

Decision No. C 169/2005

IN THE MATTER of the Electricity Act 1992

AND

IN THE MATTER of an application pursuant to section 23F of the Act

BETWEEN ELECTRICITY ASHBURTON LIMITED

(ENV C 34/05)

Applicant

AND

G T BROOK AND C A MUFF

Respondents

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)

Environment Commissioner C E Manning

Hearing at Christchurch on 30 June 2005

Appearances: Peter Whiteside and Philip Maw for Electricity Ashburton Limited  
Edwin Wylie QC for G T Brook and C A Muff

## DECISION

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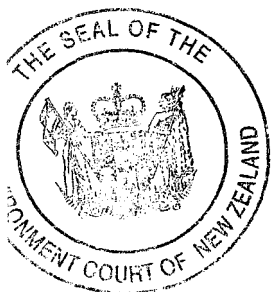
### *Introduction*

[1] This case raises complex questions about ownership of disconnected power lines on private land. The land in question is a small rural property situated at 58 Buckleys Terrace, Tinwald, south of the Ashburton River. It is owned by Mr Brook and Ms Muff, the respondents, contains 9.0129 hectares and comprises all the land in Certificates of Title 570/72 and 573/60 (“the Brook/Muff land”).

[2] The Brook/Muff land is a rectangle between a road called Buckleys Terrace and the Ashburton River. Towards the southern end of the Brook/Muff land another road - Tarbottons Road - intersects obliquely with Buckley Terrace. It is uncontentious that in the past - prior to 1993 - two 110 kilovolt (“kV”) lines owned by Transpower New Zealand Limited (“Transpower”) conveyed electricity, generated at Lake Coleridge, from Ashburton to Timaru. In this vicinity the lines ran through Ashburton, across the Ashburton River, across the Brook/Muff land and then over Buckleys Terrace and south along Tarbottons Road. To carry the lines over the Ashburton River there were three steel towers: one on the north (Ashburton) side, the second in the middle of the river, and the third on the Brook/Muff land. To avoid confusion we note that, for technical reasons, each “line” consists of three wires<sup>1</sup>.

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<sup>1</sup> This is clearly seen on photograph ‘A’ attached to the affidavit of Mr B J Quinn dated 23 June 2005.



[3] We should also record that there is another (33 kV) line running from south-east to north-west across the Brook/Muff land but that is irrelevant to this proceeding.

[4] The applicant (“EAL”) is a duly incorporated company having its registered office at Ashburton and carrying on business as a line operator as defined in section 2 of the Electricity Act 1992 (“the Act”). On 11 February 2005 Electricity Ashburton Limited applied for a declaration:

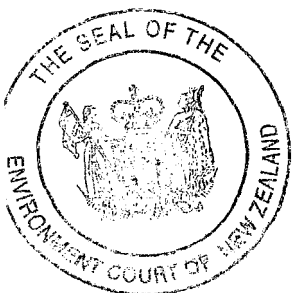
That the Applicant is entitled to enter onto the Respondent’s land . . . for the purpose of gaining access to the steel lattice tower that it owns on the Respondents’ land and reinstate the conductor from the point marked  on Exhibit C of Mr Brendon John Quinn’s affidavit along the course of the blue lines to the points marked “X” at the end of those lines and onwards to cabling installations marked “O” at the corner of Tarbottons Road and Buckleys Terrace pursuant to Section 23 of the Electricity Act 1968.

[5] The initial application was incorrectly worded because the statute it refers to - the Electricity Act 1968 - was repealed<sup>2</sup> by the Electricity Act 1992. Secondly, the declaration was said to be sought under the Resource Management Act 1991 which does not confer power upon the Court to make declarations about the Electricity Act 1968.

[6] The proceeding was at first set down for a hearing on Friday 13 May 2005. The respondents applied for an adjournment, which was granted after a hearing in Chambers although the parties were warned that a consequence of the adjournment might be a delay in both the hearing and the decision due to the Court’s very full timetable from 1 July 2005. During the conference in Chambers, Mr Whiteside, counsel for EAL, accepted that EAL’s substantive application should be amended. He volunteered to lodge a statement of claim, to which the respondents could respond with a statement of defence. Dr Wylie QC, counsel for the respondents agreed. A timetable for those statements and any further affidavits was set accordingly.

[7] In its statement of claim EAL now seeks as a remedy:

<sup>2</sup> Section 173 of the Electricity Act 1992 and the Third Schedule to that Act.



A declaration pursuant to Section 23F(6) of the Electricity Act 1992 that it is entitled through its servants, agents or employees to enter upon the Respondents' land at 58 Buckleys Terrace, Ashburton to replace or upgrade its existing works on the said land to allow the conveyance of electricity along Tarbottons Road to the Applicant's premises at Kermode Street, Ashburton by replacing the existing lines across the said land, replacing the four wooden poles on the said land and placing new lines between the four wooden poles and the Applicant's poles in Tarbottons Road.

Those orders are opposed by the respondents who have put the applicant to proof of nearly everything it alleges.

[8] Affidavits have been lodged by the parties as follows:

- (a) three by Mr Brendon John Quinn, the Network Manager for EAL, dated respectively 2 February 2005, 22 April 2005 and 23 June 2005;
- (b) by Mr G T Brook, one of the landowners, dated 15 March 2005;
- (c) by Mr K Flynn, Projects Manager for EAL, dated 22 April 2005.

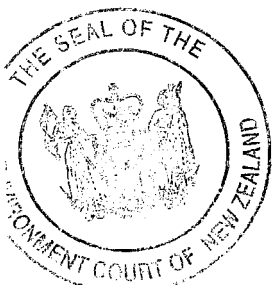
We found Mr Quinn to be an honest, if slightly confusing<sup>3</sup> witness and largely accept his version of the facts since he is the only witness who actually was part of the crucial events in 1993.

[9] Before we turn to the evidence and law relating to the issues and because the full facts of EAL's involvement with the Brooks/Muff land and the electrical works in the area are quite confusing, we will first set out the competing contentions and clear away some irrelevancies. All questions of fact are decided on the balance of probabilities.

***EAL's allegations***

[10] EAL alleges first that as at 1 January 1993 the 110 kV lines ran over the respondents' land and there were, amongst other structures on the Brook/Muff land:

- (1) four wooden poles (two pairs of two) close to the south-western boundary adjoining Buckleys Terrace;



<sup>3</sup> Not surprisingly since he was being asked to recollect events that occurred more than 12 years ago.

- (2) a single steel lattice work tower close to the north-eastern boundary (which runs parallel with the Ashburton River);
- (3) two power lines (six wires) running from a pole on the Buckleys Terrace/Tarbottons Road corner to the wooden poles, then to the steel lattice tower and across the boundary of the Brook/Muff land and across the Ashburton River to another tower.

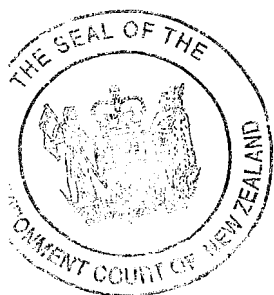
(together (1) to (3) are called “the fittings”<sup>4</sup>). Before 1993 the fittings belonged to Transpower New Zealand Limited. EAL contends that they comprise “existing works” as defined in section 2(1) of the Electricity Act 1993, with the alleged result that an easement is not required<sup>5</sup> from the landowner in respect of them.

