IN THE COURT OF APPEAL OF NEW ZEALAND

CA575/07
[2007] NZCA 512

	BETWEEN	ANTONS TRAWLING LIMITED First Appellant
	AND	ESPERANCE FISHING CO LIMITED AND ORNEAGAN DEVELOPMENTS LIMITED Second Appellant
	AND	MINISTER OF FISHERIES First Respondent
	AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES Second Respondent

Hearing: 14 November 2007

Court: William Young P, Glazebrook and Robertson JJ

Counsel: F M R Cooke QC and M J Logan for Appellants
A Ivory and P McCarthy for Respondents

Judgment: 19 November 2007 at 3 pm

JUDGMENT OF THE COURT

A Interim Order for the benefit of the appellants declaring:

(a) The respondents, and those taking consequential action based on the decisions of the respondents (including the New Zealand Seafood Industry Council and Commercial Fisheries Services Ltd) ought not to take any further action to implement the first respondent's decision to reduce the TAC and TACC for ORH1 as notified in the New Zealand Gazette 27 September 2007 AND THAT the TAC of 1,470 and TACC of

1,400 tonnes for ORH1 set by notice in the New Zealand Gazette of 20 September 2001 at 3270–3272 shall continue, and be deemed to have continued in force until further order of the Court;

(b) A sealed duplicate of this order is to be sent by the respondents to each of the New Zealand Seafood Industry Council and Commercial Fisheries Services Ltd; and

(c) That leave be reserved to the parties, to the New Zealand Seafood Industry Council and to Commercial Fisheries Services Ltd, to apply in relation to the terms and effect of these orders.

B The appellants will have costs of $6,000 together with usual disbursements.

REASONS OF THE COURT

(Given by Robertson J)

Introduction

[1] The appellants (Antons) challenge a refusal by Miller J to grant interim relief pending the hearing of an application for judicial review which has a fixture on 28 January 2008.

[2] ORH1 is a fishing quota management area extending around a substantial part of the north of the North Island from Waikanae in the west to the Bay of Plenty in the east. The Minister of Fisheries, under the Fisheries Act 1996 (the Act), set for ORH1 a total allowable catch (TAC) in 2001 of 1,470 tonnes of orange roughy per annum, of which 1,400 tonnes could be harvested by quota holders.

[3] Until September 1995 the TAC had been 190 tonnes. There was an experimental five year Adaptive Management Programme (AMP) at 1,190 tonnes until September 2000. That was followed by a TAC of 800 tonnes which operated

for one year prior to the next arrangement, which commenced on 1 October 2001, and was also expressed as an experimental five year AMP. On each occasion there were associated total allowable commercial catches (TACC) set.

[4] On 24 September 2007 the Minister of Fisheries announced a 38 per cent cut in the TAC for orange roughy within ORH1, effective 1 October 2007.

[5] Antons own 66 per cent of the quota in this area. One other fishing company owns 24 per cent and the remaining 10 per cent is owned by Maori interests.

[6] ORH1 is divided into four sub-areas, each of which has its own voluntary catch limit. The main orange roughy fishing season is winter (June to August) after the scheduled substantive hearing (January 2008).

[7] Sub-area B can be fished all year round. Although Antons have historically targeted this area before Christmas, the respondents contend they can fish it later in the year.

[8] Until September 2007, the voluntary limit for sub-area B was 500 tonnes and the Minister has requested that it be kept to 380 tonnes. The Ministry would like to restrict Antons to 251 tonnes from sub-area B whereas it has taken about 350 tonnes from it in recent years. There is immediately in contention about 100 tonnes of orange roughy which cannot be harvested before the hearing unless interim relief is granted.

[9] In 2006 the Minister of Fisheries made a decision to reduce the TAC for orange roughy which had virtually the same effect. The appellants applied for (and obtained) interim relief pending their challenge to that decision by judicial review. Prior to the substantive hearing, the Minister abandoned his defence to their claim and judgment was entered by consent setting aside the Minister's 2006 decision. As a result the TAC remained at 1,470 tonnes.

[10] This year the Minister maintained his opposition to interim relief. Miller J was not satisfied that it was reasonably necessary to protect Antons' position.

[11] The appeal was advanced on the basis that the Judge was wrong in his determination, in that:

(a) he made a mistake in relation to a critical factual matter;

(b) he adopted a pedantic approach to the losses that would arise from the TAC reduction through to the 28 January fixture;

(c) the approach he took was inconsistent with previous decisions of this Court; and

(d) he failed to address a critical factor stressed by Antons.

The litigation setting

[12] The High Court Judge held that whilst the appellants would be detrimentally affected by the Minister's decision, they had not proved that the detriment would be of sufficient moment to make interim relief reasonably necessary: at [13].

[13] In the Final Advice Paper (FAP) to the Minister (which formed the basis of his decision), the Ministry advised that the proposed cuts "would impose significant economic hardship on the majority quota owner to the point that the proposed cuts raised the 'possibility that Anton's group' will no longer be commercially viable".

