In the Supreme Court of New Zealand

SC 40/2008

Between: **New Zealand Big Game Fishing Council Inc**
Appellant

and: **Sanford Limited, Sealord Group Limited, and Pelagic & Tuna New Zealand Limited**
First Respondents

and: **Minister of Fisheries**
Second Respondent

and: **The Chief Executive of the Ministry of Fisheries**
Third Respondent

Submissions of first respondents (commercial fishers) in opposition to application for leave to appeal

Dated: 27 August 2008

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Reference: B A Scott/G T Carter

(A) Application for leave opposed

1 The first respondents (the **commercial fishers**) oppose this application for leave to appeal brought by the appellant (the **recreational fishers**).

2 The recreational fishers' application for leave to appeal and submissions in support focus on the correct interpretation of, and relationship between, ss 8, 13 and 21 of the Fisheries Act 1996 (the **Act**). The "key question" identified for the appeal is how s 8(2) of the Act is to apply to the exercise of the Minister's discretion under s 21 when making decisions to allow for recreational fishing interests when setting the total allowable commercial catch (**TACC**).

(B) Summary of basis for opposition to grant of leave

3 The commercial fishers support the Court of Appeal's analysis and interpretation of ss 8, 13 and 21 of the Act [see paras [19] and [45] - [69] of the Judgment].

4 The recreational fishers' argument that the definition of "utilisation" in s 8(2) is a mandatory relevant consideration under s 21 (rather than being part of a more general statement of purpose to which all decisions under the Act should conform), suffers from numerous difficulties:

4.1 First, the Court of Appeal's approach to the interpretation of s 8 was entirely orthodox. The Court viewed s 8 as a statement of general purpose in relation to which a decision maker must bear in mind and decisions under a more specific provision must conform. This is consistent with the approach adopted by the Court of Appeal in other fisheries cases and reflects the operation of section 8 by reference to the Act as a whole. No error of law has been identified;

4.2 Second, the recreational fishers' argument is premised on an erroneous assumption, namely that a total allowable catch (**TAC**) is a discrete sustainability decision, while a TACC is a discrete utilisation decision:

(a) To the contrary, TAC and TACC decisions invariably require the Minister to carefully balance both sustainability and utilisation considerations;

(b) This reality of decision making in a fisheries context is recognised throughout the Act but none more so than in the purpose provision itself, with the overarching (and indivisible) obligation in s 8(1) "*to provide for utilisation while ensuring sustainability*";

4.3 Third, the attempt by recreational fishers to elevate the definition of "utilisation" in s 8(2) as a mandatory consideration under s 21 is irrelevant in circumstances where the recreational fishers have not challenged the conclusions of the Court of Appeal that:

(a) the Minister had proper regard (when making decisions under s 21) to *qualitative* factors affecting the recreational interests and that his use of and reliance on *catch history* was lawful;

(b) the "*people*" whose "*social, economic and cultural well being*" need to be provided for in s 8 (2) is not limited to recreational fishers;

(c) neither s 8 nor s 21 gives recreational fishers any form of priority or preference over commercial fishers when the Minister is allowing for recreational interests and setting a TACC under s 21;

(d) under both ss 8 and 21, the Minister must balance all the competing commercial and recreation interests;

4.4 It follows that the attempt to elevate s 8(2) as a mandatory consideration under s 21 no longer advances the recreational fishers' case. It does not affect the substance of the dispute between the parties, namely the respective shares of the kahawai TACs each were allocated in the Minister's 2004 and 2005 decisions.

(C) Court of Appeal adopted an orthodox approach to s 8

5 The Court of Appeal's approach to s 8 was orthodox and consistent with previous Court of Appeal decisions concerning s 8:

5.1 Purpose provisions are only intended as a statement of general legislative intent: *Bennion on Statutory Interpretation* (2008, 5th Ed) 734;

5.2 Purpose provisions provide only a précis and are not intended to accurately cover the entire scope of the Act: *Dominion Airline Ltd v Strand* [1933] NZLR 1 at 45 (CA);

5.3 Equally, it is not likely that Parliament intended that a purpose provision would override clear wording in an operative provision of the Act: *Bennion* at 734.

5.4 Consistent with this, in the present case, the Court of Appeal approached s 8 on the basis that:

(a) it was intended as a statement of policy to guide decision makers and assist the Court's interpretation: see para [54];

(b) it sets out a "broad purpose" which the Act, and the mechanisms within it, are designed to achieve (relying on Keith J in the *Kellian* v *Minister of Fisheries* (CA 150/02, 26 September 2002: see para [53]).

