

**In the Environment Court
Christchurch Registry**

ENV -2011-CHC-090

Under the Resource Management Act 1991
And in the matter of a resource consent application under sections 87C-1 of the RMA

Between

Meridian Energy Limited

Applicant

And

Hurunui District Council and Canterbury Regional Council

Consent Authorities

And

Others

Interested parties

**Memorandum of Counsel for Meridian Energy Limited -
Directions in relation to witness summons and other
matters**

22 March 2012

BELL GULLY

BARRISTERS AND SOLICITORS

WELLINGTON LEVEL 21, 171 FEATHERSTON STREET
PO BOX 1291, WELLINGTON 6140, DX SX11164, NEW ZEALAND
TEL 64 4 915 6800 FAX 64 4 915 6810

May it please the Court:

Background

1. On 16 March 2012 Mr Carr submitted his list of intended witnesses to the Court and parties as directed.
2. A number of issues arise from this list that require consideration by and may require the intervention of the Court.

Witness summons

3. Part B of Mr Carr's list of witnesses identifies a number of witnesses he proposes "Calling as witness summons".
4. Mr Carr proposes to call some 15 witnesses pursuant to witness summons. These include numerous Meridian executives (including Mr Tim Lusk, the *former* Chief Executive Officer of Meridian) none of whom Meridian intends to call as witnesses; Mr John Foster, Chairman of the Greta Valley School Board of Trustees (which is not a party to the proceeding); several landowners; Mr Kerry Smith, Counsel for Hurunui District Council; Councillor Russell Black and numerous Hurunui District Council officers and politicians including the Mayor and Chief Executive Officer.
5. He does not disclose what it is that he intends to attempt to elicit from these witnesses or what materials they should bring with them to Court.
6. Meridian is concerned that the proposal by Mr Carr to summons most, if not all, of these persons is vexatious and is likely to amount to an abuse of the Court process. At the very least calling these witnesses is likely to waste valuable Court time and resources on matters that will have no bearing on the merits of the proposal that is before the Court.

Legal Principles

7. The Environment Court has an inherent power to decide whether or not to issue a witness summons.¹
8. The Court may decline to issue, or may set aside a witness summons where the evidence that will be presented by the witness will be unnecessary to a determination of the matter.
9. In *Tuck v Registrar of District Court* (1981) 3PRNZ459 Chilwill J considered that a witness summons could be set aside if what is sought is irrelevant, oppressive or amounts to an abusive process.
10. In *Palmerston North CC (Re an application)*, the Court held that issuing a summons against Councillors and Officers of the Council in order to seek evidence from them as to an alternative roading corridor was irrelevant to the proceedings at issue. Accordingly, the Court stated it would be beyond its jurisdiction and an abuse of process of the Court to issue the summons that was sought.
11. In *Mainpower NZ Limited v Hurunui District Council* [2011] NZENVC133, the Environment Court refused an application made by Mount Cass Ridge Protection Society to summon two experts to attend a hearing and give oral evidence. The Court found one of the objectives of the Rules was to secure a just, speedy and inexpensive determination of any proceedings.

Meridian's Concerns

12. At this stage it is impossible to determine with certainty whether some or all of the above considerations are applicable to the witnesses that Mr Carr proposes to call.
13. The intention to summons Mr Smith is highly likely to be vexatious or an abuse of the process of the Court. With all respect to Mr Smith, it is difficult to see what evidence he could possibly advance that would

¹ Palmerston North CC (Re an application) WO45/09

assist the Court with its determination of the primary issues that are before the Court.

14. Similarly, it seems that a number of the other witnesses Mr Carr proposes to summons would or could add little, if any, assistance to the Court to resolve the substantive matters brought into issue by the present application (examples include the Chairman of the Greta Valley School Board of Trustees – which is no longer a party to the proceedings, Meridian's former CEO – who has no ongoing mandate to speak for Meridian about the proposal, The Mayor and Chief Executive Officer of Hurunui District and others).
15. Mr Carr seems to be suggesting that it would assist the Court if a number of Hurunui District Council officers provide evidence, when the Council has already identified and engaged independent expert witnesses who it considers are appropriate to report on the issues arising from the present proposal, and has filed evidence from those experts. What purpose summoning landowners who consent to the proposal could possibly serve also escapes us.
16. One of the proposed witnesses by summons is the Council's Chief Transportation Engineer. Any evidence he may give is potentially of a technical nature, and in order to avoid potential delay or embarrassment at the hearing, an indication as to what evidence he is intended to adduce is required.
17. Another witness who Mr Carr would like to summons is already being called by another party (Councillor Black is being called by GCAWT).
18. If the proposed summons were to be granted, other parties may not be given a fair opportunity to test evidence in cross examination. This would almost inevitably add delay and cost to the proceedings.
19. It appears to us that Mr Carr is on a fishing expedition rather than focusing his case on how the proposal affects him and his interests or the wider community. This cannot be in the interests of justice, will result in unnecessary waste of time and resources, and is likely to be an abuse of process.

20. In order to enable Meridian and the other parties, including those persons whom Mr Carr intends to subject to a witness summons, an opportunity to consider whether or not an application should be made to the Court to oppose or set aside any such summons, Meridian seeks the following directions in relation to each witness whom Mr Carr has stated he intends to summons:

By 27 April 2012:

- (i) Mr Carr is to produce a 'will say' brief for each witness regarding the topics he intends the witness to address, including an outline of the issue(s) arising from the application that each witness will be assisting the Court to resolve; and
- (ii) A list of the documents and/or other material Mr Carr would like each witness to produce at Court.

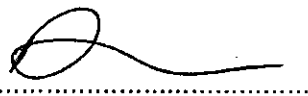
Other matters

Tipapa landscape assessment

21. In his note 4 to the list of witnesses Mr Carr asserts Meridian's Mr Smales has verbally and unconditionally undertaken to pay the cost of Mr Carr employing a landscape expert to carry out a landscape assessment of the impact of Hurunui Wind on Tipapa.
22. Mr Smales denies this undertaking was given, as do other witnesses present at the meeting at which this undertaking was supposedly given.
23. Mr Carr says he has appointed a landscape expert and expects Meridian to pay this expert's costs, so far as they relate to Tipapa estate.
24. Meridian would like to make it clear to Mr Carr before he incurs any such costs that (s.285 aside) Meridian will not be meeting the costs of his engagement of this or any other witness.

Alternative access

25. Mr Carr refers (in his note 5) to information that he has requested in relation to another access to the site that does not form part of the application. He says that until he has this information he is unable to determine whether or not he will call evidence in relation to this alternative access. Meridian has provided information on this other access to Mr Carr.
26. For the avoidance of any doubt, Meridian wishes to make it clear that for a variety of reasons it is not pursuing any other access option than the one that is part of the application (which has the approval of NZTA, Hurunui District Council's traffic expert and Meridian's own traffic expert).



.....

A J L Beatson

Counsel for Meridian Energy Limited

22 March 2012