IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CIV-2021-039-000059
CIV-2021-039-000080
CIV-2021-019-001244
CIV-2021-019-001245
CIV-2022-019-000100
CIV-2022-019-000101
[2022] NZDC 8240

IN THE MATTER OF	THE PUBLIC WORKS ACT 1981
BETWEEN	THISTLEHURST DAIRY LIMITED MICHAEL VAUGHAN PAULA VAUGHAN NICKY HAMMOND CRAIG SAMPSON KAYE WILLIS Plaintiffs
AND	MINISTER OF LAND INFORMATION Defendant

Hearing:	4-5 April 2022 5 May 2022
Appearances:	A Webb & B Tree for the Plaintiffs S Jerebine for the Defendant
Judgment:	30 May 2022

RESERVED JUDGMENT OF JUDGE S R CLARK

Introduction

[1] These proceedings concern two proposed public works. The first is to replace the intersection of State Highways 1 and 29 at Piarere ("**the roundabout"**). The second concerns an extension of the Waikato expressway from Cambridge to Piarere ("**the expressway"**).

[2] The areas of land required for the roundabout and expressway have yet to be finalised nevertheless the proposed roundabout borders a farm owned by one of the plaintiffs, Thistlehurst Dairy Ltd ("**Thistlehurst"**). The farm is known as Rockridge ("**Rockridge"**).

[3] Both projects are being managed by Waka Kotahi NZ Transport Agency ("**Waka Kotahi"**). The projects are stand-alone; however, it is anticipated that the roundabout will be on the alignment that forms part of any future extension of the expressway.

[4] In relation to the expressway Waka Kotahi has been communicating with Thistlehurst since late 2017. That project was put on hold in October 2018 and then revived in January 2020. Waka Kotahi has sought licence to occupy (**LTO**) agreements to enable them access properties along the proposed route. It wants to carry out investigations so that the designation boundary can be confirmed and to enable assessments of environmental effects of the expressway to be undertaken.

[5] In relation to the roundabout, Waka Kotahi has been communicating with Thistlehurst since 2019. Waka Kotahi (along with Land Information New Zealand - "**LINZ"**) have sought an LTO with Thistlehurst to allow investigations to take place on the farm. The proposed investigations are to assist with the design of the roundabout so the extent of the required designation boundary can be confirmed and to enable assessments of environmental effects of the proposal to be undertaken.

[6] Waka Kotahi lodged Resource Management Act 1991 ("**RMA**") applications for the roundabout on 25 August 2021. It intends to lodge RMA applications for the expressway in late 2022.

[7] To date both Waka Kotahi and LINZ have been unable to reach agreement with Thistlehurst and other occupiers of Rockridge concerning access.

[8] Rockridge is subject to a share milking agreement. Between May 2021 and the end of January 2022, LINZ served s 111 Public Works Act 1981 ("**PWA"**) notices on Thistlehurst and other occupiers of Rockridge, being Michael and Paula Vaughan ("**the sharemilkers"**) and Craig Sampson, Nicky Hammond and Kaye Willis ("**other occupiers"**).

[9] Thistlehurst, the sharemilkers and the other occupiers have all filed objections.[1] They are the plaintiffs for the purpose of these proceedings.

[10] The s 111 notices allow persons authorised by the Minister for Land Information ("**the Minister"**) to enter properties to undertake a survey or investigation. The Minister is the defendant in these proceedings.

[11] These proceedings were part-heard on 4 and 5 April 2022. On the morning of 5 April 2022, I heard an application for an adjournment of the proceedings by the plaintiff. There is no need to traverse the reasons why the adjournment was sought. They are set out in a minute dated 5 April 2022 in detail. Suffice to say that the hearing was reconvened on 5 May 2022.

The legislation

[12] Section 111 of the PWA reads:

> 111 Powers of entry for other survey and investigation purposes
>
> (1) Subject to subsections (2) to (5), any person authorised either specifically or generally by the Minister or local authority, as the case may require, may, for the purposes of carrying out any public work or any proposed public work, and subject to the limitations of any authorisation so granted—

[1] The proceedings have been consolidated, see minute dated 23 November 2021 at [1]; and minute dated 18 February 2022 at [11].

(a) enter and re-enter any land at reasonable times, with or without such assistants, aircraft, boats, vehicles, appliances, machinery, and equipment as are reasonably necessary for making any kind of survey or investigation:

(b) dig and bore into the land and remove samples of it:

(c) erect temporary buildings on the land:

(d) set out the lines of any works on the land.

(2) Unless the owner and occupier of the land otherwise agree, the powers conferred by subsection (1) shall not be exercised unless the owner and occupier of the land affected have been given 10 working days' notice in writing of—

(a) how and when entry is to be made; and

(b) the specific powers intended to be exercised; and

(c) a statement of the owner's or occupier's rights under subsection (4); and

(d) a statement that the owner or occupier may be entitled to compensation under this Act.

(3) Any person exercising any power under subsection (1) shall have with him, and shall produce if required to do so, evidence of—

(a) his authority; and

(b) his identity.

(4) The owner or occupier may, within 10 working days after receiving the notice and after giving notice to the Minister or local authority, as the case may be, of his intention to do so, object to the District Court nearest to the land concerned, and the court may summon the Minister or local authority, or his or its representative, to appear before the court at a time and place named in the summons.

(5) If it appears to the court that the proposed survey or investigation is unreasonable or unnecessary the court may—

(a) order that the survey or investigation shall not be undertaken, or shall not be undertaken in the manner proposed; or

(b) direct that the survey or investigation be undertaken in such manner and subject to such limitations and restrictions as the court thinks fit—

and all persons concerned shall be bound by any such order.

The roundabout

[13] Section 111 notices were served on:

(a) Thistlehurst on 19 May 2021;

(b) The sharemilkers on or about 8 July 2021; and

(c) The other occupiers on or about 28 January 2022.

[14] At clause 6 the notices provide that the owner or occupier may within ten working days upon receipt of the notice, advise the Minister of their intention to object. Schedule 1, clauses 2 – 9 inclusive refer to the purposes for which entry is required. The notices state that entry is required to allow authorised persons to carry out:

(a) Geotechnical testing;

(b) Survey field work;

(c) Ecological investigations;

(d) Archaeological investigations;

(e) Noise investigations;

(f) Contaminated land investigation;

(g) Entry is also required for the purposes of a cultural investigation, storm water and flooding investigation, design drawings and landscape investigation.

[15] Notices of objection have been filed respectively by Thistlehurst, the sharemilkers and other occupiers.

[16] In their notice of objection dated 1 June 2021, Thistlehurst oppose entry on the following grounds:

(a) As owners, they are not the occupiers, the land in question is subject to a sharemilking agreement and the sharemilkers have possession of the land;

(b) There is insufficient detail about the location of the project;

(c) The notice does not provide enough information about the proposed investigations and survey work;

(d) The area of land required is excessive;

(e) They have been negotiating with the Minister in good faith;

(f) Concerns are raised about compensation to be paid by the Minister in the event of damage to the land and or/disruption to farming activities;

(g) They seek additional information concerning the investigation and notice concerning the proposed entries;

(h) Thistlehurst seek orders inter alia that entry be declined and/or direct the Minister to provide further information as requested along with costs.

[17] The notices of objection filed by the sharemilkers and other occupiers on 20 July 2021 and 11 February 2022 respectively are in most respects similar to that filed by Thistlehurst.

[18] In addition, the sharemilkers object on the basis that entry would cause unnecessary interruption to farming operations. They say that the farm is a highly productive dairy unit, that the proposed point of entry affects the best grazing area and is an important part of the farming operation. They point out that specific arrangements

would be required for those exercising powers of entry to avoid unreasonable interference with the sharemilkers' ability to conduct farming operations.

[19] The sharemilkers also object on the basis that negotiations have been conducted in good faith by the owners but concerns being raised were not addressed in the notice.

The expressway

[20] Section 111 notices were served on:

(a) Thistlehurst on 13 September 2021;

(b) The sharemilkers on 13 September 2021;

(c) The other occupiers on 28 January 2022.

[21] The notices state that entry is required to allow authorised persons to carry out:

(a) Geotechnical testing;

(b) Survey field work;

(c) Ecological investigations;

(d) Archaeological investigations;

(e) Contaminated land investigation;

(f) Stormwater investigations;

(g) Landscape investigations;

(h) Cultural investigations, storm water and flooding investigation, design drawings and landscape investigation.

