

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA87/2023
[2024] NZCA 557

BETWEEN TONY JAMES SOFUS PASCOE AND
DEBBIE ANN PASCOE
Appellants

AND MINISTER FOR LAND INFORMATION
Respondent

Hearing: 10 July 2024

Court: Goddard, Mallon and Palmer JJ

Counsel: Appellants in person
R L Roff and E S Harris for Respondent
S R Gepp KC as counsel assisting the Court

Judgment: 31 October 2024 at 11.30 am

JUDGMENT OF THE COURT

- A The application for leave to adduce further evidence on appeal is declined.**
- B The appeal is dismissed.**
- C The appellants must pay costs to the respondent for a standard appeal on a band A basis, with usual disbursements.**
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REASONS OF THE COURT

(Given by Goddard J)

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Introduction

[1] Mr and Mrs Pascoe own a farm in the Mangapēpeke Valley. The Crown seeks to acquire various interests in the Pascoes' land for the Te Ara o Te Ata: Mt Messenger Bypass Project (the Project). The Project involves the construction of a 5.2 km bypass route east of State Highway 3, between Taranaki and the Waikato.

[2] Waka Kotahi | New Zealand Transport Agency (NZTA) is a Crown entity. It is responsible for carrying out the Project on behalf of the Crown. NZTA contracted with The Property Group Ltd (TPG) to provide property-related services to NZTA in connection with the Project. Those services included engaging in discussions with the owners of land affected by the Project with a view to reaching agreements for access to, and (if required) acquisition of, that land.

[3] There have been discussions between the Crown and the Pascoes since 2016 in relation to the Project, and the possible acquisition of land for the purposes of the Project. The Crown wishes to acquire approximately 11 ha of the Pascoes' land, and to obtain a leasehold interest in a further approximately 12.7 ha of the Pascoes' land

for temporary occupation during construction of the road. However no agreement has been reached in relation to acquisition of the Pascoes' land.

[4] NZTA took steps to invoke the compulsory acquisition process under the Public Works Act 1981 (PWA). The PWA confers power on the Minister for Land Information (the Minister) to acquire land required for a Government work (such as the Project). The PWA provides for a staged process under which attempts are initially made to reach agreement to acquire land. If those attempts are unsuccessful, the Minister may give notice of desire to acquire the land, endeavour to negotiate in good faith with the owner to reach an agreement for the acquisition of the land, and, in the absence of agreement, proceed to take the land under the PWA. The PWA provides for compensation to be paid where land is taken compulsorily.

[5] On 31 August 2020 a notice of desire to acquire land was served on the Pascoes under s 18 of the PWA. The issue of that notice was approved by a Toitū Te Whenua | Land Information New Zealand (LINZ) official with delegated authority to do so.

[6] However difficulties were encountered at the negotiation stage of the process. Section 18(1)(d) of the PWA provides that the Minister must “make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land”. The Pascoes consider that these negotiations must be conducted by the Minister personally, or by a LINZ official with a formal delegation from the Minister of authority to carry out the negotiations. They consider that the negotiations could not lawfully be conducted by TPG.

[7] TPG is an “accredited supplier” for the purpose of carrying out such negotiations, under an accreditation scheme established by LINZ. But the Pascoes say that this accreditation scheme is not provided for in the PWA, TPG is a private entity that is not part of the Crown, TPG is retained by NZTA rather than by LINZ, and no powers or functions under the PWA have been delegated to TPG by the Minister.

[8] The Pascoes were not willing to negotiate with TPG. The Minister and LINZ declined to negotiate directly with the Pascoes. This led to an impasse in relation to conducting negotiations for the purposes of s 18(1)(d).

[9] In the absence of an agreement for the acquisition of the Pascoes' land, the Minister issued a notice of intention to take that land under s 23 of the PWA. The Pascoes brought judicial review proceedings challenging the s 23 notice (and related matters) on various grounds.

[10] The High Court identified three preliminary questions for determination. Those questions, and the answers given by Grice J in the High Court, were as follows:¹

- (a) Is s 18(1)(d) of the [PWA] complied with if the relevant negotiations with the land owner are undertaken by an entity accredited by [LINZ] as a Crown Property Accredited Supplier (such as 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?

The Minister is not required to personally carry out the operational tasks, including the negotiations referred to under s 18(1)(d) of the [PWA] but is entitled to satisfy himself that those have been undertaken by staff or contractors in compliance with s 18(1)(d) for the purposes of exercising the power under the Act to enter into an agreement to acquire or proceed to take land.

- (b) If not, does that affect the legality of the s 23 notice subsequently issued by the Minister?

In view of the answer to the first question, this question does not require an answer.

- (c) Is the Minister permitted to exclude cls 4, 5, 6, 10, 11 and 12 of Part 2 of Schedule 3 and cl 13 of Part 3 of Schedule 3 of the Property Law Act 2007 from the proposed lease (including in accordance with ss 217 and 279(2) of the Property Law Act and Part 2 of the [PWA])?

The Minister is permitted to exclude the terms and conditions implied under cls 4, 5, 6, 10, 11 and 12 of Part 2 of Schedule 3 and cl 13 of Part 3 of Schedule 3 of the Property Law Act 2007 when acquiring land under Part 2 of the [PWA].

[11] The Pascoes appeal to this Court against the answers given by the High Court.

[12] We have concluded that negotiations for the purposes of s 18(1)(d) of the PWA can be conducted on a day-to-day basis by the Minister, a delegate of the Minister, or an authorised representative of the Crown such as TPG. The person who carries out the negotiations on a day-to-day basis does not require any formal delegation of

¹ *Pascoe v Minister of Land Information* [2022] NZHC 3173 [High Court judgment] at [58] (emphasis in original).

authority to do so from the Minister: they are not exercising any statutory power, or making any statutory decision, of a kind that requires delegated authority.

[13] In order for the Minister (or their delegate) to be satisfied that every endeavour has been made to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land, there must be systems in place to ensure sufficient oversight by the Minister (or delegate) of the negotiations, and to ensure the Minister (or delegate) receives sufficient information about the negotiation process to support that conclusion. Depending on the course the negotiations take, reference back to the Minister (or delegate) may be required during the negotiations.

[14] In this case, however, the Pascoes declined to negotiate with TPG. They insisted that the Minister or delegate negotiate with them. The Minister was not required by the PWA to negotiate directly in this manner. It was consistent with the PWA for the Minister (or delegate) to rely on TPG to conduct the day-to-day negotiations providing the Minister (or delegate) retained ultimate responsibility for the attempt to reach a negotiated agreement under s 18(1)(d).

[15] We also agree with the High Court Judge that the Minister is permitted to exclude from the proposed lease the provisions identified in question (c) above. This may however have implications for the compensation to be paid to the Pascoes.

[16] The appeal must therefore be dismissed. Our reasons are set out in more detail below.

