HIGH PRIORITY

NZLR

IN THE HIGH COURT OF NEW ZEALAND 4/3
WELLINGTON REGISTRY

A.P. 232/93

BETWEEN MINISTRY OF AGRICULTURE & FISHERIES

Appellant

AND EQUAL ENTERPRISE LIMITED

First Respondent

141

AND PETER ANDREW McLEAN

Second Respondent

AND ROBERT DAVID WILEY

Third Respondent

A.P. 266/93

BETWEEN JOHN RICHARD STEVENSON

Appellant

AND MINISTRY OF AGRICULTURE & FISHERIES

Respondent

A.P.267/93

BETWEEN REGINALD JAMES STEPHENS

Appellant

AND MINISTRY OF AGRICULTURE & FISHERIES

Respondent

Coram: Barker J (Presiding)
Heron J

Hearing: 24 November 1993 (for A.P.232/93)
8 December 1993 (for A.P.266/93 and A.P.267/93)

Counsel: G.A. Rea, G.J. Burston and M. Sullivan for Ministry of Agriculture & Fisheries
J.R. Billington for respondent in A.P.232/93
Ms H. Cull for appellants in A.P.266/93 and A.P.267/93

Judgment: 21 February 1994

JUDGMENT OF THE COURT

Introduction:

Between February 1990 and May 1991 the Ministry of Agriculture & Fisheries ('MAF') conducted a complex surveillance investigation known as "Operation Roundup". This exercise uncovered both a wholesale and systematic plundering of the nation's fishery resources and fraudulent dealings within the statutory scheme designed to preserve those resources.

The respondent Equal Enterprise Limited ('EEL'), was the owner of a large fishing vessel called the "Perserverence". Fully laiden, it can carry up to 90 tonnes of fish. EEL enjoyed individual fishing quotas which entitled it to fish for defined tonnages of the species "orange roughy". The respondents McLean and Wiley were the directors of EEL; they also owned quotas in their own right. The appellants Stevenson and Stephens were employed by EEL as 'turn about' skippers of the "Perserverence".

Over the period of surveillance, the "Perserverence" made 32 landings of orange roughy to licensed fish receivers; i.e. a Mr Muollo, trading as Cook Strait Seafoods and the Harbour Inn Group of companies. These landings of orange roughy involved serious and sustained offending by both the fishers and the licensed fish receivers' whose complicity was necessary to enable the respondent's wrongdoing to succeed. The fish receivers' liability and punishment are not in issue in these appeals, since they have been separately dealt with in District Court prosecutions.

The respondents pleaded guilty in the District Court at Wellington on 11 May 1993 to 23 charges of making false statements in the documents required by the Quota Management System established by the Fisheries Act 1983 ('the Act'). On some occasions, the respondents falsified records to show that they had caught cardinal fish when they had in fact caught orange roughy; on other occasions, they failed to declare their catches of orange roughy at all. On other occasions, they wrongly stated the area from which the fish had been caught. Available fisheries are divided into areas and individual quota entitlements are restricted to nominated areas.

The species "orange roughy" is a valuable national resource; it is the nation's second best fishery export earner. It commands a significantly higher market price than cardinal fish. When cardinal fish was wrongly

declared on the returns, cash payments from the licensed fish receivers were made to the respondents for the difference between the cheaper recorded price for cardinal fish and the price based on the value of the orange roughy actually caught; on the occasions when orange roughy was not declared at all, cash was paid to the respondents for a catch of orange roughy; appropriate sums were distributed amongst the skippers and crew.

MAF claimed that a total of 613 tonnes of landed orange roughy was either misdeclared as cardinal fish or not declared at all. The value of the orange roughy which entered the market in this illegal way is disputed. In the District Court, the respondents suggested the value at about 3/4 million and MAF at about $1 million. Another of MAF's estimates of the loss to the fishing industry is that some 2.8% of the total allowable catch for the two relevant quota areas for the year in question was illegally fished by the respondents. Whichever estimate is correct, there can be no doubt that the respondents' conduct severely depleted stocks of a valuable export fish species to the detriment of the resource itself, of the law-abiding persons in the industry and of the nation.

Since December 1986, the harvesting of significant fin fish species has been controlled by a Quota Management System. Permanent transferable allocations of fishing quotas are allotted to individuals or companies. The

total amount of the various species that may be taken in any year is restricted to sustainable yields. As noted earlier, the areas allowed to be fished are also regulated. The object of this system is to regulate the nation's fishing resources and to impose reasonable controls on what has now become a billion dollar per annum export business.

