

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2020] NZEnvC 136

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declarations under s 310 of the Act
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED (ENV-2020-CHC-99) Applicant
AND	NEW ZEALAND ALUMINIUM SMELTERS LIMITED Respondent

Court: Environment Judge J E Borthwick
Sitting alone under section 279 of the Act

Hearing: In Chambers at Christchurch

Date of Order: 25 August 2020

Date of Issue: 25 August 2020

DISCOVERY ORDER OF THE ENVIRONMENT COURT

A: Pursuant to sections 279(1)(b), 278(2), and 279(3)(c) of the Resource Management Act 1991 ("RMA"), Part 8 of the District Court Rules 2014, and Rule 6(a) of the District Court (Access to documents) Rules 2017, the Environment Court orders that The Ouvea Premix Removal Agreement be disclosed to the court and the individuals listed in Schedule 1, attached to and forming part of this order, on the following terms:

- (a) The Ouvea Premix Removal Agreement will be redacted to:
 - (i) exclude any commercially sensitive aspects, but retain any term relating to:



- the removal of ouvea premix from the Maitaura site (and any other site); and
 - the management of ouvea premix pending removal; and
 - any arrangements for placement of ouvea premix once removed.
- (b) The Ouvea Premix Removal Agreement (and any parts of any document that are created that refer to it) are to be kept confidential and only used for the purpose of any judicial settlement conference(s), mediation(s) and/or hearing(s) undertaken in the course of the current proceeding (ENV-2020-CHC-99);
- (c) publication or communication of The Ouvea Premix Removal Agreement in whole or in part to those other than the court or the individuals listed in Schedule 1 is prohibited; and
- (d) this order will remain in force until further order of the Environment Court.

B: Leave is reserved for any party to make an application to amend these orders (if necessary).

REASONS

Introduction

[1] This proceeding concerns an application for declarations filed by the Environmental Defence Society Incorporated (“EDS”) in relation to the movement and storage of dross by-products from the Tiwai smelter site in Bluff to several sites in Maitaura. A judicial settlement conference is scheduled for 8 and 9 September 2020.

[2] On 7 August 2020, counsel for EDS, has applied under s 278(2) of the RMA , requesting the discovery of contractual documents between Gore District Council (“GDC”), Inalco Processing Limited and/or Oxford Edge Limited, that relate to the removal of ouvea premix currently stored in buildings at Kana Street, Maitaura, Southland.

[3] By joint memorandum counsel for EDS, Inalco, Oxford Edge, and GDC, clarified that the information sought to be discovered is The Ouvea Premix Removal Agreement between GDC and Inalco (“the agreement”) and that Oxford Edge is not a party to, or in possession of that agreement.



The application for discovery

[4] GDC is a party to these proceedings, while Inalco and Oxford Edge are both non-parties. The application for discovery against these parties seeks orders of tailored discovery to be made against GDC,¹ and non-party discovery against Inalco and Oxford Edge.²

[5] The joint memorandum states GDC and Inalco have conferred and agreed a redacted version of the agreement to be provided for the purposes of these proceedings. The provision of the agreement however is contingent upon the following agreed undertakings:³

- a. The Redacted Ouvea Premix Removal Agreement will only be released and available to:
 - i. The Court;
 - ii. The individual persons listed in Schedule 1;

And

- b. It (and parts of any documents that are created that refer to the contents of it) are to be kept confidential and only used for the purposes of:
 - i. The judicial settlement conference (scheduled for 8 September 2020) and any further judicial settlement conference or mediation; and
 - ii. Any hearing(s) That might arise out of the current proceeding (ENV-2020-CHC-099), unless its further disclosure is agreed to in writing by Inalco Processing Limited and Gore District Council or its disclosure is required by law.

Law and consideration

[6] The Environment Court and Environment Judges have the same powers that the District Court has in the exercise of its civil jurisdiction.⁴ Many aspects of that jurisdiction are codified in the District Court Rules 2014, including in relation to discovery in Part 8. There are however, no standard requirements for discovery in proceedings before this court. Accordingly, it is necessary to consider and apply the District Court Rules but in the context of this court.

¹ Rule 8.8 District Court Rules 2014.

² Rule 8.21 District Court Rules 2014.

³ Joint memorandum dated 21 August 2020 at [5]; the undertakings were agreed by GDC, Inalco and EDS.

⁴ Section 278 Resource Management Act 1991.



[7] The application for discovery involves both tailored and non-party discovery pursuant to Rules 8.8 and 8.21 respectively. Tailored discovery must be ordered when the interests of justice require an order involving more or less discovery than that required by standard discovery, as in this case where a specific document is sought. Non-party discovery is provided for occasions where a third-party is in control of documents that would have been discoverable had that person been a party to the proceeding. These rules allow a party to make an application for the documents to be disclosed, with the leave of an Environment Judge pursuant to s 278(2) of the RMA.

[8] A party is not entitled to discovery or production as of right and the consent of the party against whom an order is sought will not necessarily lead to the making of such an order.⁵ In *Challenge Charters Ltd v America's Cup Village Ltd* Judge Sheppard held there are three criteria for making the orders for discovery of documents:⁶

- (1) Whether there are grounds for believing that the documents may be, or may have been, in the possession, custody, or power of the party against whom the order is sought.
- (2) Whether there are grounds for believing that the documents are relevant to a matter in question in the proceedings, in the sense of being capable of advancing a party's case or of damaging the case of its adversary. Relevance is to be determined by the pleadings.
- (3) Whether the making of an order is reasonably necessary.

