BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 142

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 pursuant to s 279 of the Act)
Hearing:	In Chambers at Christchurch
Date of Decision:	2 September 2020
Date of Issue:	2 September 2020

DECISION OF THE ENVIRONMENT COURT
ON APPLICATION FOR WAIVER

A. Under section 281 of the Resource Management Act 1991 the application for waiver of time by Southland Storage Limited is granted and Southland Storage Limited is joined as a s 274 party to the proceedings.

REASONS

The application for waiver

[1] Southland Storage Limited ("SSL") has now filed a s 274 notice dated 28 August 2020 and accompanying application for waiver of time to file dated 24 August 2020.

[2] SSL owns the premises where ouvea premix is currently stored in Mataura. It supports the relief sought by Environmental Defence Society Incorporated ("EDS") as it says it will provide clarity as to the ownership and responsibility of the storage of the ouvea premix.[1] SSL explains its delay in joining is due to the documents initially being delivered to the wrong entity instead of SSL, and subsequently SSL's sole director not being immediately available to consider the application.

[3] No party opposes SSL's application for waiver.[2]

Section 281 of the Act

[4] Under s 281(1)(a)(iia) of the Resource Management Act 1991 a person may apply to the Court for a waiver of the time within which a person may lodge a notice of interest under s 274 of the Act:

> 281 Waivers and directions
>
> (1) A person may apply to the Environment Court to –
>
> (a) Waive a requirement of this Act or another Act or a regulation about–
>
> ...
>
> (iia) the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings;
>
> ...
>
> (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.
>
> ...

[5] Consideration of an application under s 281 is a two-fold process. The court must first determine if any party to the proceeding will be unduly prejudiced if the waiver is granted. Second, if no party is unduly prejudiced, the court must then determine

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[1] SSL s 274 notice dated 28 August 2020.

[2] EDS email received 31 August 2020; Minister for the Environment email received 31 August 2020; Southland Regional Council email received 31 August 2020; NZAS email received 1 September 2020. No response was received from Gore District Council by the prescribed date, so it is assumed it has no issue.

whether it should exercise its discretion to grant the waiver. When considering whether to grant a waiver, relevant factors include the length of the delay, the reasons for the delay, the scheme of the Act relating to public participation, what has occurred in the proceeding and what effect introducing new parties might have on progressing the appeal to resolution.[3]

Discussion

[6] I do not consider that any party will be unduly prejudiced by SSL joining the proceedings. SSL's application has been made in the early stages of this proceeding and importantly, prior to the Judicial Settlement Conference. I am satisfied with SSL's explanation for its late filing of its s 274 notice. As no party opposes and given SSL's clear interest (as the owner of the storage facilities) in this proceeding, I will grant the waiver as sought.

[7] The application for waiver is granted and SSL is joined as a s 274 party.

Directions as to confidentiality and discovery

[8] The court has issued two decisions relating to orders for confidentiality[4] and discovery[5] (attached as Annexures A and B). Owing to the commercial sensitivity and confidentiality of the material referred to in those decisions (known as the Taha Agreement and the Ouvea Premix Removal Agreement), the decisions list the parties who may view the documents. As SSL was not a party at the time those decisions issued, it is not included in those lists.

[9] If SSL wishes to view the documents listed, and is prepared to abide by the conditions outlined in those decisions, it should apply under ss 278 and 279 RMA for discovery of those documents.

[10] As the Judicial Settlement Conference is set down for next week 8-9 September 2020 SSL should apply as soon as possible. It is preferable that the views of the parties to the court orders are sought before the application is filed and that the application set out the draft orders sought. That said, I will direct that if any party

[3] *Omaha Park Ltd v Rodney District Council* EnvC A46/08.
[4] [2020] NZEnvC 132.
[5] [2020] NZEnvC 136.

opposes SSL's application, if made, they are to file a notice of opposition **within two working days** of service.

J E Borthwick
Environment Judge

A

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 132

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: 20 August 2020

Date of Issue: 21 AUG 2020

CONFIDENTIALITY ORDER OF THE ENVIRONMENT COURT

A: Pursuant to sections 279(1)(b), 279(3)(c) and 42(2) of the Resource Management Act 1991 and rule 6(a) of the District Court (Access to Court Documents) Rules 2017, the Environment Court orders that the Taha Agreement (excluding "Schedule C: Prices" and personal/individual contact information) may be disclosed to the court and the individuals listed in Annexure 1, attached to and forming part of this order, on the following terms:

(a) the Taha Agreement (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 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);

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

(b) publication or communication of the Taha Agreement in whole or in part to those other than the court or the individuals listed in Annexure 1 is prohibited;

(c) 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] These proceedings concern an application for declarations filed by the Environmental Defence Society Incorporated ("EDS") in relation to the movement and storage of dross byproducts from the Tiwai smelter site in Bluff to several sites in Mataura. The application is opposed by the respondent New Zealand Aluminium Smelters Limited ("NZAS"). Gore District Council, Southland Regional Council and the Minister for the Environment have joined the proceedings pursuant to s 274 of the Resource Management Act 1991.