[11] EAL also alleges that between 18 and 31 March 1993 it purchased the fittings from Transpower New Zealand Limited for the total sum of \$21,375.00. EAL then states that on or about 22 March 1993 it removed the lines running south(west) from the four wooden poles to Tarbottons Road. The remaining fittings have remained on the Brooke/Muff land since that time. In other words, the 110 kV lines now start at four poles on the north side of the Ashburton River then cross the river supported by three steel pylons, run south-west across the Brook/Muff land and end at the four poles on the Brook/Muff land. The fittings, as earlier defined, minus the wires (now removed) that used to run from the four poles on the Brook/Muff land to a pole on Tarbottons Road are called “the current fittings”. The latter were present on the Brook/Muff land as at the hearing date.

[12] Following the removal of the lines north and south of the Brook/Muff land the applicant has constructed a 33 kV line along Tarbottons Road with the claimed intention of connecting that line back to the four wooden poles on the respondents’ land and then running it over the Ashburton River to the north. The applicant wishes to replace what remains of the wires (as part of what it says are the existing works) to allow the conveyance of electricity across the Ashburton River and the Brook/Muff land and then along Tarbottons Road by:

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<sup>4</sup> To use the phrase in section 2(1) of the Electricity Act 1992.  
<sup>5</sup> Section 22 of the Electricity Act 1992.



- replacing the existing lines over the Brook/Muff land;
- replacing the existing four wooden poles on the Brook/Muff land with four new wooden poles; and
- placing new lines between the four wooden poles and Tarbottons Road.

- together called “the proposed works”.

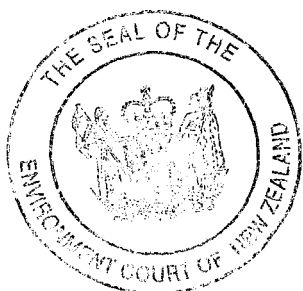
[13] EAL claims it is entitled to enter upon the respondents’ land for the purpose of maintaining or operating the current fittings and to carry out the proposed works under section 23(1)(a) and (3) of the Electricity Act 1992. It advised the respondents that it wished to enter the Brook/Muff land for the purpose of maintaining or completing the works. The respondents denied that EAL has any right to enter their land so EAL referred the dispute to the Environment Court.

*The landowners’ concerns*

[14] Mr Brook and Ms Muff purchased their land in 1997. They have four broad concerns<sup>6</sup> about EAL’s proposal. We summarise them in the order they are stated in Mr Brook’s affidavit.

[15] First, they are worried about the effects on their health of having more electricity running across their land:

The wires running from the wooden poles to the three latticework towers are 110 kw [sic] lines. As we understand it, Electricity Ashburton are proposing to connect to these existing wires, and to run 66 kilowatts of power through these lines to the pole and existing wiring on the corner of Buckleys Road and Tarbottons Road. That power will then be sent to the Lismore-Lagmore area. The line will initially take 66 kw but will have the capability to be upgraded to 110 kw. We are concerned about the potential adverse effects on our health. Our existing house property is only some 100 or so metres from the wooden poles and the route which the wires would take if they are to go over our property as sought by Electricity Ashburton. We would very much prefer that high voltage electricity should not be run over our property at all and in particular that it should not be in close proximity to our house.



<sup>6</sup> Affidavit of Mr Brook dated 15 March 2005 paras 29-31.

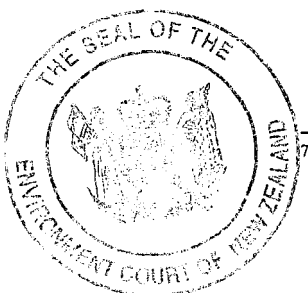
We refer to this later when considering whether the land is injuriously affected; but at this stage we comment on two aspects of that passage so that they do not cause confusion:

- all references to “kw” (kilowatts) should be to kilovolts (kV);
- Mr Quinn has stated that the proposed new lines are intended to conduct 33 kV, not 66 kV, although Mr Quinn conceded they could in future be used to convey 66 kV. We have no reason to doubt Mr Quinn on that, since there is a written record from 1993 which we will refer to shortly which corroborates that.

[16] Secondly, it is common ground that since 1997 EAL has negotiated with the respondents to purchase an easement for the proposed lines and the existing fittings on the Brook/Muff land. Dr Wylie was critical of EAL in not disclosing the negotiations in Mr Quinn’s first affidavit. However, the history of negotiations for an easement are irrelevant to sections 22 and 23 of the Electricity Act 1992. If there was an agreement between the landowners and EAL it might, in effect<sup>7</sup>, over-ride sections 23A to 23D of the Act but there is no such agreement or easement. All this Court can do is decide whether or not EAL has a right to go onto the Brook/Muff land or not, and, if so, what EAL may do when it is there.

[17] Mr Brook then describes how the respondents have changed their position:

... after negotiations broke down in late 1998, we assumed that Electricity Ashburton had abandoned its proposals. At that stage it seemed clear that Electricity Ashburton thought it needed an easement. There had been no assertion that it was entitled to reconnect the lines through any statutory provision. In reliance on this we built a building pad on our property which is immediately beneath the line of the proposed wires which Electricity Ashburton now wishes to run across our property. We have spent some thousands of dollars in doing this. I should explain that our property is part of an old river terrace. Any house has to be on a building pad built up to road level to avoid any flooding problems. We have obtained a lot of free fill and we have used that to build up a substantial pad. We have had to hire an excavator and a tractor,




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Section 23E of the Electricity Act 1992.

and I have spent many hours of work preparing and building up the pad. I would estimate our costs would have been in the vicinity of some \$15,000. We already have two titles. Our land is zoned Rural A. It is in a flood zone. I have approached a surveyor, and he has confirmed that we can realign the boundaries to create a 20 acre lot and a 4 acre lot. Our plan for some years has been to realign the boundaries of our titles, and to build a new house on the pad which we have created. The site of the pad is ideal, because it gives uninterrupted views of the mountains. Our intention has been to either sell the existing house on the new title to be created, or alternatively to retain the property, and rent the house. The latest assertions by Electricity Ashburton have thrown all of our plans into confusion.

...

So, thirdly, the respondents say their land - and in particular their new building platform - will be injuriously affected if lines are strung from the end of Tarbottons Road across their land to the four wooden poles (replaced) and then electricity is conveyed through the wires.

[18] Finally, and this is a crucial issue in this case, the respondents say that EAL does not own all the current fittings or the existing works within the meaning of the Electricity Act.

***Findings on the evidence***

[19] There is no dispute that Transpower owned the fittings on the Brook/Muff land as at 1 January 1993. We find that Transpower intended to remove at least some of the fittings (the wires) shortly after that date. The evidence is that Transpower entered into dismantling contracts for its two 110 kV lines from Dromore (north of Ashburton) to Hinds further south at some time in early 1993 with a joint venture including EAL. The EAL Staff Newsletters of March and May 1993 state<sup>8</sup> respectively:

In a Joint Venture with Electrix Ltd, Electricity Ashburton's Construction & Maintenance Division were recently awarded a subcontract to dismantle a section of the above lines between Dromore corner to the north and Tilsons Road (crossing of State Highway One) between Hinds and Rangitata. The value of this work is over \$200,000.



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Exhibit "F" to the affidavit of Mr Quinn dated 2 February 2005.



Work commenced in early February and all removal of conductors and insulators will be completed by the end of March. Pole removal and ground restoration is being carried out by Doug Hood Ltd and should be finished by the end of April  
(March 1993)

and

Dismantling of Transpower 110 kV Line

The Joint Venture contract between Electrix Ltd and Electricity Ashburton is now successfully finished and it has been a beneficial experience for our staff to work alongside staff from another company.

Doug Hood Ltd carried out the pole removal as a sub-contract for the Joint Venture and has now removed all 570 poles from our section of the line.

...

