

**In the Supreme Court of New Zealand**

**SC 40/2008**

between

**New Zealand Big Game Fishing Council Inc**

Appellant

and

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

First Respondents

and

**Minister of Fisheries**

Second Respondent

and

**The Chief Executive of the Ministry of Fisheries**

Third Respondent

**Legal Submissions of Applicant in Support of Application  
for Leave to Appeal**

**Dated: 6th August 2008**



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## May it Please the Court:

### Introduction

1. New Zealand Big Game Fishing Council Inc seeks leave of the Supreme Court to appeal to the Court against the decision of the Court of Appeal of New Zealand, dated 11 June 2008 (CA163/07, [2008] NZCA 160). The applicant is an established incorporated society who acts as a representative organisation on behalf of recreational fishing interests.
2. The decision of the Court of Appeal was preceded by the decision of the Harrison J in the High Court (Auckland Registry) by decision of 21 March 2007. These proceedings were first initiated by the applicant in August 2005 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) and the total allowable commercial catch (TACC) under the quota management scheme (QMS) for the kahawai fish species.
3. The proceedings take place against a background of proposed policy or legislative reform.
4. The key question in the application for leave to appeal is how the purpose in section 8 of the Fisheries Act 1996 to "*enable people to provide for their social, economic, and cultural well-being*" is to apply to the exercise of the Minister's discretion under section 21 when making decisions to allow for recreational fishing interests in the context of setting the TACC.
5. The appellant has restricted the scope of the proposed appeal to focus on this issue of the relationship between the purpose and operative provisions of the Act. An authoritative determination of this issue will contribute to a properly informed basis for on-going decision making under the Act and for the current policy discussions involving representative fishing interests and the Ministry.
6. The key statutory provisions are section 8, 13, and 21, as set out in the **schedule** to these submissions.

### Relevant Facts

7. The kahawai species was one of the last to enter the QMS with effect from 1 October 2004.

8. After the Ministry of Fisheries consulted on TAC's, TACC's and the non-commercial allowances in early 2004, the Minister then divided the TAC's between the fishing sectors based on the Ministry's estimates of current recreational and commercial utilisation (or catch history) less an arbitrary 15% reduction to both commercial and recreational utilisation (paragraph 14, Minister's 2004 decision letter). In effect the Minister set the TAC's at 15% below the level of recent commercial catches and estimated non-commercial catches across all quota management areas.
9. In 2005, at the Minister's direction, the Ministry consulted on TAC's, TACC's and the non-commercial allowances. The Minister subsequently set the TAC's, TACC's and the non-commercial allowances with effect from 1 October 2005 based on a further arbitrary 10% reduction across all quota management areas.
10. The QMA known as KAH1 has approximately 50% of the fishery, and encompasses the Hauraki Gulf Marine Park.
11. The Minister's 2004 decision describes kahawai as the "people's fish". A contingent valuation cost benefit study by the South Australian Centre for Economic Studies concluded that the recreational fishers valued kahawai between 11 and 16 times higher than the commercial sector.
12. In some areas including the Hauraki Gulf Marine Park, an area of declared national importance, there was evidence of very low recreational catch rates.
13. Recreational fishing involves fishing under the Fishers (Amateur Fishing) Regulations 1986, and includes recreational fishing from a charter boat. When Maori fish without a customary permit, for non-commercial purposes, they fish as recreational fishers.
14. The Minister of Fisheries has announced his intention to make new decisions for kahawai with effect from 1 October 2009. The appropriate relationship between section 8, 13 and 21 is obviously central to that decision-making.

#### **Decision Appealed against: relationship between sections 8 and 21**

15. Harrison J categorised the TACC decision as a mechanism for utilisation and the TAC as a sustainability decision: see [43], [44], [54] (HC).
16. Harrison J held that the Minister did not make an error in the exercise of his discretion under section 13(3) when setting the TAC [paragraphs

[43], [50], [51], [53] HC). Conversely, Harrison J found that in setting the TACC the Minister did not correctly apply the criterion of enabling people "to provide for their social, economic and cultural well-being" as per the utilisation definition in the purpose of the Act in section 8(2), and that this was a mandatory consideration at the stage of allowing for recreational interests in the stock: (see [55] HC).

