

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2008-485-2723
[2012] NZHC 2058**

UNDER Part 30 (formerly 7) of the High Court
Rules

IN THE MATTER OF the Electricity Act 1992 and of the
Resource Management Act 1991

BETWEEN KAPITI HIGH VOLTAGE COALITION
INCORPORATED
First Plaintiff

AND MICHAEL PHILIP ALEXANDER,
BRANDON ROBERT HINDRY,
JUERGEN GERHARD JENKNER
Second Plaintiffs

AND KAPITI COAST DISTRICT COUNCIL
First Defendant

AND TRANSPower NEW ZEALAND
LIMITED
Second Defendant

Hearing: 13-15 & 20-22 February 2012

Counsel: G D S Taylor, L S Beecroft and R Taylor for Plaintiffs
P J Reardon for First Defendant
J A Knight, N S Wood and H S J Pedler for Second Defendant

Judgment: 23 November 2012

*In accordance with r 11.5, I direct the Registrar to endorse this judgment
with the delivery time of 11.30am on the 23rd November 2012.*

JUDGMENT OF WILLIAMS J

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Overview of the facts

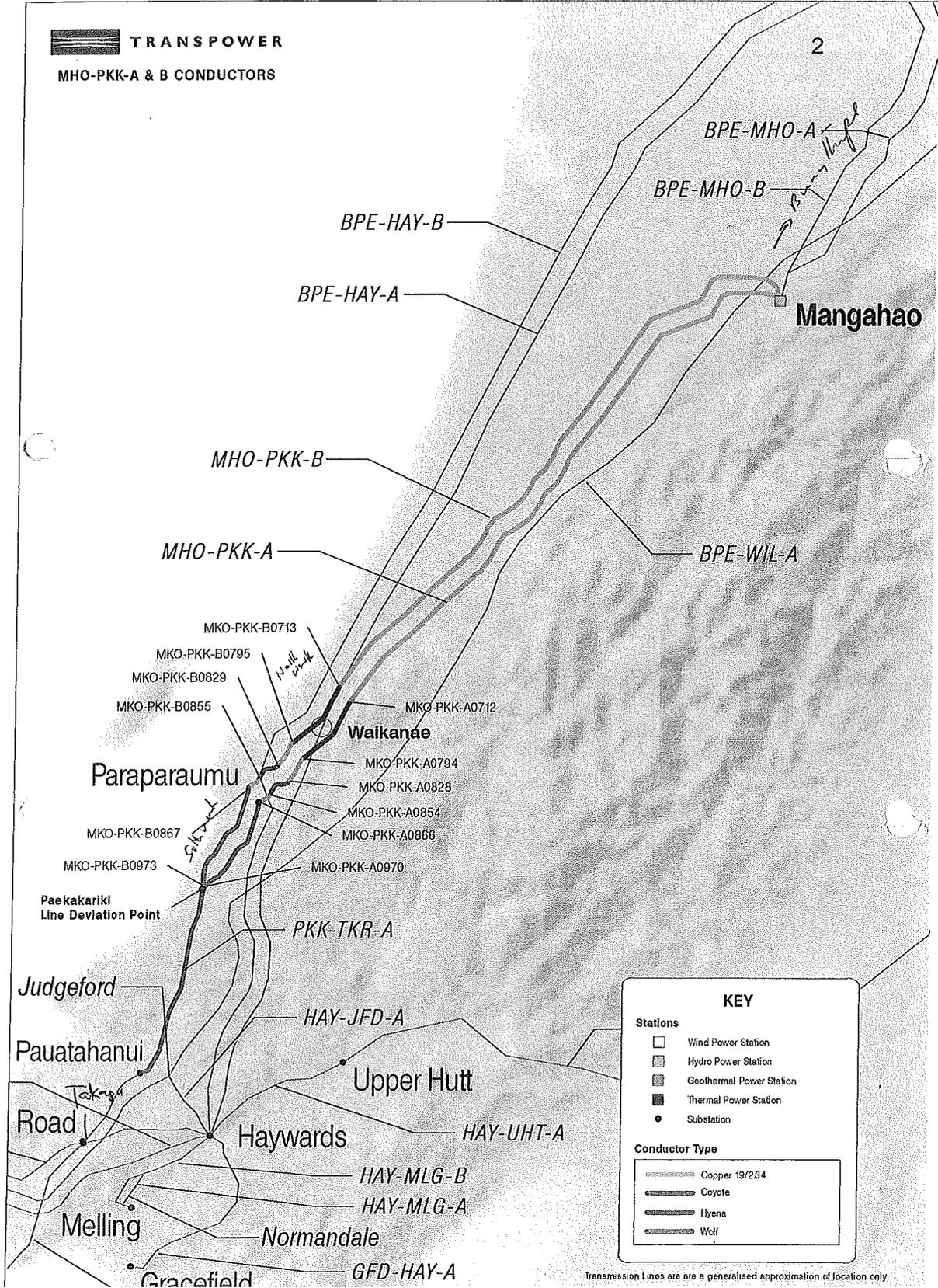
[1] Between 1998 and 2008 Transpower New Zealand Limited (Transpower) carried out extensive maintenance and upgrading work on sections of its Mangahao to Paekakariki transmission lines. These lines run north-south from Mangahao substation near Shannon to the Paekakariki substation on the Kapiti Coast in the south, passing through the Paraparaumu Substation on the way. They are rated at 110kV. There are two sets of lines designated Mangahao–Paekakariki A and B each its own separate circuit. There are three conductors in each set. They run in parallel along what might appropriately be called the Mangahao Paekakariki line corridor. Each pole along each line is numbered: even numbers on the A line and odd numbers on the B line. A line poles are numbered 2 to 972 and B line poles 1 to 973.

[2] The work undertaken by Transpower was as follows:

- (a) ‘reconductoring’ in 2000 of a 5.6km section of both lines between poles 712 and 795 in the vicinity of urban Waikanae by replacing the original copper conductors installed in 1924 with new ‘Hyena’ aluminium steel core reinforced (ASCR) conductors (reconductoring is apparently the term in general use in the industry for restringing transmission lines);
- (b) replacing 13 of the 84 poles along this Waikanae reconducted section;
- (c) reconductoring mostly in 2003 of both lines to the south between the Paraparaumu substation (starting at pole 866) and the Paekakariki substation (ending at pole 973) by replacing the old copper conductors with new ‘Wolf’ ASCR conductors;
- (d) replacing 70 per cent of the poles in this southern section.

‘Hyena’ and ‘Wolf’ are of course brand names and not technical terms. They are produced in the US.

TRANSPower
MHO-PKK-A & B CONDUCTORS



KEY

Stations

- Wind Power Station
- ▣ Hydro Power Station
- ▤ Geothermal Power Station
- ▥ Thermal Power Station
- Substation

Conductor Type

- Copper 19/234
- Coyote
- Hyena
- Wolf

Transmission Lines are a generalised approximation of location only

Conductors

[3] The original copper conductors along the entire length of the Mangahao Paekakariki lines were 11.7 millimetres in diameter. The new Waikanae Hyena conductors are 14.6 millimetres in diameter. The southern Wolf conductors are 18.1 millimetres. Thus both Wolf and Hyena conductors are fatter than the old copper conductors. The new conductors have a dulled aluminium finish and may be contrasted with the old darker green/black finish of oxidised copper wire.

[4] The new conductors – both Hyena and Wolf – can run hotter and carry more electrical energy than the old copper conductors. The old copper conductors could run at a maximum of 50° C. The new ones can run at 75° C. The power flowing through a conductor is a product of current (measured in amperes) multiplied by flow (measured in volts). Power is measured in Mega Volt Amps (MVA). The old copper conductors could carry 69 MVA at 50° C. The Wolf conductors can carry up to 110 MVA at the 75° C maximum. In fact the power that can be carried through these lines varies between winter and summer, but the difference was not treated as a matter of significance by the parties in the context of this case.

Poles

[5] In addition to the reconductoring, new poles were inserted where required along the reconductored sections to replace the old Australian hardwood poles in accordance with Transpower's pole replacement standards at the time. The new poles are made of pre-stressed steel-reinforced concrete rather than wood. The new poles could not be reinserted into the old holes left by the discarded wooden poles because the feet of the old wooden poles were often left in the ground having been sawn off below finished ground level. Apparently, digging them out was too difficult. That, and the fact that Wolf and Hyena conductors allowed for different pole separation distances (spans) to those for copper conductors, combined to mean that new poles were erected at different places when compared to the old. The difference was variable – from slight to a number of metres. It was alleged by the plaintiff that, in the course of this work, new poles were placed outside the pre-existing alignment. For the most part, Transpower denied this.

[6] Pole heights also varied between old and new. Many of the new poles are now higher than the old, although the degree of increase is a matter of controversy because there was no reliable record of the pre-existing heights at the crucial poles in this case. Across the reconductoring some poles are now lower. New pole heights now vary between 11 metres and 19 metres, with the mean being 14 metres. According to Transpower witness, Robert Lake, the design information on Transpower files suggested that the old poles ranged from 11-16 metres above ground level with the average being 13 metres.

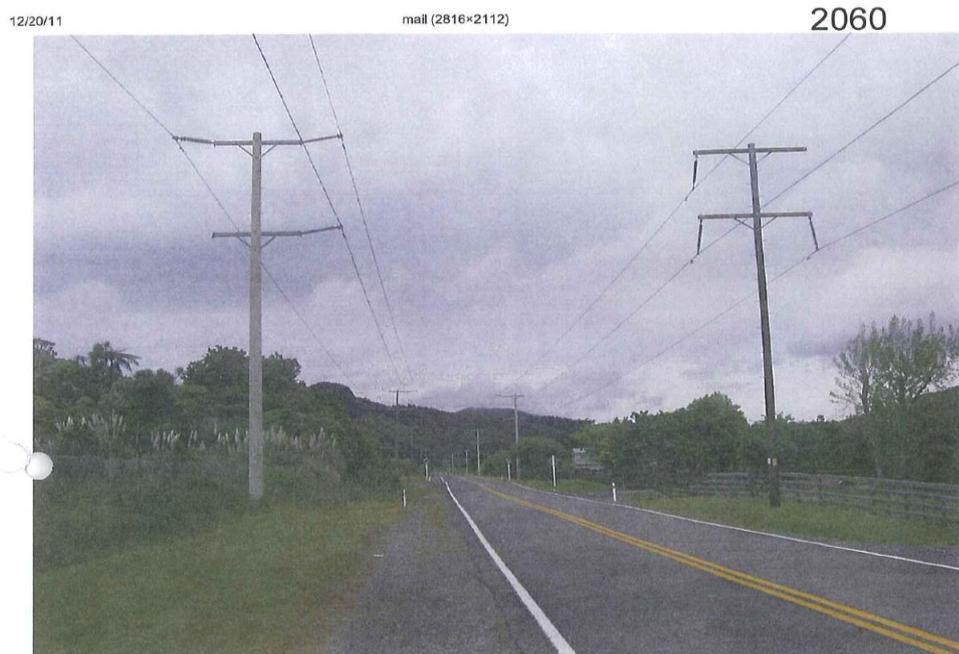
Cross-arms

[7] In some cases cross-arms (the arm at the top of the pole across which the conductors are strung) were placed higher on the pole than before. In the new configuration on the Wolf reconductoring for example, conductor height on the bottom cross-arm was, according to Transpower, about 10.4 metres, and on the top cross-arm about 13.3 metres. These variations lifted the conductors to accommodate increased conductor sag. Ground clearance for conductors is dictated by the industry standard NZECP34:2001.¹ Where the span between poles is long or the sag characteristics of conductors greater, cross-arms must be higher.

[8] Because the new conductors run hotter and carry more load, the new cross-arms had also to be wider. Wider cross-arms enable wider separation distances between the conductors on each pole. The old cross-arms were around 3.9 metres wide (although that varied in fact – the cross-arms were not of uniform width). They had swinging insulators hung vertically on a hinge mechanism at each end of the cross-arm. This allowed the conductors to swing somewhat in the wind. The new cross-arm structures are wider at around 5.2 metres on average – but that too varied case by case. The additional width reflected the fact that the new cross-arms have fixed insulators extending straight out from the end of the arm itself at about 10° above horizontal. This effectively made the fixed insulators an extension of the cross-arm rather than a hanging appendage as under the old configurations.

¹ New Zealand Electrical Code of Practice for Electrical Safe Distances (NZECP 34:2001).

[9] Greater separation distances achieved by the new cross-arm and insulator configurations were needed because greater sag increases the risk that swinging lines may actually touch or earth against something else in strong winds.



*Poles 894 and 893 on Valley Road looking south.
Pole 894 on the left is the new configuration and pole 893 on the right is the old.*

[10] All of the work undertaken in the reconductoring needed to be calibrated against the requirements of the Resource Management Act 1991 (the RMA) to ensure that appropriate consents were obtained or that the work was permitted without the need for consents.

Waikanae Hyena reconductoring permissions

[11] In March 1998, Kapiti Coast District Council (KCDC) granted Transpower a certificate of compliance under s 139 of the RMA for the Waikanae Hyena portion of the project. This certificate confirmed that no resource consent was needed for the proposed work. KCDC's planners were of the view that the work was a permitted activity under its District Plan. The Plan's rules provided that "maintenance, operation, repair and upgrading of existing network facilities" did not need a consent provided that, in the case of upgrading, the character and scale of visual effects from

the upgrade were the same or less than the previous position and also that existing lines were not increased in size.² I will return to these provisions below. KCDC planners also considered that the Hyena reconductoring was within the effects envelope of the pre-existing transmission lines, giving Transpower existing use rights under s 10 RMA in any event.³ It was common ground that KCDC wrongly believed the project involved no height, alignment or dimension changes along this line. KCDC was initially advised by Transpower that the project involved only the switch from copper conductors to the thicker Hyena ASCR conductors. The Council considered that the increase in conductor diameter from 11.7 millimetres to 14.6 millimetres was inconsequential, and invoked the *de minimis* principle in concluding that a certificate of compliance could be granted.

[12] Transpower had not started work on the reconductoring within the two year statutory time limit contained in s 139, meaning the 1998 certificate of compliance expired before being exercised. Transpower requested a two year extension (as it was entitled to do under the section) subject to the proviso that there had been an error in the original project description. Transpower confirmed that new cross-arms would be installed which (as I have described) would be wider than the old ones. KCDC granted the extension nonetheless, again considering the cross-arm variation to be of no moment in planning terms.

[13] On 15 June 2005 a further certificate of compliance was granted re-covering the Waikanae reconductoring. This application reflected (it seems) a realisation within Transpower that the application did not in fact amount to a simple re-stringing of existing poles on new cross-arms. Although it is not entirely clear from the certificate itself, it must have been retrospective in effect, the actual work having been completed in 2000.

² Kapiti Coast Proposed and Operative District Plans, permitted activities in residential and rural zones at D1.1.1 and D2.1.1.

³ The generally accepted position at the time was that s 139 compliance certificates could not be used to obtain a declaration about existing use rights so that this view was very much expressed as an aside. The focus was on the permitted activity status of the reconductoring.

Paraparaumu-Paekakariki Wolf reconductoring

[14] On 9 December 2002, KCDC granted Transpower a comprehensive resource consent to reductor the southern lines from Paraparaumu to Paekakariki with Wolf ASCR. The additional diameter of the Wolf conductors (18.1 millimetres) was made necessary, according to Transpower, because of anticipated growth and demand along this stretch of line.

[15] In March 2003, consent was granted to vary the height of the line in the vicinity of an urupa reserve on Whareroa Station owned by Landcorp. This was necessary to avoid placing new poles inside the urupa area itself where the old poles had stood. Instead new poles were placed outside the reserve at each end. The result was a longer conductor span. This in turn required the conductors to be raised. Whareroa Station adjoins the property of one of the plaintiffs: Michael Alexander. Mr Alexander says that by raising the height of the conductors over Whareroa Station, the conductors were made higher at his boundary too.

[16] In September 2007, a certificate of compliance was granted acknowledging that it was lawful without further consent for Transpower to run the Wolf conductors on the southern line at up to 70° C. In February 2008 a variation was granted to an outline plan designation in order to alter the alignment of the lines to reduce their impact on the Harris residence, a suburban property at 137 Ruapehu Street, Paraparaumu, next door to the Paraparaumu substation at the northern-most extreme of the Wolf reconductoring. Construction crews subsequently altered the old alignment pursuant to the new outline plan. But it seems they made an error. When the work was completed it was found that the new lines were in fact placed 1.6 metres further into the Harris property than before. Transpower subsequently acknowledged that this was an error. About 13 months later, the lines were shifted back to their correct alignment under the variation. I will address the discrete issue of the Harris property below.

[17] By 2009, all work on the Paraparaumu to Paekakariki project was complete and by 2010 the southern line was operating at 60° C, that is 10° C below its permitted maximum of 70° C.

