

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

CIV-2015-404-0000719

IN THE MATTER OF

an application for judicial review under Part I of the
Judicature Amendment Act 1972

BETWEEN

**URBAN AUCKLAND, THE SOCIETY FOR THE
PROTECTION OF AUCKLAND CITY AND
WATERFRONT INCORPORATED**

Applicant

AND

AUCKLAND COUNCIL

First Respondent

AND

PORTS OF AUCKLAND LIMITED

Second Respondent

FIRST AFFIDAVIT OF

DR JOEL KEITH CAYFORD FOR APPLICANT

Sworn May 2015

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I, **Joel Keith Cayford**, of Auckland, Planner, swear:

1. INTRODUCTION

- 1.1 My name is Joel Keith Cayford. I have been a resident of Devonport, Auckland since 1991.
- 1.2 I hold a BSc (Hons) in physics, a Masters in Planning Practice (University of Auckland 2012) and a PhD in physics.
- 1.3 I am presently enrolled in postgraduate research studying the political economy of New Zealand urban waterfront planning at the School of Architecture and Planning, University of Auckland, where I am also engaged on contract as a planning lecturer. For the past five years I have also provided strategic planning advice for a variety of clients in New Zealand.
- 1.4 For the twelve years prior to that I served as an elected councillor on North Shore City Council and Auckland Regional Council and was a qualified Resource Management Act commissioner. Throughout this period I have engaged in public policy debates on a number of topical issues and have developed informed and independent expertise on Auckland local government and related planning matters.
- 1.5 My evidence addresses three matters relevant to the challenge that has been made by the applicant, Urban Auckland, to the consents granted to Ports of Auckland Limited (**POAL**):
 - (a) An academic planning analysis of decision-making processes used by POAL, its precursor Auckland Harbour Board, and associated local government authorities that enabled and led to the development of Princes Wharf in the 1990's.
 - (b) A chronology of activity and processes relating to the proposed Bledisloe Wharf reclamation since POAL was established by statute during the reforms of the late 1980's;
 - (c) An examination of regional planning policy relating to Auckland's waterfront and to the special circumstances that arise when considering any proposal to extend Bledisloe, including those

that arise since Queens Wharf was purchased from POAL and brought into the ownership of Auckland Council.

2. ACADEMIC ANALYSIS OF AUCKLAND WATERFRONT PLANNING DECISION-MAKING

- 2.1 For the past two years I have engaged in detailed planning research to analyse the function and role of planning systems in the various stages of redevelopment of Princes Wharf on Auckland's waterfront over the past thirty years.
- 2.2 Public documents relating to the planning and development of Auckland waterfront were obtained from Auckland Council, Auckland Library, Auckland City Council Archives, Auckland Maritime Museum (for Auckland Harbour Board files), and Auckland Council Property files (planning permits, resource consents and other regulatory matters). Processes and practices that influenced Auckland's Princes Wharf redevelopment were identified and the competing roles of planners and planning institutions and other stakeholders analysed. This research has been compiled into an academic paper which has been prepared for publication. Attached and marked "JC01" is a draft of that paper.
- 2.3 The patterns of behaviour that are evident in these detailed investigations include strategies of incrementalism, where a succession of resource consent applications – each avoiding the need for notification and manifesting minor adverse effects - constrains the ability of a consent authority to deliver or give effect to the integrated management purposes of the Resource Management Act, private encroachment onto and private use of public space, and a pattern of deal-making between POAL and public authorities which short-changed the public interest.
- 2.4 My research into the behaviours that have led to the B2 and B3 consenting decisions that are being contested in Urban Auckland's application for judicial review indicates they exhibit similar patterns. For example, at paragraph 62(c) of POAL's Statement of Defence is the statement:

“It admits that the B2 Extension Consent Applications and the B3 Extension Applications were made by it on a sequential basis and states further that this was a lawful approach available to it.”

- 2.5 In my opinion POAL is acting rationally in regard to the B2 and B3 extensions in pursuit of the objective of being a successful business, as set out in its establishing legislation. However, it is also my opinion that POAL, Auckland Council (including the Auckland Council Investments Ltd CCO) have not acted in accordance with agreed practices, have ignored relevant statutory planning provisions, and as a consequence have failed to give effect to the integrated management purposes of the RMA in their collective considerations of these proposals.

