

IN THE HIGH COURT OF NEW ZEALAND  
GISBORNE REGISTRY

M.41/83  
M.42/83

NZLR

639

(3)  
FST

BETWEEN STEPHEN JOHN ATWILL

Appellant

A N D MALCOLM CHARLES BLAKE

Respondent

Hearing: 17th May, 1984.

Counsel: T. G. Stapleton for Appellant.  
P. B. Prescott for Respondent.

Judgment: 6 June 1984

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JUDGMENT OF TOMPKINS, J.

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The Appellant (the informant in the court below) has appealed by way of Case Stated on a question of law only in respect of decisions delivered in the District Court at Wairoa on the 21st July, 1983, dismissing two informations laid by the Appellant against the Respondent.

The informations alleged that the Respondent in one case did take, and in the other case did have in his possession, spiny crayfish the tails of which were less than 152 mm. in length, contrary to RR.3(1)(a) and 5(a) of the Rock Lobster Regulations, 1969 ("the 1969 Regulations").

By the Controlled Fisheries (Gisborne Rock Lobster Fishery) Notice, 1980 (1980/23), the Gisborne rock lobster fishery was declared to be a controlled fishery for the purposes of Part III of the Fisheries Act, 1908 ("the Act"). The Respondent was the holder of a controlled fisheries fishing licence granted in respect of the Gisborne rock lobster fishery. It was common ground that if the Respondent had taken spiny crayfish they had

been taken from an area of water which lay within that fishery.

The Respondent pleaded not guilty. After hearing the evidence adduced on behalf of the Appellant, and submissions made by the parties, the learned District Court Judge reserved his decision. In his reserved decision he determined that:-

- (a) The rock lobsters described in the information had been taken from a controlled fishery;
- (b) The judgment of Jeffries, J. in Paton v. Attorney-General (A. No. 32/82, Napier Registry, 7th February, 1983) was authority for the proposition that:
  - (i) the Rock Lobster Regulations 1969 did not apply to controlled fisheries;
  - (ii) there were no regulations which applied to controlled fisheries;
- (c) I was bound to apply the judgment and thereby dismiss the information.

The Case Stated set out the following question:-

" The question for the opinion of the Court is whether my decision was erroneous in point of law and, in particular:

- (a) Do those regulations of the Rock Lobster Regulations 1969 (which are regulations made pursuant to either Part I or Part II of the Fisheries Act 1908) which are not inconsistent with any regulations made under Section 147 of the Fisheries Act 1908 apply to a rock lobster fishery which, pursuant to Section 118 of the Fisheries Act 1908, has been declared to be a controlled fishery?
- (b) As at 22nd January 1983, did Regulation 26(1) of the Rock Lobster Regulations 1969 apply to the Gisborne rock lobster fishery?
- (c) As at 22nd January 1983, did Regulation 3(1)(a) of the Rock Lobster Regulations 1969 apply to the Gisborne rock lobster fishery? "

Until 1977 the Act comprised two parts: Part I, which applied to sea fisheries, and Part II which applied to fresh water fisheries. The Fisheries Amendment Act, 1977 ("the Amendment Act") introduced to the Act Part III comprising ss.100 to

148. It introduced the concept of controlled fisheries. By s.118 the Minister was empowered, if he considered necessary or desirable for the conservation or management of the fishery, or economic stability of the fishing industry, and after consultation with the Fishing Industry Board, by notice in the Gazette to declare any fishery specified in the second schedule to the Act to be a controlled fishery. Then s.120 required fishing in a controlled fishery to be specially licensed. As it has assumed some importance in this and preceding cases, I set it out in full:-

- " 120. (1) Subject to this section, no person shall fish in a controlled fishery unless that person is the holder of a controlled fisheries fishing licence granted in respect of that controlled fishery.
- (2) Subsection (1) of this section shall not apply to the following persons:
- (a) Those taking controlled fish from a controlled fishery within prescribed limits for purposes other than for sale or as an incidental catch or by-catch:
  - (b) Those on innocent passage through the area of a controlled fishery:
  - (c) Those fishing in a controlled fishery for fish other than controlled fish.
- (3) Every person who fishes for, takes, has in his possession, has on board any boat, or, being a person engaged in the fishing industry, has control of, any controlled fish in a controlled fishery otherwise than under or pursuant to this Part of this Act or a licence commits an offence and shall be liable on summary conviction before a Magistrate to a fine not exceeding \$10,000.
- (4) Every person who fails to cease fishing in a controlled fishery forthwith upon being lawfully ordered by a fishery officer to do so commits an offence and is liable on summary conviction before a Magistrate to a fine not exceeding \$1,000. "

Following the introduction of Part III, commercial licensed fishermen who did not have a controlled fisheries fishing licence considered that they could nevertheless catch, land and

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sell rock lobsters as an incidental catch or by-catch because of the provisions of s.120(2)(a). In June, 1982, the Senior Fisheries Officer in Napier took a contrary view. He issued a directive prohibiting the practice. The result was that Mr. Paton took out an originating summons under the Declaratory Judgments Act, 1908, seeking a court ruling. Because of the view the learned District Court Judge took of the judgment that followed, I set out the questions that were submitted to the Court:-

" 1. WHETHER the words "within prescribed limits" used in Section 120(2)(a) of the Fisheries Act 1908 mean (in respect of rock lobsters) six in number or whether those words bear some other meaning and if so what is that other meaning.