Waikanae de-energised and disconnected

[18] I note as an important piece of background that all lines between Mangahao and Paraparaumu – the northern section including Waikanae – were de-energised in 1991. This means they were no longer used to carry generated electricity, although they still had the capacity to do so, at the flick of a switch as they say. This section included the reconducted Hyena section at Waikanae. Thus Transpower completed the reconductoring knowing the line was not then used to transmit electricity and there were no concrete plans to change that. In fact, for technical reasons, it was not possible to run the Mangahao-Paekakariki lines at the same time as the parallel, and much larger, Bunnythorpe-Haywards 220kV line (the main line into Wellington). Apparently, the two systems would interfere with one another if run simultaneously and cause havoc. Nonetheless, Transpower advised in evidence that the line was available to be re-energised if a fault brought down the main Bunnythorpe-Haywards 220kV line and that this was why the company continued to maintain it.

[19] This remained the position until 2004. In 2004 (after the Waikanae reconductoring was completed) the switches at each end of the section north of Paraparaumu (Mangahao and Paraparaumu) were physically removed. The line was no longer available for emergencies. Transpower's intention at that point was (and remains) to save the northern line in case urban development in and around Levin made necessary a new exit point off this line to service that community. In other words this section of line remained relevant to Transpower for future urban growth contingencies but could not be immediately deployed for electricity generation purposes.

The plaintiffs

[20] The first plaintiff is the Kapiti High Voltage Coalition Incorporated. For the most part I refer to the first plaintiff as KHVC in this judgment. KHVC was formed in 2007 to monitor compliance by electricity transmission companies with relevant legal requirements. According to the evidence of Mr Jenkner, it has 26 members who are, or claim to be, in some way affected by Transpower's reconductoring projects the subject of this litigation. In addition to the second plaintiffs who I

describe below, members of the coalition include Mrs Harris whose property at Paraparaumu I have already mentioned, Mr & Mrs Brooking at 25 Emerald Glen Road, Paraparaumu and Mr & Mrs Ker of 29 Emerald Glen Road.

[21] The second plaintiffs are Michael Alexander, Brandon Hindry and Juergen Jenkner. Mr Alexander is a co-owner of two adjoining properties at 81 and 91 Emerald Glen Road, Raumati South. The properties together comprise about 25 hectares, and they host both the A and B lines. Mr Hindry is a co-owner of a Christian holiday camp on Valley Road, Paraparaumu comprising about four hectares. The A line runs along the road reserve adjacent to the camp. Poles 894 and 896 stand next to the camp chapel and playing field respectively. Mr Jenkner owns 35E Kotare Street, a semi-rural lifestyle property in Waikanae. Together the two titles comprise approximately 2.75 hectares. Both the A and B lines pass through the front portion of 35E. The three named plaintiffs sue in their own names and on behalf of members of KHVC similarly affected.

An overview of the arguments

[22] The plaintiffs attack the project at two levels. First, they say that there was no legal authority for it primarily (in relation to the southern Wolf reconductoring) because of the changes in electricity throughput, line footprint, pole placement and conductor specification between old and new and, in the Waikanae section, because the line was not used to transmit electricity at the relevant time and is now disabled. Second, by reason of this illegality, the plaintiffs say the activities associated with the reconductoring projects and the continued “use” of the lines after completion amounted to unlawful interference in their private property rights. The overall legality of the project is challenged by way of judicial review of KCDC’s RMA decisions and a related application for a declaration that the reconductoring was not protected by existing use rights under s 10 RMA. The various direct impacts of the project on the second plaintiffs and members of the first plaintiff are challenged by way of private law trespass actions.

[23] The case is really about whether, in undertaking the project and “operating” or “using” the new lines in a manner that interferes in the enjoyment by certain of

the plaintiffs of their land, Transpower can claim the protection of the Electricity Act 1992 and, as Mr Taylor argues it, the RMA. On the plaintiffs' case, if it cannot, both the structures on the Mangahao–Paekakariki A and B lines and their “use” are unlawful and Transpower is a trespasser.

Judicial review

[24] Mr Taylor arranged the public law aspect of his case as challenges to nine “reviewable actions”. They are pleaded in the following order:

- (1) KCDC issuing the 1998 certificate of compliance for the Waikanae reconductoring with Hyena ASCR conductors and then granting an extension on the certificate in 2000.
- (2) Transpower giving effect to that certificate in the specific context of entering the property of Mr Juergen Jenkner to carry out reconductoring work.
- (3) KCDC's December 2002 decision granting Transpower consent to reconductor the southern portion of the lines between Paraparaumu and Paekakariki with Wolf ASCR conductors.
- (4) KCDC's June 2005 decision to grant a further certificate of compliance in relation to the Waikanae reconductoring.
- (5) KCDC's August 2007 decision to grant a certificate of compliance for Transpower's proposal to raise a conductor on pole 892 outside the property of Brandon Hindry on the southern section.
- (6) KCDC's March 2005 decision to vary the conditions of the southern reconductoring consent ((3) above) to allow an increase in the height of poles either side of an urupa reserve within Whareroa Station, in order to facilitate the removal of poles from within the urupa.

- (7) KCDC's September 2007 decision to "uprate" the maximum operating temperature on the Wolf conductors to 75° C.
- (8) KCDC's approval in February 2008 to Transpower's proposed variation to the outline plan of works in relation to the Paraparaumu Substation which variation facilitated altering the alignment of conductors above the property of Ms Harris.
- (9) Transpower's action in entering private property to undertake and/or implement the work permitted in the foregoing "reviewable actions" as follows:
 - (i) replacing conductors on the Jenkner land in Waikanae;
 - (ii) carrying out the southern reconductoring generally;
 - (iii) raising the Hindry conductor;
 - (iv) thermal uprating along the southern lines;
 - (v) removal of urupa poles and raising conductors.

[25] The allegation that these actions were unlawful formed the core of Mr Taylor's case.

[26] At the commencement of trial, the parties handed up a joint memorandum incorporating proposed consent orders and setting out (different) views as to how the consent orders would affect the scope of trial. In the joint memorandum, the parties agreed that reviewable actions (3) to (7) were invalid and that orders should be made quashing those decisions. In addition, in opening Mr Taylor formally abandoned part of the eighth reviewable action, namely the outline plan variation in relation to the Harris property, although he continued to challenge the change of alignment and subsequent reversal of that change. During the course of trial, Mr Taylor also abandoned the implementation actions in respect of the Jenkner property (reviewable action (2)), accepting that on the evidence, the acts complained of occurred outside

the statutory limitation period. This left as live issues in the trial only the Waikanae reconductoring, the temporary Harris realignment and all the implementation actions set out in reviewable action (9). This had the effect of reducing the necessary evidence to some extent, but legal argument continued to be advanced on a broad front. Transpower and the District Council parted company at this point. KCDC agrees with KHVC that the 1998 certificate of compliance for the Waikanae reconductoring and the 2000 extension on it were both invalid. Transpower maintains the fight and says these authorities were valid.

Existing use rights

[27] Collaterally, Mr Taylor argues that none of the reconductoring is entitled to the protection of existing use rights under s 10 RMA. In respect of the Waikanae section of the line, this is because, as I have already outlined, the Mangahao to Paraparaumu A and B lines had been “optimised out” of the national grid in 1992 and completely “de-energised” in 2004. On the southern section, this is because:

- (a) the lines are utilised more intensively now as the Wolf conductors carry more current than the old copper conductors and there are greater dangers from electro-magnetic radiation or EMR;
- (b) the change in 70 per cent of poles from wood to steel reinforced concrete has introduced a new risk – Earth Potential Rise or EPR;
- (c) the reconductoring has produced changes in height, alignment and line footprint or volume. By volume I mean the amount of airspace necessary to accommodate the new poles and the swing of the new conductors.⁴

⁴ This point is argued only obliquely under the existing use rights heading, although the argument is logically available to be made here. Instead Mr Taylor understandably argues this point primarily under the trespass heading.

2009 regulations

[28] There is one further twist in the tale of this part of the plaintiffs' case. In 2009, after both projects had been completed, the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations were promulgated. These regulations override the Kapiti Coast District Plan rules relating to electricity transmission in most relevant respects and could render the reconductoring a permitted activity in this case if they applied to the lines.⁵ This raised the question, in my mind at least, as to whether these proceedings were ultimately futile now, whatever their pre-2009 legality.

[29] Mr Taylor says the Regulations do not apply to save the project if it was otherwise illegal because at the time the Regulations were promulgated:

- (a) the northern Paraparaumu-Mangahao line had been disabled. It was not, he argued, an "existing transmission line" to which the Regulations apply, because it was not 'able to be operated' within the meaning of the Regulations; and
- (b) since the southern reconductoring RMA permissions were all admitted by Transpower to be invalid, the southern line cannot, in law, be an "existing transmission line" as required by the Regulations because even Transpower admits it is illegal.

[30] This means, Mr Taylor says, Transpower cannot now claim the protection of this far more permissive contemporary regime.

[31] Mr Taylor says that if the foregoing is correct all decisions should therefore be referred back to KCDC for reconsideration in accordance with the relevant law applicable when the original decisions were made, rather than under the 2009 Regulations.

⁵ Reg 6 makes reconductoring with overhead conductors up to 50 millimetres in diameter a permitted activity. Reg 14 makes alteration, relocation and replacement of poles a permitted activity provided (for present purposes): they are no more than 15 per cent higher; no more than 12 metres from an occupied building, or at least no closer than the old pole if that pole was closer than 12 metres; and no more than 5 metres from the old pole position.

Transpower's response

[32] Mr Knight rejects these submissions. He says Transpower will make fresh applications “to the extent necessary” to cover all works undertaken, but in any event argues that all works are:

- (a) either permitted under the KCDC District Plan or the 2009 Regulations; and
- (b) all implementation steps were independently authorised under the Electricity Act 1992 anyway and do not need to rely on RMA validity for protection under the Electricity Act.

[33] Mr Knight also argued in the alternative that the plaintiffs have taken too long to bring their action in judicial review. The relevant impugned decisions were made in 1998 and 2000 – the oldest of them 10 years before proceedings were commenced and 14 years before hearing. Even if the certificate of compliance and extension were unlawful, it is now far too late for the court, in its discretion, to grant an order in the nature of certiorari.

Trespass

[34] The plaintiffs' private law trespass action is bound up in the terms of s 23 of the Electricity Act 1992. Since 2001, that section has allowed electricity companies to replace or upgrade their equipment provided there is no resulting injurious affection to the land. The plaintiffs' trespass action thus depends on a finding of injurious affection.⁶ The plaintiffs argue that the additional height and space taken up by the new lines around and over the land of the plaintiffs, the differing alignment of the conductors between the new and the old and the change in colour and size of conductors all add up to injurious affection. This enables the plaintiffs, it is argued, to mount a general action in trespass. In the alternative, the plaintiffs argue that there is an implicit requirement in s 23 of the Electricity Act that the new lines may encroach no further into the plaintiffs' land or airspace than did the old lines. Any

⁶ Although, as I have said, Mr Taylor argues that illegality under RMA is enough to make the s 23 protection inapplicable anyway. I pick this point up later.

greater encroachment is, they argue, an automatic trespass with or without injurious affection.

[35] Mr Knight for Transpower argues that it is not possible to bring a general action in trespass on behalf of a coalition of citizens. Rather, trespass is an action the elements of which must be made out in respect of particular land relating to a particular owner. Thus the generic KHVC action cannot be sustained.

[36] Transpower says that it is entitled to rely on s 23 of the Electricity Act 1992 for all works and all entries on to land to carry out those works. Transpower argues that none of the second plaintiffs has proven that the “footprint” or impact of the new works on their properties is so different from that of the old as to produce injurious affection and none, therefore, can avoid s 23.

[37] Transpower did not directly address the circumstances of coalition members for whom specific evidence was called but focussed instead only on the named second plaintiffs.

[38] Apart from joining in the joint memorandum to which I have already referred, KCDC played a limited role in argument. The Council sought only to be heard on the question of appropriate remedies.

Approach

[39] I will address the judicial review action first, then the plaintiffs’ related arguments in respect of existing use rights. Although there is considerable overlap between these two categories of argument, I have found it helpful to separate them for the purposes of analysis. I will then turn to the Electricity Act 1992 and the action in trespass. I will finally consider the question of remedy.

Judicial review

Detailed arguments

[40] KHVC argued that the certificate of compliance in 1998 and the extension in 2002 in relation to the Waikanae reconductoring were invalid from the outset. They were not mere “maintenance or repair” as provided for in rules D.1.1.1(iv) and D.2.1.1(iv) of the Kapiti Coast District Plan then in force. Rather the works involved a major capacity upgrade including a significant increase in line size.

[41] In addition, KHVC argued that the Waikanae section of the line (being north of Paraparaumu) was not in use either in 1998 or 2000 because from 1992 until 2004 the lines carried no electricity. They had been “optimised out” of the grid. They therefore could not satisfy the relevant rules that make a “network utility” a permitted activity. A network utility is defined in the District Plan as “any activity relating to transformation, transmission or distribution of electricity”. Mr Taylor argued that there was no such activity taking place in relation to these works at the relevant time because they had been switched off.

[42] Transpower argued that the certificate of compliance was valid. Mr Knight argued that active transmission of electricity is not necessary to establish that the lines were in use. It was sufficient that the lines were available at the relevant time to reticulate electricity in the event of a fault in the larger Bunnythorpe-Haywards A and B lines running roughly parallel to the Mangahao-Paekakariki lines. That, he said, was their role in the overall network in 1998 and 2000 when the certificates of compliance were issued. In addition, Mr Knight argued that as the effects of the reconductoring were negligible, this upgrade was also consistent with the limitations contained in D.1.1.1(iv) and D.2.1.1(iv) of the District Plan.

[43] In any event, Mr Knight argued that KHVC had delayed too long in seeking judicial review in this case and, in the exercise of the court’s discretion, relief should not be granted even if KHVC were right in its invalidity argument.

My view

[44] Section 139 of the Resource Management Act provides for certificates of compliance. Between 1998 and July 2003 (the relevant period) its terms were as follows:

139. Consent authorities to grant certificates of compliance

- (1) Where a plan describes any activity as a permitted activity, or the activity could be lawfully carried out without a resource consent, in respect of any particular location, the consent authority shall, upon request and payment of the appropriate administrative charge, issue to any person who so requests a certificate that a particular proposal or activity complies with the plan in relation to that location.
- (2) A consent authority may require an applicant for a certificate of compliance to provide further information relating to the request if, in the opinion of the consent authority, the information is necessary to determine whether the particular proposal or activity complies with the plan.
- (3) No certificate of compliance may be issued where a proposed plan has been notified and the proposal or activity is not a permitted activity, or could not lawfully be carried out without a resource consent, in relation to that location in the proposed plan.
- (4) A certificate of compliance shall describe the particular proposal or activity and the location concerned and be issued within 20 working days of the receipt by the consent authority of the request, or of further information requested under subsection (2), whichever is the later.
- (5) A certificate of compliance shall state that the particular proposal or activity was permitted, or could be lawfully carried out without a resource consent, on the date of receipt of the request by the consent authority.
- (6) Subject to sections 10, 10A and 20(2), a certificate of compliance shall be deemed to be an appropriate resource consent issued subject to any conditions specified in the plan, and the provisions of this Act shall apply accordingly, except that, with the exceptions of sections 120, 121, 122, 125, 134, 135, 136 and 137, this Part does not apply.

[45] Section 139 provides greater certainty to land owners in the event that their land use proposals are permitted activities and do not need consents. A certificate of compliance, if granted is deemed to be a resource consent. The certificates of compliance issued for the Waikanae reductoring thus gave complete protection to the project provided it stayed within the terms of the certificate.

Was the Waikanae reconductoring a permitted activity?

[46] Rule D.1.1.1(iv) and D.2.1.1(iv) of the District Plan relating to residential and rural zones respectively were the relevant rules at the relevant time. These rules were, in all material respects, identical. They provided that the following were permitted activities in terms of s 139:

The maintenance, operation, repair and upgrading of existing network utilities, regardless of the date of their establishment, provided that the character and scale of the visual effects after any upgrading would be the same, similar, or less than that existing prior to the upgrading.

[47] There was an exclusion, however. It provided:

This rule does not apply to additional lines or supporting structures or increases in the size of existing lines.

[48] “Network utility” was also defined in the plan. It meant “any activity relating to transformation, transmission or distribution of electricity”.

[49] Between 1998 and 2000, the switches remained in place at the Paraparaumu and Mangahao substations. Transpower advised that the lines in that northern section had been de-energised sometime between 1991 and 1992. In fact, as I have said, this line could not be run at the same time as the Bunnythorpe-Haywards 220kV A and B lines. Mangahao-Paraparaumu A and B lines could only run if Bunnythorpe-Haywards was turned off. Transpower’s evidence was that, during this period, Mangahao-Paraparaumu A and B were available if Bunnythorpe-Haywards suffered a fault. The company said that it continued to maintain the line because of the emergency role that it performed.