3. BLEDISLOE WHARF AND POAL CHRONOLOGY

- 3.1 The evidence in this section is drawn either from POAL planning documents, public statements, or NZ Herald newspaper reports.
- 3.2 **1989 Port Development Plan.** This plan (extract only shown below) proposed intensification and redevelopment of the area from Bledisloe Wharf to Fergusson Container Terminal for heavy port activities. Stages 1, 2 and 3 being additional reclamations of Bledisloe in accordance with this figure:

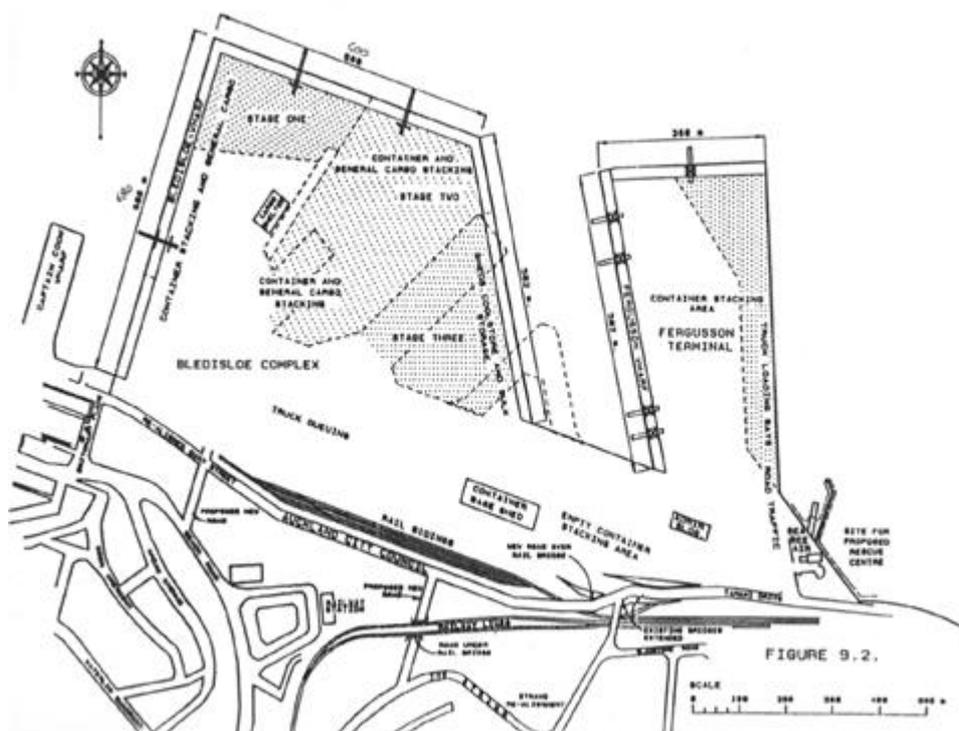


Fig 2: 1989 Port Development Plan (extract)

- 3.3 **March, 1998.** POAL tells the Environment Court considering an appeal brought by Judges Bay Residents¹ opposed to the Fergusson Terminal reclamation that “future proposed redevelopment of the Bledisloe/Jellicoe complex in three stages would involve a further 21.5 hectares” (paragraph 78). This essentially restates the 1989 Plan. (Attached and marked “**JC02**”).
- 3.4 **December, 2005.** *Auckland Waterfront Vision 2040* published by Auckland Regional Council and Auckland City Council (attached and marked “**JC03**”). This states: “It is likely the future growth of the port and the need to accommodate activities from elsewhere in the waterfront will require further reclamation in the precinct over time....” Action: “Complete updated port development plan based on the original Port Development Plan (1989)”.
- 3.5 **January, 2008.** *Port Plan 2008* prepared in partial compliance with Vision 2040 actions. This describes the “medium term 2010-2025” plan: “The next likely reclamation development is Bledisloe North comprising 7.5ha of surface area with additional berth length (Fig 18).