[9] EDS submits the agreement is relevant to the declarations sought. The declarations would require NZAS to remove the ouvea premix from the Maitara site on a priority basis. The agreement is considered directly relevant to the issues in dispute, being the alleged agreement for removal of the ouvea premix from the Maitara sites, including the timeframes for removal, whether ouvea premix is being returned to the Tiwai Smelter site, and any terms and conditions that may apply pending removal from Maitara.

[10] EDS submits also that the respondent pleads and relies upon the agreement in its notice of opposition as a basis for the refusal of the declarations. Non-disclosure of

⁵ *Blackett v Christchurch City Council* C062/99 at 4.

⁶ *Challenge Charters Ltd v America's Cup Village Ltd* A010/99 at [19].



the agreement would therefore put EDS at an unfair disadvantage in terms of its ability to have equal rights to information and participation in the proceedings.

[11] Further EDS submits that the order for discovery is reasonably necessary as it is in the public interest that the agreement is disclosed to EDS and that disclosure would not be disproportionately oppressive or otherwise unjust.

[12] I am satisfied the application for discovery meets the criteria above, but I am mindful that the consideration of whether or not to make an order for discovery is a discretion I am to exercise.⁷ The agreement of GDC and Inalco to provide a redacted copy of the agreement was made contingent upon the court making directions as to the agreement's confidentiality by the court's endorsement of the following undertakings:

- (a) the discovery of the document is limited to only the court and persons identified by the parties in Schedule 1⁸ to this application;
- (b) the agreement and (and parts of any documents created that refer to the contents of it) are to be kept confidential and only used for the purposes of the judicial settlement conference and any further judicial settlement conference(s), mediation(s) or hearing(s) that might arise out of the current proceeding; and
- (c) further disclosure of the agreement or any documents referring to it would only be made with agreement in writing by Inalco and GDC or if its disclosure is required by law.

[13] The joint memorandum records that the parties conferred and agreed commercially sensitive aspects of the agreement would not be able to be disclosed and would be redacted pursuant to District Court Rule 8.28(2). They agree also that the information to be disclosed are any terms relating to the removal of ouvea premix from the Maitara site (and any other site) and the management of the ouvea premix (pending removal) and any arrangements for the placement of ouvea premix (once it is removed).



⁷ *Challenge Charters Ltd v America's Cup Village Ltd* A010/99 at [20].

⁸ The Schedule was amended to include the persons listed with the agreement EDS, Inalco and Gore District Council (see emails to the Registry dated 25 August 2020).

[14] Section 279(3)(c) of the RMA provides the court with the power to make an order of the nature set out in s 42(2) prohibiting or restricting the communication of any information obtained by it during the proceedings and to exclude the public from a hearing where that information is likely to be referred to. Further, Rule 6(a) of the District Court (Access to Court Documents) Rules 2017 is relevant here as it concerns restrictions on access to court files.

[15] While I have not seen the agreement, I accept the advice of the parties that it contains information that bears on the issues before the court. I also accept the parties' advice that it contains information of a commercially sensitive nature. Inalco is a third party to these proceedings, and it is important that its privacy be protected.

[16] I am satisfied that the redacted agreement should be made discoverable. In coming to this decision, I have given weight to the fact that EDS, GDC and Inalco have confirmed they consent to the terms of the orders sought.⁹ I consider it appropriate that the disclosure of the documents be limited by restrictions included in the order to protect the confidentiality of the agreement. While I agree with the contents of the restrictions as sought, they have been redrafted for clarity and completeness. I will reserve leave for any party to apply to amend the orders if they have issue with the amended wording or in the event that there is any further commercially sensitive information contained within the agreement.

[17] The court is grateful for the co-operation demonstrated by the parties determining in advance the aspects of the agreement to be provided and those to be redacted, as this will assist the timely disclosure of the documents prior to the scheduled judicial settlement conference.

Outcome

[18] Having considered the application for discovery, I am satisfied that orders in respect of the tailored and third-party discovery should be made.

⁹ Joint memorandum dated 21 August 2020.



[19] The court orders a copy of The Ouvea Premix Removal Agreement be disclosed for use in these proceedings subject to the restrictions set out in Order [A].




J E Borthwick
Environment Judge

Schedule 1 – List of recipients

- Rob Enright
- Cordelia Woodhouse
- Shay Schlaepfer
- Karenza deSilva
- Stuart Ryan
- Michael Garbett
- Shelley Chadwick
- Gary Taylor, EDS
- Louise Wickham, Emission Impossible (for EDS)
- Stephen Parry, CEO Gore District Council
- Vin Smith, General Manager Policy, Planning and Regulatory Services, Southland Regional Council
- Chris Jenkins, Team Leader Hydrological Response, Southland Regional Council
- Simon Mapp, Compliance Manager, Southland Regional Council
- Eleanor Jamieson
- Rebecca Elvin
- Shaun Lewis, Ministry for the Environment
- Ben Williams;
- Lucy Forrester;
- Stewart Hamilton (for NZAS); and
- Shaun O'Neill (for NZAS)

