IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2652

	UNDER	the Declaratory Judgments Act 1908
	BETWEEN	CANTERBURY REGIONAL COUNCIL Plaintiff
	AND	THE ATTORNEY-GENERAL Defendant

Hearing: 29 June 2009

Counsel: G J X McCoy QC and P A Joseph for the Plaintiff
B H Arthur for the Defendant

Judgment: 14 August 2009 at 3.00pm

JUDGMENT OF MILLER J

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Introduction

[1] The Canterbury Regional Council (**CRC**) seeks declarations that its councillors are not disqualified from conducting hearings into a plan change merely because CRC promoted it under a collaborative planning agreement with local authorities.

[2] CRC has chosen to sue the Attorney-General, claiming that he is a proper contradictor in any application under the Declaratory Judgments Act 1908 involving the construction of public legislation. The Attorney objects, saying that while he may intervene in litigation in the public interest, a plaintiff may not sue him as of right absent some dispute between the plaintiff and the Crown. He asks the Court to strike him out, leaving CRC without a defendant.

The narrative

[3] The case had its beginnings in a review of CRC's Regional Policy Statement (**RPS**). CRC's jurisdiction encompasses the Canterbury region from Kaiköura to Waitaki and the Main Divide, including the greater Christchurch urban area. Its RPS took effect in June 1998, and under s 79 of the Resource Management Act 1991 CRC had to review it not later than ten years afterward.

[4] Three local authorities, the Christchurch City, Selwyn District and Banks Peninsula District Councils, oversee the greater Christchurch urban area. Following an amendment to the Act in 2003 their district plans, which contain rules governing such matters as where urban development is permitted, must give effect to CRC's RPS.

[5] CRC and the three Councils want to co-ordinate land use and transport strategies for the greater Christchurch urban area. They have developed an Urban Development Strategy (**UDS**), which would set urban limits for residential and business growth, designate areas within central Christchurch for intensive development, and fix a sequence for urban development of other areas.

[6] After public consultation beginning in 2006, CRC, the three Councils, and Transit New Zealand (which operates the state highway network) adopted the UDS in June 2007. They entered a Memorandum of Agreement under which they would "continue to support the implementation, monitoring and review" of the UDS.

[7] Against that background, CRC promoted Proposed Change One (**PC1**) on 28 July 2007. It is an amendment to the RPS, designed to further parts of the UDS affecting greater Christchurch, including limits on residential and business development.

[8] A council must invite submissions on a proposed plan and hold a hearing if any submitter wishes to be heard. Many people opposed PC1, wanting the urban limits extended to their land, and sought a hearing.

[9] Section 34A of the Resource Management Act allows CRC to delegate the conduct of such hearings to hearing commissioners, who need not be elected councillors. Approval of the RPS itself may not be delegated. CRC appointed four councillors as commissioners on 7 February 2008, and the hearings were scheduled for July 2008.

[10] On 17 June, National Investment Trust Limited sought judicial review for itself and other submitters, alleging that the four commisioners were biased. It is said that the claim rested on CRC's participation in the UDS and Memorandum of Agreement.

[11] CRC says that it decided it must settle when National Investment Trust threatened that the litigation, including appeals, would be dragged out as long as possible, believing that it could not delay PC1 without jeopardising its long-term growth strategy. So it capitulated, appointing independent commissioners to conduct the hearings. That brought the National Investment Trust proceeding to an end.

[12] CRC maintains that the National Investment Trust challenge went to the heart of its statutory functions and democratic mandate. There is evidence that the additional expense of using independent commissioners will be about $1M. And

CRC believes that it, or any other council confronting a similar problem, is vulnerable to tactical applications for judicial review launched by developers late in the consultation process. It says that any such litigation delays a plan change. I return to this last point below.

[13] Other regional councils and local authorities have begun similar collaborative planning strategies. Many support CRC's stance and one, the Waikato Regional Council, wants to become a plaintiff. Rather than wait until another council finds itself in the same quandary, they would establish now that councillors are not disqualified by their prior participation in such collaborative processes.