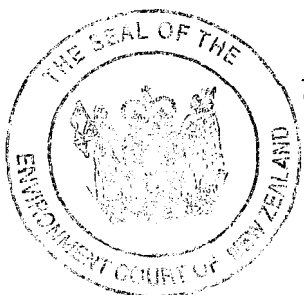
(May 1993)

[20] Dr Wylie submitted that Transpower was undertaking the dismantling, but that is incorrect. We find from the evidence quoted above that there was a contract (“the joint venture contract”) between Transpower (as owner of the lines) and a Joint Venture (comprising Electrix Limited and EAL) to dismantle a section of the lines by removing the wires and poles (but not any steel pylons); and that the joint venture subcontracted removal of the poles to a third party, and removal of the conductors (wires) and insulators to EAL.

[21] The reason we find that the joint venture contract did not include removal of any steel pylons is that on 15 February 1993 Transpower made an offer to EAL. The offer is contained in a letter<sup>9</sup> dated 15 February 1993 from Transpower to EAL which stated:

ASHBURTON 110KV RIVER CROSSING TOWERS

This is to confirm telephone conversation Hitchcock/Quinn 11 February 1993.



<sup>9</sup> Signed by Mr E F Hitchcock, for Transpower. It is Exhibit “D” to B J Quinn’s affidavit of 2 February 2005.

I have obtained further information from Chandra Kumble as to the value and dismantling cost of these towers and am now able to make you an offer for the sale of them.

Chandra's assessment of the upper limit of the value of these towers is that they would have a value of around \$25,000 each dismantled and that the dismantling cost would be around \$45,000.00. This leaves a net value of \$30,000.00. These estimates are subject to significant uncertainty especially the value of the recovered items and the cost of refurbishing them for use elsewhere. Trans Power therefore offers these three 110kV steel lattice towers to you for half the estimated value or \$15,000.00 plus GST.

The towers would be offered to you on an as is, where is, basis after the conductor between them has been removed. Trans Power would offer no guarantee as their suitability for any particular use or to their physical condition, although we would provide assistance to help you determine their condition. Should you in future decide to remove or dismantle them then the responsibility for removing the foundations or satisfying other legal requirements would be with Electricity Ashburton.

As previously discussed, Trans Power wishes to proceed with its dismantling contracts at the earliest practical time. Please advise urgently whether you wish to proceed with purchasing these towers on the conditions proposed.

Please contact me if you would like to discuss this matter further.

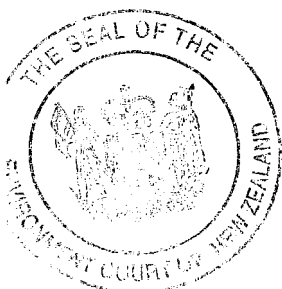
Yours faithfully

TRANS POWER NEW ZEALAND LIMITED

E.F. HITCHCOCK

Customer Services Manager - Christchurch

The letter is an offer only, and it is an offer to sell the three steel pylons "as is" and after all the wires (described as "the conductor") had been removed. There is a hearsay statement from a Transpower solicitor in a letter" dated 27 April 2004 to Mr Brooks and Ms Muff that the offer was accepted on 2 March 1993, but for reasons we go into shortly, we doubt if the Transpower/EAL contract was as simple as that.



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<sup>10</sup> Exhibit "K" to Mr Brook's affidavit of 15 March 2005.

[22] Some bucolic notes in an EAL “worksheet”<sup>11</sup> - actually a diary entry dated 22 March 1993 - show that EAL removed a short section of the lines - from the south-western end of the Brook/Muff land on or by that date.

[23] The evidence that EAL did purchase the fittings other than the pylons is the copy<sup>12</sup> of an internal EAL computer posting called “Creditors Masterfiles”. That contains entries as follows (relevantly i.e. quoting the entries on which Mr Quinn was cross-examined):

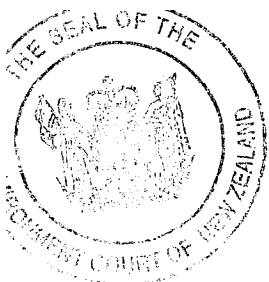
|         |          | Electricity Ashburton |                               |       |           |                     |           |
|---------|----------|-----------------------|-------------------------------|-------|-----------|---------------------|-----------|
| File no | Ø1       | Crml                  | Creditors Masterfiles         |       |           | Transaction Inquiry |           |
| Rec no  | 861Ø     |                       | TRANS POWER (N.Z.) LTD        |       |           | Last no. 861Ø       |           |
| Line    | Date     | Type                  | Bch Ref                       | Ref   | Their Ref | Amount              | Balance   |
| ...     |          |                       |                               |       |           |                     |           |
| 3Ø633   | 31/Ø3/93 | 1 INV                 | 53ØØ3                         | 53ØØ3 | 1163Ø     | 45ØØ.ØØ-            | 45ØØ.ØØ-  |
|         |          |                       | ASH RIVER CROSSING HARDWARE   |       |           |                     |           |
|         |          | GL:8Ø8245             | GST Charge                    |       |           |                     | 5ØØ.ØØ    |
|         |          | GL: 181455            | Invalid GL Acc                |       |           |                     | 4,ØØØ.ØØ  |
| 3Ø636   | 18/Ø3/93 | 1 INV                 | 53ØØ3                         | 53ØØ3 | 116Ø1     | 16875.ØØ-           | 21375.ØØ- |
|         |          |                       | STEEL TOWERS – RIVER CROSSING |       |           |                     |           |
|         |          | GL: 8Ø8245            | GST Charge                    |       |           |                     | 1,875.ØØ  |
|         |          | GL: 181455            | Invalid GL Acc                |       |           |                     | 15,ØØØ.ØØ |
| ...     |          |                       |                               |       |           |                     |           |

The two key dates in that document (which has events out of chronological order) are:

- 18 March 1993 when EAL paid for the three steel towers; and
- 31 March 1993 when EAL paid \$4,000 plus GST for the “Ashburton River Crossing” hardware.

[24] In his second affidavit Mr Quinn’s explanation of the purchase was<sup>13</sup>:

... in the Applicant’s initial dealings with Transpower we negotiated to purchase just 3 steel towers with the Applicant connecting its own conductor. However, as negotiations proceeded the Applicant ended up purchasing the conductor lines as well. Having purchased the lines it was also necessary to purchase the wooden poles to support the conductor; otherwise the steel towers



<sup>11</sup> Exhibit “E” to B J Quinn’s affidavit of 2 February 2005.  
<sup>12</sup> Mr G J Quinn, Affidavit of 2 February 2005, Ex “I”.  
<sup>13</sup> B J Quinn, Affidavit dated 22 April 2005, paras 12 and 13.

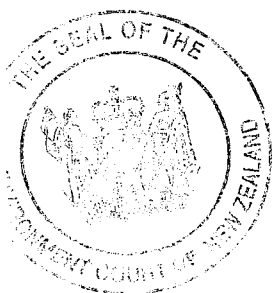
may have collapsed, Exhibit I in my first affidavit sworn on 2 February 2005 shows the purchase price of the wooden poles and the lines at \$4,500.00 including GST . . .

It was certainly never the intention of the Applicant to acquire the steel towers for scrap metal purposes. If that had been the Applicant's intention we would have onsold the towers. The use of a value for the towers at the time of purchase by the Applicant based on a scrap value approach was merely for the want of any other basis for valuing the towers. If Transpower had been able to sell the towers and remove them then their value would have simply been as for scrap metal. However, the Applicant always had a purpose and use in mind for the steel towers as set out previously in this affidavit.