[22] Notices of objection were filed by Thistlehurst and the sharemilkers on 27 September 2021 and by the other occupiers on 11 February 2022.

[23] Thistlehurst objects on the following grounds:

(a) They do not occupy the land as it is subject to a sharemilking agreement;

(b) The notice does not provide enough details about the location of the project;

(c) The notice does not provide enough information about the works or recognises the current use of the land;

(d) The duration of the works is unreasonable;

(e) The works are unnecessary because implementation will not commence before 2028;

(f) The notice lacks details about compensation in the event of damage to the land and/or disruption to farming activities.

[24] In addition, Thistlehurst set out several other requirements, for example requiring details of a proposed timeline and greater notice period prior to entry. They seek orders inter alia from the court that entry be declined and costs.

[25] The notice of objection filed by the sharemilkers is, broadly speaking, similar to that filed by the owners.

[26] The other occupiers' notice of objection is also in broad terms, like that filed by Thistlehurst. Ms Hammond, one of the occupiers, raises a specific objection that she relies upon the quiet enjoyment of the land – clause 5(d). The other occupiers also say that there is very little information about what is proposed and the potential to result in significant disruption to farming activities and/or their quiet enjoyment.

The other occupiers raise a specific objection that the area of land required under the notice is excessive and will unreasonably interfere with their quiet enjoyment for no reason – see clause 5(l).

The plaintiffs' position

[27] The plaintiffs:

(a) Have challenged the lawfulness of the s 111 notices on two bases. They are:

(i) There is no evidence of delegation of authority from the Minister to the ministerial delegate who authorised the s 111 notices;

(ii) The ministerial delegate did not undertake an informed and authoritative consideration before the process was commenced.

(b) Make submissions concerning the jurisdiction of the court pursuant to ss 111(2) and (5);

(c) Submit that a Mr Rawat is an occupier and should have been served with a s 111 notice.

The defendant's position

[28] The defendant filed two sets of legal submissions. The first set responds specifically to the concerns raised in the notices of objection.[2]

[29] The second set responds to the challenge to the lawfulness of the s 111 notices.[3]

[2] Defendant's submissions dated 25 February 2022.
[3] Defendant's submissions dated 29 March 2022.

Delegated authority

[30] In total ten s 111 notices have been served. They appear in the agreed bundle **("AB")** at tabs 11-15 and 19-23 inclusive. All the notices were signed by Kerry McPhail purporting to act on delegated authority. His affidavit confirms that he is the Senior Advisor Clearances for LINZ and has held that role since July 2014.[4] Underneath his signature on all ten notices, the following clause appears:

> For and on behalf of
>
> Her Majesty the Queen
>
> Acting pursuant to delegated
>
> authority from the Chief
>
> Executive of Land Information NZ
>
> pursuant to Clause 2 of Schedule 6
>
> of the Public Service Act 2020

[31] The plaintiffs refer to clause 2 of schedule 6 of the Public Service Act 2020 and submit that there is no evidence of actual delegation of authority from the Minister to the Chief Executive in the first place and no evidence of any subsequent delegation to Mr McPhail.

[32] The delegations have been included in the agreed bundle of documents at tabs 1-5 inclusive. The defendant submits that the delegations are lawful.

[33] There are five written delegation documents before the court, they are:

(a) Delegation 1 signed by the Minister for LINZ to the Chief Executive of LINZ, dated 14 July 2009;

(b) Delegation 2 signed by the Minister for LINZ to the Chief Executive dated 6 August 2013;

[4] Affidavit of Kerry McPhail dated 30 March 2022 at [1].

(c) Delegation 3 signed by the Chief Executive of LINZ to the Deputy Chief Executive Crown Property dated 29 November 2019;

(d) Delegation 4 (described as a sub-delegation) signed by the then Deputy Chief Executive Crown Property dated 29 November 2019 to seven positions described in Part One of the Schedule. One of the positions referred to is Senior Advisor Clearances (SAC), the position held by Mr McPhail;

(e) Delegation 5 signed by the Chief Executive of LINZ dated 28 July 2021.

[34] Delegations 1-4 were signed prior to 2020 and therefore were made pursuant to the State Sector Act 1988 ("**SSA**"), which was repealed by s 132(1) of the Public Services Act 2020.

[35] Delegations 1-4 refer to sections 28 and 41 of the SSA. Subsections 28(1), (2) and (4) specifically provide:

> **28 Delegation of functions or powers of appropriate Minister**
>
> (1) The appropriate Minister in relation to a department or departmental agency may from time to time, either generally or particularly, delegate to the chief executive of that department or departmental agency all or any of the Minister's functions and powers under this Act or any other Act, including functions or powers delegated to the Minister under this Act or any other Act.
>
> (2) Every delegation under this section shall be in writing.
>
> (3) …
>
> (4) The power of the appropriate Minister to delegate under this section—
>
> (a) is subject to any prohibitions, restrictions, or conditions contained in any other Act in relation to the delegation of the Minister's functions or powers; but
>
> (b) does not limit any power of delegation conferred on the Minister by any other Act.

[36] Section 28 of the SSA allows for the appropriate Minister to delegate to the chief executive of that department (in this case the Chief Executive of

Land Information New Zealand) all or any of the Minister's functions and powers under any Act, including functions or powers delegated to the Minister under any Act. Section 28(2) requires this to be in writing.

[37] Section 41 of the SSA goes on to provide for the delegation of functions and powers by the Chief Executive. Subsections 41(1) and (2) specifically provide:

> **41 Delegation of functions or powers**
>
> (1) A Public Service chief executive may, either generally or particularly, delegate in writing to a person described in subsection (1A) or (2A) any of the functions or powers of the chief executive under this Act or any other Act (including functions or powers delegated to the chief executive under this Act or any other Act), except that—
>
> (a) the delegation of functions or powers delegated to the chief executive by a Minister requires the prior written approval of that Minister; and
>
> (b) the delegation of functions or powers delegated to the chief executive by the Commissioner requires the prior written approval of the Commissioner.
>
> (1)A The following persons may be a delegate under subsection (1) or a subdelegate under subsection (2):
>
> (a) another Public Service chief executive:
>
> (b) a Public Service employee:
>
> (c) an individual working in the Public Service as a contractor or as a secondee from elsewhere in the State services in relation to a function or power of the Public Service:
>
> (d) the holder for the time being of any specified office in the Public Service.
>
> (2) A person to whom a function or power has been delegated under subsection (1) by a chief executive may, with the prior written approval of that chief executive, subdelegate the function or power to any other person described in subsection (1A).

[38] Section 41(1)(a) of the SSA allows a Public Service Chief Executive to generally or particularly delegate in writing to a person described in subsections (1A) or (2) any of the functions or powers of the Chief Executive. The delegation requires the prior written approval of the Minister.

[39] Subsection 41(2) of the SSA allows a person to whom any of the functions or powers have been delegated to sub-delegate those to any other person described in subsection 41(1A) with the prior written approval of the Chief Executive.

[40] Section 4C of the PWA also contains a delegation section. Subsections 4C(1)-(3) provide:

> **4C Delegation of Minister's powers**
>
> (1) Any Minister of the Crown may from time to time, either generally or particularly, delegate in writing to any officer of the Minister's department any of the powers conferred on the Minister by this Act, except the power of delegation conferred by this section.
>
> (2) Despite subsection (1), the Minister for Land Information must not delegate the power to issue a notice of intention to take land under section 23(1).
>
> (3) Delegation under this section may be made to-
>
> (a) a specified person; or
>
> (b) a person of a specified class; or
>
> (c) the holder for the times being of a specified office or appointment; or
>
> (d) the holders for the time being of offices or appointments of a specified class.

Delegation one

[41] Delegation 1 involves a delegation by the Minister for Land Information to the Chief Executive of LINZ of certain functions and powers within the Act.

[42] Of relevance, this includes the functions and powers under ss 111(1) and 111(4) of the PWA. Sections 111(1) and (4) gives functions and powers to the Minister and can therefore be delegated under s 28(1) of the SSA, and sub-delegated under s 41 with prior written consent of the Minister.

[43] Delegation 1 correctly delegates the functions and powers of ss 111(1) and (4) from the Minister of Land Information to the Chief Executive of LINZ under s 28(1) of the SSA and is in writing as required under s 28(2). It correctly gives prior written

consent for the Chief Executive of LINZ to sub-delegate these functions and powers under s 41 of the SSA.

Delegation two

[44] Delegation 2 purports to be a delegation by the Minister for Land Information to the Chief Executive of LINZ of functions and powers under s 111(2) of the PWA.

