IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 168

IN THE MATTER OF	an objection under s 23 of the Public Works Act 1981
BETWEEN	TJS PASCOE & DA PASCOE
	(ENV-2021-AKL-116)
	Objectors
AND	MINISTER FOR LAND INFORMATION
	Respondent

Court:	Environment Court Judge DA Kirkpatrick
Hearing:	In chambers on the papers
Date of Decision:	10 August 2023
Date of Issue:	10 August 2023

DECISION OF THE ENVIRONMENT COURT
ON PROCEDURAL ISSUES

A: The constitution of the Court in this proceeding may include his Honour Environment Judge Dwyer.

B: The applications by the objectors for a stay of this proceeding and for discovery are refused.

C: Timetable directions are made as listed at paragraph [28] of this decision, as sought by the respondent.

D: The Court will convene a conference with urgency in the event that any timetable direction is not complied with.

REASONS

Introduction

[1] There are several outstanding procedural issues to be addressed by this decision:

(a) The constitution of the court, including whether Environment Judge Dwyer can sit on this proceeding;

(b) Whether this proceeding should be stayed;

(c) If this proceeding is not stayed, what steps need to be taken to bring this proceeding to a hearing; and

(d) The discovery application.

Constitution of the Court

[2] As set out in a memorandum dated 4 July 2023, Mr and Mrs Pascoe object to Judge Dwyer presiding in this proceeding and have requested that he recuse himself and that this proceeding be transferred to another judge. This request is on the grounds:

(a) that Judge Dwyer presided over the hearing of six appeals in this Court relating to an upgrade or realignment of the Mt Messenger section of SH3 (**the RMA appeals**) involving Mr and Mrs Pascoe and the Poutama Kaitiaki Charitable Trust iwi during 2019-2021;

(b) the Pascoes do not believe they got a fair hearing;

(c) the Pascoes lodged a formal complaint to the Chief Justice on 16 November 2022 alleging that Judge Dwyer treated their evidence as being unreliable without any rationale, preferred fraudulent and misleading evidence led by NZTA and others, and accepted untrue statements from Buddle Findlay and expert witnesses with no field of expertise;

(d) that Judge Dwyer has a real conflict of interest as he would essentially be making a judgment on his earlier decision and would not bring an impartial mind or would bring bias to the resolution of the questions to be decided,

so that they have no confidence in their ability to get a fair hearing or due process.

[3] The Crown says by a memorandum dated 7 July 2023 in response:

(a) it is not correct that because an Environment Judge has heard and determined a designation and resource consent matter, that Judge is precluded from hearing and determining an objection under the Public Works Act 1981 (**PWA**);

(b) there are advantages if the same Judge hears the objection in relation to the same project, and this is anticipated by s 24(6A) of the PWA; and

(c) the previous decision of the Environment Court was subject to an appeal on questions of law to the High Court, which was dismissed;

[4] Judge Dwyer has advised me that he does not consider that there are grounds on which he must recuse himself. That is his decision to make.

[5] It remains for me to determine whether or not the case should be transferred to another judge. As the Chief Environment Court Judge, under s 251(2) of the Resource Management Act 1991 (**RMA**) I am responsible for ensuring the orderly and expeditious discharge of the business of the Court and accordingly may, subject to the provisions of this or any other Act and to such consultation with the Environment Judges as is appropriate and practicable, make arrangements as to the Environment Judge or Judges and member or members who is or are to exercise the court's jurisdiction in particular matters or classes of matters and in particular places and areas.

[6] For the purposes of the request to me to allocate this proceeding to another judge, I have reviewed the relevant material in this proceeding and the decisions of this Court and the senior courts relating to other proceedings involving these parties.

[7] In the RMA appeals before this Court, the interim decision[1] and the second interim[2] and final[3] decisions were all the subject of appeals to the High Court.[4] Neither appeal raised any issue relating to, and neither decision of the High Court included any adverse comment about, the conduct of the Environment Court or any of its members.

[8] When I raised the question of recusal directly with Judge Dwyer, he told me that at the conclusion of the hearing of the RMA appeals on 24 July 2019, after his concluding remarks there was an exchange between him and Mr Pascoe in which Mr Pascoe thanked all of the Court for being patient with the appellants as they had tried very hard and they appreciated the respect which they had been shown. Judge Dwyer responded that the Court tries to approach things on an impartial basis and do its best and that the Court was very conscious of the impact that the case had had, and thanked Mr Pascoe. That exchange, considered together with the absence of any appeal question raising the issue of bias, pre-determination, or other unfairness, clearly indicates that those issues did not arise during the hearing.