[2] In accordance with the court's Record of Telephone Conference dated 31 July 2020, an application has been filed by NZAS seeking confidentiality orders in relation to the Taha Agreement.[1]

The application for confidentiality orders

[3] The Taha Agreement is an agreement between NZAS and Taha International for Industrial Services. It is a large document that contains several schedules and attachments. NZAS considers that all parts of the Taha Agreement are commercially sensitive, with numerous references to particular NZAS/Rio Tinto documents, processes and materials that are confidential.[2] NZAS says it would be impossible to separate out parts that would not be commercially sensitive.

[1] The Taha Agreement is an agreement between NZAS and Taha International for Industrial Services that was signed in September 2010. It is a large document based on a template NZAS/Rio Tinto contract framework containing a number of schedules and attachments.

[2] Memorandum of counsel to accompany application for confidentiality orders dated 7 August 2020 at [5].

[4] Having consulted with the other parties, NZAS proposes to release all parts of the Taha Agreement except the pricing (contained in Schedule C) and any reference to personal/individual contact details. All parties agree to the release of the Taha Agreement on the proposed terms set out below.[3]

[5] Accordingly, NZAS seeks that the court make the following confidentiality orders:[4]

> (a) The Taha Agreement (excluding "Schedule C: Prices" and personal/individual contact information) will only be released and available to:
>
> (i) the Court;
> (i) the individual persons ("Recipients") listed in Annexure 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
> (i) 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 NZAS or its disclosure is agreed to in writing by NZAS or its disclosure is required by law.

Law and consideration

[6] Sections 279(3)(c) and 42(2) of the Resource Management Act 1991 ("RMA") provide the court with the power to make an order 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. The court is not obliged to make such orders, even where those orders are unopposed by the parties. The exercise of any statutory discretion, here whether to make the confidentiality orders sought, must be undertaken in a principled way.

[7] Section 277 RMA provides that all hearings shall be held in public but that the court may (relevantly) require that evidence be heard in private and/or prohibit or restrict

[3] Email of Rob Enright for EDS to the Registry, dated 9 August 2020; Email of Karenza de Silva for Southland Regional Council to the Registry, dated 12 August 2020; Email of Shelley Chadwick for Gore District Council to the Registry, dated 14 August 2020.
[4] Application for confidentiality orders dated 7 August 2020.

the publication of any evidence if it considers the reasons for doing so outweigh the public interest in a public hearing and publication of evidence.

[8] Section 278 of the RMA gives Environment Judges the same powers that the District Court has in the exercise of its jurisdiction which means the District Court Rules are applicable where appropriate. 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.

[9] While I have not seen the Taha Agreement, on this occasion I accept NZAS' advice that the information it contains is commercially sensitive and disclosure of the agreement would cause prejudice to NZAS if it were made publicly available. I am satisfied the list of parties to whom the agreement will be disclosed is comprehensive, and that limiting the use of the agreement to only the judicial settlement conferences or hearings held as part of the proceeding is sensible. I consider the potential prejudice to NZAS outweighs the public interest in publication of the Taha Agreement. In coming to this decision, I have given weight to the fact that EDS, Gore District Council and Southland Regional Council have confirmed they consent to the terms of the orders sought.

[10] The Minister, having joined the proceedings after this application was made, has not yet had an opportunity to review the orders sought, or to advise whether the Ministry consents. As I am satisfied with the content of the orders, I will grant them on the basis that in doing so there will be no prejudice to the Minister. I will, however, reserve leave for the Minister to apply to amend these orders should the Ministry take issue with the substance of the orders.

[11] Further, while I am satisfied with the contents of the orders, they have been redrafted for clarity and completeness.[5] I will reserve leave for any party to apply to amend the orders if they have issue with the amended wording.

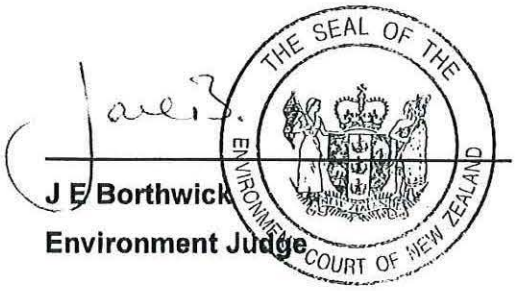
Outcome

[12] Having considered the draft order filed, I am satisfied that the confidentiality

[5] Annexure 1 to notice of application has also been amended to include the representatives of the Minister for the Environment (whose s 274 notice was received after the application was made) and Stephen Parry of Gore District Council (who was omitted from the notice in error).

orders in respect of the Taha Agreement should be made.

[13] The court orders a copy of the Taha Agreement be disclosed for use in these proceedings subject to the restrictions as set out in Order [A].



J E Borthwick
Environment Judge

Annexure 1: Recipients

- Rob Enright;
- Cordelia Woodhouse;
- Shay Schlaepfer;
- Karenza de Silva;
- Stuart Ryan;
- Michael Garbett;
- Shelley Chadwick;
- Gary Taylor, EDS;
- Louise Wickham, Emission Impossible;
- 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; and
- Shaun Lewis (Director, Systems Change and Investments, Ministry for the Environment)

B

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 Mataura 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 Mataura. 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, Mataura, 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.

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[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 Mataura 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 Mataura 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 Mataura.

[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

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[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 1[8] 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 Mataura 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)