

**IN THE MATTER** of a resource consent application under  
Section 87C(1) of the Resource  
Management Act 1991 (**the Act**)

**BETWEEN** MERIDIAN ENERGY LIMITED  
(ENV-2011-CHC-000090)

Applicant

**AND** HURUNUI DISTRICT COUNCIL  
CANTERBURY REGIONAL COUNCIL

Respondents

**BEFORE THE ENVIRONMENT COURT**

Court: Environment Judge M Harland, in Chambers on the papers

Date: 15 June 2012

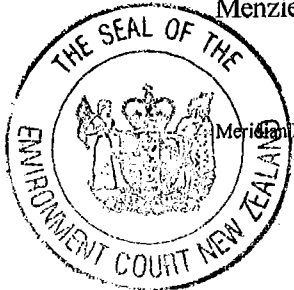
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**MINUTE OF THE ENVIRONMENT COURT IN RELATION TO  
ATTENDANCE OF MR CARR  
AT REMAINING EXPERT CAUCUSSING SESSIONS**

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**Introduction**

[1] Commissioner Menzies was appointed by the Court to undertake the conferencing of expert witnesses ( sometimes referred to as "caucusing") in relation to this proceeding, covering the topics of noise, tourism, traffic, landscape and valuation. The first round of conferencing meetings was held on 22, 24, 25 and 31 May and 1 June in Christchurch. One meeting was held in Auckland on 30 May. Mr Carr for Tipapa Ltd ("**Tipapa**") attended all the Christchurch meetings. Further meetings were required. Thereafter, Commissioner Menzies indicated that she did not wish Mr Carr to attend any other expert witness



conferencing meetings apart from in relation to part of the landscape conferencing meeting, because she formed the view that Mr Carr did not have the necessary expertise to justify his attendance at the health, traffic and noise meetings which remained. Mr Carr challenged this decision. On 29 May I directed that Mr Carr was not authorised to attend the remaining expert conferencing meetings unless permitted to do so by Commissioner Menzies. I indicated that I would issue a Minute outlining my reasons. This Minute records my reasons, and has been delayed by other work commitments.

### **Background**

[2] I am now responsible for the overall management of this file, that task having previously been fulfilled by Judge Borthwick. During my absence on leave Judge Whiting assisted and issued two Minutes directly relevant to expert witness conferencing.<sup>1</sup>

[3] In his Minute of 17 May at paragraph [8] Judge Whiting authorised Mr Carr to attend the conferencing meetings for tourism, noise, traffic, valuation and landscape. Judge Whiting said:

He may only participate in areas within his expertise or with the consent of the facilitator.

[4] This Minute was met by a memorandum from Meridian dated 18 May 2012. The concern of counsel for Meridian was about the expertise Mr Carr claimed to have, and the fact that he is acting for himself (albeit as a director of Tipapa). Essentially Meridian sought to exclude Mr Carr from the expert conferencing meetings.

[5] Judge Whiting issued a further Minute dated 18 May 2012. At paragraph [6] of that Minute Judge Whiting said:

Often parties who act for themselves have some degree of expertise that is within the provenance of expert witnesses. To exclude such people from an expert caucusing meeting should be done with caution. In this case the meeting is being facilitated by a commissioner with considerable experience. I am confident that the commissioner is well able to discern what areas of expertise, if any, Mr Carr has, and whether he can contribute to the expert caucusing in a meaningful manner. Further, the commissioner is well able to ensure that Mr Carr, as a party, does not participate in areas outside of his alleged area of expertise.



Minutes dated 17 and 18 May 2012

[6] Judge Whiting permitted Mr Carr to attend the meetings “subject to the constraints that may be imposed by the Commissioner undertaking the facilitation.”<sup>2</sup>

[7] Mr Carr then attended the expert conferencing meetings in relation to noise on 22 May, traffic on 24 May, valuation on 25 May, and both landscape meetings on 31 May and 1 June.

[8] After these four meetings, further meetings were arranged for the experts dealing with the topics of traffic, noise and landscape.

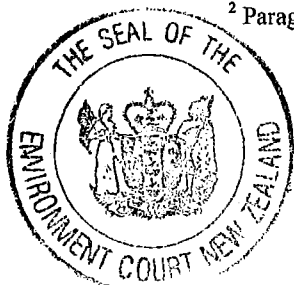
[9] Commissioner Menzies determined that she did not wish Mr Carr to attend any other expert witness meetings, as in her view he did not have the necessary expertise. Commissioner Menzies agreed that Mr Carr should attend the landscape experts’ briefing on 31 May in the morning, together with eleven other local people from Glenmark. The intention was to enable each of these people to give a 15 minute briefing to the landscape expert witnesses who were present, and to allow the experts up to half an hour in total to ask questions of clarification arising from the presentations.