The strikeout application

[14] The statement of claim is intituled under the Declaratory Judgments Act. It narrates the factual context, including the UDS, PC1, and the National Investment Trust settlement, and seeks the following declarations:

> a. On a proper construction of the consultation provisions of the [Local Government Act], the Applicant [CRC] or a committee of its members may validly hear submissions under the [Resource Management Act] on Proposed Change 1 to the Canterbury Regional Policy Statement and make decisions thereon;
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> b. That the Applicant may validly appoint two or more of its members as a Hearing Panel under the RMA to hear submissions on PC1 and make decisions on behalf of or recommendations to the Applicant;
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> c. That two or more members of the Applicant, having been appointed as a Hearing Panel under the RMA to hear submissions on PC1 and make recommendations to the Applicant, are not disqualified from subsequently participating in the Applicant's decision(s) thereon;
>
> d. That the Applicant bears no legal obligation or expectation under the RMA to appoint independent commissioners to the Hearing Panel for hearing submissions on PC1 and making recommendations thereon to the Applicant;

At the hearing, Mr McCoy advised that CRC proposes to amend the declarations so they focus more generally on whether it must appoint independent hearing commissioners when a plan change results from a regional initiative such as the UDS.

[15] No defence has been filed. The Attorney moves to strike out, saying that he has no larger role under the relevant legislation than any member of the public, no interest in PC1, and no dispute with CRC; and further, that he is not a proper contradictor even if the proceeding is designed to test a public law issue in the public interest. The Attorney is disposed to agree with CRC on the merits.

[16] CRC opposes, contending that the Attorney may be sued under the Declaratory Judgments Act where the plaintiff wants a decision upon a matter of public law in the public interest, that a defendant is needed if the proceeding is to be viable, and that if the Attorney agrees with CRC on the merits, the proper course is not to strike him out but to appoint amicus curiae.

[17] I must record what is not presently in issue. Because the Attorney does not ask that the entire proceeding be struck out, I need not decide whether the Court would refuse relief in the exercise of its discretion under the Declaratory Judgments Act. Rather, the Attorney's stance is that whatever the substantive merits, he is not a proper defendant.

Striking out a party

[18] Rule 4.56(1)(a) of the High Court Rules allows the Court to strike out a party who was improperly or mistakenly joined. It appears to be common ground that the test is the same as that used for striking out a statement of claim; that is, whether it is clear that the claim cannot succeed against the party.[1] That is appropriate in most cases, since r 4.3(1) provides that all persons may be joined as defendants against whom is alleged a right to relief arising from the facts and the strikeout usually turns on whether the claim might lead to the relief sought on the facts pleaded.

[19] However, one of the tests for joining a party is whether its "presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding".[2] It must follow that a party whose presence is founded not on a claim

[1] *McKendrick Glass Manufacturing Co Ltd v Wilkinson* [1965] NZLR 717, 718
[2] Rule 4.56(1)(b)(ii)

for relief against it but on necessity may be struck out if the Court is satisfied that its presence is not in fact necessary.[3]

The Declaratory Judgments Act 1908

[20] Section 3 of the Act confers an expansive jurisdiction[4] to make declaratory orders determining the construction of a statute,[5] on the application of any person who has done or desires to do any act the validity, legality or effect of which depends on its construction, or who is in any other manner interested in its construction:

> **3 Declaratory orders on originating summons**
>
> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any bylaw made by a local authority, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
>
> Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—
>
> such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[21] The Act provides a swift and inexpensive method of obtaining a judicial interpretation where the issue cannot be brought before the Court in its ordinary jurisdiction.[6] Proceedings are now commenced by statement of claim under r 18.4. Under s 2, no proceeding is open to objection on the ground that declaratory relief alone is sought, and the Court may make binding declarations of right, whether or not any consequential relief is or could be claimed. So it is no bar to the proceeding that CRC seeks no other relief. Further, a declaration may anticipate an event: s 9.

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[3] cf *Business Associates Ltd v Telecom Corporation of New Zealand Ltd* (1990) 2 PRNZ 317, 320
[4] *Gazley v Attorney-General* (1996) 10 PRNZ 47, 50-51 (CA)
[5] *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147

In *Re Chase*, Cooke P held that s 2 is "amply wide" and should not be restricted by interpretation, provided it is read with s 10, under which the Court enjoys a discretion to refuse to give or make a declaratory judgment or order on any grounds it thinks sufficient.[7]

[22] Using its discretion under s 10, the Court has frequently refused relief where there was no dispute between the parties or no proper contradictor, or the plaintiff sought an advisory opinion. A dictum of Lord Dunedin's in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* is often cited:[8]

> The rules that have been elucidated by a long course of decisions in the Scottish Courts may be summarized thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

In *Gazley v A-G*, for example, the Court of Appeal refused relief because there was no dispute and the application raised hypothetical questions.[9] In *Simpson v Whakatane District Court (No 2)* the Court of Appeal held that the Court will exercise its broad discretionary jurisdiction only to declare existing legal rights, subsisting or future, of the parties before it; that is, it will not declare generally or give advisory opinions.[10]