[50] I am satisfied that these lines continued to be an activity relating to the transmission or distribution of electricity even though they were not themselves live. They served a bona fide purpose within a very complex national and regional network and therefore related to electricity transmission or distribution. They were “in use” as an alternative in case of an emergency in the same sense that a sprinkler system is “in use” in a building even if it has not gone off. This means that they were still a “network utility” as defined in the District Plan.

[51] That said, I am also satisfied that the reconductoring did not meet the permitted activity description contained in D.1.1.1(iv) and D.2.1.1(iv) of the District Plan at the relevant time. That is because the lines in Waikanae had increased in size. The original copper conductors were 11.7 millimetres in diameter. The new Hyena conductors were 14.6 millimetres in diameter – an increase of nearly 25 per cent. It is clear that the size increase referred to in the exclusion to the rule relates to the diameter of these new lines rather than their length or number. Additional lines are already covered in another clause in the exclusion and reference to length would make no sense.

[52] Transpower argued that the copper conductors were old and had worn out and the Hyena replacements were for maintenance or repair rather than upgrade. Transpower argued that Hyena was a modern equivalent of the old copper conductors. This argument is also relevant to the applicability of s 23 of the Electricity Act 1992 (I address this below). I do not accept that argument is relevant here. The exclusion in the rule applies to *any* increase in line size whether as a result of maintenance, repair or upgrade. There does not need to be an upgrade before the exclusion applies.

[53] The Council took the view that the increase in size was “de minimis” and therefore should be disregarded for the purpose of applying the relevant rules. I do not think that is correct. That is to conflate the visual effect limitation in the body of the rule and the exclusion from the rule’s benefit in three specific examples of increase in scale: additional lines, support structures and increase in line size. In the context of that clause, a 25 per cent increase in line size cannot be described as “de minimis”. I conclude therefore that the Waikanae reconductoring was not a permitted activity and should not have been granted a certificate of compliance.

Existing use rights today

[54] If the reconductoring at Waikanae is not a permitted activity, does it nonetheless have existing use rights in terms of s 10 RMA? If it does have such rights, an invalid certificate of compliance would not be fatal to the validity of the reconductoring. I turn to consider that question now. I begin with the Waikanae

reconductoring and then move to the same question in relation to the southern reconductoring.

[55] Before dealing with the substantive arguments, it is necessary to address a preliminary objection raised by Transpower. Transpower's argument was essentially that an enquiry into existing use rights across the whole of the Mangahao-Paekakariki A and B lines required the court to embark on a purely hypothetical exercise because Transpower makes no claim to the shelter of existing use rights on these lines. It was, Transpower argued, inappropriate for the court to engage in such an exercise.

[56] I do not agree with that analysis. It is far from hypothetical to ask whether Transpower had other pathways to legality in relation to its reconductoring project than the certificates of compliance and consents granted by KCDC. This requires a practical assessment of the evidence in relation to actual work undertaken against the requirements of s 10 RMA. In my view a failure to ask this question is to ignore a very relevant element in the case and to risk failing to resolve the actual controversy between the parties once and for all. The ultimate question here is whether the reconductoring was lawful. That question cannot be finally answered without grappling with existing use rights.

Waikanae reconductoring

[57] Randerson J in *Spring Promotions v Springs Stadium Residents Association Inc* [2006] 1 NZLR 846 (HC) explained the purpose of s 10 in these terms:⁷

[39] The essence of s 10 is to permit existing uses of land to continue in certain circumstances notwithstanding that the use would otherwise contravene a rule in a district plan or a proposed district plan. The section reflects a statutory policy which recognises that, in certain circumstances, it would be unfair or wrong to require an existing use of land to cease or to be subject to more restrictive control by a subsequent change or proposed change to a district plan. Substantial sums of money might have been invested in an existing activity or people may have otherwise ordered their affairs on the basis that there were no relevant controls or on the basis of the controls then existing. In some cases, as SPL submits here, an activity might not be able to continue at all or only in a restricted form on consequent of a

⁷ At [39].

change to a district plan which would render an existing activity non-complying.

[40] There are two essential conditions under s 10 which must both exist before existing use rights may be established. These are:

- (i) The relevant land use must have been lawfully established before the relevant rule became operative or the proposed plan was notified; and
- (ii) The effects of the use must be the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified.

[58] As I have said, the fact that the Waikanae section was not actually transmitting electricity between 1998 and 2000 does not mean it was no longer being used at that time. Nonetheless, while it is possible that existing use rights protected the Waikanae reconductoring between 1998 and 2000, the facts changed in 2004 requiring a fresh analysis. In that year Transpower removed the switching gear for those lines from both the Mangahao and Paraparaumu substations. That meant that the lines north of Paraparaumu were no longer available as emergency back-up for Bunnythorpe-Haywards A and B lines. They were completely isolated from the transmission grid.

[59] Mr Taylor argued that this was a material change. He argued that if one separated the physical works themselves – the furniture as it were – from the use – transmitting electricity – then on any reading of it, the use had stopped for more than a year in terms of s 10(2) and any existing use rights were lost thereby.

[60] Transpower, understandably, preferred to rely on its permitted activity status, perhaps accepting that the division between use and furniture was appropriate.

[61] As I have said, the Mangahao-Paraparaumu lines are now completely isolated from the rest of the regional and national grid. They cannot be revived without new switches being acquired offshore and installed. Re-enlivening, if it ever happens, could well take weeks. The lines have been in this state of isolation now for eight years.

[62] That said, they remain in Transpower's strategic plans and have clearly not been completely abandoned. Transpower's new aim is to protect these lines for possible future use as a result of urban growth around Levin. Once development in Levin reaches tipping point (I was not advised by Transpower what or when that point might be), the line will be re-enlivened.

[63] With these facts in mind, I return now to the relevant provisions in relation to existing use rights. Section 9(3)(b) provides:

No person may use land in a manner that contravenes a District rule unless the use is allowed by s 10.

[64] Use is now defined in s 2 of the Act. The definition is lengthy, inclusive and, largely unhelpful, but it does provide that in s 10, use means "alter erect place, reconstruct or use a structure on or over land" and includes "any other use of land".

[65] The relevant parts of s 10 in its current format are as follows:

10 Certain existing uses in relation to land protected

- (1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—
 - (a) either—
 - (i) the use was lawfully established before the rule became operative or the proposed plan was notified; and
 - (ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:
 - (b) or—
 - (i) the use was lawfully established by way of a designation; and
 - (ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.
- (2) Subject to sections 357 to 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—
 - (a) an application has been made to the territorial authority within 2 years of the activity first being discontinued; and
 - (b) the territorial authority has granted an extension upon being satisfied that—
 - (i) the effect of the extension will not be contrary to the objectives and policies of the district plan; and
 - (ii) the applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in

the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.

- (3) This section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan or proposed district plan.

[66] The essential question here is whether maintaining disabled infrastructure on this scale while awaiting the occurrence of a contingent event amounts to “using” that infrastructure within the meaning of “use” as contained in s 2 RMA.

[67] This is of course a major infrastructural asset. Its size, complexity and capital value are such that the courts will be prepared to tolerate relatively limited use rather than hold that its regulatory underpinning has been removed.

[68] The cases demonstrate that some use cycles can be relatively long term and that passive user will sometimes meet the requirements of s 10. For example, in *Springs Promotions Ltd*, seasonal speedway racing in which no racing occurs for the majority of the year satisfied the requirements of s 10. Randerson J said:⁸

I add that reliance on existing use rights does not require that the activity in question take place continuously. An activity which occurs annually, such as the speedway racing at issue here, may be the subject of existing use rights even though it does not occur throughout the year. The only limitations imposed by s 10 are that the activity should remain at the same or similar character, intensity and scale as existed prior to the relevant date and that the activity not be discontinued in terms of subsection (2).

[69] In the *Omya* decision⁹ the Environment Court had to decide whether bentonite mining that had occurred progressively in one title provided a sound platform to establish existing use rights to mine across untouched adjoining lands in which Omya also owned mining rights. The court pointed out that:¹⁰

34 years have elapsed since extraction began and only now are operations moving towards the highest point of the Wright royalty.

[70] The court had no difficulty in treating the overall land spanning several titles as a single entity for the purpose of assessing existing use rights. This meant that titles that had been unused still carried existing use rights on a global view.

⁸ At [47].

⁹ *Re Omya NZ Limited* [2004] NZRMA 104 (EnvC).

¹⁰ At [24].

[71] These cases get Transpower part of the way, but in my view not far enough. Here, the Mangahao-Paraparaumu lines are being held (and presumably maintained) against the long term contingency of urban build up in Levin. There is no timeframe given nor even any indication of a potential trigger point for a final decision one way or the other. In my view, this is not a limited or passive use but rather a hope of use at some time in the future. Unlike the mining activity in *Omya* which was always going to reach every corner of the land over which *Omya* held rights, re-enlivening the northern line is not at all inevitable. Planning against a future possibility of use in these very vague terms is not itself a use, even bearing in mind the scale and complexity of these lines. There is a material difference between this and the emergency use to which Transpower put these lines prior to 2004. To use these lines must require the user to apply them to some purpose or to employ them to achieve an objective. Transpower is not doing that; it is waiting to decide whether to do that.

[72] Whether this conclusion entitles the plaintiffs to a declaration to the effect that the Waikanae reconductoring lacked existing use rights is a matter I will address at the end of this judgment.

The southern lines

[73] The southern lines between Paraparaumu and Paekakariki remain in place and live. Remember that Transpower and KCDC agree with KHVC that the reconductoring consents for this section were invalid, so that is the starting point. Do these lines nonetheless have existing use rights? It is accepted that the alignment of the original poles has changed in places. Transpower accepts that 27 poles have been moved in alignment during the reconductoring.

[74] Mr Taylor argued that one point where the alignment did change significantly was on and about the Alexander property – at poles 936 and 937, and possibly in respect of the poles close to the urupa on Landcorp land adjoining the Alexander property. A change in alignment will, he argued, terminate any existing use rights.

[75] Mr Taylor argued further that the electrical current passing through the new Wolf conductors has increased by 72 per cent in the winter and 94 per cent in the

summer on that of the old copper conductors. He argued that this amounted to increased intensity in terms of s 10. He also argued that new dangers were introduced as a result of the increased electro-magnetic field generated by the new conductors. A related though distinct point arises out of the change to steel reinforced concrete poles. This created, Mr Taylor argued, the risk of “earth potential rise” or EPR presenting a new danger of injury or fatality to both humans and stock that did not exist before.

[76] Transpower argued that the existing use rights issue was a diversion. Mr Knight argued that one way or another the reconductoring was a permitted activity and so existing use rights did not arise or need to arise.

[77] For completeness, I note that the Wolf conductors represented an even greater increase in line size than the Hyena – over 50 per cent in fact – meaning the southern reconductoring cannot be considered a permitted activity in terms of the current form of rules D.1.1.1(iv) and D.2.1.1(iv).

Are there existing use rights on the southern line?

[78] It is important to remember that it is not the use that must be the same or similar in character, intensity and scale under s 10. It is the *effects* of the use that must be the same or similar in character, intensity and scale to that which obtained under the last iteration of the District Plan.¹¹

[79] It follows that a changed alignment is not of itself relevant. Rather it is for the plaintiffs (as applicants for the required declaration) to show that the changed alignment has introduced new, more intensive or greater effects so as to take the use outside the s 10 parameters.

[80] Mr Taylor did not argue that increased dimensions in poles, cross-arms or conductors or changed alignments might destroy existing use rights. At least not in those direct terms. He was content to advance these elements in aid of his claim to

¹¹ As to whether the correct reference point for measuring existing use rights is the first point at which the District Plan rendered the use non-compliant or the last iteration of the Plan doing so, see *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZCA 13, [2007] NZRMA 320.

injurious affection under s 23 of the Electricity Act 1992. In the light of that, and although this issue and the evidence relating to it is potentially relevant here too, I simply note here that the arguments were mentioned superficially under this heading. I am content to address the evidence more squarely under the trespass heading later in this judgment.

Earth potential rise

[81] There was one particular area in which the plaintiffs argued that the reconductoring had introduced a new and negative effect on the southern line. It related to the change in poles from Australian hardwood to steel reinforced concrete. The plaintiffs argued that this change introduced the risk of injury or fatality through a phenomenon known as “earth potential rise” or EPR. They said this new phenomenon disqualified the southern line from the benefit of existing use rights. The plaintiffs called in aid an electrical engineer named Ralph McCorkindale. Transpower called Anthony Mitton (also an electrical engineer) in rebuttal. It will be necessary to address this matter in some detail.

[82] EPR is the enlivening of the ground around a pole as a result of a fault in transmission lines causing the current in the lines to earth. It can occur due to a conductor physically touching or flashing over to an earthed pole. Typically this occurs due to insulation failure on a pole, lightning strike, pollution or fauna interfering with electrical gear. The simple diagram below, provided in the evidence of Mr Mitton, demonstrates this phenomenon:

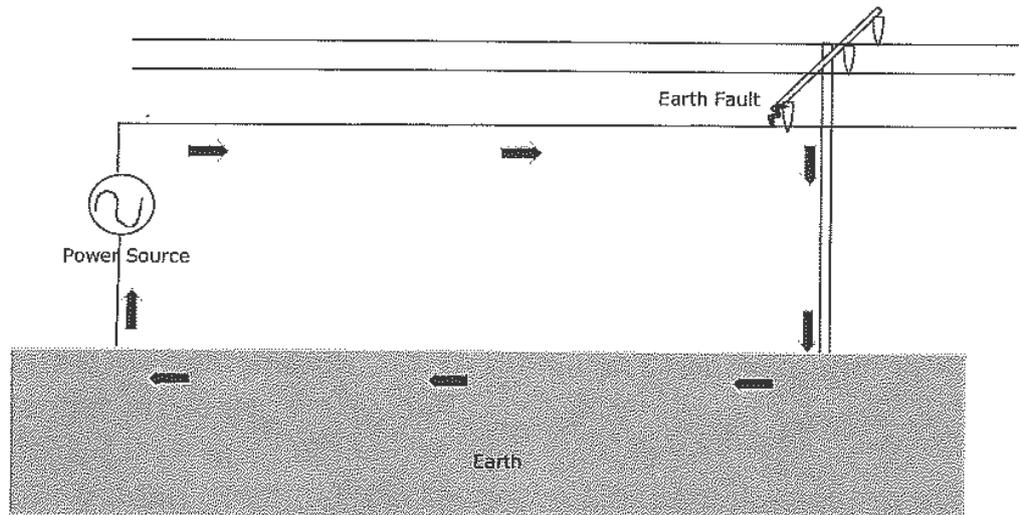


Fig 1: Fault Current Path

[83] EPR could not occur on wooden poles because they are not earthed. Concrete poles have steel reinforcing through their centre all the way to the foot of the pole. They also have steel cross-arms. Thus a current entering the pole at the top can earth through the steel reinforcing.

[84] EPR is strongest at the pole and immediately around its base. Current decreases geometrically with distance from a live pole. Current strength can be mapped around the pole in what is known as an EPR contour. Engineers can predict which contour line at what distance from the pole is the outer edge of the EPR danger zone.

[85] Some EPR risks, for example as a result of lightning strike, can be reduced by stringing a third earth wire above the two conductors on the circuit. These do not however, as I understand it, reduce the EPR risk from faults from other causes.

[86] There have been 94 faults capable of creating EPR on the Mangahao to Takapu Road line in the last 25 years. That is, nearly four faults are reported on average a year.

[87] The risks associated with EPR are divided into two categories: *touch* potential and *step* potential. Touch potential arises where a human (or, on farmland, stock) touches a live pole or structure close to a pole (such as a fence that has become enlivened due to a fault in the line) while also touching earth or an earthed object. Step potential is different. It relates to humans (or livestock) touching the ground at two or more points around an enlivened pole (or touching a structure at two or more points) so as to create a circuit through the body – for example, left leg and right leg. Danger occurs where the current running through the earth is at different potentials at the two points of contact. This causes the earthing current to bridge through the body between the two points of different electrical potential. For example, feet that are a metre apart at 90° from a pole can produce this effect.

[88] Mr McCorkindale for KHVC said that EPR has been introduced to the southern line as a result of the reconductoring and is very dangerous. He relied on the 1993 New Zealand Electrical Code of Practice for Power Systems Earthing – NZECP 35:1993. His evidence was that the *touch* potential danger at a faulty pole was sufficient to produce a fatality. He said this breached the relevant standard.