¹ *Judges Bay Residents Association v The Auckland Regional Council and The Auckland City Council* Environment Court Decision No. A 72/98

A possible commencement date is 2017, with construction over 10-12 years (consent application around 2012). And the “long term 2025 onward” plan: “The ultimate port footprint includes further reclamation between Bledisloe and Fergusson, generally within PMA 1A of the Regional Plan: Coastal. The total port area would comprise approximately 115 hectares.” (POAL Port Plan 2008, attached and marked “**JC04**”)



Fig 18: Bledisloe North reclamation

- 3.6 **July, 2009.** Auckland Regional Council agrees to purchase 50% of Queens Wharf, with Government, from POAL subject to POAL retaining a licence to use a 7 metre strip along east and west sides of wharf, leaving the northern end free of such obligations. (Auckland Regional Council committee papers, attached and marked “**JC05**”)
- 3.7 **July, 2009.** Jens Madsen, Golden Opportunity for Waterfront. NZ Herald OpEd: “...by working smarter and using new technology, we have been able to reduce our waterfront footprint by nearly half, from 140ha to 77ha. The released land includes the Westhaven Marina, the Viaduct, the Wynyard Quarter Tank Farm, Princes Wharf and - most recently - Queens Wharf, which will be transferred to the Government and Auckland Regional Council next April. We are also working to enable, within about 10 years, public access to the 2.1ha Captain Cook Wharf, opposite Gore St. In reducing our footprint, it has been important to retain enough land to run an efficient port. Long-term, we also need to be able to grow and intensify our operations in the east, so that Auckland's and New Zealand's future cargo and freight needs can be met.” (NZ Herald Opinion, 15.7.2009, attached and marked “**JC06**”)