[14] It was accepted that Antons would begin to be adversely affected by the TAC reduction before 28 January 2008. Miller J held that their ability to fish in one part of the ORH1 would be reduced by approximately 100 tonnes, but there was dispute as to the financial consequences of that, and whether they were irretrievable in the remainder of the fishing year.

[15] The Judge also noted that "there is no evidence that the granting of interim relief would have any impact on the sustainability of the orange roughy stock in ORH1, or in sub-area (B)": HC WN CIV-2007-485-2199 25 October 2007 at [22].

[16] Antons complain that the substantial cut in the TAC (which they argue is unprecedented) has occurred without evidence that the orange roughy stock is under threat, and in the knowledge that it threatens their financial survival.

[17] Antons also contend that it was of particular significance that Miller J made no reference to the fact that, when the challenge was mounted 12 months earlier, their essential contention was that the Minister's "precautionary" approach had not followed the requirements of s 13 of the Act, a factor which is central in this year's challenge also. The Minister contended that this aspect received no evaluation in 2006 as the withdrawal of the new reduced level was on the basis of a failure in process.

The approach to interim relief

[18] As an application for interim relief under s 8 of the Judicature Amendment Act 1972, the relevant principles are summarised in *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423 at 430 per Cooke J:

> In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, … the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weaknesses of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[19] There is a different appreciation between the parties as to the consequences for Antons. Antons contend that there will be irreparable damage to them from which it would be impossible to recover. The Minister argues that there is an absence of evidence that relief is necessary because the reduction would be minimal and could be alleviated over winter. Further, the contention that it would interfere with annual fishing plans were mere assertions lacking evidence according to Mr Ivory.

[20] Antons contended that granting them relief would merely postpone the introduction of the Minister's cautious approach to preservation whereas the Minister contended that, although there was not an immediate sustainability risk, granting

relief in these circumstances, given the deficit in relevant information, would mean that the matter could never properly be addressed.

[21] The Minister stressed that the test is what is necessary, not what may be desirable from the perspective of Antons.

The strength of the substantive case

[22] Despite the discrete grounds advanced, the appeal substantially revolves around the underlying challenge of the judicial review.

[23] The setting of the TAC by the Minister occurs under s 13 of the Act. As relevant, it provides:

> **13 Total allowable catch**
>
> (1) Subject to this section, the Minister shall, by notice in the *Gazette* set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.
>
> (2) The Minister shall set a total allowable catch that:
>
> (a) Maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or
>
> (b) Enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered:
>
> (i) In a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and
>
> (ii) Within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock; or
>
> (c) Enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum

> sustainable yield, having regard to the interdependence of stocks.

[24] The Minister reached his decision under s 13 on the basis of the information contained in the FAP. He was provided with three options. In respect of all of them it was made clear by his advisers that it was not possible to provide accurate scientific data with regard to maximum sustainable yield (MSY) for this particular species.

[25] Mr Cooke QC argued that the Act required the Minister to make decisions based on biomass and MSY assessments in different rebuild periods having regard to the economic and social effects. He contended that there was insufficient evidence that this information had been available, and that the Minister had simply decided to adopt a precautionary approach and to make a substantial cut to the TAC.

[26] Mr Cooke further submitted that, in the circumstances, the Minister needed to resort to s 14 which provides an alternative means of setting a TAC.

[27] Mr Ivory responsibly acknowledged there were problems with regard to the application of s 13(2) but he argued that s 14 could never have application. He contended that, not only was orange roughy not on the relevant schedule, it could not be added because it was not the "biological characteristics" of orange roughy which meant it was not possible to estimate MSY.

[28] Mr Ivory contended that the difficulties with regard to s 13(2) were in fact dealt with when regard is had to the provisions of s 10 of the Act which provides:

> **10 Information Principles**
>
> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:
>
> (a) Decisions should be based on the best available information:
>
> (b) Decision makers should consider any uncertainty in the information available in any case:
>
> (c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:

> (d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

[29] We are in no doubt that there is a real and substantial question as to the statutory basis for what has occurred.

[30] This very issue was before the Court 12 months ago. Because of concessions which the Minister properly made with regard to other factors, it was not addressed. That is not a question of apportioning blame but is part of the reality which needs to be assessed in undertaking a balancing exercise in this case.

[31] We do not agree with Miller J that the strength of the case is neutral. Antons has an arguable case which is sufficiently cogent to make it reasonable for the decision whether to grant interim relief to depend on a comparison of the adverse consequences for the parties of refusing or granting such relief.

Consequences for the parties

[32] It has always been accepted that there is no evidence that orange roughy is under immediate threat so it is a question of whether the postponement of a new regime in place of one which has operated over a substantial period of time is of greater significance than the effect which the new regime will have had on the appellants if they are successful in the substantive hearing.