[45] Section 111(2) provides that the powers conferred by subsection 111(1) shall not be exercised unless the owner or occupier has given 10 working days' notice in writing.

[46] After the word **WHEREAS** the delegation document sets out three clauses numbered (1), (2) and (3) respectively. Clauses (2) and (3) refer to ss 28 and 41 of the SSA. It seems clear that this part of the document provides background leading to the operative part of the delegation.

[47] Below clauses (1), (2) and (3) the operative parts of delegation 2 are set out. It is in two parts, which read:

> **NOW THEREFORE** pursuant to section 41 of the State Sector Act 1988, **I THE HONOURABLE MAURICE WILLIAMSON, HEREBY DELEGATE** those powers and functions under the Public Works Act 1981 indicated in the **Schedule** to this instrument to the **Chief Executive of Land Information New Zealand.**
>
> **I HEREBY CONSENT** to the further sub delegation of those powers and functions to employees of Land Information New Zealand.

[48] A table follows the operative part. It refers to s 111(2), the 10 days' notice period, the Minister being the "Principal authority" and the delegate being the Chief Executive.

[49] However, the operative parts of the delegation refers to s 41 only and not s 28 of the SSA. For reasons which I set out shortly, I consider this to be fatal. As s 28 is not referred to, the functions and powers of the Minister under s 111(2) of the PWA were not delegated to the Chief Executive of LINZ.

Delegation three

[50] Delegation 3 involves the delegation by the Chief Executive of LINZ to the Deputy Chief Executive Crown Property of several functions and powers under the Act.

[51] Of relevance, this includes the delegations of the functions and powers under ss 111(1), (2) and (4) of the PWA.

[52] Section 41(1) allows for the Chief Executive of LINZ to sub-delegate functions of powers delegated to them by the Minister to a person under subsection (1A) with prior written consent of the Minister.

[53] Subsection (1A) includes; another Public Service chief executive, a Public Service employee, an individual working in the Public Service as a contractor or as a secondee from elsewhere in the State services in relation to a function or power of the Public Service, and the holder for the time being of any specified office in the Public Service.

[54] The powers and functions of the Minister under ss 111(1) and (4) have been correctly delegated to the Chief Executive of LINZ pursuant to s 28 of the SSA and Delegation 1, and prior written consent for the sub-delegation has also been given under s 41 in Delegation 1. The Deputy Chief Executive Crown Property is a Public Service employee under s 41(1A)(b) and can therefore have these functions and powers sub-delegated to them. Delegation 3 correctly sub-delegates the functions and powers of ss 111(1) and (4) of the PWA from the Chief Executive of LINZ to the Deputy Chief Executive Crown Property under s 41 of the SSA and provides prior written consent for the Deputy Chief Executive Crown Property to sub-delegate these to any person under s 41(1A) of the SSA. Delegation 3 is therefore valid for the functions and powers under ss 111(1) and (4).

[55] However, as the functions and powers under s 111(2) were not correctly delegated to the Chief Executive of LINZ by the Minister, the above reasoning cannot apply specifically to s 111(2).

Delegation four

[56] Delegation 4 involves the sub-delegation by the Deputy Chief Executive Crown Property to several persons as listed in the Schedule of several functions and powers under the Act.

[57] Of relevance, this includes the sub-delegations of the functions and powers under ss 111(1), (2) and (4) of the PWA.

[58] Section 41(2) allows for the Deputy Chief Executive Crown Property to sub-delegate functions of powers delegated to them by the Chief Executive of LINZ to a person under subsection (1A) with prior written consent of the Chief Executive of LINZ.

[59] The powers and functions of the Minister under ss 111(1) and (4) have been correctly sub-delegated from the Chief Executive of LINZ to the Deputy Chief Executive Crown Property pursuant to s 41(1) of the SSA by Delegation 3, and prior written consent for the sub-delegation has also been given under s 41 in Delegation 3. The seven people listed in the Schedule come within the class of persons referred to in subsection (1A), therefore can have these functions and powers sub-delegated to them. Delegation 4 correctly sub-delegates the functions and powers of ss 111(1) and (4) of the PWA from the Deputy Chief Executive Crown Property to the seven persons listed in the Schedule under s 41 of the SSA. Delegation 4 is therefore valid for the functions and powers under ss 111(1) and (4).

[60] However, as the functions and powers under s 111(2) were not correctly delegated to the Chief Executive of LINZ by the Minister, the above reasoning does not apply specifically to s 111(2).

Delegation five

[61] Delegation 5 dated 28 July 2021 involves the updating of delegations under several acts under the Public Service Act 2020, which repealed and replaced the SSA. Clause 1 of the delegation purports to delegate and re-delegate functions and powers

to persons holding what is described as unchanged positions. The powers and functions are those provided for pursuant to certain legislation as set out at Schedule 1 which includes the Public Works Act 1981.

[62] Clause 2 of Schedule 6 of the Public Service Act 2020 allows for the Chief Executive to delegate generally or particularly functions or powers under any Act but must have prior approval for functions or powers delegated to the Chief Executive by a Minister.

[63] Delegation 5 correctly re-delegates all delegations made previously pursuant to the PWA which includes ss 111(1) and (4) of the Act, but not s 111(2) of the PWA.

Discussion

[64] Subsection 111(1) gives certain functions and powers to the Minister. They include the ability to enter and re-enter land and to carry out certain types of work including the investigations and surveys contemplated in this case.

[65] Subsection 111(1) is subject to subsection 111(2). The powers conferred by subsection 111(1) cannot be exercised unless the owner or occupier has first been given 10 working days' notice in writing pursuant to s 111(2). That notice must set out how and when entry is to be made, the powers to be exercised, a statement of the owner/occupier's rights and a statement that the owner/occupiers may be entitled to compensation.

[66] Section 111(4) then provides that an owner or occupier may object to the nearest District Court. The Court may then summons the Minister to appear before it.

[67] Subsections 111(1), (2) and (4) of the PWA set out distinct but complementary powers and functions. A power to enter and carry out certain works – s 111(1), a power to issue a notice–s 111(2) and a power/function to appear before Court – s 111(4). All those powers and functions could be delegated pursuant to s 28(1) of the SSA to the Chief Executive of LINZ. Any subsequent delegation by the

Chief Executive had to be made pursuant to s 41, with the prior written consent of the Minister.

[68] For reasons unknown, Delegation 1 refers only to those powers and functions set out in ss 111(1) and (4). It did not refer to s 111(2). Subsection 111(1) is subject to s 111(2). Any delegation by the Minister to the Chief Executive had to be in writing. As there was nothing in writing referencing s 111(2), Delegation 1 cannot be said by implication to include the power to issue a notice pursuant to s 111(2).

[69] Delegation 2 post-dates Delegation 1 by over four years. It refers to s 111(2) only. It makes no mention of subsections 111(1) and (4).

[70] The operative part of Delegation 2 refers to s 41 not s 28 of the SSA. Section 41 permits delegation from the Chief Executive of LINZ and subsequent sub-delegations. What is missing is the delegation of the powers or functions of the Minister to the Chief Executive in the first place. As s 28 is not referred to, the functions and powers of the Minister under s 111(2) of the PWA were not expressly delegated to the Chief Executive.

[71] Could this simply have been a mistake or oversight? I did not receive any evidence or written submissions on this point. Nevertheless, I raised it with counsel for the defendant during her oral submissions. Counsel submitted that the language of the delegation shows an intention to delegate under s 28 from the Minister to the Chief Executive. Although s 28 is not referred to in the "operative part" of the delegation, that was an oversight and the Minister's intention is clear.

[72] After the hearing had concluded counsel for the defendant filed a memorandum citing the decision of *Bounty Oil & Gas NL v Attorney-General*[5] in support of her submissions. The *Bounty* case concerned the revocation of petroleum exploration permits. Two notices of revocation had been issued. It was argued that the notices were void as they had been issued by the Group Manager of the Crown Minerals Group of the Ministry of Economic Development instead of by the Minister of Energy.

[5] *Bounty Oil & Gas NL v Attorney-General* [2010] NZAR 120. I grant leave for the authority to be cited to the Court, after the hearing has concluded, pursuant to rules 1.7 and 1.11(1) of the District Court Rules 2014 and rule 11.8A of the High Court Rules 2016.

