start with, which was removed, and then Mr –

WINKELMANN CJ:

You might just need to move the microphone a bit towards you.

MR PASCOE:

20 Sorry. Mr Andrew Hopkirk from TPG which was removed from talking to us and coming to a situation of what to go forward and then Mr Billing told us that he did not have the authority to do a land exchange when we asked for ground marking and all that sort of stuff. So I just want to make it very clear that's why we wanted to negotiate with the delegate, LINZ delegate. I'll let Marie carry on.

25 **MS GIBBS:**

Thank you. I just wanted to – there was a comment by Ms Roff about Mr Knowles' evidence that he identified a particular issue so that's in his

affidavit which is tab 35 and it's page 201.0049. Mr Knowles said: "A particular issue I identified was that one of the leasehold areas that the TPG report proposed to be subject to a s 23 notice was smaller than the area covered by the s 18 notice." Mr Knowles is not being truthful in that statement. If you look at those two documents it is impossible to identify that issue from those two documents. So if you look at the TPG report proposed to be subject to the 23 notice, it's dated the 15th of March 2021. TPG and NZTA report to LINZ. There is only one of those reports, and that's where we showed you this morning that survey plan, which was based on, so we're just saying Mr Knowles' statement there is not truthful because he can't have, it is impossible for him to have identified that particular issue from the documents he refers to your Honour.

1550

I just wanted to also quickly point you to the authority number 49. It's the terms of negotiation, and it's one example of what the Minister has to do under section 18(1)(d), and on page 3 of that document at 7(i) he agrees, they sign terms of negotiations. So they sign these for negotiations can commence, and number (i) says the parties will: "Aim to commence substantive negotiations as soon as reasonably practicable after the Ngāti Tama Iwi Development Trust have been provided with the information and resources it has previously requested from the Crown."

So our submission is that there are, under section 18(1)(d), the Minister has obligations to complete pre-negotiations, and provide everything that the landowner has reasonably requested and needs prior to negotiations commencing, and if the Minister, or the Crown can do it for the Ngāti Tama Iwi Development Trust, they can do it for Tony and Debbie Pascoe.

I've just made a few notes and I'll go through them. Your Honours, I can't remember who, someone said section 23 objection is a protection for landowners, and we just wanted to make the comment that that provision is actually being removed by the Public Works Critical Infrastructure Bill, so that

might be relevant while section 18(1)(d) is still going to be in there, that might be a relevant consideration for your Honours.

We respectfully request the Court do a statutory interpretation of section 18(1)(d) and a statement of what the law says the Minister or his delegate, but what needs to be done when the Environment Court makes its factual findings, and we're saying it's an error because they're using the wrong statutory test. They're applying the incorrect statutory framework, because we say it's never actually been stated, and that's what we're respectfully asking from your Honours. State what the purpose of the Public Works Act, who has to do section 18(1)(d), and what has to be done. We're saying some examples is complete pre-negotiations: remove any blocks to negotiations commencing; remove any blocks to reaching agreement; make it as easy as possible for the landowner; not be adversarial; meet landowners requests.

15

This is obligations on the Minister, and we just want to point out, section 18(1)(d) does not put any obligations on the landowner. The obligations under section 18(1)(d) are on the Minister and his delegate. It doesn't matter what the landowner does, the Minister still has to fulfil his section 18(1)(d) obligations. So he has to make every endeavour to negotiate in good faith in an attempt to reach agreement with the landowner no matter what, otherwise section 18(2) cannot be invoked.

20

The Minister or his delegate must route around for the information. Make sure he's got everything. Don't rely on the requiring authority or the accredited supplier that they've disclosed everything. He's got an obligation on him to seek the evidence, and that's so he can inform his statutory discretion exercise under section 18(1)(d), and that's also so he can ensure that the landowners have been provided everything they need to make their decisions, because the landowners, and especially in this case, have got important decisions to make. They need to know what effect of the project is on their land, especially in this case where there's temporary occupation. Tony and Debbie still don't know whether they'll be able to continue farming, even after they get their temporary occupation land back, that's why they ask for the ground marking co-ordinates.