[23] However, I accept Mr McCoy's submission that a present or pending dispute between the parties is not a prerequisite to relief. It is enough that a declaration may serve some practical purpose.[11] In *R v Gordon-Smith* the Supreme Court held that the Court has jurisdiction to hear an issue "involving a public authority as to a question of public law" although there are no longer live issues between the parties. That is especially appropriate if the question of public law warrants an early determination.[12]

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[6] *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84, 85
[7] [1989] 1 NZLR 325 at 333
[8] [1921] 2 AC 438 at 448
[9] (1994) 8 PRNZ 313; see also the recall judgment at (1996) 10 PRNZ 47
[10] [2006] NZAR 247 at [42]
[11] *Birkenfeld v Yachting New Zealand* [2009] 1 NZLR 499 at [41]-[43]
[12] [2009] 1 NZLR 721 at [17]

[24] Nor is it essential that there be a defendant to serve as contradictor, although the want of one may tell against relief. In *Auckland City Council v A-G*, to which I must return, Thorp J held that "the Court when asked to act in a purely advisory capacity should be particularly slow to do so in the absence of 'a proper contradictor".[13]

The Attorney's responsibilities for litigation affecting rights of a public character

[25] The Attorney is the principal legal advisor to the Crown and the Crown's representative in the Courts, Minister with responsibility for prosecutions, plaintiff or defendant for the Crown in litigation by or against the government,[14] and senior law officer of the Crown.[15] In the first of these capacities he may be heard to explain matters affecting the Crown's prerogatives or public policy, in which the state speaks with one voice,[16] while in the last two he has a special responsibility for the protection of public rights, representing the community and the public interest.[17]

[26] The Attorney may exercise his responsibility for public rights in various ways. He may sue, or intervene in others' litigation. Intervention is as of right where the prerogatives of the Crown may be affected, and otherwise by the Court's leave or invitation.[18] The High Court Rules facilitate intervention by providing that the Court should consider whether the Solicitor-General ought be notified when litigation raises a significant issue under the New Zealand Bill of Rights Act 1990 or affecting the nation's international obligations or those of the Crown under the Treaty of Waitangi, "or an issue in the proceeding is otherwise of significant public

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[13] [1995] 1 NZLR 219 at 223
[14] Section 14 Crown Proceedings Act 1950; Zamir & Woolf *The Declaratory Judgment* (3ed 2002) at 6.22
[15] The Attorney-General's Office *The Governance of Britain: A Consultation on the Role of the Attorney-General* (Cm 7192 2007) at 1.11
[16] *Adams v Adams* [1970] 3 All ER 572 at 576-7, *In Re Chamberlain's Settlement* [1921] 2 Ch 533, 548
[17] The Attorney-General's Office *The Governance of Britain: A Consultation on the Role of the Attorney-General* (Cm 7192 2007); Attorney-General's Department *Report on the Review of the Attorney-General's Legal Practice* (March 1997) at 3.24-3.25. See for example *A-G v Maori Land Court* [1999] 1 NZLR 689 at 690 (CA)
[18] *Adams v Adams [A-G intervening]* [1970] 3 All ER 572, 576-7

interest".[19] The Attorney may allow a citizen to sue in his name in a relator action, since as a general proposition "public rights can only be asserted by the Attorney-General as representing the public" and a private pursuit may be struck out.[20]

The Attorney as defendant

[27] The Attorney generally need not be sued unless the claim affects the rights of the Crown, directly or indirectly. That is so even if the claim raises public interest issues; in that case, the Court may invite or allow him to appear as an intervenor, without first becoming a party.[21] If the Attorney elects not to appear, the Court may nonetheless decide the issue, appointing amicus to argue it if the Court thinks fit.[22]

[28] However, the Court may think it necessary to join the Attorney as a defendant. I begin with *Attorney-General ex rel. McWhirter v Independent Broadcasting Authority*,[23] in which the plaintiff wanted to restrain the broadcasting of a documentary he thought indecent, relying on legislation requiring the Independent Broadcasting Authority to broadcast only material that met standards of good taste and decency. The majority in the Court of Appeal held that a citizen with a sufficient interest might sue for a declaration or injunction to enforce a public right, joining the Attorney as a defendant if need be, if the Attorney refused to lend his name to a relator action or took too long to reach a decision.[24] The case addressed traditional difficulties about standing that might otherwise have prevented the Court from coming at justice for want of someone to represent the public at large or a section of them. That might happen if for some unsatisfactory reason the Attorney himself refused to enforce a public right, as Lord Denning MR and Lawton LJ recognised.[25] In such a case it might be necessary for a citizen to sue, joining the Attorney as a defendant, to ensure the government obeys the law. Mr McCoy relied