It is unnecessary to go into detail of how the Quota Management System operates. We think it significant to note that the success of the system depends on the honesty of all fishers and licensed fish receivers on whom falls the responsibility of honest and reliable record-keeping. Any falsification of the returns which have to be made to MAF has the dual effect of depleting a scarce resource and of being unfair to honest operators in the industry who become unable to utilise their quota as a result of the fraudulent conduct.

"Operation Roundup" was the name given by MAF to the operation which resulted in the detection and prosecution of the respondents and others. It was the biggest operation of its kind. The result of that operation was noted thus by the learned District Court Judge in his sentencing remarks -

> "This case is about organised theft on a major scale. The people involved deliberately decided to break the trust imposed in them by the system of quota management. They did so without regard for the need to harvest this resource in a sensible way.

They made a conscious choice to exploit the system and the resource."

History of Proceedings:

Some 2,000 informations were laid in three different District Courts against the respondents,(i.e. EEL, Wiley and McLean) and the appellants, Stephens and Stevenson. There was a defended hearing of some of the charges laid in the District Court a Napier in March 1993 which resulted in convictions and fines to which reference will later be made.

Another batch of charges was removed to Wellington and a defended hearing commenced before Judge Unwin in July 1993. The hearing had been set down to occupy 5 weeks of sitting time. Shortly after the hearing had begun, discussions amongst counsel resulted in EEL and Messrs Wiley and McLean each pleading guilty to 23 charges of making false statements in the Catch Effort and Landing Returns and to 7 charges of taking fish for sale otherwise than in accordance with the relevant quota.

For such offences committed before 1 April 1990, the maximum penalty was a fine of $10,000; for offences committed after that date, the maximum penalty was a fine of $250,000 per offence. The theoretical total maximum liability in fines for the 2,000 charges laid was therefore astronomical. During the course of the hearing in the District Court, the charges were restricted in number. This can only be described as a

sensible exercise. Nevertheless, even with the numbers of charges reduced to 23, EEL and the two directors still faced a theoretical maximum aggregate penalty of $5.82 million. The prosecutions were laid under the Act rather than under allied Regulations where the maximum fine would have been $10,000 per offence.

We find it difficult to accept that, even for a sustained and deliberate course of offending, it should have been necessary to have laid 2,000 charges spread against three defendants. Apart from the over-burdening of and confusion to the Court system, it seems hardly possible for a defendant adequately to prepare to defend and to defend such an overwhelming number of charges. Should an exercise such as "Operation Roundup" occur again, we hope that the sensible selectivity which eventually prevailed might be demonstrated right at the start of the Court process.

The appellant Stephens pleaded guilty to 17 charges of making false statements in Catch, Effort and Landing Returns and 7 charges of taking fish for sale otherwise than in accordance with the quota. He became liable to a maximum penalty of $4.32 million. The appellant Stevenson pleaded guilty to 5 charges of making false Catch Effort and Landing Returns and 2 charges of taking fish for sale otherwise than in accordance with the quota. His maximum liability for fines was $1.75 million.

Stevenson and Stephens had been convicted and fined in the found of hearings in the District Court at Napier in March 1993 for offences arising out of "Operation Roundup". The District Court Judge was therefore required to decide in the Wellington proceedings whether in terms of S.107D(2) of the Act they should be allowed to fish for the next 3 years because of the previous convictions.

The sentencing of the respondents and the appellant skippers was fixed to take place in the District Court at Wellington on 30 July 1993. In the event, only the sentencing of EEL, McLean and Wiley took place on that date. Counsel for Stevenson and Stephens was unavailable because she was then appearing in the Court of Appeal. The District Court Judge fined each of the present respondents a total (including Court costs and solicitors' fees) of $196,850. On 3 September 1993, he fined the appellant Stephens a total of $96,680 and the appellant Stevenson a total of $36,365. He also granted their application under S.107D(3). In his sentencing remarks of 30 July 1993, Judge Unwin purported to divide criminal responsibility between the respondents on the one hand and the skippers on the other, on the basis of two thirds/one third. At the second sentencing, after hearing counsel for the skippers, he reduced his assessment of their culpability to one-quarter.

Forfeiture:

In terms of S.107B of the Act, a defendant's fishing boat, other equipment and quotas are automatically forfeited to the Crown upon conviction. There is provision for a District Court to order that forfeiture not take place if circumstances "special to the offence" justify such a course. That situation could not possibly apply in the present case.

