IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-004495

UNDER	Part I of the Judicature Amendment Act 1972
IN THE MATTER OF	an application for review
BETWEEN	THE NEW ZEALAND RECREATIONAL FISHING COUNCIL INC, AND NEW ZEALAND BIG GAME FISHING COUNCIL INC Plaintiffs
AND	MINISTER OF FISHERIES First Defendant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES Second Defendant
AND	SANFORD LTD, SEALORD GROUP LTD AND PELAGIC & TUNA NEW ZEALAND LTD Third Defendants

Hearing: 3 July 2007

Appearances: Stuart Ryan for Plaintiffs
Alan Ivory for First and Second Defendants
Bruce Scott for Third Defendants

Judgment: 11 July 2007

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 4.00 pm on 11 July 2007

SOLICITORS
Hesketh Henry (Auckland) for Plaintiffs
Crown Law Office (Wellington) for First and Second Defendants
Chapman Tripp (Wellington) for Third Defendants

[1] The Minister of Fisheries and the Chief Executive of the Ministry, supported by Sanford Ltd, Sealord Group Ltd, and Pelagic & Tuna New Zealand Ltd (the commercial interests), have applied for an order staying my decision delivered on 21 March 2007 on an application for judicial review brought by the New Zealand Recreational Fishing Council Inc and the New Zealand Big Game Fishing Council Inc (the recreational fishers).

[2] The application arises in unusual circumstances. The Minister and Chief Executive, who were the unsuccessful respondents on the application brought by the recreational fishers, have not appealed my decision. The appeal is brought by the commercial interests who were joined as additional respondents or counterclaim applicants in the proceeding brought in this Court. Indeed, the Minister and Chief Executive along with the recreational fishers are cited as respondents to the appeal brought by the commercial interests. The recreational fishers have also cross-appealed on one limited point. The appeal and cross-appeal are set down for hearing for two days in the Court of Appeal on 26 and 27 February 2008.

[3] The issue for determination on the substantive application and cross-application is whether or not the Minister's decisions in 2004 and 2005 allocating the total allowable catch (TAC) and the total allowable commercial catch (TACC) for the kahawai species, a shared fishery, were wrong in law. I was satisfied that the Minister erred in some respects when making both decisions. However, I was satisfied that it would be pointless to quash either decision, for this reason: at [144]:

> I am satisfied that it would be pointless to quash either decision. The 2004 decision was spent upon the advent of the 2005 decision. The latter has been in full force and effect for the past 18 months. It would be contrary to the purposes of the Fisheries Act to set aside sustainability and utilisation measures without substitutes in place. In my judgment it is, in the circumstances, appropriate to treat the decisions as operative, despite their unlawful aspects, until the Minister makes a fresh and legally effective decision.

[4] I granted relief to the recreational fishers in these terms: at [145]:

> (1) A declaration that the Minister's decisions in 2004 and 2005 were unlawful to the extent that the Minister:

(a) fixed the TACCs for kahawai for all KAHs without having proper regard to the social, economic and cultural wellbeing of the people;

(b) failed to take any or proper account of ss 7 and 8 Hauraki Gulf Marine Park Act 2000 when fixing the TAC for KAH 1;

(c) failed without giving any or proper reasons to consider advice from MFish to review bag catch limits for recreational fishers;

(2) A direction that the Minister reconsider or review his 2005 decisions forthwith to take account of the terms of the declarations of unlawfulness.

[5] In accordance with my direction the Minister is currently reconsidering or reviewing his 2005 decision to take account of the terms of the declarations of unlawfulness. The Chief Executive has drafted an Initial Position Paper (IPP) which is due for release on or about 13 July. Interested parties, principally the recreational fishers and commercial interests, will make submissions for consideration by the Ministry which will then prepare a Final Advice Paper (FAP) for the Minister. The revised allocation decisions will come into force on 1 October 2007. Thus there is a degree of urgency about consideration of the application for stay.

