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IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

22/6

No. AP135/89

BETWEEN FOWLER & RODERIQUE LIMITED

Appellant

AND THE ATTORNEY-GENERAL

Respondent

Hearing: 1 June 1990

Counsel: T.L. Savage for Appellant
D.G. Slater for Bluff Oyster Boat Owners Association
No appearance of Respondent

Judgment: 20 June 1990

JUDGMENT OF HOLLAND, J.

On 23 December 1987 the appellant applied to the Fisheries Authority created by s.13 of the Fisheries Act 1983 for a controlled fisheries fishing licence authorising it to recover oysters by means of the vessel "Lady Lou" in areas marked H, K and L on a map of the Ministry of Agriculture and Fisheries in the Fouveaux Strait Dredge Oyster Fishery.

The Fouveaux Strait Oyster Dredge Fishery is a controlled fishery under the Act. Section 31 of the Act prohibits commercial fishing in a controlled fishery by every person who is not a licence holder. The appellant's application was duly considered by the Authority and declined by it. On 1 June 1989 the Authority advised the appellant of its decision enclosing with the letter of

advice a statement of the Authority's reasons for declining the application of the appellant.

On 20 June 1989 the appellant filed notice of appeal in the Administrative Division of this Court in Wellington against the decision of the Authority declining its application. The original notice of appeal named no parties and was addressed to the Registrar of the Administrative Division of the High Court and to the Fisheries Authority. On 9 October 1989 the appellant filed an amended notice of appeal naming the Attorney-General on behalf of the Ministry of Agriculture and Fisheries as respondent. On 11 December 1989, on the application of the appellant, the following orders were made at a conference at which counsel for the appellant and counsel for the respondent attended:-

(a) That all documents filed or to be filed herein shall be served on the Bluff Oyster Boat Owners Association by leaving the same at the office of its Solicitors, Messrs Macalister Bros. N.Z.I. House, Kelvin Street, Invercargill.

(b) That service on the said Association in manner aforesaid shall be deemed to be valid service on the Association and on each of its members.

(c) That the documents contained in the Record of Proceedings (Volumes I and II) lodged with the Registrar by the Fisheries Authority pursuant to Rule 693 shall be material for consideration by the Court on the hearing of this appeal.

(d) That Rule 508 of the High Court Rules relating to cross-examination of deponents shall apply in respect of this appeal.

(e) That the appeal shall be heard at Invercargill on such date and at such time as the Court shall appoint.

(f) That the file be transferred to the High Court at Invercargill for hearing.

(g) That leave be reserved to any party to apply for further orders.

At the hearing before me in the Invercargill High Court I was advised that counsel for the Attorney-General on behalf of the Ministry of Agriculture and Fisheries did not regard itself as a party to the proceedings and did not wish to take part in the appeal on the basis that the Ministry, although supplying a report to the Authority, did not recommend the granting or the non granting of a licence. The argument in opposition to the appeal accordingly rested solely on the Bluff Oyster Boat Association which was said to represent 14 boat owners and 20 of the 23 boats licensed to dredge for oysters in the controlled area. Of the three other boats licensed to dredge, two were owned by the appellant and one was owned by Enterprise Fishing Company Limited which took no part in the proceedings.

Section 49 of the Fisheries Act 1983 gives a right of appeal to the High Court against the whole or any part of a decision of the Authority refusing to grant an application for a licence. Subsections (3) and (4) provide for the procedure on appeal as follows:-

"(3) Every appeal under this section shall be heard and determined by the Administrative Division of the High Court (hereinafter referred to as the Court).
(4) Subject to this Act, the procedure in respect of any appeal to the Court shall be in accordance with the rules of the Court."

Section 52 empowers the Court to receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it and then provides in subsection (4):-

"(4) In its determination of any appeal the Court may confirm, modify, or reverse the decision appealed against, or any part of that decision, and, subject to section 53 of this Act, the decision of the Court shall be final and conclusive."

Section 53 empowers the Court on an appeal to refer the matter back to the Authority instead of determining the appeal. Rules 690 to 700 of the High Court Rules apply to appeals to the Administrative Division of the Court. Rule 696 provides that the appeal, not being one by way of case stated on a question of law only, shall be by way of rehearing. The Rule further provides, however, that in the absence of any special order, questions of fact shall be brought before the High Court by the production of a record of the evidence taken before the Tribunal. The Court is, however, empowered to rehear the whole or any part of the evidence. No viva voce evidence was heard before the Court and the appeal was argued on two volumes of documents that had been presented before the Fisheries Authority.

supplemented to only a minor extent by the bringing up to date of some statistical data relating to the oyster bed.