[89] Mr McCorkindale also argued that the *step* potential risk introduced by the reconductoring was unacceptable. He used the Christian holiday camp operated by one of the named plaintiffs, Mr Hindry, on Valley Road as an example. Pole 894 is situated on the road reserve just outside the boundary fence of the camp and adjacent to a large playing field. Mr McCorkindale argued that a child who was barefoot or in light damp shoes risked receiving a lethal shock as a result of step potential EPR as far away as 12 metres from a faulty pole producing EPR, if the conductors were running at 2.4kA. At 4.1kA, a lethal shock could be delivered at 15-16 metres he said. These figures took the EPR contour for danger well inside the Holiday Camp playground adjacent to pole 896. Mr McCorkindale acknowledged that the auto-shut off system on the southern lines meant that any fault capable of producing EPR would be shut down within 550 milli-seconds, but that period, he said, was enough – particularly he said because the Wolf conductors would probably be running at the higher 4.1kA rating. Mr McCorkindale said that 3,600 children per year visited the camp with 40-60 children on the playing field at regular intervals.

[90] Mr McCorkindale suggested that sites creating similar risks were roadsides where cyclists congregated and cemeteries where mourners and families gathered. These he called “special locations”.

[91] Related issues arose, Mr McCorkindale said, in respect of the property owned by Michael Alexander, another plaintiff. This is a small farm/forestry property of around 25 hectares on Emerald Glen Road. According to Mr McCorkindale EPR could produce a fatality within 13 to 14 metres of the poles on the Alexander property with the system running at 2.4kA, or within 16 to 17 metres at 4.1kA. Mr McCorkindale also raised issues in relation to Telecom cables buried within five to six metres of one of the poles on that property. He estimated that the cable was located at the 5,300v EPR contour. He said that insulation in the Telecom cables was unlikely to exceed a rating of 1600v. This meant that EPR could cause the insulation to fail producing a fault that would direct a current along the Telecom cable all the way to the Alexander house. Such a fault would short out appliances and cause a fire. It would also injure humans if they were using them. Mr McCorkindale also referred to gas lines sheathed in PVC piping in reasonably close proximity to poles 869, 870, 871 and 872 located elsewhere. These, he said, carried the same risk.

[92] Mr McCorkindale was supported in these views by a report prepared for Transpower in July 2002 by Meritec Limited. Meritec was engaged by Transpower to prepare an assessment of potential problems and risks associated with the reconductoring. Serious problems were pointed out in relation to EPR. The report provided:¹²

In summary there are EPR issues for the lines, particularly the lines along Valley Road. Various options for earthing structures are being considered but will not be available until after a separate Risk Assessment Investigation has been completed.

[93] Appendix J to the report contained a separate earthing systems investigation. This was completed in June 2002. The appendix applied NZECP 35.¹³ In respect of step potential, the report provided:¹⁴

¹² Meritec Limited PKK-TKRA and MHO-PKK A and B lines – Reconductoring Report July 2002 at 17.

¹³ New Zealand Electrical Code of Practice for Power Systems Earthing (NZECP 35:1993).

¹⁴ At 8.

Analysis of the existing earthing systems shows that step potentials DO exceed the allowable values for body weights of 50kg. (*emphasis in original*)

[94] Conclusions included:

- Analysis of each of the steel lattice tower and steel reinforced concrete pole earthing systems has demonstrated that they are NOT technically compliant with the New Zealand Electricity Regulations, 1997, in respect to both step and touch voltage hazards.
- Currently all the poles in the PKK-PRM section of line are wooden. Should these be replaced with steel reinforced concrete poles then this investigation demonstrated that they will NOT be technically compliant with the New Zealand Electricity Regulations 1997.
- ...
- Installation of steel reinforced concrete poles along Valley Road and within the boundary of Paraparaumu City may not be acceptable even using risk assessment principles due to the nearby location of a school and the associated foot traffic. (*emphasis in original*)

[95] Meritec recommended the use of non-ferrous reinforcement (for example glass fibre) in the poles, as well as the installation of continuous overhead earthing wires along the entire line but reserved its position in respect of an overall mitigation strategy pending further investigation. Meritec clearly felt Transpower faced a significant problem here.¹⁵

[96] For Transpower, Mr Mitton's evidence was that both Mr McCorkindale and Meritec had applied the wrong standard. He said that NZECP 35 only applied to lines carrying no more than 66kV, not the 110kV lines in issue in this case. This point seems to be correct.¹⁶

[97] Mr Mitton's evidence was that the correct industry standard is contained in the new IEC60479-1:2005 *Effects of Current on Human Beings and Livestock*. This standard seems to be reflected in the applicable Australasian standard – AS/NZS7000:2010 *Overhead Line Design – Detailed Procedures*. The standard contains lengthy chapters on design for avoiding EPR risks. Mr Mitton indicated that the new standard introduced two new concepts into EPR risk analysis that

¹⁵ At 8-9.

¹⁶ See NZCEP 35 1.1.2(a): "This code does not apply to lines and associated fittings operating at or above a voltage of 66kV."

changed the way companies like Transpower thought about this subject. The first relates to risk quantification. Low risk in the new standards is assessed as one in a million. Intermediate is one in ten thousand to one million. High risk is a greater risk than one in ten thousand. Where risks are intermediate (and in some cases low) mitigation techniques are to be applied in accordance with the ALARP principle – that is, design should be aimed at achieving a risk that is “as low as reasonably practicable”. High risk is, without exception, to be avoided.

[98] The second new concept in the 2005 standard is “heart current factor”. This standard measures the current likely to flow through that part of the heart capable of causing ventricular fibrillation for the various touch and step voltage configurations. The standard measures heart current factor, for example, in foot to foot or backside to foot step voltage or hand to foot in touch voltage. Heart current factor, according to Mr Mitton, provides a more sophisticated meter for the amount of current likely to go through the heart in an EPR event. He provided a table as follows:

Heart-current factor F for different current paths

Current path	Heart-current factor F
Left hand to left foot, right foot or both feet	1.0
Both hands to both feet	1.0
Left hand to right hand	0.4
Right hand to left foot, right foot or to both feet	0.8
Back to right hand	0.3
Back to left hand	0.7
Chest to right hand	1.3
Chest to left hand	1.5
Seat to left hand, right hand or to both hands	0.7
Left foot to right foot	0.04

[99] As can be seen hand to foot (i.e. touch potential) causes 100 per cent of the available current to pass through the heart. But step potential from left foot to right foot will, according to this analysis, cause only 4 per cent of the current to pass through the heart. This is a massive reduction in risk. In AS/NZS7000:2010 this

factor has been increased by means of a variation. The variation is in the following terms:¹⁷

This level of voltage [i.e. 0.04] would potentially cause other serious harmful consequences from internal injuries, burns, respiratory effects and tissue damage. Therefore a heart current factor of 0.1 is considered more appropriate when calculating prospective step voltage limits.

[100] This variation still means that in standard step voltage EPR, only 10 per cent of the current will be channelled through the heart. The effect of this, Mr Mitton said in evidence, was to virtually eliminate step potential hazards except within 1.5 metres of a pole. On this basis, Mr Mitton assessed the risk of injury for both step and touch potential at Hindry's and Alexander's properties pursuant to the new standard as low – that is a lower risk than one in one million. He said the likelihood of a fault at the Hindry or Alexander poles was 0.0047 or one fault in every 212 years. Too low, he said, to justify any significant mitigation measures. There was, he considered, insufficient human activity at or close to these poles to produce an intermediate or high risk result.

[101] Mr Mitton explained the difference between his view and that of Meritec by suggesting that the new 2005 standard was under development in the early 2000s when the Meritec design report was being prepared. The Meritec report had, he said, been superseded by the new standard. He also considered that Meritec adopted assumptions about public exposure to risk (essentially time spent in the hazard zone) that were too conservative.

[102] Mr Mitton also challenged Mr McCorkindale's conclusions in respect of the risks at the Alexander property of EPR burning out buried Telecom cables and short circuiting domestic appliances. He said that although EPR voltage may exceed the formal rating for insulators on buried cables, that rating was for sustained exposure. Insulators could easily survive short pulses of much higher voltages such as those generated by earth faults.

[103] That said, Mr Mitton accepted that there was some risk of induced current being created on the wire fence running along the boundary of the Hindry christian

¹⁷ AS/NZS7000:2010 at 94.

camp and parallel with the conductors and he suggested Transpower adopt appropriate mitigation measures in that respect.

[104] I generally prefer the evidence of Mr Mitton on the EPR questions. This for two reasons. First, Mr McCorkindale very fairly accepted that Mr Mitton was an earthing design and testing expert whereas he (Mr McCorkindale) was a “practical operating level or design level person” with no specialist expertise in earthing.

[105] The second reason relates to the 2005 standard that Mr Mitton explained in his evidence and suggested should apply. Of course an industry standard is not a legal standard and must not be applied as such. But it is an indication of the latest industry practice and where the industry considers the precautionary line should be drawn in terms of public safety. Standards such as these will always be significant ingredients when relevant legal standards are being set, even if they are not necessarily decisive. The fact that the new structures generally comply with this standard is, in my view, significant.

EPR and existing use rights

[106] In this case, the question under s 10 RMA is whether the presence of EPR in the reconductored southern line introduces an effect that is new in character into the equation sufficient to breach the s 10 ceiling. Based on Mr Mitton’s evidence, it is my view that it does not. Although EPR is a new effect, its practical impact is, in my view, too minor. That is, I accept Mr Mitton’s evidence that the risk of EPR to humans, livestock or property, whether by touch or step voltage is generally speaking lower than one in a million for the reasons given by Mr Mitton in his evidence. It is a risk with significant consequences but very low probability.

[107] Mr Alexander gave evidence of finding four to six dead sheep at the base of pole 937 during the period after the 2003 reconductoring. He argued that these deaths were the result of EPR. I do not believe that evidence. I take that view because over all the years Mr Alexander has been locked in conflict with Transpower and KCDC over the reconductoring, involving extensive meetings and correspondence, the first time this issue was raised was when he gave evidence in

court. I have no doubt that if, at the time of the alleged livestock fatalities, Mr Alexander had really thought that pole 935 was the cause, there would have been photographs and a lengthy trail of correspondence with the Council and Transpower about the matter. There was not.

[108] Secondly, Mr Alexander said that he was so worried about EPR around the pole that he built a barrier around it, but I saw no evidence of this in photographs of pole 935, even though there was livestock in the shot.

[109] In contrast, Mr Youngman gave evidence about Transpower's practical experience with EPR issues over 20 years. He said:

I believe that the manageability of step and touch issues associated with concrete poles is well demonstrated by Transpower's statistics on earth faults affecting the 110kV network. Transpower has 12,000 route kilometres of transmission lines which equates to about 60,000 kilometres of phase wire and 10,000 kilometres of earthwire. In the last 20 years there have been approximately 2,400 earth faults recorded. None of those faults resulted in human injury.

The only suggestion of an injury to a living thing Transpower has on record for the 110kV network is a dead cow that was found at the base of a concrete pole after a fault. The cause of death of the cow was not confirmed as being associated with the transmission line, but was recorded as such because of this possibility.

[110] I assess EPR's effect as too small to take the overall effects of the southern re-conducted section outside the "same or similar" standard in s 10.

[111] There are two exceptions to that conclusion. The first was suggested by Mr Mitton himself. That is that the risk of induced voltage or earthing through the fence at the Hindry boundary should be mitigated through insulating techniques that prevent the fence behaving as a circuit. The evidence was that Transpower accepted this.

[112] The second is more significant. It relates to step voltage at pole 894 adjacent to the Hindry playing field. Mr McCorkindale's evidence was that children sitting on the grass in the playing field within five metres of pole 894 could still, even on Mr Mitton's analysis, be exposed to real danger from EPR in a fault event at the pole. This is because the heart current factor for both hands to both feet (or

presumably to backside) is 1.0 not 0.1. In cross-examination Mr Mitton accepted that step potential risks in that scenario could extend as far as five to 10 metres from the pole depending on the amperage at which the conductors are operating. If that is the case, it would bring EPR risk to well inside the playground.

[113] There are regular occasions when 40-60 children are on the playing field at any one time according to the evidence. In those circumstances, it is my view that the field is a special location at which Mr Mitton's usual calculations are not valid. This is because there could be regular occasions when children staying at the camp could be seated on the ground within 10 metres of pole 894 and certainly many more children than postulated by Mr Mitton in his risk calculation of 0.0047. I would conclude that at that site, EPR effects are new and potentially material so unless steps are taken to mitigate them, the effects must be seen to exceed the s 10 existing use rights limit at that site.

[114] Mr McCorkindale made reference in evidence to similarly placed sites along the southern reconductoring route, but I am not prepared to make findings in respect of those sites because the evidence was not sufficient for me to reach a view on them one way or the other.

Electro-magnetic fields

[115] Mr Taylor also argued that there was a significant increase in current through the southern lines and this too was fatal to existing use rights. It is important to understand that increased current does not, of itself, cause the s 10 ceiling to be breached. Rather, the plaintiffs must show that this change has introduced a new, more intensive or greater effect.

[116] The health dangers of radiation from electro-magnetic fields (EMF) around transmission lines were also raised both by the pleadings and Mr McCorkindale, but were not pursued with any vigour either by him or counsel. It is therefore unnecessary for me to explore this issue in any detail.

[117] Mr Robert Lake gave evidence for Transpower on this aspect. He is a senior development engineer at Transpower and a civil engineer. His evidence was that EMF around the conductors on the southern line would increase through reconductoring from an average of 44 milligauss under the old copper lines, to 74 milligauss under the new ones. This was a 60 per cent increase. This, he said, was still less than 10 per cent of the maximum allowable level under International Commission on Non Ionizing Radiation Protection (ICNIRP) Guidelines 1998. This evidence was unchallenged. Mr McCorkindale did say that there was something of a movement developing in some European countries towards the adoption of much stricter electro-magnetic radiation standards, but the impression left with me was that these developments were at an early stage and the standards were more suggestions than firm lines.

[118] I therefore accept the evidence of Mr Lake as to health issues around EMF. As with EPR, the standards here are not legal standards, but they provide useful background in terms of establishing under s 10, whether the effects to be measured under that section are greater in scale or intensity than before. In this case, there is an increase in EMF, but there is no evidence that this produces an effect relevant under s 10. In this regard, I agree generally with the approach adopted by the Environment Court in *Fernwood Dairies Ltd v Transpower New Zealand Ltd*.¹⁸

Conclusion

[119] I conclude therefore that the Waikanae reconductoring does not enjoy existing use rights under s 10 RMA but the southern reconductoring does, with the exception of the span between poles 892 and 894. I would add in that respect that I do not consider that a failure to meet the s 10 test at any point along these lines must mean a failure of the whole line. The size of the relevant planning unit for existing use rights purposes (the issue raised in *Omya*) will depend very much on the circumstances of the case. Here, the effects impact is limited to the Hindry property and I consider it appropriate to treat that property as the relevant planning unit. Hence my focus on the span between poles 892 and 894.

¹⁸ *Fernwood Dairies Ltd v Transpower New Zealand Ltd* [2007] NZRMA 190 (EnvC) at [107]–[114].

[120] In the light of the findings here in favour of the plaintiffs, I will consider at the end of this judgment the question of whether relief ought to be afforded the plaintiffs and if so to what extent.

The 2009 Regulations

[121] In the light of my conclusions in relation to the Waikanae reconductoring, and in case I am wrong in finding that existing use rights attach to almost all of the southern reconductoring, it is necessary for me briefly to review the potential impact of the Resource Management (National Standards for Electricity Transmission Activities) Regulations 2009. It must be remembered that the effect of these regulations, *if they apply*, is to make both sets of reconductoring permitted activities for which no consents are required. Thus, the absence of existing use rights in the Waikanae section will not matter, the Hyena reconductoring being able to be undertaken without a consent anyway. Similarly, if I am wrong about the existing use rights enjoyed by the southern reconductored lines except the span between poles 892 and 894, then again no permission will be necessary anyway and a separate consent in that respect becomes unnecessary.

Summary of the Regulations

[122] Subclauses (2) and (6) of reg 6 make any reconductoring a permitted activity provided the diameter of the conductor is no greater than 50 millimetres. In the present case of course, both the Hyena and Wolf conductors are less than 50 millimetres in diameter so reg 6 covers them. In addition, reg 7 provides that adding an overhead earth wire is a permitted activity in these circumstances. Reg 10 provides that increasing the current rating of the lines is a permitted activity provided the standards contained in reg 10(2) to (9) are satisfied. These standards relate to electric field strength and magnetic flux. I received no evidence in these matters but no issue was taken in that respect by the plaintiffs. Reg 14(2) makes altering, relocating or replacing a pole a permitted activity provided (as relevant) the following conditions are met:

- (a) the poles are no more than 15 per cent higher;

- (b) they are relocated no closer than 12 metres to an occupied building or any closer at all if the original pole was within 12 metres; and
- (c) they are no more than 5 metres from the pole's original position.

Arguments

[123] Mr Taylor argued that the Regulations had no application to either the Waikanae or the southern re-conducted lines. He relied on reg 4(1) which provides as follows:

These regulations apply only to an activity that relates to the operation, maintenance, upgrading, relocation, or removal of an *existing transmission line* ... (my emphasis)

[124] Mr Taylor said the Waikanae re-conducting is not an existing transmission line because it has been disabled. He argued further that the southern line failed to qualify as an existing transmission line because all relevant consents were admitted by Transpower to be invalid. In other words, an unlawful transmission line cannot in law be an existing transmission line under the Regulations.

