

between

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

Appellants

and

The New Zealand Recreational Fishing Council Inc and New Zealand Big Game Fishing Council Inc

First Respondents

and

Minister of Fisheries

Second Respondent

and

The Chief Executive of the Ministry of Fisheries

Third Respondent

Legal Submissions of First Respondents in Support of Notice of Cross-Appeal and to Support Decision Appealed On Another Ground

Dated: 29 January 2008



HESKETH HENRY
Lawyers

First Respondents Solicitors
11th Floor
41 Shortland Street
Private Bag 92093
DX CP 24017
AUCKLAND
Tel +64 9 375 8700
Fax +64 9 375 8771

Solicitor
Counsel acting

Stuart Ryan 09 375 8778
Alan Galbraith QC 09 309 1769

stuart.ryan@heskethhenry.co.nz
alan.galbraith@xtra.co.nz

Legal Submissions of First Respondents in Support of Notice of Cross-Appeal and to Support Decision Appealed On Another Ground

May it please the Court:

Outline

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- b. Relevant Facts
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- d. Relief On The Cross-Appeal/ Notice to Support
- e. List of Authorities to be cited:

Summary

2. The first respondents seek to apply the High Court's findings that the total allowable catch (TAC) decision for KAH1 was flawed by the Minister's failure to take any or proper account of the Hauraki Gulf Marine Park Act 2000 (HGMPA) – and extend the High Court's reasoning to the total allowable commercial catch (TACC) decisions for KAH1. The first respondents have filed a combined notice of cross-appeal/memorandum pursuant to Rule 33 of the Court of Appeal Rules to advance this as an additional error in the Minister's 2004 and 2005 decision for the kahawai fish stocks.

3. At para 76 of the decision Harrison J. reasoned that:

"The Minister is bound to have regard to the relevant provisions of the HGMPA when setting a sustainability measure such as a TAC: S 11(2). **There is no comparable requirement when fixing an allocative mechanism like a TACC.** Both ss7 and 8 recognise the national significance of the Hauraki Gulf, and identify six overlapping objectives for its management. Of particular relevance are the statute's recognition of : s 7(2):

(emphasis supplied)

4. The Court's reasoning [at para 76] that the Hauraki Gulf Marine Park Act 2000 (HGMPA) is relevant only when setting sustainability measures such as a TAC overlooks the effect of s.13 HGMPA, which states:

13. Obligation to have particular regard to sections 7 and 8

Except as provided in sections 9 to 12, in order to achieve the purpose of this Act, all persons exercising powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 must, in addition to any other requirement specified in those Acts for

the exercise of that power or the carrying out of that function, ***have particular regard to the provisions of sections 7 and 8 and of this Act.***

(emphasis supplied)

5. By extension, it is submitted that the High Court's finding [at para's 75-82 of the decision] that the TAC setting process for KAH1 was flawed in respect of the Hauraki Gulf should logically also extend to the decisions of the Minister when setting the TACC under s.21

Relevant Facts

6. The respondents rely on the findings of fact set out in paragraphs 75-82 of the High Court decision on appeal..

Submissions

7. These proceedings were initiated by the first respondents as a test case seeking directions as to the nature and extent of the public's recreational fishing rights when setting the total allowable catch (TAC's) and the total allowable commercial catch (TACC's) under the quota management scheme (QMS) for the kahawai fish species. The kahawai species, described in the Minister's 2004 decision as the "people's fish", was introduced into the quota management system with effect from 1 October 2004.
8. The first respondents (the "recreational fishers") are two established incorporated societies who act as representative organisations on behalf of a number of other recreational fishing and marine interests.
9. The recreational fishers support the decision and findings of Harrison J (CIV-2005-404-4495) that:
 - a. The Minister of Fisheries fixed the TACCs in 2004 and 2005 for all kahawai stocks without having proper regard to the social, economic and cultural wellbeing of the people (paragraphs [54] – [83]).
 - b. The Minister of Fisheries failed to take any or proper account of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 when fixing the TAC for KAH 1 (paragraphs [75] – [83]).
10. The first respondents seek to extend the High Court's Hauraki Gulf findings on the TAC setting process to the TACC decisions for the

Hauraki Gulf Marine Park. The first respondents have filed a combined notice of cross-appeal/memorandum to support the decision of Harrison J on a ground other than the one on which it is based.

11. At para 76 of its decision the High Court reasoned that:

"The Minister is bound to have regard to the relevant provisions of the HGMPA when setting a sustainability measure such as a TAC: S 11(2). **There is no comparable requirement when fixing an allocative mechanism like a TACC.** Both ss7 and 8 recognise the national significance of the Hauraki Gulf, and identify six overlapping objectives for its management. Of particular relevance are the statute's recognition of : s 7(2):

12. The Court's reasoning [at para 76] that the Hauraki Gulf Marine Park Act 2000 ((HGMPA) is relevant only when setting sustainability measures such as a TAC appears to overlook the effect of s.13 HGMPA.

