IN THE COURT OF APPEAL OF NEW ZEALAND **CA82/97**

UNDER Part I of the Judicature Amendment Act 1972

IN THE MATTER of an application for review

BETWEEN NEW ZEALAND FISHING INDUSTRY ASSOCIATION (INC)

First Appellant

AND NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN (INC)

Second Appellant

AND SIMUNOVICH FISHERIES LIMITED, NORTH HARBOUR NOMINEES LIMITED AND MOANA PACIFIC FISHERIES LIMITED

Third Appellants

AND MINISTER OF FISHERIES

First Respondent

AND THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES

Second Respondent

AND NEW ZEALAND RECREATIONAL FISHING COUNCIL INC

Third Respondent

CA83/97

BETWEEN TREATY OF WAITANGI FISHERIES COMMISSION

Appellant

AND MINISTER OF FISHERIES

First Respondent

AND **THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES**

Second Respondent

CA96/97

BETWEEN **AREA 1 MAORI FISHING CONSORTIUM AND NGAPUHI FISHERIES LIMITED**

Appellants

AND **MINISTER OF FISHERIES**

First Respondent

AND **THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES**

Second Respondent

Coram: Richardson P
Gault J
Keith J
Blanchard J
Tipping J

Counsel: J E Hodder and B A Scott for Appellants in CA82/97
C J Finlayson, D A Laurenson, M K Mahuika for Appellants in CA83/97 and CA96/97
A P Duffy, I C Carter and I L Johnson for Respondents in all cases
M J Slyfield for Third Respondent in CA82/97 (given leave to withdraw)

Date of hearing: 30 June, 1, 2, 3 July 1997

Judgment: 22 July 1997

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

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Introduction

These appeals from McGechan J concern commercial fishing for snapper. When deciding what the total allowable commercial catch (TACC) should be for the 1995 fishing year the Minister of Fisheries decided to set the amount at 3,000 tonnes for the Snapper 1 management area (North Cape to East Cape). This represented a 39 percent reduction from the previous level of 4,938 tonnes. Various parties representing commercial and Maori commercial fishing interests challenged the Minister's decision. An interim order was made in the High Court pursuant to which the Minister did not implement his decision. The Minister made a further decision in September 1996 in respect of the fishing year commencing on 1 October 1996. This decision was to the effect that the TACC should remain at 3,000 tonnes for the ensuing year. Again that decision was not implemented because of interim relief. In substantive proceedings brought in the High Court both decisions were challenged by way of application for judicial review. McGechan J upheld them both. These appeals followed. Further interim orders were made in this Court, as a consequence of which neither decision has been brought into effect.

Fishing years run from 1 October to 30 September. Accordingly by reason of the several interim orders, the decision for the 1995/96 fishing year is spent so far as its intended effect on the fishery is concerned. The decision for the 1996/97 fishing year is for all practical purposes similarly spent, but both decisions retain practical effect by reason of rights which certain people have under s28N of the Fisheries Act 1983 (the 1983 Act)in combination with s28OE. This is because if the reduced figure of 3,000 tonnes is valid and there is a subsequent increase in quota from that figure, those with s28N rights are said to be entitled to receive their share of such increase at no cost. Whether the reduction to 3,000 tonnes was valid is therefore a live issue which requires the Court to examine the point in spite of the fact that from the point of view of the fishery the 1995 decision is wholly spent and that made in 1996 practically so.

Legislation: and approach to issues

Both the Minister's decisions were made under the 1983 Act. However, the decision which the Minister intends to make in respect of the 1997/98 fishing year will be made under those parts of the Fisheries Act 1996 (the 1996 Act) which are now in force, in combination with certain parts of the 1983 Act which remain in force.

Because of the view we take of the validity of the 1995 and 1996 decisions and the basis for that view, we shall address those decisions and the attack made on them only to the extent of explaining why in our view they must be set aside. Having done that, we will address a number of other matters which were argued. We shall do so, not in the context of the 1995 and 1996 decisions because that is unnecessary, but rather in order to give assistance to the Minister and the parties on those issues.

McGechan J's judgment ran to 177 pages. He was faced with a vast amount of evidence and other materials. So were we. We propose to address only those matters which are essential to deciding the relevant issues.

Section 28D(1)(b)(ii) of the 1983 Act

Under s28C of the 1983 Act the Minister was empowered by notice in the Gazette to specify:

> "the total allowable commercial catch to be available for commercial fishing for each quota management area in respect of each species or class of fish subject to the quota management system [QMS]."

The QMS is the system established under Parts IIA or IIB of the 1983 Act. It is not necessary to describe that system which is well known to all those involved in this case.