[25] Dr Wylie accepted that the sale by Transpower to EAL was carried out in part by telephone. But he then submitted that there is no evidence before the Court as to the nature of those discussions. That is not quite correct as the previous paragraph shows. In any event, that lack of evidence about the content of the sale and purchase agreement was remedied in the following passage in Dr Wylie's cross-examination of Mr Quinn<sup>14</sup>:

- Q. If Transpower wanted the wiring removed between the three steel lattice-work towers, and were prepared to sell you the towers after that wiring had been removed, why would it have agreed to sell you the wiring between the four wooden poles and the steel lattice-work tower on the Brook and Muff land?
- A. That was part of the further negotiations we had with them.
- Q. What were you going to do with one section of wiring?
- A. No. the wires from the four poles on the Brook-Muff property, through the towers to the four poles on the other side. The reason for that was the practicalities - we were going to restring the power pylons with new conductor. The practicality was it was a lot easier to pull the conductors through using the old conductor as drawline. So we went back and we agreed to buy [the] wire and termination structure. There is a subsequent invoice for about \$4500 which covers that.

We conclude that the Transpower offer in its letter of 15 February was not accepted in its terms, but a counter-offer was made by EAL that the wires should remain, and Transpower accepted that. Any complications for the Transpower/Joint Venture agreement to dismantle the lines would be readily dealt with, since there would have been less work for the joint venture if it could leave some lines still strung up across the Ashburton River.



<sup>14</sup> Transcript pp. 11-12.

[26] The “invoice” Mr Quinn referred to was in fact not an invoice but the EAL internal computer record quoted previously. Mr Quinn conceded<sup>15</sup> that there is no express reference in the accounts to the four wooden poles (or the wires for that matter). He said those items are described as “hardware” in the masterfiles, and we accept that.

[27] Dr Wylie tried to suggest<sup>16</sup> that the entry in the EAL records related to the structures in and above the Ashburton River and not to the Brook/Muff land. We are satisfied that in 1993 both Transpower and EAL lumped all the fittings on the Brook/Muff land into a more general category of works identified as the “Ashburton River Crossing” since a number of the 1993 documents use that phrase.

[28] To help us understand why EAL wanted the fittings, Mr Quinn explained in his second affidavit that EAL had a project since at least 1993 if not earlier for the new 33 kV line. He described the project in this way<sup>17</sup>:

IN 1993 prior to the purchase of the Transpower installations on the Respondents’ property the Applicant had identified a need to establish a backup supply to secure electricity supply both into and out of Ashburton in the future. A 33,000 volt line was therefore established along Tarbottons Road for a distance of approximately 2 kilometres to the Tinwald-Westfield-Mayfield Road starting at P3. That line has never been commissioned because of the absence of any connection past P3 and across the Respondents’ land. It is only now we need to secure supply into Ashburton that we need to connect this 33,000 volt circuit across the Respondent’s land. Obviously if the Applicant had never intended to use the installations on the Respondents’ land we would never have purchased the installations from Transpower nor constructed the 33,000 volt line in the first place along Tarbottons Road.

[29] As evidence of EAL’s 1993 intentions, Mr Quinn produced<sup>18</sup> a copy of some pages from an EAL document called “Tarbottons Road Point of Supply Project New 33 kV Distribution Line”. Mr Quinn described that as being<sup>19</sup> “. . . the Applicant’s work plan for the . . . installation [on the Brook/Muff land] completed in 1993 at the time of the purchase of the installations from Transpower.” We have some doubts about that.

<sup>15</sup> Transcript p. 12.

<sup>16</sup> Transcript p. 12.

<sup>17</sup> B J Quinn, affidavit dated 22 April 2005, para 7.

<sup>18</sup> B J Quinn, affidavit dated 22 April 2005, Exhibit “B”.

<sup>19</sup> B J Quinn, affidavit dated 22 April 2005, para 6.



The following evidence supports the work plan as being for a 33 kV line up to the Brook/Muff land's south-western boundary. It does not go very far in establishing EAL's intention (in 1993) to go beyond that, that is, across Buckleys Terrace and then across the Brook/Muff land. We find that:

- (a) the Location Plan shows the new distribution line as terminating at Pole 3 at the Tarbottons Road/Buckleys Terrace intersection;
- (b) a new 33 kV line is shown leading south-westwards along Tarbottons Road through Poles 4 to 7 from Pole 3 on the western corner of the Tarbottons Road/Buckleys Terrace intersection;
- (c) there are some handwritten notes on sheet "7 of 16". First, one note identifies the power lines marked as running from Pole 2 to Pole 1 (which appears to be the four wooden poles on the Brook/Muff land) as being an "intended line". Secondly Pole 1 is described as "Ex Transpower Termination Structures", and thirdly the 33 kV line is described as being "... not in use". We were not told when those handwritten notes were added, so we disregard them.

However, we have no doubt that the 33 kV lines down Tarbottons Road were, and still are, intended to connect to other lines and the logical conclusion is that they are lines across the Brook/Muff land and then over the Ashburton River.

[30] Dr Wylie submitted that the timing and wording of the payments in EAL's records lead to the inference that it was simply purchasing the "hardware" and "towers" separately and for their removed residual value. Against that we have:

- (1) the evidence<sup>20</sup> of Mr Quinn that "the transaction was the purchase of all the hardware in relation to the installation on the property now belonging to the respondents";
- (2) the implication in the Transpower letter<sup>21</sup> of 15 February 1993 that Transpower knew that EAL had no intention at that time to remove or dismantle the towers since Transpower referred to a possible change of

<sup>20</sup> Mr B J Quinn's affidavit of 2 February 2005 para 9.

<sup>21</sup> Quoted at para [21] above.



mind: “Should you in the future decide to remove or dismantle them . . . (our underlining);

- (3) the EAL budgets<sup>22</sup> which show that EAL intended to string a 33 kV line from Tinwald to Ashburton including (by inference) down Tarbottons Road and across the Ashburton River.

[31] We find that while Transpower’s initial intentions may have been to remove the lines strung across the Brook/Muff land and the Ashburton River and the three pylons at the crossing, there is no evidence of a final, complete decision to that effect. On the balance of probabilities we find that whatever Transpower’s earlier intentions, it changed its mind and decided to sell the current fixtures to EAL. We also infer that Transpower varied the joint venture contract for the removal of all the lines, and agreed that those across the Ashburton River could remain to assist EAL lead its new 33 kV lines across the river in due course<sup>23</sup>.

[32] We infer that the lines were removed by EAL from the western end of the Brook/Muff land first so that Doug Hood Limited could remove the poles along Tarbottons Road in compliance with its (varied) subcontract to the joint venture group; and secondly so that EAL in due course could string up its proposed 33 (or 66) kV lines.

[33] We find that:

- (1) on or before 22 March 1993 EAL removed the 110 kV lines along Tarbottons Road and from the Brook/Muff land as far as the four wooden poles on that land;
- (2) EAL purchased all the current fittings - and not just the steel tower - on the Brook/Muff land from Transpower at some time between 2 March 1993 and 31 March 1993; and
- (3) EAL intended from before 11 February 1993 to replace the Transpower 110 kV lines with its own 33 kV lines but using the same steel pylon on the Brook/Muff land; and

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<sup>22</sup> Exhibit B to B J Quinn’s affidavit of 23 June 2005.  
<sup>23</sup> Transcript p. 12.



- (4) The officers of EAL and Transpower dealing with the Ashburton River crossing fittings were not, on the evidence, aware of the provisions of Part III of the Electricity Act 1992. EAL's Mr Quinn did not realise the potential benefits of sections 22 and 23 until 2004 or 2005. Up to that time he thought EAL required an easement from the respondents.

### *The Electricity Act 1992*

[34] The Electricity Act 1992 made fundamental changes to the relationship between electricity operators (distributors) and landowners. Under the now repealed Electricity Act 1968, the Minister of Energy was empowered<sup>24</sup> to take land for transmission lines. The owner's only remedy was to claim compensation for "any injurious effect"<sup>25</sup>. That power was removed by the Electricity Act 1992. Under the latter statute electricity operators (distributors)<sup>26</sup> are given no powers to take land for transmission lines. By implication they now usually<sup>27</sup> have to purchase easements from any landowner before they can erect and use transmission lines.