There is also provision in the legislation whereby the Minister of Fisheries may allow a fisher, who has had his or her boat and other equipment forfeited, to pay a redemption fee and thus have the property returned. This fee is set at such lesser amount than the total value of the property forfeited as the Minister may determine. We were informed by counsel that, in this case, the Minister has decided not to allow the respondents to redeem any part of the property seized. The consequence is that assets to a gross value of $5.75 million, including fishing boat, quotas, vehicles and equipment, have been forfeited to the Crown.

Some of these assets were encumbered. It may be that the encumbrancers will need to look to other assets of the respondents to satisfy their amounts advanced. The effect of the forfeiture on the sentencing process is a matter which we shall consider later.

Appeal by MAF against inadequacy of sentence:

With the consent of the Solicitor-General, MAF has appealed against the sentences imposed on EEL, McLean and Wiley alleging that they were manifestly inadequate. There was no appeal against the severity of sentence by those respondents. However, the skippers Stephens and Stevenson have appealed against the severity of the sentences passed on them. There is no informant's appeal against the inadequacy of those sentences.

Because of the need for sentencing guidelines for the assistance of District Court Judges in future prosecutions of this nature, a Full Court of two Judges was assembled for the hearing of these appeals. The major hearing, which occupied a day's sitting time, was MAF's appeal against the inadequacy of the fines imposed on EEL, Wiley and McLean. We are grateful to all counsel for their careful submissions in all the appeals. They provided us with an anthology of unreported decisions from both this Court and from various District Courts showing a range of penalties imposed for offences under the Act and Regulations.

We deal first with the appeal by MAF against the inadequacy of sentence against EEL and its two directors. In his sentencing remarks, the learned District Court Judge noted that there had been a sophisticated, ongoing conspiracy motivated by greed, without any concern

displayed by the respondents for conservation and management principles. In fixing the amount of the fine, Judge Unwin took into account the following broad submissions made by counsel for the respondents -

(a) EEL, Wiley and McLean had been prosecuted in Napier n April for offences arising out of the same or similar trips; if all charges had been heard together, then the probability was there would have been a lesser overall penalty.

(b) As a consequence of their convictions, the respondents lost their major assets including their boat and quotas. Their counsel submitted that, financially speaking, Wiley and McLean would have been better off serving a prison sentence for their dishonesty but retaining their boat and quotas with which to earn their livelihood on release.

(c) If all the charges had proceeded to a defended hearing, many months of Court time would have been expended; much expense to the State has been saved by the guilty pleas.

The Judge was not satisfied as to the adequacy and correctness of statements of the respondents' financial position with which he had been provided. He sentenced on the basis that he simply did not know the respondent's financial position. He seems, however, to have accepted

that the value of the property forfeited to the Crown was around $5 million. This estimate was not really challenged by the appellant Ministry.

The Judge did not determine the main area of conflict before him on sentencing; i.e. whether the value of the fish illegally caught was $750,000 or $1 million. He saw little point in spending "a week or two" resolving that matter even though MAF had been prepared to produce evidence in support of its contentions.

The Judge made it clear that deterrent penalties were necessary to draw attention to the need to conserve the nation's fishing resources and to warn potential offenders against trying to cheat the system.

Looking at the totality principle, the Judge considered that he was not entitled to take into account the consequential forfeiture of the boat, quotas and vehicles, unless that loss affected the means of the defendant to pay a fine. He considered the situation of the other players in the conspiracy, particularly the licensed fish receiver who was fined a total of over $300,000. He stated that the primary responsibility with the planning and execution belonged to the company and its directors and fixed their involvement at approximately two-thirds.

We have carefully considered all the decisions to which we were referred both of this Court on appeal and of District Court Judges at first instance. Most are unreported. All cases show that the legislation aims to preserve the national asset of fisheries. Parliament has considered it tolerable that individuals should be punished with great financial severity in enforcing that aim presumably because policing the regulatory scheme is so difficult and there is heavy reliance on the honesty of all participants in the industry. Any fine imposed must be seen by persons involved in commercial fishing as being more than a modest licence fee; along with automatic forfeiture of quota, boat and equipment, any fines imposed should act as a deterrent to those minded to buck the quota management system. However, with a maximum fine of $250,000 for each offence and the likelihood of there being many charges laid for any sophisticated operation, we wonder whether the astronomical maximum fine in almost all instances is really rather a blunt instrument. Particularly when, as here, the assets of the wrongdoers are forfeited with no hope of redemption. Indeed, we wonder whether fraudulent criminal behaviour in this area should not more appropriately be punishable by a specific criminal offence. Alternatively there are a range of offences involving falsification of documents and false pretences in the Crimes Act which might appropriately have been considered.