Section 28D of the 1983 Act specified those matters which the Minister was obliged to take into account in determining or varying the TACC. As the relevant terms of s28D are important, we set them out as they stood at the time of both decisions:

> "... the Minister shall -
>
> (a) After having regard to the total allowable catch for the fishery, including any total allowable catch determined under section 11 of the Territorial Sea and Exclusive Economic Zone Act 1977, allow for -
>
> (i) Non commercial interests in the fishery;
>
> (ii) Any amount determined under section 12 of the Territorial Sea and Exclusive Economic Zone Act 1977 as the allowable catch for foreign fishing craft:
>
> (b) Where considering any reduction in a total allowable commercial catch, have regard to -
>
> (i) Whether or not the imposition of other controls under this Act on the taking of fish would be sufficient to maintain the fish stock at a level where the current total allowable commercial catch could be sustained; and
>
> (ii) Whether or not a reduction in the level of fishing could be achieved by the Crown's retaining or obtaining the right to take fish under any appropriate quota and not making those rights available for commercial fishing:"

The appellants contend that as a result of erroneous advice the Minister failed to have regard to the mandatory consideration set out in s28D(1)(b)(ii) which is underlined and to which we shall refer as paragraph (b)(ii). There is no doubt that when the Minister was considering a reduction in the TACC he was obliged as a matter of law to consider whether he could achieve the desired reduction in the level of fishing by the method specified in paragraph (b)(ii). That method can conveniently be described as Crown acquisition of quota. The idea behind such

acquisition is that the TACC is not itself reduced, but by the process outlined the level of fishing is. The essential objective of a reduction in TACC is to take the pressure off the fishery, but before making a reduction the Minister must consider whether that objective can be achieved by Crown acquisition and subsequent non utilisation of the quota acquired.

The advice which the Minister received from his officials in respect of the 1995 decision drew attention to s28D. The terms of that section, including paragraph (b)(ii), were set out near the commencement of the advice paper. At paragraph 69 of the paper, both subparagraphs (i) and (ii) of paragraph (b) were set out again. The paper then said at paragraph 70:

> "MFish believes that large scale reductions in removal are better achieved by catch limit reductions, and additional controls should be considered to address particular problems (e.g. juvenile bycatch). However, such controls can also aid stock rebuild, improve recruitment and increase yield per recruit."

That passage was addressing the question of "other controls" referred to in paragraph (b)(i). There was no comment on the Crown acquisition issue. However, that circumstance plus what was in fact said, following as it did a reference to subparagraph (ii) as well as subparagraph (i), must be seen as suggesting that the Crown acquisition option was not a live issue and thus should not receive the Minister's consideration. There was certainly at this point no discussion at all of the pros and cons of a matter which the Minister was obliged to consider.

At paragraph 95 of the advice paper under the heading "Crown Obtaining Quota" the following passage appears after a paragraph advising the Minister he had an obligation to consider Crown acquisition, but no obligation to proceed with such a course of action:

> "You could consider leasing back SNA1 on the market. Recent lease prices are about $2,800 per tonne. Attempts to lease large amounts are likely to increase that price considerably until a point where fishers will only lease if the price compensates them for the expected profit

> from fishing and sunk costs. The length of time quota would need to be leased and the total cost would clearly be relevant considerations. The Government has decided that it is not appropriate to compensate fishers for reductions in TACCs for sustainability purposes."

It is clear enough that the final sentence of the passage set out was an important part of the advice given to the Minister. It appeared to be saying that Crown acquisition of quota should not be considered because the Government had decided it was "not appropriate" to compensate fishers for reductions in TACC for sustainability purposes. Clearly, therefore, Crown acquisition of quota, this being the topic under discussion, was seen as involving compensation for a reduction in TACC.

Another dimension to this matter is the timing of the advice. It was given after the removal from the statute of the right to compensation following a reduction in TACC but before the repeal of paragraph (b)(ii). While the general right to compensation had gone, the Minister's power to acquire quota still remained and with it his duty to consider whether to exercise the power. The Minister was effectively being advised to anticipate the repeal of paragraph (b)(ii) which Parliament did not effect until over a year later. This is not simply a case of the Minister failing to consider a mandatory consideration; his failure is related directly to what can be seen as an erroneous statement of the legal position in the advice which he received.

In an attempt to justify the approach taken Ms Duffy drew attention to s28OD(7) which said, with a presently immaterial exception

> "... no compensation shall be payable for any reduction in quota pursuant to this section [which deals with a reduction in TACC under s28OB or section 28OC]"

Ms Duffy submitted that this provision conflicted with paragraph (b)(ii) of s28D(1) or at least should be read alongside it. We can see no conflict. The "no compensation" provision applies only if there is a reduction in TACC. A Crown

acquisition under paragraph (b)(ii)**,** followed by non utilisation, does not result in a reduction in TACC. It results, as is intended, in a reduction in the level of fishing but without reducing the TACC. Thus the "no compensation" provision does not apply, and from the point of view of the structure of these provisions, whatever may be seen as the practical effect, Crown acquisition of quota under paragraph (b)(ii) does not amount to compensation. The Minister was thus wrongly advised when he was effectively told that he could not or should not consider this possibility because of the Government's decision about compensation.