25

30

We're saying the Minister's actually got an obligation to provide, like comply with landowner's reasonably made requests. So Tony and Debbie requested GPS co-ordinates so they could mark out project features on their land, and the Minister instead of providing that information, he just transferred it as an

5 OIA to NZTA. NZTA refused to provide it, and the Minister didn't make them. So we're saying the Minister has failed his every endeavour test because he should have instructed the requiring authority to provide the information that Mr and Mrs Pascoe said they needed to make their decisions.

10 The Minister in this case was obligated to negotiate – assess, or have his valuer assess compensation for the removal of the PLA clauses. So while the Court of Appeal has found that, yes, the Minister can serve a section 18 notice, and a 23, with removing the PLA clauses relating to leases that protect landowners interests, the Court of Appeal has said that that is compensatable *[sic]*. So we

15 say if the Minister is removing those clauses, he is obliged to give that information to the valuer, and ask the valuer to value the effect of that, and that hasn't happened in this case. But as part of a test, if he is removing the PLA clauses, we say that should be part of his make every endeavour test.

20 We say the Minister or his LINZ delegate must set the parameters for the negotiations. For example, they must set the parameter whether a home will be offered with option 1, for example. Whether a farm hub will be offered. Whether reinstatement land exchange will be offered. NZTA are setting these parameters and we say that is an unlawful delegation. We say that the Minister,

25 another thing he has to do, part of the test, is determine what kind of taking it is. Is it just taking someone's home, or part of their residential, where they – or is it taking land which they rely on for their livelihood. We think that's important with Tony and Debbie, like they weren't provided resourcing because they said, oh, that's your personal time. It wasn't Tony and Debbie's personal time, it was

30 their work time.

Making every endeavour, one of the other tests is making sure the landowner has time and capacity and resourcing to review the information, understand it.

WINKELMANN CJ:

So all of these issues, it's broader than the issue we're looking at. I understand your point that you'd like clarification, but I think we've got the general picture, you'd like guidance.

5 MS GIBBS:

Thank you your Honour. NZTA are not just providing information in the section 18(1)(d) process, they are actually exercising the section 18(1)(d) function.

WINKELMANN CJ:

10 That's your essential point?

1600

MS GIBBS:

Yes your Honour. NZTA are not property managers. Project managers sorry. The Minister doesn't have decision-making function or powers for the project.

15 That sits with NZTA. NZTA get their powers from the Land Transport Management Act 2003 and they are statutorily independent which means that they don't have a minister telling them what to do. The NZTA Board have complete independence. There were some comments before about the project budget. There is no project budget because that statutory independence
20 means that the NZTA Board can keep approving endless funding approvals which is what is happening. When NZTA Board chose the option in 2017 it was 200 million, 199.6. In 2020 it was 280. There's no project budget. In 2024 it's 365 and it's all been spent –

KÓS J:

25 This isn't really helping me very much I have to say.

MS GIBBS:

If the project budget is relevant, what we're saying is there is no project budget. There was some discussion before about –

WINKELMANN CJ:

I think we've got the point, yes.

MS GIBBS:

– does the project budget affect the –

5 **WINKELMANN CJ:**

That was Ms Gepp. It's not a major point. It was a side point.

MS GIBBS:

Thank you, your Honour.

KÓS J:

10 It's probably one of these situations, Ms Gibbs, where we need to hear Ms Gepp because she's got the heavy lifting legal points which are the ones that help you most.

MS GIBBS:

Sure. I'm going as quick as I can. I just wanted to point you to –

15 **KÓS J:**

Pick your main ones please.

MS GIBBS:

Thank you. Authority 25 which is the *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (CA) case, and it's on page 2. It just says that the cost
20 estimates are “only estimates at that time. Like all estimates they are often falsified in execution” and in this case the assurance meant it was never, option E was never going to be 200 million. So we're just saying that's not relevant to the section 18(1)(d).

WINKELMANN CJ:

25 Yes, got it.

MS GIBBS:

We're also saying that there's no – the project can't limit the section 18(1)(d) negotiations. We're saying only the Minister and the delegate can exercise their statutory discretions on what the landowner will be offered. It can't be limited –

5 **WINKELMANN CJ:**

So your submission there is that the project can't limit what's fair and reasonable, fair and reasonable limits what's fair and reasonable?

MS GIBBS:

That's correct, your Honour, and the evidence of that is that one of the other
10 landowners got \$7.7 million cash for a similar amount of land across the fence. They got a \$1.2 million land exchange which was a working farm with a dwelling and they didn't have a working farm or a dwelling before but they've got one now and that was never offered to Tony and Debbie because NZTA made the decision not to and we're saying that was not their decision to make. It had to
15 be the Minister or LINZ to make that decision.