[9] In response to my direction at a conference on 27 July that they provide the Court with information about the alleged complaint about Judge Dwyer to the Chief Justice, Mr and Mrs Pascoe filed a memorandum dated 28 July 2023. The principal document is a letter dated 16 November 2022 from Ngā Hapū o Poutama to the Chief Justice and the Race Relations Commissioner. That letter does not refer to Judge Dwyer. In the other material attached to that memorandum there are references to the RMA appeals that Judge Dwyer sat on, but there is nothing specific about his behaviour. It appears to me that the content of that memorandum and the documents attached to it relate principally to a complaint about a decision of the High Court[5] on an appeal from a decision of this Court[6] in a separate proceeding relating to a different public

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1 *Director General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203.

2 *Director General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27.

3 *Director General of Conservation v Taranaki Regional Council* [2021] NZEnvC 40.

4 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 in relation to the interim decision and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 in relation to the second interim and final decisions.

5 *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2022] NZHC 2713.

6 *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC

work in a different locality. Judge Dwyer was not involved in the hearing in the Environment Court in that proceeding.

[10] The office of the Chief Justice responded to the Pascoes on 2 December 2022 advising that any complaint about the conduct of the High Court Judge in the other proceeding should be addressed to the Judicial Conduct Commissioner. I note that if there were to be a complaint about Judge Dwyer's conduct, it should also be referred to the Judicial Conduct Commissioner. It does not appear that any such complaint has been made.

[11] Having reviewed all of this material, I consider that no particulars have been identified by the Pascoes of any appearance of bias or predetermination on the Judge's part. No example in the transcript has been referred to. No such issue was raised in either of the appeals to the High Court. No complaint about Judge Dwyer's behaviour has been made to the Chief Justice or to the Judicial Conduct Commissioner. There is accordingly no basis on which I should exercise my power to allocate this proceeding to a judge other than Judge Dwyer.

[12] I accept the submission of the Crown that there is an overlap between the processes for dealing with notices of requirements and designations under the RMA, and with the processes and requirements for the acquisition of land for public works under the PWA. Given the lengthy and complex nature of the proceedings in relation to the Pascoes' land, there is an advantage in having a Judge who is involved in the former process also involved in the latter. That advantage, of course, may be completely offset if there is some reason why it would be inappropriate to have the same judicial officer involved in both processes. For the reasons I have given, however, there is no such reason in the present case.

Stay of proceeding

[13] The Pascoes say that the Crown is asking this Court to leapfrog the judicial review proceeding they have brought in the High Court.[7] They further say that the

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7 *TJS Pascoe and DA Pascoe v Minister for Land Information* High Court, New Plymouth,

Crown has been resisting progress in the judicial review proceeding. The Pascoes also note that they have limited resources and have difficulties coping with two proceedings at once. They seek a stay of this proceeding.

[14] The Crown opposes any stay and seeks timetabling directions to get this proceeding ready for hearing.

[15] It is no business of this Court to intervene in any issue that is being dealt with by the High Court. Any procedural issue arising in another Court should be dealt with by that Court.

[16] There is a question about the order in which matters may be dealt with by either this Court or the High Court. There are issues about identifying a logical order for addressing similar or related questions. Part of that logic includes making an assessment of the most efficient, or otherwise best, use of Court resources.

[17] The Pascoes refer to the decision of this Court in *Seaton v Minister of Land Information* [2010] NZEnvC 412 where a stay of a proceeding in this Court was ordered pending the outcome of a related proceeding in the High Court. It is a brief procedural decision. Importantly, in that case the Minister consented to the stay. The decision therefore provides little assistance in this case.

[18] The Crown points out that, contrary to the submission by the Pascoes, the decision of the Supreme Court in *Dromgool v Minister for Land Information* [2022] NZSC 716 does not stand for the proposition that a judicial review must be heard before a substantive objection under the PWA. As I read paragraphs [87] – [93] of that decision, the majority of the Supreme Court was considering the general question of how a decision of the Minister may be objected to or challenged. It noted that this Court cannot exercise a judicial review jurisdiction that it does not have and should concentrate its attention on the decision to which the objection relates, being the proposed taking under s 23, by considering the factors in s 24(7).

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[19] This proceeding is focussed on various powers, rights and interests affecting or affected by ss 23 and 24 of the PWA. Essentially, this Court must do the things set out in s 24(7) of the PWA, being to:

> (a) ascertain the objectives of the Minister or local authority, as the case may require:
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> (b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:
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> (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:
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> (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:
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> (e) prepare a written report on the objection and on the court's findings:
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> (f) submit its report and findings to the Minister or local authority, as the case may require.

[20] These tasks are closely related to the tasks of a territorial authority and, on appeal, this Court when considering a notice of requirement under s 171(1) of the RMA. It is for that reason that the evidence presented before this Court in relation to that consideration may be accepted by this Court when considering an objection to a notice to take under s 24 of the PWA.