5.5 Accordingly, decisions which the Minister makes must "*bear in mind and conform with the purpose of the legislation*" (citing Keith J in *Westhaven Shellfish Ltd* v *Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at [45]: see para [58] of Judgment).

6 The scheme of the Act also supports the adoption of this orthodox approach to the application of the purpose provision in s 8 of the Act:

6.1 The recreational fishers' submissions contend that it is not enough that the Minister's decision must "*bear in mind and conform with the policy of the legislation*".[1] They submit that part only of s 8 (the definition of "*utilisation*" in section 8(2)) should be used to define what Parliament chose not to define in s 21 when it provided that the Minister is to "*allow for . . . recreational interests*" before setting a TACC (see para [33] of submissions);

6.2 If this had been the intent, then Parliament could have included the same or similar wording to that found in s 8(2) in s 21, as it did in s 13. It did not do so: see Court of Appeal's analysis on the history of these provisions at para [59];

6.3 Equally other sections of the Act specifically reference back to the purpose provision in s 8 and require it to be taken into account (see for example sections 10(d), 17B(2), 97(3), 254 and 256(7)(a)). Again s 21 does not refer back to s 8, let alone refer only to subsection 8(2).

(D) Section 8 argument premised on erroneous assumption

7 The attempt to elevate the definition of "*utilisation*" in s 8(2) into a mandatory relevant consideration under s 21, is premised on the proposition that the Act draws a clear dividing line between "sustainability" and "utilisation" decisions. The primary function of the TAC is said to be a sustainability measure while a TACC decision is said to be primarily an issue

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1 Note that the Court of Appeal went on later in its judgment to find that the Minister's decision did in fact "bear in mind and conform with the purpose of the legislation": see paras [74]-[80].

of how the resource is divided and utilised between sectors (see paras 25(a), 28 and 29 of submissions).

8 This submission shows a fundamental misunderstanding of the nature and purpose of most decision making under the Act, including the factors that influence TAC and TACC decisions.

9 While it is undoubtedly true that a TAC decision performs an important sustainability role (in that it is required to limit the total level of annual harvest to that which is sustainable), it is also a key utilisation decision:

9.1 One of the primary functions of a TAC is to *allocate* to all users of the resource (commercial and non-commercial) a portion of the total biomass or yield that can be collectively utilised by them. Put simply, the "total allowable catch" defines the total level of *utilisation* allowed each year;

9.2 Adjustments to TACs are made from time to time for both sustainability reasons and to achieve certain utilisation objectives. For example:

(a) TAC increases are always made for utilisation reasons. The existing TAC is by definition sustainable but the opportunity for a greater level of utilisation may also be sustainable;

(b) Similarly, a TAC may be sustainable at its current level, but the Minister may nevertheless decide to *reduce* the total level of harvest (the TAC) for a range of utilisation reasons. The Minister may want to increase the size of the biomass over time in order to provide a larger stock size for future generations;

(c) Relevantly in the present context, a TAC might be reduced to increase the size of the biomass over time in order to improve the catch rates of recreational fishers and the average size of the fish that are in the water:

(i) Commercial fishers typically advocate for TACs that maximise sustainable yield (i.e. a TAC that will over time produce a biomass size that will produce the MSY);

(ii) In contrast, recreational fishers often want the Minster to increase the size of the biomass above the MSY because at the higher biomass sizes they can catch their bag limits quicker and on average can catch larger fish.

These are all utilisation considerations that need to be balanced against sustainability considerations.

9.3 As such, particularly in shared fisheries such as kahawai, the Minister will be presented (as occurred in this case) with a range or continuum of potential TAC options. These will factor in both sustainability and utilisation considerations. The Minister must balance those competing considerations and interests when making a decision to select one option over another.

10 The need to balance sustainability and utilisation considerations is by no means unique to the TAC and TACC setting process. For example, decisions made under s 15 enable the Minister to prohibit fishing for the purpose of ensuring that a limit on fishing related mortalities for marine mammals is not exceeded. Like a TAC decision made under s 13, s 15 decisions are also categorised as "sustainability measures" in Part 3 of the Act. The Court of Appeal has said of a decision under s 15(2) that "*(t)he Minister, as is often the case under the Fisheries Act, was required to balance utilisation objectives and conservation values*": See *Squid Fishery Management Company Ltd v Minister of Fisheries* (13 July 2004, CA 39/04) at para [75]. See also the discussion of the broad continuum of options available to the Minister in that case at paras [85] – [102].

