IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2018-425-000096
[2019] NZHC 1680

	BETWEEN	EUGENE ANTHONY GREENDRAKE Applicant
	AND	DISTRICT COURT OF NEW ZEALAND Respondent

Hearing: On the papers

Appearances: Applicant in person
R W Donnelly appointed to assist the Court as Contradictor

Judgment: 18 July 2019

JUDGMENT OF DUNNINGHAM J

Introduction

[1] The applicant seeks to review a decision of the District Court made under s 26 of the Criminal Procedure Act 2011 refusing to accept the applicant's charging documents for filing.

[2] The respondent, as is the convention, abides the decision of the Court and has been excused from further attendance.

[3] In order to ensure that the matter is fully argued before the Court, Mr Donnelly has been appointed as counsel to assist the Court and to act as contradictor. In a memorandum filed on 26 April 2009, Mr Donnelly raised the question of whether, pursuant to s 9(1)(b) of the Judicial Review Procedure Act 2016 (the Act), the potential defendant, Mr McConnochie, should be a respondent in this proceeding because he is a "party to those proceedings".

[4] If Mr McConnochie is considered to be a party to the proceedings, counsel to assist proposes that the following directions are made pursuant to s 14(2) of the Act:

(a) Wayne Alexander McConnochie be added as a respondent to this proceeding;

(b) Mr McConnochie be served with all documents filed in this proceeding and all minutes of the Court; and

(c) if McConnochie wishes to file a statement of defence, he is to do so no later than 25 working days after service of the documents.

The applicant's submissions

[5] Mr Greendrake, the applicant, objected to the proposal that Mr McConnochie being served and, in a minute issued 7 May 2019, Gendall J made directions allowing Mr Greendrake to file a memorandum in response to Mr Donnelly's proposal and for Mr Donnelly to file any memorandum in response.

[6] Mr Greendrake's memorandum considers the case of *Prescott v District Court at North Shore*, which Mr Donnelly referred to as supporting his contention that Mr McConnochie should be added as a respondent.[1] Mr Greendrake points out that the relevant difference between the present case and *Prescott* is that in *Prescott*, before the private prosecution was proposed, there was a proceeding in which the applicant was the plaintiff and the proposed defendant was a witness. The evidence given by the proposed defendant in that proceeding was the basis for the proposed charges of perjury.

[7] Mr Greendrake points out that, unlike *Prescott*, there have been no court proceedings involving both himself and Mr McConnochie, and the proposed criminal proceeding cannot be regarded as existing yet as it has not been commenced pursuant to s 14 of the CPA as the charging documents have not been accepted for filing.

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1 *Prescott v District Court at North Shore* [2017] NZHC 2828.

Because there is no proceeding referable to in s 9(1)(b) of the Act, it cannot be used to justify adding Mr McConnochie as a respondent in this case.

[8] He also notes the case of *Mitchell v Porirua District Court*, where the District Court held a hearing to give the defendants opportunity to oppose the proposed charges before deciding not to accept them.[2] In the present case, nothing like that happened in the District Court. Mr Greendrake also notes that in neither *Prescott* nor *Mitchell* was counsel appointed to act as contradictor. It was thereby reasonable to have "real contradictors" added.

[9] Mr Greendrake also seeks to rely on a further affidavit he has filed to support excluding Mr McConnochie from the proceedings. He acknowledges the affidavit contains hearsay evidence but he seeks to have it admitted pursuant to s 20(1) Evidence Act 2006. In it, he notes that Mr McConnochie is a firearms owner and he recounts evidence of third parties that Mr McConnochie is a "loose cannon" who routinely shoots animals on his property in the vicinity of where the witnesses, and he, reside. The implication appears to be that if Mr McConnochie becomes aware of the proceeding before he is charged, he may be a threat to potential witnesses.

Discussion

[10] I do not consider the information contained in the affidavit is relevant, nor should it be admitted. Even if the hearsay evidence was admitted it does not disclose any cogent evidence which would suggest that Mr McConnochie would use his firearm unlawfully. Furthermore, it would be entirely inappropriate to prevent Mr McConnochie from participating in proceedings based on hearsay evidence if he otherwise has a right to do so.

[11] The sole issue therefore is whether Mr McConnochie should properly be regarded as a party to those proceedings because of his status as a "proposed defendant".

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2 *Mitchell v Porirua District Court* [2017] NZHC 1331.

[12] The relevant provision is s 9 of the Judicial Review Procedure Act 2016, which states:

> (1) The following persons must be named as a respondent to an application:
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> (a) the person whose act or omission is the subject matter of the application; and
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> (b) if the application relates to any decision made in proceedings, every party to those proceedings.

[13] This provision was previously found in the Judicature Amendment Act 1972, which provided at s 9(4):

> The person whose act or omission is the subject-matter of the application for review, and, subject to any direction given by a Judge under section 10 of this Act, every party to the proceedings (if any) in which any decision to which the application relates was made, shall be cited as a respondent.

[14] There are a number of cases that deal with the application of s 9(4) Judicature Amendment Act, which is substantially the same as the current provision. In *Air New Zealand Ltd v Queenstown Lakes District Council*, the High Court held:[3]

> It is a mandatory requirement that persons whose conduct is the subject matter of an application for review to be named as a party [sic]. This is, of course, the status quo. For example, the Environment Court is regularly reviewed for procedural decisions. The Environment Court is always stated as the first respondent. The second respondent is the party favoured by the ruling. The litigation usually proceeds with the Environment Court abiding and the party favoured by the ruling defending the Environment Court's conduct.

[15] That case was cited in *Muir v Taxation Review Authority*, which was decided in 2017 but nevertheless applied the Judicature Amendment Act because the application had been commenced under that legislation.[4] The Commissioner of Inland Revenue applied to be joined as a respondent, as he was the named defendant in the decision under review. Gordon J found that the Commissioner should be joined under s 9(4) because he had "been favoured by Judge Sinclair's decision. It prevented Dr Muir from resurrecting the proceeding against the Commissioner".[5] Given that the

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3 *Air New Zealand Ltd v Queenstown Lakes District Council* HC Christchurch CIV-2010-425-395, 7 April 2011 at [8].

4 *Muir v Taxation Review Authority* [2017] NZHC 846.

5 At [19].

outcome of the judicial review proceeding would directly affect the Commissioner, the Court held his interest should be recognised by joinder.[6]

[16] A full bench of the High Court expressed the same view in *Wilson v Attorney-General*:[7]

> Emerging from the cases is that joinder is appropriate where the party's interests are, or may be, directly or indirectly affected by the judicial review application. In such situations, it would be unjust to decide the issues in the absence of the party so affected, or potentially affected… Fairness to the plaintiff, who is having another party interposed in his proceeding, demands that the Court consider whether the joinder should be for all or only limited purposes. The level of participation should be only what is necessary to protect the interests of the party being added.

Conclusion

[17] Thus, while it is well accepted that there is no obligation on the District Court Judge making a decision under s 26 to hold a hearing or allow the proposed defendant to file materials,[8] and the Judge did not do so in this case, the outcome of the application for judicial review could potentially affect Mr McConnochie as the proposed defendant. Given the generally expansive approach to the identification of parties on an application for judicial review, I think it is appropriate that Mr McConnochie be served with the proceedings and offered the opportunity to participate.

[18] Accordingly, I make the orders proposed as set out in [4] above.

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6 At [23]-[24].
7 *Wilson v Attorney-General* HC Wellington CIV-2010-485-1147, 27 July 2010 at [20].
8 *Goodman Fielder New Zealand Ltd v District Court at Porirua* [2019] NZHC 599.