[21] The Pascoes' judicial review proceeding in the High Court mostly raises separate and distinct issues to those that are relevant under ss 23 and 24 of the PWA. However, three further causes of action have been added that might be relevant, which I summarise as follows:

(a) a seventh cause of action alleging that the Minister did not lawfully delegate power to issue Notices under s 18 of the PWA;

(b) an eighth cause of action that the alternative sites, routes or other methods of achieving the objectives of the public work were not placed before the Minister and the basis for the choice of the Pascoes land was mis-stated; and

(c) a ninth course of action that the information and advice relied on by the

Minister was deficient so that the Minister's decision to sign the s 23 notice under the PWA was defective.

[22] I understand that the seventh cause of action is set down to be heard in the High Court in New Plymouth on 2 October 2023. The delegation issue in that cause of action is not a matter over which the Environment Court has any jurisdiction. As I understand it, should the Pascoes be successful in that cause of action, then the foundation of the notice issued by the Minister under the PWA will be undermined and the High Court may, in its discretion, declare the notice to be invalid. It would then follow that this proceeding in this Court, based as it is on that notice, would also have no foundation, so that the objection may have to be upheld. On that basis, it may be better for this Court to await the decision of the High Court on this seventh cause of action and the delegation issues.

[23] As far as the eighth and ninth causes of action are concerned, however, the matters raised in them are directly related to the matters to be considered by this Court under s 24(7) of the PWA. To determine which proceeding should go first, the Crown submits that s 296 of the RMA applies to the effect that no application for judicial review may be made as there is a right of appeal to the Environment Court in respect of the matters sought to be reviewed. In light of that, this Court should proceed to hear the matters under ss 23 and 24 of the PWA.

[24] I have been given a copy of a Minute of Gendall J dated 31 July 2023 and issued in the judicial review proceeding. That minute traverses the issues relating to the application of s 296 of the RMA to that proceeding and concludes that no further timetable directions relating to the judicial review proceeding in the High Court are to be made at this point. I have asked for and received confirmation that this direction does not affect the hearing of the seventh cause of action in the High Court on 2 October 2023.

[25] A consequence of this Minute is that if I were to order a stay of this proceeding, then neither the High Court nor this Court would deal with the common issues arising in the eighth and ninth causes of action before the High Court and in the s 23

objection before this Court. That would be wholly inconsistent with the principle of finality in litigation and so is not an acceptable outcome.

[26] In terms of difficulties in conducting two proceedings at once, I note that the Pascoes have *pro bono* representation in relation to the hearing of the seventh cause of action in the judicial review proceeding. I also note that the preparation for the hearing of their objection in this proceeding is likely largely to consist of evidence that either has already been presented to the Court in the RMA appeals or is closely related to that evidence.

[27] On that basis, I refuse the application for a stay of this proceeding. This Court should proceed to address the issues relating to the objection under s 23 of the PWA. It should be able to do this in good time following the outcome of the seventh cause of action in the High Court on whether the notice to which the objection relates was given under appropriately delegated authority. Any decision of this Court may then be subject to a right of appeal to the High Court on questions of law, which may include the matters that arise in the eighth and ninth causes of action in the judicial review proceeding.

Timetabling and Discovery

[28] The Crown has filed a memorandum dated 4 August 2023 setting out what appears to be a comprehensive timetable to bring this proceeding to a hearing, as follows:

a) The proceedings are set down for a ten-day hearing on the first available date after 27 November 2023 (subject to the Registry liaising with counsel regarding availability).

b) The objectors are to file and serve their evidence by Friday 1 September 2023. This timeframe takes account of the fact the objectors have had now over a year to prepare their evidence, which was due in February 2023.

c) The Minister is to file and serve any evidence in reply and confirm to the Court and the objectors whether it seeks to continue with its previous application to adduce evidence from the parallel RMA proceedings under s 24(6A) of the Public Works Act 1981 (and if so, in respect of which witnesses) by Friday 6 October 2023.

d) The Minister is to provide a draft hearing schedule to the objectors by Friday 13 October 2023.

e) The objectors are to provide any comments on the draft hearing schedule to counsel for the Minister by Wednesday 17 October 2023.

f) The Minister is to file and serve the hearing schedule by Friday 20 October 2023.

g) The parties are to liaise with the registry to organise a joint site inspection attended by the parties and the Court in the week of 24 October 2023.

h) The Minister will provide a draft common bundle to the objectors and for their review by 24 October 2023. The objectors will provide any comment to the Minister by Friday 27 October 2023.

i) The Minister will file and serve the Common Bundle by Friday 3 November 2023.

j) The Minister will file and serve opening submissions by 9 November 2023.

k) The objectors will file and serve their opening submissions by 16 November 2023.