11 Similarly, TACC decisions (including the related decisions as to what allowance will be made for recreational interests), commonly require sustainability issues to be balanced alongside demands for greater or lesser levels of utilisation. Fundamentally, a TACC is *both* a limit on the level of commercial harvest that can be taken sustainably and an *allocation* of part of the resource made in favour of the commercial sector. TACC decisions are not made in isolation from the related TAC decision.

12 Merely because a particular section does not sit within Part 3 of the Act does not mean it does not have an important sustainability component to it. Many provisions throughout the balance of the Act have important sustainability drivers even though they are not part of the formal "*sustainability measures*" in Part 3. For example the deemed value regime (ss 75 to 76 of the Act) and the ability to set overfishing thresholds (ss 77 to 78 of the Act) are important measures with the wider Quota Management System that help to ensure sustainability in conjunction with the TAC and TACC.

13 The fundamental error in the recreational fishers' approach can be seen simply by looking at the purpose of the Act itself, with its direction to "*provide for utilisation while ensuring sustainability*". Sustainably and utilisation issues are ever present in fisheries decision making and can only rarely be viewed in isolation from each other. As such, the Court of Appeal

correctly held that "*section 8(1) describes the purpose as involving an inherent balance and exercise between sustainability and utilisation, and we do not see that as being subdivisable*": see para [47].

(E) Section 8 argument has become irrelevant

14 The recreational fishers' overall purpose in seeking to appeal the finding that s 8(2) is not a mandatory relevant consideration under s 21 is not clear.

15 Presumably, in advancing this argument by way of appeal, the recreational fishers are seeking to take advantage of the High Court's criticism of the Minister's decision in so far as it held that the Ministry had failed to correctly advise the Minister on the meaning and effect of s 8(2) as it related to recreational interests in kahawai (see paragraphs [55]-[75] of High Court judgment).

16 That criticism by the High Court included:

16.1 an alleged failure to advise the Minister that he did not have a wide discretion on what factors to take into account when allowing for the recreational interests (para [65]-[67]);

16.2 that the Ministry's policy preference for catch history could not take precedence over a mandatory requirement to adopt a "*utilisation approach*" (whatever that means) (para [67]); and

16.3 that the effect of a TACC reduction on commercial operations was not relevant to the Minister's consideration of the recreational allowance, as the "people" whose "wellbeing" needed to be considered were recreational fishers, consumers who purchase kahawai to eat and employees of commercial fishers, but not commercial fishers themselves (see paras [55]-[57] and [69]-[72] of High Court judgment).

17 However, all these key findings were overturned or clarified by the Court of Appeal. Specifically, the Court of Appeal held that:

17.1 the reference in s 8(2) to "*people*" whose "*social, economic and cultural wellbeing*" needed to be provided for, applied equally to commercial interests [see para [66]];

17.2 recreational fishers do not have any form of priority or preference over commercial fishers in the allocation process, either under s 21 or, to the extent relevant, s 8(2) [see paras [61] and [69]];

17.3 under both ss 8 and 21, the Minister must balance all the competing commercial and recreational interests [see paras [61]-[63]];

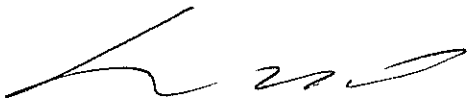
17.4 the Minister (a) did have proper regard to the qualitative factors affecting recreational interests, (b) was not wrongly advised over the Ministry's preference for the use of a catch history approach, and (c) his decision to choose a catch history approach was reasonable in the circumstances (see paras [70]-[80]).

18 Given that the application for leave to appeal does not challenge any of these key findings, the attempt to turn the specific wording in s 8(2) into a mandatory consideration under s 21 serves no purpose. It does not affect the substance of the dispute between the parties, namely the respective shares of the kahawai TACs each were allocated in the Minister's 2004 and 2005 decisions.

(F) Conclusion

19 Leave to appeal should not be granted. The Court of Appeal's interpretation of the relationship between ss 8, 13 and 21 was completely orthodox and no error of law has been identified. The issue is in any event devoid of any practical significance, given the decision not to challenge the Court of Appeal's key findings.

Dated 27 August 2008



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