13. Section 13 HGMPA states:

13.Obligation to have particular regard to sections 7 and 8

Except as provided in sections 9 to 12, in order to achieve the purpose of this Act, all persons exercising powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 must, in addition to any other requirement specified in those Acts for the exercise of that power or the carrying out of that function, **have particular regard to the provisions of sections 7 and 8 and of this Act.**

(emphasis supplied)

14. The obligation on all persons exercising powers or carrying out functions for the Hauraki Gulf to have *particular regard* to the provisions of sections 7 and 8 and of the HGMPA applies to the Fisheries Act 1983 and the Fisheries Act 1996, as are both listed in Schedule 1 to the HGMPA.¹

15. When making decisions on any sustainability measure under section 11(1) Fisheries Act 1996, the statutory language is "*have regard to*" the relevant provisions due to s.12 HGMPA, which states:

12. Amendment to Fisheries Act 1996—

¹ Schedule 1 HGMPA includes: Biosecurity Act 1993 (Part 5), Conservation Act 1987, Fisheries Act 1983, Fisheries Act 1996, Foreshore and Seabed Act 2004, Harbour Boards Dry Land Endowment Revesting Act 1991, Historic Places Act 1993, Local Government Act 1974, Local Government Act 2002, Marine Farming Act 1971, Marine Mammals Protection Act 1978, Marine Reserves Act 1971, National Parks Act 1980, Native Plants Protection Act 1934, New Zealand Walkways Act 1990, Queen Elizabeth the Second National Trust Act 1977, Reserves Act 1977, Resource Management Act 1991, Soil Conservation and Rivers Control Act 1941, Trade in Endangered Species Act 1989, Wild Animal Control Act 1977, Wildlife Act 1953

Section 11(2)(b) of the Fisheries Act 1996 is amended by adding the expression ``; and'', and by adding the following paragraph:

``(c) **sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (for the Hauraki Gulf as defined in that Act)—.**''

16. As amended, Section 11(2) (c) of the Fisheries Act 1996 states:

(2) Before setting or varying any sustainability measure under subsection (1) of this section, the Minister shall have regard to any provisions of—

...

[(c) Sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (for the Hauraki Gulf as defined in that Act)—]

that apply to the coastal marine area and are considered by the Minister to be relevant.

17. The setting of TAC's is a "sustainability measure", defined in section 2 Fisheries Act 1996 as:

"Sustainability measure" means any measure set or varied under Part 3 of this Act for the purpose of ensuring sustainability:

18. Setting a TAC under s.13 Fisheries Act 1996 (within Part 3) is a sustainability measure, whereas setting the TACC under s.21 Fisheries Act 1996 is not a sustainability matter. Section 21 is not within Part 3.

19. As a consequence, the Minister, is required under the Fisheries Act 1996 to:

- a. *have regard to* the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 for the Hauraki Gulf when setting the sustainability measure, the TAC for KAH1, as considered by the Minister to be relevant: s.11(2)(c) Fisheries Act 1996.
- b. *have particular regard to* the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 when exercising powers or functions for the Hauraki Gulf, including setting the TACC: s.13 HGMPA.

20. A decision which illustrates the application of the HGMPA is *Gulf District Plan Association Inc v Auckland City Council* [2004] NZRMA 202, 208-209 (HC), Williams J., where in a resource management context, Williams J noted at para 17-19 that :

[17] Section 13, the section on which the Gulf Plan Association principally relied, reads:

"13 Obligation to have particular regard to sections 7 and 8

Except as provided in sections 9 to 12, in order to achieve the purpose of this Act, all persons exercising powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 must, in addition to any other requirement specified in those Acts for the exercise of that power or the carrying out of that function, have particular regard to the provisions of sections 7 and 8 of this Act."

The Resource Management Act 1991 is one of the statutes listed in Schedule 1.

[18] Therefore, pausing at that point, it is clear that persons exercising powers or functions for the Gulf must have "particular regard" to ss7 and 8 in addition to any other statutory requirements. But what is fatal to the Gulf Plan Association's submission is that ss 9-12 are excepted from the operation of s13 and s9(4) relating to resource consent applications such as that brought by Mr and Mrs Hay, reads:

"9 (4) A consent authority must, when considering an application for a resource consent for the Hauraki Gulf, its islands, and catchments, have regard to sections 7 and 8 of this Act in addition to the matters contained in the Resource Management Act 1991.

[19] Section 9(4) accordingly requires those dealing with resource consent applications only to "have regard" not to "have particular regard" to ss7 and 8 in deciding resource consent applications.

21. The obligation to have particular regard to the provisions of sections 7 and 8 HGMPA is therefore a mandatory consideration when setting the TACC and the requirement to allow for non-commercial fishing interests in the quota management area KAH1.
22. It is submitted that by logical extension, the High Court's finding [at para's 75-82 of the decision] that the TAC setting process for KAH1 was flawed for the Hauraki Gulf, should also extend to the decisions of the Minister when setting the TACC under s.21.

Relief On The Cross-Appeal/ Notice to Support

23. The Recreational Fishers seek a declaration or directions that the Minister of Fisheries' 2004 and 2005 decisions fixing the TACC (including setting the recreational allowance) for KAH1 failed to have particular regard to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000.

List of Authorities to be cited:

Gulf District Plan Association Inc v Auckland City Council [2004] NZRMA 202, 208-209 HC, Williams J.

Rangitoto Island Bach Community Association Inc v Director General of Conservation [2006] NZRMA 376, HC, Harrison J.

Dated at Auckland 29 January 2008



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SJ Ryan/ AR Galbraith QC
Counsel for the First Respondents

To: The Registrar of the Court of Appeal
And To: The Appellants, by their solicitor
And To: The Second and Third Respondents, by their solicitor

This document is filed by **Stuart James Ryan**, solicitor for the first respondents, of the firm Hesketh Henry. The address for service of the first respondents is at the offices of Hesketh Henry, 41 Shortland Street, Auckland.

Documents for service on the first respondent may be delivered to that address or may be:

- (a) posted to the solicitor at PO Box 92093, Auckland 1142; or
- (b) left for the solicitor at a document exchange for direction to DX CP 24017, Auckland; or
- (c) transmitted to the solicitor by facsimile to facsimile number (09) 365 5278