The text of the Minister's 1995 decision dealing with the Snapper 1 area refers to the question of "other controls", but makes no mention of the Crown acquisition point. Nor is there any reference in the Minister's affidavits to his having considered Crown acquisition of quota: see also the reference below to paragraph 146 of the 1996 advice paper. It is, therefore, a reasonable conclusion that, consistently with the tenor of the advice he received, the Minister did not regard that point as a relevant consideration. This was an error of law because Parliament had expressly required the Minister to have regard to the possibility of Crown acquisition of quota on the terms referred to in paragraph 2(b).

Ms Duffy suggested that if this was the Court's view, relief should be refused because had the Minister given consideration to this possibility he would almost certainly have dismissed it as a viable option. We cannot speculate on that. If properly advised the Minister could have thought it appropriate to reduce the obvious hardship on the fishing industry by reducing the TACC to a lesser extent than he did and purchasing or leasing the balance of the tonnage which he wished to remove from the catch. We do not see paragraph (b)(ii) as an all or nothing option. Part of the desired reduction in the level of fishing could have been achieved by reducing the TACC and the rest by Crown acquisition. For these reasons we regard the Minister's 1995 decision as probably influenced by a material error of law.

When the Minister made his 1996 decision he was working from the premise that the TACC was now 3,000 tonnes by dint of the 1995 decision which although

under challenge had not then been set aside. Section 28D(1)(b) applies only when the Minister is considering a reduction in TACC. In 1996 he was not considering a reduction, simply maintaining the level at 3,000 tonnes. On this basis paragraph (b)(ii) was not a mandatory consideration as it had been in 1995. There is no need to discuss the 1996 advice paper save to note paragraph 146 which indicates that the "Crown did not consider" the option of obtaining quota in 1995. This observation supports the conclusion already expressed that in 1995 the Minister did not consider a mandatory consideration.

Although paragraph (b)(ii) did not apply in 1996 it must follow that once the 1995 decision is found to be invalid it is very difficult to uphold the 1996 decision because the Minister was clearly working in that decision from a base of 3,000 tonnes when he should have been working from the earlier base of 4,938 tonnes (see S.R. 1992/252) or such other base (not necessarily 3,000 tonnes) as the Minister in the meantime had validly fixed. On this point, paragraph 143 of the 1996 advice paper recorded that the fishing industry had invited consideration of:

> "... whether, as an alternative to TACC of 3,000 tonnes, a reduction could be achieved by the Crown obtaining quota rights on the open market and not making those rights available for commercial fishing."

In response to that proposition, the advice paper said:

> "However, your decision for 1996-97 concerns any change to the current TACC of 3,000 tonnes and other management controls that exist in the fishery."

The inevitable link between the flawed 1995 decision and that made in 1996 is thus clearly apparent. For these reasons we regard the 1996 decision as flawed also. We therefore order that both the 1995 and the 1996 decisions be set aside.

Before coming to that conclusion we have considered the discretionary nature of such an order. In our judgment once grounds for setting aside are found to exist there is a clear balance in favour of doing so. Without setting aside there would have

been two years of de facto overfishing; there is also the question of the s28N rights and it is desirable to have the legal position consistent with the reality that the decisions have never come into effect.

It is appropriate at this point to note that McGechan J was very much inclined to the same conclusion as we have reached in relation to the 1995 decision. He refrained from reaching it only because of the view he took of what was described as "shelving". This concept means holding quota unfished. The Judge considered the Minister had given consideration to the shelving issue and thereby concluded that he had given proper consideration to paragraph (b)(ii). However, understandably in the light of the mass of material with which he was faced and as the Crown now accepts, the Judge mistook the Minister's reference to shelving, which was in fact a response to the industry's proposal for some voluntary shelving on its part, as a reference to Crown acquisition of quota, which it was not. In short, the Minister's reference to shelving was to industry shelving and not to Crown acquisition.

While Ms Duffy accepted that the Judge was mistaken in this way, she submitted that his reasoning on industry shelving should been seen as applying equally to the Crown acquisition option. That cannot be assumed with any confidence. Indeed, we consider it follows from the tenor of McGechan J's judgment that if he had correctly understood the Minister's reference he would have concluded that there had been a failure to advert to a mandatory consideration or what amounts to the same thing in the present context, a misdirection in law. Indeed McGechan J expressly said that "all that save[d]" the Minister was that he did have regard to shelving. He did not, of course, have regard to shelving in the form of Crown acquisition.