17. The Court of Appeal rejected Harrison J's analysis and held that the finding in relation to the TAC decision (where the Minister was held to have regard to social, cultural and economic factors) created an inconsistency with the Judge's finding on the TACC decisions: [49] CA. The Court said that "*however, because of the view we take about the general application of s.8, it is not necessary for us to engage further with this argument*": [49] CA.
18. The Court of Appeal adopted the approach in *Westhaven Shellfish Limited v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) which the Court of Appeal described as taking a "*global approach to purpose*": [58] CA.
19. At [59] the Court of Appeal said that the purpose is that expressed in s.8(1). The Court says:
 

*"... the definitions in s.8(2) of course guide the application of s.8(1), but the reference in the definition of utilisation to enabling people to provide for their social, economic and cultural wellbeing is not expressed as a purpose of the Fisheries Act itself, but rather as an object of the conserving, using, enhancing and developing of Fisheries resources. If Parliament had wished to require that the Minister, in the course of making allowance for recreational fishers, had to direct his or her mind to their social, economic and cultural wellbeing, to the exclusion of the social, economic and cultural wellbeing of any other sector of society, it needed to say so explicitly"*.
20. At [61] the Court of Appeal said that "*the consideration of the wellbeing factor requires a balance of competing interests, especially in the case of a shared fishery such as Kahawai*".
21. Section 21 was described by the Court of Appeal as being the "primary provision" [57], and the "governing provision" [69] CA.
22. The Court noted, in contradistinction with s.13(3) "*there is no expressed reference to social, economic and cultural factors in s.21(1)*": [65] CA.

23. At [69] the Court said that the *"decision which the Minister makes under s.21(1) must conform with the purpose of the Fisheries Act as expressed in s.8(1), but the governing provision is s.21(1), not s.8(1)"*.
24. The Court of Appeal noted in various parts of its decision that non-commercial interests had to be allowed for first (see [56], [57] CA). The Court noted [57] that: *"that does not mandate any particular outcome (it can be imagined that for some species the Minister would determine that there should be little or no allowance for those interests, while for others the allowance may be all or a substantial portion of the TAC). However, it does make it clear that the Minister must direct his or her mind to the extent of the allowance which should be made for the non-commercial interests before setting the TACC ..."*.

### **The Points of Law Appealed Against**

25. The Appellant seeks leave to appeal to this Court on the grounds that the Court of Appeal erred in law by rejecting the analysis of Harrison J as to the interpretation of the relationship between sections 8 and 21 in the TACC decisions (paragraphs [50] to [69] CA) and the related findings as to the relationship between the TAC and TACC decisions (paragraphs [45] to [50] CA). In particular it is alleged the Court erred:
- a. In rejecting the analysis of Harrison J that the TAC and TACC decisions can be characterised as sustainability and utilisation decisions respectively (paragraphs [45] – [48]).
  - b. By holding (paragraph [54]) that the stated purpose in section 8 of the Fisheries Act 1996 was essentially "a statement on Government policy ...", and a "guide" (paragraph [59]) rather than applying and giving effect to the purpose when assessing recreational interests in the context of section 21.
  - c. By interpreting the purpose and meaning of sections 8 and 21 to take a "global approach to purpose" and to "bear in mind and conform with the purposes of the legislation" (paragraphs [58] – [61]).
  - d. By finding (in comparison with section 13(3)) that the lack of express reference to social, economic and cultural factors was

relevant to the approach to statutory interpretation of section 21 (paragraphs [64] – [65]).

- e. By finding that the Minister was not bound to consider peoples social, economic and cultural wellbeing as contained in section 8 when allowing for recreational interests in each stock (paragraph [64] - [67]).
- f. Incidentally, by finding that the common law public right of fishing still extended to commercial fishers (paragraph [68]) whereas commercial fishing rights under the quota management scheme are statutory rights.
26. The legal questions involve ascertaining the purpose for which the power under section 21 was given to the Minister.
27. Section 21 of the Fisheries Act 1996 is not specific as to the extent to which recreational fishing interests are to be allowed for, but the Minister’s power is not an unfettered one. As held by this Court in *Unison Networks v Commerce Commission* [2008] 1 NZLR 42, 58 (SC):
- [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision maker “so uses his discretion as to thwart or run counter to the policy and objects of the Act”. ....
- [54] Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. ....
28. Ascertaining the meaning of the Fisheries Act 1996 requires consideration of all of the indicators provided in the enactment: s.5(2) Interpretation Act 1999. It is submitted that contrary to the Court of Appeal decision, the internal context of the Act makes a clear distinction between “sustainability” and “utilisation” decisions:
- Part 2 of the Act contains the purpose and principles in ss. 8, 9 and 10. Section 8(1) expresses two public policy objectives, namely “utilisation” while “ensuring sustainability”. Both are defined in s.8(2).
  - Both s.9 and s.10 commence with: “*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 ... principles.*" This requirement to take into account these principles is expressed disjunctively. The disjunctive "or" in s.9, and s.10 illustrates that the powers exercised under the Act have different functions (and see also disjunctive reference to the functions in s.17B(1)).