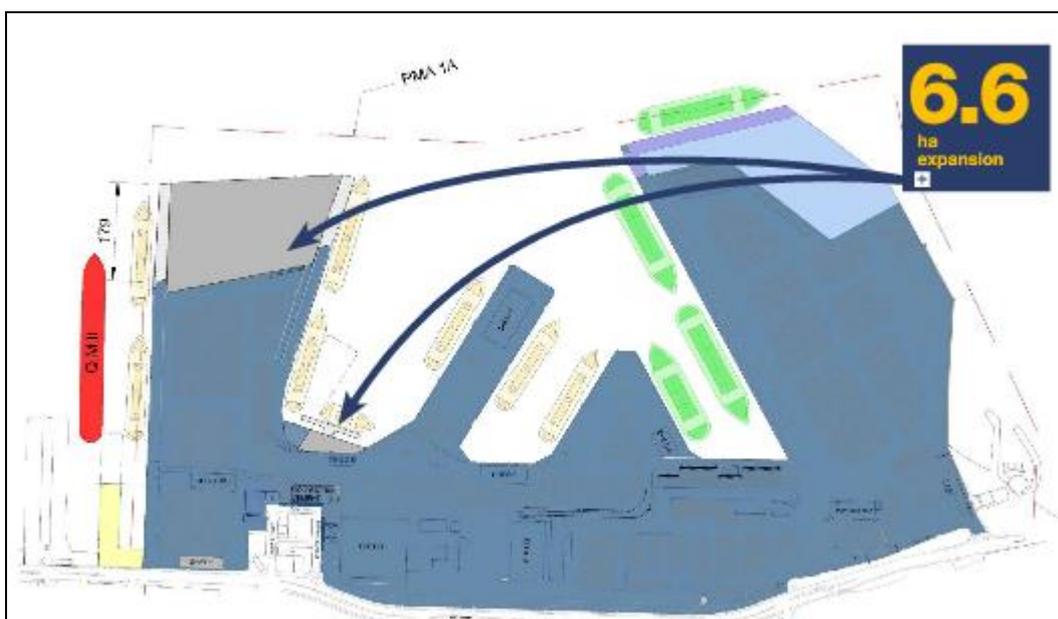
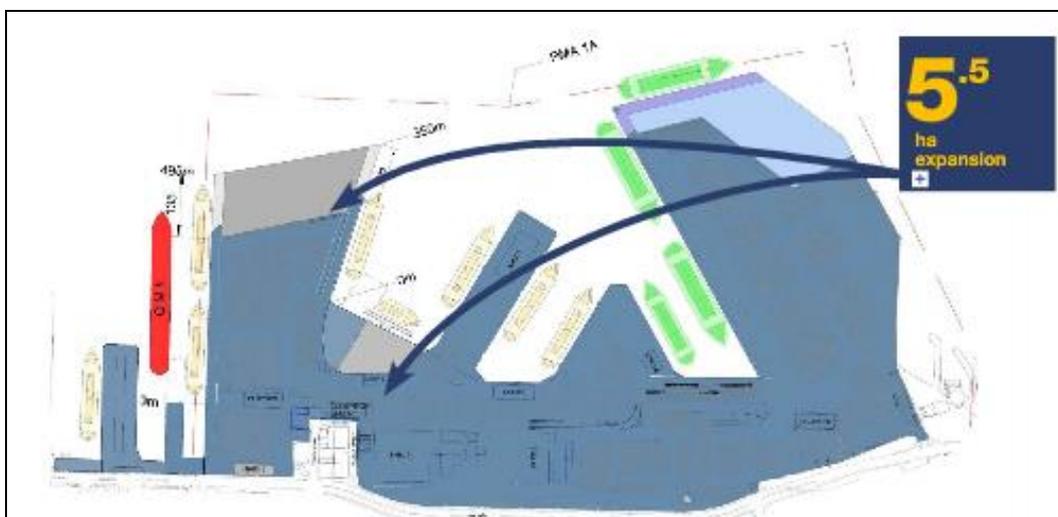
- 3.8 **August, 2009.** *Matthews and Matthews Heritage Assessment of Queens Wharf and Sheds.* This advises: "Views from the along the centre of Queens Wharf back to Queen Street and towards the Waitemata harbour are important." In relation to the aesthetic values the place contributes to sensory perception through the formal qualities of its composition and setting to the site, locality, district and region. And in relation to its landmark quality, Matthews & Matthews advise: "Queens Wharf occupies a prominent position when approaching Auckland and the ferry terminals from the harbour." (Assessment, Pgs 32,33, attached and marked "JC07")
- 3.9 **September, 2010.** *Project Auckland,* NZ Herald: As ever, Madsen says the timing of developments will depend on projected trade volumes and these remain deflated by recession. But the plan envisages that Fergusson and Bledisloe will both be lengthened by around 2026 and that, by 2040, the harbour in between will be filled in to form a vast container base - if resource consent is gained for such contentious work. (NZ Herald Project Auckland Liftout, 14.9.2010, attached and marked "JC08")
- 3.10 **December, 2010.** Queens Wharf, including "part of the land described as Pt Lot 37 DP 131568, North Auckland Land District, and the buildings and structures known as the Queens Wharf thereon, and their fittings and fixtures" was listed as a Category 1 Historic Place. (Heritage New Zealand. <http://www.heritage.org.nz>, attached and marked "JC09")
- 3.11 **October, 2011.** Tony Gibson OpEd in NZ Herald. "If Auckland is to develop the port must grow. Our current plans increase the existing port area by 10 per cent by 2020 and 27 per cent by 2050. There are no plans to extend beyond the current port zone (the area already tagged for port development by the authorities). Within this area, we envisage extending the length of Bledisloe wharf to accommodate two ships at once. This is a critical move if Captain Cook wharf is to become public space...." (NZ Herald Opinion, 28.10.2011, attached and marked "JC10")
- 3.12 **January, 2012.** The growth in freight and the critical role of the ports in the regional and national economy are the key reasons given by

Ports of Auckland for expanding its operations into the Waitemata Harbour. The port company has strongly lobbied its case and last December urged Auckland councillors to "lock in place" a coastal zone allowing it to expand its waterfront operations from 77ha to 95ha by 2055. In a submission on the draft Auckland Plan on December 19, infrastructure general manager Ben Chrystall said the ports handled \$26.5 billion of trade annually, 36 per cent of New Zealand's container trade by volume and 31 per cent of New Zealand trade by value. (NZ Herald Report, 27.1.2012, attached and marked "JC11")