Few of the cases to which we were referred dealt with major commercial offenders; some small-time offenders have been subjected to relatively heavy fines where the maximum has been high; the requirement of S.27 of the Criminal Justice Act 1985 to take into account a defendant's means has been stressed by various Judges.

A helpful summary of considerations relevant when imposing penalties for this kind of offending is found in the unreported judgment of Fisher J in **Ministry of Agriculture & Fisheries v Lima** (A.P.146/93, Auckland, 26 August 1993). We have found His Honour's analysis of sentencing criteria most helpful.

That was an informant's appeal against the inadequacy of sentence imposed on a small-time operator dealing in black market fish; he had "by-passed" the Quota Management system entirely. He had been fined a total of $1,370 in the District Court; Fisher J increased the aggregate fines on appeal to $12,170.

Fisher J noted the Act's aim of management and conservation of the fisheries resources within New Zealand waters; the principal means for conservation of the resources was the Quota Management System, which was dependent on accurate recording and reporting of catch returns and purchases by both commercial fishermen and licensed fish receivers.

Fisher J first categorised the various levels of offending as suggested by the increasing levels of maximum fines. At one end of the scale are offences involving amateurs; the maximum fine is $5,000 and a small range of property is subject to potential forfeiture. At the next level where no offence relating to the quota management scheme records is involved, there is a maximum fine of $10,000; presumptive forfeiture applies with a discretionary power on the Court to dispense with forfeiture. On the most serious level, are the quota management and associated returns offences such as those under review in this case.

Secondly, the Judge considered the legislative messages conveyed by increases in maximum fines. He quoted with approval, as do we, the following statement of Hardie Boys J in Davis v Ministry of Atriculture & Fisheries (Invercargill, 9 December 1988, A.P.57/88) -

> "The doubling of the maximum penalty in 1986 was a plain demonstration of the Legislature's concern for conservation of the nation's fishery resource. The Courts appear to have been slow to respond to it. Bearing in mind that in this kind of case the level of penalties must be more than a modest licence fee for an illicit business activity, I question the adequacy of the penalties even before the 1986 increase."

Hardie Boys J was there speaking of the doubling of 1983 penalties by a 1986 amendment. His remarks apply with much greater force in the present legislative climate since the maximum penalty for just one offence has been further increased from $10,000 to $250,000.

Thirdly, deterrence had to be the dominant sentencing consideration; offending in the most serious category of offences will always be deliberate and premeditated and offenders will subconsciously weigh prospective gains against the risks of detection and probable penalty.

Fourthly, when dealing with commercial type offending that financial penalties must be set at a level which would render the offending patently uneconomic.

Fifthly, Fisher J considered, as do we, that past decisions highlighted the following aggravating features of offending; all were present in this case -

(a) a high degree of commercialism, as distinct from amateurish or part-time activity;
(b) the involvement of substantial quantities of fish;
(c) the making of substantial profits;
(d) a long-standing, settled pattern of conduct, as distinct from isolated incidents;
(e) knowledge by the offender that an offence was being committed, especially if accompanied by deliberate attempts at concealment.

It is against these criteria which we adopt with gratitude that we now consider this appeal.

The principal matter discussed in argument was the extent to which the Judge was entitled, when fixing the level of

fines, to consider the automatic forfeiture of the respondents' quotas, vessel and vehicles.

In **Fisheries Inspector v Turner** [1978] 2 NZLR 234, the Court of Appeal had held that it was possible for there to be a discharge without conviction under the predecessor of S.19 of the Criminal Justice Act 1985; if there were no conviction, then there could be no automatic forfeiture. In **Turner**, a Magistrate had considered that the respondent's infraction of the Regulations was minor and did not deserve the drastic penalty of forfeiture. The Magistrate was upheld by both this Court and the Court of Appeal.

No doubt it was **Turner's** case which prompted the Legislature to enact S.107B(5). A discharge without conviction is no longer an option available to the Court. The subsection reads -

> "For the purposes of section 19 of the Criminal Justice Act 1985, any forfeiture referred to in subsection (2) or subsection (3)(a) of this section shall be deemed to be a minimum penalty in respect of the commission of an offence referred to in those subsections, except to the extent that the Court for special reasons relating to the offence thinks fit to order that the property, fish, proceeds, or quota not be forfeit."