[6] It is common ground that I have jurisdiction to order a stay: R12(3) Court of Appeal (Civil) Rules 2005. The jurisdiction is discretionary and must take into account a range of factors. They have been identified in a number of cases and are well known. The parties filed extensive affidavits in support of and opposition to the application but they have not been of assistance. The issue is one of principle. I take particular account of three factors.

[7] First, I am satisfied that the appeal and cross-appeal are bona fide. The merits are relevant within that context. The notice of appeal filed by the commercial interests on 19 April caused me initial concern. It raised a large number of grounds which appeared to indiscriminately resurrect a range of issues on their cross-application that were devoid of merit and were rejected at the substantive hearing. Their repetition might have given rise to an inference that the commercial interests were intent on continuing to pursue a scorched earth analysis of the Minister's decisions regardless of true merit or tenability. If that approach was maintained, the

prospects of the hearing on appeal concluding within two days would be remote, and the time for delivering a judgment would inevitably be extended.

[8] However, on 9 July Mr Bruce Scott, counsel for the commercial interests, filed a memorandum at my request which provisionally limits and gives focus to the grounds of appeal. It has satisfied me that the commercial interests will only pursue points which are truly arguable on appeal, and which establish their good faith.

[9] Second, I accept the submission made by Mr Alan Ivory for the Minister and by Mr Scott that a refusal to grant a stay may reflect adversely on the integrity of public administration. This case has generated a considerable degree of public interest and debate. It was apparent at the hearing that allocation of kahawai resources is a contentious topic. To the extent that they referred to the merits, counsels' arguments on the application for stay left me distinctly apprehensive that my original decision is unlikely to survive the ravages of the appeal process intact. At the very least I must acknowledge the real risk of first instance fallibility.

[10] I held that the Minister erred in law when making allocations in 2004 and 2005; none of the parties on the appeal, including the Minister himself, will apparently be arguing that he was correct. Without a stay, the Minister will undertake the allocation process for 2007 on the different legal basis directed in my decision. There is a real risk that his 2008 or 2009 allocations will proceed on a further different basis if the Court of Appeal intervenes.

[11] That degree of uncertainty or instability will diminish public confidence in the statutory process. I agree with Mr Ivory. It is undesirable that the Minister should be placed in the position of having to make allocation decisions on or before 1 October 2007 on a legal basis which is subject to bona fide challenge by two of the most interested parties and which, before the next allocation is undertaken, the Court of Appeal may find was wrong.

[12] Third, it is common ground between counsel that the terms of my directions to the Minister are likely to result in a revised allocation of the kahawai resource which is favourable to the recreational fishers at the expense of the commercial

interests. It was also common ground at the substantive hearing that the recreational fishers have not been catching their statutory allowances in recent years. On that basis, it is unlikely, as Mr Ivory submits, that a further increase in their allowances would be caught during the fishing year commencing on 1 October 2007.

[13] I agree with Mr Ivory that in these circumstances there is no real likelihood of prejudice to either party if the status quo remains until the appeal is determined. To the extent that the presumption against depriving a successful party of the fruits of a judgment by ordering a stay is relevant in the public law context, I am satisfied that a stay of limited duration in this case will not adversely affect the recreational fishers.

[14] A decision on whether or not to grant a stay of a decision pending determination of an appeal is essentially a balancing exercise. Ultimately I am satisfied that the interests of justice require a stay. I am conscious, of course, that none of the parties apparently seek to resort to the status quo represented by the legal considerations which influenced the Minister's decisions in 2004 and 2005. Nevertheless, it is better to maintain the result of a flawed decision-making process than to require allocations to be carried out on a revised basis which the appeal process may also show to be flawed. A compounding of errors should be avoided in this important context if at all possible.

[15] Accordingly, I order that the judgment delivered by me on 21 March 2007 be stayed pending determination of the appeal against that decision by the commercial interests and the cross-appeal by the recreational fishers, provided of course that the parties use their best endeavours to ensure that the appeal proceeds to hearing on its allocated dates, being 26 and 27 February 2008. I reserve leave to any party to apply on seven days notice in the event that that fixture is vacated. There will be no order as to costs.

Rhys Harrison J