In the light of our conclusion that the Minister's decisions should set aside, it is not strictly necessary to examine the various other bases upon which the decisions were challenged. Nevertheless, as these issues were fully argued, and in order to assist the Minister and the parties with regard to the forthcoming 1997 decision, we

will express our views on such of the other matters raised as appear to have continuing relevance.

Obligation to move to maximum sustainable yield (MSY)

Section 13 of the 1996 Act which is one of the provisions of that Act now in force, expressly requires the Minister to set a total allowable catch (TAC) for each species of fish in each management area. Under the 1983 Act there was no such express obligation but because the TACC could not exceed the TAC a TAC was obviously necessary. The issue between the parties at trial and again on appeal was whether the definition of TAC in the 1983 Act cast an obligation on the Minister to move the fishery to MSY over time. The expression maximum sustainable yield was not the subject of any definition in the 1983 Act but in the 1996 Act it is defined as meaning:

> "In relation to any stock [MSY] means the greatest yield that can be achieved over time while maintaining the stock's productive capacity, having regarding to the population dynamics of the stock and any environmental factors that influence the stock."

There was, however, in the 1983 Act a definition of TAC from which the obligation to move over time to MSY was said to arise. That definition was to this effect:

> "[TAC], with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards."

In our judgment that definition both alone and informed by the relevant articles of the United Nations Convention on the Law of the Sea (UNCLOS) cast on the Minister a prima facie duty to move the fishery towards MSY, if not already there, by such means and over such period of time as the Minister directed. That

prima facie obligation was subject to the so called qualifiers i.e. those factors introduced by the words "as qualified by". Those qualifiers were matters which the Minister was required to address when considering how to implement his prima facie duty and, if the qualifiers were cogent enough, whether the prima facie duty was for the moment overtaken by one or more of those factors. Thus the qualifiers were relevant to whether, and if so, by what means and over what time the prima facie duty should be implemented. That in our judgment is the correct way of looking at the matter rather than saying, as Mr Hodder at one point submitted, that if any of the qualifiers applied the Minister had a discretion rather than an obligation to move to MSY.

Under the 1983 definition of TAC it was the "amount of fish" - the catch - which was the subject of the qualifiers not the MSY. Whatever may have been the difficulties on this issue under the 1983 Act the position has become much clearer under s13 of the 1996 Act, which to the extent relevant to this point provides:

> "(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.
>
> (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 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 any

environmental conditions affecting the stock and;

(ii) Within a period appropriate to the stock and its biological characteristics; 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.

(3) In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under paragraph (b) or paragraph (c) of subsection (2) of this section, the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant."

It is thus made clear that in setting the TAC for a fishery whose yield is below MSY the Minister has an obligation to move the stock in question towards or above a level which can produce MSY. It is similarly made clear that what used to be called the qualifiers (now expressed as such social, cultural and economic factors as the Minister considers relevant) are matters to which the Minister must have regard when he considers the way in which and the rate at which the stock is moved towards or above MSY. In short, the Minister now has a clear obligation to move the stock towards MSY and when deciding upon the time frame and the ways to achieve that statutory objective the Minister must consider all relevant social, cultural and economic factors. For the future the Minister might think it wise in making his decision to refer expressly to the social, cultural and economic factors which he has considered to be relevant to his decision, and any matters pressed upon him which he has not considered to be relevant.

While the question of relevance under s13(3) is prima facie for the Minister, a decision that something is not relevant which obviously is, or vice versa, would be susceptible of judicial review on ***Wednesbury*** principles. While the point was not

the subject of much argument, we are of the preliminary view that the economic factors of which s13(3) speaks need not necessarily be confined to matters directly affecting the fishing industry. In our view wider considerations affecting the national economic interest are capable of being regarded as relevant. MSY is itself directed at the national interest as well as at sectional interests and this supports the view that national economic factors can be relevant to a TAC assessment under s13. We note as a postscript to this point that whereas s13 of the 1996 Act now governs the setting of TAC, s28D of the 1983 Act still governs the setting of TACC, but of course it is s28D in its present form that will be relevant to the 1997 decision. The amendment to that section which removed paragraph (b) of s28D(1) came into force on 1 October 1996. Obviously, therefore, the absence of paragraph (b) from s28D(1) is relevant for 1997. We do not consider it necessary to discuss the 1983 TAC definition and the issues arising from it any further, nor do we consider it appropriate to make any further comment about s13 of the 1996 Act.