The researches of counsel and the Court have not been able to discover any reported decision of an appeal under the Fisheries Act 1983. Although the Fisheries Authority in whom is vested the original power of deciding applications for licences is undoubtedly a specialist authority, albeit chaired by a person not financially interested in the fishing industry, there is no provision, as is the case in some appeals from specialist tribunals to the Administrative Division of the High Court, that the appeal shall be considered as if it were an appeal from the exercise of a discretion. It follows that the appeal must be heard by way of a rehearing as explained in Pratt v Wanganui Education Board (1977) 1 N.Z.L.R. 476 at p490. This Court is concerned to ensure that proper weight is given to the considered decision of the Fisheries Authority as a specialist tribunal, but in the light of the provisions in the Act simply describing the appeal as being by way of rehearing, it must apply the principles stated by Viscount Cave L.C. in Mersey Docks & Harbour Board v Procter (1923) A.C. 253 at p258:-

> "The procedure on an appeal from a Judge sitting without a jury is not governed by the Rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

In this case there is no real issue as to credibility of witnesses and I would add to the phrase:- "not disregarding the judgment appealed from" the words "and "the expertise of the tribunal appealed from in relation to the matter in question ".

With those principles in mind, I set out to consider the evidence and arguments for and against the case of the appellant.

It is impossible properly to consider the case of the appellant without having regard to the history of the matter which I must set out in some detail and which was set out in a 16 page letter written by the late Mr I.A. Arthur, then counsel for the appellant, to the Minister of Agriculture and Fisheries in support of the application to the Authority.

The attempts of the appellant to obtain a licence for the "Lady Lou" to fish for oysters in the area the subject of the application and appeal date back some 16 years to 1974.

By virtue of the Fisheries Amendment Act (No. 2) 1969, the Fisheries Amendment Act 1963 was amended to contain a provision set out in s.10A, defining as a special area part of Fouveaux Strait, and requiring that any owner of a registered fishing boat desiring to obtain a boat fishing permit in that special area enabling it to dredge for oysters should apply to the Director General of Fisheries. The section provided that no more than 23 boat fishing permits may be in force at any one time and that

preference was to be given to fishing boats used for oyster dredging prior to the introduction of the Act. There were in fact 23 boats dredging for oysters at the time the provision was introduced in 1969.

The appellant company made enquiry of the Director General of Fisheries in 1974 concerning an area outside the special area and in fact being the areas H, K and L on the map earlier referred to. On 10 March 1975 the appellant applied for a shell fishing permit to dredge for oysters with the "Lady Lou" outside the special area defined in s.10A of the Fisheries Amendment Act 1963. The application was not dealt with by the Ministry, and on 3 November 1978 the appellant made another application for a permit authorising the "Lady Lou" to dredge for oysters in areas H, K and L. In the meantime there had been a further amendment in 1977 to the Fisheries Act. It was apparently the belief of the Ministry that the effect of this amendment had been to include the areas H, K and L in the special area. On this ground the Ministry purported to refuse the application of the appellant in a letter dated November 1978.

The appellant pursued its application to the Ministry submitting that the application had been refused on a ground which could not possibly be sustained, and after further correspondence the appellant's solicitors again wrote to the Ministry on 1 March 1979 requesting in effect that it be issued with a general oyster dredging permit excluding the special area defined under s.10A. (Subsequent litigation established beyond doubt that at the time of its

applications the appellant was entitled as of right to an oyster fishing permit for the "Lady Lou" for an area outside of the special area defined in s.10A.) On 21 March 1979 a boat fishing permit was issued authorising the "Lady Lou" to dredge for oysters anywhere in New Zealand fisheries waters outside the special area. The rights of the appellant were, however, short lived. On the very next day, namely 22 March 1979, the Minister of Fisheries, in exercise of the powers conferred on him by s.119 of the Fisheries Act 1908 (as inserted by s.2 of the Fisheries Amendment Act 1977) declared that no further licences or permits would be granted for oyster dredging both in the special area but also in areas "H", "K", and "L" which had previously not been included in the special area and which was the specific area in respect of which the appellant wished to dredge for oysters. The Fishing Industry Board in April 1979 recommended to the Minister that no oyster dredging permit be issued to the "Lady Lou" in the current season and that only the 23 vessels currently permitted to dredge for oysters in the special area be permitted to dredge for oysters in H, K and L. There were of course 24 valid licences if the "Lady Lou" licence is included.

