MEDIUM PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 18/12 C.A. 313/91

UNDER the Judicature Amendment Act 1972 Part I

IN THE MATTER of Section 281 of the Fisheries Act 1983

1778

BETWEEN JENS RYDER JENSSEN, of Napier, Commercial Fisherman

Appellant

A N D DIRECTOR-GENERAL OF AGRICULTURE AND FISHERIES

First Respondent

A N D THE QUOTA APPEAL AUTHORITY, a statutory body established by Section 28 of the Fisheries Act 1983

Second Respondent

Coram: Cooke P.
Richardson J.
Gault J.

Hearing: 13 and 14 April 1992

Counsel: J.V.B. McLinden for Appellant
C.B. Littlewood and G.V. Capes for Respondents
(Second Respondent abiding decision of the Court)

Judgment: 16 September 1992

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal from a judgment of McGechan J. delivered on 14 October 1991 dismissing an application by way of a judicial review proceeding

to set aside a decision given on 28 July 1989 by the Quota Appeal Authority constituted under the Fisheries Act 1983. The Authority had dismissed an appeal from a refusal by the Director-General of Agriculture and Fisheries to grant the plaintiff what the statute calls provisional maximum individual transferable quota (PMITQ) for orange roughy, and had allowed in part only an appeal against the quotas awarded for other species by the Director-General

The relevant legislation is Part IIA, inserted in the Act in 1986 and providing for commercial fishing on the quota management system. In summary it enacts as follows. After consultation with the Fishing Industry Board the Minister may declare that the taking of any species of fish in any specified quota management area shall be subject to the system (s.28B). Thereupon the Director-General shall allocate provisional quotas to holders of fishing permits. He is to use as a basis the proportion that the holder's commercial catch of the species, as shown in fishing returns, bears to the total commercial catch in the area in previous years. But this is subject to adjustment on the ground of unfairness, on which question the present case turns. The provisional quotas convert to guaranteed minimum individual transferable quotas - which are valuable assets. From the Director-General's decisions there are rights of appeal to the Quota Appeal Authority.

It is common ground that the Appeal Authority is to conduct a *de novo* hearing and that there may be an appeal against a nil allocation as well as against a positive allocation. By s.28I(3) the Act provides that decisions of the Appeal Authority shall be final unless challenged by an application for review under Part I of the Judicature Amendment Act 1972, and that the Authority is so to inform the parties when conveying its decision. Thus the legislature has stopped short of giving an appeal to the Courts, so ensuring a considerable measure of

conclusiveness to the Appeal Authority's decisions, but has expressly allowed for judicial review. As every lawyer knows but is not always understood by non-lawyers, this is narrower than appeal. Broadly it is review to ensure that the Authority acts in accordance with law and principle, in accordance with natural justice so far as procedure is concerned, and on an assessment of the facts that is open to a reasonable Authority. The Court cannot simply substitute its own view of the facts.

The first four subsections of s.28E should be set out, the remaining two not being relevant to this case:

> **28E. Criteria for granting provisional maximum individual transferable quotas** - (1) Where any declaration is made under section 28B of this Act, the Director-General shall make an allocation of provisional maximum individual transferable quotas in accordance with this section, using as a basis the proportion that the commercial catch of the person in that quota management area of that species or class of fish as shown in the fishing returns of that person bears to the total commercial catch in that quota management area of that species or class of fish in previous years.
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> (2) Allocations may be made under subsection (1) of this section only to -
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> (a) Persons who are holders of fishing permits issued under this Act at the date of the declaration under section 28B of this Act; and
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> (b) Persons who have held such permits within the previous 12 months or such longer period as the Director-General considers appropriate for special reasons relating to any particular case.
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> (3) In determining any provisional maximum individual transferable quota the Director-General may, where the Director-General is satisfied in a particular case that the provision maximum individual transferable quota determined under subsection (1) of this section would be unfair having regard to -
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> (a) The commitment to, and dependence on, the taking of fish of that species or class in that

quota management area by the person at that date of the declaration under section 28B of this Act; and

(b) The other provisional maximum individual transferable quota (if any) allocated to that person, -

allocate a different provisional maximum individual transferable quota to the person.

(4) In determining the commitment to, and dependence on, the taking of any fish by any person for the purposes of subsection (3) of this section, the Director-General may disregard any information relating to the taking of fish that is not supported by fishing returns made in accordance with the requirements of this Act or any regulations made under this Act.