Quota as property rights

The appellants submitted that the Minister's decisions were not made in accordance with two underlying purposes of both the 1983 and the 1996 Acts, namely to maintain the integrity of the QMS and to afford proper respect to the property rights of those holding quota. It was submitted that in defiance of those purposes the Minister's decision had afforded a preference to recreational fishers and involved an immediate and future reallocation of the catch from commercial to recreational fishers. We shall be addressing the preference point later when discussing arguments about proportionality between commercial and recreational interests. Here we shall consider the property rights point, but mindful of the effect which it is said the Minister's decisions have had on the balance between the two interest groups. While acknowledging the extensive arguments which we heard on the property rights point, we consider the answer is quite straight forward. While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be

reduced. If such reduction is otherwise lawfully made, the fact that quota are a "property right", to use the appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned. There is no doctrine of which we are aware which says you can have the benefit of the advantages inherent in a species of property but do not have to accept the disadvantages similarly inherent. Of course, if the Minister is considering any reduction in TACC with a consequential reduction in quota, he must carefully weigh the economic impact of what he proposes to do both on individual quota holders and on the QMS generally. That is a given, but it would not be consistent with the capacity to reduce quota to hold that the property rights inherent in the QMS afford any kind of absolute protection from reduction. Thus the Minister was not in our judgment acting unlawfully simply by dint of the fact that his decision reduced the property rights inherent in the quota system.

Proportionality

The appellants submitted that if a reduction in TACC was justified, quota holders should bear no more than their proportionate share of that reduction along with recreational interests which should also bear their proportionate share.

Mr Hodder acknowledged that this submission involved the proposition that the recreational percentage of the total TAC was permanently fixed unless there was an increase in the total biomass. The starting point is the same both under s28D of the 1983 Act and s21 of the 1996 Act. When setting or varying any TACC the Minister must have regard to the TAC for the species in question. Under the 1983 Act the Minister is then required to "allow for":

(i) Non commercial interests in the fishery

(ii) The catch allowed for foreign fishing craft.

Under the 1996 Act the Minister is required when setting TACC to "allow for":

> "(a) The following non-commercial fishing interests in the stock, namely -

(i) Maori customary non-commercial fishing interests; and

(ii) recreational interests; and

(b) all other mortality to that stock caused by fishing."

The appellants' proportionality argument which was based on the concept of equality of sacrifice must first face the acknowledged fact that neither Act makes any express provision to that effect. If proportionality is a legal requirement it must arise implicitly. The appellants recognise this and submit that the necessary implication should be made. It is important to recognise that what is allowed for by the Minister in respect of the interests for which he must allow before setting the TACC, is not a quota as such. To take recreational fishers as an example, the "allowance" is simply the Minister's best estimate of what they will catch during the year, they being subject to the controls which the Minister decides to impose upon them e.g. bag limits and minimum lawful sizes. Having set the TAC the Minister in effect apportions it between the relevant interests. He must make such allowance as he thinks appropriate for the other interests before he fixes the TACC. That is how the legislation is structured. We do not consider it implicit in the relevant section or in the scheme of the Act as a whole that once the ratio of recreational tonnage to commercial tonnage is fixed there can be no change in that ratio except on an increased biomass. Section 21(2) of the 1996 Act obliges the Minister to consult interested parties including Maori, environmental, commercial and recreational interests. He must do this before setting or varying TACC. Each group will no doubt seek to advance its own position in the process. We can see no reason why either as his primary purpose or as a consequence of some other purpose the Minister should not be able to vary the ratio between commercial and recreational interests. To do that is in our judgment within his powers.

There was a further complaint which can conveniently be dealt with under this heading. It was suggested that the Minister's decision was flawed because he had not taken any or any sufficient steps to constrain the recreational fishery. This is

a point similar to one raised by the Maori appellants to be dealt with later. It is sufficient for present purposes to say that we are satisfied from the evidence that the Minister has made bona fide efforts to constrain recreational fishing. Bag limits have been substantially reduced over recent years and the minimum legal size for snapper was quite recently increased from 25cm to 27cm. In addition, the Minister has forecast further work in this area which satisfies us that he is very much alive to the need to restrain recreational fishing in a way which seeks to prevent the commercial sacrifice being caught on recreational hooks. The imprecision of the actual recreational catch is one good reason why strict proportionality would be near impossible to achieve. That makes it difficult to imply an obligation to achieve it. Once one retreats from the proposition that strict proportionality is required, there can be no satisfactory solution other than that the Minister must act reasonably to seek to stop the saving resulting from TACC reductions being lost to recreational fishing.

A further matter which points against any implication of proportionate reduction is that the Minister is in our judgment entitled to bear in mind changing population patterns and population growth. If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover it, subject always to his obligation carefully to weigh all the competing demands on the TAC before deciding how much should be allocated to each interest group. In summary, it is our conclusion that neither the specific sections (28D and 21) nor the Acts when viewed as a whole contain any implied duty requiring the Minister to fix or vary the recreational allowance at or to any particular proportion of the TACC or for that matter of the TAC. What the proportion should be, if that is the way the Minister looks at it from time to time, is a matter for the Minister's assessment bearing in mind all relevant considerations.