[73] In that case an instrument of delegation by a Deputy Secretary required the consent of the Chief Executive under s 41 (2) of the SSA. However, the actual signed instrument wrongly stated that the Chief Executive had given his consent under s 41 (1) of the SSA.

[74] The High Court held that this was an obvious error and the intent of the Chief Executive to consent to a sub-delegation of the powers was clear. MacKenzie J relied upon a principle set out in the House of Lords decision of *Inco Europe Ltd v First Choice Distribution (a firm)* [6] that "…. a court may interpret legislation in a manner which is inconsistent with the literal meaning when that is necessary to correct an obvious error".[7]

[75] The principle enunciated in *Inco* is that Courts can add, omit or substitute words in statutes but must exercise considerable caution before doing so. The power is confined to plain cases of drafting mistakes and the Court should abstain from any course which might have the appearance of judicial legislation. Before interpreting a statute in this way the Court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. [8]

[76] Sometimes, even when those conditions are met, the Court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. The insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language. [9]

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6 *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109.
7 *Bounty Oil & Gas NL v Attorney-General* [2010] NZAR 120 at [20].
8 *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109 at 115
9 *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109 at p 115

[77] In *Bounty*, the Chief Executive already had the power delegated to him by the Minister and the power to sub-delegate approved by the Minister. The error occurred when the Chief Executive was purporting to give consent for further sub- delegation.

[78] In the case before me the error occurred when the Minister was purporting to delegate his powers to the Chief Executive by referring to s 41 when he should have referred to s 28 of the SSA. The error is more egregious than *Bounty*, because in *Bounty*, the Chief Executive already had the powers to sub-delegate properly delegated to him by the Minister. The error was referring to s 41(1) instead of s 41(2).

[79] The error here is the omission of s 28. Substantively, the error had the effect of the Minister giving consent for sub-delegations by the Chief Executive, without first delegating any powers to the Chief Executive in the first instance. That error is fatal as a necessary step in the delegation process has been missed.

[80] I also note that the *Inco* principle is a principle of statutory interpretation, which was adapted to the circumstances of the *Bounty* case. With respect, the issue here is not one of statutory interpretation rather it is whether the Delegation 2 was lawful.

[81] The law does not permit delegation of powers, unless the enabling Act confers an express power or supports a necessary implication authorising delegation. It does not excuse an unauthorised delegation that had become "normal and accepted practice". If the initial sub-delegation is unlawful, so is every subsequent delegation.[10]

[82] The State Sector and Crown entities statutes override the maxim "delegatus non potest delegare". Ministerial and Crown entity powers may be delegated then sub-delegated, notwithstanding the common law maxim. However, the exercise of the delegation powers still requires an actual delegation. [11] The authority to delegate does not clothe an act with validity in the absence of an actual delegation.[12]

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[10] *Carey v McInerey* HC Timaru, CP32/87, 11 July 1989 at 6 and 7.
[11] *Attorney-General v Waikato Regional Airport* [2002] 3 NZLR 433 (CA) at 462;
[12] *Webster v Taiaroa* (1987) 7 NZAR 1 (HC); and *United Fisheries Ltd v Chief Executive of Ministry of Fisheries* [2001] NZAR 707 (CA).

[83] As I said at paragraph at [67] above, s 111 of the PWA sets out three classes of powers/functions which could be delegated. It is not for this Court to second guess why two only of the three powers and functions were delegated in Delegation 1. Nor is it for this Court to infer that the failure to refer to s 28 in Delegation 2 was by mere oversight. Any delegation from the Minister to the Chief Executive had to be expressly set out in writing. It was not therefore there does not appear to be a way to save it without redrafting the delegation.

[84] For the sake of completeness, I refer to a decision of *Body Corporate 212138 v Minister for Land Information.* In it, Judge Sinclair considered s 111 notices issued concerning a major infrastructure project in Auckland known as the Waterview Connection.[13] She had four delegations to consider. They had all been made pursuant to ss 28 and 41 of the SSA.

[85] Judge Sinclair ultimately held that the delegations were *ultra vires* the PWA but on the delegation point she found that they had been correctly made.[14]

[86] I note that only one of the delegations bears the same date as those before me, 14 July 2009. Importantly, Delegation 2 was not one of delegations considered by her. The remaining three delegations all have different dates than those before me. If they were relevant, I would have expected to see them in the evidence before me or as part of the AB. As they are not before me, I do not consider the conclusion Judge Sinclair reached on the validity of the delegations to be applicable in this case.

Conclusion

[87] In conclusion on this point I find that:

(a) The powers and functions set out in subsection 111(1) and (4) were correctly delegated to the Senior Advisor Clearances;

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[13] *Body Corporate Number 212138 v Minister for Land Information* DC Auckland CIV-2012-004-2027, 31 January 2013.

[14] At [22].

(b) There was no lawful delegation of the power to issue notices pursuant to s 111(2) to the Chief Executive of LINZ. That power remains with the Minister for LINZ;

(c) There was no lawful subsequent delegations or sub-delegation of the power to issue s 111(2) notices including to the Senior Advisor Clearances;

(d) The s 111(2) notices signed by Mr McPhail as Senior Advisor Clearances are unlawful.

[88] In case I am wrong on that point, I go on to consider whether Mr McPhail as the ministerial delegate undertook an informed and authoritative consideration before the s 111(2) notices were issued.

The authorisation processes

[89] Five reports were prepared for Mr McPhail to consider ("**authorisation reports"**) prior to the service of the s 111 notices. They were prepared and peer reviewed by employees of WSP New Zealand Limited ("**WSP"**),[15] a consultancy services company who provide services to Waka Kotahi during the investigation, design procurement and construction phases of transport projects.

[90] Most of the authorisation reports were prepared by Mr Munro of WSP. In each report the authors signed them. Following that an approval clause is set out for the ministerial delegate. It reads:

> Approved / ~~Declined~~
>
> Signed "Kerry McPhail" Date
>
> In terms of a delegation
>
> Land Information New Zealand

[15] Agreed bundle at tabs 6-10 inclusive.

[91] All the authorisation reports had attachments and/or appendices. Those documents differed from report to report but included inter alia draft s 111 notices, copies of title documents, land entry plans and additional reports prepared by Waka Kotahi employees called action papers **("action paper").**

[92] Mr McPhail undertook the authorisation process, in his capacity as Senior Advisor Clearances for LINZ. He provided an affidavit and was cross-examined. He deposed that as the ministerial delegate, scrutiny and review of reports is a critical part of his role and undertaken every time he makes a statutory decision.[16] For each report he closely reads and considers each page and, if required, raises any issues or questions with the author.[17] He also said that he would not authorise a report without first having read it and his signature confirms he has read the report.[18]

[93] Specifically, in relation to the authorisation reports before the Court, Mr McPhail deposed that he had read each of them and did not seek any amendments or limitations to the notices.[19]

The advice considered by Mr McPhail

[94] The plaintiffs are critical of the authorisation process. They submit that the reports were prepared and reviewed by WSP employees, people who do not have delegated authority from the Minister. Furthermore, they submit that there is no evidence from Mr McPhail to confirm he had read, considered, questioned, or otherwise scrutinised the reports and/or provided any declarations about the limits (if any) that should be imposed on the exercise of forced entry powers. The plaintiffs submit that the authorisation process undertaken by Mr McPhail amounts to little more than "rubber stamping".

[95] The defendant rejects any claim to the effect that the Minister's delegate must prepare, then consider any authorisation report. The defendant submits that the Minister's delegate is permitted at law to take advice, that there is no requirement at

[16] Affidavit of Kerry McPhail dated 30 March 2022 at [4].
[17] At [5].
[18] At [4].
[19] At [7].

law to sign a document as "approved" and also confirm they have "read, considered and scrutinised the report". The word "authorised" used in this case and the signature of Mr McPhail confirms that, as the Minister's delegate, he had considered the contents of the report and made the approval accordingly. The defendant also submits there was no "rubber stamping" of the authorisation reports by Mr McPhail.

[96] On the issue of taking advice the defendant relies upon *New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry.*[20] This was a judicial review application which sought to overturn new standards proposed by the Ministry relating to the importation of raw pig meat. The Board argued that four key officials should have been excluded from further involvement, but Justice Williams held at [206] that in the ordinary course of the business of the government, it is expected that officials will provide advice. On appeal, Justice Williams' position was upheld.