We just wanted to also point you to *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (HL), and silly me I haven't put the paragraph down, but it says the power for the courts to add, omit or substitute words in statute is
20 "confined to plain cases of drafting mistakes". So we're saying that the statute says what it says and it says what it says because Parliament intended it to say that. It's not a mistake and so it can't be changed when it says: "the minister must make every endeavour" that doesn't mean he must be satisfied that every endeavour has been made.

25 **WINKELMANN CJ:**

So we're really running out of time now, Ms Gibbs, because we're at 4 o'clock and we haven't heard from Ms Gepp yet.

KÓS J:

Have you got one more big point?

MS GIBBS:

Thank you. Okay, I just want to make one more point. If the Minister says he took 11 months to move on the section 23 notice, and that's what Ms Roff told the Court, that doesn't explain how the section 23 survey was carried out on the 11th of January 2021. If I could just point you to tab 5 and start at paragraph 56 and that's just the statutory scheme for where NZTA get their powers from and how the project came about.

WINKELMANN CJ:

Thank you, got that.

10 **MS GIBBS:**

Thank you, your Honours.

MR PASCOE:

Thank you, your Honours.

WINKELMANN CJ:

15 Thank you both. Ms Gepp?

MS GEPP KC:

Thank you, Ma'am, I'll be very brief. I've got five short points to make. I'm going to start with, start at the end with the notice of intention to support the decision on other grounds and what was the effect of the other decisions that have been made where my friend says well there's been a finding as a matter that this was fair and that essentially deals with this process as well.

So if I could ask Ms Wright to put up the respondent's tab 18, the judicial review decision, at 104. Just noting what this does say is that it notes what Mr Knowles says he considered, which it sounds very similar to what he says in his affidavit in this case. He says specifically: "LINZ and the Minister do not consider that it is their role to step into NZTA's shoes in this regard." So just making really clear the precise issue that is before you was just sort of taken as accepted in that case. So it goes on to say: "... Mr Knowles says he does not regard the

process he undertook as a rubber-stamping exercise. He considers his role and that of the Minister is to consider the adequacy of the process followed by NZTA rather than a reconsideration of the merits of each [in this case] alternative.” So that's what Mr Knowles described his job as and then at 109 –

5 **GLAZEBROOK J:**

He's talking more substantively there though, isn't he?

MS GEPP KC:

He is but these are the paragraphs that my friend said demonstrated –

GLAZEBROOK J:

10 Okay.

MS GEPP KC:

– that had been, had showed that this issue had been considered and was found as a matter of fact to not be unfair. And then just noting at 109, the Court is moving on and it says: “The Pascoes identify three matters that they say
15 make the information provided to the Minister in the briefings deficient.” So that’s the issue that the Court is looking at in that case. The information provided, not the question of who was the negotiator.

So the next, on the same point, the Environment Court's decision on the
20 objection to the taking and my friend is just going to put that up. That is the Court records that Mr Billing, Mr Billing is the property group representative, Mr Billing testifies he made numerous attempts to contact. His evidence was not challenged. The answer was that, as Mr Knowles said, “... prior to the issuing of the second section 18 notice Mr and Mrs Pascoes had arrived at the
25 view that ... negotiations could only be done by the Minister himself, or by LINZ itself under delegation.” And then the Court says straight under that quote: “This issue was not argued in front of us and has been the subject of determination in the High Court (now under appeal, we understand).”

So that's how the Environment Court dealt with it. It put that issue to one side. It essentially accepted that the legality of that issue was, that it was lawful unless this, unless overturned by an appeal court. So it's whole assessment of the fairness of the process is premised on leaving that issue to one side and

5 that is the same approach taken in the Court of Appeal on that, the appeal from that decision, and the Court records at 47, that it granted the parties leave to file brief written submissions as to the relevance to that decision of the –

KÓS J:

What is this decision?

10 **MS GEPP KC:**

Sorry that's the appeal, sorry that's the High Court –

WINKELMANN CJ:

I was going to say I didn't think it had got to the High Court.