[125] Mr Knight was coy about Transpower's position over the Regulations. He preferred to submit only that Transpower would apply for any consents now needed. I assume this is because the evidence is not altogether clear whether the multiple requirements of reg 14(2) are met for all poles.

My view

[126] "Existing transmission lines" for the purpose of reg 4 is defined as follows:

- (a) means a transmission line that was operational, or was able to be operated, at the commencement of these regulations; and
- (b) includes a transmission line described in paragraph (a) that is altered or relocated in accordance with these regulations; and
- (c) includes a transmission line that, in accordance with these regulations, replaces a transmission line described in paragraph (a).

[127] A “transmission line” is also defined. The definition is as follows:

- (a) means the facilities and structures used for, or associated with, the overhead or underground transmission of electricity in the national grid; and
- (b) includes transmission lines support structures, telecommunication cables, and telecommunication devices to which applies; but
- (c) does not include an electricity substation.

[128] “Electricity substation” is not separately defined but there is no doubt that the substations at Paraparaumu and Mangahao are electricity substations for the purposes of the exclusion in paragraph (c) of the definition of transmission line.

[129] In my view, subject to compliance with the height and pole location variation rules in reg 14, the Regulations apply generally to both the Waikanae and southern reconductored lines.

[130] I do not think that the lack of a valid consent prevents the southern line from being considered an “existing transmission line” within the meaning of the Regulations. The definition relates to facts, not legal status. In this the Regulations are no different from rules in a District Plan. If the rules in a District Plan are changed to make a non-complying structure compliant, the structure is entitled to the benefit of that change. It does not cease to be a structure for all purposes just because it is non-compliant. The word “existing” should, in my view, be taken at face value and construed in accordance with the meaning given to it in reg 3. RMA compliance is, in my view, a quite separate matter. I will return to this issue later in this judgment in my considerations of s 23 of the Electricity Act 1992.

[131] In this case, I conclude that provided the lines were operational or able to be operated when the Regulations commenced, they can benefit from the new regime. The southern line clearly was in existence and operational at that time, and so is entitled to the protection of the Regulations.

[132] In respect of the Waikanae section, the question is whether that section was “able to be operated” in fact in December 2009. Here, the focus must be on whether

the transmission lines themselves (as distinct from the substations they connect) are able to be operated. The definition of “transmission line” excludes substations.

[133] In my view, the lines were “able to be operated”. Despite the fact they were not actively carrying a current, and the switches at each end (Mangahao and Paraparaumu) had been removed, the lines themselves were still capable of carrying a current. They were not defective. They were being held in reserve by Transpower should population build-up in Levin warrant their enlivening. While, as I have concluded, for the purposes of s 2 of the RMA and existing use rights, they were not being “used” at the time, they nonetheless were “able to be operated” for the purposes of the 2009 Regulations because, with reasonable amendment to the surrounding infrastructure, they *could* carry a current if required to do so. All it would take would be the re-installation of switches and re-introduction of electricity. The position is to be compared with a situation where the lines themselves were defective in some way and unable to be re-enlivened or where more fundamental work was required in relation to the lines themselves. In the end, whether lines are “able to be operated” becomes a question of degree.

[134] This view is consistent with the purpose of the 2009 Regulations, that is, to create a more permissive regime for the operation, administration and maintenance of specified existing transmission lines.

[135] I expressly leave open the question of whether a line that cannot carry a current because for example a section of conductors has been removed, is still “able to be operated” within the meaning of the Regulations. It is unnecessary for me to decide the point because on the facts before me all poles are up and strung in this section of line. It would be unwise to succumb to the temptation to lay down a bright line on the basis of these facts. It is sufficient for me to conclude that, on the facts as I have them, there is sufficient integrity in the lines for them to amount to an existing transmission line. I realise that this conclusion varies from that reached in respect of existing use rights on this line. I am however drawn to the present result by the differing statutory language, indeed the differing statutory purpose, of the 2009 Regulations and s 10.

[136] I am satisfied therefore that both the Waikanae and southern reconducted lines are existing transmission lines within the meaning of the 2009 Regulations. Whether or not they are permitted activities in terms of regs 6, 7, 10 and 14 requires a more detailed assessment. In particular, whether the detailed requirements of reg 14 have been satisfied needs to be considered pole by pole. There was insufficient evidence for that analysis to be undertaken here.

[137] Matters must therefore be left on the basis that further evidence will be required before it is known whether, and if so to what extent, the reconductorings fall outside the protection of the 2009 Regulations and must therefore be rectified by fresh resource consents.

Conclusions thus far

[138] My conclusions thus far are therefore as follows:

- (a) the Waikanae reconductoring was not a permitted activity under the KCDC District Plan in 1998 or 2000 and should not have received a certificate of compliance, nor does it have current existing use rights;
- (b) the southern reconductoring (the consents for which, it is agreed, were invalid) generally has existing use rights except at the Hindry property; and
- (c) both the Waikanae and southern reconductorings may be entitled to the benefit of the 2009 Regulations since they prima facie apply, but there is too little evidence to determine whether the performance standards in the Regulations are satisfied.

[139] I turn now to the action in trespass.

Trespass

[140] The plaintiffs' claims in trespass are advanced in three distinct ways and at two different levels. Categories of alleged trespass are:

- (a) physical entry onto land owned by those represented by KHVC or the individuals named as second plaintiffs. This relates to Transpower employees and contractors entering private land to undertake the reconductoring;
- (b) the result of the reconductoring to the extent that it has altered either the alignment of the lines or the physical space taken up by them due to increases in pole or cross-arm height, cross-arm width and/or conductor swing;
- (c) increased intensity of use through thermal uprating from 49° C to 70° C.

[141] The case is advanced at two levels. The first relates to the lands of the second plaintiffs, Alexander and Hindry. (I note in this respect that the trespass and claim originally advanced by Mr Jenkner (reviewable action (2) was withdrawn, the evidence being that it accrued outside the limitation period). Second, there is a representative action in trespass in which each of the second plaintiffs sues “on his own account and as representative of the 20 members of the first plaintiff ... who own and occupy land over which the transmission lines in issue pass.”

Representative action

[142] I consider, at the outset, that the representative action as pleaded in bold terms is not permissible. Rule 4.24 of the High Court Rules requires that each of the second plaintiffs must have “the same interest in the subject matter of the proceeding”.¹⁹ That is simply not possible given the way the plaintiffs have mounted

¹⁹ For examples of the application of this rule see *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) and compare *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC).

their trespass case. They plead both direct entry onto land and material changes to the lines themselves as separate grounds for the trespass claim. The limited evidence available in relation to the changes in height, alignment, conductor swing width and cross-arm width insofar as it affected particular land suggests that not everything changed in every case, and even when changes were made, they were not the same in each case.

[143] There is therefore no “common interest” because it cannot be assumed that all are affected in precisely the same way, or indeed that all are affected at all. At least not without direct evidence in each case. Without knowing the circumstances of each piece of land owned and occupied by the members of KHVC, there is no way of knowing whether the land was even physically entered by Transpower or its agents. As Mr Knight rightly pointed out, the evidence was limited in relation to whether KHVC members were in occupation at all. Indeed, although a necessary element of a trespass action, the point was not actually pleaded. It follows then that insofar as the trespass action relates to direct entry and/or altered height, space or alignment, the only properties able to be considered are those in which there is direct evidence on the point.

Arguments

[144] Mr Taylor’s argument was essentially that in the Waikanae reconductoring, the Hyena conductors had a greater overall sag than copper. This meant cross-arms and conductor heights had to be raised to comply with ground clearance requirements. This he said, made the “sausage” (his term) of airspace within which the cross-arms and conductors sat (remember the conductors swing in the wind) higher than before, causing encroachment into new space.

[145] Second, Mr Taylor argued that the cross-arms became on average wider with the new concrete poles. This was because, as I have said, the cross-arms have new fixed insulators extending directly out from the end of the arm itself at about 10 per cent above horizontal, effectively making the fixed insulators an extension of the arm. Mr Taylor’s argument was that the new conductor width at rest was

26 centimetres greater than the old copper lines. Remember the insulators on the old lines hung straight down from a movable hinge on the cross-arm.

[146] In respect of the southern Wolf reconductoring, again the cross-arms are wider this time from typically 3.9 metres under the old wooden poles to 5.2 metres in the new ones.

[147] Mr Taylor submitted that the old copper conductors produced 4.8 metres of swing width at maximum wind pressure and the Wolf conductors produced 3.9 metres. This, he said, suggested that overall the Wolf conductors on much wider cross-arms produced greater encroachment than copper conductors at maximum swing as well.

[148] Transpower would not engage at this generic level. Instead Transpower directed its submissions at the land of Hindry, Alexander and Harris. Transpower argued that the encroachment over the Hindry title was no greater than prior to the reconductoring. In respect of Alexander, it was agreed that there were minor height increases but no change in alignment or space taken up by conductors and structures. And in respect of Harris, it was accepted that Mrs Harris suffered a greater incursion into her property for about a year before the lines were moved back to their original alignment. But Transpower argued that this was the fault of a contractor failing to follow instructions and Transpower had no responsibility for this mistake.

[149] I note in passing that Mr Knight objected to KHVC relying on valuations that had been placed in the common bundle, but not adduced in evidence by the author. On the approach I have taken, it has proved unnecessary to resolve these objections.

Applicable principles

[150] Trespass to land is the unjustified direct interference with another's possession of land. There is no doubt but that in New Zealand, interference with land includes not only interference with the surface or soil but also applies to buildings and structures on the land, as well as interference in the subsoil and the

airspace above land.²⁰ Trespass as described is actionable per se without proof of damage.

[151] I must therefore be satisfied first that Transpower has interfered directly with the plaintiffs' possession of their land, and if so satisfied, that the use is unjustified. Justification is for Transpower to prove. In this case Transpower argues that it was entitled to undertake the reconductoring pursuant to s 23 of the Electricity Act 1992. This section entitles Transpower to enter land to inspect, maintain or operate its lines. Since 2001, maintenance under s 23 has been deemed to include replacing or upgrading existing works provided the land will not be injuriously affected as a result of the replacement or upgrade. A significant question therefore is whether the reconductoring caused injurious affection to the land of any of the plaintiffs. But before I address that matter I will first determine whether, but for s 23, Transpower has trespassed in any way on the land of any of the plaintiffs.

[152] I will address the evidence relating to trespasses generally before turning to the specific properties identified above.

General trespass evidence

[153] Assuming that the original lines were authorised under the relevant electricity works legislation in 1924 (I leave aside RMA compliance for the moment but will come back to it below), then, in principle, any increase in pole height, conductor height, swing width or pole circumference on that which applied before the reconductoring, and any adjustment to the old alignment would constitute a fresh trespass but for s 23.

[154] The evidence seems to suggest that all new concrete poles have a greater circumference than the old wooden ones. The average increase is 34 per cent according to Mr Lake, but some poles are up to 50 per cent greater in circumference.

²⁰ Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at [9.2.01-03]. There is a minor jurisprudential debate around the actionability of at least some forms of airspace encroachment. This is discussed in *Todd* at [9.2.03(1)], but need not detain us here, as the suggestion that some forms of transient or temporary airspace intrusion may be excusable, does not go so far as to apply a similar principle to permanent airspace incursions such as those alleged in this case.

Such increases must amount to a minor technical trespass though, again, the extent of the trespass must vary pole to pole as they are not of uniform circumference.

[155] It is not possible, in my view, to reach any general conclusion in relation to pole height, cross-arm width or conductor swing. The evidence such as it suggests that some poles are shorter in situ than the old ones and some are taller. Conductor heights are generally greater to ensure compliance with ground clearance requirements under NZECP 34:2001, but that is not uniformly so. Much depends on the length of span between poles. This often changed in the reconductoring process as poles were shifted along the same alignment. Similarly, conductor swing varies depending on tension, temperature, span and pole location.

[156] It is not possible to reach any generally applicable conclusions in respect of these matters. Rather, an assessment must be made site by site with the benefit of specific evidence. The task is rendered more difficult because the evidence about pre-existing heights, dimensions and alignments is generic only and patchy at best.

[157] The plaintiffs also argued that the thermal uprating of the entire southern line from 50° under the old copper conductors to 70° under the Wolf conductors amounted to a trespass. I do not see how this can be so.

[158] Trespass is about interference in the possession of land (including airspace). The uprating is a regulatory consent. It cannot have amounted to an interference in itself. If the plaintiffs really meant to argue that the heating up of the southern line produced greater sag, and the sag was a new encroachment, then there are difficulties in the evidence about that too.

[159] First, Transpower's evidence was that the Wolf conductors had been heated to a maximum of 60°C not 70°. Second, there was no evidence from either side about the effect that operating the Wolf conductors at 60° would have on line sag. There is therefore no evidence one way or another on whether higher conductor temperature produced greater encroachment in any particular case. It is true that conductor heights were often increased along the southern reconductoring in order to accommodate either larger spans or greater sag, but there were no details sufficient

to enable any expert witness to calculate accurately whether the new conductors sagged lower than the old ones in respect of any particular span. Rather, the evidence was aimed at showing encroachment as a result of increased conductor heights. It is not possible on the evidence to support a finding that Wolf conductors operating at 60°C will always produce increased encroachment. Rather, once again, evidence is required span by span.

[160] I find therefore that the trespass claim on the thermal uprating ground is not made out.

Physical entry

[161] According to the evidence of Mr Murray for Transpower, five properties were entered for the purpose of carrying out the reconductoring south of Waikanae.

- (a) Julie and Michael Riepen: 525 State Highway 1, Paraparaumu. The notice of entry under the Electricity Act proposed the following dates for entry onto the property:
 - (i) 25 January 2003 from 8.00am for a period of approximately 4 days;
 - (ii) 7 February 2003 from 7.30am for a period of approximately 3 days;
 - (iii) 10 March 2003 from 7.30am for a period of approximately 4 days; and
 - (iv) 24 March 2003 from 7.30am for a period of approximately 4 days.

The Riepens' action against Transpower has since settled and they are not part of KHVC.

(b) Michael and Trevor Alexander: 81-91 Emerald Glen Road, Paraparaumu. The notice proposed the following dates for entry onto the property:

- (i) 16 January 2003 from 8.00am for a period of approximately 5 days;
- (ii) 5 February 2003 from 8.00am for a period of approximately 4 days;
- (iii) 5 March 2003 from 8.00am for a period of approximately 4 days; and
- (iv) 22 March 2003 from 8.00am for a period of approximately 4 days.

(c) Karen and Peter Brooking: 25 Emerald Glen Road, Paraparaumu. The notice proposed the following dates for entry onto the property:

- (i) 5 February 2003 from 7.30am for a period of approximately 4 days;
- (ii) 5 March 2003 from 7.30am for a period of approximately 2 days;
- (iii) 22 March 2003 from 8.00am for a period of approximately 4 days.

(d) Sang Sue Limited: 347 State Highway 1, Paraparaumu. The notice proposed the following dates for entry onto the property:

- (i) 22 January 2003 from 7.30am for a period of approximately 5 days;

- (ii) 7 February 2003 from 7.30am for a period of approximately 3 days;
 - (iii) 10 March 2003 from 7.30am for a period of approximately 5 days; and
 - (iv) 24 March 2003 from 7.30am for a period of approximately 4 days.
- (e) Robert and Jillian Ker: 29 Emerald Glen Road, Paraparaumu. The notice proposed the following dates for entry onto the property:
- (i) 22 January 2003 from 7.30am for a period of approximately 2 days;
 - (ii) 7 February 2003 from 7.30am for a period of approximately 4 days;
 - (iii) 4 March 2003 from 7.30am for a period of approximately 2 days; and
 - (iv) 22 March 2003 from 8.00am for a period of approximately 2 days.

[162] Each notice also specified the particular works to be carried out on the relevant property, such as replacement of specified poles and the replacement of conductors.

[163] Clearly without the protection of s 23 of the Electricity Act, all such entries without the consent of the person entitled to possession, would be trespasses.

The Hindry property

[164] I have already mentioned the Hindry property on Valley Road. Mr Hindry operates a Christian holiday camp on a 10 acre block there. Pole 894 is situated on

the road reserve two metres or so from the Hindry's boundary fence. Mr Hindry says the conductors on this pole now sit in the airspace over his property when they did not before.

[165] Transpower wrote in a letter to Mr Hindry of 7 October 2003 that the original wooden pole in that position had, over time, been pulled to lean away from the Hindry property as a result of having two conductors on the pole's outer side. Transpower said that originally, when the wooden pole was new and directly upright, the lines had encroached on the Hindry airspace. Transpower said the reconductoring did no more than put the lines back where they had originally been.