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[19] Schedule 5, clause 20. For an example, see *ENZA Ltd v Apple and Pear Exports Permits Committee* (2001) 15 PRNZ 303

[20] Rule 4.28 High Court Rules; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477, per Lord Wilberforce

[21] see *ENZA Ltd v Apple and Pear Export Permits Committee* (2001) 15 PRNZ 303 at [13]-[15]; Zamir & Woolf at 6.24

[22] Zamir & Woolf at 6.29

[23] [1973] 1 QB 629

[24] at 649 per Lord Denning, 657 per Lawton LJ

[25] at 648-9 and 656-7 respectively

upon *R v Greater London Council, ex p Blackburn*, in which Lord Denning MR made similar observations.[26]

[29] Mr McCoy also relied on *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,[27] in which it was suggested that the Attorney not uncommonly refuses to enforce public rights against central government. An employers group claimed that the Commissioners had acted unlawfully by granting amnesty to casual Fleet Street workers who had dishonestly evaded tax. The case did not involve the Attorney directly, but Lord Diplock observed that in practice the Attorney never seeks prerogative orders against government departments, and held that it would be a grave lacuna in public law if a pressure group or a taxpayer were unable to come to Court to vindicate the rule of law.[28] The other law Lords held that one taxpayer has no sufficient interest in the affairs of another to support judicial review.

[30] The question whether the Court will review the Attorney's exercise of his right to enforce public rights, whether directly or by relator action, appears to be unsettled. *Gouriet v Union of Post Office Workers*[29] concerned an attempt to enforce by injunction a criminal prohibition on Post Office workers delaying mail. They proposed to boycott mail to South Africa. The House of Lords held that only the Attorney-General may sue for the public to prevent public wrongs.[30] Lord Edmund-Davies doubted that *McWhirter* was correctly decided, since by permitting a plaintiff to sue in such circumstances the Court would be reviewing the Attorney's decision to neither sue nor permit a relator action. It did not matter that the instant case concerned the criminal law; the Attorney's exclusive authority to sue stemmed from his unique role acting for the Crown as parens patriae.[31]

[31] The proposition that Mr McCoy sought to draw from *Blackburn* and *National Federation of Self-Employed and Small Businesses* was that a responsible local authority, CRC, might be denied standing for want of a suitable defendant. He then

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[26] [1976] 3 All ER 184, 191-2
[27] [1982] AC 617
[28] at 644
[29] [1978] AC 435
[30] at 478, 494
[31] at 511

argued that "it is the role of the Attorney to be a respondent to proceedings of public law in which there is a public interest". It suffices to join the Attorney, in his submission, that CRC seeks declarations about public rights. I accept that the authority of elected councillors to conduct hearings into PC1 may be characterised as a public right. But CRC undoubtedly has standing to seek declarations under the Declaratory Judgments Act, without joining the Attorney. It is a separate question whether the Court might deny relief, in the exercise of its remedial discretion, because opposing interests are unrepresented. And the authorities cited do not support counsel's proposition that the Attorney is a proper defendant whenever a declaration of public rights is wanted. They suggest, at their highest, that the Attorney might be joined as a defendant when a public right is in issue, the proposed plaintiff lacks standing to enforce it, and the plaintiff complains that the Attorney has refused or neglected to enforce it himself.[32]

[32] In New Zealand, the Attorney has occasionally intervened or been joined to represent the public interest by presenting opposing arguments where by convention the real respondent abides the Court's judgment. *Thompson v Commission of Inquiry into Administration of District Court at Wellington* stemmed from criminal proceedings against Deputy Registrars accused of interfering in Court procedures for parking infringements. The Commission of Inquiry was constituted, and the Deputy Registrars moved for judicial review, trying to delay the inquiry until the criminal proceedings concluded. Orders were made by consent joining the Attorney as a respondent to represent the public interest and to present argument contrary to that of the applicants.[33] The Attorney appeared as sixth respondent for the same reason in *Re Erebus Royal Commission: Air New Zealand Limited v Mahon (No 2).*[34]

[33] In my opinion, *Wybrow v Chief Electoral Officer*,[35] which Mr McCoy characterised as directly analogous to this case, falls into the same category. The General Secretary of the Labour Party sought a declaration about the meaning of provisions of the Electoral Act 1956 governing the validity of votes. There were conflicting High Court decisions on electoral petitions, from which lay no appeal.