In October 1979 the Minister of Fisheries announced that the Fouveaux Strait Dredge Oyster Fishery would become a controlled fishery and that only 23 vessels would be licensed to harvest oysters in the controlled fishery. By s.21 of the Fisheries Amendment Act 1979, enacted on 2 November 1979, s.10A of the Fisheries Amendment

Act 1963 was repealed. On 22 November 1979 the special area with the addition of areas H, K and L was declared to be a controlled fishery for the purposes of Part II of the Fisheries Act 1908 and the maximum number of licences that might be granted by the Fisheries Licensing Authority in respect of the fishery was fixed at 23. The appellant then applied to the Fisheries Licensing Authority for a permit to dredge for oysters in part only of the controlled fishery, namely areas H, K and L. The chairman of the Licensing Authority indicated that it would grant licences only for the whole area and accordingly the appellant, in respect of the Lady Lou, amended its application for the whole area. There were in fact 26 applications for the 23 licences. On 25 January 1980 the Authority gave its decision granting the 23 licences to the boats previously authorised to fish the special area. The application of the appellant accordingly failed.

The appellant in 1980 applied to the Supreme Court by way of review of the decision of the Minister fixing the maximum number as 23. The case was heard in the Supreme Court at Invercargill on 21 May 1984 but in the meantime there had been yet further changes by way of legislation and the Fisheries Act 1983 came into force on 10 October 1983. The High Court dismissed the appellant's application for review. In the Court of Appeal there was quite stringent criticism by the appellate Judges of the actions of the Ministry and in particular of the failure to give the appellant the right to be heard before the number

of licences was restricted to 23 and issuing a Ministerial policy directive that licences should be granted in respect of the "23 boats currently authorised".

Casey J. in the Court of Appeal reported sub. nom. Fowler & Roderique Ltd v Attorney-General (1987) 2 N.Z.L.R. 56 said at p77:-

> "However, implicit in the decision to hold the number at 23 was the virtual certainty that neither the appellant nor the other vessel which had obtained a boat permit at the same time (the Apollo) would obtain a licence for the new and larger controlled fishery. This was a consequence that could flow naturally from any decision to maintain or reduce the existing numbers and by itself could not give cause for complaint by prospective oyster fisherman, so long as the Minister's decision was in conformity with the statute and its objects. Sections 121 to 123 laid down a procedure for the allocation of such licences by the Fisheries Licensing Authority and the ordinary expectation would have been that Fowler & Roderique Ltd's grievances could have been fully aired then, and such weight given to its situation as was consistent with the purposes of the Act. However, the Minister's directive effectively foreclosed any such consideration and made it inevitable that the existing 23 licensees would prevail. This confirms the view that once the earlier decision was made the die was cast and the appellant's Lady Lou was excluded from the new area. The subsequent hearing to allocate the licences can only be regarded as an empty formality.
>
> It is impossible to escape the conclusion that virtually every step taken (or not) by the Ministry, and every recommendation it made over the years since 1974 in connection with the fishery, was basically prompted by the appellant's special interest in areas H, K & L, and its shareholders' conviction that the beds would not be adversely affected by an additional boat, which could be economically operated. Against this background it seems to me that before making a decision to limit the licences (and which he must have known would have the additional consequence of excluding its boat), the Minister should have given the

> company a hearing. On any notion of fairness a member of the industry so genuinely concerned for so many years with this area, and having existing rights to dredge it, ought to have had the chance to put its case on the matters specified in s.118 directly to him before being excluded in this way."

The Court of Appeal dismissed the appeal because it was of the view that any order it made could be of no effect in the light of the new legislation contained in the Fisheries Act 1983. The Court nevertheless allowed the unsuccessful appellant costs of $4,000 and disbursements. Somers J., in his judgment at p75 said:-

> "In the result I am of opinion there is now no maximum number of licences and that it is open to Fowler & Roderique Ltd to apply for a licence under s.32 of the 1983 Act and, if such application is refused, to appeal to the High Court under s.49. No order of this Court now made can have any effect, nor could the Minister effectively be directed to reconsider the limitation on licences declared by him in 1979."