[166] Mr Lake for Transpower gave similar evidence before me. In fact Mr Lake's evidence was that at maximum swing, the Wolf conductors encroached 100 millimetres less into Hindry airspace than the old pole (when it was straight). This, he said, was because although the new cross-arms are wider at 5.2 metres than the old cross-arms at 3.8 metres, the insulators on the old cross-arms were not fixed. Rather, they were hinged and hung vertically. Mr Lake's evidence was that the hinged insulators allowed the old copper wire to swing out further than the fixed Wolf conductors by about 100 millimetres.

[167] Mr Hindry rejected Transpower's leaning pole thesis. He said the original pole was never on a lean to his eye. He said he was sure the intrusion is now much greater than before.

[168] There was no direct evidence to support Transpower's leaning pole thesis. I doubt whether this was ever in fact the case to any material extent. Mr Lake had cause, during the course of his evidence, to reconsider the position after thinking about it overnight. He accepted that when the new Wolf conductors are lying at rest – that is not under wind load – they would sit 900 millimetres further toward the Hindry boundary than the old copper conductors. This, it seems to me, explains the discrepancy in the evidence.

[169] I visited the site. It appeared to my eye that the Wolf lines currently sit over the Hindry boundary when at rest. This was confirmed by an audit undertaken by

survey firm Connell Wagner in 2008. Connell Wagner measured the overhang at pole 894 at 640 millimetres. The photograph of pole 894 provided in the Connell Wagner survey showed the lines were at rest. On that basis, the old copper conductors when at rest would have sat entirely within the road reserve airspace by 260 millimetres. That must be the position in light of the Lake calculation that the overall difference in position when the conductors are at rest was 900 millimetres. Thus, it appears that in a westerly storm, the old copper conductors encroached further because they would have been at full eastward swing. But at all other times – and that means most of the time – the Wolf conductors intrude onto the Hindry land to the extent mentioned but the old copper conductors did not. On balance, I am satisfied that the reconductored line encroaches into the Hindry airspace permanently while the old copper line did so only occasionally.

[170] *Telecom Auckland Ltd v Auckland City Council*²¹ was a case in which the Court of Appeal was called upon to decide whether the rights held by Telecom in its buried and overhead lines amounted to interests in land sufficient to trigger liability under the Rating Powers Act 1988. Blanchard J, delivering the judgment of the court, found that Telecom held an exclusive possessory right in the space occupied by its lines. In the case of overhead lines, Blanchard J defined that space as the area of lateral movement of the lines which cannot, as a consequence of that movement, be in shared occupation with the landowner. That right was sufficient to attract rating liability.²² Although the court's conclusion in that case answered a very different question to the one confronting me, and although it ultimately ran against the line owner, it seems to me that the court's reasoning must apply with equal force in this case.

[171] It is relevant therefore to note that pole 894 was not the only issue for the Hindrys. Pole 892 to the north is situated such that the conductors leading to it from pole 894 sat only 1.5 metres above the roof of the camp chapel – the building closest to the road reserve. So close in fact that the Hindrys said the roof was occasionally electrified, at least once when they were sitting on it. This, it seemed, was the result of increased conductor sag after the reconductoring. Transpower agreed to lift the

²¹ *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426 (CA).

²² At 440.

conductors at that pole to ensure sufficient conductor clearance was achieved. Transpower obtained a certificate of compliance in 2007 (reviewable action (5)) to lift the overhanging conductor up to the top cross-arm on pole 892. The reason I mention this is that the change almost certainly means the overhanging conductor must have been higher than prior to the reconductoring for at least part of the span between poles 892 and 894. This means in turn that the conductors were in fact encroaching further into Hindry airspace than before over that span, albeit on a higher vertical plane rather than an extended horizontal plane. This in turn must mean that the principle in *Telecom* is not technically engaged even though the new conductors lay within the full extent of the lateral swing of the old copper conductors. The offending conductor was, in short, higher than before even though it was not wider at maximum swing.

[172] The case in trespass is therefore made out at the Hindry property.

[173] Whether that means that Mr Hindry can then make out a case of injurious affection is a question that I will address below.

The Alexander property

[174] Mr Alexander has poles 934 to 938 on the A line and 935 to 939 on the B line situated on his property. All but pole 937 were replaced. Mr Alexander says that the alignment of the conductors changed by approximately three metres as a result of the reconductoring; that poles 938 and 939 are higher than before by 340 and 50 millimetres respectively; and that some or all cross-arms are set higher. On the span between poles 938 and 940 he said top conductor height is increased by 510 millimetres and bottom conductor height by 460 millimetres. Mr Alexander also argues that the cross-arms are wider and pole circumference greater than before.

[175] Mr Youngman gave evidence for Transpower on this matter. He said that conductor alignment remained unchanged though he agreed that pole and conductor height had increased by a very small amount.

[176] Mr Alexander produced photos in evidence showing Transpower undertaking the reconductoring on his land. His photographs showed what I think are the new poles 935 and 936. They are standing alongside the old B line pole 935 which had not, at the time of the photographs, yet been removed. The photographs show clearly that the position of pole 935 has been moved about 3 metres to the west. I assume for conductor separation purposes that pole 936 on the A line was moved at least as far further westward as well.

[177] I accept therefore that the alignment of the A and B lines through the Alexander property has changed to some extent. I accept also that pole heights at 938 and 939 have increased slightly and that conductor heights have increased as well. I also accept that all poles on the property have a greater circumference than the old wooden ones.

[178] Finally, as with pole 896 outside the Hindry property, I accept that the lines on the Alexander property when at rest are wider than previously due to wider cross-arms and fixed insulators even though, for the most part, conductor swing is smaller.

[179] I find accordingly that a trespass is made out in respect of the Alexander property.

[180] Mr Alexander also raised an issue in relation to the replacement of poles within an urupa reserve on a neighbouring Landcorp property called Whareroa Farm. Mr Alexander argued that because Transpower had to replace poles situated within the urupa with poles outside its boundaries, the effect on Mr Alexander was to raise conductor height at his property boundary. Transpower pleads the Limitation Act saying this work was completed on 25 March 2003 and the plaintiffs' original statement of claim did not plead this particular trespass.

[181] I have already found that conductor height through the Alexander property was raised making this particular cause of action academic in any event. It is unnecessary for me to resolve the limitation debate.

The Harris property

[182] Insofar as the Harris property in Paraparaumu is concerned, there is no argument that in 2008 the lines above the property were placed in the wrong position so that they encroached into that property by 1.6 metres further than previously. There is no question therefore that, for the year before this mistake was corrected, there was an encroachment. The question is who was encroaching – Transpower or its subcontractor who mistakenly put the line in the wrong place?

[183] Transpower relies on the English Queen’s Bench decision in *Jolliffe v Willmet*.²³ Transpower, relying on this case, argues that the plaintiffs must show that Transpower negligently appointed the independent contractors who carried out the work or that Transpower’s negligence was itself in some way a direct cause of the trespass.²⁴

[184] This argument seems to be correct. The plaintiffs needed to join Transpower’s contractors in respect of the Harris trespass. This cause of action must fail accordingly.

Statutory authorisation

[185] Trespasses are therefore made out in respect of entry by Transpower workers into the Alexander, Brooking, Ker and Sang Sue Limited properties. They are also made out in the respects discussed in greater detail in respect of the Hindry and Alexander properties. To the extent that trespass is made out, Transpower pleads the defence of statutory authorisation. This is in reliance on s 22 and s 23 of the Electricity Act 1992.

Relevant provisions

[186] Section 22 provides essentially that the owner of any “existing works” that have been lawfully fixed or installed on any land are entitled to remain there until the

²³ *Jolliffe v Willmet* [1971] 1 All ER 478 (QB).

²⁴ At 485.

works owner decides otherwise and only the works owner has any interest in those works. Existing works in the Act means works constructed before the commencement of the Act on 1 January 1993. The Mangahao-Paekakariki A and B lines were constructed before 1993.

[187] Section 23(1) provides relevantly:

Any person that owns any existing works may enter upon land for the purpose of gaining access to those works and may perform any act or operation necessary for the purpose of:

(a) inspecting, maintaining, or operating the works;

...

[188] Prior to 2001, the term “maintain” was defined as including “to repair” and “maintenance” was deemed to have a corresponding meaning. This old definition is relevant because it was the controlling law when the Waikanae reconductoring was undertaken in 2000. A new subsection (3) was added to s 23 in 2001. It provided an expanded definition of “maintenance”. Its terms were as follows:

(3) in this section, maintenance includes–

(a) any repairs and any other activities for the purpose of maintaining, or that have the effect of maintaining existing works; and

(b) the carrying out of any replacement or upgrade of existing works as long as the land will not be injuriously affected as a result of the replacement or upgrade.

[189] This expanded definition applies in respect of the southern reconductoring because that work was undertaken after 2001.

[190] Sections 23A to 23F provide a regime whereby notice of entry is given to landowners and disputes about access can be dealt with in the Environment Court. These were the notices mentioned earlier that were served on certain landowners.

[191] “Works” is relevantly defined as “... any fittings that are used, or designed or intended for use, in or in connection with the generation, conversion, transformation or conveyance of electricity; ...”.

[192] “Fittings” is also defined. It means “everything used, or designed or intended for use, in or in connection with the generation, conversion, transformation, conveyance or use of electricity.”

Issues

[193] This regime gives rise to three issues here. The first, a preliminary issue, is whether the Mangahao to Paekakariki A and B lines are “existing works” within the meaning of the Act. The second issue is whether the Waikanae reconductoring was “maintenance” within the pre-2001 definition of that term. The third question is whether the southern reconductoring undertaken after the introduction of s 23(3) was an upgrade that caused injurious affection to the plaintiffs’ land.

[194] The first question arises because if the relevant lines are not existing works within the statutory definition, then Transpower cannot call in aid the statutory justification in s 23. The second question arises because if the Waikanae reconductoring did not fit the pre-2001 narrow meaning of maintenance, s 23 was not available to Transpower for that work. The third question arises because Transpower can only claim the protection of s 23 if the replacement or upgrade carried out in the southern reconductoring does not injuriously affect the plaintiffs’ lands.

Existing works

[195] On the first question, Mr Taylor argued that the statute required works to be operative in order to be considered existing works. He pointed to the word “operate” in s 23(1) in support. Mr Taylor sought to distinguish the Environment Court decision in *Electricity Ashburton Ltd v Brook*²⁵ in which that court adopted an expansive definition of “existing work”. In that case, the Environment Court held that existing works continue to maintain that status whether they are functional or inoperative (for example, because parts are missing) at least until the works are lawfully removed from the private land on which they are situated.

²⁵ *Electricity Ashburton Ltd v Brook* EnvC Christchurch C169/2005, 25 November 2005.

[196] It is not necessary for me to decide whether that is right. In my view the question before me is answered by reference to the statutory definitions that I have already set out. Works are exclusively defined as any fittings used, designed or intended for use in connection with the generation, conversion, transformation or conveyance of electricity. Fittings means “everything” used, designed or intended for that purpose. The definitions could not be wider. In the Waikanae reconductoring, there is no doubt that the copper lines were fittings in situ since, even though they were not currently being used to convey electricity, they were designed or intended for that use. Unlike the *Ashburton* case, this is not a situation where lost or missing fittings are being reintroduced to the circuit. These are existing fittings being removed and replaced.

[197] There is no merit in the argument that the Waikanae reconductoring does not relate to an existing work.

[198] Mr Taylor’s argument in relation to the southern reconductoring depended on the invalidity of those works under the RMA. He argued if the works were not being operated in compliance with the RMA they could not be existing works. I have indicated somewhat tentatively that the southern reconductoring may well be entitled to the benefit of the 2009 Regulations, although I have come to no final view on that question, the evidence being insufficient to do so. Can the southern reconductoring still be an existing work under s 23 if it has no valid resource consent, no existing use rights and does not meet the requirements of the 2009 Regulations? In my view the RMA and Electricity Act issues are distinct. Even if Transpower did not have authority under the RMA to reductor the southern lines, that would not stop the lines being an existing work and the reconductoring being an upgrade in accordance with the requirements of s 23 of the Electricity Act.

[199] It is important to understand the different purposes of this part of the Electricity Act and the RMA. The RMA relates to sustainable management of natural and physical resources and it focuses on environmental management. The relevant provisions in the Electricity Act are about the regulation of competing property rights – the statutory right of works ownership vested in electricity companies under the Act and the private property rights of landowners. The two

Acts operate in entirely different spheres. This is reflected in the terms of s 23 of the RMA. That section provides:

- (1) Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.
- (2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.
- (3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provision of this Act.

[200] The RMA is a code, and in the foregoing provision Parliament expressed its intention that enforcement of the terms of that code would be undertaken through that Act and not any other. I reject the argument that works that breach the RMA cannot be “existing works” for the purposes of the Electricity Act. Rather, that phrase should have only the meaning attributed to it in s 2 of that Act, with no unnecessary gloss.

Waikanae and the old definition of maintenance

[201] The second question relates to the Waikanae reconductoring. Transpower argues that the Hyena reconductoring was a permissible repair even under the narrow definition of maintenance. Mr Youngman’s evidence was that the copper conductors on this line were the original conductors installed in 1924 and they had become potentially dangerous because although they had been optimised out, they could still carry induced current. There was also, he said, an increasing risk of conductor fall due to age.

[202] Counsel referred to the decision of his Honour Judge Cadenhead in *Counties Power Ltd v Croudish*: a decision which applied the old definition. In that case his Honour said:²⁶

In my view, the statute is clear in authorising only those acts or operations necessary for the purpose of “inspecting, maintaining, or operating” the “existing works”, and that such mandate does not extend to operating something substantially different from what is in existence. The element of

²⁶ *Counties Power Ltd v Croudish* DC Pukekohe NP 182/96, 14 August 1996 at 15.

necessity means that if the existing works are operating satisfactorily, and it is not necessary to perform additional acts or operations, then the statutory powers of s 23 cannot be invoked.

[203] That conclusion is clearly correct. On the facts in that case Counties Power Ltd sought to upgrade the voltage through its lines from 33kV to 110kV and so required larger insulators and taller poles (and, I expect, wider cross-arms). This, the Judge found, was impermissible.

[204] In this case, as I have said, the new Hyena conductors are 25 per cent larger in diameter than the old copper conductors. Although the conductors themselves have never carried a generated current, they are at least capable of conveying more electricity than the copper lines.

[205] The MVA capacity of Hyena running at 110kV and operating at maximum temperature is 83 MVA. For copper the equivalent figure is 69 MVA.

[206] While this is always a matter of degree, in my view it is appropriate to treat the Hyena reconductoring as maintenance within the old definition. There is a good argument that although the Hyena conductors have higher specifications, they are a rough modern equivalent to the previous copper lines. It is certainly not possible to argue, on these facts, that the Hyena reconductoring introduced “something substantially different” from that which obtained previously in terms of Judge Cadenhead’s formula.²⁷

[207] In addition there was, as I have said before, general evidence about increased conductor and cross-arm height, but at the specific level the evidence was limited and focused primarily on the southern reconductoring. As far as it went, it tended to suggest that generalisations were unreliable. There was certainly not sufficient evidence for me to positively find that the Waikanae reconductoring produced higher poles and conductors and wider cross-arms as a general proposition.

[208] I find therefore that the Waikanae Hyena reconductoring met the definition of maintenance under the old legislation. This means that even if he had been able to

²⁷ Note that the *Croudis* test is different to that contained in the KCDC District Plan rules D.1.1.1(iv) and D2.1.1(iv), the rules excluding any increase in line size.

pursue his action in trespass, the entry onto Mr Jenkner's property as noted by Transpower letter dated 15 September 2000, to undertake the reconductoring work, was protected by s 23 in its pre-2001 form.

Injurious affection

[209] I turn now to the third issue relating to the southern reconductoring. Here, it is necessary to address the impact of the new expanded definition of maintenance in s 23(3) and of the specific evidence relating to higher, wider and realigned poles, cross-arms and conductors.

[210] Section 23 provides Transpower a right of entry to carry out maintenance on lines and structures situated on land it does not own. After 2001, maintenance was deemed to include "replacement or upgrade" of those lines and structures. There is no doubt that the southern Wolf reconductoring was an upgrade in terms of that subsection. No party argued otherwise.

[211] There is, as I have said, an important limitation on how far an upgrade can go under subsection (3). Upgrade will be permitted "... as long as the land will not be injuriously affected as a result ...". A key question therefore is whether any of the Wolf reconductoring resulted in private land being injuriously affected. If it was, then the work is not authorised.

[212] It is likely that the change in the definition of maintenance to allow upgrade was a result of the *Croudis* decision of Judge Cadenhead. In any event, the explanatory note to the Electricity Industry Bill 2000 noted that there was uncertainty around the meaning of maintenance for which clarification was required. According to the Hansard debates for the second reading of the Bill, the concept of injurious affection was introduced into the Bill during the Select Committee stage as a result of a submission by Federated Farmers.²⁸ This introduces a conceptual dissonance in the administration of s 23. Injurious affection is a concept primarily directed at the quantification of compensation where land is affected in some way by public works on or near it. And it is generally considered after the works are

²⁸ 593 NZPD 10171 (28 June 2001), the Honourable Dr Michael Cullen.

completed in cases such as this one. It is deployed in s 23 for a very different purpose – to scribe the line between authorised and unauthorised interference in private property rights. It does not fit tidily into that role.