The statutory framework — an overview

[17] We begin by outlining the statutory framework for compulsory acquisition of land, so far as relevant for present purposes.

[18] The PWA seeks to strike a balance between the high level of protection that the common law provides for rights of private property, and the public interest in provision of infrastructure and other public works that are needed to enable modern societies to function. There has been legislation providing for compulsory acquisition of land in

New Zealand for public works since 1863.² The power of the Crown to acquire land for public works compulsorily is now set out in the PWA, which was enacted in 1981 and has been extensively amended since then. Those amendments in large part reflect a series of public sector reorganisations in New Zealand since the early 1980s.

[19] Section 16 of the PWA empowers the Minister to acquire land required for a Government work.³ Likewise, every local authority is empowered to acquire land that is required for a local work for which it has financial responsibility.⁴

[20] A Government work for the purposes of the PWA is a work or intended work that is to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose.⁵

[21] The power conferred by the PWA to acquire or take land for a public work includes the power to acquire or take any particular estate or interest in the land, whether or not for the time being that estate or interest subsists separately.⁶ So for example the Crown can acquire or take a leasehold interest in land in circumstances where the owner holds a freehold title to the land, and there is no subsisting lease.

[22] Section 17 of the PWA provides for acquisition of land by the Minister or a local authority by agreement. Any such agreement will necessarily be preceded by negotiations about the land to be acquired, the price to be paid for that land, and the other terms of the agreement.

² See The Lands Clauses Consolidation Act 1863; and *Dromgool v Minister for Land Information* [2022] NZSC 157, [2022] 1 NZLR 716 at [120]–[121] per Winkelmann CJ.

³ Public Works Act 1981, s 16(1).

⁴ Section 16(2).

⁵ Section 2 definition of “Government work”.

⁶ Section 28, and see s 2 definition of “land”.

[23] If agreement to acquire land is not reached under s 17, s 18 provides for the initiation of the process for taking land under the PWA:

18 Prior negotiations required for acquisition of land for essential works

(1) Where any land is required for any public work the Minister or local authority, as the case may be, shall, before proceeding to take the land under this Act—

- (a) serve notice of his or its desire to acquire the land on every person having a registered interest in the land; and
- (b) lodge a notice of desire to acquire the land with the Registrar-General of Land who shall register it, without fee, against the record of title affected; and
- (c) invite the owner to sell the land to him or it, and, following a valuation carried out by a registered valuer, advise the owner of the estimated amount of compensation to which he would be entitled under this Act or the betterment that he may be liable to pay; and
- (d) make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land.

(2) If, after a period of 3 months,—

- (a) the owner fails to respond to any invitation issued under subsection (1); or
- (b) the owner refuses to negotiate with the Minister or the local authority, as the case may be; or
- (c) an agreement for the sale and purchase of the land is not made with the owner under section 17,—

the Minister or local authority may, within 1 year after notifying the owner under subsection (1), proceed to take the land under this Act.

(3) Any notice under subsection (1)—

- (a) may be withdrawn by the Minister or local authority at any time; and
- (b) shall, in relation to any person and his interest in the land, be deemed to have been withdrawn at the expiration of the period of 1 year beginning on the day after the date on which the notice was served on that person unless, before the expiration of that period,—
 - (i) proceedings have been commenced under subsection (2); and

- (ii) notice of the commencement of those proceedings has been given to that person.

...

[24] The process under s 18(1) may lead to an agreement under s 17. Alternatively, it may not because the owner has failed to respond to the invitation to sell under s 18(1)(c) or has refused to negotiate under s 18(1)(d), or because the good faith negotiations under s 18(1)(d) have been unsuccessful in reaching an agreement. Section 18(1)(d), which requires the Minister (or local authority) to make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land, is at the heart of this appeal. By whom must these negotiations be carried out? We will return to this question after identifying other relevant features of the statutory scheme.

[25] At the risk of stating the obvious, negotiations under s 18(1)(d) must as a minimum address the particulars of the land to be acquired, the estate or interest in the land that is to be acquired, the timing of the acquisition, and any financial compensation to be provided for the acquisition of the land. Those negotiations may have additional dimensions. For example, the agreement may provide for a land swap or for the construction of buildings on land by way of compensation, as contemplated by s 21 of the PWA:

21 Land may be purchased or improved for granting as compensation

Any notifying authority, as defined in section 59, may acquire any land under section 17 and develop and construct buildings on such land or on any other land owned by the notifying authority for the purpose of granting the land or any part of it in payment or satisfaction or in part payment or part satisfaction of the compensation payable to the person entitled for any land taken, purchased, or acquired for or in connection with a public work.

[26] Section 18(2) provides for the Minister or a local authority to proceed to take land under the Act if an agreement is not reached within the period of three months from the giving of a s 18 notice. The scheme is, therefore, that a compulsory taking may proceed only if a negotiated agreement is unable to be reached under the s 18(1) process. If that is the case, the Minister has a one-year period from the date of service of the notice of desire under s 18(1)(a) to commence the steps to take the land.

[27] Section 23 sets out the steps to be taken where land is to be acquired compulsorily:

23 Notice of intention to take land

- (1) When land (other than land owned by the Crown) is required to be taken for any public work, the Minister in the case of a Government work, and the local authority in the case of a local work, shall—
 - (a) cause a survey to be made and a plan to be prepared, and lodged with the Chief Surveyor, showing the land required to be taken and the names of the owners of the land so far as they can be ascertained; and
 - (b) cause a notice to be published in the *Gazette* and twice publicly notified giving—
 - (i) a general description of the land required to be taken (including the name of and number in the road or some other readily identifiable description of the place where the land is situated); and
 - (ii) a description of the purpose for which the land is to be used; and
 - (iii) the reasons why the taking of the land is considered reasonably necessary; and
 - (iv) a period within which objections, other than objections by persons who are served with a copy of the notice under subsection (1)(c), may be made; and
 - (c) serve a notice on the owner of, and persons with a registered interest in, the land of the intention to take the land in the form set out in Schedule 1.
- ...
- (3) Every person having any estate or interest in the land intended to be taken may object to the taking of the land to the Environment Court in accordance with the provisions of the notice.
- (4) Every notice of intention to take land given under this section shall, on the expiration of 1 year after the date of the publication in the *Gazette* of the notice, cease to have effect unless, on or before the expiration of that year,—
 - (a) a Proclamation taking the land has been published in the *Gazette*; or
 - (b) the Minister or the local authority has, by a further notice in writing served on the owner of the land, and persons with a registered interest in the land, intended to be taken, so far as

they have been ascertained, confirmed the intention, subject to the provisions of this Act, of taking the land; or

- (c) the intention to take is the subject of any inquiry by the Environment Court or an Ombudsman, or of any application for a judicial review, in which case the notice of intention shall remain valid for 3 months after the date of the Environment Court's report or the date on which the Environment Court received written notice of the withdrawal of the objection, or the date of the completion of any inquiry by an Ombudsman, or the judicial decision, as the case may be.