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[32] cf *Environmental Defence Society v Agricultural Chemicals Board* [1973] 2 NZLR 758, 765-6
[33] [1983] NZLR 98, 101
[34] [1981] 1 NZLR 618, 657.
[35] [1980] 1 NZLR 147

The application was removed into the Court of Appeal, where the other political parties chose to abide, as did the defendant, the Chief Electoral Officer. His administration of the legislation was strictly in issue, but he was described as a nominal defendant because the real question was whether the High Court judgment in *Re Hunua Election Petition*[36] was correct. His counsel was given leave to withdraw. The Attorney had been served "as the representative of the public", and accepted the responsibility of presenting opposing argument. It does not appear that he was made a party, so he must have been heard through the Solicitor-General as amicus, or perhaps as an intervenor.

[34] It has also been held that the Attorney might be joined to bring an appeal for an inferior tribunal which is not a party. *Re Baise-Moi*[37] concerned a decision of the Film and Literature Review Board, which had simply ignored an earlier High Court judgment on an appeal from a determination of its own. In *Re Baise-Moi* the Court of Appeal criticised the Board for its conduct, but recognised that it was not a respondent to such appeals and had no right of further appeal. The Court suggested that "where important issues of public interest arise" in such a case, consideration ought be given to joining the Attorney as a party so he or she might appeal, if thought appropriate.[38]

[35] There is also a class of cases in which the Attorney has been joined because the litigation concerns his or her responsibility for criminal prosecutions. In *Auckland Area Health Board v A-G* the question was whether doctors might be charged with manslaughter were they to disconnect life support machines sustaining a man utterly undone by Guillain-Barre syndrome.[39] The Attorney was named as a defendant but was removed by consent and appeared as an intervenor, Thomas J having refused to allow him to appear by amicus on the ground that he had responsibilities (for criminal prosecutions) in his own right. In *Woolworths (New Zealand) Ltd v A-G* the question was whether a supermarket on Waiheke Island might sell certain goods on Good Friday and Easter Sunday.[40] The Labour

[36] [1979] 1 NZLR 251
[37] [2005] NZAR 214
[38] at [52]
[39] [1993] 1 NZLR 235
[40] [2001] 3 NZLR 123

Department was removed as a defendant by consent and the Attorney appeared on its behalf as an intervenor, Glazebrook J recording that the Attorney accepted she ought not appear by amicus since a prosecutorial function was affected. I observe that in these cases the Court was content to proceed without a defendant where the Attorney appeared as intervenor, and might have been willing to rely on amicus had the litigation not engaged a responsibility for criminal prosecutions.

[36] The Attorney has sometimes been joined as a defendant not because the Crown is interested in the litigation but to represent interests opposed to the plaintiff. In *Ellis v Duke of Bedford* the Court of Appeal held, Vaughan Williams LJ dissenting, that the Attorney must be joined to represent growers of fruit and vegetables who might be interested in disputing the plaintiffs' claim to preferential rights to establish stalls at Covent Garden Market under legislation regulating the market.[41] The Court reasoned that it would be wrong to resolve the case against the public (other growers) unless the Attorney represented them. That conclusion was not challenged on appeal, but two members of the House of Lords criticised it nonetheless. Lord Brampton thought the growers whom the Attorney was to represent did not themselves represent the public.[42] Lord Macnaghten noted that neither plaintiff nor defendant wanted the Attorney, and inquired pertinently:

> What is the Attorney-General to do when he comes? Is he to support the growers, or is he to take part with the Duke, who is alleged to favour the middlemen, or is he merely to look on and see fair play? And who is to pay his costs?[43]

[37] In *Auckland City Council v A-G* (above) the Council held property that had been set aside for public works and from time to time wanted to dispose of some of it. The Council wished to know whether it might sell such land under the Public Works Act 1981 without first offering it to adjoining owners. The case turned on the meaning of the legislation, for no particular land was in issue and no specific declaration of right was sought. The Attorney was sued "on behalf of all public interests", and accepted the role. He supported the Council, his counsel explaining that the Crown had a very similar interest. Thorp J saw the issue was significant but

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[41] [1899] Ch 494, 518, 519

[42] *Duke of Bedford v Ellis* [1901] AC 1, 23. In *Gouriet v Post Office Union of Workers* (above) Viscount Dilhorne distinguished *Ellis* on this ground (at 494)

[43] ibid, at 12

declined to exercise jurisdiction, reasoning that it was better to refuse than to decide a question of public importance affecting many properties and adjoining landowners without hearing from anyone with an interest in the opposing alternatives. There was "a measure of artificiality" in the mooted appointment of amicus at that late stage of the case. Notwithstanding that the case involved a question of construction and the Attorney was willing to serve as defendant, the Court declined to grant relief when the real contradictors were unrepresented.