Not surprisingly the appellant then applied under the 1983 Act for a licence to dredge oysters in areas H, K and L within the controlled fishery and it is that unsuccessful application which is the subject of this appeal. Section 30 of the Fisheries Act 1983 empowers the Minister by notice in the Gazette, after having regard to the provisions of any plan in respect of a fishery and to the recommendations of the Fishing Industry Board, to fix the maximum number of licences and boat authorities that may be granted in respect of the controlled fishery. No such maximum number has been fixed.

Section 26(1) of the Fisheries Act provides as follows:-

> "(1) In the exercise of its functions and powers under this Act, the Authority shall give effect to the policy of the Government in relation to those functions and powers, as communicated to it from time to time in writing by the Minister."

The appellant, through its solicitor, was careful to cover this position prior to its application being considered before the Authority. In its solicitor's letter to the Minister of 16 February 1988 it concluded with the following passage:-

> "We note that in terms of s.26 of the Act the Fisheries Authority in the exercise of its functions and powers under this Act is required to give effect to the policy of the government as communicated to it from time to time by the Minister."
>
> It was pursuant to a similar section in the 1908 Act that the Minister issued the direction to the Licensing Authority which precluded it from issuing a licence for the "Lady Lou".
>
> We trust that having regard to the matters outlined in this letter you will consider it inappropriate to issue a similar directive to the Fisheries Authority in the matter of the application now pending.
>
> Accordingly, before we proceed with our client's application for a licence, we would be obliged if you would let us have an assurance that no such directive will be issued to the Fisheries Authority in this instance."

The Minister replied on 10 June 1988 saying that he would not be issuing any directive to the Authority

which would have the effect of restricting the number of licences in the fishery to 23 and advising that the 1979 directive issued by the then Minister had become of no effect and that he would advise the Authority accordingly.

Part III of the Fisheries Act 1983 creates provision relating to controlled fisheries. Section 32 entitles every commercial fisherman desiring to obtain a Controlled Fisheries Licence to make application to the Authority and contains particulars of what is to be stated in an application, and a provision that the Authority shall refer every application to the Director-General of Fisheries for a report.

Section 33 provides that the Authority, after receiving the application and the report, and considering them, shall grant the licence if it is fully satisfied that, having regard to the applicant's character, financial position and qualifications, and the matters specified in s.34 of the Act, the applicant is a fit and proper person to hold a licence. If the Authority is not so satisfied, it is required to state a time and place for the hearing of the application and notify the applicant and the Director-General who shall both be entitled to be present and to be heard. There is no provision in the Act requiring the Authority to hear any other person. Section 34 prescribes the matters to be considered in determining the application for a licence, and ss.35 and 36 provide for the classification, duration, terms and conditions of licences.

The Authority commenced the hearing of this application in Invercargill on 8 March 1989. At the commencement of the hearing the Authority indicated that it would first call a representative of the Ministry of Agriculture and Fisheries to update his report of 1 December 1988 and any other matter relating to the report, that it would then hear from the applicant in support of its application, and that after hearing the applicant the Authority would hear submissions from interested parties. In fact it received the report from the Ministry, heard submissions against the granting of a licence from a Mr M.E. Dormer representing three vessels operating in the area for dredging oysters, submissions on behalf of Bluff Fish and Oyster Company Limited, Fouveaux Strait Oyster Fish Supply Company Limited, Robert Russell Limited, Stewart Island Canneries Limited, and Irwin and Company Limited, submissions by the Bluff Oyster Boat Owners Association, and submissions from Fisheries South Island Limited, all in opposition. No objection was taken to the Authority at the hearing receiving submissions from all those persons concerned, and there would not appear to be any valid ground of so doing. In all cases the submissions were in writing and have been presented before me on appeal. I have considered them all.

For the purposes of the hearing of this appeal the Bluff Oyster Boat Owners Association has been appointed to represent all those making submissions in opposition.

