

BETWEEN

NEW ZEALAND BIG GAME FISHING
COUNCIL INC

APPELLANT

AND

SANFORD LIMITED, SEALORD GROUP
LIMITED AND PELEGIC & TUNA NEW
ZEALAND LIMITED

FIRST RESPONDENT

AND

MINISTER OF FISHERIES

SECOND RESPONDENT

AND

THE CHIEF EXECUTIVE OF THE
MINISTRY OF FISHERIES

THIRD RESPONDENT

SUBMISSIONS ON BEHALF OF SECOND AND THIRD RESPONDENTS
IN RESPONSE TO APPLICATION FOR LEAVE TO BRING CIVIL
APPEAL

27 August 2008



CROWN LAW
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Issue

1. The issue that the appellants seek to have determined in this appeal is stated in paragraph 4 of their submissions in support of the application for leave:

“The key question in the application for leave to appeal is how the purpose in section 8 of the Fisheries Act 1996 to “enable people to provide for their social, economic, and cultural well-being” is to apply to the exercise of the Minister’s discretion under section 21 when making decisions to allow for recreational fishing interests in the context of setting the TACC.”

2. In terms of the criteria for leave to appeal in s 13 Supreme Court Act 2003, the application is advanced on the basis that:¹

- 2.1 this question is inherently a matter of general or public importance;
- 2.2 the question of the correct approach to the role of purpose provisions in legislation is a matter of general or public importance;
- 2.3 the issue is of significant interest to a substantial section of the public, as recreational fishing is a right open to be enjoyed by all New Zealanders; and
- 2.4 the question affects commercial fishing interests and so is also a matter of general commercial significance.

Factual background

3. The second and third respondents generally accept the factual background set out in paras [7]-[14] of the submissions for the appellant. By way of update:

- 3.1 The evidence of low recreational catch rates in the Hauraki Gulf Marine Park was anecdotal evidence from recreational fishers, and was taken into account by the Minister (especially in the 2005 decision). The KAH1 fishstock, which includes the area of the Hauraki Gulf Marine Park is presently at a level “above B_{MSY} ”, which means that catch rates and average fish sizes should both be greater

¹ Para 4(b)-(d) application for leave.

than if the stock were at the B_{MSY} benchmark specified in s 13 Fisheries Act.²

3.2 The Minister and his officials have initiated on-going discussion between the Ministry of Fisheries and the different fishing sectors regarding law reform in this area. The Minister has obtained Cabinet approval for consultation with the recreational sector on introducing activity and catch reporting by recreational charter boat operators.³

3.3 In April 2007 representatives of recreational, commercial and customary fishing interests all proposed that they engage in a tripartite working group, which would report to the Minister with its proposals for statutory reform. The Minister has requested this report by the end of this month.⁴

Why leave to appeal should not be granted

4. It is submitted that leave ought not to be granted for the reasons set out below.

Interpretation of section 8

5. The submissions for the appellant appear to criticise the decision of the Court of Appeal in relation to interpretation of section 8, as a preliminary to addressing the question for which leave is sought.

6. The Court characterised section 8 as “involving an inherent balancing ... and ... not ... being subdivisible.”⁵ The full text of section 8, as opposed to the extract quoted in the proposed question, supports this characterisation.⁶

² The latest scientific assessment is published at: http://fpcs.fish.govt.nz/science/documents/Plenary/KAH_FINAL%2008.pdf. The relevant passage notes “Based on the scenarios examined, it is likely that current spawning biomass is greater than BMSY, but it is uncertain how far above.” See section 5 “Status of the stocks”, sub-heading “KAH1”.

³ A summary of events to date can be found at <http://www.fish.govt.nz/en-nz/Shared+Fisheries/default.htm?WBCMODE=PresentationUnpublished++>.

⁴ A briefing paper that sets out the role of the tripartite group can also be found at the Shared Fisheries web page (link in footnote 2).

⁵ CA para [47]

⁶ Section 8 provides:

Purpose

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act—

Ensuring sustainability means—

7. The appellant's criticism is that the Court was wrong to fail to recognise that section 8 contained "dual policy objectives",⁷ and so a clear distinction between those provisions that are primarily concerned with sustainability and those that are primarily concerned with utilisation.⁸
8. It is submitted that the appellant's approach is not reasonably arguable. Section 8 cannot reasonably be read as containing two purposes that apply differently to different provisions of the Fisheries Act.