2. WHETHER the words "within prescribed limits" used in Section 120(2)(a) of the Fisheries Act 1908 relate only to the words "for the purposes other than for sale" as used in that Section and whether those words "within prescribed limits" have any application to the words "or as in incidental catch or by-catch" used in that subsection.

3. DOES the Ministry of Agriculture and Fisheries have any jurisdiction or authority to issue the instruction to the Plaintiff dated the 28th June 1982 in the following terms:-

" Following the instruction received from the Regional Fisheries Officer, Hastings (Mr. W. Gillespie) it shall be an offence for any fisherman not holding a current Rock Lobster Controlled Fishery licence to offer for sale any rock lobster or to be in possession of more than his amateur quota of same. This instruction shall be strictly enforced as from the above date. "

The originating summons came before Jeffries, J. in the High Court at Napier on the 21st October, 1982. By his judgment issued on the 7th February, 1983, he answered question 1 "No" to the first part of the question and to the second part after the word "or" he referred to the answer to question 2. Question 2 he answered by stating that the words "within prescribed limits" referred to both exemption limbs of s.120(2)(a). Question 3 he answered "No".

His answer to question 1 was based upon a finding that the Regulation making powers under Part III are conferred upon the Governor-General by Order-in-Council pursuant to s.147 which came in with the amendment. No Regulations had been made pursuant to that power. The 1969 Regulations which, by R.19 prohibits a person from taking more than six rock lobsters on any one day unless the person holds a fishing permit for taking them or has a boat fishing permit, were made pursuant to s.5 of the Act before Part III was introduced into the Act. Therefore, he concluded that until the Governor-General makes regulations prescribing the limits, there are no prescribed limits within the meaning of s.120(2)(a). The 1977 Amendment did not adopt the 1969 Regulations and the declaration by the Minister (S.R. 1980/129) did not impose any limits.

From this decision the Attorney-General appealed. In the judgment of Richardson and McMullin, JJ. delivered by Richardson, J., there is a detailed analysis of the relevant statutory provisions. The judgment states the underlying issue concerned the effect of the words "within prescribed limits" on the operation of the exemption from subs.(1) provided for in subs.(2)(a). As the judgment states the statutory language is far from clear and it is difficult to arrive at any firm conclusions as to the intended scheme of the legislation.

That judgment and the judgment of Somers, J. concluded with a declaration that s.120(2)(a) of the Fisheries Act, 1908, does not provide exemption from the prohibition in s.120(1) save within the limits prescribed by regulations made under s.147.

The basic issue posed by the questions in these cases stated is whether some or all of the 1969 Regulations apply in a controlled rock lobster fishery.

The learned District Court Judge in his decision referred to that portion of Jeffries, J's decision to which I have already referred, holding that there were no numerical limits. The learned District Court Judge then goes on to refer to the answer to question 2 where Jeffries, J. said:-

" This question it seems is designed to obtain a ruling from the court in anticipation of regulations prescribing limits, assuming the 1969 regulations do not at present apply, which is the court's decision. "

Then again when commenting on question 3 Jeffries, J. said:-

" Because of the answer to question 1. Without regulations applying to controlled fisheries the Ministry has no jurisdiction to issue such a directive. "

It was in reliance on these passages that the learned District Court Judge held that the rock lobsters described in the two informations having been taken from a controlled fishery and there being no regulations applying to controlled fisheries, the two informations must be dismissed.

I do not consider that Jeffries, J's judgment was authority for the conclusion reached by the learned District Court Judge. Certainly Jeffries, J. stated, when answering question 1, that the short point was whether the 1969 Regulations which were passed before the 1977 amendment, apply after the amendment was enacted. But he said that, and the other statements referred to by the learned District Court Judge, in the context of the particular questions he was being asked to answer. They were directed not to whether the Regulations as a whole applied in a controlled fishery, but to the narrower issue of whether those Regulations prescribed limits for the purposes of s.120(2)(a). Jeffries, J. held that they did not because they were not regulations made under Part III. Thus when, in answering question 2, he said that the 1969 Regulations do not at present

apply, he was referring to their not applying for the purpose of prescribing such limits.

The learned District Court Judge's decision was issued before the judgments in the Court of Appeal. However, they do not deal with the issue in the present case. The Court of Appeal was not concerned with whether, quite apart from prescribing limits for the purposes of s.120(2)(a), the 1969 Regulations otherwise applied to a controlled rock lobster fishery.