Maori issues

The Treaty of Waitangi Fisheries Commission supported by Area 1 Maori Fishing Consortium and Ngapuhi Fisheries Ltd raised two arguments specific to Maori in support of the contention that the Minister's decisions were invalid. Both were said to relate to the proposition that the Minister's decision had undermined the intention that the settlement reached between the Crown and Maori over fishing matters in 1992 should be a just, honourable and durable settlement.

Mr Finlayson argued that the Minister had failed to take into account relevant considerations in this area. Mr Laurenson argued that the Minister's decision defeated the legitimate expectations of Maori. He made it clear, however, that he did not found his argument on any separate or specific ground of breach of legitimate expectation, but rather contended that the points he was making resulted in the Minister's decisions being unreasonable. We shall deal with the topic of unreasonableness below and will include the points made by Mr Laurenson in that exercise.

Mr Finlayson's argument was that when the Minister's decisions were placed in their social and historical context, particularly as regards the fishing settlement between the Crown and Maori in 1992, it could be seen that the Minister had failed to have regard to what was implicitly a mandatory consideration when he fixed the TACC now impugned. The appellants' contention is that McGechan J wrongly focused his attention solely on the confines of s28D when considering the matters to which the Minister was obliged to have regard. Mr Finlayson took us to the Maori Fisheries Act 1989 and to the Treaty of Waitangi (Fisheries) Settlement Act 1992 (the Settlement Act) and he traversed the events leading up to the Settlement Act. While we accept it is legally possible to find a mandatory consideration which is implicit rather than expressed, such a situation is not common, particularly where, as here, the legislation expressly sets out one or more mandatory criteria.

The submission was that when reading all the legislation together the Minister was implicitly obliged to have regard to -

(i) the source of the Maori held quota, ie the settlement

(ii) his duty to implement and give effect to the settlement

(iii) the need for the compensation given under the settlement, ie quota, to have real and lasting value. In support of this point, it was said that the TACC cut will cost Maori fishers $14.6m.

In short, it was argued that the Minister had failed in his duty to consider specifically and separately the interests of Maori before deciding to make the TACC cut. Mr Finlayson disclaimed any attempt by Maori to gain some priority or preference. Indeed it could never have been intended that Maori would be protected from any cut if there was to be one. Yet the consequence of the submission would be that if a cut is otherwise justified but its application is held to be precluded or diminished because of the Maori dimension, non Maori fishers will gain the benefit of such consequence equally with Maori fishers, because it was accepted that Maori quota could not be dealt with differently. Such an incidental benefit to non Maori fishers could hardly have been intended either.

In our judgment the implication sought by the Maori appellants cannot be made. The evidence is that the Maori negotiators studied the QMS very carefully before deciding to settle their claims in return for quota. The capacity for a reduction has always been inherent in the quota system. No doubt no one anticipated a reduction of the present size, but under the settlement Maori accepted quota with its capacity to go down without compensation and up without cost. Under the settlement Maori became holders of quota along with all other holders. Their rights were in our view no more and no less than those of non Maori quota holders. The Minister was accordingly obliged to give them exactly the same consideration as all other holders of quota. Any other conclusion would be to give Maori a preference, which appropriately Mr Finlayson said they did not seek.

Under s5 of the 1996 Act the Minister in making future decisions is obliged to act in a manner consistent with the Settlement Act. The idea that the settlement is any the less just, honourable and durable should Maori quota be reduced, is

unpersuasive. An asset which Maori obtained under the settlement had within it the capacity for diminution (see the property rights discussion above). If that capacity is lawfully realised, there cannot be any complaint on the basis that the settlement has been broken or has not proved durable. Something which was liable to happen under the settlement has happened. A reduction in TACC, which is otherwise lawful, cannot be viewed as a decision by the Minister inconsistent with the Settlement Act. Obviously the interests of Maori as quota holders along with all other people in a like position must be carefully weighed, but in our judgment Maori cannot claim to be entitled under the Settlement Act to some kind of additional threshold or onus before their quota is reduced. For these reasons, we accept the Crown's submission that the Minister approached the matter properly when he said in his affidavit:

> "30. As a consequence of the interim settlement in 1989, the Crown provided Maori, through the Treaty of Waitangi Fisheries Commission, with 10 percent of [quota] for all fish species in the QMS, including SNA1 in recognition of their claims over commercial fisheries. A final settlement was concluded with the Deed of Settlement which was entered into in 1992. Since 1990 the Fisheries Act has provided for a proportionate TACC with the risk of decreases falling on the participants in the commercial fishery and the benefit of increases being enjoyed by them at no extra cost.
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> 31. I would have expected Maori to have been aware in 1992 when it finalised its settlement with the Crown of the working of the Fisheries Act in respect of TACC decreases and increases. I refer in particular to clause 4.2 of the Deed of Settlement by which Maori endorsed the QMS and acknowledged that it is a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand."