The main argument before us centred around the proper meaning of S.107C(4) which reads -

> "Any forfeiture directed or redemption payment imposed pursuant to this section shall be in addition to, and not in substitution for, any other penalty that may be imposed by the Court or by this Act."

This subsection was first enacted as S.107B(3) in 1986. It was unaltered when it became S.107C(4) in 1990.

Tipping J in **Ministry of Agriculture and Fisheries v Sutherland** (Invercargill, A.P.36/88, 2 August 1988) said-

> "Section 107B(3) is not particularly happily worded in this context but I think, as Mr Eagles was constrained to accept, its purpose is to make it clear that when the Court is imposing a penalty for a breach of the Act or Regulations the fact that forfeiture may follow as a matter of statutory consequence is to be regarded as in addition to and not in substitution for the penalty that the Court might otherwise impose. It is hard to see what other purpose the rather unhappily worded provisions of subsection (3) could be thought to have. So therefore I think that I am bound to take the view for present purposes, as was the learned judge, that I should not take into account the question of the forfeiture of the vessel. No doubt the Minister or whoever makes the decision in relation to relief against forfeiture or whatever the appropriate terminology is, will be looking at the overall effect."

Fraser J in **MacDuff v Ministry of Agriculture and Fisheries** (Invercargill Registry, A.P.52/90, 10 December 1990) said -

> "The direction that forfeiture and redemption payments are to be in addition to and not in substitution for any other penalty imposed was considered by Tipping J in **Ministry of Agriculture & Fisheries v Sutherland** (Invercargill, AP.36/88, 2 August 1988). He took the view that this provision must have been intended to negate the decision in **Fisheries Inspector v Turner** [1978] 2 NZLR 233 that forfeiture following conviction was a matter to be taken into account in sentencing. Without differing from that view in principle it is difficult at least in this particular case adequately to consider the means and responsibilities of the offender and take them into account in fixing a fine without having regard to the fact that the undersized crayfish tails seized by the Ministry had been paid for by the factory and the appellant has a liability of $1,300 in respect thereof, and the vessel and equipment from which he makes his living are forfeit

> to the Crown. He will be left with a liability equivalent to the whole of the purchase price. He will either have no vessel with which he can carry on his former business and be unemployed or he will have to raise whatever money is required by the Minister by way of redemption fee to enable him to get it back and resume his fishing operation. What the amount of that redemption fee will be is unknown."

We agree with Fraser J's approach. It is impossible to consider the means of the offender in a vacuum. Clearly the forfeiture of assets to a value of $5 million is likely to affect detrimentally all but the super-rich. There was no suggestion that the respondents were in that category, despite the uncertainty about the value of their assets.

Counsel for the appellant submitted that a sentencing Judge is not permitted to take into account the question of forfeiture; when settling the level of the fine the Judge may consider the fact of forfeiture and have regard to its effect on the means of the defendant to pay any fine.

A similar question has been considered in Australia in the case found after perusal of an article presented by counsel for the respondents in the course of argument. This case was R v Hoar (1981), 34 ALR 357, a judgment of the Full Court of the Federal Court of Australia on appeal from a decision of the Chief Justice of the Northern Territory.

In that case, the appellants were convicted of conspiracy to commit an offence against the law of the Northern Territory. Certain plant, equipment and vehicles were ordered by the trial Judge to be forfeited by the Crown. The Crown appealed against the sentence. Hoar appealed against the order of forfeiture. Muirhead J was the Judge on appeal who dealt most fully with the forfeiture provision. The other two Judges did not disagree with him on this point. Muirhead J said at 366-7 -