### *Part III of the Electricity Act*

[35] However, Part III of the Electricity Act 1992 does provide some protection for 'existing works' already used by electricity operators. The provisions relevant to this proceeding are sections 22 and 23. As amended by the Electricity Amendment Act 2001 they state:

#### **22. Protection of existing works -**

Any existing works, lawfully fixed to or lawfully installed over or under any land that is not owned by the person that owns the works, shall continue to be fixed or installed until the owner of the works otherwise decides, and no person other than the owner of the

<sup>24</sup>

Section 14 of the Electricity Act 1968 now repealed.

<sup>25</sup>

Section 14(7) and section 16 of the Electricity Act 1968 now repealed.

<sup>26</sup>

Section 4A Electricity Act 1992.

<sup>27</sup>

An exception is contained in sections 24 and 30 of the Electricity Act 1992. Section 24 of the Electricity Act 1992 empowers an electricity operator to construct any works in, along or under any road. Section 30 of the Electricity Act 1992, despite its title (which rather misleadingly is headed "Charges for access to road reserve"), prohibits any local authority or Transit New Zealand from requiring rent for that use of the road. Difficulties with obtaining rights of way over private land may explain why there is a trend for electricity operators to build their pylons and string their wires along road reserves.





works shall have any interest in any such works by reason only of having an interest in the land.

**23. Rights of entry in respect of existing works -**

- (1) Any person that owns any existing works may enter upon land for the purpose of gaining access to those works and may perform any act or operation necessary for the purpose of -
  - (a) Inspecting, maintaining, or operating the works:
  - (b) In the case of works the construction of which had not been completed before the 1st day of January 1988 (in the case of works owned by the Corporation) or before the 1st day of January 1993 (in the case of works owned by any other electricity operator), completing the works.
  
- (2) A certificate signed by the owner of any existing works containing a statement that any specific works were constructed (in whole or in part) before the 1st day of January 1988 (in relation to works owned by the Corporation) or before the 1st day of January 1993 (in the case of works owned by any other person) under the authority of the Electricity Act 1968 (or any Act repealed by that Act) or the Electric Power Boards Act 1925 or the Local Government Act 1974 or the Public Works Act 1981 or any local or private Act shall be admissible in evidence in any proceedings and shall, in the absence of proof to the contrary, constitute proof of that statement.
  
- (3) In this section<sup>28</sup>, “maintenance” includes -
  - (a) any repairs and any other activities for the purpose of maintaining, or that have the effect of maintaining, existing works; and
  - (b) the carrying out of any replacement or upgrade of existing works as long as the land will not be injuriously affected as a result of the replacement or upgrade.

EAL relies on section 22 to establish its ownership of the current fittings; and on section 23 for its rights to go onto the Brook/Muff land. Unfortunately Part III appears to have been drafted with haste and has the problems of interpretation commented on in

<sup>28</sup> Subsection (3) was added by section 10(1) of the Electricity Amendment Act.



other privatising statutes by Cooke P in *Auckland City Council v Minister of Transport*<sup>29</sup>. At least we have found it difficult to understand.

[36] To give the context of those sections we add that Part III of the Electricity Act 1992, as amended by the Electricity Amendment Act 2001, also includes provisions about the need for the line owner to give notice<sup>30</sup> to land owners; for conditions to be imposed by the land owner<sup>31</sup>; and for any dispute to be referred to the Environment court.

[37] There is a parallel set of provisions about constructing or maintaining (electrical) works on road reserves in sections 24 to 28 of the Electricity Act, and, curiously, any “appeal” about the conditions set by the local authority or owner of any pipe (along a road) is to the District Court<sup>32</sup>.

[38] We also note that Part VI of the Act contains miscellaneous provisions<sup>33</sup> relating to supply of electricity including compensation for damage to property<sup>34</sup> and for removal of trees and vegetation<sup>35</sup>.

[39] Finally we note that we were not referred to any provision in the Act which expressly entitles the owner of fittings to convey electricity (emitting electromagnetic radiation waves which concern some people) across existing works on land owned by another. That appears to be an omission which might usefully be remedied by Parliament to avoid arguments later. The only suggestion that we can find that an electricity operator may convey electricity through existing works is the authority in section 23 for the operators to gain access to the land to perform any act necessary for the purpose of operating the works. But that is rather clumsy since most of the time access to land is not necessary for conveyance of electricity over it. In our view, there is (without deciding the point since it was not argued) a reasonable implication that electricity may be conveyed across land on any existing works on that land.

<sup>29</sup>

[1990] 1 NZLR 264 at 289 (CA).

<sup>30</sup>

Sections 23A, 23B, 23C and 25 of the Electricity Act 1992.

<sup>31</sup>

Section 23D of the Electricity Act 1992.

<sup>32</sup>

Section 27 of the Electricity Act 1992.

<sup>33</sup>

As the heading to Part VI describes them.

<sup>34</sup>

Section 57 of the Electricity Act 1992.

<sup>35</sup>

Section 58 of the Electricity Act 1992.



*Disputes*

[40] Relevantly to this hearing, section 23F provides for disputes to be referred to the Environment Court. It states:

**23F. Disputes about land access -**

- (1) The owner or occupier of land, or the owner of the works, may refer any dispute under sections 23 to 23E to the Environment Court.
- (2) The objector must, as soon as practicable after making a written objection, serve a copy of the objection on the other party to the dispute.
- (3) Within 1 month after receiving a copy of the objection or within any further period that the Environment Court allows, the other party to the dispute must send to the Environment Court and serve on the objector a reply to the objection containing matters that are appropriate having regard to the objection made and to any practice directions issued by the Environment Court.
- (4) The Environment Court must inquire into the objection and, for that purpose, may conduct a hearing at any time and place it appoints.
- (5) The Environment Court must give not less than 15 working days' notice of any time and place so appointed to the objector and to the other party to the dispute.
- (6) The Environment Court has power to make a declaration as if the proceeding had been brought under sections 310 to 313 of the Resource Management Act 1991.
- (7) The findings of the Environment Court are binding on the objector and the other party to the dispute.
- (8) The Environment Court may award those costs that it considers just either in favour of or against either party.
- (9) Subject to sections 299 to 308 of the Resource Management Act 1991, no appeal lies from any declaration of the Environment Court under this section.

EAL's amended application is brought under this section: we read the statement of claim as an objection, and the statement of defence as the reply.



***The meaning of sections 22 and 23 of the Electricity Act***

*What are existing works?*

[41] Part III of the Electricity Act 1992 starts with section 22 about ownership of “existing works”. As for what is meant by “existing works”, section 2 of the Electricity Act 1992 defines three related concepts about electrical infrastructure: “existing works”, “fittings” and “works”. Starting with the fundamental term “fittings”, the terms are defined as (relevantly):

- “Fittings” means everything used, or designed or intended for use, in or in connection with the generation, conversion, transformation, conveyance, or use of electricity.

“Works” -

- (a) Means any fittings that are used, or designed or intended for use, in or in connection with the generation, conversion, transformation or conveyance of electricity; but
- (b) Does not include -
  - (i) Any fittings that are used, or designed or intended for use, by any person, in or in connection with the generation of electricity for that person’s use and not for supply to any other person; or
  - (ii) Any part of any electrical installation.

“Existing works”,-

...

- (b) In relation to works owned by any other person, means any works constructed before the 1st day of January 1993; and **includes any works that were wholly or partly in existence**, or work on the construction of which commenced, before the 1st day of January 1993:

...