...

[28] If an affected person objects to the taking of land under s 23(3), the objection is heard by the Environment Court. The Environment Court undertakes the inquiry prescribed by s 24 of the PWA:⁷

24 Objection to be heard by Environment Court

- (1) On receiving a written objection under section 23, the Environment Court shall, as soon as practicable, send a copy of the objection to the Minister or local authority, as the case may require.

...

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

...

- (7) The Environment Court shall—
 - (a) ascertain the objectives of the Minister or local authority, as the case may require;
 - (b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives;
 - (c) in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court;
 - (d) *decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:*

⁷ Emphasis added.

- (e) prepare a written report on the objection and on the court's findings:
- (f) submit its report and findings to the Minister or local authority, as the case may require.

...

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

...

[29] If no objection is made under s 23, or an objection is withdrawn or is disallowed by the Environment Court, the Minister or local authority may proceed to take the land in accordance with the process set out in s 26 of the PWA. The Minister or local authority may do so only if they are of the opinion that the land should be taken for the public work specified in the notice given under s 23, and that no private injury will be done for which due compensation is not provided in the PWA.

[30] Section 4C of the PWA expressly provides for delegation of the Minister's powers under the PWA to any officer of the Minister's department, other than that power of delegation. However, s 4C(2) expressly provides that the Minister must not delegate the power to issue a notice of intention to take land under s 23(1).

[31] General powers of delegation by Ministers are also set out in legislation governing the public sector: in the relevant period these delegation powers were initially found in the State Sector Act 1988, and subsequently in the Public Service Act 2020.⁸

[32] The powers conferred on the Minister were, at all relevant times, able to be delegated to the Chief Executive of LINZ under s 28 of the State Sector Act and, with the Minister's written approval, subdelegated by the Chief Executive to other LINZ officials under s 41 of that Act.⁹ Those general powers of delegation were subject to contrary indications in the legislation conferring the power. So, for example, the

⁸ The State Sector Act 1988 was replaced by the Public Service Act 2020, which preserved existing delegations. See Public Service Act, s 8 and sch 1 pt 1 cl 7.

⁹ The corresponding provisions are now found in the Public Service Act, sch 6 cls 2 and 5.

express prohibition on delegation of the s 23 PWA power in s 4C(2) means that this power cannot be delegated under the State Sector Act or Public Service Act.

[33] As this brief survey illustrates, there are a number of checkpoints in the process before land can be taken compulsorily. A decision must be made (by the Minister or a delegate) to initiate that process under s 18. The steps required by s 18 — including using every endeavour to negotiate in good faith — must be undertaken. Absent an agreement, a decision must be made by the Minister personally to give a notice of intention to take land under s 23. The landowner has an opportunity to object to the taking, and to have that objection heard by the Environment Court. And a decision must then be made to proceed to take the land under s 26: this decision must also be made by the Minister personally in the absence of any delegation.¹⁰

The acquisition process that was followed in this case

NZTA responsibility for the Project

[34] NZTA has statutory responsibility for the construction and management of the State Highway system under the Land Transport Management Act 2003 and the Government Rounding Powers Act 1989.¹¹ NZTA is a Crown entity.¹²

[35] The Project is a Government work for the purposes of the PWA: that is, it is a work to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown.¹³ NZTA is responsible for constructing and managing the Project on behalf of the Crown. That includes responsibility for the design of the Project, for acquiring the land and other inputs needed for the Project, and for managing the funding approved by the Crown for the Project. If the Pascoes' land is acquired it will be vested in the Crown, not NZTA.

¹⁰ Our understanding of the evidence before the Court is that the power to make a s 26 decision has not been delegated, so is only exercisable by the Minister personally.

¹¹ Land Transport Management Act 2003, s 95(1)(h); and Government Rounding Powers Act 1989, s 61.

¹² Land Transport Management Act, s 93(2).

¹³ Public Works Act, s 2 definition of "Government work".

The responsibilities of the Minister and LINZ

[36] As already explained, the Minister is responsible for the acquisition of land required for Government works under the PWA.¹⁴ The Minister is supported in performing that responsibility by LINZ, a Government department.

[37] The Minister has delegated certain powers under the PWA to the Chief Executive of LINZ. As relevant for present purposes, the Minister has delegated the power to execute documents under s 4B, the power to enter an agreement under s 17, the power to issue and serve a notice of desire to take under s 18(1)(a), the power to lodge the notice under s 18(1)(b), the power to invite the owner to sell under s 18(1)(c), and the power to endeavour to negotiate under s 18(1)(d). The Minister has not delegated the power to withdraw a notice of desire to take land under s 18(3). And as already mentioned, the Minister cannot delegate the power to issue a notice of intention to take land under s 23.

[38] All of the powers delegated to the Chief Executive have in turn been subdelegated to LINZ officials, with the Minister's consent.¹⁵ In practice, the relevant officials who exercise these powers are members of a team within LINZ that provides support to the Minister in connection with statutory decision-making responsibilities under the PWA.

[39] Under the arrangements put in place by LINZ (discussed in more detail below), LINZ officials do not conduct negotiations directly with affected landowners under ss 17 and 18 of the PWA. Rather, the acquiring agency (here, NZTA) is expected to retain an "accredited supplier" to conduct those negotiations. An accredited supplier is a private entity that has met the requirements of the LINZ accreditation system.

The LINZ accreditation scheme

[40] LINZ has adopted an accreditation system under which individuals and organisations may apply for accreditation as nominated persons and accredited

¹⁴ Sections 4A and 16.

¹⁵ The delegation is to the Deputy Chief Executive Crown property and employees of LINZ or other persons within s 41(1A) of the State Sector Act.

suppliers in order to carry out certain Crown property work to support the discharge by LINZ of its statutory functions. LINZ accredits private sector service providers to carry out certain types of work involved with the acquisition, management and disposal of Crown-owned land under the PWA.

[41] Mr Harris is the Commissioner of Crown Lands and Manager Crown Property Regulatory at LINZ, with responsibility for (among other matters) the administration of the systems for Crown acquisition and disposal of land under the PWA.

[42] Mr Harris gave evidence that the accreditation process is designed to ensure suppliers have the necessary expertise, experience and understanding of the PWA to carry out that work. He said that accredited suppliers undertake operational tasks to support statutory functions and decision-making. Accredited suppliers do not have authority to exercise statutory powers.

[43] One of the operational functions that is undertaken by accredited suppliers is conducting negotiations with landowners. However accredited suppliers do not have the power to enter into a contract for the acquisition of land under s 17 of the PWA, or the power to issue a notice of desire to acquire land under s 18. These powers remain with LINZ officials. The power to issue a notice of intention to take land under s 23 of the PWA remains with the Minister. The Minister and LINZ retain statutory responsibility for making decisions and signing relevant documents under the PWA. But, Mr Harris said, operational functions under the PWA are outsourced to accredited suppliers.