[97] The Minister also refers to *Riccarton High School Board of Trustees v Attorney-General*.[21] That case involved the applicant trying to overrule the defendant's priority rights regarding hiring her as a teacher. The Board of Trustees wrote a letter to the Minister of Education, who referred it to Mr Hoffman, a contracted employee of the Ministry. In turn, he sought assistance from a former district inspector of secondary schools who was contracted to work for the Ministry. The Minister also received and sought legal advice from a senior legal advisor of the Ministry and made the decision to uphold the priority rights.

[98] The plaintiff argued that the Minister had not decided or exercised his discretion due to his approach adopted, namely referring the matter to his departmental advisors. It was held that relying on appropriate qualified persons to carry out the necessary research did not amount to abdicating his responsibilities and was the only way a busy Minister could possibly deal with the multitude of departmental matters which he is confronted with day by day.

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[20] *New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry* [2012] NZHC 888.

[21] *Riccarton High School Board of Trustees v Attorney-General* HC Wellington CP364/91,16 September 1991.

[99] The defendant also refers to *Bushell and Another v Secretary of State for the Environment.*[22] That case states that the discretion in making administrative decisions is not conferred on the Minister as an individual but as a holder of an office in which he will have available to him the collective knowledge, experience and expertise of all those who serve the Crown in the department when he makes his decision.

[100] The advice primarily relied upon by Mr McPhail came in the form of the authorisation reports prepared by employees of WSP, a private professional services firm, commissioned by Waka Kotahi.

[101] I understand that Waka Kotahi are a Crown Agency pursuant to the Crown Entities Act 2004, as established by s 93 of the Land Transport Management Act 2003.

[102] The principle relied upon by the defendant seems to go only as far as being able to take advice from officials within the government department concerned or, at its furthest, from those contracted to provide advice to that department. Thus, the question arises whether the advice given by employees of WSP falls within this principle?

[103] In this case Mr Essa, a WSP manager, deposed that WSP is a LINZ "accredited supplier, responsible for leading the Public Works Act process relevant to this proceeding" for both the roundabout and expressway projects.[23]

[104] I note that in each of the authorisation reports underneath the name of the peer reviewer, mention is made of the fact that the reviewer is a "nominated person for WSP as a LINZ accredited supplier".

[105] I am generally aware that LINZ accredits private sector providers to carry out certain types of work to assist in the acquisition, management and disposal of properties including work undertaken pursuant to the PWA.[24] However, the precise nature of the legal relationship between LINZ and their accredited suppliers is

[22] *Bushell and Another v Secretary of State for the Environment* (1980) 2 A11 ER 608.
[23] Affidavit of Zaid Ayad Essa dated 24 February 2022 at [5]; Affidavit of Zaid Ayad Essa dated 24 February 2022 at [5].
[24] As result of my former role as a Māori Land Court Judge.

unknown to me. I did not receive any evidence or submissions on point. I do not know for example whether it is a contractual one or governed by regulation or statute.

[106] It is possible perhaps even probable, that by virtue of their accredited supplier status, WSP fall within the class of persons whom Mr McPhail could take advice from. However, I am not prepared to definitively make that finding as I do not know enough about the relationship. Had the situation been that WSP were simply third-party contractors to Waka Kotahi, without the benefit of the accredited status with LINZ, their advice may not have come within the principle relied upon by the defendant.

Informed and authoritative consideration

The plaintiffs' position

[107] The plaintiffs are critical of the content of the authorisation reports provided to Mr McPhail. In relation to the roundabout reports they submit that:

(a) A representation that the notices are urgently required to resolve safety issues at the intersection is not supported by data;

(b) The claims for urgency are overstated; and

(c) The reports make no mention of attempts at negotiations undertaken to try and reach a negotiated settlement.

[108] In relation to reports prepared for the expressway the plaintiffs submit that:

(a) There is no reason why a "desktop" analysis, undertaken for the roundabout project could not be likewise be undertaken for the expressway project thus avoiding forced entry;

(b) The reports relied on seasonal constraints to justify urgency;

(c) The reports do not explain why forced entry is necessary and why a negotiated outcome is impossible or what attempts have been made to resolve this;

(d) They are concerned that the reports carry a tone of a lack of cooperation from the defendant which is misplaced. They refer to an offer of a walk over by Thistlehurst which was rejected and an offer on the part of Mr Vaughan, one of the sharemilkers, to meet the defendant's agents which was refused until access was granted. They submit that none of that information was included in the reports; and

(e) There are concerns that entry is sought over an extremely large swath of the farm and the impact on farming activities.

[109] The plaintiffs submit that the reports are superficial and meaningless. Given the potential substantive interference with the plaintiffs' rights from the forced entry, it is submitted that far more information was required in those reports to meet the threshold of an informed and authoritative consideration.

[110] Prior to the first hearing, counsel for the plaintiffs filed a memorandum with the Court on Friday 1 April 2020, noting that the action papers attached to the authorisation reports had not been disclosed. The action papers were provided to the Court and counsel for the plaintiffs, moments before the hearing commenced on 4 April 2022.

[111] The hearing commenced but during the afternoon of the first day, counsel for the plaintiffs filed a memorandum describing the action papers as artificial and an oversimplified commentary on the background matters and at worst misleading. The following day a request for an adjournment and the filing of evidence setting out the background attempts at negotiations was sought. I subsequently adjourned the hearing to 5 May 2022 and set out a timetable allowing for the filing of further evidence.[25]

[25] Minute 5 April 2022.

[112] The plaintiffs subsequently filed a statement from Darryl Gregory describing negotiations between Thistlehurst and WSP.

[113] Three action papers are now included in a supplementary agreed bundle ("**SAP"**). They were prepared by employees of Waka Kotahi and formed part of the bundle of material available to Mr McPhail during his considerations.

[114] The plaintiffs submit that the action reports provide very little information about the attempts at negotiations and discussions with the owner and occupiers and provide no explanation as to why a negotiated settlement could not work.

The defendant's position

[115] The defendant submits that the authorisation reports do not contain material errors and the plaintiffs' claims either misstate or misunderstand the reports. The defendant submits that the threshold for legal error through error of fact is high, the conclusion must be "so unsupportable – so untenable – as to amount to an error of law".

[116] In respect of the authorisation reports prepared for the roundabout the defendant submits that:

(a) The plaintiffs' claim that the reports are urgently required to resolve safety issues is not correct. Urgency is raised in the context of project management timing and due to the owner's refusal to allow entry, the planned construction timeline is in jeopardy;

(b) The plaintiffs' submissions about safety are made without the benefit of any evidence. Moreover, the reports accurately reflect the Waka Kotahi published project overview available online;

(c) In response to the criticism that urgency is not required to support the RMA process, they say that there is a "certain degree of risk" proceeding with RMA applications based only a desk top investigation. Furthermore, the subsequent s 111 investigations are needed to inform

detailed design and to confirm reports prepared in support of a notice of requirement and regional resource consent applications;

(d) Information contained in the reports about planned dates for construction was accurate and based on the known and published timeline at the time. If the dates were later amended, that does not amount to factual error and cannot amount to an error of law. Furthermore, the defendant submits that the plaintiffs' submissions on timing are speculative; and

(e) The reports set out in detail the interactions with Thistlehurst and their consistent refusal to permit entry over some months. The defendant's position is that the owners continued to seek information, to refuse entry and to engage and rely on legal counsel. The Minister's view of the facts is that a notice of entry was required.

[117] In relation to the expressway authorisation reports the defendant submits:

(a) Any risk of relying on a "desktop" assessment could be avoided because there is enough time in the programme to undertake site investigations;

(b) They deny that the reports rely on seasonal constraints without identifying what they are or how they will be resolved;

(c) The reports do refer to discussions with the owner and sharemilker;

(d) The reports state that the actual area of land required for the project is not yet finalised but will incorporate multiple grazing paddocks. The specific areas for each investigation type are shown in the plans that form part of the appendices to the report; and

(e) The defendant submits that there was no error in a "copy and paste" approach. The use of the same or similar words or format does not constitute an error and the reports are factually correct and robust.

Legal principles

[118] The leading authority concerning the issuing of s 111 notices is *Pengelly's Marketing Limited and Anors v Attorney General*.[26] That case involved an investigation by the Ministry of Education of the need for an additional primary school in the Otahuhu area. Potential sites were identified including a site occupied by the appellant. Negotiations were conducted over a period of twelve months without success. The Ministry then invoked s 111 and arranged for the service of a s 111(2) notice on the appellant. In that case the Court held that:

(a) The authorisation process required of the Minister is separate from the notice to enter; [27]

(b) As the process concerns entry to property, rights of citizens are involved and are not to be treated lightly;[28]

(c) Inherent in the entry process is that there must be an *informed and authoritative consideration* before the process is commenced;[29] (emphasis added)

(d) There must be Ministerial authorisation prior to execution of the notice.[30]

[119] In *Pengelly* there was no reference to any authorisation, nor any proof that it existed independently of the notice.[31]

[120] During the oral submissions, I raised with counsel the interplay and applicability of the informed and authoritative consideration principle outlined in *Pengelly* and the error of fact/law principles referred to by counsel for the defendants.