[38] In *Proprietors of Hiruharama Ponui Block Inc v A-G* the Court seemingly of its own motion directed that the Attorney be served to represent all opposing interests.[44] The question was whether a lease required the consent of the Maori Land Court. All applicants, including the plaintiff incorporation, wanted a negative answer. The Court was evidently unsure whether there were opposing interests, but noted that not all holders of votes had supported the proposal at a meeting of the plaintiff. The Attorney being present, the Court accepted that there was a proper contradictor for the declarations sought.

[39] In *re Chillagoe Railway and Mines Ltd* the Court ordered that the Attorney be joined as a defendant where trustees of a debenture trust deed sought an inquiry to identify the holders of certain bearer securities.[45] As a general rule, however, the Attorney's responsibility for trusts is confined to those having a charitable purpose. He acts as parens patriae to represent the objects of such charities, to afford advice and assistance to the Court in their administration, and to enforce charitable purpose trusts.[46]

[40] *Attorney-General and The Spalding Rural District Council v Garner* is instructive for its discussion of the circumstances in which the Attorney may sue for a section of the public.[47] The case concerned rights to graze a private road, granted by commissioners under an Inclosure Act. The commissioners had directed that the proceeds of grazing be used to repair roads in the parish of Gosberton. Twice daily the defendant drove his stock down the road, ostensibly to reach water but in fact to

[44] [2003] 2 NZLR 478 at [3]
[45] [1930] W.N. 41
[46] *Wallis v Solicitor-General of New Zealand* [1903] AC 173, 181-2
[47] [1907] 2 KB 480, 487

exploit the pasturage. The question was whether either the Council or the Attorney might restrain him. Channell J held that the Attorney could not sue because the property right in issue was enjoyed by a limited section of the public, the parishioners, and was not held in common with the public at large. He held that "[t]he Attorney-General takes proceedings as the representative of the public, for he represents the Crown and the Crown represents the public."[48] There was an almost complete absence of authority, but in principle:

> …the rights, which the Attorney-General intervenes in order to protect, as representing the Crown, in the capacity … of parens patriae, must be rights of the community in general, and not rights of a limited portion of His Majesty's subjects, especially when the limited portion in question … have representatives who can bring the action.[49]

[41] Channell J also held that the Attorney might represent a portion of the community in respect of interests they hold "in common with all the rest of the community", but such persons must appear as parties to represent interests peculiar to themselves.[50]

Necessity the test of joinder where there is no dispute with the Crown

[42] The authorities lead me to conclude that neither party is entirely correct in their respective contentions (summarised at [2] and [15]-[16] above). So far as Ms Arthur's argument is concerned, I do not accept that the Attorney may be sued only when there is a dispute (and presumably, some relief claimed) affecting the Crown, with intervention in public interest litigation being entirely in the Attorney's prerogative.

[43] And contrary to Mr McCoy's argument, the Attorney may not be sued whenever a plaintiff wants a declaration about the meaning of public legislation or raises a "public law issue", and whether or not relief is sought against the Crown. The Attorney is not invariably a proper contradictor in the sense used by Lord Dunedin – a person with a true interest to oppose the declaration sought. The Crown does not by definition have an opposing interest in every such case; on the contrary,

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[48] at 485
[49] at 487

legislation normally binds it too[51] and its interests, if any, may be aligned with the plaintiff's, as *Auckland City Council v A-G* illustrates.

[44] If Mr McCoy's submission were correct, the Attorney might be joined in every case involving the construction of legislation, whether or not there was another contradictor and whether or not the Attorney agreed with the plaintiff. Indeed, counsel made a virtue of the point, saying that the meaning of legislation is pre-eminently a question of public interest in which the Attorney is a proper respondent. The High Court Rules and the authorities to which my attention has been drawn do not support that conclusion. On the contrary, they show that the Attorney may be joined only where there is a claim against him or the Crown or his presence as a party is necessary to adjudicate upon the issues. In other cases, the Court may choose to determine the issue without the Attorney, relying on such assistance as another defendant may provide or appointing amicus, as appropriate.

[45] The authorities show that the Attorney's presence as a party may be necessary when the litigation engages his responsibility for the conduct of criminal prosecutions, although the Court may be willing to allow him to appear as intervenor instead. As a defendant, the Attorney assumes a party's responsibilities for pleadings, discovery, evidence and costs.