> "Section 48(2) of the Fisheries Act provides that 'forfeiture shall be in addition to and not part of the penalty imposed under this Ordinance'. It was suggested that this had the effect of excluding from the consideration of a court passing sentence the losses flowing to the convicted person from seizure and consequential forfeiture. I agree that it has no such effect.
>
> Section 48(2) was inserted to declare that an order of forfeiture was to be regarded as an exercise of power distinct from the imposition of penalty in the case of a substantive offence, not as a direction that the loss caused by forfeiture can not be taken into account by a court imposing penalty when the defendant is also the person suffering deprivation or loss by seizure or forfeiture. The sentencing discretion is a wide one in which the situation of the accused himself must always be relevant. It would be wrong, in my view, for a judge deciding an appropriate sentence to put out of his mind that the prisoner had by seizure or a concurrent forfeiture order been deprived of substantial equipment and plant. The evidence before the trial judge as to the plant and equipment forfeited was not satisfactory, either as to value or ownership. It appeared that a company or business in which Hoar had a substantial interest (Buffalo International) might in fact have been the true owner of all or some of the forfeited items, but Hoar's interest therein was not, as I read the transcript, in issue.
>
> I do not agree with the Crown's submissions that the learned Chief Justice was in error in taking into account possible losses to the appellant Hoar, consequent upon seizure. We were told that we do not know what the future holds concerning forfeiture, and my judgment as to the appropriate

> penalties in the Crown appeals has in no way been influenced by reason of the fact that this court has set aside the order concerning forfeiture." (Emphasis added)

The Crown appealed to the High Court of Australia against the Federal Court's decision that there was no basis for seizure and therefore no power to make the order for forfeiture (See R v Hoar (1981), 148 CLR 32). The only reference in the majority judgment of the High Court to the relevant subsection is at p.39 in a brief passage which seems to have approved Muirhead J's approach -

> "Had forfeiture been authorised by the Act the Chief Justice would have been entitled to take its impact on Hoar into account in assessing the penalty to be imposed on him, despite the provision in S.48(2) that 'forfeiture shall be in addition to and not part of a penalty'."

We consider that the approach of Muirhead J in the **Hoar** case is appropriate. It appears to have been given the imprimatur of the High Court of Australia. It was based on a statute worded similarly to S.107B(3). **Hoar's** case does not appear to have been referred to in a decision of the Full Court of the Supreme Court of South Australia **R v Weller** (1988), 37 Crim.R. 349. That decision is rather to contrary effect when interpreting a statute which provided that "all penalties shall be in addition to any forfeiture".

This Court cannot blind itself to the facts that, whatever the exact value of the quota and assets of these respondents, they have lost their livelihood, as well as very substantial assets which they will never retrieve.

Accordingly, we find that the District Court Judge was entitled to take the effect of forfeiture into account when settling the appropriate penalty.

With regard to the penalties imposed on the respondents in the Napier case; the charges there related to false statements concerning the quota management areas from which the Orange Roughy was taken, offences known in fisheries circles as "area misreporting" .

The District Court Judge in Napier imposed fines of $20,000 on each of the respondents in respect of each of 6 charges for EEL, six for McLean and four for Wiley. This was a total of $320,000 plus costs. We agree with the submission of counsel for the appellant that the offences were of a different nature but all are part of the same pattern of dishonest disregard of obligation. Some but not much account should be taken of the fines imposed in the Napier case when considering the sentencing in this case because of the totality principle.

The appellant then criticised the District Court Judge for not receiving evidence from the Ministry about an aggravating feature of the offending for which guilty pleas had been entered; i.e. evidence to show the value of the fish involved at about $1 million, instead of $750,000 as the respondents claimed.

Counsel referred to the principles relating to factual disputes on a plea of guilty as discussed by the Court of Appeal in R v Bryant [1981] NZLR 264, 270. If we felt that an appropriate way in which to fix the fines would have been to assess the value of the fish illegally taken and then to multiply that figure by some arbitrary number, then the dispute might become necessary to determine. However, we think that the District Court Judge was entitled to take a broad view of the matter. It probably mattered relatively little in the ultimate sentencing outcome whether the value of the illegally obtained fish was $750,000 or $1 million. Many other aggravating circumstances were present. The exact value of the fish was but one of the circumstances. The value was large, even if the lower figure were accepted.

Counsel for the appellant submitted that we should follow the course taken by District Court Judge Ongley in Ministry of Agriculture & Fisheries v Aston (judgment 20 October 1993). That learned District Court Judge considered the aggravating factors mentioned by Fisher J in the Lima case. He considered that the starting point for the overall fine in that case was about three times the landed value of the fish.

We are unable to accept any suggestion either that the value of the fish taken provides some kind of upper limit for the fine or that the fine should be fixed by applying a multiple to the value of the fish, as was suggested by

Judge Ongley. Sentencing should never be mechanical. The individual circumstances of defendants are infinite and there should be no straitjacket self-fitted on the Courts' discretion.