[44] The accreditation system for accredited suppliers is a check on the entity's systems and procedures. For nominated persons employed by an accredited supplier, the accreditation system involves a check on the individual's knowledge and expertise. Applications for accreditation as a nominated person are made for particular categories of work, which relate to different areas of LINZ's statutory functions. One relevant category is "PWA — Acquisition of and Compensation for Land". A nominated person accredited in this category may undertake negotiation of acquisitions with landowners, sign and submit work to LINZ for decision-making, draft notices of desire and

intention to take, and draft briefings to the Minister for notices of desire and an intention to take.

[45] LINZ's Clearances Team checks all work submitted to it by accredited suppliers against relevant LINZ standards and guidelines.

[46] A Crown agency (such as NZTA) that requires land for a Government work will generally engage an accredited supplier at the outset of a project. An accredited supplier engaged by a Crown agency will generally have had some contact, and may have entered into negotiations, with the landowner to seek their agreement to acquisition before LINZ has any involvement in the context of the compulsory acquisition scheme. Where initial negotiations are successful, the accredited supplier prepares the acquisition agreement for execution by LINZ under s 17 of the PWA. Where negotiations are unsuccessful, the accredited supplier may recommend to LINZ that the compulsory acquisition process commence in accordance with pt 2 of the PWA.

[47] Generally, the same accredited supplier is engaged to undertake both s 17 and s 18 negotiations, to ensure continuity in terms of knowledge of the proposed work and relationship with the affected landowners.

[48] Mr Harris's evidence set out in some detail the process by which an accredited supplier provides information about steps taken to engage with the landowners, and draft reports and other documents, to LINZ. For present purposes, it is sufficient to note that the accredited supplier cannot exercise any of the powers conferred on the Minister, or commit the Minister to exercising those powers in a particular way, because:

- (a) If negotiations conducted by an accredited supplier are successful, the terms of an in-principle agreement must be agreed to by the Minister (or their delegate). An agreement to acquire land cannot be executed by the accredited supplier or the acquiring agency.

- (b) If negotiations conducted by an accredited supplier are unsuccessful and the accredited supplier recommends that a s 23 notice be issued, the LINZ Clearances Team reviews the chronology of negotiations and the report and accompanying information provided by the accredited supplier, and may request further information. The LINZ team provides a briefing note to the Minister advising whether in LINZ's view a good faith negotiation has been carried out, and whether a s 23 notice should be issued. It is then for the Minister to decide whether to issue a s 23 notice.

[49] No further detail of these arrangements is necessary because the question before us is not whether the systems for ensuring the quality of the work of accredited supplier are adequate. Rather, the narrower question raised by this appeal is whether s 18(1)(d) PWA negotiations must be undertaken directly by the Minister or an official with delegated authority, rather than through an accredited supplier such as TPG.

TPG

[50] TPG is a privately owned company which provides a range of property-related services. It is, as mentioned above, an accredited supplier.

[51] The evidence before the High Court went into some detail about the history of TPG. We do not consider that this history is relevant to the issues we need to determine: the issues for determination relate to all accredited suppliers, not just TPG.

[52] There is a contractual relationship between NZTA and TPG under which TPG is retained to provide property-related services for the Project.

[53] There is also a relationship between TPG and LINZ pursuant to the accreditation system. Although the parties made submissions about whether this relationship is contractual and/or fiduciary, we do not consider that we need to determine that issue. The functions that TPG is retained to carry out, and the role of LINZ in supervising and checking the work done by TPG and other accredited suppliers, are summarised above at a level that is sufficient for present purposes.

The dealings between the Pascoes and the Crown

[54] Evidence about steps taken under the PWA in relation to the Pascoes' land was given by Mr Knowles, who was employed as Manager, Clearances by LINZ. Mr Knowles manages the Clearances Team, and exercises delegated powers and functions on behalf of the Minister. Mr Knowles holds delegated powers under s 17(1), (2), (4) and (7) and s 18(1) and (4) of the PWA.

[55] The first involvement of the LINZ team in relation to the Pascoes' land was in 2016. TPG had been retained by NZTA and had engaged in discussions with the Pascoes about arrangements to access their land to carry out geotechnical investigations and a bird survey. Agreement in principle was reached for a licence to occupy to enable those activities to take place. TPG provided a report on these matters to LINZ. Mr Knowles reviewed the report and approved entry into the licence to occupy and the issue of a compensation certificate under s 19 of the PWA. Two further licences to occupy were entered into in 2017.

[56] An initial notice under s 18 of the PWA was served on the Pascoes in March 2018. The decision to issue that s 18 notice was made by a LINZ official with delegated authority to do so. Negotiations took place between TPG and the Pascoes following that notice, but were unsuccessful. In August 2018 TPG submitted a report to LINZ recommending that the Minister issue a notice of intention to take under s 23 of the PWA. LINZ reviewed that report and submitted a briefing with a recommendation to the Minister at the time in November 2018. However the Minister decided not to issue a s 23 notice, as various issues relating to the Project were unresolved at that time.

[57] A s 18 notice lapses one year after being served, if no s 23 notice has been served on the landowner within that time.¹⁶ Thus, as Mr Knowles explained in his evidence, it was necessary for the s 18 process to start again once various Project-related issues had been resolved.

¹⁶ Public Works Act, s 18(3)(b).

[58] In July 2020 TPG provided a further report in relation to a proposed s 18 notice concerning the Pascoes' land. That report also dealt with notices to be issued to two other landowners. A LINZ official approved the issue to the Pascoes and other landowners of s 18 notices of desire to acquire land. A s 18 notice was served on the Pascoes on 31 August 2020.¹⁷

[59] In March 2021 TPG submitted a report recommending a s 23 notice in relation to the Pascoes' land. Mr Knowles considered this report. There was evidence in the chronology provided with the TPG report of attempted negotiations with the Pascoes by TPG and NZTA. However Mr Knowles said in his evidence that it was clear to him that between the first s 18 notice in 2018 and the second notice in 2020, the Pascoes had arrived at the view that the s 18(1)(d) negotiations could only be carried out by the Minister himself, or by LINZ under delegation. The Pascoes were not willing to negotiate with TPG.

[60] Mr Knowles 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.

[61] The Pascoes contacted LINZ and the Minister on a number of occasions with questions, complaints and requests under the Official Information Act 1982. The Pascoes were provided with the relevant delegation and subdelegation instruments, and background information about the manner in which LINZ administers the PWA process. They were also provided with a draft of the LINZ briefing to the Minister on the s 23 notice, and invited to provide comments on the draft.

[62] In April 2021 LINZ met with the Pascoes to listen to their concerns and to clarify the roles and responsibilities of the Minister, LINZ, NZTA and TPG from the perspective of LINZ.