[26] *Pengelley's Marketing Limited & Anors v Attorney General* [2000] 3 NZLR 198.
[27] At [17] and [20].
[28] At [22].
[29] At [23].
[30] At [26]
[31] At [24].

I noted that the authorities cited in support of the error of fact/law submissions were judicial review proceedings. This is not a judicial review nor is it a statutory appeal.

[121] As the case and the submissions evolved, I understood counsel to be agreed that this is not a case in which it is being said that there was an error of fact/law. Rather, the decisions Mr McPhail made must be assessed against the principle set out in *Pengelly*.

[122] What does that mean in this case for the 10 separate s 111 notices? I accept that the Court is clearly required to undertake an assessment of the process undertaken and material before Mr McPhail. Thus, it would seem to me that means the Court must be satisfied on an objective and reasonable basis that the ministerial delegate has discharged the standard imposed by *Pengelly.*

[123] I also accept that it would be unrealistic to expect that Mr McPhail be informed of every step and interaction that occurred between Waka Kotahi, Thistlehurst, the sharemilkers and the other occupiers.

[124] Nevertheless, at the risk of placing a gloss on the *Pengelly* principle, in order to be satisfied that an informed and authoritative decision had been made, it seems implicit in that notion that Mr McPhail had to be sufficiently and properly informed of: the background and nature of what was proposed; an identification of the affected owners/occupiers; the position of the affected owners/occupiers; and what discussions/negotiations had taken place, if any, in an attempt to gain entry by agreement.

Decision of 12 May 2021

[125] In reaching his decisions, Mr McPhail relied totally upon the authorisation reports and attachments. The authorisation reports are particularly critical. They were prepared by WSP, the majority by Mr Munro. As Mr McPhail did not carry out any inquiries independent of the material provided to him, it was important that the reports were not only accurate but sufficiently informative of why forced entry was necessary.

[126] When one reads the authorisation reports, two themes emerge which are relied upon to justify execution of the notices: urgency and a refusal by the owners of Thistlehurst to allow entry.

[127] The first report authorised by Mr Mc Phail was on 12 May 2021.[32] That report authorised the execution of a notice for the roundabout to be served on Thistlehurst.

[128] At page 2, the authorisation report records discussions with Thistlehurst, that approval had been given for a "walkover" which Waka Kotahi considers insufficient. At page 6, a chronology of events is outlined ending at 8 April 2021. At page 7, the comment is made that Thistlehurst has been:

> …engaged regularly in relation to providing partial approval, refusing to sign a Land Entry Agreement to allow access to carry out the following investigations.

[129] In the action report attached prepared by Waka Kotahi and dated 6 April 2021 at para 12 it states:

> The owner has not responded to requests to allow access by necessary disciplines to undertake relevant investigations.

[130] Mr McPhail was cross-examined on his knowledge of the state of negotiations. Propositions were put that he was not properly informed about their state. His response was that he was satisfied that there had been negotiations, they were unsuccessful, and it was therefore appropriate to authorise a s 111 notice to issue.[33]

[131] I have reached the conclusion that Mr McPhail was not properly informed about the state of negotiations. The Court has before it a statement of evidence from Daryl Gregory on behalf of Thistlehurst and various letters and emails that were exchanged between 8 December 2020 and 19 May 2021. Throughout, Mr Gregory was in negotiation and communications with Mr Munro of WSP. I received no evidence on this issue from Mr Munro.

[32] AB at tab 6.
[33] Notes of evidence at 42, lines 26-27; and l33-34 and at 44, lines 3-5 and 8-10.

[132] The Gregory evidence reveals that between 8 and 22 December 2020 there was an exchange of correspondence and draft LTOs for the roundabout project. Between 20 January and 19 March 2021 there were discussions about the area of land encompassed in any draft LTO, a "walkover" of Rockridge farm and who might attend on behalf of Waka Kotahi.

[133] On 19 March 2021 Mr Gregory wrote to Mr Munro saying:

> I think we are making good progress…. It is clear from his perspective that he thought a walkover was still in contemplation.

[134] Mr Munro responded by email on 8 April 2021. It is clear on reading that email that he held out that a walkover was still in contemplation. He said:

> The intention of this "walkover" was, and is to, gain an understanding of the site….

[135] On 10 May 2021 Mr Munro rang Mr Gregory to arrange a meeting for 19 May 2021. Mr Gregory has provided a file note taken at the time recording the discussions.[34] There is no mention that at the meeting scheduled for 19 May 2021 a s 111 notice would be served. In response to a question from the bench about the ongoing possibility of access being granted by negotiation as at 10 May 2021, he said "Yeah totally".[35]

[136] A meeting subsequently took place on 19 May 2021. To Mr Gregory's surprise he was served with a s 111 notice. His evidence was that following service "negotiations stopped abruptly".[36]

[137] A proper examination of the events and documents exchanged between 8 December 2020 and 21 April 2021 indicate two errors in the action paper of 6 April 2021. The first appears at paragraph 12 where it states that negotiations originally commenced in 2017. That is not correct, communications started in 2019.

[34] ASP at tab 12.
[35] Notes of evidence at 28, lines 15-17.
[36] Statement of evidence Daryl Gregory dated 2 April 2022 at [5].

[138] The second and more significant error concerns a statement that the owner had "not responded to requests to allow access" for investigations to occur. That was not correct. There had been discussions and negotiations about an LTO. There had also been agreement to allow certain persons to access Rockridge for a walkover. The evidence I have clearly demonstrates that Thistlehurst, as the owner, was responding and negotiating entry.

[139] In a similar vein, missing from the authorisation report is that as at 21 April 2021 negotiations for a "walkover" were still in progress. Mr Munro had said so in his email on 8 April 2021 but for whatever reason omitted that fact from the authorisation report.

[140] Mr McPhail did not sign the authorisation report until 12 May 2021. By then Mr Munro had contacted Mr Gregory on 10 May 2021 to arrange a meeting for the 19th of that month. He could have but did not update Mr McPhail about either of those matters.

[141] From what was available to him Mr McPhail would have been left with the impression that the negotiations about an agreed entry had failed. The evidence I have indicates otherwise. Within a relatively short space of time pre-Christmas 2020 discussions had taken place concerning an LTO. The LTO covered a large area and not surprisingly Thistlehurst sought and obtained legal advice to assist them. While it is true to say that it had not been finalised, it was not accurate to say that Thistlehurst had refused to respond or refused to sign an LTO, negotiations were ongoing.

[142] Criticism has been levelled at Thistlehurst about inquiries they made of Waka Kotahi in 2021 about aspects of the roundabout and expressway proposals, whom might be visiting their property and what they might be doing. As I said earlier, one of the underlying themes of the authorisation reports was the perceived urgency of the situation. There is more than a hint by the defendant that Thistlehurst were procrastinating and being obstructive in the requests they were making. Having reviewed the exchange of correspondence between Mr Gregory and Thistlehurst, that is not my impression. Requests for information were reasonable and exactly the type one might expect if as an owner of a property you were being asked to allow access

for several different disciplines to carry out invasive testing on your land. As to the perceived urgency, I note that it took close to three weeks for Mr Munro to respond to the Gregory email of 19 March 2021. I also note that the authorisation report took three weeks before it was signed off by Mr McPhail. Those delays of six weeks or more cannot be visited on the plaintiffs.

[143] I accept that Mr McPhail did not need to know all the detail of the negotiations. What he did need to receive was accurate information on whether the negotiations concerning the LTO and a walkover were at an end. They were not at an end and Mr McPhail was not informed of that fact.

[144] Would the provision of that information have made a difference to the McPhail decision? Ultimately, it may not have, but the characterisation of Thistlehurst refusing to respond, refusing access and that negotiations were at an end were simply not correct. The correct position could have been but was not outlined to Mr McPhail, therefore he did not have all the information upon which to make an informed and authoritative decision.