[29] I note that this timetable leading to a hearing after 27 November 2023 may mean that the High Court may be able to deliver a decision on the delegation issue, to be heard on 2 October 2023, before this proceeding is heard.

[30] The Crown also seeks directions in the event that this proposed timetable is not adhered to and otherwise reserves its rights in the event that it is not. It refers to previous defaults as the basis for seeking such pre-emptive directions. It also requests that, should any late filing occur, the Court and parties will immediately convene to determine whether any such late filed material is to be accepted

[31] The Pascoes oppose these arrangements in their memorandum dated 7 August 2023. As I understand it, their argument is essentially based on the ground that the Crown has not disclosed all of the relevant information on which the Minister's decision to issue the notice to the Pascoes was based. Their proposed timetable essentially relates to matters to be done in the judicial review proceedings.

[32] This relates to the application by the Pascoes for discovery. While framed as a request for all information, the particulars advanced in various e-mail messages from

the Pascoes refers to information about "Option Z and the cableway". I note that the interim decision in the RMA appeals discusses the online option, also known as Option Z, and the location of a haul road, in its examination of alternative sites, routes and other methods and concludes that there was adequate consideration of alternative sites, routes or methods for undertaking the proposed works.[8]

[33] A central issue for this Court in addressing the Pascoes' objection is whether the Minister had adequate regard to alternative sites, routes or methods at the time of making the decision to issue the notice. The assessment of that by the Court will require more than the discovery of documents: it will require evidence at a hearing from witnesses who can say what happened and who may be cross-examined by other parties or questioned by the Court about their evidence. If the evidence shows that the Minister had inadequate regard to relevant alternatives, then the objection may be upheld. The evidence will include any evidence that the Pascoes may lead, whether by cross examination of the witnesses to be called by the Crown, or by any witnesses they call. It may be that the Pascoes make submissions about the adequacy of the Minister's decision based on inferences that may be drawn from any failure by the Minister call adequate evidence to show how the alternatives were considered.

[34] There is already substantial evidence available from the previous hearing before this Court in the RMA appeals. This may be accepted by the Court under s 24(6A) of the PWA. I refer to the earlier direction of Judge Borthwick made at the conference held on 26 January 2023 declining to make orders sought by the Crown for 15 briefs of evidence and the transcript of the hearing in the RMA appeals to be accepted in this proceeding. It appears that the main reason for this was because the Pascoes wished to reserve their right to cross-examine the relevant witnesses. Judge Borthwick did however indicate that she would be prepared to revisit the matter if it emerges that there are matters that are not in contention.

[35] As I read the minute of that conference, the refusal to make the orders sought may have been based on concerns about the effect of the word "accept" and the question whether or not the evidence given in that earlier proceeding could be

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8 Fn 1 at [93] - [102].

challenged in cross-examination or contradicted by other evidence in this proceeding. It seems to me that these issues can be avoided by directing that the evidence in the RMA appeals be received by the Court in this proceeding, such receipt to be subject to all of the usual evidential processes, including cross-examination.

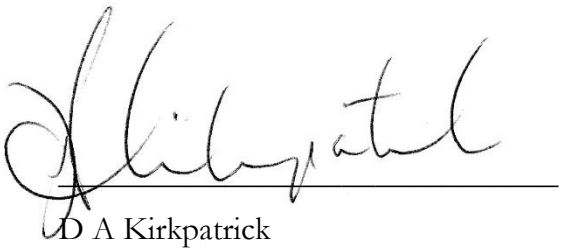
[36] In any event, any witness on whose evidence the Crown will rely to show that the Pascoes' objection should not be upheld will need to be called to give that evidence and be available to be cross-examined.

[37] The Court's power to order discovery is under sub-part 1 of Part 8 of the District Court Rules 2014, which may be applied in the Environment Court under s 278 of the RMA. As a general principle, particular discovery should not be ordered unless it is reasonably necessary at the time the order is sought.[9] In this case, the evidence already available indicates that requiring discovery would do little more than duplicate the evidence. On that basis, I will not make any order for discovery at this stage.

[38] In all the circumstances, and given the clear need to advance this proceeding, I will make the timetable directions sought by the Crown and set out at [28] above.

[39] I also confirm that the Court will convene a conference with urgency in the event that any timetable direction is not complied with. I will not make any pre-emptive orders or directions at this stage.

For the Court:



D A Kirkpatrick
Chief Environment Court Judge

[9] *Sterling Phrmaceuticals (NZ) Ltd v Boots Co (NZ) Ltd* [1991] 2 NZLR 233 (HC).