[63] Further correspondence took place following that meeting. The Pascoes' position continued to be that negotiations under s 18(1)(d) should be conducted by the Minister or LINZ officials with delegated authority, and not by TPG.

¹⁷ The s 18 notice was also accompanied by a notice issued under s 110 of the PWA authorising entry to the land for surveying purposes. That notice was issued by a LINZ official under delegated authority.

[64] In July 2021 LINZ provided a briefing to the Minister recommending issue of a s 23 notice. The Minister accepted that recommendation and signed a s 23 notice on 16 July 2021. The notice was served on Mr and Mrs Pascoe on 18 July 2021. A replacement notice, to correct a minor error, was issued on 2 August 2021 and served on 4 August 2021.

The proceedings

[65] In September 2021 the Pascoes applied to the High Court for judicial review of the Minister’s decision to issue a s 23 PWA notice, and of various steps taken in the process leading up to that step. In their amended statement of claim (ASC) filed in June 2023 they pleaded nine causes of action against the Minister.

[66] As already mentioned, in April 2022 the High Court approved three questions for preliminary determination. Those preliminary questions correspond to the issues raised by the first, second and sixth causes of action in the ASC.

[67] Another preliminary issue was determined by the High Court in October 2023.¹⁸

[68] The Pascoes represented themselves before the High Court, and on appeal before this Court. Although they received some assistance from a friend, they did not have the benefit of legal advice and representation.

[69] This Court considered that having regard to the significance of the issues for the Pascoes, and their legal complexity, the Court would benefit from the assistance of counsel to act as an effective contradictor.

[70] By minute dated 30 May 2024, Cooper P directed the appointment of counsel to assist the Court to make submissions concerning:

- (a) the questions for determination resolved by the High Court;

¹⁸ *Pascoe v Minister for Land Information* [2023] NZHC 2844.

- (b) the nature of the relationship between the Minister, LINZ and TPG and NZTA in this case, including whether any limitations were imposed by NZTA on the matters able to be negotiated for the purposes of s 18(1)(d) of the PWA;
- (c) the actual scope of TPG's authority in the negotiations; and
- (d) any other relevant matters that counsel consider should be brought to the attention of the Court.

[71] Ms Gepp KC was appointed as counsel to assist the Court.

[72] For completeness we add that the Pascoes also objected to the taking of their land under s 23(3) of the PWA. Their objection was heard by the Environment Court in late 2023. On 10 May 2024 the Environment Court issued a decision finding that the taking of the land was fair, sound and reasonably necessary for achieving the objectives of the Minister.¹⁹

Application to adduce further evidence on appeal

[73] The Pascoes applied to adduce further evidence on appeal comprising correspondence about the proposed acquisition of their land, including email correspondence between TPG and NZTA about the basis of any agreed acquisition.²⁰ However none of that evidence is relevant to the specific questions of law before this Court. Nor is it fresh in the sense that it could not have been adduced before the High Court. We decline to admit this further material.

¹⁹ *Pascoe v Minister for Land Information* [2024] NZEnvC 101.

²⁰ For the criteria in relation to the admission of further evidence on appeal see *Lawyers for Climate Change Action NZ Inc v Climate Change Commission* [2023] NZCA 443 at [12], citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193; and *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

First preliminary question

The issue

[74] We set out again, for ease of reference, the first question before this Court:²¹

Is s 18(1)(d) of the [PWA] complied with if the relevant negotiations with the land owner are undertaken by an entity accredited by [LINZ] as a Crown Property Accredited Supplier (such as 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?

High Court determination

[75] The Judge accepted the Minister’s submission that it was appropriate for the s 18(1)(d) negotiations and attendant operational issues, such as assessing the value of the property, reviewing titles and negotiating, to be performed by a third party with relevant expertise. 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.²²

[76] The Judge considered that reading s 18 in the light of its context and purpose, the Minister was not required personally to take every step in the process. The Minister is entitled to rely on staff and contractors to undertake operational matters leading up to the decision under s 23, which the Minister personally must make. The preliminary steps involved, including obtaining valuations and negotiation, require a level of expertise and resource that is likely to be outside the technical capability of the Minister. That is not to say that the Minister does not have to engage with the information and ensure that they have all the critical information before them in making a decision. However the Minister is not required to personally undertake the negotiations and associated work.²³

²¹ High Court judgment, above n 1, at [58(a)] (emphasis in original).

²² At [41].

²³ At [42].

[77] The Judge considered that although TPG was not a statutory decision-maker, and was not entitled to bind either LINZ or the Minister, that had no bearing on TPG being engaged to carry out the “legwork” in negotiations. The processes put in place by LINZ for contracting with appropriately qualified third parties to undertake that work were appropriate. The Minister was entitled to rely on the information and assurances set out in the briefing paper presented to him, subject to his obligations as decision-maker under the legislation. No formal delegation was required to enable TPG to carry out the relevant negotiations and associated work.²⁴

The Pascoes’ submissions on appeal

[78] The Pascoes say that the obligation to make every endeavour to negotiate in good faith with the owner of land, in an attempt to reach an agreement for the acquisition of that land, is a statutory function. They say that the PWA provides for delegation of the Minister’s statutory powers, functions and discretions to officers of LINZ. It does not provide for delegation to third parties such as TPG.

[79] In particular, the accreditation system operated by LINZ is not referred to in the PWA and does not provide for delegation to “accredited suppliers” of the Minister’s functions under s 18 of the PWA.

[80] The Pascoes add that negotiations are a process of bargaining and attempting to reach agreement. There must be dialogue between two or more parties intended to reach an understanding or resolve a point of difference. Negotiations are more than just consultation or discussion.

[81] The Pascoes say that Mr Knowles has had a lengthy involvement in the Project and would be capable of carrying out the statutory function of negotiating with them. However he refused requests to do so. In circumstances where LINZ officials, and in particular Mr Knowles, have refused to negotiate with them, the Pascoes say that it is plain that every endeavour was not made to negotiate in good faith with them.

²⁴ At [43].

Submissions of counsel to assist the Court

[82] In response to the issues identified in the Court's minute, Ms Gepp submitted that:

- (a) The relationship between NZTA and TPG is contractual: a commercial, non-government entity (TPG) provides services to a Crown agent (NZTA) for consideration. TPG acts as agent for NZTA when dealing with landowners. TPG also owes a fiduciary duty to NZTA.
- (b) Because the project was treated as a Government work, the relationship between NZTA and the Minister is as two divisions of the Crown.
- (c) The relationship between LINZ and TPG is contractual. TPG provides services to LINZ, the provision of which is governed by the accredited supplier scheme. The scheme creates a contractual relationship even though TPG is engaged by (and paid by) NZTA. TPG also owes a fiduciary duty to LINZ. The evidence is equivocal as to whether TPG is an agent of LINZ when dealing with landowners.
- (d) The evidence indicates that NZTA participates (generally, and in this case) in negotiations, imposes limitations on the matters able to be negotiated, and that NZTA approval to the terms of an acquisition is required.
- (e) TPG does not have authority to bind the Minister in the s 18(1)(d) negotiations.