[10] I directed that Mr Carr was not to attend the conferencing meetings unless permitted to do so by Commissioner Menzies. Mr Carr challenged that direction, referring to paragraph [10] of Judge Whiting’s Minute of 17 May and paragraph [6] of his Minute of 18 May. Mr Carr contended that Judge Whiting granted him leave to participate either in areas within his expertise, or with the consent of the facilitator. To this end Mr Carr asserted that he does have expertise on current noise levels at Tipapa, Tipapa’s landscape, and in relation to traffic. He wished to attend to raise the subject of sun-strike, present photographs as evidence of that, and to participate in relation to the topic of speed limits along Motunua Beach Road, which Mr Carr (a traffic expert for Meridian) agreed to investigate following the first traffic conferencing meeting.

[11] I directed the Registry to advise Mr Carr that my direction that he not attend the further conferencing meetings unless permitted to do so by Commissioner Menzies superseded Judge Whiting’s Minutes.

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<sup>2</sup> Paragraph [7], Minute of 18 May 2012



### **Expert conferences**

[12] The conferencing or caucusing of expert witnesses is a new procedural tool included in the Environment Court Practice Note of November 2011 at paragraph 5.4. Paragraph 5.4.1 of the Practice Notes outlines:

5.4.1 Expert conferencing is a process by which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement. Such a conference is a structured discussion between peers within a field of expertise which can narrow points of difference and save hearing time (and costs). All experts have a duty to ensure that any conference is a genuine dialogue between them in a common effort to reach agreement about the relevant facts and issues. It should be understood that the term 'expert' means a person who would be recognised by the Court as an expert in his or her field by reason of relevant qualifications and/or experience. Persons not having such qualifications and experience will not participate in conferences unless otherwise agreed by all parties or directed by the Court.

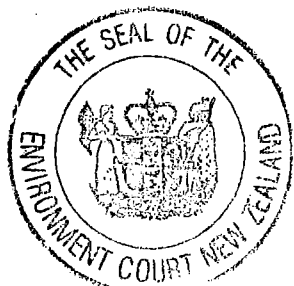
[13] The technique is used to make more efficient use of the Court's time at a hearing, given that the Court is concerned to only determine those matters relevant to issues in the proceeding that are in contention.

[14] The Practice Note requires expert conferencing to occur in circumstances where the experts remain uninfluenced by their client's perspective on the proceedings. Counsel are not permitted to attend these conferences.

[15] If the experts agree that certain issues are not in contention, then this concession binds only the experts who have attended, and not any experts who have not attended. The concessions also bind the experts' clients, because they are made within the bounds of the expert knowledge of their discipline.

### **Expert evidence in Court**

[16] Witnesses who are not expert are able to give evidence about matters of fact but not opinion. Expert witnesses are, however, able to give their opinion on factual matters, providing the opinion is within their area of expertise. Whether a witness is an expert depends on their qualifications within a purported area of expertise, and their experience. In the Environment Court expert evidence is routinely presented, but the question of whether a witness is an expert is always a matter of factual determination for the Court. A witness is



not an expert because they believe themselves to be so. Whether a person has sufficient expertise to qualify as an expert witness is one to be objectively assessed by the Court.

[17] The topic of expert evidence is a large one and the intricacies of it are not able to be traversed in a Minute.

### Mr Carr's expertise

[18] Mr Carr is emphatic that he is an expert in matters relating to Tipapa. Even if he is right in this (and I make no determination on that issue at this time), it is a different question to establish expertise in the expert disciplines that form part of the expert conferencing meetings currently being held. Commissioner Menzies indicated that Mr Carr has been unable to establish that he has qualifications in any of the areas of expertise of a formal or informal nature that would mean that he could constructively contribute to the technical matters that would need to be considered during the meetings.

[19] It is inappropriate for me as the potentially presiding Judge to delve into any matters relating to the substance of the matters discussed at the expert conferencing sessions. The Practice Note refers to these sessions being "without prejudice". It is for this reason, no doubt, that Judge Whiting was content to leave Mr Carr's participation as a matter to be determined by Commissioner Menzies, who is well familiar with the kinds of expertise the Court usually deals with, and was well placed to form a judgment about whether or not Mr Carr's participation in these sessions would be constructive or not.

### Conclusion

[20] The expert evidence to be called in the case is only part of the evidence the Court will hear and will need to determine. If there are areas of disagreement identified in the expert conferencing statements, Tipapa, through Mr Carr, is able to cross-examine the experts during the hearing. Likewise if the witness is not Tipapa's witness, Mr Carr can cross-examine about the agreements reached if he disagrees with them.

**DATED** this 15th day of June 2012



M Harland  
Environment Judge

