

**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2018] NZEnvC 196**

IN THE MATTER of the Resource Management Act 1991  
AND of an appeal pursuant to s 120 of the Act  
BETWEEN DROMGOOL  
(ENV-2017-AKL-101)  
POULTON  
(ENV-2017-AKL-102)  
AND NEWMAN FARMS LIMITED  
(ENV-2017-AKL-103)  
Objectors  
AND MINISTER FOR LAND INFORMATION  
Respondent

Court: Environment Judge JA Smith  
Environment Commissioner ACE Leijnen  
Environment Commissioner IM Buchanan

Hearing: 13 June 2018

Appearances: A Isac and MC McCarthy for the Minister  
D Salmon and A McDonald for the Objectors

Date of Decision: 13 June 2018

Date of Issue: 9 October 2018

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**PROCEDURAL ORAL DECISION OF THE ENVIRONMENT COURT ON DISCOVERY  
AND ADMISSION OF DOCUMENTS**

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A: The application for further production of documents by the Minister for Land Information is refused.

Dromgool, Poulton & Newman Farms Limited v Minister for Land Information



## REASONS

### Introduction

[1] On the end of the first day of hearing of this matter, Mr Salmon asked Mr Shaw about matters arising from a series of documents discovered very late in this process relating to Top Energy Limited's (TEL) limited decision-making process leading up to the request to the Minister under s 186 to take the property the subject of this appeal. As a result, the Minister identified an asset management plan, available on the TEL website, a Transpower Energy's Future Report available on the Transpower website, a Net Present Value analysis for diesel prepared, we think, between January and February 2018, and part of a ten-year Financial Plan for TEL which was not on the TEL website as part of the Asset Management Plan. Although originally there was a request for the price equality justification, that apparently is part of the Asset Management Plan on the TEL website. The documents were provided to Mr Salmon, and he reserved his position and over a half day he has considered the documents. He has advised us that he does not seek the admission of those documents, nor does he want to cross-examine on them. In those circumstances, Mr Isac made the unusual step of seeking to have those documents admitted for the Minister, notwithstanding they have been raised as part of his commencement or until Mr Salmon requested copies of them.

### The question of discovery

[2] Discovery has been an issue in this case from the commencement, particularly discovery against Top Energy Limited. It was raised at the first conference, and in fact Mr Salmon indicated that he may have to make formal orders for discovery. Although not specifically noted in the Minutes, I have a clear recollection that I advised the parties that discovery should be agreed between them, and that in the event that documents were sought to be relied on which had not been discovered, that would face the risk that they would not be admitted to this Court on a leave application. That appears to have been acknowledged, and subsequently the parties cooperated in discovery, although in December 2017 Mr Salmon again indicated that there had been a delay in the provision of some of the TEL documents relevant, in his view.

[3] It is, therefore, surprising that on the Saturday before the commencement of the hearing, that is 9 June, a large bundle of documents were delivered to Mr Salmon containing a series of reports, including the consideration of the viability of diesel energy



as a substitute for the alternative line approach, and a number of board decisions, recommendations and reports. Those are exhibited in this case as **Exhibit B1** and **B2**, being a synopsis of particular documents that Mr Salmon considers relevant.

[4] During the cross-examination of Mr Shaw, the CEO of TEL, he was questioned about those documents, and some of those responses suggested that there were other documents which explained or gave a context to the various reports prepared. These are the documents that are now sought to be produced by the Minister. Accordingly, it is clear to this Court that the question of discovery of documents by TEL has been at large from the very beginning. Ms Isac takes the technical point that TEL was not the subject of a formal order for discovery, and that is correct; but that was on the basis of arrangements made between counsel to discover the relevant documents. In those circumstances, I think little turns on that technical point. I make the point more particularly that, where an electricity authority is seeking to take land with the Minister's assistance, it must always be relevant as to the process that TEL has undertaken. For example, if the Minister does not rely on the process that TEL undertook, it is nearly inevitable that they will not succeed in the take in this case. In those circumstances, discovery against the Minister must include discovery against the requiring authority that has sought the Minister's permission to take.

#### **The application for discovery**

[5] Mr Isac does not produce any separate information in relation to the application to admit these new documents, but more particularly says that the evidence that has already been given, particularly by Mr Shaw, can be taken into account. I accept that is the case. Nevertheless, there is no evidence before me that explains why there has been such a significant delay in supplying particularly relevant documents (that includes the documents in **B**). I do not know whether the documents that are now sought to be produced are relevant or not, but they seem to be at a level of generality which is unlikely to be helpful to this Court.

[6] As to the argument as to whether or not lines transmission versus embedded transmission, solar wind, fossil fuels etc is more appropriate, that is an argument which it seems to me is not directly germane to the taking in this case, although, to the extent that it is, it has been addressed by Mr Salmon in his cross-examination of Mr Shaw, and the answers that he has given to those questions are clearly in evidence before this Court. To the extent that he has given evidence about these other reports, then that also



stands as evidence in this case and can be referred to by counsel in closing if they wish.

[7] In the end, the Minister has chosen the evidence it wishes to call in support of its case. It has been warned that documents of TEL may be relevant. It has chosen not to discover documents, but now seeks to rely upon certain documents. Even Mr Isac, in his application, noted to me that the documents may not be relevant.

[8] Accordingly, I am not satisfied there has been an explanation for the delay. I am not satisfied that the documents are highly relevant to the matters we have to decide, and in the circumstances the Court must rely on the processes it sets in place to give a fair basis for the hearing of the case. The attempt to introduce documents at a late stage may have the effect of skewing the entire hearing, and nullifying the processes that are already before us.

[9] Mr Salmon has made the point to me, in opposing an agreed position earlier, that his clients do not wish to have this matter adjourned and wish to proceed. They are entitled to do so. The matter was set down in accordance with directions made by this Court. If one party has not complied with the requirement for discovery that was both explicit and implicit in those Minutes, then it cannot seek to rely on the documents at this late stage. Accordingly, the application for further production of documents by the Minister is refused.

For the court:



W H Johnson  
Registrar<sup>1</sup>

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<sup>1</sup> This decision is issued by the Registrar in the Judge's absence in accordance with s 278(3) of the Resource Management Act 1991.