

**IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
ŌTEPOTI ROHE**

**CIV-2021-412-89**

UNDER the Declaratory Judgments Act 1908

IN THE MATTER of an application under the Declaratory  
Judgment Act 1908

BETWEEN OTAGO REGIONAL COUNCIL  
Plaintiff

AND ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW  
ZEALAND INCORPORATED  
First Defendant

AND MINISTER FOR THE ENVIRONMENT  
Second Defendant

Counsel: A J Logan and T M Sefton for Plaintiff  
P Anderson for First Defendant  
P Higbee for Minister for the Environment (Notice of  
Appearance)  
S Christensen and J St John for Oceana Gold (New Zealand) Ltd  
(Notice of appearance)  
P A C Maw for Canterbury Regional Council (Notice of  
Appearance)  
M Baker-Galloway and R Giles for Otago Fish & Game Council  
(Notice of Appearance)  
C Ford for Te Rūnanga o Ngāi Tahu (Notice of appearance)  
J Macdonald for Central Otago District Council (Statement of  
Defence)  
S J Scott for Queenstown Lakes District Council (Statement of  
Defence)  
M Garbett for Waitaki District Council and Dunedin City Council  
(Statement of Defence)  
L A Andersen QC and S L McMillan for Port Otago Ltd  
(Statement of Defence)

Minute: 29 October 2021  
  
(Determined on the papers)

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## MINUTE OF OSBORNE J

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### **Joinder**

[1] There has been referred to me the request of the Minister for the Environment (through Ms Higbee) to be joined as a defendant. The request was made at the same time as the Minister's notice of appearance (neither supporting or opposing the declarations) was filed.

[2] Counsel for the plaintiff have indicated that the plaintiff does not object to the Minister's joinder.

[3] The request raises for me a technical issue but one which it is appropriate to resolve despite the plaintiff's non-opposition.

[4] The application for joinder must have been made under r 4.56 High Court Rules which permits joinder if the person in question ought to have been joined or their presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding.

[5] On this basis it is not clear to me why the Minister seeks an order joining him as a defendant.

[6] Because the Minister was one of the persons directed to be served on this appeal he falls within the definition of "defendant" under r 1.3. The persons served did not need to be named as defendants (r 18.6 applying).

[7] The memorandum endorsed on the notice of proceeding (in terms of form G4) explains to those served that they may file a statement of defence or enter the various forms of appearance identified in the notice. It is clear from r 18.12 that a defendant who files a statement of defence or an appearance may also file affidavit evidence.

[8] I note from Ms Higbee's memorandum that the Minister, by joining the proceeding, intends to preserve appeal rights.

[9] I am not immediately aware of the law in relation to appeal rights in this situation. My assumption has been that a defendant (such as the Minister) who files a statement of defence and participates at the hearing is entitled to appeal. My expectation is that a person who merely files a notice of appearance does not have appeal rights. (I appreciate that in proceedings where a person is joined as an interested party or intervenor — as in *Wilson v Attorney-General* (2010) 19 PRNZ 943 — the Court will expressly state the rights that person will have, and in practice frequently excludes appeal rights. But those situations involve directions made by the Court.)

[10] In the circumstances, I ask that counsel for the Minister promptly files an additional memorandum —

- (a) referring to any rules or case law which identify or clarify the rights of appeal which will or will not flow from respectively the status of defendant in a proceeding, the filing of a statement of defence and the filing of a notice of appearance; and
- (b) explaining why against that background it is necessary to “join” the Minister as a defendant when the Minister is already a defendant by reason of r 1.3.

### **Timetable**

[11] The existing timetable (paragraph 4(h) of the Minute dated 21 September 2021) requires the defendant and any persons supporting the defendant to file and serve their submissions, list of authorities and chronology no later than 10 clear working days before the hearing.

[12] Miss Higbee asks that I make a direction that the Minister file his documents also 10 clear working days before the hearing. I assume that direction is needed on the basis that the Minister is not as such “supporting the defendant”.

[13] It is appropriate that such a direction be made.

[14] The timetable directions were made before a number of organisations filed their defences and/or appearances and/or evidence. I am not aware which of the parties appearing (other than the plaintiff, Forest & Bird and the Minister) intend to make submissions but anticipate that some will. To the extent that those submitting will be opposing the plaintiff's position in part or in whole it will be appropriate that their submissions be filed and served at the same time as those of Forest & Bird. On the other hand, if any submissions are to be filed essentially in support of the plaintiff's position, there will need to be an amended timetable to provide for those submissions to be filed in advance of those of Forest & Bird and any other "opposers".

[15] For now, I direct in amendment of the 21 September 2021 timetable that the parties to file their submissions at least 10 clear working days before the hearing will be the defendant and all persons (other than the plaintiff) who will be making submissions.

[16] I request counsel for the plaintiff to lead a discussion of all other counsel as to whether that amended timetable direction will enable the parties and the Court to receive an appropriate sequence of submissions with responding submissions able to be made in relation to the forms of declaration which the Court will be asked to consider. Counsel are to file a memorandum if further amendment of the timetable is needed.

### **The nature of this proceeding**

[17] In the course of considering the above matters, I have had occasion to look at the matters raised by the defendants. Although Forest & Bird refers to its pleading as a "statement of defence" it appears to in fact contain a counterclaim through which Forest & Bird seeks different declarations. That helpfully identifies the position which I anticipate Forest & Bird will support through its submissions.

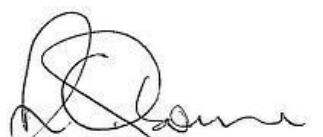
[18] The statement of defence of Port Otago Ltd contains (at paragraph [12]) a series of propositions including as to the invalidity of the Otago Regional Council decision on 16 June 2021. That said, Port Otago's statement of defence does not seek any particular relief. I am taking it from the pleadings, therefore, that Port Otago's position will simply be that the declarations sought by the plaintiff should not be made.

I take it that a similar situation exists in relation to the position of Waitaki District Council and the Dunedin City Council.

[19] I raise these matters simply to ensure that the Court will have before it, on a properly pleaded basis, the full range of relief which it is being asked to consider.

### **Timing of memoranda**

[20] Any memoranda to be filed and served in response to this Minute are to be filed within *five working days*.



Osborne J

### **NOTICE REQUIREMENT**

The solicitors on the record for the parties are promptly to provide a copy of this Minute to their clients (r 5.43).

### **Solicitors:**

Ross Dowling Marquet Griffin, Dunedin for Plaintiff  
Royal Forest and Bird Protection Society of New Zealand Inc, Christchurch for First Defendant  
Crown Law, Wellington for Second Defendant  
J St John, Oceana Gold (New Zealand) Ltd, Dunedin  
Counsel: S Christensen, Barrister, Dunedin  
Wynn Williams, Christchurch for Canterbury Regional Council  
Anderson Lloyd, Queenstown for Otago Fish and Game Council  
Te Rūnanga o Ngāi Tahu, Christchurch  
Mactodd Lawyers, Queenstown for Central Otago District Council  
Simpson Grierson, Christchurch for Queenstown Lakes District Council  
Anderson Lloyd for Waitaki District Council and Dunedin City Council (Statement of Defence)  
L A Andersen QC and S L McMillan for Port Otago Ltd (Statement of Defence)  
McMillan & Co, Dunedin for Port Otago Ltd  
Counsel: L A Andersen QC, Dunedin