[145] It is clear that at the date he signed off the first authorisation report Mr McPhail thought the negotiations were unsuccessful. He said in his oral evidence:

> I understood there were negotiations. I understood they were unsuccessful and therefore it was appropriate to move to a different solution.[37]

[146] That position was informed by reliance on the authorisation and action reports. As I have outlined above, Mr McPhail was misinformed. Waka Kotahi were holding out as at 8 April 2021 that a walkover would still happen. They did nothing to disabuse the owners of that notion prior to 19 May 2021.

[147] When questioned on this point Mr McPhail appears to have closed his mind to making an independent decision. He said:

> …. I guess short of telling us that there was a signed agreement, that an agreement had been signed by the landowners that was going to come into us to agree to, I wouldn't expect to be asked to stop that process at that point anyway, because if there is no agreement there is no agreement.

[37] Notes of evidence at 44, lines 3-5.

…….

> ….even had I been aware that these meetings were taking place, if Waka Kotahi still said they had the requirement and they wanted to protect their timeline by using the process I would still have agreed to do it.[38]

[148] That evidence is of concern. Mr McPhail is the Ministerial delegate. He is expected to bring an independent mind to his considerations. His role is not to defer to Waka Kotahi, rather, it is to make the informed and authoritative decision spoken of earlier. It is of concern that his mindset was such that even if he had been properly informed about the state of negotiations, he would have made the same decision. That indicates a closing of the mind to the role he had to undertake and an unnecessary deference to the Waka Kotahi agenda.

[149] Subsequent authorisation reports were also signed off by Mr McPhail on 30 June 2021, 9 September 2021 and two dated 27 January 2022. None of them or any of the action papers include any information that between 8 April and 19 May 2021 Mr Munro for Waka Kotahi and Mr Gregory for Thistlehurst were in ongoing negotiations concerning agreed access. It is my distinct impression that once an initial decision was made the die was cast so to speak and nothing short of forced entry would suffice.

Decision of 30 June 2021

[150] The next authorisation report was signed off on 30 June 2021.[39] It relates to notice to be served on the sharemilkers.

[151] The action paper attached in support is dated 6 April 2021, the same report which was attached to the first authorisation report. It was of no assistance to Mr McPhail because it does not refer to the sharemilkers only the owners.

[152] The sharemilkers are referred to in the authorisation report at page one, as an occupier. In most respects, the report is the same as that signed off on 12 May 2021 with the majority of the references in the report to the owners. The sharemilkers are

[38] Notes of evidence at 5, lines 1-5 and 12-16.
[39] AB at tab 7.

referred to briefly at page 3 and on only one further occasion at page 7, when the following paragraph appears:

> Notwithstanding the fact that the original s 111 Notice was not served on the Sharemilker as the "occupier", the name and contact details of the sharemilker have subsequently been provided and therefore we believe that the Owners would have advise the Occupier of the proposal and actions that the Crown is taking to obtain access to the land.

[153] Mr McPhail was content to authorise a s 111 notice based upon an assumption made by WSP that Thistlehurst were keeping the sharemilkers informed of all developments. He did not challenge that WSP assumption. He did not challenge the fact that there was no separate action paper prepared for the sharemilkers. He did not challenge the fact that the authorisation report provided scant information about the sharemilkers other than identifying their names, addresses and making an assumption about their state of knowledge.

[154] Also missing from either the authorisation report or action paper is that the sharemilkers had attempted to set up a meet with Mr Munro and others to discuss a timetable for works to be carried out that suited everyone. Mr Michael Vaughan's unchallenged evidence was that:

> Mr Munro said he could only discuss this once *"....approval has been obtained to access the property".* This was ironic given that the terms of access were exactly why I wanted to meet up with Mr Munro to discuss. (emphasis added).[40]

[155] Rockridge farm is a large productive dairy farm which milks approximately 800 cows producing 213,000-225,000 kgs of milk solids per annum. In addition, calving and cropping are important seasonal activities. Including the sharemilkers, at least six people live onsite. Mr Vaughan, as the sharemilker, was at all times responsible for the operation of Rockridge. That includes all health and safety requirements and knowledge of whom was on site. The sharemilkers' interests clearly align with the owners, but they are different. As the people in actual possession of the farm, as occupiers, they had rights and interests which had to be separately considered. It is not enough to subsume the sharemilkers' interest within any considerations made about the owner's position, which is what appeared to have happened here.

[40] Statement of evidence Michael Vaughan dated 11 February 2021.

[156] Those different interests and rights were not reflected in any of the material made available to Mr McPhail. Where reference is made to the sharemilkers, it is scant. In deciding to execute a s 111 notice, Mr McPhail was required to undertake an informed exercise in relation to the sharemilkers' position. It is clear that he did not do so.

Decision 9 September 2021

[157] The next authorisation report was signed off on 9 September 2021.[41] It concerned a s 111 notice for the expressway project; the subjects were Thistlehurst and the sharemilkers.

[158] The action paper attached to that report is dated 12 May 2021. Attachment A is a table intituled "Property Detail and Negotiation Status". What follows is a brief summary of the position concerning several properties. The entry for Thistlehurst refers to the owners being provided LTO documents on 8 December 2020 with discussions resulting in "limited progress". It goes on to state that expectations are that limited progress will be made concerning the expressway. For the reasons I have said earlier, this description of where matters had got to in April/May 2021 did not properly inform Mr McPhail of what had actually happened.

[159] There is no mention in the action paper about the sharemilkers. Therefore, once again it was of no assistance in informing Mr McPhail about their position.

[160] Returning to the authorisation report, there are more references to the sharemilkers than in the report previously authorised on 30 June 2021. They are briefly referred to at pages 2, 3, 6-8 and 10. The most substantive comment appears at page 8. It should be noted that the comment is made in the context of referring to an objection by Thistlehurst as owners, not the sharemilkers per se when the following was said:

> Two of the grounds for objection was that the Owners could not unilaterally grant access to the Land without the consent of the Sharemilkers, as occupants

[41] AB at tab 9.

> of the Land and no evidence had been provided as to how any effects on the management of the business would be mitigated.[42]

[161] Missing from the authorisation report is any real appreciation of the sharemilkers' interest as occupiers rather than owners. They were entitled to expect that their position as the occupiers on the ground would be considered separate to that of the owners. Missing also is any reflection of what those concerns might be and that that they had been trying unsuccessfully to meet with Waka Kotahi to discuss those concerns.

[162] On 20 July 2021 the sharemilkers filed a notice of objection concerning the roundabout project. In it they raised various concerns including amongst other things that as occupiers and people in possession their permission was required to enter, of the potential for disruption to their farming activities, insufficient details about the project had been provided and the proposed area of land was excessive.

[163] By then Vaughan had also attempted to set up a meeting with Mr Munro, the intention being to set out a timetable for works to be carried out that suited everyone.

[164] Mr McPhail authorised the report on 9 September 2021. Well prior to then, the sharemilkers had formally raised concerns about the roundabout. Although that was for a different project it concerns the same property – Rockridge Farm – and the same type of proposes investigations concerns. There is no evidence before the Court that Mr Phail was ever alerted about the specific objection filed by the sharemilkers on 20 July or took their separate concerns into account.

[165] Once again, attempts at negotiations, this time with the sharemilkers, were not brought to Mr McPhail's attention. There is no mention in the authorisation report about Mr Vaughan's requests for a meeting to discuss issues.