- Part 3 of the Act is titled "Sustainability Measures" and is principally concerned with ensuring the sustainability part of the purpose.
- A Minister may set a sustainability measure: s.11(1).
- The default management regime in s.13 is concerned with ensuring sustainability. Section 13 requires a TAC to be set that *"maintains the stock at or above a level that can produce the maximum sustainable yield ..."*.
- Decision making under s.21 is within Part 4 of the Act "Quota Management System". It is about "utilisation" of the resource once a decision to "ensure sustainability" has been made.
- Decision making under s.21 contemplates that a decision in respect of the TAC will already have been made, thus the decision to ensure sustainability is made ahead of the decision to set or vary the TACC. Before any TACC is set or varied the Minister *"shall have regard to"* the TAC for that stock: see s.21(1) and s.20(5).
- As noted by the Court of Appeal at [50] a decision under s.13 setting the TAC is a "sustainability measure" as defined in s.2, namely *:"Sustainability measure means any measure set or varied under Part 3 of this Act for the purpose of ensuring sustainability"*

29. This is not to say that TAC decisions do not have an element of utilisation to them as both the High Court (see para [17] HC), and the Court of Appeal ([148] CA) recognised. Nonetheless the *primary function* performed by decision-making under s.21 is to utilise the resource by the respective fishing sectors; whereas the *primary function* performed by decision-making under s.13 is ensuring sustainability.

30. The case was not argued in the Courts below that the application of the utilisation purpose required exclusive consideration of recreational wellbeing to the exclusion of commercial wellbeing. See the concession by Counsel recorded by the Court at [66] (CA).
31. The legislative history of the enactment of the purpose in s.8 of the Fisheries Act 1996 reaffirms the dual policy objectives. In its original form the purpose clause to the Fisheries Bill stated at clause 6(1): “*The purpose of this Act is to provide for the sustainable utilisation of fisheries resources.*” The Select Committee considering submissions on the Bill gave consideration to the Act’s purpose and recommended amendments to its current form, in effect recognising the dual policy objectives, saying “*this reflects the fact that the Bill aims to facilitate the activity of fishing, and that all fishing should ensure sustainability of the resource*” (Fisheries Bill, as reported from the Primary Production Committee, page viii).
32. The Court of Appeal drew assistance at [25] from RMA cases as lending support to a “*global approach*” to purpose, citing *Bella Vista Resort Limited v Western Bay of Plenty District Council* [2007] 3 NZLR 429. It is submitted that caution is required in making comparison with the RMA, because the RMA differs significantly in the specificity with which functions and powers are to be exercised, and the weight given to specific values, e.g.:
- decision makers are required to “*recognise and provide for*” the matters of national importance in s.6 RMA.
  - in achieving the purpose of the Act, all persons exercising functions and powers are required to have “*particular regard to*” the other matters listed in s.7; and
  - when considering resource consent applications, consent authorities shall, subject to the purpose and principles in part 2 “*have regard to*” the specified matters in s.104 RMA.
33. In comparison, s. 21(1) Fisheries Act 1996 does not spell out the considerations applicable to the decisions as to the allowance for recreational interests. The purpose in section 8 therefore takes on a

relative significance when ascertaining the meaning of recreational interests in s.21(1).

34. The use of a 'goal based' statutory purpose, namely the use [etc] of fisheries resources to "*enable people to provide for their social, economic, and cultural well-being*", is not simply an aspirational statement deserving only globalised treatment by the Courts. In the fisheries context is a readily measured public policy goal. Wellbeing can be measured for recreational fishers' by whether there is sufficient abundance to enable people to catch fish. For example in the Hauraki Gulf there is information that there are very low recreational catch rates in the Hauraki, as measured by boat ramp surveys carried out by the Ministry.