[46] The Attorney's presence as a defendant may also be necessary when the claim confronts the interests of the public in general, especially when there is no other defendant who can represent those interests. It is a different matter when the interests of a section of the public are at stake. While the Attorney has represented a section of the public as defendant from time to time, my attention has been drawn to no case in which the Court decided over the Attorney's opposition that he must remain a party. Following *Spalding Rural District Council*, I consider that the Court may insist he remain only when the interest the Attorney is to represent is held in common with the community in general, since his appearance must be founded on his responsibility for public rights. To the extent that the section of the public whom the Attorney is to represent have interests that are not held in common with the

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[50] at 486
[51] The Resource Management Act does so: s 4

public at large, the Attorney cannot be compelled to represent them; they must appear for themselves or by some other representative. Those cases in which the Attorney has assumed the role of a defendant for the private interests of a section of the public may be explained by his willingness to assist, the Court having identified a need for representation, by assuming the role – party, intervenor, or amicus – that was thought appropriate to the case.

[47] I turn to consider the Attorney's position in this case.

Is the Attorney sued for the Ministers administering the Resource Management Act and the Local Government Act?

[48] Mr McCoy first argued that the Attorney is sued for the Minister for the Environment and the Minister of Local Government, for CRC wants declarations about the rights of elected councillors under legislation that the two Ministers administer. On this view, the claim is much like any other in which relief is sought against the government.

[49] I do not agree. There is no present or pending controversy between CRC and the Crown, and no ministerial or official decision is impugned or even pleaded. The claim may point to weaknesses in the legislation, but it does not address the Ministers' administration. One way of testing the point is to inquire whether any specific relief might be granted against the Ministers. Manifestly it could not. I was told that the Attorney was not a party to the National Investment Trust claim, although he ought to have been if the Ministers' administration was in issue.

Is the Attorney a necessary party?

[50] Mr McCoy's alternative and principal submission was that because public rights are involved, the Attorney is a proper contradictor under the Declaratory Judgments Act. I have already rejected the broad submission that the Attorney is invariably a proper contradictor in such a case. The argument raises several questions: whether there is a live issue of public importance; whether there is another proper contradictor; whether the opposing interest is held in common with the public

at large; what role the Attorney would play; and whether there are other reasons, such as the availability of an appeal should CRC fail, why a defendant is needed.

A live issue

[51] The predetermination issue remains live notwithstanding the National Investment Trust settlement. It will arise in essentially the same factual context when the other three Councils revise their own district plans under the UDS, unless they opt to appoint independent commissioners at the outset, and it will arise generally as other regional and local authorities adopt similar co-operative planning strategies. The case also differs from *Auckland City Council v A-G* in that there is a specific factual context. That is important for another reason; by its nature, an allegation of predetermination depends on the facts.

[52] I am not sure that the issue "haunts local government", as Mr McCoy put it, but it does possess importance for the greater Christchurch urban area, and also for the administration of the Resource Management Act; CRC wants to confirm that the test of predetermination stated in *Travis Holdings Ltd v Christchurch City Council* [52] applies in this context and remains good law.

No proper contradictor to serve as defendant

[53] A section of the public, comprising developers and landowners, are plainly interested in opposing plan changes implementing the UDS. PC1 has been referred to independent commissioners, but the developer interests may wish to argue that other local authority councillors have predetermined their own plan changes for the same reason. The purpose of this proceeding, from CRC's perspective, is to pre-empt such arguments so far as it is possible to do. So the developer interests are proper contradictors; and as in *Auckland City Council v A-G*, the Court may refuse relief in the exercise of its discretion if they are unrepresented.

[52] [1993] 3 NZLR 32

[54] In argument, I explored with counsel whether the Court must decide the issue now, or whether CRC can simply wait until it next arises, presumably when one of the three local Councils also moves to implement the UDS.

[55] I was initially led to understand that CRC faced a firm deadline for review of the RPS. In a memorandum of 3 February 2009, counsel submitted that CRC had to release decisions on submissions within two years after notifying a proposed change, and that it could not expect a final decision within that time because the judicial review proceedings had been brought many months after notification. When the issue was examined in argument it became apparent that CRC is able to extend time, up to twice the maximum period, under s 37(1)(a) and s 37A of the Resource Management Act. So the time for reviewing the RPS might be extended for a substantial period (counsel variously stated it as a further two or 10 years). Further, PC1 will not govern development directly even after CRC adopts it; it will do so only when given effect in district plans. In the meantime, PC1 is already a relevant consideration in applications for resource consent, under s 104(1)(b)(iii) of the Act.

[56] Still, timing is important. Under s 75(3)(c) of the Act, a local authority must give effect to the RPS only when it is operative. Until that time, a local authority which is changing its district plan merely has regard to the proposed RPS under s 74(2)(a)(i). It need not be given substantial weight. It is also arguable that pending adoption PC1 provides no meaningful constraint on applications to rezone land.[53] These considerations may encourage developers to delay the UDS at every turn, in the meantime trying to have land rezoned from rural to residential. CRC characterises this as a race to the Environment Court, with CRC wanting PC1 approved and developers pursuing rezoning. Counsel advises that an application to rezone a very large area of rural land has already been lodged with the Christchurch City Council.