[83] In those circumstances, Ms Gepp expressed doubt as to whether s 18(1)(d) of the PWA is complied with if the relevant negotiations with the landowner are undertaken by (or directed by or subject to the agreement of) NZTA rather than the Minister or the Minister's delegate.

[84] In relation to the first question for determination, Ms Gepp submitted that s 18(1)(d) of the PWA is not complied with if the negotiations with the landowner are

undertaken by an accredited supplier such as TPG. The process of negotiation is a critical part of the acquisition process and of the statutory duty. It is not, she submitted, a merely operational or administrative task. The legislation intends this function to be undertaken by the Minister or their delegate. It is not complied with where the negotiations are undertaken by an accredited supplier such as TPG.

[85] Further, she submitted, it is difficult to see how an entity that has been engaged to undertake a wider range of services by NZTA could carry out the s 18(1)(d) role for the Minister (or delegate) without an actual or perceived conflict of interest arising.

Submissions for the Minister

[86] Ms Roff, who appeared for the Minister, supported the Judge's reasoning. She emphasised that the Project is a Government work. It is the Crown, not NZTA, that will acquire the land required for the Project. There is no conflict between the interests of the Minister and NZTA: the Minister is acquiring the land for the Crown for a Government work, and NZTA is the Crown agency with statutory responsibility for constructing and managing the work for the Crown. Both the Minister and NZTA are acting for the benefit of the Crown, in accordance with their respective statutory responsibilities, to enable a Government work to be carried out.

[87] Ms Roff submitted that "making every endeavour" to negotiate in good faith includes making every endeavour to ensure that negotiations are carried out by individuals and entities that have the knowledge and expertise to do so. The PWA does not require the Minister or a delegate to personally conduct the required negotiations. It is appropriate for the delivery agency (here, NZTA) and the accredited supplier retained by that agency to be involved together in negotiations for land acquisition for a Government work. These are the entities that understand the objectives and requirements of the Project, the budget constraints, and the possibilities for making adjustments and compromises.

[88] Ms Roff submitted that requiring landowners to negotiate through a central Government employee, as proposed by the Pascoes and Ms Gepp, would be impractical, in many cases would reduce the quality of negotiation, would impose greater burdens on landowners, and may not meet the required "good faith" standard.

[89] Ms Roff submitted that an accredited supplier could at a general level be described as an “approved agent” of the Minister for specific purposes. Whether this relationship is described as contractual or fiduciary makes little difference. The roles and responsibilities of the Minister, the accredited supplier, and NZTA pursuant to the legislation and the parameters of the accredited supplier scheme are clear. Statutory powers of decision-making under the PWA remain with the Minister and/or the Minister’s LINZ delegate, and are performed by them.

Discussion

[90] We begin by addressing the submission made by the Pascoes and Ms Gepp that there is a conflict of interest between an acquiring agency such as NZTA and the Minister which could disqualify TPG (an accredited supplier engaged by NZTA) from engaging in the day-to-day negotiations with the landowner on behalf of the Minister. We are firmly of the view that TPG is not disqualified on this basis.

[91] First, we accept Ms Roff’s submission that in the case of a Government work such as the Project, where land is to be acquired by the Crown for the purposes of that Government work, the Minister and the acquiring agency (here NZTA, a Crown entity) are both acting for the benefit of the Crown, in accordance with their respective statutory functions.

[92] Second, where land is acquired for a local work it is the same local authority that is responsible for carrying out (and funding) the local work and making decisions under the PWA in relation to acquisition of land for the local work. In particular, the local authority responsible for the local work makes decisions under ss 18 and 23 of the PWA. The PWA does not proceed on the basis that decision-making under that Act should be separated from responsibility for the relevant work.

[93] Third, when the PWA was enacted many Government works were carried out by the Ministry of Works and Development under the control of the Minister of Works and Development, who was the Minister for the purposes of pt 2 of the PWA.

[94] Thus, no separation of acquiring functions and decision-making powers was contemplated, let alone required, by the PWA when first enacted. It was not suggested

that the disestablishment of the Ministry of Works and Development and the establishment of the Department of Lands and Surveys, as part of the significant reorganisation of the State sector in the 1980s, sought to ensure a separation between the acquiring agency and the Minister of Lands for the purposes of the pt 2 powers.

[95] Fourth, and importantly, only the Minister or delegate can enter into an agreement (if one is successfully negotiated) and only the Minister can make decisions under s 23 to proceed to take land. This means that LINZ officials, and ultimately the Minister, retain responsibility for the negotiations under s 18(1)(d). As noted earlier, the accreditation scheme is intended to enable an accredited agency to do the day-to-day negotiations but it is LINZ that has control over who is an accredited agency and that reviews the negotiation before entering into an agreement (if one is negotiated), or that reviews the negotiation before advising the Minister whether to proceed with a s 23 notice. The Minister in turn must make the decision to issue a s 23 notice in the light of that advice.

[96] The requirement that the Minister personally make the s 23 decision recognises the significance of a decision to take land, and ensures that there is direct democratic accountability for that decision at the highest level of Government. The purpose of this requirement is not to introduce some sort of separation of functions between agencies.

[97] We also accept Ms Roff's submission that it makes good practical sense for the acquiring agency responsible for a project to be closely involved in negotiations with landowners under s 18(1)(d). The acquiring agency knows what the relevant project entails, and what land is required for the project. It understands where there may be room for flexibility in relation to what land is acquired. It can assess the timing and cost implications for a project of any proposals made by a landowner to modify an aspect of the notified taking. In the present case, for example, if the Pascoes had suggested that the leasehold interest that is sought to be acquired should be reduced in area, or that the duration of the lease should be reduced, or that some other term of the lease should be altered, that possibility would need to be assessed by reference to its implications for the Project. If a LINZ official was conducting the day-to-day

negotiations, they would not know the answer without referring back to NZTA to seek information and instructions on such suggestions.

[98] In circumstances where it is unobjectionable — and often, necessary — for an acquiring agency to be involved in negotiations, no significance attaches to whether an accredited supplier is retained by NZTA as acquiring agency, or by LINZ. No conflict of interest arises merely because the negotiator is retained by the acquiring agency.²⁵ Rather, the critical question becomes whether negotiations for the purpose of s 18(1)(d) can only be carried out by the Minister or a delegate, or whether all or part of that function can be carried out by some other person.

[99] In order to answer that question, it is helpful to step back and consider the process of negotiation towards a s 17 agreement.

[100] It is commonplace for an agreement to be negotiated on behalf of a principal by an authorised representative with the relevant knowledge and skills, even though that representative is not the agent of the principal in the sense that they have delegated authority to enter into the agreement on behalf of the principal. That is the basis on which many agreements are negotiated by a lawyer on behalf of their client, for example.