In the light of the criticism of the Court of Appeal addressed to the Ministry, it may not be surprising that Crown counsel for the Ministry should have indicated that the Ministry did not wish to take part in this appeal. Nevertheless, I am not satisfied that it was totally accurate to state that the Ministry did not recommend the granting or non-granting of a licence. The report required to be provided by the Ministry under the Act and dated 30 November 1988 in paragraph 2 on the first page at the end of a paragraph headed "Summary and Conclusions", stated:- "For this reason, the application by Fowler and Roderique should be declined on economic grounds". At page 14 of the report, in considering particularly the provisions of s.34(1)(a), it said:-

> "In summary, the decision to allow 23 licences within the fishery has resulted in overcapitalisation, and inefficient use of vessels in the fishery. In addition super profits not being captured by increased resource rentals may be sustaining overcapitalisation and encouraging further applications to be a part of the fishery. The granting of an additional licence without a corresponding exit from the fishery would serve only to worsen the situation. For this reason the application by Fowler and Roderique should be declined on economic grounds."

Although the granting or refusal of a licence is a power vested in the Authority, the decision as to whether the area should be a controlled fishery, and the administration of that controlled fishery, very much rests on the Ministry. The attitude of the Ministry to an application for a licence to fish in a controlled fishery

must be an important factor to be considered by the Authority and this Court on appeal. It is clearly so recognised in the Act. I do not wish it to be thought that I am suggesting that the Authority or this Court is bound to apply the attitude of the Ministry, but it must be a material factor. If the only opposition to an application were from competing boat owners and did not include opposition from the Ministry, I could much more easily be persuaded to grant an application than where there is, in addition, a reasoned report from the Ministry opposing the granting of the application. Notwithstanding the reported attitude of Crown counsel, an examination of the papers compels me to reach the view that at all stages the appellant's application has been opposed by the Ministry and that on appeal there is no departure from that opposition but that the Ministry wishes to make no further submissions.

The area in question has been made a controlled fishery in accordance with provisions in the Act. There is no presumptive right to a licence to fish in the area. There is clearly an onus on an applicant to establish that, after considering the matters specified in s.34 of the Act, a licence should be granted. Section 34(1) provides as follows:-

> "(1) In considering any application for a licence, the Authority shall generally have regard to -
> (a) The extent to which the grant of a licence is necessary or desirable in the controlled fishery, and in the areas of that fishery in which it is proposed to operate the licence:

(b) Any policy approved by the Minister for conversation of any species of fish, aquatic life, or seaweed or controlled fish, aquatic life, or seaweed, the proper management of any controlled fishery, or for any other matter relevant to fishing or the fishing industry within the controlled fishery:

(c) The desirability of providing and maintaining a reasonable standard of living for commercial fishermen within the controlled fishery:

(d) The desirability of giving preference to commercial fishermen -

(i) Already engaged in the fishing industry

(ii) From a community within the area of the controlled fishery."

Section 34(2) relates to matters pertaining to the applicant by way of the nature of the vessel, financial ability, and other matters which are not really in dispute. They, however, only arise for consideration after the Authority has considered the matters in subs.(1).

The Authority in its brief statement of its reasons for decision dealt with s.34(1) under paragraph 4. It said as follows:-

> "Having had regard to all of those provisions as contained in the Fisheries Act 1983, the Authority found:
>
> 34(1)(a). The grant of an extra licence in the present fishery is neither necessary (the present 23 boats can easily catch the TAC each season at the 115,000 sack level and more so if the TAC is lowered as a result of further parasite infestation (or failure to recover adequately from the previous attack). There are already allegations of over-capitalization and certainly the present boats are old. Nor was it considered that an extra licence desirable given that the applicant company already has 2 boats in the fishery.

> The applicant company did apply for Areas H, K & L only - on the basis that this could be separated or considered separately from the 'special area'. The Ministry maintains that the fishery as a whole was considered in setting the TAC of 115,000 sacks and that Areas H, K & L were thus included in their estimate of the oysters available. Thus they argue that an extra licence - even for H, K & L alone must come from the TAC by a pro-rata reduction of the quotas of the other licences. This view is sustainable and is supported by the present licence holders who do not wish to have their quotas reduced. However, evidence was given that the stock surveys of H, K & L are about 25 years old, were based on a small sample and could not be said to represent the present stock.
>
> 34(1)(b). No policy directive from the Minister has been issued in respect of the matters of this Section.
>
> 34(1)(c). The granting of the application would have an adverse effect on the existing licence holders, if the MAF report is accepted, by up to $18,000 gross per season. While it may be considered that this is not a high percentage of gross returns, if the quota were reduced the effect would be greater.
>
> 34(1)(d). The applicant company is already the operator of two boats in the fishery."