In addition to Part IIA of the Fisheries Act there is a jungle of subordinate legislation said to have some bearing on the present case. We were supplied with a booklet reproducing 18 sets of statutory regulations and notices. The most important point appears to be that for the relevant species of fish the Minister's declaration took effect on 1 October 1986; that is to say, from the beginning of the 1987 fishing year in industry usage. The base years for calculations under s.28E(1) were specified so that the only relevant fishing years were 1982, 1983 and 1984. See the Fisheries (Quota Management Areas, Total Allowable Catches, and Catch Histories) Notice, S.R. 1986/267. For reasons to be explained shortly, the appellant had no qualifying commercial catch history in those years. Accordingly his ability to obtain any provisional quota depended on s.28E(3).

The appellant is an experienced and skilled commercial fisherman. There is evidence that his integrity is highly regarded by East Coast fisheries officers. From 1966 to 1981 he worked, mainly as a skipper, for the Jenssen group of family companies. They ceased operating, and for some three years he worked in the building industry, but in 1984 he began re-establishing himself in the fishing

industry. He soon arranged to buy for $250,000, a somewhat run-down trawler, *Sea Reaper*, owned by Southern Cross Fisheries. Until the purchase price was paid off the arrangement was that he would operate the vessel under the vendor company's permit but in all respects as if it were his own business. As well as paying off the vendor he needed money to re-equip the vessel; he claims to have spent more than $100,000 on this up to 31 March 1986, the main expenditure being something more than $50,477 for five hydraulic winches capable of fishing in deep water down to 1000 fathoms and holding up to 2000 fathoms of wire on the drums. He says that catches of up to 100 tonnes could be reeled in. Other items to which he deposes include an echo sounder, radar to pinpoint the orange roughy 'hills' under the water, deep water floats, orange roughy nets, and extra wire.

The appellant claims that the essential purpose of this planning and expenditure was to fish for orange roughy, although it would involve by-catches of other fish such as alfonsino and bluenose. He ordered the winches in July 1985 and received them in January 1986. Shortly after that he received a fishing permit in his own right, although the two events were apparently not connected. He had taken an active part in promoting and persuading the Ministry to arrange an orange roughy survey off Hawkes Bay in June and July 1985. He was not able to use *Sea Reaper* in that survey as the winches were not available but he did participate by using his boat to mark 'hills' for those trawling. In the fishing years 1985 and 1986 he had catches of quota species claimed by him to amount to 245 and 443 tonnes respectively; the Appeal Authority appears to have accepted these figures as sufficiently accurate.

He fished for only 108 days out of a desirable 180 in the latter year, losing fishing time, he says, because work on the vessel was continuing. Nevertheless his total catch improved dramatically, reflecting improved

performance of the vessel. The Appeal Authority considered that he was fishing in deep waters, but the appellant takes issue with that. What does seem clear is that he caught no orange roughy, not being permitted to do so. He also makes the point that his catch would have been recorded as significantly larger but for the fact that the Ministry required him to dump at sea, or confiscated, quantities of alfonsino and bluenose, for which he did not have quotas at the time.

Under the regulatory regime which applied until the end of September 1985, the appellant, if his vessel was ready, would have been able to compete for a quota of orange roughy available to 'others', and like it seems many commercial fishermen he had assumed on the basis of what he was told by fisheries officers that this opportunity would continue; but unexpectedly the 'others' category was abolished from the beginning of the 1986 fishing year. Dissatisfaction in the industry culminated in a system whereby orange roughy quotas were allocated to all who had fished for orange roughy in the 1985 fishing year or whose vessels were geared to fish for orange roughy by the end of that fishing year. That was a retrospective decision. The appellant did not meet the criteria. He claims that numbers of fishermen who did meet it had installed equipment which would not be, and proved not to be, suitable for orange roughy fishing in the long term; whereas his own planning was for the long term.

The Director-General allocated to the appellant provisional quotas totalling 218.8 tonnes, distributed among various species not including orange roughy. The Appeal Authority heard the appellant's appeal at Napier on 14 and 15 May 1987 and issued a written decision more than two years later, on 28 July 1989. The delay reflects a system of hearing all or a large number of appeals before deciding any. It was a system possibly better calculated to produce fairly uniform results than to do justice to the particular circumstances of individual cases.

The appeal failed totally as regards orange roughy. For the other species it succeeded in part. The Authority adopted a formula of 75 per cent of the appellant's catch for each species in the 1986 fishing year or the average of his catch for each species in the 1985 and 1986 fishing years, whichever was the greater. The result was a total allocation of 399.5 tonnes.