Mr. Prescott, for the Respondent, in submitting that no part of the 1969 Regulations applied to a controlled rock lobster fishery, did not seek to rely on the judgments in Paton's case in this Court or in the Court of Appeal. He agreed that those judgments left open the issues now before this Court.

He contended that Part III initiated a new system of licensed fishing and that by implication (it did not do so expressly) it supplanted the 1969 Regulations. He advanced a number of reasons in support.

First, he submitted that s.120(1) imposed a blanket prohibition on fishing in a controlled fishery without a controlled fisheries fishing licence. This prohibition is alleviated by the other provisions in the section and in particular by subs.(2)(a), but in the absence of any prescribed limits then the alleviation did not apply.

Then he pointed to s.125 which enabled the Authority when granting a licence, to specify any of the matters listed in the section including the quantity, quality or size of controlled fish that may be taken from the controlled fishery. He pointed out that s.125(1) is expressed to be subject to such terms and

conditions as may be prescribed. That means, applying the definition of "prescribed" in s.100, prescribed by regulations made under Part III. So it seems that regulations can be prescribed setting out further terms and conditions that the Authority may specify when granting a licence.

The statutory intention, he submitted, was that all the matters relevant to the taking of, for example, rock lobsters from a controlled rock lobster fishery, were to be set out in the terms and conditions of the licence. Any regulations, and in particular the 1969 Regulations, therefore became unnecessary.

That the 1969 Regulations were intended no longer to apply to a controlled rock lobster fishery was apparent, he contended, by considering the effect of Part III on R.19. That regulation prohibits a person from taking more than six rock lobsters on any one day unless he holds a fishing permit for taking them or has a boat fishing permit. The regulation was therefore permissive but he submitted the regulation cannot stand in the face of s.120. No longer can a person take six rock lobsters in a controlled rock lobster fishery unless he is the holder of a controlled fisheries fishing licence granted under Part III, or unless the taking would be within the limits prescribed by regulations made under Part III.

I agree with his submissions on the effect that s.120 has on R.9. But I do not consider that it follows from that that the other regulations in the 1969 Regulations no longer can have any effect in a controlled fishery. Indeed Mr. Prescott in the course of his submissions was inclined to accept that some of the other regulations, such as R.21, requiring all rock lobsters to be alive when processed, could still apply in a controlled fishery. I find nothing inconsistent in regulations governing



all fishermen in matters such as the size or condition of fish taken with a power being given to the Authority to prescribe like matters in terms of a licence. In my view the matters to be dealt with as terms in a licence are intended to relate to that particular licence, the licensee, the area to which the licence relates, the type of fishing authorised, the period for which the licence is granted, the boats to which it applies, and the like. No doubt these terms could include more general matters, but it may well be preferable that those more general matters be dealt with in a regulation applicable to all rock lobster fishing rather than have to be repeated in every licence.

Mr. Stapleton, in support of his submission that the 1969 Regulations continued to apply in a controlled fishery, pointed to s.147. That is the section that authorises the Governor-General to make regulations for the purposes set out in subs.(1). Subs.(4) provides:-

" Any regulation made under this section shall, to the extent that any provision of Part I or Part II of this Act or any regulation made pursuant to either of those Parts is inconsistent with such regulation, have precedence, and the operation of any inconsistent provision or regulation shall be suspended accordingly . . . . . "

There are, as I have stated, no regulations made under s.147. But I consider there is some force in Mr. Stapleton's submission that subs.(4) makes it clear that the legislature had in mind regulations made under Part I or Part II applying to a controlled fishery under Part III. Otherwise subs.(4) would be entirely redundant.

I find nothing in the statutory scheme of Part III to justify a conclusion, in the absence of regulations made under that Part or terms specified in a licence, that the legislature intended that the taking of rock lobsters by the holders of controlled fisheries fishing licences should be uncontrolled.

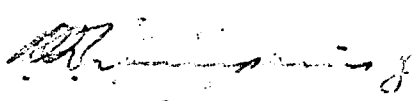
Such a result would be contrary to the reasons for the declaration of a controlled fishery spelt out in s.118 to which I have already referred. For these reasons I conclude that, except to the extent that any particular regulation in the 1969 Regulations is inconsistent with the statutory provisions in the Act, the 1969 Regulations continued to apply to a rock lobster fishery which, pursuant to s.118 of the Act, has been declared to be a controlled fishery.

The answer to question (a) is "Yes, except to the extent that they are inconsistent with the statutory provisions in the Act".

There is nothing in R.26(1) or R.3(1)(a) that is inconsistent with the statutory provisions in the Act. I therefore answer each of the questions (b) and (c) "Yes".

Since this is in the nature of a test case, the result of which will affect not only the present case but others that are pending, I make no order as to costs.

The Act has been repealed by the Fisheries Act, 1983, which came into force on the 1st October, 1983. This judgment relates only to the Act that has now been repealed. I do not intend to express any opinion on whether the views expressed in this judgment have any application to the 1983 Act.



Solicitors:

Crown Solicitor, Gisborne, for Appellant.

Dowling & Co., Napier, for Respondent.