[101] We cannot see any sensible basis on which it could be suggested that it was inconsistent with the PWA for the Crown to negotiate with a landowner through a lawyer instructed to act for the Crown on property matters, or through an authorised representative such as TPG, with a view to reaching an agreement in principle that could be approved on behalf of the Crown under s 17 of the PWA. If agreement on terms is reached as between the landowner and the Crown's authorised representative, the Minister (or a person to whom s 17 powers have been delegated) would then need to decide whether to enter into the agreement on behalf of the Crown. If they decide to do so, both the agreement and the process that preceded it would be consistent with

²⁵ An accredited supplier appointed to conduct negotiations may of course have conflicts of interest, and those need to be managed appropriately as part of the accreditation process. But that is a different issue.

the scheme of the PWA. Nothing in the text of s 17 or the broader statutory context suggests otherwise.

[102] It would in our view be unsatisfactory if the position were otherwise. For the reasons discussed above, an authorised representative with knowledge of the purpose of the acquisition, and relevant property-related skills, will often be better placed to undertake such negotiations than a LINZ official. Similarly, some negotiations may be better undertaken by a lawyer acting for the Crown, where the issues to be negotiated include technical conveyancing issues. The Crown is able to retain an appropriately skilled and knowledgeable representative to negotiate a s 17 agreement on the Crown's behalf in the same way that any other person can retain such a representative, without conferring rights of decision on that representative.

[103] A decision to give notice of desire to acquire land under s 18(1)(a) involves the exercise of a significant statutory power. That decision must be made by the Minister or a delegate. But what of the downstream steps contemplated by s 18(1), including negotiations with the landowner?

[104] We consider that the Minister can make every endeavour to negotiate in good faith with a landowner in an attempt to reach an agreement for the acquisition of the land by appointing (personally, or through a delegate) an appropriately skilled and knowledgeable person to undertake those negotiations on the Minister's behalf, provided that the Minister (or delegate) retains ultimate responsibility for the negotiation. That person need not have delegated decision-making power under s 18 or any other provision of the PWA. Negotiation towards an agreement conducted under the oversight of the Minister (or delegate), without authority to approve entry into the agreement, is a form of preliminary or incidental work which the Minister can choose to undertake in a range of ways for the purpose of s 18(1)(d), as under s 17.

[105] The same applies to various other s 18 functions. So, for example, s 18(1)(b) requires the Minister to lodge a notice of desire to acquire the land with the Registrar-General of Land. The function of lodging the notice under s 18(1)(b) has been delegated to LINZ officials. But there is no need for the lodging of the notice and its service to be effected personally by the Minister or a LINZ official. The

Minister (acting through LINZ) can employ an appropriately qualified professional, such as a lawyer, to take this conveyancing step.

[106] The same applies in relation to service on the landowner of the Minister's notice of desire to acquire the land, as required by s 18(1)(a). The Minister or a delegate must, as noted above, decide to give the notice under s 18. But physical service of the notice on the landowner can be carried out by any person authorised to do so. Similarly, under s 18(1)(c) the Minister can invite the owner to sell the land, and advise the owner of the estimated amount of compensation, through a person authorised to perform this function.

[107] In the illustrations given above, the person who (for example) lodges a notice of desire to acquire land is not doing so as an alter ego of the Minister in the sense contemplated by the *Carltona* principle.²⁶ Nor is a person performing that function making any decision or exercising any statutory power that the PWA provides for the Minister to make or exercise, which can only be made or exercised by some other person if they have delegated authority to do so.

[108] The Pascoes argue that because these are all elements in the Minister's "functions", and the Minister has power to delegate functions, a delegation is necessary before any other person can perform them. However that does not follow as a matter of logic, or as a matter of legal principle. The powers conferred on the Minister by the PWA and by the State Sector Act/Public Service Act to delegate functions do not mean that only persons with formally delegated powers can perform each and every task involved in performing the Minister's functions. It is still necessary to ask whether the particular task is of a kind that can only be carried out by a person with statutory authority to do so, having regard to relevant public law principles and to the specific statutory context. Put another way, it is necessary to ask whether engaging someone to perform the particular task amounts to a delegation of the statutory function. As Ms Gepp submitted, that depends on the nature of the task.

²⁶ *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560; and *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 at [178].

[109] As a matter of public law principle, where a Minister's statutory functions encompass matters such as gathering information, or administrative tasks, the Minister (or their officials) can engage any appropriate person to perform those tasks. Likewise, where a Minister's functions include delivery of services or carrying out works, and those services/works do not themselves involve the exercise of any statutory power,²⁷ the Minister or their officials can retain any appropriate person to carry out those tasks. The person who is allocated the task may be an employee of a public sector entity who does not hold any delegated powers. Or they may be an external private sector provider. Public law principles do not preclude, for example, the use of external lawyers to give effect to instructions to enter into a transaction, or to take steps to implement a transaction. They do not preclude the use of real estate agents to market a property. They do not preclude the use of private security firms to protect Crown properties. They do not preclude engaging private engineering firms to carry out geotechnical investigations, or engaging private construction firms to carry out construction work. The Minister (or a person with delegated authority to do so) must exercise any statutory powers and make any statutory decisions that affect a person's rights or interests. But the Minister (or delegate) is not required to do themselves something that does not require specific statutory authority, for example because it could be done by an individual or a private entity with no statutory powers, unless an applicable statute requires this expressly or by implication.

[110] The Public Service Act sets out a framework for delegation by public service chief executives of statutory functions or powers, including functions or powers delegated to the chief executive.²⁸ Specific provision is made for delegation to a person outside the public service, subject to various safeguards.²⁹ But it could not sensibly be suggested that this process must be followed where a department engages, for the purpose of carrying out its functions, a private sector supplier of administrative services or supporting services of the kinds referred to above. So for example the Ministry of Justice has, as one of its functions, the construction and maintenance of court buildings. But when the Chief Executive of that Ministry (or their delegate)

²⁷ The services or works may result from the exercise of such a power on the part of the Minister or officials, but that does not affect who can perform the downstream work.

²⁸ Public Service Act, s 58 and sch 6.

²⁹ See in particular sch 6 cl 2(5), (8), (9) and (12).

enters into a contract on behalf of the Crown with a construction company to build a new courthouse, or to do maintenance work on an existing courthouse, the Chief Executive is not *delegating* that function. Rather, the Chief Executive is *performing* that function by making the relevant decisions about what is to be constructed, and engaging the construction company to provide a relevant input to give effect to that decision. The Chief Executive does not need to follow the delegation process set out in the Public Service Act in order to engage the construction company, because no delegation of a function or power is involved.

[111] As this example illustrates, it does not follow that there has been a delegation of a function for the purposes of the Public Service Act, or for that matter at common law, merely because a person has been engaged to assist with the performance of that function. Whether such an engagement involves delegation of a function will depend on the extent of decision-making authority and control retained by the office holder, and the nature of the task that the third party is engaged to perform. At the risk of stating the obvious, an engagement to provide services that does not amount to delegation of a function or power will not trigger statutory or common law requirements for a valid delegation.