[33] There was a good deal of material directed to the adequacy or strength of the evidence about consequences led by Antons. Although greater detail would have been advantageous, we accept that, because of the nature of the challenge which the respondents mounted 12 months ago, Antons may not have anticipated that the direct financial consequences were a live issue on this occasion. The subject is dealt with in reply and although Miller J was critical that it came in at that point, the timing is explicable and it was evidence which could not be ignored.

[34] Antons contended that any fishing they undertake in sub area B later in the year would be at the expense of fishing in other areas because of the limited number

of boats in their fishing fleet. Accordingly Antons do not accept that they could make up the lost revenue. The Minister conceded that, even if Antons could make up the lost revenue later, fishing costs would be greater. Thus, even on the Minister's concessions, there is a cost to Antons.

[35] Antons' cash flow would undoubtedly be deleteriously affected if there is no relief and the costs of maintaining capital which was not being employed will continue. We are satisfied that there is inevitably a financial detriment to Antons which can only be measured in many tens of thousands of dollars and which could be irretrievable if Antons were to succeed in the substantive hearing.

The applicable law

[36] We agree with Mr Ivory that the test for interim relief is that set out in [18] above. There is not some different regime for fisheries cases. The problems recognised by this Court in *New Zealand Fishing Industry Association Inc v Ministry of Fisheries* [1997] NZAR 316 at 320 are, however, apposite :

> Such set-back as there will be to the rebuilding of the fishery, though disruptive of the Minister's programme for the longer term management of the fishery, should it prove to have been unjustified, cannot be regarded as irreparable to the same extent as the economic and social harm to members of the industry from the reduction in the TACC if it should turn out that it should not have been imposed.
>
> With this ability to adjust TACC in future years, the Minister will be in a position, should he determine that longer term interests so require, to take account of the extent to which the required rebuilding of the fish stocks has been set back.
>
> Accordingly, we were satisfied that, in the interests of justice, the decision for the current year should not be implemented for this further short period. The interim declarations therefore were extended subject to an early fixture to determine those issues on which a decision may still be of assistance in the fixing of the TACC by the Minister for the next fishing year.

[37] Similarly, in *Squid Fishery Management Company Limited v Minister of Fisheries* (2004) 17 PRNZ 104 (CA), McGrath J said:

> [13] Unfortunately the *NZ Fishing Industry Assn* decision was not cited to France J last week. As a result the weight we give to the judgment of the

> High Court on the interim order applications is less than it otherwise would have been.
>
> [14] The position as we see it is that a genuine appeal has been brought which is clearly not frivolous. Beyond that it is impracticable for the Court to address the merit of the arguments that will be raised on 5 April. If the notice remains in force, those represented by the appellant will suffer losses of $4 million for each of the 2 weeks until this Court can hear the substantive appeal. Although there is an opportunity to fish after 5 April if the appellant is successful, there is a real risk that the loss will not be recovered. Those losses and their impact on those who are involved in the squid fishing industry accordingly have to be weighed against the important consequences in relation to the protected mammals to which the Minister's notice is directed.

Although the scale of operation is much smaller in the present case, the authorities are demonstrative of the difficulties which can arise in this particular area.

Conclusion

[38] We are satisfied that, on the basis that there can be a significant challenge mounted as to the availability of the statutory regime employed, the balance of convenience clearly favours the granting of interim relief to Antons.

[39] We do not accept, however, Mr Cooke's contention that we should put in place some regime which would extend beyond the determination of the judicial review hearing in January 2008. Whether there is almost an inevitability of an appeal by the unsuccessful party is no ground to extend interim relief now. It will be an issue to be determined at the time and in light of the circumstances which then exist.

[40] Antons are not the only quota holders in ORH1 but the proceedings have been brought by them alone. We have considered the various ways in which the relief might be expressed, but have concluded that it is appropriate to adopt the same course as was adopted by consent before Wild J in the High Court in 2006. There will be an interim order declaring that:

(a) The respondents, and those taking consequential action based on the decisions of the respondents (including the New Zealand Seafood

Industry Council and Commercial Fisheries Services Ltd) ought not to take any further action to implement the first respondent's decision to reduce the TAC and TACC for ORH1 as notified in the New Zealand Gazette 27 September 2007 AND THAT the TAC of 1,470 and TACC of 1,400 tonnes for ORH1 set by notice in the New Zealand Gazette of 20 September 2001 at 3270–3272 shall continue, and be deemed to have continued in force until further order of the Court;

(b) A sealed duplicate of this order is to be sent by the respondents to each of the New Zealand Seafood Industry Council and Commercial Fisheries Services Ltd; and

(c) That leave be reserved to the parties, to the New Zealand Seafood Industry Council and to Commercial Fisheries Services Ltd, to apply in relation to the terms and effect of these orders.

[41] The order is for the benefit of Antons. If others wish to avail themselves of similar relief, they will need to apply to the High Court to get this order extended to them.

[42] Costs should follow the event. There will be an order against the respondents in the sum of $6,000 together with usual disbursements.

Solicitors:
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