Relevance of the proposed question to the substance of the dispute

9. The dispute between the recreational fishers and the commercial fishers relates to what share each got of the kahawai fishstocks KAH1, KAH2, KAH3, KAH4 and KAH8 in the Minister's decisions in 2004 and 2005.
10. It was not in issue before either Court below that the reference in section 8 to enabling "people to provide for their social, economic, and cultural well-being" included both recreational and commercial interests.⁹ The submissions for the appellant suggest that they continue to accept that section 8 relates to both recreational and commercial interests.¹⁰ On that approach, section 8 does not indicate any favour for recreational fishers.
11. In light of this common ground, and on the submissions presented for the appellant, it is difficult to see how a further examination in this Court of the relationship between the ss 8 and 21 could assist in resolving the substance of this dispute.

Broader issues about the approach of the Court of Appeal

12. The role of purpose provisions in legislation is well understood, and the approach taken by the Court of Appeal was completely orthodox. The Court held that:

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

Utilisation means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

⁷ Appellant's submissions para [31]

⁸ Appellants' submissions paras [28]-[29]

⁹ CA para [66]

¹⁰ Appellant's submissions para [30]

- 12.1 A purpose provision, such as section 8, is essentially a statement of policy, “to guide decision-makers and assist Courts in interpreting the detail of the Act”; but¹¹
- 12.2 A purpose provision does not automatically create mandatory relevant considerations in relation to individual decisions under specific machinery provisions.¹²
13. It is submitted that the approach of the Court of Appeal does not disclose any error of principle.

Practical application

14. Section 21 requires the Minister, among other things, to allow for recreational interests and to set a Total Allowable Commercial Catch.
15. The Minister’s allocation of the Total Allowable Catch of a fishstock to the different fishing sectors under s 21 involves consideration of the circumstances of the fishstock in question. While questions of mandatory relevant considerations are inherently matters of law, they necessarily have to be assessed in the context of the particular fishery. For example:
- 15.1 While the area of the Hauraki Gulf Marine Park (which has its own special legislation and the population pressures of Auckland nearby) is particularly important for kahawai fishing,¹³ snapper is fished on both coasts and the Hauraki Gulf is not significant for blue cod, rock lobster and paua.¹⁴
- 15.2 The different species have different values for commercial fishers: snapper, rock lobster and paua are reasonably high-value, while kahawai is low-value.

¹¹ CA para [54]

¹² CA para [58]

¹³ Compare appellant’s submissions para [10].


¹⁴ For snapper see http://fpcs.fish.govt.nz/science/documents/Plenary/SNA_FINAL%2008.pdf, section 1.2 heading “Recreational fisheries”; for kahawai see http://fpcs.fish.govt.nz/science/documents/Plenary/KAH_FINAL%2008.pdf section 1.2 “Recreational fisheries” for blue cod see http://fpcs.fish.govt.nz/science/documents/Plenary/BCO_%20FINAL%2008.pdf section 1.2 heading “Recreational fisheries” and section 1.5 “Other sources of mortality”; for paua see http://fpcs.fish.govt.nz/science/documents/Plenary/PAU_INTRO%20FINAL%2008.pdf section 1.2 heading “Recreational fisheries”.

- 15.3 Different means are used for restricting recreational catches of the different species within sustainable limits. For example snapper is subject to a minimum legal size and to species-specific daily bag limits, while kahawai is not and is subject to the general mixed species daily bag limit.
16. It is difficult for any single judgment to provide further useful guidance for the Minister's future decisions on all shares fisheries stocks.

Legislative reform

17. The Crown agrees with all fishing sectors that it would be desirable to have a more structured approach to allocation of shared fisheries than section 21 presently provides. In order to develop a workable approach that has the support of all interested groups, the Crown has co-ordinated the current tripartite discussions. These discussions include representatives of customary fishing interests, which have not been included in this proceeding, in order to ensure all fishing sectors are heard.

27 August 2008



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TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The Applicants and First Respondents