MS GEPP KC:

15 – appeal from the Environment Court taking, I'm getting my courts mixed up. The High Court appeal from the Environment Court objection and so the Court says it granted the parties leave to file written submissions as to the relevance of the Court of Appeal's decision that we are here discussing to that appeal. It agreed with the Minister's submission that the Court of Appeal does not raise

20 any issues which bear on that appeal. So it was, again, it was put to one side.

1610

So the other point that I want to make is in relation to the – my friend said in relation to the history, the Court asked if LINZ is going to, Justice Kós asked:

25 "If LINZ is going to do the negotiating, it would have to have a large number of negotiators" and my friend said "yes" and that has always been separated but in my submission that's not the case when you look at the legislative history. It may have been separated in practice but that's not how the legislative history showed the division of, the allocation of duties going.

KÓS J:

I don't, seeing as that was my question, I'd like to understand your answer.

MS GEPP KC:

Say again, sorry, Sir?

5 **KÓS J:**

What is your point? I mean is she right that it would require a lot of negotiators in LINZ if your argument is right?

MS GEPP KC:

10 There would need to be, yes, there would need to be. LINZ would need to be resourced to do the job and in my submission the resourcing follows the requirements of the law and doesn't inform the interpretation of the law.

KÓS J:

So how much work could TPG do in your perfect – if we had legal compliance in your terms?

15 **MS GEPP KC:**

20 So certainly information gathering informing the Minister on the way, or the Minister's delegate, on the way of negotiating. The Court's question is challenging about what if there was a separate entity doing the day-to-day but going back to the Minister, or the delegate, at each stage and I agree that that is a – it's difficult to know exactly whether that could be seen as retaining sufficient control in practice over the statutory function in order for that to be lawful but what is clear is that is not the situation in this case. There's clearly not a retaining of control over the iterative decisions that needed to be made along the pathway of the negotiation. LINZ set up the accreditation process, then the accredited supplier had the discretion to negotiate constrained by the compensation provisions in the Act but, as I've said, those are not particularly constraining in the sense that they provide – they don't provide a particular outcome or suite of outcomes that might be arrived at in a particular case. The control for those iterative decisions was very much with the accredited

supplier and with NZTA and that's what you saw in the letter that my friend took you to which was this one here, 22 April 2021, in the fourth paragraph, at the end of this paragraph, with regard to historical damages Waka Kotahi have confirmed they're open to receiving information on this matter as well as

5 engaging on the overall compensation for the acquisition of part of your property. So this is LINZ saying it's not up to us to make those decisions but Waka Kotahi is able to do that and willing to do that. So in terms of retaining control, the requisite level of control, to say that the function, the statutory function remains with the Minister, is just not there. Thank you.

10 **WINKELMANN CJ:**

Is that it Ms Gepp? Excellent, thank you very much. We didn't ask the Pascoes about costs I think. Do you have any submissions on costs?

MR PASCOE:

Where they lie.

15 **WINKELMANN CJ:**

Where they lie, right.

MS GIBBS:

I think it's in the submissions, your Honour.

WINKELMANN CJ:

20 Okay, you're happy to rest on those.

MS GIBBS:

And I think it's self-represented \$500 a day.

WINKELMANN CJ:

Yes, right.

25 **MR PASCOE:**

Also, your Honours, is it possible because of the short time period, can we ask the Court if we can email the points we didn't –

THE COURT ADDRESSES MR PASCOE – MOVE TO MICROPHONE

(16:14:07)

MR PASCOE:

Because of our short time period, can we ask the Court please if we can just
5 email the very few last points, important points, that we were trying to say?

WINKELMANN CJ:

Yes, you may and the Crown can have a right – can you do that by the end of
the week? Have you written them or do you need some time to type them up?

MR PASCOE:

10 Yes, yes, we have.

WINKELMANN CJ:

If you do that by the end of the week and then the Crown can have a further
three days, one day, three days? One week.

GLAZEBROOK J:

15 The Crown wouldn't normally have a reply to the reply.

WINKELMANN CJ:

Well that's quite right. Actually you don't need to reply to a reply. I'm just tired.

MR PASCOE:

Thank you very much, your Honour.

20 **WINKELMANN CJ:**

Yes, so no right of reply.

MR PASCOE:

Thank you very much.

WINKELMANN CJ:

Well thank you very much for your submissions all parties and counsel assisting and we will reserve our decision.

COURT ADJOURNS: 4.15 PM