The evidence is incontrovertible that the 23 boats presently licensed to dredge oysters in the fishery can easily catch in each season the total number of oysters authorised to be taken from the fishery. It is unnecessary fully to set out the history of the fishery area. The methods of control have varied from time to time. Until the repeal of the Regulations by the Fisheries Act 1983, the oyster bed was controlled by the Oyster Fishing Regulations 1946 which required returns to be made of catches and provided for a closed season in the summer and for

restricted hours of fishing and prescribed the minimum size of oysters which could be taken.

From 1963 onwards quotas for the fishery were written as restrictions in special conditions on the individual dredge permits required under the Fisheries Act 1908. From 1963 to 1968 an annual quota of 170,000 sacks was fixed, but this was reduced to 156,000 sacks in 1968, and to 121,500 sacks in 1969, and to 115,000 sacks in 1970. From 1971 to 1974 the catch rate declined, but the quota remained at 110,000 sacks a year. This quota was increased to 115,000 sacks from 1977 onwards.

In 1986 bonamia was diagnosed as the cause of very high mortalities of oysters in the bed. The season was closed at the end of July when only 77,800 sacks had been caught. The quota for 1987 was reduced to 64,000 sacks but increased again to 92,000 sacks for 1988. In 1990, because of bonamia, the quota has again been substantially reduced. The records produced indicate that in practically all years the authorised quota has been achieved, or very nearly. In some years the quota has been exceeded by taking oysters from beds outside the specified area and controlled by the quota but these are all prior to the provisions of the 1983 Act.

It is essentially the case of the appellant that it has for many years considered that there was a substantial quantity of oysters available in areas H, K and L originally outside the specified area which were not being adequately fished. The records of the oysters taken from

those areas, or part of those areas, while the "Lady Lou" had its short period of authorised dredging gives support to the appellant's submissions. It is also significant that in so far as the records of areas in the oyster bed from which licensed operators have obtained oysters can be relied upon, other oyster dredging vessels have not spent much time dredging in areas H, K and L. The appellant submits that it can successfully dredge for oysters in areas H, K and L with a total limit of catch of the same amount as applies to other licensed operators without affecting those other operators or the oyster bed, and that a licence could be granted to it without affecting the quota of other boats. In the alternative it says that an extra licence to it will not materially affect the standard of living of those employed in the industry.

It was a general principle of licensing law that where an industry was licensed and an applicant for a new licence established that it was creating new business it should receive a licence. I am not sure that that principle is of such general effect in relation to a controlled fishery, the principal reason for which is to control the fishery rather than to protect others involved in the industry or ensure an adequate service to the public. It must be emphasised that the title of the Fisheries Act is:- "An Act to consolidate and reform the law relating to the management and conservation of fisheries and fishery resources within New Zealand and New Zealand fishery waters".

A careful consideration of the evidence presented before the Authority and this Court on appeal does leave one with the impression that there is some considerable lack of certainty as to the availability of oysters in the fishery and the precise number that can be permitted to be taken from the bed each year without risking ultimate depletion of this unique resource. I do not wish this remark to be taken by way of criticism because it is apparent that more and more information is becoming available each year, but it is a fact as to the present position.

A consideration of the report of the Ministry, and of the submissions of the applicant and those in opposition, leads one inevitably to agree with the conclusion that historically too many boats might have been licensed to dredge in the area. The deregulation of New Zealand fisheries in 1962 opened up the oyster fishery to any fisherman who wanted to dredge for oysters. In 1969 the number of vessels licensed to fish in the specified area earlier referred to was restricted to 23, but that was a substantial increase from the 8 to 12 vessels which operated in the area up until 1962. No doubt the recognition of 23 vessels was an acceptance of the status quo, but the figures appear to indicate that there are more operators and vessels in the area than are economically required to ensure that the total catch authorised to be taken from the whole fishery over the period of the last ten years is economically obtained. It is likewise clear from the

failure of operators to produce financial accounts that it is not the licensed operators who are suffering from any inefficiencies that arise. In 1963 there was some form of strike action by the licensed oystermen resulting in a very low catch for that year, but otherwise there does not appear to be any evidence of difficulty in the existing fleet easily obtaining the prescribed quota.

The appellant counters this conclusion with the submission that there are oysters available in areas H, K and L which have not been dredged and which can be dredged without affecting the other oyster bed. In considering this submission the Authority was bound to have regard to the management plans for the fishery introduced by the Ministry. The management strategy of the Ministry is fully set out in its report and is described as being in four periods - (1) prior to 1960; (2) 1960-1967; (3) 1968-1974; and (4) 1975 to present.