The appellant brought the judicial review proceeding. It was dismissed by McGechan J. in the judgment now under appeal, although in some respects the Judge was critical of the Authority's decision.

The High Court judgment is long and a mass of material was placed before this Court. Consideration of so much as appears to be relevant and the arguments of counsel, themselves elaborate, has led us to appreciate that as to the orange roughy the appeal turns on the reasoning in the following passages:

> Appeal Authority's decision, para. 7:
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> 7. The only step which the appellant took which, in our view, might be regarded as indicating a significant commitment to orange roughy was his ordering of deepsea hydraulic winches in July 1985. The evidence was that these winches were completed by January 1986 but have never been installed. Although their total value installed, together with required tanks and ancillary equipment, was estimated by the appellant at $100,000, we have no evidence as to what money they actually cost him, their present usefulness or value, or the appellant's intention for them. Nor are we convinced that the appellant ordered them with the sole intention of equipping his boat to fish for orange roughy. Again, we think it more likely that they were ordered with a view to improving the appellant's ability to gain access to a range of deep sea species. In any event, given the matters we have referred to above in considering this ground of appeal, we do not consider that the appellant's actions in ordering deepsea winches in July 1985 exhibit sufficient commitment to orange roughy to justify an allocation of provisional quota.

High Court judgment with reference to that passage:

> I must say I find the content of paragraph 7 just reviewed, apart from the final sentence, somewhat unconvincing, even on the evidence then before the QAA, and even making allowances for credibility advantages. These were large winches, appropriate to deep water fishing. Obviously, whatever the exact figures, they were expensive items. The fact - in evidence before the QAA at hearing in May 1987 - was that following delivery in February 1986 they were not fitted. If they were intended, or useful, for a range of deeper water species, why were they not fitted or used? The QAA notes itself elsewhere that the 1986 fishing year involved a considerable increase in the plaintiff's catch of gemfish and hoki, which it regarded as 'deeper' water species. One does not need to step into credible evidence now offered on review to the effect these were winches for orange roughy, and for nothing else, to draw the latter conclusion. If this were all, I might well incline to the view that on this aspect the QAA had gone over the limits of the acceptable, even in review proceedings. However, it is not all. I consider the final fallback conclusion, in the last sentence, was one which was open to the QAA. It is more a value judgment than a statement of fact. The QAA, 'in any event', given previous findings as to mixed intentions in relation to orange roughy and also other deeper water species, did not regard ordering the winches in 1985 as sufficient. I read that as a conclusion that even if the winches were ordered for orange roughy alone, given mixed intentions in other respects, and for other equipment, such was not enough. That is a conclusion on which views could differ, but it was a conclusion which was open to the QAA as part of an assessment of competing considerations.

We consider that the view to which the Judge might well have inclined but for the 'final fallback conclusion' is correct, and for the reasons summarised by him. As to the last sentence in the Authority's paragraph 7, which in the Judge's opinion saved that decision, we have considered all the matters referred to earlier in the decision, in passages too long for convenient quotation, but can find no indication that the Authority focussed adequately on what emerges as the essential question: namely, would expenditure of this order, including more than $50,000 for deep-water winches, have been incurred but for a firm intention to fish for

orange roughy? It is true that the Authority did express the opinion that the appellant's intention was no more than to leave open the possibility of future access to the fishery. But that appears to overlook the fact that, although he had been fishing for what the Authority regarded as deep-water species, the appellant had not fitted the winches.

We think that McGechan J. correctly identified the significance of that fact. We also note that earlier in its decision the Authority accepted that the appellant's balance sheet showed that he had spent approximately $55,000 on upgrading work and repairs (which would presumably include the winches) and approximately $27,000 on fishing gear. Evidently the Authority accepted the appellant's credibility, and while his evidence confirming the balance sheet was somewhat general the Authority's reference to lack of evidence of actual cost is incorrect. It is not merely a case of assessment of competing considerations. We are compelled to conclude that the Authority did not take into account the crucial consideration that on the evidence it was highly unlikely that the winches would have been ordered but for the prospect of orange roughy fishing. The theory that the appellant was doing no more than leave that prospect open appears, with respect, to be founded on surmise rather than on evidence and exploration at the hearing of the appeal.