[our emphasis]

[42] There are two relevant parts to the definition of “existing works” - they must be “works” within the wide definition of that term; and they must be, “existing” in the sense in which that term is used in the Electricity Act 1992. The first issue is a question of fact, relatively simply resolved. But the second issue, as to whether works are “existing” is more complex.



[43] That term “existing works” is defined to include any works owned by any person other than the Electricity Corporation if those works were:

- (1) wholly in existence;
- (2) partly in existence; or
- (3) commenced

- as at 1 January 1993. Given that:

- actually existing works; and
- commenced but only partly existing works

- are both included in the width of the definition we must presume that “partly existing” works is not a redundant category. We hold that the definition of “existing works” includes not only functional works and works which have been started, but also works which had been completed and/or functional prior to 1 January 1992 but which are broken, or partly removed as at that date. Parliament is attempting to cover the three dimensions of time - past, present, and future - in relation to works as at 1 January 1993. Section 22 intends “existing works” to apply not only to actual fittings on any private land at that date, but also to notional fittings - fittings that were not yet on the land but were needed to complete a line, and also to fittings that may have been on the land, but were not fixed or present on the land as at 1 January 1993. That is the meaning to be taken from the definition of “existing works” as including works that were “. . . partly in existence”.

[44] It appears to us that there are two other ambiguities in the words “existing works”. First, it appears to be a continuing term if applied to fittings as at 1 January 1993 and their continued existence. But what if the works are damaged, replaced or, as in this case, partly removed? Are they still “existing works”? It is unfortunate that when Parliament decided to protect the rights of existing line operators as at 1 January 1993 it used the phrase “existing works” to apply to works as at that date and, apparently, to such works - damaged and/or repaired - at all subsequent dates.



*The rights retained under section 22*

[4.5] The rights created and removed by section 22 are that:

- If: (a) if there are existing works (in the wide sense discussed)  
 (b) which are lawfully fixed to or installed over any land (not owned by the owner of the works),  
 then: (1) the works “shall continue to be fixed or installed”  
 (2) until the owner “otherwise decides”, and  
 (3) the owner of an interest in the land has no interest in the works.

The meaning of section 22 is difficult to ascertain from the phrases quoted in (1) and (2). First, existing works are works as at 1 January 1993 so in what sense can they continue to be fixed since on any subsequent date they will be different physically from the works on 1 January 1993? How changed can they be and still remain within the category of “existing works”? Secondly, what does until the owner “otherwise decides” mean? Is it simply enough if the electricity operator decides that the works are not to continue to be fixed or installed, or must it do more than simply make a decision? Section 22 is silent on these issues so we will need to look at other guides as to its meaning.

*The purpose of the Electricity Act*

[46] The purpose of the Act can be ascertained, in part, from its Long Title which states that the Act is:

- (a) To make better provision for the regulation of the supply of electricity and the electricity industry in New Zealand; and
- (b) To consolidate and amend the law relating to the regulation and control of electrical workers; and
- (c) To provide for matters incidental thereto; and
- (d) To repeal the Electric Linemen Act 1959, the Electricity Act 1968, and the Electrical Registration Act 1979.

We are unable to gain much assistance from that Long Title in interpreting section 22 (and section 23) of the Electricity Act 1992.



*Other indications of meaning*

[47] Potentially more useful indications as to the way in which section 22 should be interpreted may be ascertained from its context in Part III of the Electricity Act 1992. The heading of Part III reads:

POWERS AND DUTIES OF ELECTRICITY OPERATORS AND OTHER OWNERS OF  
ELECTRICITY WORKS

That suggests that the privileges (to use a neutral word) of electricity operators are relatively limited since they are described as “powers” rather than as “rights” or even “licences”. That is confirmed by the organisation of Part III of the Act in that much of it is concerned with the rights of the owners and (other) occupiers of land (whether private or public). Section 26 of the Electricity Act actually makes it an offence for an electricity operator to fail to comply with sections 24 and 25 of the Act (which relate to construction or maintenance of electrical works of roads).

[48] Section 22 should of course be read in the light of section 23 which empowers the owner of “existing works” to enter land to inspect, maintain (including some repair<sup>36</sup>) and operate the works. There is no suggestion that any repair results in the works losing their status as existing works.

[49] Superficially most indications outside the text of sections 22 and 23 of the Act favour narrow reading of the sections. However, on reflection we consider the other indications are more neutral than that. The organisation of Part III suggests that Parliament was trying to balance more evenly the rights of land owners and the privileges of electricity operators by ensuring notice was given of access to land, and providing for land owners to impose reasonable conditions but not so as to require rent<sup>37</sup> or so as to “defeat the ability of the owner of the works to exercise effectively the powers in section 23”<sup>38</sup>. That balance between the two groups of property owners was assisted by enabling reference of disputes to the Environment Court, as in this case.

<sup>36</sup> See the definition of “maintenance” in section 23(3).

<sup>37</sup> Section 23D(b) of the Electricity Act 1992.

<sup>38</sup> Section 23D(c) of the Electricity Act 1992.



[50] While a land owner may move existing works of an electrical operation at the land owner's expense<sup>39</sup>, the Electricity Act is silent on an issue important to this case: the subsequent (i.e. after 1 January 1993) removal of part of existing works from any land. The closest the Act comes to the first issue is that section 22 states that existing works "... shall continue to be fixed until the owner of the works otherwise decides".

[51] Can an electricity operator simply decide to abandon its fittings? Although the point was not argued before us, we are inclined to think the answer is that they must remove any fittings because abandoning the fittings would be a trespass. In *Konskier v B Goodman Limited*<sup>40</sup> the English Court of Appeal was concerned with a situation where the defendant had a licence to store rubbish on land for a limited (reasonable) time. It stated<sup>41</sup>:

... they had no more than a limited licence and were bound to remove the rubbish when their work was finished; and if they did not remove it within a reasonable time after the work was done, they could not and cannot now contend that the rubbish was lawfully there. By failing to remove it they rendered themselves substantially trespassers and the trespass was a continuing trespass.

The general principle, as we understand it, is that a licensor has a "packing up period" - to use the phrase in *Winter Garden Theatre (London) Limited v Millennium Productions Limited*<sup>42</sup> - to remove their possessions from land they do not own but after that they are a trespasser if they leave objects on that private land. There is no suggestion that Parliament meant to change the common law of trespass in Part II of the Electricity Act,

[52] There may also be complications arising out of the duties of persons who control places of work under section 16 of the Health and Safety in Employment Act 1992 (as amended by the Health and Safety in Employment Amendment Act 1998).



<sup>39</sup> Sections 32 and 33 (local authorities) and 35 (private land owners) of the Electricity Act 1992.

<sup>40</sup> [1928] 1 KB 421.

<sup>41</sup> [1928] 1 KB 421 at 426.

<sup>42</sup> [1948] AC 173,206.



[53] We conclude, rather tentatively since that issue was not argued, that a decision to remove under section 22 of the Electricity Act requires both intention and, usually, action (removal) by the owner of the works.

[54] There is a ‘related issue: what if one part of a line is removed, does that immediately cause all existing works relying on that part to cease to exist as “existing works”? It is obvious that the operation of any electrical (or other service) line in its entirety is always vulnerable to a physical (or legal) attack at any one point in its length. That is why, in our view, Parliament has in effect stated in the Electricity Act that for existing works as at 1 January 1993, if part of an intended line crossed private land, then the operator is deemed to own the whole of a notional line.