Although in considering the provisions of s.34(1)(b) of the Act the Authority said "no policy directive from the Minister has been issued in respect of the matters in this section", I am of the view that the Authority did not properly interpret the subsection. Clearly no policy direction had been given pursuant to s.26 of the Fisheries Act which would have bound the Authority to give effect to such policy, but s.34(1)(b) requires the Authority to have regard to any policy approved by the Minister for the conservation of fish or the proper management of the controlled fishery. The report of the

Ministry makes it clear that its policy has been a considered one and it must be inferred that that policy has been approved by the Minister. It is not a policy which the Authority is bound to implement, but it is nevertheless a policy which it is bound to have regard to under s.34. Although the Authority indicates that it has not considered anything under s.34(1)(b), it is clear that by virtue of the reasons it gave in considering those provisions of s.34(1)(a) that it has in effect given weight to the management policy of the Ministry. In any event, on this rehearing I do give weight to the conservation and management policy of the Ministry in relation to the bed.

Although different policies have been adopted during different periods, it is apparent that the present management and policy is to control the total catch from the total bed without endeavouring to concentrate on specific areas. At least since 1975, and probably earlier, the policy has taken into account areas H, K and L when considering the conservation of oysters in the fishery. Research has indicated that oysters tend to be found in small areas within the fishery. Fishermen will tend to exploit those small areas where oysters are found in plenty. They will then, however, tend to move to another small area, leaving the original area to recover over a period of some years. Previous attempts to control the fishery by specifying particular areas within the fishery from which oysters may be taken have not been successful.

The evidence falls short of satisfying me that there is an accurate estimate available to the Ministry of the oysters within areas H, K and L. Nevertheless, the Ministry has, in accordance with the information available to it, done its best to assess the total number of oysters in the total fishery and the amount which can be permitted to be taken from that area without causing serious damage to the fishery.

There are insufficient records of dredging and survey of oysters in areas H, K and L to be accurate. Although those areas have been available to licensed fishermen, they are further from the home base of Bluff than other areas in the fishery. Obviously when there are sufficient oysters available close to the home base it is uneconomic for fishermen to travel further than is necessary.

No doubt at the instigation of the Ministry, the Authority, when considering the earlier application in 1979, considered that any licence that was to be granted would have to be for the whole area rather than being restricted to part. That has been echoed in the report of the Ministry on the present application and in the decision of the Authority. The reasons for this are said to be the difficulty in policing, but more importantly the necessity to enable fishermen to change their fishing spots within the fishery to give effect to the conservation plan of the Ministry.

The difficulty of policing does not appear to me to be a matter of substance. If a new licence were

granted to dredge in specified areas in the light of opposition from all other licensed operators, offences would be easily detected and quickly reported. I likewise am of the view that if the evidence established that there were sufficient oysters in areas H, K and L to enable a further boat to operate economically in that area, and still preserve the life of the oyster bed in that area, and that oysters were not otherwise being dredged in that area by licensed operators, or likely to be, it would be desirable to grant a new licence, if only on the grounds that it would make more oysters available to the public. However, I am satisfied that the evidence falls short of establishing that situation.

The records produced by the appellant show that during the years from 1975 to 1989 inclusive no oysters are recorded as having been taken from area K and only 19 sacks in 1982 from area L. In 1973 boats were permitted to fish in area H within the permitted season once the quota from the specified area had been reached. Records show that in about three weeks the fleet extracted 15361 sacks from area H. In 1974 some 7347 sacks were taken from area H, no doubt as a result of the knowledge of the industry of the availability of oysters in the area. However, no oysters were taken in area H from the years 1975 to 1978 inclusive. In 1979 the "Lady Lou" and another boat were licensed to dredge oysters outside the specified area. Those two boats took 3,314 sacks from area H or its vicinity. If those sacks are excluded the rest of the fleet is recorded as

having taken from area H for the years 1979 to 1989 inclusive only a total of 2,524 sacks.

It is quite apparent that in 1973, 1974 and 1979 there was a substantial quantity of oysters in area H. This, however, falls far short of establishing that area H, K and L is capable of sustaining the annual taking from it of the normal oyster fishing licence quota of 4,000 sacks per boat without seriously harming the fishery.

