

In the Supreme Court of New Zealand

SC 40 /2008

between

New Zealand Big Game Fishing Council Inc

First Appellant

and

New Zealand Recreational Fishing Council Inc

Second Appellant

and

Sanford Limited, Sealord Group Limited and Pelegic & Tuna New Zealand Limited

First Respondents

and

Minister of Fisheries

Second Respondent

and

The Chief Executive of the Ministry of Fisheries

Third Respondent

**Reply Submissions on behalf of First and Second Appellants in support of
Application for Leave to Appeal**

Dated: 3 September 2008



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May It Please The Court:

Leave Sought For The Applicants To Reply To Submissions In Opposition On Question Of Leave

1. Subsequent to the order extending time for NZ Recreational Fishing Council Inc to join the proceedings, submissions in opposition to the leave application have been received from the respondents.
2. The Court has enquired whether NZ Recreational Fishing Council Inc relies on the submissions earlier filed by NZ Big Game Fishing Council, and that separate submissions will not be filed.
3. Counsel confirms that NZ Recreational Fishing Council Inc relies on the submissions earlier filed for NZ Big Game Fishing Council. However leave is sought pursuant to Rule 20(5) of the Supreme Court Rules 2004 for the applicants to respond (briefly) to the legal submissions in opposition.

Applicants Reply To Submissions In Opposition On Question Of Leave

4. The Crown (on behalf of the Minister of Fisheries, and the Ministry of Fisheries) and the commercial fishers submit that further judgment would not provide useful guidance for the Minister's future decision-making (para 16, submissions on behalf of second and third respondents). The first respondents submit that the issue is devoid of practical significance (para 19, submissions of first respondents). There is no issue between the parties that the Minister has announced that further decisions on kahawai fish stocks will be made next year, for the 2008/2009 fishing year.
5. Because the legal issues identified in the application for leave to appeal are to be argued at a level of principle, some factual context may assist in illustrating the relevance and importance of the legal issues advanced in the application for leave to appeal.
6. The Crown advise that the evidence of low recreational catch rates in the Hauraki Gulf Marine Park was anecdotal evidence from recreational fishers (para 3.1, Crown submissions). This is incorrect. In fact there is information from boat ramp surveys carried out by NIWA under contract to the Ministry of Fisheries which provides information based on a

survey of recreational boats returning to boat ramps in the Hauraki Gulf. The evidence (uncontested) is that in 2004, 7 out of 8 recreational fishing boats surveyed by NIWA at boat ramps did not catch a single kahawai in the Hauraki Gulf¹.

7. It is correct (para 3.1, Crown submissions) that the latest Ministry scientific assessment (not available at the time of the Minister's decisions in 2004 and 2005) for the KAH1 fish stock, including the area of the Hauraki Marine Park, shows the stock presently at a level above BMSY i.e. above a level which ensures sustainability for the purposes of the decision under section 13.
8. While stocks in the quota management area *as a whole* (KAH1-covering East Cape to Cape Reinga) are assessed as being above a level which ensures sustainability, recreational catch rates within the Hauraki Gulf, and some other areas in New Zealand are so low as to result in an allowance for recreational fishers which is almost meaningless in terms of the ability of recreational fishers to catch fish. When the data (2004 year) is that 7 out of 8 recreational fishing boats do not catch a single kahawai in the Hauraki Gulf this has relevance to whether people's "wellbeing" is enabled.
9. Whether the TACC decision under section 21 is a decision concerning utilisation, as Harrison J found, is submitted as important and relevant to ongoing decision-making. As a utilisation decision, this is the purpose for which the power to allow for recreational interests in section 21 is given.
² The interpretation advanced by the commercial fishers is contested.
10. The Crown refers to the tripartite discussions concerning possible legislative reform as a reason to decline leave (para 17, Crown submissions). Counsel may have been unaware, but the parties to those discussions expressly agreed that the discussions are without prejudice to these proceedings. There is in any event no agreement over the shape of reform, if any.

¹ Affidavit of J C Holdsworth para 23.14-23.15. These figures are based on boats, not individual fishers i.e. where boats held more than one fisher then individual catch rates can be assumed to be lower.

² Paraphrasing *Unison Networks v Commerce Commission* [2008] 1 NZLR, 42, 54

Dated at Auckland this 3rd day of September **2008**

A handwritten signature in black ink, appearing to be 'S J Ryan', written in a cursive style.

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S J Ryan, Solicitor for the NZ Big Gaming Fishing Council Inc
and New Zealand Recreational Fishing Council Inc.