The Minister went on to point out further that the TACC decrease upon which he had decided would not decrease the proportion of Maori held quota. This is the proportionate point to which he had referred earlier. Following the decrease Maori held quota remained at the same percentage of the total TACC. As the Minister pointed out, any attempt to hold the quota owned by Maori at its original mark, or reduce it by a lesser percentage than that applied to other quota holders, would result in the Maori share of the total quota being greater than the original percentage

received under the Deed of Settlement. The Minister also pointed out that both of those approaches would require greater reduction on non Maori quota holders.

For these reasons, we are of the view that Mr Finlayson's argument cannot succeed. There was no failure by the Minister to take into account a relevant consideration along the lines contended for by the Maori appellants.

Unreasonableness

The law is as stated by this Court in ***Wellington City Council v Woolworths (New Zealand) Ltd (No.2)*** [1996] 2 NZLR 537. There is no need for any further discussion.

The argument concerned whether the Minister's decision to make a cut of 39 percent in the TACC was unreasonable in the relevant sense, which may well be better captured by the word irrational. No ultimate conclusion is required for the purposes of this case and it is preferable not to express one. It must be said at once that the decision which the Minister made must have had a very substantial effect on commercial fishing interests. The Minister acknowledged the impact his decision would have, but there was little if any analysis either in the advice paper or in the decision itself of the costs and benefits of all kinds to be derived or incurred either from the objective of moving to MSY or from the speed at which that should be done. Indeed, the advice to the Minister suggested no great concern at the time frame for moving to MSY, yet there was apparently no consideration given in the decision to the differences which would flow to both cost and benefits if the time frame adopted were altered to 30 years, or any other period, from the period of 20 years which the Minister ultimately fixed. Putting the matter in a concrete form, there was no analysis of what harm would have been done if for example 30 years had been selected, thus lessening the impact on the industry. All that seems to emerge is the view that any time period longer than 20 years would lack "credibility", but why that should be so is by no means obvious. In addition, no consideration appears to have been given to a staged reduction with the position being carefully monitored and the

capacity for adjustment as the effects of the initial stages became apparent. Nor was any consideration apparently given to whether, provided there is movement towards MSY the goal must be achieved within a fixed time.

While the relevant biomass is at only 50 percent of the level required for MSY, it appears that the fishery itself is at 92 percent of MSY. Thus a 39 percent cut was seen as necessary to obtain an 8 percent increase from 92 percent to 100 percent MSY over 20 years.

In the Crown's submissions, a number of matters were identified as purportedly justifying the immediate and substantial economic hardship caused by the decision and what might well be seen as a substantial undermining of the QMS as a whole. Whether those matters, which were themselves not the subject of much cost/benefit analysis, were sufficient to justify the prima facie economic harshness of the Minister's decision is not something which requires decision. All we wish to say for the future is that the Minister would be wise to undertake a careful cost/benefit analysis of a reasonable range of options available to him in moving the fishery towards MSY. If the Minister ultimately thinks that a solution having major economic impact is immediately necessary, those affected should be able to see, first, that all other reasonable possibilities have been carefully analysed, and, second, why the solution adopted was considered to be the preferable one.

We turn now to the submissions made by Mr Laurenson in support of the view that the Minister's decision was irrational. His argument was that the Maori appellants had a legitimate expectation that if there was a reduction in TACC it would be applied proportionately to the commercial and recreational interests. The point is similar, if not identical, to the proportional point discussed earlier. The contention is that the Minister's failure to adopt the suggested proportional approach renders his decision unreasonable/irrational. Mr Laurenson acknowledged that the Crown had not said anything to suggest, imply or encourage the view that the proportional approach would be followed. The Maori appellants nevertheless contend that such an approach "goes without saying". In our judgment this is an

untenable proposition. It may be that this is what some of the negotiators on the Maori side assumed, but nothing has been identified as justifying that assumption. For one party to have a legitimate expectation upon which that party may fairly rely, it is necessary, all other points aside, for the decision maker to have done something to foster that expectation. There is some analogy with estoppel. From the point of view of unreasonableness or irrationality the concept of legitimate expectations provides no basis for holding that the Minister's decision can be impugned.

