
**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
Judgments Act 1908

BETWEEN **OTAGO REGIONAL COUNCIL**
Plaintiff

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

AND **MINISTER FOR THE ENVIRONMENT**
Second Defendant

MEMORANDUM OF COUNSEL FOR THE SECOND DEFENDANT

5 November 2021

Judicial Officer: Osborne J

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MAY IT PLEASE THE COURT:

Introduction

1. By his Minute dated 29 October 2021 Justice Osborne sought clarification from the Minister for the Environment (**the Minister**) as to the rights of appeal that will or will not flow from the status of a defendant in a proceeding, the filing of a statement of defence and the filing of a notice of appearance and to explain, against that background, why it is necessary to “join” the Minister as a defendant.¹
2. The Minister’s understanding of appeal rights is set out below. However, the Minister accepts His Honour’s point that the Minister, as a person directed to be served on this appeal, is already a defendant,² and that a defendant who files a statement of defence and participates at the hearing is entitled to appeal.³ Leave is sought in this Memorandum to file a late statement of defence in accordance with the position already set out in the Minister’s notice of appearance and accompanying memorandum. A statement of defence is filed with this memorandum.

Appeal rights

3. The differences in appeal rights that flow, or do not flow, from the status of a defendant in a proceeding, the filing of a statement of defence, and the filing of a notice of appearance are unclear.
4. The right of appeal to the Court of Appeal must be found within an enactment as the right of appeal is not covered in the Court of Appeal (Civil) Rules 2005.⁴ Section 56(1) of the Senior Courts Act 2016 gives the Court of Appeal the power to hear and determine appeals from the High Court. The Declaratory Judgments Act 1908, s 8 grants a right of appeal to the Court of Appeal in the same manner as in the case of a final judgment of the High Court.
5. However, neither s 56(1) of the Senior Courts Act 2016 or s 8 of the Declaratory Judgments Act 1908 give guidance on which parties to the proceeding, or in which circumstances (that is, having elected to file a statement of defence or

¹ Minute of the Court dated 29 October 2021 at [10].

² Minute of the Court dated 29 October at [6].

³ Minute of the Court dated 29 October 2021 at [9].

⁴ Matthew Casey and others *Sim’s Court Practice* (online ed, LexisNexis) at [CARPRAC1].

having elected to only file a notice of appearance), have the right to appeal a judgment. In contrast, s 56(4) of the Senior Courts Act 2016 explicitly states that:

“**Any party** to any proceedings may appeal without leave to the Court of Appeal against any order or decision of the High Court —

- (a) striking out or dismissing the whole or part of a proceeding, claim, or defence; or
- (b) granting summary judgment.”

[Emphasis added]

6. In the circumstances set out in s 56(4) any parties to the proceeding, including those who only filed notices of appearances, have their appeal rights preserved. However, the Senior Courts Act 2016 is not explicit on which parties may appeal other forms of final judgment of the High Court. Due to this silence, it is possible that s 56 of the Senior Courts Act 2016 may not grant appeal rights to the Court of Appeal for all parties to the proceeding in some circumstances.
7. Due to this uncertainty the Minister sought to be joined as a party as joinder confers a right of appeal.⁵
8. As noted, the Minister accepts that he falls within the definition of a defendant for the reasons set out in the Court’s Minute dated 29 October 2021 and accordingly does not need to be joined as a defendant to the proceeding. The Minister also accepts that defendants that file a statement of defence and participate at hearing are entitled to appeal.

Leave from the Court

9. Accordingly, as the Minister has preserved his rights by filing a notice of appearance, the Minister seeks leave from the Court to file a late statement of defence in this proceeding. A statement of defence is attached to this memorandum.

5 November 2021



R Dixon / R Muston
Counsel for the second defendant

TO: The Registrar of the High Court of New Zealand.

AND TO: The plaintiff and other parties

⁵ *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177 at [15](i).