The Court cannot fail to have considerable sympathy for the appellant. It is obvious that the late Mr Fowler has had extensive experience in fishing the oyster bed over a very long period. It would also appear that he has constantly waged a campaign that the bed is not being effectively dredged and that there are substantial quantities of oysters available in the total area that have not been recognised by the industry or the Ministry. I have carefully considered the voluminous evidence presented on behalf of the appellant but it falls short of establishing that there are in area H K and L sufficient oysters to justify the granting a licence for that area without seriously endangering that part of the fishery for the future. This situation is made of even greater risk to the security of the fishery because there may already be too many licensed operators in the total area.

One could be tempted to consider granting the appellant a licence restricted to the area sought, notwithstanding the opposition of the Ministry, the Authority, and the industry, and leave it to the Ministry to

determine as best it can the availability of oysters in the area and the number of oysters which the licensed boat for that area would be permitted to take. I am satisfied that such a decision would be irresponsible. All 23 of the existing licensed boats are authorised to dredge in area H, K and L as well as the other areas of the fishery. Competition might be expected to be such that at least some of those operators would immediately direct their attentions to areas H, K and L, if only for the purpose of rendering the operation of the appellant's licence uneconomic. Such a decision would also be contrary to the Ministry's management plan, and would put part of the fishery at risk. Although no counsel made reference to it, consideration must also be given to the terms of s.36(3) of the Act which provides:-

> "The Authority shall attempt to ensure that, as far as practicable, all licences granted in respect of fishing units of similar size and capacity are granted subject to similar terms and conditions."

It follows from the foregoing that the appellant has not established that a grant of a licence is either necessary or desirable, either in respect of the fishery as a whole or part of the fishery as sought, and that the granting of a licence would prejudice the conservation or management plan approved by the Minister within the terms of s.34(1)(b). Although the Authority considered that the granting of the application would have an adverse effect on existing licence holders, I do not consider that that adverse effect would affect the

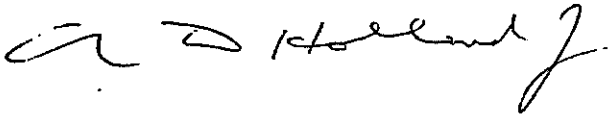
reasonable standard of living which is required to be maintained for commercial fishermen within the controlled fishery as required by s.34(1)(c). In that respect it is unnecessary for me to consider in detail the submission of counsel for the appellant that "commercial fisherman" is defined in the Act as:- "means any person who has a fishing permit issued under s.63 of this Act entitling the person to take any species or class of fish, aquatic life or seaweed". Practically all those "commercial fishermen" are limited liability companies and there may be some difficulty in determining what is "a reasonable standard of living" for a limited liability company. It may well be, however, that the context of s.34(1)(c) requires a different meaning to be applied to the term "commercial fisherman" other than that given in the definition section in s.2. In any event before holding this aspect as a factor against the granting of a licence to the appellant I should expect there to have been better, or even some, evidence of the financial position of the objectors.

I also agree with counsel for the appellant that the provisions of s.36(1)(d) are not relevant to this application and would normally only arise when there was a limit to the number of licences to be granted in respect of the fishery.

As I have already recorded, the decision which I have reached causes me some considerable sadness. One cannot help but admire the persistence of the appellant in its endeavours to obtain a licence. One cannot help but

consider that in some respects in the past the appellant has not been sympathetically or fairly treated by the Ministry. Those observations and conclusions, together with observations and conclusions of the Court of Appeal in the earlier case, cannot, however, be regarded as grounds for granting the appellant a licence when the Authority and this Court is bound to consider the matters specified in s.34 of the Act. The appellant fails because it is not established that the granting of a licence to it is either necessary or desirable. The decision of the Authority is confirmed.

The appeal has involved a great deal of reading, but the actual hearing in Court comprised only half a day. There was considerable preparation involved by counsel for the appellant who had to take over the matter at very short notice, but counsel for the only party represented at the hearing was able essentially to rely on the submissions that were presented to the Authority. It is appropriate that some award for costs should be made but I do not in the circumstances consider that a substantial sum of party and party costs is warranted. The appellant will pay to the respondent costs of $1,000 and disbursements relating to the appeal.



Solicitors:

Arthur Watson Savage, Invercargill, for Appellant
McAlister Bros., Invercargill, for Bluff Oyster Boat Owners Association