The reason for that approach by the Authority is not clear. Possibly the Authority thought that it should distinguish between fishermen who had geared up for orange roughy in time for the 1986 season and those who had not, although a retrospective adoption of that criterion could not be fair. Another possibility is that, as Mr McLinden contended, the Authority misinterpreted the expression 'The commitment to, and dependence on, ...' in s.28E(3)(a) by limiting itself to actual catch record or financial contribution before 1 October 1985. In its decision on the

appellant's case the Authority did not state its interpretation of the words just quoted. Reading the decision as a whole, we are not satisfied that there was a misinterpretation, but we are left in doubt.

The words chosen by the legislature are obviously deliberately wide. We think that the true interpretation is that 'commitment' extends to a firm intention to fish for a species, evinced by the taking of significant practical steps to that end; and that 'dependence' refers to the economic significance of the species in the person's fishing history or plans. In the appellant's circumstances the ordering of winches and other equipment for the primary purpose of orange roughy fishing comes within these concepts. On the evidence that was before the Authority we consider that a reasonable Authority, correctly understanding the meaning of s.28E(3), could not have concluded otherwise than that as early as October 1986 the appellant was committed to the taking of orange roughy, being only prevented by the unavailability of quota. The same appears to apply to dependence, but what has already been said is enough to invalidate the decision so far as orange roughy is concerned. The grounds of failure to take into account an essential consideration and error of approach or unreasonableness overlap, as is often the case in administrative law.

As to the other species, for which the Authority granted the appellant quotas, there is force in the contention that the arithmetical approach related to his actual catches in the 1985 and 1986 fishing years, and ignoring dumped or confiscated fish, was too narrow under s.28E(3). Indeed it is not entirely clear that the Authority purported to be acting under that subsection, although the appellant was certainly entitled to have his case as regards these species considered thereunder. But since all the provisional quotas of the person should be considered together, as is underlined by paragraph (b), it is unnecessary to decide whether the

allocations for the other species could have been set aside even if the nil allocation for orange roughy had stood.

Counsel for the Director-General, while supporting the reasoning of McGechan J., did so in the alternative only. Mr Littlewood's first argument in this Court was that the appellant could not qualify for any allocation of quota for orange roughy, bluenose or alfonsino, because before October 1986 he had no legal rights to catch those species. The relevant date was said to be 18 September 1986, being the date of the making of the Minister's declaration which came into effect on 1 October. It was not an argument submitted to either the Appeal Authority or the High Court, and it is inconsistent with the Ministry's practice and the Appeal Authority's award of alfonsino and bluenose quotas to the appellant. On the interpretation that we have already placed on s.28E(3) the argument cannot succeed. A person could be committed to and dependent on a species at the material date if by then he had taken practical steps to enable fishing for that species in the event of his being granted quota.

This Court is not in a position to determine what the appellant's quotas should be. Contrast *McLean and Wiley* v. *Director-General of Agriculture and Fisheries* (C.P. 892/90, Wellington; judgment 18 March 1992) where on the particular facts Heron J. found himself able to declare a specific entitlement to orange roughy. While it would appear that, in common with others who qualified, the appellant should have received an orange roughy quota of not less than 100 tonnes, and that his quotas for other species may well merit some increase, the case can be most appropriately dealt with by allowing the present appeal, setting aside the Appeal Authority's decision, and pursuant to s.4(5) of the Judicature Amendment Act 1972 directing the Authority to reconsider the allocation to the appellant of provisional quotas for orange roughy and the other species, in the light

of what has been said in the present judgment. We understand that there have been changes in the personnel of the Quota Appeal Authority and we are confident that the case will effectively receive fresh consideration. Leave is reserved, however, both to the appellant and to the Director-General to apply to this Court should any further problem arise.

We add that affidavits filed in the High Court make a more detailed and stronger case for the appellant than did the evidence before the Appeal Authority. We have based our conclusion on the latter evidence and the Authority's reasoning thereon, but the new evidence will now be available to the Authority. It may also be as well to add that the Authority's reconsideration should be directed to the quotas that the appellant ought to have received at the time of its previous decision. Any subsequent changes in general quota levels will apply to the appellant as to other quota holders.

The appellant is entitled to costs against the first respondent in the sum of $12,500 to cover the proceedings for both Courts, together with disbursements including the reasonable cost of preparing the case on appeal, to be settled by the Registrar.

R Bowie P.

Solicitors:
Leo Lafferty, Napier, for Appellant
Crown Law Office, Wellington, for Respondents