Changes in airspace and alignment

[213] Mr Taylor argued that injurious affection was not the only limit on the use of s 23. He argued that upgrades would also be outside the authority in s 23 if the land or airspace taken up by the upgraded works (the “sausage” as he termed it) was greater than the airspace formerly taken up or if the upgrade changed the original footprint of the works in some way. Such changes might occur, he said, through increased height or width for example, or by a change of alignment. In other words any increased encroachment created by an upgrade would automatically disqualify the upgrade from the protection of s 23.

[214] In support of his more limited reading of s 23, Mr Taylor relied primarily on the decision of the Environment Court in *Fernwood Dairies Ltd v Transpower New Zealand Ltd*²⁹: a case in which Transpower proposed to upgrade its lines from simplex to duplex. The court identified four categories of possible injurious affection as follows:

It appears to us that, potentially, injurious affects under section 23(3) fall into, at least, four categories:

- (1) encroachments – where the result of the work is to exclusively occupy more space on the underlying land than the existing works did before;
- (2) the effects of carrying out the maintenance (e.g. disturbance to pasture, creation of tracks);
- (3) effects on amenities that affect the underlying land (e.g. visual effects that affect land value);
- (4) the stigma effect (the result of public fears about power lines).

Category (1) arises where there is such an encroachment that the electricity operator is exclusively occupying more space than it did before. An encroachment would in effect be a taking of land and cannot be authorised under section 23(3) of the Electricity Act. That issue does not arise in these

²⁹ *Fernwood Dairies Ltd v Transpower New Zealand Ltd* [2007] NZRMA 190 (EnvC).

proceedings because we find as a fact that there will be no encroachment in the sense of permanent exclusive occupation of more of Fernwood's land so we do not consider encroachment further.

[215] The court concluded (in obiter) that *any* additional encroachment into land or airspace not previously occupied by the works would automatically amount to injurious affection.³⁰

[216] The authorities however, are not unanimous on the issue. In *Grey District Council v Graham*,³¹ a High Court decision of Panckhurst J, the court accepted that, as here, hardwood poles had been replaced by concrete poles and "associated equipment" had also been replaced. The court nonetheless found that because the lines remained at 110kV, there was no injurious affection to the interest held by Graham in the land.³²

[217] Had the issue of airspace and alignment been squarely put in court, that may have been an end to the debate, but it appears from the terms of the decision that the case was not argued in quite that way.

[218] In any event, I do not agree with the absolutist conclusion reached by the Environment Court in *Fernwood Dairies*. In my view, the only limitation on upgrade and replacement under s 23(3) is injurious affection (the Environment Court seems implicitly to accept that) and injurious affection is "a matter of valuation rather than law" as, again, the court itself accepts.³³

[219] Injurious affection is a well settled concept. It was described by Harman LJ in *Edwards v Minister of Transport* as:³⁴

A piece of jargon having a respectable pedigree and prolific litigation in our courts for a century or more.

³⁰ There is some support for this approach in *Murray-Leslie v United Networks Ltd* DC Thames NP208/00, 11 July 2002; and in *Counties Power Ltd v Croudish* DC Pukekohe NP 182/96, 29 August 1996, but these decisions predate the addition of subsection 3 in 2001 so are strictly speaking not on point.

³¹ *Grey District Council v Graham* HC Christchurch CIV-2006-485-1131, 1 October 2007.

³² See generally paragraphs [40] and [48].

³³ At [88] adopting the principle espoused in Keith Davies *Law of Compulsory Purchase and Compensation* (Butterworths, London, 1972).

³⁴ *Edwards v Minister of Transport* [1964] 2 QB 134 (CA) at 144.

[220] As the plaintiffs' valuer described it, injurious affection requires "a permanent adverse effect on the owner's land which is substantial enough to affect the owner's use and enjoyment of the land and, hence, value of the land.". Thus, to put it simply, to establish injurious affection, the plaintiffs must establish permanent impact on land value.

[221] It must follow that not every encroachment will diminish use and enjoyment and therefore value. Within limits, a thicker pole is unlikely to. Nor will a pole that is 5 millimetres taller than the original pole or one that is standing on a slightly different alignment. It will always be a question of degree assessed in the particular (and inevitably unique) circumstances of each case.

[222] I conclude therefore that while changes to height, width, alignment and the like are relevant considerations in assessing injurious affection, they are not gateway questions for the application of s 23. Changes of the kind described will not automatically be a trump for the plaintiffs.

A general approach

[223] It follows that the only question for me is whether the changes brought about to the Paraparaumu/Paekakariki A and B lines by the southern reconductoring were such as to injuriously affect the land of any of the plaintiffs in such a way as to permanently reduce the value of that land. In valuing any injurious affection, the correct approach is described as "before and after". An assessment is required of the full value of the property before the works are constructed and then the extent of depreciation in that value arising out of the new work, excluding any temporary effect or personal discomfort arising from the construction itself.

[224] Injurious affection must be to the land and not to its owners, unless the impact of the works on the owners is so significant as to make the land less attractive for occupiers generally and thereby to cause a reduction in its value. This requires an objective assessment in which the market is the ultimate arbiter of value. It does not matter therefore whether the market responds irrationally or on limited evidence. Once it can be objectively established that the market generally is responding to the

particular impact in question that will provide a proper basis for an adjustment in value. These issues are particularly relevant to questions in relation to EPR and EMF.

Valuation evidence

[225] Three experts gave evidence on valuation. Malcolm Robertson, a valuer, gave evidence for the plaintiffs. For the defendants Frank Boffa, a landscape architect and Timothy Crichton, a valuer, gave evidence.

[226] I will first summarise generally applicable conclusions and findings offered by the experts, before turning to the particular properties assessed.

[227] Malcolm Robertson accepted that EPR was not yet a matter recognised generally in the market and should be put it to one side as an element to be assessed in injurious affection. His evidence was nonetheless that due to a combination of elements, the reconductoring did create injurious affection in the properties he assessed. His assessment related to, he said, a combination of elements including pole height, cross-arm width and the nature of the conductors. But he did not feel that changes in height or cross-arm width were decisive. Nor was the change in conductor diameter from 11.7 millimetres to 18.1 millimetres. The decisive factor in Mr Robertson's view in the entire reconductoring exercise was the colour change in the conductors from the dark green/black oxidised copper colour of the copper conductors to the bright aluminium Wolf conductors. This, he said, produced a stark negative change and was the primary driver of his opinion. Mr Robertson accepted however that, while he was a qualified valuer with considerable experience, he had no formal visual assessment qualification.

[228] Mr Boffa is, as a landscape architect, an expert on the visual impact of human activities on landscapes. He did not however assess any particular property at issue in this case. Rather, he provided a more general and somewhat abstract opinion on the visual effects of the reconductoring. He did not believe that the colour change was significant. He said:

While the difference in material could be apparent where standard aluminium was used, I understand the aluminium conductors used on the Paekakariki to Paraparaumu line were “dulled” to a matt finish in order to eliminate the shiny effect often associated with new unweathered aluminium conductors. When comparing the Te Horo section of the lines where copper conductors have been retained, with the Valley Road section of lines where “dulled” aluminium conductors have been used, I consider there is no difference at all. While in certain light conditions a difference may be sometimes apparent, I consider that this ephemeral effect would be minor and of a transient nature.

[229] His view was that the visibility of any lines will very much depend on context. Dark copper lines he said would show up more against a light background, whereas lighter aluminium lines would show up more against a dark background. The impression given was that, in his view, these matters would even out with seasons and changes in light.

[230] Mr Crichton, Transpower’s valuer, said that a reduction in land value required a significant as opposed to incremental change. That change would either be an individual element such as pole height or swing width or a cumulative effect arising from a combination of elements. The crucial point however was, he said, that injurious affection required a step change in the effect of the work on the land in circumstances where the issue is an upgrade of long existing structures that have already significantly reduced the value of the land. Implicit in his evidence was that it is all too easy to transpose pre-existing impacts to the new works.

[231] Mr Crichton advised that he had worked for Transpower on compensation issues in relation to the upgrade of the Whakamaru to Otahuhu lines from (I presume) to 220kV to 400kV. In that process, he said he developed a clear view of the sorts of circumstances that produce the necessary step change and those that produce only incremental and insignificant changes in terms of value.

[232] He agreed with Mr Boffa that the colour change from dark oxidised copper to dulled aluminium was not a step change as a general proposition. Rather, its effect would vary with seasons and different backgrounds.

[233] With those general propositions in mind, I turn now to the specific evidence given by valuers.

Alexander property

[234] Mr Robertson valued Mr Alexander's two properties at 81 and 91 Emerald Glen Road.

[235] 81 Emerald Glen Road is a 4.0393 hectare property, rectangular in shape and covered in either pasture or mature pine trees. Some sea views are available. The A and B lines pass diagonally through the property about 21 metres apart.

[236] 91 Emerald Glen Road is 22.9558 hectares. It adjoins 81 Emerald Glen Road on the southern and eastern boundaries. The land is relatively steeply contoured, rising sharply from the road to a house site. The site consequently has good views toward the coast and the sea and Kapiti Island in the distance. The A and B lines pass through the front of the section between the house and the front boundary.

[237] The house on No. 91 is a single dwelling constructed in 1974 with a floor area of 260 square metres. There is a double garage/workshop to the north of the house.

[238] Mr Robertson was of the view that 81 Emerald Glen Road (the smaller of the two) had a value excluding all lines of \$545,000. With the original hardwood poles and copper lines that value was reduced to \$497,500. And after the reconductoring it was reduced further to \$450,000. On this basis he considered that injurious affection as a result of the reconductoring was \$47,500 rounded to \$50,000 – roughly the same impact on the land as that created by the original works.

[239] In respect of 91 Emerald Glen Road, Mr Robertson considered that the property was worth \$950,000 without any lines on it at all. It was valued at \$910,000 when the old lines were in place and \$850,000 after the reconductoring. This produced injurious affection of \$60,000 – a 50 per cent greater impact than the original works.

[240] Mr Robertson said the changes in insulators, cross-arms, conductor capacity and colour (but particularly colour) led him to conclude that “the whole character

and scale of the visual effects after completion of the works is significantly different to the original lines.”

[241] Mr Crichton on the other hand took the view, for the general reasons I have already traversed, that the changes brought about by the reconductoring were insignificant in the context of these properties.

[242] I agree with Mr Crichton. There are six poles passing through these properties 934, 936 and 938 on the A line, and 935, 937 and 939 on the B line. All but 937 changed in height to some degree. The pole heights after reconductoring were accurately measured by Mr Turner, a surveyor but I have no way of knowing whether the pre-reconductoring pole height figures he gave are accurate. Mr Crichton provided the pre-conductoring pole heights, but I do not know where his numbers came from, let alone how accurate they were.

[243] I set out below in table form the pole numbers, the old heights, the new heights and the differences.

Pole	Pre reconductoring (m)	Post-reconductoring (m)	Difference
934	13.3	13.07	-230 mm
935	13.2	13.14	-60 mm
936	13.2	13.00	-200 mm
938	12.9	13.24	+340 mm
939	13.3	13.35	+50 mm

[244] In relation to pole circumference, Mr Robertson generalised that this had been increased from 1 metre in the old hardwood poles to 1.4 metres for the concrete poles. He clearly did not measure each pole, but I am happy to proceed on the basis that changes were of this order. For completeness, I also confirm that the material for the poles changed from wood to steel-reinforced concrete.

[245] As I have said earlier, cross-arm width was not uniform in the southern reconductoring. The parties did not provide their own accurate measurements. But I am prepared to proceed on the basis that the general dimensions given for cross-arms of 3.9 metres for the old hinged insulator set up and 5.2 metres in relation to the new set up with fixed post insulators.

[246] It appears that in respect of the Alexander property the new insulators are larger than the pre-existing ones. The old insulators were 800 millimetres long and 102 millimetres in diameter whereas the new ones are 1200 millimetres long and 190 millimetres in diameter. This was not generally the position as most other hanging insulators were in fact larger than the new ones. But some insulators in and around the Alexander property were of a smaller kind.

[247] As to the conductors themselves, the Wolf conductors are 18.1 millimetres as against the copper 11.7 millimetres. The copper conductors had an oxidised green-black finish whereas the Wolf conductors have a dulled aluminium finish.

[248] The alignment of the poles at 934 and 935 varied eastward by about 3 metres.

[249] I conclude that none of the changes in dimension I have listed above are so significantly different as to amount to a step change in the effect of the lines on this land. Nor was there any particular evidence to suggest that the height of the conductors now would affect coastal view shafts from the house site. My own site visit confirmed for me that view impacts are not significant. The lines are visible in the lower foreground from the house platform (this is the primary view amenity) but they do not intrude in any significant way into views of the rural hinterland, coast and Kapiti Island. There was certainly no evidence that the lines encroach on those view shafts now to any greater extent than the old lines had.

[250] As Mr Robertson submitted, conductor visibility is the primary issue at this property and, having viewed the site myself, I agree with Mr Boffa and Mr Crichton that the difference in diameter of the conductors is a trivial matter and that the colour change is ephemeral. By ephemeral I mean the impact of conductor colour changes depending on the background and light.

[251] In particular, in my view, the change from oxidised dark green/black to dulled aluminium is not so significant that I could responsibly conclude that it would be likely to have a perceivable effect on value. In my view, it is the pre-existing fact of the conductors and support structures on the land that reduces value in this case and not the change from the old hardwood poles and copper lines to the new concrete poles and aluminium lines at all. More particularly I completely disagree with Mr Robertson's assessment that the reconductoring on this property had a greater effect on value than the original placement of these structures in 1924, let alone, as he says, a 50 per cent greater effect.

[252] I find therefore that 81 and 91 Emerald Glen Road has suffered no injurious affection from the reconductoring.

Ker property

[253] I turn now to the Ker property at 29 Emerald Glen Road. I earlier concluded that the three named plaintiffs could not bring generalised representative claims and of course Mr Ker is not a named plaintiff. But my primary concern related to the lack of site specific evidence in relation to the properties of members of KHVC. The Ker property then is an exception to this concern since there was direct evidence of impact by way of a valuation from Mr Robertson. I therefore consider it appropriate to assess the evidence and draw conclusions.

[254] The Ker property had by the time of Mr Robertson's evaluation on 11 September 2008 already been sold for \$1.125 million. There was in evidence, therefore, an actual end value. This affected the way in which Mr Robertson approached his task.

[255] The property is a lifestyle block of 3.5454 hectares. It incorporates a two-storey architecturally designed home constructed in the mid-1980s and comprising five bedrooms. The house occupies a relatively elevated position with wide sea views incorporating Kapiti Island and the South Island in the distance with rural views in the foreground.

[256] The lines pass through the property between the rear of the house and an adjoining forestry block on the east side.

[257] The lines are, according to Mr Robertson, between five and ten metres from the rear of the house.

[258] He assessed the value of the property without any lines on it at \$1.26 million. He then made a deduction of 5 per cent of that value for the pre-existing presence of the old copper lines – a figure equalling \$63,000. That brought the value of the property depreciated due to the pre-existing lines and prior to the reconductoring to \$1.197 million which Mr Robertson rounded to \$1.2 million. Since the actual price was \$1.125 million when the land sold in 2008, Mr Robertson assessed injurious affection from the reconductoring at a rounded \$75,000.

[259] Mr Crichton says that the changes brought about by the reconductoring were too insignificant in their effect on the land to create injurious affection when the pre-existing alignment is borne in mind.

[260] Once again I agree with Mr Crichton.

[261] Mr Robertson suggests that the original hardwood pole heights were 10.5 metres and the new ones 12.5 metres. No source were given for either figure. Given that the pole heights he provided in relation to the Alexander property (12.5 metres for both old and new) were clearly no more than rough estimates, I hesitate to rely literally on the heights provided in respect of the Ker property. I am prepared to accept however, for want of any other evidence, that the reconductoring produced an increase in height on this land that was more than trivial.

[262] It must follow that the poles loom larger than they did before, assuming they are in roughly the same position as the old poles. Mr Robertson's evidence was that the lines were "right in your face" when viewed from the rear of the house, only five to ten metres away. But they must have been "in your face" before the reconductoring anyway. There was no evidence that the alignment had changed. I do not think that the extra height and cross-arm width are such a step change in the

nature and presence of these structures on the land as to be a source in their own right of injurious affection. The issue is not whether the present lines are a dominant aspect of the amenity of this land to the rear of the house (they obviously are), but whether they are step change in dominance or impact when compared with that which existed before. In my view, the real impact on the house in this case is the *existence* of the lines, not the change between old and new.

[263] It should also be borne in mind that the primary view amenity from this land is the coastal aspect. From that perspective, the lines are behind the viewer and have no impact.