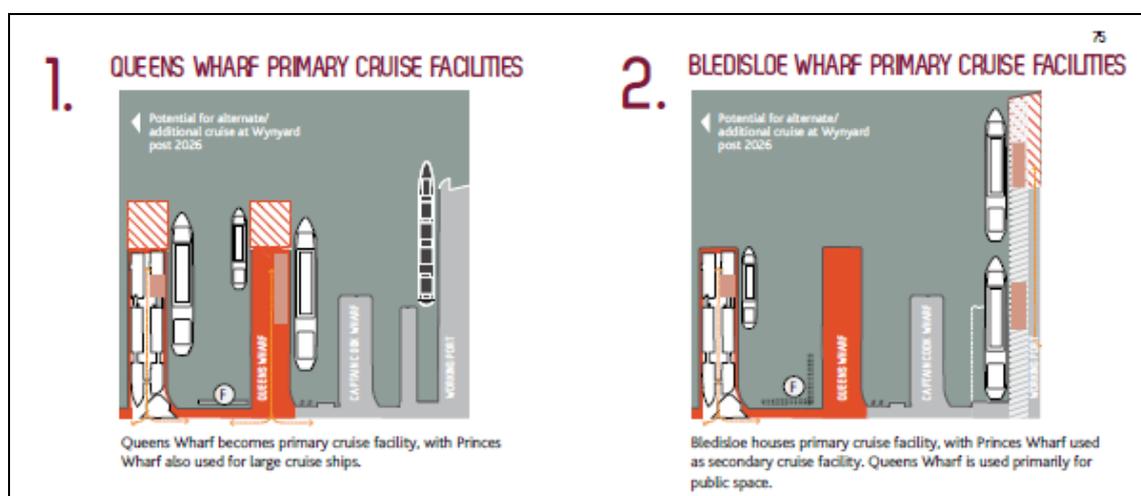
- 3.13 **November, 2012.** An independent study on freight demands of the three North Island ports shows Auckland cannot open up Captain Cook and Marsden wharves to the public without having to fill in more of the harbour or limit the amount of cargo it handles.... Ports of Auckland wanted a coastal zone allowing it to expand its waterfront operations from 77ha to 95ha by 2055 - the equivalent of adding two Victoria Parks to its space. The study also followed a *Herald* poll of 1000 Aucklanders in September, which found more than three-quarters wanted more wharf space opened up to the public.... "If Captain Cook and Marsden wharves are released for public access, the capacity will need to be replaced or the port will lose business." Replacement capacity could come in the form of reclamation and providing alternative facilities, like car-parking buildings. (NZ Herald Report, 30.11.2012, attached and marked "JC12")
- 3.14 **December, 2012.** Auckland Council will look at shrinking the area for Ports of Auckland's future growth after an independent study found the need for reclaiming more of Waitemata Harbour is not as substantial as claimed.... in the preferred options in the 2008 Ports of Auckland Development Plan, which envisaged an extra 18ha of harbour needed. (NZ Herald Report, 7.12.2012, attached and marked "JC13")
- 3.15 **April, 2013.** Auckland councillors today will consider a recommendation from officers to "support in principle" two options from the port company to extend Bledisloe Wharf by 135m or 179m into the harbour. The latest plans were sparked by a Herald campaign last year against further reclamation of the Waitemata

Harbour. (NZ Herald Report, 16.4.2013, attached and marked “JC14”)

- 3.16 **May, 2013.** Ports of Auckland today published its new port development proposals for public consideration. Tony Gibson, Ports of Auckland CEO said “We’ve spent the past year listening to feedback from Aucklanders and advice from experts, and have come up with a new, more efficient, more compact development plan. Option 1 (assumes keeping Marsden and Captain Cook) and Option 2 (next page) which doesn’t: (POAL media statement & plan, attached and marked “JC15”)



- 3.17 **August, 2013.** Confidential briefing by council officers. Councillors were primed to include Ports of Auckland's expansion plans in the Unitary Plan at a public meeting on August 13. The port company wants councillors to lock in two choices for a coastal port zone in the Unitary Plan. The first choice involves expanding Bledisloe Wharf 135m into the harbour for a 5.5ha expansion and keeping Captain Cook Wharf for cargo, such as cars. The second involves expanding Bledisloe Wharf 179m into the harbour for a 6.6ha expansion to free up Captain Cook Wharf for public use. The choices are a scaled back version of a port plan last year to extend 283m into the harbour and expand its operation from 77ha to 99ha. (Joel Cayford notes, attached and marked "JC16".)
- 3.18 **February, 2014.** POAL consults mana whenua re the need for a Cultural Impact Assessment for "impervious structures" (not reclamation, no mention of the word "wharf" as far as I am aware). The consultation indicates POAL would not build, at once, more than 3,500 square metres of "additional impervious structures" at a time. (POAL Consent applications, Appendix F, **Common Bundle document []²**)
- 3.19 **September, 2014.** *Downtown Framework* launched "mid-September" by Auckland Council. Includes "indicative options" linking Captain Cook wharf with presumed "extensions" to Bledisloe wharf (NB: not "reclamations"): (*Downtown Framework*, attached and marked "JC17")



² To be cross referenced once agreed Common Bundle of documents produced.