Notice

The appellants argued for an implied requirement that reasonable notice (6 months was suggested) should be given if the Minister was going to make a substantial cut in the TACC. In 1995 the fishing industry received only a few days notice of what on any view was a major cut having substantial ramifications. There is no utility in looking at the past on this issue. As for the future, s13, as earlier mentioned, requires the Minister to set the TAC. No time frame is expressly set out, but it is provided that once set the TAC shall continue to apply for each fishing year unless varied. Subsection 4 provides for variations. Again, no time frame is set out. Subsection 6 says that with one exception the TAC set or varied shall have effect from the first day of the next fishing year. The exception relates to mid season increases. In the TACC sections (s28C of the 1983 Act and s20 of the 1996 Act) there are comparable provisions. There is again no express requirement for any period of notice. The question is whether such requirement can be implied. We do not consider it can. The legislative framework clearly allows the decision to be made and published at any time prior to the start of the fishing year to which it relates. Obviously in some circumstances late notice will cause major hardship and disruption. While there is no implied requirement, we consider the Minister should always strive to give as much notice as possible, particularly when a significant change in the TACC is involved. Such notice will usually occur, we imagine, from the consultation process which the Minister must follow. In an extreme case a last minute unheralded notification of a major change, although not unlawful per se could

be susceptible of challenge for unreasonableness/irrationality unless there was some very convincing explanation for it.

Section 28N Rights

565.6 tonnes of quota remain subject to these rights. All the current holders represent people or companies who were originally holders of quota in 1986. We were informed that holders of these rights are entitled on any future increase in the total amount of quota to their share of that increase at no cost. Apparently, in order to qualify the increase does not have to be an increase above the base amount which applied immediately after the holders had suffered their reduction; it can be any subsequent increase. If this is indeed the effect of the legislation, the position may justify some examination. Those bearing the present sacrifice on a decrease in quota will not necessarily recoup all that sacrifice on any subsequent increase.

We were not taken into the full details of this issue and we simply make this comment from what we were advised at the bar.

Presentation

We wish to conclude by making certain observations about the presentation of the submissions on this appeal. There were a number of respects in which the Practice Note was not observed, particularly as regards summaries of submissions and their length. All parties were to a greater or lesser extent involved. The Case on Appeal extended to 10 volumes but a substantial part of it was never referred to; likewise the several bundles of authorities. The forest of paper with which we were presented represented a classic case of not being able to see the wood for the trees. In a number of respects essentially the same point was advanced under several different headings. It was not until after a considerable amount of enquiry from the bench that the intended submissions achieved any real definition or focus. At times these judicial review proceedings were improperly treated as if they were an appeal on matters of fact. We exempt the Maori appellants from most of these last criticisms.

The consequence was that a case which could with properly focused written submissions have been completed within 2-2½ days took 4 days to be heard, with the better part of the first day being taken up by the Court endeavouring to clarify a number of points and to identify the real issues.

The s28N point emerged during the course of discussion. The point should have been expressly drawn to the Court's attention before the hearing in the light of the understanding recorded when the application for continuing interim relief was heard in this Court and which continued to apply at the conference in May.

The point arising under s28D(1)(b)(ii) emerged darkly from the forest, and its significance did not appear to have been recognised judging by its lack of prominence in the voluminous submissions.

The essential points in almost all cases, however apparently detailed and complicated those cases may be, can almost always be compressed into comparatively short and simple propositions. Substantial detail may, of course, sometimes be needed to support those propositions. In the interests of the expeditious hearing of appeals and in the interests of other litigants waiting their turn, the Court proposes to take a firm line in this area, consonant with the Practice Note. Non compliance may well, as in this case, have a bearing on costs, or otherwise.

Conclusion - Costs

In the result the appeal is allowed and the Minister's 1995 and 1996 decisions are both set aside. There is no need for any order for reconsideration as that will effectively occur when the Minister makes his 1997 decision. That decision should be made on the basis that the present TACC is 4,938 tonnes. It should of course be preceded by the formal setting of the TAC and should visit *de novo* the setting of an appropriate TACC from the stand point of the law in force at the time the decision is made.

As to costs, the industry appellants have succeeded, but far more hearing time was expended than would have been necessary if the problems identified above had not occurred.

The points raised by the Maori appellants have failed. We order the first respondent (the Minister) to pay the industry appellants (in CA82/97) the sum of $5,000 plus disbursements to be fixed by the Registrar. In all other respects, we leave costs in this Court lying where they fall. Costs in the High Court were reserved. We remit that question to McGechan J to determine in the light of this judgment and the course of the proceedings before him.

Solicitors
Chapman Tripp Sheffield Young, Wellington, for Appellants in CA82/97.
Crown Law Office Wellington, for Respondents in all cases
Morrison Kent, Auckland, for Third Respondent
Bell Gully Buddle Weir, Wellington, for Treaty of Waitangi Fisheries Commission
Craig Griffin & Lord, Auckland, for Area 1 Maori Fishing Consortium and Ngapuhi Fisheries Limited