[57] It is apparent from this summary that affected councils are not compelled to settle as CRC did. If they choose not to appoint independent commissioners, they have the unpalatable option of delaying plan changes while dealing with legal challenges. So the issue might be resolved in other proceedings. However, I remind

myself that that consideration is relevant to the Court's remedial discretion under s 10, and that the Attorney does not seek to strike the claim out on the basis that the Court would inevitably exercise its discretion against CRC. I will assume in CRC's favour that a judgment in this proceeding will reduce delays in district plan changes by reducing the likelihood of judicial review proceedings, with significant implications for the UDS.

[58] I will also assume that it is not possible to identify a representative of the developer interests who might serve as a defendant now, in anticipation of the three local Councils implementing the UDS and insisting on appointing councillors to conduct the hearings. Nothing in the material before me identifies such a defendant. That in turn leads me to accept for purposes of this judgment that there is no other defendant to serve as proper contradictor.

What is the Attorney to do when he comes?

[59] Mr McCoy did not suggest the Attorney should remain a defendant because he has arguably failed to discharge his own responsibility for public rights by taking proceedings. CRC claims plausibly to represent the public interest itself, while the interest of the proper contradictors, the developer interests, does not appear, on the material before me, to be held in common with the public at large.

[60] The Attorney does not want to represent the proper contradictors, quite understandably. Mr McCoy acknowledged that the Attorney cannot be required to plead and argue the opposing case. He suggested that amicus be appointed to argue the opposing case if the Attorney will not. The Attorney would represent opposing interests by acting not as an actual contradictor but as a "nominal defendant", as counsel put it in a memorandum filed before the hearing.

[61] I accept that amicus is able to represent opposing interests here. Senior counsel for National Investment Trust has indicated that he is willing to accept such appointment, and his clients consent to it. They have no interest in becoming parties,

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[53] *Canterbury Regional Council v AMI Limited* HC CHCH CIV 2008-409-2292 5 June 2009

the substantive question and costs having been settled. Counsel can advance the arguments and evidence that National Investment Trust would have done, and he would otherwise assist the Court. Although CRC resists that appointment, saying that counsel would be partisan, the object of the appointment in this case would be to see the private interests of opposing parties effectively represented. (Of course I do not exclude other counsel, who may be equally able to represent opposing interests for all I know.) As an alternative, counsel might be appointed under r 4.27(b) to act for unrepresented persons, which may be a better course in the circumstances. The Court may order that CRC bear the costs.[54]

[62] In the circumstances, I cannot see what the Attorney would do qua defendant. Since amicus would do the actual work of representing the developer interests, the Attorney's presence is not necessary for that purpose. And having regard to CRC's purpose of obtaining a judgment that will settle the predetermination issue, the Attorney certainly should not be asked to serve as a nominal defendant; on the contrary, by insisting that he remain the Court would call on the Attorney to take responsibility for the interest assigned to him.

[63] Mr McCoy's final point was that if the Attorney remains a party he may appeal a decision in CRC's favour. It is true that a defendant's appeal may not be possible absent a defendant. (It is arguable that the High Court may authorise one in its inherent jurisdiction,[55] but the point is unresolved and was not addressed in *Re Baise-Moi*.) This consideration is capable of justifying joinder of the Attorney as suggested in *Re Baise-Moi*, but that case is explicable by the convention that an inferior tribunal is not a party to appeals against its determinations. Joining the Attorney was a practical way of permitting an appeal on an issue of public importance. There is no obvious public interest in such an appeal in this case. Nor did Mr McCoy argue that the Attorney must appeal a decision adverse to the developers' interests. Presumably he would not do so by choice, since he is disposed to agree with CRC.

Decision

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[54] s 99A Judicature Act 1908
[55] *Contradictors v A-G (No 2)* [1999] 2 NZLR 519 at [10]

[64] I am satisfied that the Attorney's presence is not necessary to adjudicate upon the issues in this proceeding, for it cannot be said that the opposing interests are held in common with the public at large and amicus or counsel for unrepresented persons is able to represent the proper contradictors. The Attorney is struck out.

[65] The Attorney will have costs of the application on a 2B basis. Memoranda may be filed if counsel cannot agree.

[66] The Registrar is to convene a telephone conference to determine whether the proceeding will remain in the Wellington registry, whether the Waikato Regional Council will be added as a plaintiff, and the appointment of amicus or counsel for unrepresented parties.

Miller J

Solicitors:
Wynn Williams & Co, Christchurch for the Applicant
Crown Law, Wellington for the Respondent