[55] Taking this principle to a logical extreme can produce absurd results. What if a line existed prior to 1 January 1993, and one pole was left standing on some private land by Transpower or some other predecessor of an electricity operator? Would that pole create a right to re-establish a line over the land? The answer would depend on the circumstances. If there were no other poles or wires on adjoining private land or along road reserves then there would be no surviving evidence of an intention to keep and, in time, to repair the line. In that case the Court would probably infer a past intention to abandon the line (notwithstanding any trespass). However, if there was a trail of poles (and wires) leading to and from the private land on which the one pole stands then that one pole might in those circumstances be enough to retain the right to repair and re-use a line. The electricity operator would be empowered to complete the works by adding more poles and stringing wires, provided it gave notice<sup>43</sup> of its wish to access the land and complied with any reasonable conditions<sup>44</sup> set by the land owner.

[56] The fact that an absurd scenario can be imagined does not, in our opinion, make this part of the Electricity Act meaningless, although it is undoubtedly obscure. Parliament was clearly concerned to ensure that the rights of existing line-owners continued to exist. Since we should try to make Part III of the Act work - *Northland*

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<sup>43</sup> Section 23A of the Electricity Act 1992.

<sup>44</sup> Section 23D of the Electricity Act 1992.



*Milk Vendors Association Incorporated v Northern Milk Limited*<sup>45</sup> we conclude that the test as to whether repair rights for non-functioning remnants of lines have been retained is one of reasonableness in each particular circumstance.

[57] We hold that existing works as at 1 January 1993 whether functional or inoperative, because parts are missing, continue to be “existing works” despite changes of ownership or changes in their state, until they are lawfully removed from the private land on which they are situated.

### *Section 23*

[58] The requirements of section 23 are that before a person may enter land:

- There need to be existing works
- which the person owns; and
- that the person has the purpose of gaining access to those works
- to perform any act or operation necessary for the purpose of -
- inspecting, maintaining or operating the works.

[59] We hold that “existing works” is not used in exactly the same way in section 23 as it is in the preceding section 22. That is permissible because section 2(1) of the Electricity Act 1992 commences “Unless the context otherwise requires . . .”. In section 23 of the Electricity Act the phrase “existing works” must include fittings which:

- (a) were existing works as at 1 January 1993 in the very wide sense discussed above; and
- (b) which have been modified by design or by accident or natural wear and tear.

The section is unworkable if not read in that way.



<sup>45</sup>

[1988] 1 NZLR 530.

*The effect of the Electricity Act 1992 in this case*

[60] Since there is no challenge to EAL's case that its purpose in going onto the Brook/Muff land is to access the current fittings, the issues for us to determine under sections 22 and 23 of the Electricity Act 1992 are:

- Were works lawfully installed on the Brook/Muff land?
- Are they "existing works" under the Electricity Act?
- Did the previous electricity operator decide to abandon the existing works?
- Does EAL own the existing works; and
- Is the proposed work "maintenance" of existing works?
- Is the proposed work necessary?
- Is the respondents' land injuriously affected?

*Were works lawfully installed?*

[61] We record that, to establish lawful fixing of the electrical fittings on the land in this case, EAL produced copies of the Gazette Notices<sup>46</sup> under which the fittings were built.

*Are they "existing works" under the Electricity Act?*

[62] Mr Quinn produced a Certificate dated 22 April 2005 under section 23(2) of the Electricity Act 1992. The Certificate<sup>47</sup> states that:

I, **BRENDON JOHN QUINN** the Network Manager for Electricity Ashburton Limited certify on its behalf that the steel towers, wooden poles and conductor lines owned by Electricity Ashburton Limited and situated on the property belonging to Graeme Trevor Brook and Christine Anne Muff at Buckleys Terrace, Ashburton being all the land comprised and described in Certificates of Title 570/72 and 573/60, Canterbury Registry, were constructed before the 1st of January 1993 under the authority of the Public Works Act 1908 and 1928.

DATED this 22nd day of April 2005

B J Quinn

For and on behalf of Electricity Ashburton Limited



<sup>46</sup> 1914 p. 3942; 1929 p. 1050 (Exhibits "G" and "H" to Mr B J Quinn's affidavit of 2 February 2005).

<sup>47</sup> Affidavit of Mr Quinn dated 22 April 2005 Exhibit "A".

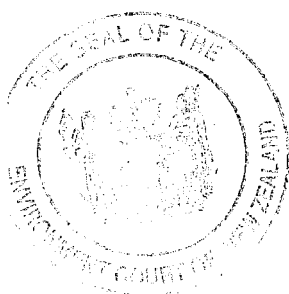
That certificate is put forward by EAL under the authority of section 23(2) of the Electricity Act 1992 (quoted above) as proof of the fact that the fittings were built before 1 January 1993.

[63] Dr Wylie objected to this certificate on the grounds that it was annexed to Mr Quinn's second affidavit which should have been evidence in response. He submitted that the certificate was new evidence and thus inadmissible. Even if the second affidavit was a reply (which is not our understanding of the Court's timetable), the point is technical and without merit. The lateness of the certificate is irrelevant except possibly to the issue of costs.

[64] We have found the fittings were being operated as at 1 January 1993. Given the definition of "works" as meaning any fittings in use, or designed or intended for use, in or in connection with the . . . conveyance of electricity", we hold that the wooden poles, steel pylons, insulators, and wires on the Brook/Muff land which were designed or intended for use in connection with the conveyance of electricity, are therefore "works". We also find that none of the exclusions in paragraph (b) of the definition<sup>48</sup> of "works" applies.

[65] Consequently we hold that any 'existing works' on the Brook/Muff land are the fittings which were on the land as at 1 January 1993. We find that on 1 January 1993 the fittings on the Brook/Muff land were:

- (a) the four wooden poles;
- (b) the steel lattice tower;
- (c) two 110 kV power lines<sup>49</sup> running from the Tarbottons Road/Buckleys Terrace intersection to the Ashburton River (together called "the fittings").



<sup>48</sup> Section 2 of the Electricity Act 1992.

<sup>49</sup> B J Quinn, affidavit of 2 February 2005, para 3.

We know that the lines were being used on 1 January 1993 because Transpower only turned the power off<sup>50</sup> six weeks later: it stopped transmitting power through the lines on 15 February 1993.

[66] Further, while the fittings as at 1 January 1993 are the ‘existing works’, the effect of the definition of ‘existing works’ and the use of the term in section 23 is that the works continue to be the existing works even if in the intervening 14 years they have deteriorated or been modified in some way. Dr Wylie asserted that EAL is proposing to construct new works, and that there are no “existing works”. We find that is incorrect. As we have seen the scheme of sections 22 and 23 and the definition of existing works all show that Parliament was concerned to ensure that a broken or missing link in the chain of works across private land did not destroy “existing works”.

*Did the previous electricity operator decide to remove the existing works?*

[67] We have held the Act requires an electricity operator not only to decide to remove the works, but also to remove all existing works with the intention of not replacing them. In this case we have evidence that Transpower intended to remove the wires from the Brook/Muff land. We have also found that Transpower intended to leave the four poles and the steel pylons on the land, and to sell first the latter, and then, a little later, the poles, the pylon and the connecting wires to EAL. We also find as a fact that Transpower never decided to remove the steel pylon from the land.

*Does EAL own the existing works?*

[68] In their statement of defence the respondents have challenged EAL’s ownership of the current fittings or indeed of the “existing works”. In particular the respondents contend that EAL does not own the four wooden poles, nor the two power lines, only the steel pylon on their land. That last concession is probably enough to empower all the work that EAL wishes to carry out on the Brook/Muff land. In any event we have found that EAL did purchase all the current fittings.