25.4.7 Maintaining or enhancing the landscape and amenity links between the harbour, the port and adjacent areas, including the Central Business District.

- 4.2 There are rules and a single method to implement this policy. The method is:

26.6.1 That the ARC will liaise with Auckland City Council and Ports of Auckland Ltd on issues associated with any future development or expansion of the ports in Port Management Areas 1A and 1B, to encourage consistent management across administrative boundaries.

- 4.3 The foregoing chronology suggests that there has been some liaison at officer level – but only in a regulatory sense following the lodgement of the B2 and B3 extension applications. It is clear that Councillors were not involved in any liaison, especially not in regard to “issues” that had been debated in public and which are also canvassed earlier in this affidavit. The POAL consent applications for the B2 and B3 extensions – despite being regarded as contentious by many – were not even referred to Auckland Council’s Hearings Committee for consideration, despite Council’s Hearings Policy. The explanation given for the method gives a fuller account of why the policy writers felt the method was necessary:

26.7.2 Maintaining liaison between the ARC, Auckland City Council, and Ports of Auckland Ltd complements the objectives, policies and rules and is important because of the potentially significant cultural, social, economic, and environmental implications of port expansion for the port company, the downtown area, and the Auckland Region.

- 4.4 This recognises the significant social and cultural implications of port expansion for Auckland, the downtown area and the port company itself, and in my opinion is a clear policy signal that any expansion proposals advanced without evidence of Council liaison will need careful assessment, including for notification purposes, and particularly the special circumstances notification discretion.

- 4.5 In that regard, I consider there were four obvious special circumstances that at least needed detailed evaluation (which did not take place) in the context of considering how to process the applications (i.e., notified or non-notified).
- 4.6 The first of these relates to the fact that Queens Wharf had been brought into public ownership (like Wynyard Quarter), but without any plan change that would have allowed the implications of that change in ownership and status to be reflected in the Auckland Regional Plan: Coastal.
- 4.7 For example, as noted above in the *Matthews and Matthews Heritage Assessment of Queens Wharf and Sheds* which advises: “Views from along the centre of Queens Wharf back to Queen Street and towards the Waitemata harbour are important.” I consider that a plan change would likely have protected this view shaft. The heritage assessment notes that in relation to its landmark quality, Matthews & Matthews advise: “Queens Wharf occupies a prominent position when approaching Auckland and the ferry terminals from the harbour.” Again, this suggests that being able to see Queens Wharf and its structure while approaching from the water is another view that needs some form of protection or recognition. This is a special circumstance that did not exist until the study had been carried out and which was triggered by the purchase of Queens Wharf.
- 4.8 The second special circumstance relates to the fact that Queens Wharf, as noted in the chronology above for December 2010, was listed as a Category 1 Historic Place by Heritage New Zealand. It is likely that the Historic Places Trust would have been treated as a potentially affected person in relation to any activity that would potentially affect the heritage character and amenity of Queens Wharf, if this matter had been identified and considered. In any case such a significant listing should be regarded as a special circumstance leading to notification in my view.
- 4.9 The third special circumstance relates to the fact that it appears from the chronology that POAL and Auckland Council were clearly aware that POAL’s intention was to infill between B2 and B3 in order to achieve an objective that it has articulated consistently since 1989 - to

expand Bledisloe Wharf north by reclamation, and that B2 and B3 extensions were clearly a means to that end.

- 4.10 The fourth special circumstance is that Council, in recognition of overwhelming public concern expressed over port expansion plans in the last 3 years, had adopted the non-complying rule for reclamation in the draft Unitary Plan. This surely was an indication that there was very significant public interest in any development that would enable, or be by itself, an expansion of Bledisloe Wharf into Waitemata Harbour. It was surely a good reason to notify these consent applications – preferably together, but at the very least one at a time.

SWORN at Auckland this day of May before me:		
		Joel Keith Cayford
A Solicitor of the High Court of New Zealand		