[166] As for the owners, the authorisation report records that LTOs had been provided on 8 December 2020 and again on 19 May 2021. Further, that Thistlehurst had adopted a position as at 13 July 2021 that they would not sign any LTO documentation until objection concerning the roundabout had been heard and

[42] AB at tab 9, page 8.

determined. Page eight of the report records an objection that the owners could not unilaterally grant access without the consent of the sharemilkers and no evidence had been provided as to how the effects on the operation of the farm could be mitigated.[43]

[167] The matters mentioned in the authorisation report are correct, but context is also important. As discussed earlier, none of the authorisation reports make mention of the negotiations that had taken place up until 19 May 2021. It also makes no mention of the fact that those discussions about obtaining agreed entry were for the roundabout project, not the expressway. In an email dated 22 December 2020, Mr Munro attached an amended LTO for the roundabout and sent that to Mr Gregory. He said:

> This relates to the License to Occupy (LTO) for the SH1/SH29 intersection Upgrade only. If we can finalise this agreement, then it should largely remain unchallenged for the LTO for C2P which we would like to finalise in the new year if possible.[44]

[168] The chronology records an entry for 19 May 2021, which refers to LTO's being tabled with Thistlehurst for the roundabout. No mention is made of the fact that the s 111 notice was served that day. Mr Gregory's evidence is that was a "new and completely unexpected development".[45]

[169] There seems to be little or no appreciation of the fact that the owners were negotiating in good faith with two organisations – WSP and Waka Kotahi, over two separate proposals, which had major potential impacts on themselves, the sharemilkers and other occupiers. Mr Gregory's evidence was that up until 19 May 2021 negotiations had been cordial but by being unexpectedly served with a s 111 notice, the purpose of the 19 May 2021 meeting had been misrepresented.[46]

[170] Whilst it is correct that in July 2021 Thistlehurst said they would not sign an LTO for the expressway project, that is hardly surprising. There appears to be no appreciation of the fact that state of events had actually been brought about by WSP holding out that negotiations were on foot in April and May of that year, when in fact

[43] AB at tab 9.
[44] WSP email to Mr Gregory dated 22 December 2020 SAB at tab 7.
[45] Daryl Gregory statement of evidence dated 22 April 2022 at tab 46.
[46] Notes of evidence at 28, lines 17-34.

both they and Waka Kotahi were drafting action and authorisation reports to commence the s 111 process. LINZ commenced the initial s 111 process for the roundabout on 19 May 2021. That drew Thistlehurst into a formal legal process and they objected. It is hardly surprising that after being brought into that process Thistlehurst were in no mood to sign LTOs until that process had been heard and determined.

Decisions 27 January 2022

[171] Two authorisation reports were signed off by Mr McPhail on 27 January 2022.[47] They relate to both the roundabout and expressway and concern s 111 notices for the "other occupiers".

[172] No action reports were prepared by Waka Kotahi in support of either authorisation report.

[173] The other occupiers are barely mentioned in the authorisation reports. At pages 3 of both reports the following passage appears:

> In a memorandum to the District Court on 18 January 2022 TDL (the plaintiffs) it was noted that as a s 111 Notice of Entry was not served on other occupiers on the Land. These "occupiers" include farm workers (3) and third parties who rent out dwellings (2) located on the farm…
>
> Two of these occupants reside in dwellings that are located on land (separate titles) that has not been identified in the previous s 111 Notices. There is no intention to enter the land contained within these titles, therefore it is not considered necessary to give notice to these other occupiers.
>
> This report relates to a notice to be provided to the remaining three Occupiers.[48]

[174] The only other significant reference appears in the authorisation report prepared for the roundabout. The following comment is made:

> Notwithstanding the fact that the original s 111 Notice was not served on the remaining occupiers as the "occupier", the name and contact details of the remaining occupiers have subsequently been provided and therefore we

[47] AB at tabs 8 and 10.
[48] AB at tab 8 and 10 at 3.

> believe that the Sharemilker would have advised the remaining Occupiers of the proposals and actions that the Crown is taking to obtain access to the land.[49]

[175] The information provided to Mr McPhail about the other occupiers was sparse and inadequate. He was again being asked to make a decision based on assumptions being made by WSP, which he did not challenge or clarify.

[176] The other occupants were entitled to expect that an attempt would be made to inform the Ministerial delegate of their interests prior to any decision being made. Mr McPhail accepted under cross-examination that the occupiers have equal rights with those of the owners, to consider under the PWA.[50] On the question of gathering information about the other occupiers, he said that was part of the process Mr Munro undertook. Specifically, the following exchange took place:

> Q. Yes, but you've got no information about that, have you?
>
> A. Apart from what's been supplied, no.[51]

[177] No attempt was made to gain information about the other occupiers' interest in the property and their concerns. Notwithstanding what Mr McPhail said, there appears to be no real appreciation that under s 111 of the PWA, as the Ministerial delegate had to undertake a separate informed and authoritative consideration of their interests and position prior to authorising the s 111 notices. That did not happen.

Conclusion

[178] In conclusion on this point, I find that at the time he signed the authorisation reports Mr McPhail did not undertake such informed and authoritative considerations to warrant commencing the s 111 process.

The jurisdiction of the court pursuant to ss 111(1) and (5)

[179] Given the decisions I have reached above there is no need to consider the submissions made on these matters.

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[49] AB at tab 8 at 8.
[50] Notes of evidence at 53, lines 19-21.
[51] Notes of evidence at 54, lines 1-2.

Mr Rawat

[180] Likewise, with Mr Rawat there is no need for me to decide whether he should have been served with a s 111 notice as an occupier. Having said that, I have reviewed the PWA and note that the word "occupier" has been used 76 times across 27 sections. Of these, the word "occupier" has only been defined twice.

[181] At s 174, the PWA states that the person in charge of any railway or part of a railway, whether vested in the Crown or not, shall be deemed to be the occupier of it for the purposes of the Impounding Act 1955.

[182] At s 196, the PWA defines that an occupier, in relation to any land, means the person in actual possession of the land, or, if there is no such person, means the owner in fee simple of the land.

[183] The interpretation of "occupier" in s 196 of the PWA is limited to Part 19 of the PWA (ss 195A to 223) regarding irrigation schemes owned by the Crown and therefore not directly applicable.

[184] Despite the extensive usage of "occupier" within the PWA, I was unable to find any cases which comment on the interpretation of the word in any section of the PWA. It appears that there have not been cases involving disputes around the definition of an occupier.

[185] I have also reviewed definitions of the word "occupier" in other legislation such as the Resource Management Act 1991 and the Property Law Act 2007 and in various legal dictionaries.[52]

[52] LexisNexis "Dictionary of New Zealand Law" <www.advance.lexis.com>; William Cox Cochran and Robert A. Mace *Cochran's Law Lexicon: Pronouncing Edition; A Dictionary of Legal Words and Phrases* (4th ed, W.H. Anderson Co, Cincinnati, 1956*)* at 221; John Bouvier *Bouvier's Law Dictionary* (Banks-Baldwin law Pub. Co., Cleveland, 1934) at 869; W. J. Byrne *A Dictionary of English Law* (Sweet & Maxwell, London, 1923) at 625; James C Cahill *The Cyclopedic Law Dictionary* (2nd ed, Callaghan, Chicago, 1922) at 718; and Edward Albert Wurtzburg *Wharton's Law Lexicon, Forming an Epitome of the Laws of England under Statute and Case Law, and Containing Explanations of Technical Terms and Phrases Ancient, Modern, and Commercial, with Selected Titles from the Civil, Scots, and Indian Law* (12th ed, Stevens & Sons, London, 1916) at 616.

[186] Having considered that material, I have reached an initial view that Mr Rawat would not need to have been served. My reasons are:

(a) Mr Rawat is employed to work at Rockridge Farms. He resides on part of the farm but not the land affected by any of the s 111 notices;

(b) Mr Rawat's legal relationship is governed by his employment contract with the sharemilkers. There seems to be little doubt that from time to time he would be physically present at areas of the farm on which investigations and surveys may be carried out. However, I do not accept that meets the definition of occupier;

(c) Mr Rawat is clearly not an owner. He does not occupy the land in question pursuant to the lease, sublease, licence or residential tenancy. Thus, he has no possessory rights. Nor do I think that he has the right to control the land or property in question; and

(d) I accept that any persons who live in houses on the lands affected (including those employed by the sharemilkers) are "occupiers" for the purposes of s 111 of the PWA. They would be entitled to enjoy the quiet enjoyment of their houses, but Mr Rawat is in a different position to them.

Result

[187] The powers and functions set out in ss 111(1) and (4) of the PWA were correctly delegated to the Senior Advisor Clearances. There was no lawful delegation of the power to issue notices pursuant to s 111(2) to the Chief Executive of LINZ. That power remains with the Minister for LINZ. There was no lawful subsequent delegations or sub-delegation of the power to issue s 111(2) notices, to the Senior Advisor Clearances. The s 111(2) notices signed by Mr McPhail as Senior Advisor Clearances were unlawful.

[188] Even if the s 111(2) delegation was lawful, the Ministerial delegate did not, in fulfilment of the *Pengelly* test, undertake such informed and authoritative considerations to warrant commencing the s 111 process for either the roundabout or expressway project. The s 111(2) notices signed by Mr McPhail as Senior Advisor Clearances were unlawful.

Costs

[189] The plaintiffs are entitled to costs. They are to file and serve a memorandum within 14 working days of the date of this judgment. The defendant is to file and serve its memorandum within a further 14 working days. Any reply memorandum is to be filed and served within 5 working days thereafter.

_____
Judge SR Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 30/05/2022