[69] We found it difficult to understand Dr Wylie’s submissions on ownership but if we understand him correctly, his first point is that even if there were “existing works” as

<sup>50</sup> Letter from Transpower to Mr Brook and Ms Muff dated 27 April 2004 [Exhibit “K” to Mr Brook’s affidavit].



at 1 January 1993, by the time EAL purchased the steel tower on the Brook/Muff land, the wires had been removed between Tarbottons Road and the four poles on the Brook/Muff land. Basically Dr Wylie appeared to be arguing that if a line is snipped anywhere so that it is not continuous at least across the whole of any private land (or even from source to point of supply) then it is no longer “existing works”.

[70] As we have already explained, we consider the correct position is that the Electricity Act 1992 adopts the opposite approach for existing works. Instead of stipulating that any cut or discontinuity terminates ownership of rights to use lines across private land, the definition of “existing works” in section 2 expressly states that term includes works that were only commenced as at 1 January 1993, or that were only “partly in existence” as at that date.

[71] Dr Wylie submitted that the fittings on the Brook/Muff land were not being constructed, but dismantled by Transpower. We find that is not correct: Transpower certainly intended to dismantle its lines between Dromore (north of Ashburton) and Hinds (to the south) under a joint venture agreement with EAL and others, but we have found that it subsequently changed its mind about dismantling the lines over the Ashburton River (including most of the lines over the Brook/Muff land) **and** that it never intended to dismantle the steel pylons (including that on the Brook/Muff land).

*Is the proposed work a maintenance of existing works?*

[72] We find that EAL has placed new 33 kV lines along Tarbottons Road and wishes to:

- (a) replace the four poles on the Brook/Muff land;
- (b) remove the existing 110 kV lines; and
- (c) string 33 kV lines right across the Brook/Muff land.

[73] Maintenance is defined as including<sup>51</sup> any repairs, and any replacement (or upgrade) of **existing works**. The latter scenario is qualified by the proviso that the replacement of the existing works should not injuriously affect<sup>52</sup> the land as a result of

<sup>51</sup> Section 23(3) of the Electricity Act 1992.

<sup>52</sup> Section 23(3)(b) of the Electricity Act 1992.



the replacement or upgrade. So is EAL's proposal the repair, or the replacement or upgrade of existing works?

[74] A critical point here is that the maintenance authorised by section 23 is of the "existing works" as defined, **not** of the current fittings which comprise only part of the "existing works" (with another part having been dismantled).

[75] Mr Quinn under cross-examination by Dr Wylie called EAL's activities "reinstatement" of the wire(s). That is a nice phrase because it neatly (but fairly) avoids expressing any opinion on whether the reinstatement is a "repair", "replacement" or "upgrade". The interpretation of section 23(3) is a legal issue. What is clear on the facts is that the 110 kV line which is part of the existing works (as at 1 January 1993) has in the meantime been removed and a 33 kV line will be strung up instead. We find that is a simple case of replacement rather than repair. It is not an 'upgrade' because the new line is smaller than the old one.

[76] In an interesting action for trespass in *Murray-Leslie and Smeets v United Network Limited*<sup>53</sup> the District Court was faced with a situation where in 1987 the then Thames Valley Power Board had installed an underground 951 mm diameter cable across the plaintiffs farm. Ten years later the cable failed. The defendant, by then the electricity operator for the area, entered the farm and installed a new 185 mm diameter cable mostly in a trench close to the 1987 cable line. Judge Maze held as preliminary determinations that the Electricity Act 1992 (prior to its 2001 amendments) meant that<sup>54</sup>:

... the laying [of] the underground section of the 1997 cable was not the maintenance of . . . existing works, but rather the creation of new works. It follows therefore that what was done was not done in lawful exercise of the powers of entry and accession given under section 23 of the Electricity Act.

It appears likely that the learned Judge would have come to the same conclusion even if the new section 23(3), adding a definition of "maintenance", had been operative,



<sup>53</sup> DC, Thames NP 208/00 Judge Maze, 11 July 2002.

<sup>54</sup> DC, Thames NP 208/00 Judge Maze, 11 July 2002 at para [30].

because there was no evidence that the new cable was attached or became part of the old fittings. It was a completely new cable in its own trench.

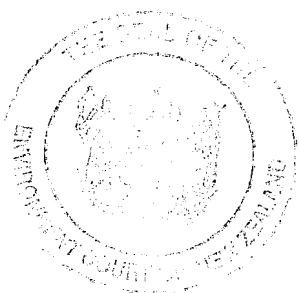
*Is the proposed work necessary?*

[77] Dr Wylie submitted there was no evidence of necessity. That is not correct. We have the uncontroverted evidence of Mr Quinn, partly supported by the 1993 working plan, that in 1993 at the time of the purchase of the fittings, EAL intended to build a 33 kV line south of Ashburton, and that the fittings were to be used as a segment of that line. At present, the fittings on the Brook/Muff land are useless since no power can be conveyed through them. To make the (notional) existing works function, it is necessary to restring 33 kV lines across the site. We find that this work has been proved to be necessary under section 23 of the Electricity Act.

*Is the respondents' land injuriously affected?*

[78] The test is whether the respondents' land is injuriously affected by the replacement of existing works. They claim it is because they will lose their new house site with its better views. The answer to this is that the "existing works" are as at 1 January 1993. Those works include the lines operating to convey 110 kV of electricity. The effect of section 22 of the Electricity Act 1992 - when the definition of "existing works" is considered - is that Mr Brook and Ms Muff purchased their land subject to the rights of EAL to convey electricity over their land through the fittings, and to maintain those fittings. So we hold that EAL would be entitled to thread replacement 110 kV lines through the poles and the pylon on the Brook/Muff land. In fact the new lines are to be replacements at 33 kV (with a theoretical maximum of 66 kV). We conclude that the respondents will not be injuriously affected because they will be exposed to less radiation than would have passed (110 kV) over their land when Transpower was operating the lines.

[79] That aspect of injurious affection has made us pause. Since the respondents have owned the land, electricity has never flowed across the lines. If the repairs are carried out then electricity will be conveyed across it causing (possibly) the effects that Mr Brook has said in his affidavit (quoted earlier) that he and Ms Muff are concerned about. The effect of our understanding of sections 22 and 23 is that EAL could have





replaced and used the missing lines at any time under its “powers” under section 22. In those circumstances the respondents are not being injuriously affected.

***Outcome***

[80] In the circumstances we find that all the elements of sections 22 and 23 of the Electricity Act 1992 are satisfied.

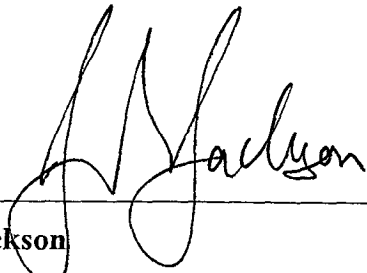
[81] Therefore we declare that pursuant to Section 23F(6) of the Electricity Act 1992 that Electricity Ashburton Limited is entitled through its servants, agents or employees to enter upon the Respondents’ land at 58 Buckleys Terrace, Ashburton to replace or upgrade its existing works on the said land to allow the conveyance of electricity along Tarbottons Road to the Applicant’s premises at Kermode Street, Ashburton by replacing the existing lines across the said land, replacing the four wooden poles on the said land and placing new lines between the four wooden poles and the Applicant’s poles in Tarbottons Road provided it gives proper notice under section 23A of the Electricity Act 1992.

***Costs***

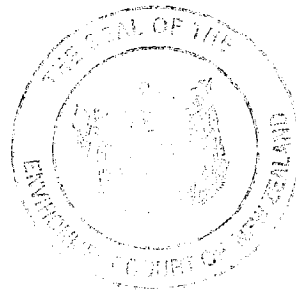
[82] EAL does not seek costs, so there is no need to reserve leave on this issue.

Dated at Christchurch 25 November 2005

For the Court:



**J R Jackson**  
**Environment Judge**



Issued<sup>55</sup>: 28 NOV 2005