We bear in mind the aggravating features of this case, which were largely those isolated by Fisher J in the **Lima** case, as well as the mitigating factors; i.e. first offenders of previous good character who pleaded guilty. We are not satisfied looking at that offending overall that the penalty could be said to be manifestly inadequate. We do not under-estimate the saving to the State implicit in the guilty plea. The saving can be measured in hearing weeks not hearing days. Significant savings of time accomplished by guilty pleas in complex cases do merit a reduction in sentence. See **R v Caulderwell** (Court of Appeal, 31 May 1990, unreported). The savings benefit the Court, the prosecution and witnesses.

We take into account specifically the effect on the respondents of the forfeiture of assets worth $5 million. We now know, (but the District Court Judge did not know), that the Minister of Fisheries has refused to allow any redemption of these assets. We think that this forfeiture, plus the total fines, heavy by any standards, were, in total, sufficient punishment for this fraudulent scheme to plunder natural resources. Even the fines imposed by the District Court Judge - taken alone - will

give a clear message to the fishing community that serious breaches of the trust imposed in them by the quota system will not pay.

Accordingly we consider that the appeal by MAF must be dismissed. We make no order as to costs of the prosecutor's appeal.

Appeal by Skippers against Severity of Sentence:

In sentencing the skippers, the Judge in the Court below said -

> "However for the sake of completion I record that the offences relate to a fishing boat known as the "Perserverence", that it could carry up to 90 tonnes of fish. Mr Stephens and Mr Stevenson at all material times were employed by the company and its directors to skipper the "Perserverence" on a trip. (?) With the active participation of all the defendants, including these two, Orange Roughy was landed to two licensed fish receivers in Wellington during a time span of a little over a year. This Orange Roughy was regularly misreported. In the view of the Ministry it was either declared as a different and cheaper non-quota species known as Cardinal, or not declared at all. A series of cash payments was made to make up the difference between the fish which was landed and the fish which was misreported or not reported.
>
> It is alleged that 613 tonnes of Orange Roughy with a landed value of over 1 million dollars was brought into the country illegally or deceptively. The retail value was said to be approximately 1.8 million dollars. It was stressed to me that this valuable national resource was second only to Hoki as an export earning species. Equal Enterprises Limited and these defendants say that the amount of misreported fish is closer to 433 tonnes valued at $750,000. Although the Ministry are prepared to stand by their figures, it has never seriously been suggested to me that I delay sentencing so that the factual basis can be established.

> Whatever the figure, it represents the largest quantity of fish detected and prosecuted by fishery officers to date. In their affidavits as to means both defendants allege that they were operating under instructions from their employers. They do not go so far as to say that they had no choice nor do they disavow the inference that they would have profited from the enterprise. I take the general view that no scheme to defeat the Quota Management System would be possible without the active support and assistance of the skippers and the boat owners and the licensed fish receivers. It seems to me that this was the only way to avoid the checks and balances in the system."

The Judge went on to consider that the two appellants were a necessary part in what could properly be described as a conspiracy. He also thought that there were differences between them individually, perhaps the most significant being that Stevenson came into the conspiracy when it was already in place and joined it; he had played no part in its initial conception. The Judge thought that the skippers' involvement overall was approximately one-third, as he put it, and that the two of them could share that one-third in the proportion in accordance with the number of informations to which they had pleaded guilty. Their counsel criticised the use of the actual formula; which meant that whatever the level of fines was in respect of the major conspirators, one-third would then fall on the skippers.

A Judge has to look at the overall part played by offenders in cases where there are more than one party. In our view, an arithmetical apportionment may create a rigidity which is undesirable when further factors such

as the means of the offender have to be taken into account as well.

We have no difficulty in accepting that the skippers are to be seen as lesser players in the overall offending when compared to the company and its directors. The latter obviously have it within their power to make the decision to breach the law. Whilst the skippers were foolish enough to go along with the arrangements, the initiative must have come from the company. The skippers are experienced fishermen, and have a degree of autonomy which captains of all vessels are expected to exercise; however, sight should not be lost of the fact they are essentially employees and act at the direction of their employers in matters of this particular kind. That they gave away the sturdy independence which generally is an attribute of sea captains is a matter of considerable regret.

The important considerations in the present case are (1) the relationship between the captains and the principal offenders; (2) their willing participation in the conspiracy overall, tempered by their position in the working arrangements and the acknowledged pressures that would be placed on any captain who attempted to stand outside the arrangements; (3) the essential part played in the conspiracy by the skippers which would not have worked but for such participation; (4) the lesser role played by the skippers; (5) their personal circumstances;

(6) the plea of guilty, resulting in substantial savings to the country of time and expense.