[264] I certainly do not accept Mr Robertson's evidence that the impact of the new lines (at \$75,000 diminution) is greater than the introduction of lines in the first place (at \$63,000 diminution). In my view that is quite unrealistic.

[265] I find that injurious affection is not made out in respect of this property.

Harris property

[266] The Harris property is situated at 137 Ruapehu Street, Paraparaumu. It is a small urban section. The lines cross the backyard behind the house. It seems, as I set out in paragraph [16] above, that Transpower's subcontractors wrongly placed the new conductors 1.6 metres closer to the Harris house than was the original position. This was corrected 12 months later. During the period of the misalignment, Mrs Harris says noise from the insulators was significant and constant.

[267] In my view this constituted a more than trivial encroachment into a property likely to be the sort of step change envisaged by Mr Crichton as giving rise to injurious affection. I consider this to be different in character from small but nonetheless non-trivial height increases or similar cross-arm width increases when, in either case, the structure is entirely within the property anyway. Horizontal encroachment from the boundary introduces a new and negative element into the property, making the case for injurious affection obvious and measureable.

[268] The difficulty in this case for Mrs Harris, in addition to her inability to bring proceedings in trespass against Transpower,³⁵ is that injurious affection must logically be permanent in order to impact on value. This clearly was not. The lines were put back.

[269] I find therefore that injurious affection is not made out in this case.

Hindry property

[270] The Hindry property has been discussed at some length already. Mr Lake's evidence confirms that the conductors now encroach more often into the property than previously, even if at full swing the old span would have encroached further. I am satisfied that permanent encroachment to a lesser extent is worse, in the case of this property, than greater encroachment but only occasionally. I do not ignore in this respect the decision of Blanchard J in *Telecom Auckland Ltd v Auckland City Council*³⁶ to which I have already referred, to the effect that the exclusive occupation right of the works owner extends, in the case of overhead wires, to the full extent of natural conductor swing.³⁷ But as I noted earlier, there is, in fact, vertical encroachment due to the raising of the overhanging conductor on pole 892 north of the chapel.

[271] In any event, even if I am wrong in concluding vertical encroachment is enough here, injurious affection (a matter not at issue in the *Telecom* case) asks only how the market would respond to the constant presence of overhead wires when that presence was not constant, or even predominant, in the past. To adopt any other approach to the concept of injurious affection would be to allow Transpower to fill its pre-reconductoring airspace up with conductors of any kind and in any number as long as they did not further encroach. That is inconsistent with the whole idea of s 23(3) (which is to allow upgrades provided they do not diminish the value of the

³⁵ See above paragraph [184].

³⁶ *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426 (CA).

³⁷ At 441.

host land owner's land). It would produce obviously unfair results for the landowner.³⁸

[272] For completeness here, I mention that the agreed bundle contained a valuation by Gerard Smith, registered valuer, completed in November 2005. The valuation found that there was injurious affection on the land and that it was valued at \$100,000.

[273] Transpower (consistent with its stance on all valuations put into the common bundle) objected to its inclusion. For a number of reasons it is unnecessary for me to resolve that objection. Foremost among them is that I have not relied on it in reaching my own conclusion. Indeed the valuation proceeds from the false premise that the overhang is greater now than it was before the reconductoring. I have found that is not correct in an absolute sense. The valuation is also very much focused on the situation of the buildings toward pole 892 rather than pole 894 which has been my focus. The opinion was expressed that the conductors breached the requirements for clearance from buildings under NZECP 34. That problem seems to have been remedied, as I have said, by the raising of the overhanging conductor.

[274] I accordingly set that valuation to one side. I have reached my own independent view of matters having heard evidence in respect of encroachment and seen the land for myself.

[275] I am satisfied that a willing buyer reasonably acquainted with the property³⁹ and appraised of the relevant facts would consider that such a change diminished the value of the land. I am not called upon to put a dollar value on that diminution.

³⁸ There is older New Zealand authority (*Tawa Central Ltd v Minister of Public Works* [1934] NZLR 841 (HC) at 860) containing obiter sourced in turn from English authorities, to the effect that injurious affection is only recoverable if independently actionable but for the statutory power allowing the impact. This would require actionable trespass in this case. The proposition is not repeated in the New Zealand texts on the subject (see for example Peter Salmon *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington, 1982); J A O'Keefe *The Legal Concept and Principles of Land Value* (Butterworths, Wellington, 1974); Alan Hyane *The Law Affecting Valuation of Land in Australia* (4 ed, the Federation Press, Sydney, 2009) at 445–458. Nor in the leading Australian text. Indeed the cases cited there accept that injurious affection can arise from activities entirely off the severed land (see for example *Commonwealth v Morison* (1972) 127 CLR 32)).

³⁹ See *Davey v Minister of Agriculture* (1979) 1 SALR 466 (NPD) at 469 per Kamleben J as the source of this formulation.

Conclusions on injurious affection

[276] I conclude therefore that the only property in respect of which the plaintiffs have proved injurious affection as a result of the reconductoring is the Hindry property. And in respect of that land, Transpower cannot claim the protection of s 23(3) of the Electricity Act. All other trespass actions must fail.

[277] I turn now to consider arguments in relation to that question.

The question of relief

Arguments

[278] Transpower says that even if KHVC makes out any of its causes of action, relief should be declined by reason of inexcusable delay in bringing proceedings. Transpower says in relation to the judicial review application regarding the Waikanae reconductoring, the original certificate of compliance was issued on 20 March 1998 and extended on 5 April 2000. The work was completed that year, but proceedings were not issued until December 2008, eight years and eight months later. That Transpower says, is too long a delay.

[279] Transpower takes the same position with respect to the southern reconductoring. Most work was completed in 2003, with the Whareroa farm work also completed that year, the Hindry conductor raised in 2007, and the thermal up-rating consent being granted in the same year. Transpower says it has long since completed these works and it would be unfair to require Transpower to start again.

[280] Mr Taylor accepts that there has been lengthy delay but argues that this is a classic case of the little guy with limited resources up against a big corporation with deep pockets. It took time, he said, to build a grass roots organisation, and once established, KHVC directed its energies to lobbying KCDC to make the Council focus on the issue and force Transpower to comply with the law. Launching proceedings, Mr Taylor argued, is an expensive and risky undertaking and KHVC saw this very much as a last resort. He submitted that the authorities support the

proposition that a remedy for proven unlawfulness will not be withheld by reason of delay alone. Rather, a defendant will need to show prejudice to third parties occasioned by that delay.

Analysis

[281] Judicial review is, of course, a discretionary remedy that can be withheld even if an error is made out,⁴⁰ but there is a strong presumption that an applicant who has succeeded on the merits will be entitled to relief unless there are extremely strong reasons countering that principle.⁴¹

[282] There are a number of cases in which delay in bringing proceedings had been a factor in declining relief and it is worth reviewing some of them. *Heaney v Rodney District Council*⁴² was an RMA notification case in which Gendall J found the respondent Council had erred, but that a five year delay in bringing proceedings amounted to a kind of waiver. The court also considered it relevant that the plaintiffs and the respondent landowner (whose property had received the consent) were both the innocent victims of what was entirely a matter of Council error. It was in those circumstances, the court felt unfair to penalise the consent holder.

[283] *King–Turner v Minister of Agriculture & Fisheries*⁴³ related to competing applications by the parties for the same water space in which to establish their respective mussel farms. McGechan J found that the claim to breach of natural justice by King–Turner had merit, albeit on a “borderline basis” but the Judge found that an 18 month delay in bringing proceedings and then a further eight year delay in getting the matter to trial was too long. This, combined with the high unlikelihood that any reference back to the Minister would produce a different decision, meant relief should not be granted.

⁴⁰ *Bulk Gas Users Group v Attorney General* [1983] NZLR 129 (CA) at 36.

⁴¹ *Air Nelson Limited v Minister of Transport* [2008] NZCA 26 [2008] NZAR 139 at [60]–[61].

⁴² *Heaney v Rodney District Council* HC, Auckland, CIV-2003-404-003480, 16 March 2004.

⁴³ *King–Turner v Minister of Agriculture & Fisheries* HC, Blenheim, A4/83, 31 July 1989.

[284] *Ngati Apa ki te Waipounamu Trust v Attorney General*⁴⁴ concerned an attack by way of judicial review of a 1990 Maori Appellate Court decision setting the boundary line between the Tau Ihu Tribes of Nelson–Marlborough and Ngai Tahu to the south. Ellen France J found that the Maori Appellate Court had made no error in its decision making. But in obiter she noted that the seven year delay in filing proceedings would have been fatal anyway in light of the fact that in the interim period, the Te Runanga O Ngai Tahu Act 1996 and the Ngai Tahu Claims Settlement Act 1998 had both been passed into law.

[285] Mr Taylor pressed upon me the decision of Elias J (as she then was) in *Murray v Whakatane District Council*⁴⁵ another planning case in which the High Court was satisfied that the District Council had misunderstood the planning status of a subdivision in the relevant zone and had therefore failed to meet its obligation to notify the application. The question of the scope of relief then arose. Among other matters advanced by the respondent developer for the court's consideration was delay in bringing proceedings. Elias J was sympathetic to the circumstances of community groups engaging in litigation of this type. She said:⁴⁶

The more substantial contention on behalf of the defendants is that of prejudice to the third party and delay on the part of the plaintiffs. The delay from the consent in December 1995 is not considerable. The plaintiffs are, however, a group of individuals who have to combine and seek legal advice in a manner of some complexity. Their first course was to apply to the Planning Tribunal to seek a declaration. That application entails some delay itself. In the circumstances I do not think it can be said that the plaintiffs have slept on their rights to such an extent as to disentitle them to relief in the absence of real consequential prejudice to Waiohahi.

[286] The Judge took the same approach in relation to the plaintiffs' failure to seek interim orders at the outset⁴⁷:

Nor do I think the plaintiffs are to be criticised for not applying for interim relief. The invitations made to them by both second defendants to make such application and provide undertaking as to damages need to be viewed realistically in the context of litigation of this type. Such undertaking would generally be expected to turn off litigants in the position of the plaintiff.

⁴⁴ *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [20005] 1 NZLR 779 (HC). The Court of Appeal upheld the decision.

⁴⁵ *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC), 325 (CA).

⁴⁶ At 321.

⁴⁷ At 321–322.

[287] On the facts in that case, delay was relatively minor – from September 1995 consent was granted to June 1996 when proceedings were issued. A relevant factor was that the developer itself was challenging the Council’s own consent conditions for much of this period anyway. There was no evidence that the developer had altered its position to its detriment in the interim period. Nonetheless, Mr Taylor was correct in my view in submitting that when judicial review proceedings are brought by ad hoc community groups, distinctive considerations will apply. The courts should recognise that such groups will have taken some time to establish themselves and to develop a plan of action, will have their own internal accountability processes and cannot, because they are part-time and unpaid, move as quickly as established corporate entities whether public or private. Community groups will also struggle to find the resources necessary to mount complex proceedings. In combination, these factors suggest that some level of delay will be understandable.

[288] In this case, delay in bringing and prosecuting these proceedings is clearly a major factor and must inevitably have some effect on relief. It took nearly nine years for proceedings to be commenced even if one did not start the clock ticking until 2000 when the extension on the original certificate of compliance for the Waikanae reconductoring was granted. In addition, the matter was not brought to hearing until four years later. Mr Knight was right to submit that granting relief in those circumstances would set a national record for acceptable delay in judicial review. In the meantime, Transpower had long completed the Waikanae reconductoring at a cost of some millions of dollars and had carried out all implementation works in relation to the invalid RMA consents for the southern reconductoring, also at a cost of millions of dollars. The potential impact of invalidation for both Transpower and consumers south of Waikanae is very significant indeed.

[289] On the other hand I need also to take into account the fact that Transpower accepts the RMA consents for the southern reconductoring are invalid and should now be quashed. And it accepts this despite the fact that the key consent (in 2003) was five years old when proceedings were commenced and nine years old at hearing. These delays are still significant yet were not seen by Transpower as a bar to quashing orders.

[290] The real controversy here is not about the legality of the impugned RMA decisions and implementation actions, rather, given that some (but not all) of them were invalid or unlawful, what should the next steps be? So far I have found in the judicial review and the existing use rights declaration actions that:

- (a) the Waikanae certificates of compliance were invalid;
- (b) the Waikanae reconductoring did not enjoy the protection of existing use rights;
- (c) (by consent) the southern reconductoring consents were invalid;
- (d) but they did have the benefit of existing use rights with the exception of the A line span between pole 892 and 894.

[291] And in so far as the trespass actions are concerned:

- (a) The Waikanae reconductoring (both work and structures) enjoyed the protection of s 23 of the Electricity Act as it stood prior to 2001;
- (b) The southern reconductoring (both work and structures) enjoyed the protection of s 23(3) of the Electricity Act in its post 2001 form, except for that part of the A line between poles 892 and 894 at the Hindry property.

[292] Mr Taylor argues that all matters of RMA validity should be sent back to be reheard under the rules that applied when the consents and certificates were granted, with a direction that all applications must be notified at least to the plaintiffs. This approach would remove from Transpower any advantages that may be obtained through the 2009 Regulations while ensuring that KHVC retained a right of participation in the consenting process.

[293] Mr Knight submitted that Transpower planned to apply to KCDC for all consents and permissions required as a result of these proceedings, keeping his

powder dry on the question of the extent of Transpower's recourse to the 2009 Regulations.

[294] It is worth mentioning the potential impact of those regulations on relief. If they do cover the reconductoring, then Transpower has a fair argument that granting relief to KHVC in this proceeding would be futile. Transpower does not, however, make that argument and I have since found in any event that there is insufficient evidence to determine whether the reconductoring satisfies the performance criteria contained in the regulations. But the more important point is that even if I were to adopt Mr Taylor's path and refer the matter back for rehearing, there is nothing at all to stop Transpower, independently of these proceedings, from applying for fresh consents under the current law if that strategy was to its advantage. There is a danger of tying ourselves up in knots over relief here because a lengthy delay by the plaintiffs has seen the law move on, potentially in a material way.

[295] Insofar as the judicial review and existing use right declaration proceedings are concerned a practical approach is the best way of addressing clear invalidity but lengthy delay. The plaintiffs will be entitled to quashing orders in relation to the RMA consents and permissions, and to declarations in relation to existing use rights in respect of the Waikanae reconductoring and the Hindry property. But I will not refer these matters back for reconsideration under the relevant law at the time of consent or permission. Rather I will direct that Transpower must apply within three months hereof for such consents as may now be required under the current rules and the Regulations, such applications to be served on the plaintiff at the same time. I of course respect the fact that notification under RMA is a matter for KCDC. I require service as a matter of relief in these proceedings quite independently of notice under RMA and any rights of participation the plaintiffs may have in RMA processes.

[296] Mr Hindry will also be entitled to a declaration in respect of the trespass to his property.

Final disposition

[297] The following consents and permissions are declared invalid and quashed from the beginning:

- (a) the certificate of compliance dated 20 March 1998 in relation to the replacement of conductors on the Mangahao-Paraparaumu A and B lines at Waikanae;
- (b) the extension of such certificate on 31 May 2000;
- (c) the certificate of compliance RM050129 dated 15 June 2005 in relation to maintenance and upgrade work on the Mangahao-Paraparaumu A and B lines at Waikanae;
- (d) the resource consent RM020283 dated 9 December 2002 in relation to maintenance and upgrade works on the Paraparaumu-Paekakariki A and B lines south of Paraparaumu;
- (e) the certificate of compliance RM070259 dated 30 August 2007, in relation to raising a conductor at pole 894 (Hindry property);
- (f) the certificate of compliance RM070274 dated 12 September 2007 in relation to thermal up-rating of Paraparaumu-Paekakariki A and B lines;
- (g) the resource consent dated 19 March 2003 varying RM020283 above in order to raise conductors and move poles in relation to an urupa on Whareroa Farm.

[298] The following declarations are made:

- (a) a declaration that the second defendant cannot claim existing use rights in order to justify the maintenance work carried out in Waikanae on the Mangahao-Paraparaumu A and B lines in 2000;

- (b) a declaration that the second defendant cannot claim existing use rights in order to justify the maintenance and upgrade work carried out on that section of the Paraparaumu-Paekakariki A line between poles 892 and 894 opposite the property of the plaintiff Hindry;
- (c) a declaration that the maintenance and upgrade work carried out on that section of the Paraparaumu-Paekakariki A line between poles 892 and 894 constitutes a continuing trespass on the land of the plaintiff Hindry.

[299] It is further ordered that the second defendant must within three months hereof, make application for such permissions or consents as will render the Waikanae and southern reconductoring projects compliant with the Resource Management Act 1991 in all respects and must at the same time serve such application on the plaintiffs.

[300] Leave is reserved to all parties to apply for such further directions as may be necessary to give full effect to this judgment.

[301] Costs are reserved and may be dealt with by memoranda if necessary, such memoranda not to exceed five pages each.

Williams J