### **Why Leave Should be Granted Under Section 13 Supreme Court Act 2003**

35. Section 21 of the Fisheries 1996 is not specific as the extent to which recreational fishing interests are to be "allowed for" before setting the commercial catch. The relationship between the stated purpose in section 8 and allowing for non-commercial fishing interests in the setting of the TACC under section 21, and the correct approach to statutory interpretation is a matter of general or public importance for the reasons following, and those expressed above in paragraphs 2, 3, 5, and 14.
36. The precise role occupied by section 8 in the scheme of the Fisheries Act 1996 has not been the subject of detailed consideration in earlier decisions of the Court (noted by the Court of Appeal at [53]).
37. The issues are of significant interest to a substantial section of the public. Recreational fishing in all its aspects is a popular and highly valued activity in New Zealand. Surveys indicate that up to 20% of the population engage in recreational marine fishing annually (Ministry of Fisheries, Briefing for the Ministry of Fisheries, 5 March 2004).
38. The relationship between recreational and commercial fishing interests when making decisions under section 21 of the Fisheries Act 1996 is also a matter of general commercial significance insofar as the correct approach to statutory interpretation between sections 8 and 21 relates to the rights of commercial fishers. Section 21 regulates the utilisation of the fisheries resource between the public rights of non-commercial

fishers' and the private property rights of commercial fishers' who hold quota.

39. The use of statutory purpose or objects clauses is a distinctive legislative feature, though no longer the unusual feature described by the Court of Appeal in *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78, 88.
40. The application for leave to appeal raises the question as to whether the “conform with” test in *Westhaven* is too global, and reads down Parliament’s intention that the peoples social, cultural and economic wellbeing be considered before setting the recreational allowance and the TACC. Because there are relatively few fisheries in which recreational participation is substantial, recognising the context is vital.<sup>1</sup>
41. The Supreme Court of the United States in *Rodriguez v United States* 480 US 522(1987)<sup>2</sup>.said:  
 “No legislation pursues its purposes at all costs. Deciding what competing values will or will not be scarified to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplicity to assume that *whatever* furthers the statute’s primary objective must be the law” ...
42. It is submitted that “conforms with” suffers from the same defect.

**Dated** at Auckland this 6<sup>th</sup> day of August 2008.

.....

**A R Galbraith QC/ S J Ryan**

Counsel/ Solicitor for the Applicant

<sup>1</sup> See Cathy Nijman, “Ascertaining The Meaning Of Legislation- A Question Of Context”(2007) 38 VUWLR 629

<sup>2</sup> As cited in R.S. Geddes “Purpose and Context in Statutory Interpretation” (2005) 2 UNELJ 5, 44; and for a comparison of the purposive approach to statutory interpretation in Australian and US law in environmental decision-making see: Charmain Barton: “Aiming At The Target: Achieving The Objectives Of Sustainable Development In Agency Decision-Making” Georgetown International Law Review (2001) Vol 13:837.

**To:** The Registrar of the Court of Appeal

**And to:** The First Respondents, by their Solicitors

**And to:** The Second and Third Respondents, by their Solicitors

This document is filed by **Stuart James Ryan**, Solicitor for the abovenamed respondents, of the firm of Hesketh Henry. The address for service of the abovenamed respondents is at the offices of Hesketh Henry, Lawyers, Level 11, 41 Shortland Street, Auckland 1.

Documents for service on the abovenamed respondents may be left at that address for service or may be:

- a. Posted to the solicitor at Hesketh Henry, Private Bag 92093, Auckland;  
or
- b. Left for the solicitor at a document exchange for direction to document exchange box no. CP 24017, Auckland; or
- c. Transmitted to the solicitor by facsimile to (09) 365 5278.

## **Schedule- Sections 8, 13, 21 Fisheries Act 1996**

### **8 Purpose**

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act—

**Ensuring sustainability** means—

- (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
- (b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

**Utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

### **13 Total allowable catch [extract only]**

(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.

(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.

....

[(10) Subsection (1) does not require the Minister to set an initial total allowable catch for any quota management area and stock unless the Minister also proposes to set or vary a total allowable commercial catch for that area and stock under section 20.]

**21 Matters to be taken into account in setting or varying any total allowable commercial catch** [extract only]

- (1) In setting or varying any total allowable commercial catch for any quota management stock, the Minister shall have regard to the total allowable catch for that stock and shall allow for—
  - (a) The following non-commercial fishing interests in that stock, namely-
    - (i) Maori customary non-commercial fishing interests; and
    - (ii) Recreational interests; and
  - (b) All other mortality to that stock caused by fishing.
- (2) Before setting or varying a total allowable commercial catch for any quota management stock, the Minister shall consult such persons and organisations as the Minister considers are representative of those classes of persons having an interest in this section, including Maori, environmental, commercial, and recreational interests.
- (3) After setting or varying any total allowable commercial catch under section 20 of this Act, the Minister shall, as soon as practicable, give to the parties consulted under subsection (2) of this section reasons in writing for his or her decision

....