The fines in this matter totalled for Stephens $96,680 and $36,365 for Stevenson. The Judge had fined the other three defendants $196,850 each; at the first sentencing, he had thought the skippers' share of blame should be one-third. That observation rather suggested that before receiving submissions on the appropriate penalty, penalty had been predetermined in some arithmetical sense. After hearing submissions at the second sentencing, the Judge came to the view that the sentence should be the lesser proportion of one-quarter.

The earlier fines were imposed in Napier for discrete offending arising out of the particular trip. Other discrete offending, involving the same documents but separate offending nonetheless, was dealt with in the Wellington proceedings. Having been dealt with separately, the level of fines imposed in Napier is a relevant consideration to take into account in applying the totality principle when sentencing the skippers for the remaining offences (as it was for the others). We agree there is an element of duplication about this, but they remain separate offences. There is no question of any breach of S.10(4) of the Crimes Act 1961, nor of S.26 of the New Zealand Bill of Rights Act 1990.

Miss Cull says the Judge failed to give proper account to a submission which she described as "double jeopardy". Because the skippers were prosecuted in respect of making a false statement arising out of the same documentation that gave rise to charges they faced in the Napier District Court they were in some way in double jeopardy.

The offence is one of making a false statement in a document and separate charges were appropriately laid in respect of each false statement. As the skippers had already been fined for falsities arising out of the same set of events, these had to be considered as part of the total offending. So that the offending overall could be the subject of an appropriate fine, the Napier proceedings had to be taken into account as well. The Judge noted that as the defendants were fined in Napier $3,000 between them, plus costs, it played but a small part in the total picture. He did acknowledge that he would discount the total fine minimally to recognise that fact, and he was required to do no more.

Counsel submitted that the Judge erred in failing to take into account the value of the forfeiture imposed on the others. She says that when one adds in the forfeiture, together with the fines imposed in Wellington and Napier on the other three and then add in the fines imposed here, the subject of the present appeal, the overall financial penalty is excessive. We have already dealt with the question of forfeiture and have held that it is

a relevant factor to be taken into account. There was no appeal by the company or Messrs McLean and Wiley. The effect of our decision there is merely to hold the penalty at the level already imposed.

What weighs more with us in the present case is not so much the overall financial penalties but the impact of the penalties actually imposed on the two skippers. The skippers are protected from the impact of forfeiture. We think we should consider their position against the overall background, but the extent of forfeiture, as against other persons, seems to us not to assist a great deal in fixing the appropriate level of fine.

Miss Cull attempted to demonstrate that the financial benefits received by the skippers ranged from $35,000 to $16,000 for Stephens and $8,000 to $3,000 for Stevenson, minimal in comparison to the gain by the principal offenders. Whilst the actual gain has been calculated by netting off what might otherwise have been received for legitimate fishing, some regard must be paid to the value of the fish illegally caught. That is the value of the property which is the subject of the crime. But we think Miss Cull is right that the very nature of their position made the financial returns to them less, and their offending overall significantly less than the principal participants.

In general terms, for the reasons we give, we think this is one area where the Judge did not give appropriate weight to the lesser nature and role of the skippers in the overall transaction. In the process of apportionment which we have already discussed, the lesser part they played and their relative means of meeting substantial fines has not been given sufficient emphasis.

When one looks at numerous cases for multiple offending the standard penalty of $1,000 for a false statement in a CELR charge is confirmed. In respect of taking fish other than under quota relevant penalties range from $500 to $1,500. In Napier, the sentencing Judge in respect of the same offending accepted that the appropriate fine was in that range.

The appellants were both married men with families. They each had a half-share in a home but very little else in the way of assets. Stephens has now separated from his wife and his assets have been reduced through the operation of the Matrimonial Property legislation. Their ability to earn a livelihood as fishermen remains.

We think a fine of $96,680 for Stephens is excessive. His fines should be calculated at $500 per offence prior to 1990 and $2,500 thereafter which totals $50,670, a little over half that imposed in the Court below. The costs and Court fees must remain unchanged.

Stevenson's participation should be measured on a similar basis. His total fines are $18,865. The appeals by Stephens and Stevenson are accordingly allowed. We make no order as to costs.

R.D. Barker J.

Solicitors: Crown Solicitor, Napier, for MAF
Bell Gully Buddle Weir, Wellington, for other parties