[112] How do these principles apply in the context of negotiating to acquire land from a landowner under the PWA?

[113] Negotiations conducted under s 18(1)(d) do not of themselves alter a landowner's rights or interests. The landowner can withhold agreement from proposals advanced by the negotiator. The landowner can make proposals to the negotiator. If agreement in principle is reached, that does not of itself affect rights or interests. Rather, rights and interests will be affected only if and when the agreement is approved by the Minister or delegate.

[114] If no agreement is reached, the negotiations as such will not affect the landowner's rights and interests. But the landowner's rights and interests will be affected by the fact that negotiations have been attempted, potentially triggering s 18(2) and s 23. That is why the Minister or delegate must retain ultimate

responsibility for undertaking good faith negotiations in an attempt to reach a voluntary agreement.

[115] We agree with the Pascoes that good faith negotiations require more than just gathering information, or consultation. The negotiations must be undertaken with a willingness to give genuine consideration to concerns expressed, and to the possibility of agreeing to alternative proposals advanced by the landowner. A fair balance must be held between the public interest and the interests of the landowner. But it is legitimate (indeed, necessary) for a landowner's proposals to be measured against the requirements of the relevant project and against the approach to compensation provided for in pt 5 of the PWA. Some proposals may be so unrealistic that they need not be considered in depth. Others will require more careful assessment.

[116] But these requirements all go to how the negotiations are conducted, not to by whom they are conducted. As already mentioned, it is commonplace for negotiations to be conducted by a person through an authorised representative who does not have delegated authority to enter into any resulting agreement. The appointment of a representative to conduct negotiations does not mean those negotiations are not being conducted in good faith, provided the representative has the necessary skills and qualifications, is given appropriate instructions, and is appropriately supervised by LINZ officials under the LINZ process.

[117] There is force in Ms Gepp's submission that negotiations are a fluid and path-dependent process, and that the way in which a person conducts negotiations may foreclose options along the way. But that does not mean that only the Minister or delegate can undertake negotiations. Rather, it suggests that there may 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 unsuccessful).

[118] If agreement is not reached and the Minister comes to consider whether to exercise the s 23 power, the Minister will need sufficient information about the s 18(1)(d) negotiations to be satisfied that every endeavour has been made on the Minister's behalf to negotiate in good faith with the landowner — which may in some cases include information about significant issues addressed in those negotiations, such as proposals made by the landowner that were rejected by the negotiator.

[119] Neither the Pascoes nor Ms Gepp identified any public law principle of general application that would require the Minister to negotiate personally or through an authorised representative. We consider that negotiations towards a contract with a landowner are properly seen as administrative or supporting functions of a kind that can be performed by a person other than the relevant statutory decision-maker, provided the decision-maker retains control over the manner in which the negotiations are conducted, and retains responsibility for deciding whether to enter into a contract, and, if so, on what terms. Retaining TPG (or another accredited supplier) to conduct s 18(1)(d) negotiations does not in our view involve delegation of a function or power in the relevant sense.

[120] Does the PWA expressly or impliedly require the negotiations to be conducted by the Minister or a delegate personally, and preclude engaging another person to perform that task, even though such an engagement does not amount to a delegation of a function or power of the Minister? There is nothing in the language of s 18(1)(d) to support the argument that the work involved in conducting negotiations under that provision cannot be allocated to an appropriately qualified representative of the Crown who does not hold formal delegations from the Minister. The representative will need to act in good faith, and the process requirements outlined above will need to be met. But none of this requires that the representative have any formally delegated powers under the PWA.

[121] Nor does it follow from the Minister's obligation to use *every endeavour* to negotiate with the landowner in good faith that the landowner is entitled to specify the person or persons with whom they wish to negotiate. Provided the Minister has established appropriate systems for selecting representatives to carry out negotiations, and exercises appropriate supervision and control over the negotiation process, it is

for the Minister to decide who will carry out the negotiations on the Minister's behalf. A refusal to negotiate with the person appointed to conduct the negotiations on the Minister's behalf is a refusal to negotiate with the Minister for the purpose of s 18(2)(b).

[122] In the present case, the preliminary question concerns the ability of the Crown to negotiate through TPG. We are not asked to determine the appropriateness of the accreditation system, or TPG's qualifications to carry out the negotiations in question, or the appropriateness of the process that was adopted by the Minister and LINZ to supervise and control the negotiations. Consistent with the framing of the preliminary question, the Pascoes' argument was presented on an "all or nothing" basis. We have concluded that it was open to the Minister to negotiate through an authorised representative such as TPG. We leave for another case, where it is necessary for decision, questions concerning the process for selecting authorised representatives and supervising and controlling the activities they undertake.

[123] 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 (here, LINZ officials).

Second preliminary question

[124] The second preliminary question asks whether, if s 18(1)(d) of the PWA could not be complied with if the relevant negotiations are undertaken by an accredited supplier, that affects the legality of a s 23 notice subsequently issued by the Minister.

[125] We can deal with this briefly, for two reasons.

[126] First, the Minister accepted that if s 18(1)(d) had not been complied with, that would affect the legality of the s 23 notice.

[127] Second, we agree with the Judge that in view of the answer to the first question, the second question does not arise and need not be answered.³⁰

Third preliminary question

[128] We set out again, for ease of reference, the third preliminary question:³¹

Is the Minister permitted to exclude cls 4, 5, 6, 10, 11 and 12 of Part 2 of Schedule 3 and cl 13 of Part 3 of Schedule 3 of the Property Law Act 2007 from the proposed lease (including in accordance with ss 217 and 279(2) of the Property Law Act and Part 2 of the [PWA])?

[129] We can be brief as we agree with the Judge, for the reasons she gave, that the Minister is permitted to exclude those terms and conditions when acquiring land under pt 2 of the PWA.³²

[130] The Pascoes' submissions did not advance any rationale for reaching a different conclusion. Ms Gepp, in her capacity as counsel assisting the Court, accepted that the High Court Judge's conclusion was correct and did not present argument to the contrary.

[131] Ms Gepp observed, and we agree, that the exclusion of these clauses will be relevant to the assessment of compensation for the taking of the leasehold interest. To the extent that exclusion of those clauses makes the taking more burdensome for the Pascoes, the compensation to which they are entitled should reflect that additional burden.

Result

[132] The application for leave to adduce further evidence on appeal is declined.

[133] The appeal is dismissed.

³⁰ High Court judgment, above n 1, at [46].

³¹ At [58(c)].

³² At [47]–[57].

[134] It was not suggested at the hearing before us that there was any basis for departing from the usual rule that costs follow the event. The Pascoes must pay costs to the Minister for a standard appeal on a band A basis, with usual disbursements.

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent