IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP No. 14/93

94/181

UNDER The Declaratory Judgments Act 1908

BETWEEN THE DIRECTOR-GENERAL OF AGRICULTURE AND FISHERIES at Wellington

Plaintiff

AND WILLIAM ROSE TRAWLING LIMITED a duly incorporated company having its registered office at Wellington and carrying on business as a Commercial Fisher

Defendant

Date of Hearing: 29 and 30 April 1993

Date of Judgment: 21 FEBRUARY 1994

Counsel:
G.A. Rea for Plaintiff
M.E.J. Macfarlane as Amicus Curiae

JUDGMENT OF NEAZOR J

In this proceeding the plaintiff has sought a declaration that a fishing vessel is forfeit to the Crown following conviction of the defendant of two offences under the Fisheries Act 1953. There has been proof of service on the defendant company both of the original proceedings and of the amended statement of claim, but the defendant has taken no step.

At the instigation of the plaintiff Mr Macfarlane was invited to agree to act as amicus curiae on the basis that his reasonable fees would be paid by the plaintiff. I invited Mr Macfarlane to accept that appointment and he did so. It was clearly understood when that appointment was made that Mr Macfarlane would present argument which could reasonably be advanced on the part of the defendant, were it represented by solicitors and counsel of its own choice.

The situation is unusual and the procedure has drawbacks in that there might be difficulty in taking the case further if there is disagreement with the decision, but I do not think the question can properly be described as hypothetical because the plaintiff has raised it as relating to the Crown's right in respect of a particular vessel.

The defendant was the owner of the fishing vessel "Garraway" and was the holder of a fishing permit issued in respect of that vessel pursuant to s 63 of the Fisheries Act 1983. Informations were laid charging the defendant with two offences against s 96(b) of the Act. Both offences were charged as having occurred at Napier.

The first offence was of making, together with the directors of the company and Mr A.M. Muollo, a false statement in a Catch Effort and Landing Return, being a return supplied by the defendant for the purposes of s 66(1) of the Act and regulation 4 of the Fisheries (Reporting) Regulations 1990, by falsely stating the greenweight of fish taken and landed from the vessel "Garraway" between 29 January 1991 and 3 February 1991. The date specified for the commission of the offence was beetween 2 March 1991 and 29 March 1991.

The second offence charged alleged that the company and the named individuals were parties to the making of a false statement in a Licensed Fish Receiver Return for the month of February 1991 being a return made by Mr Muollo for the purposes of s 66(1) of the Fisheries Act 1983 and regulation 10 of the Fisheries (Reporting) Regulations 1990 in that the return falsely stated the greenweight of fish received by Mr Muollo during February 1991. The date specified for the offence was between 6 March 1991 and 5 April 1991.

The defendant pleaded guilty to those charges and convictions were entered on them. Subsequently penalties were imposed.

Section 107(2)-(4) of the Act provide for forfeiture of property used in the commission of an offence, unless the Court for special reasons relating to the offence thinks fit to

order otherwise. In this case, when imposing penalty the District Court found that no special reasons existed to justify the making of an order under that section.

The plaintiff indicated that it believed that on the entry of the convictions the vessel "Garraway" was forfeit to the Crown as property used in the commission of the offence of which the defendant was convicted and that the Crown wished to seize the vessel if the Court confirmed that it was forfeit.

The factual information provided as a basis for the argument came by way of an affidavit by a senior fisheries investigator employed by the Ministry who was the informant in the criminal proceedings against the defendant out of which the present questions arise. He exhibited a copy of the summary of facts presented to the Court when pleas of guilty were entered on behalf of the defendant.

The summary indicates that on 2 February 1991 fisheries officers observed two vehicles at a Wellington wharf. One was traceable by its registration number to a person employed by Mr Muollo who traded as Cook Strait Seafoods. The second was registered as belonging to that company. The vessel "Garraway" was observed to berth adjacent to the Cook Strait Seafoods truck. The officers observed bins being unloaded from the vessel, and the contents of the bins being sorted. What was unloaded from the vessel was transferred into the vehicles and the vehicles drove away. Forty bins of fish in all were unloaded from the vessel. This activity was recorded on videotape.

Later another vehicle registered to the defendant came to the wharf and parked by the vessel. Three bins of fish were unloaded from the vessel and placed in that vehicle. Later a truck belonging to another company was observed discharging bins at the vessel.

On 28 March 1991 the defendant submitted Catch Effort and Landing Returns to MAF Fisheries reporting fish landed to a licensed fish receiver which was the owner of the last vehicle referred to. No return of other fish landed was made.

The Ministry visited the premises of Cook Strait Seafoods but found no documentation of the purchase of fish product by that company from the defendants.

When interviewed, the master of the vessel, a director of the defendant, said that all fish landed was recorded in the Catch Effort and Landing Return with the exception of heads.

The relevant returns were also exhibited. The Catch Effort and Landing Return was dated 3 March 1991 and purported to relate to a trip which began on 30 January 1991 and ended on 2 February 1991. The licensed fish receivers return was dated 7 March 1991.

Mr Macfarlane made it clear that he was not in a position to argue about or test the facts of the case and submitted that the statements of fact could be regarded as no more than facts pleaded: as matter to be regarded as admitted because not denied. The plaintiff's purpose does not require dispute of that stance. The Director-General's concern is to obtain a declaration as to the construction of the words "used in respect of the commission of the offence" in the forfeiture provisions.

The factual basis for the judgment must be this:

(a) that fish was taken during a voyage of the vessel "Garraway", and was landed from that vessel;

(b) that the Catch Effort and Landing Return did not include all fish taken on the trip to which the return related and landed on return from that trip;

(c) that the licensed fish receiver's return did not include fish received by Mr Muollo and that the circumstances made the company a party to that offence, the basis on which the company was a party not being specified;

(d) relevant dates and places are as has been indicated; in particular that the taking and landing of the fish was complete by 2 February and the returns were completed and lodged a month or so later.

Mr Rea postulated the question arising as being whether a vessel can be forfeit when the relevant charges are based on breach of statutory requirements (including requirements of regulations) relating to documents or is forfeiture incurred only as a result of a breach related to the physical taking of fish. That question in turn gave rise to the question what connection between the property alleged to be forfeited and the offence charged is necessary for forfeiture to be incurred under the statutory words.

The directly relevant provisions of the Fisheries Act 1983 are:

(1) s 66, which requires particular people - amongst others, holders of permits, licences, authorities or approvals issued under the Act to take fish by any method for any purpose, masters and owners of vessels registered under the Act, owners and persons in charge of any premises or vessel where fish is received, purchased, stored, processed, sold or otherwise disposed of an licenced fish receivers - to keep such records and make such returns as may be required under the Act to assist the management and conservation of any fishery resources;

(2) s 89 which authorises the making of regulations prescribing the accounts, records, returns and information that any person may be required to keep or furnish pursuant to s 66 of the Act and providing for the form of such records, the time within which such records are to be kept or furnished and the person or office of the Ministry to whom or which required returns are to be sent (s 89 (1)(ka));

(3) s 93 which provides that:

> "Every person commits an offence who acts in contravention of or fails to comply with any provision of this Act, or any notice, direction, restriction, requirement, or condition given, made, or imposed under this act."

(4) s 96 which provides that:

> "Every person commits an offence who -
> (a) Fails to provide any accounts or records or who neglects or refuses to furnish any records, return, or information when lawfully requested to do so pursuant to this Act;
>
> (b) Makes any false or misleading statement or any material omission in any communication or application or return for the purposes of this Act."

(5) s 107B which provides for forfeiture. There are three provisions in that section which apply forfeitures of differing extent:

> "(2) On the conviction of any person for a quota management offence or an offence relating to returns and records, -
> (a) Any property used in respect of the commission of the offence (whether or not seized pursuant to section 80 of this Act); and
> (b) Any fish in respect of which the offence was committed (whether or not seized pursuant to section 80 of this Act); and
> (c) Any proceeds from the sale of such fish pursuant to section 80(4) of this Act; and
> (d) Any quota held by the person at the time the offence was committed -
> shall be forfeit to the Crown unless the Court for special reasons relating to the offence thinks fit to order otherwise.

(3) On the conviction of any person for an offence against this Act or regulations made under this Act (not being a quota management offence or an offence relating to records and returns or an offence for which the maximum penalty is a fine not exceeding $5,000), -

(a) There shall be forfeit to the Crown, unless the Court for special reasons relating to the offence thinks fit to order otherwise, -

(i) Any property used in respect of the commission of the offence (whether or not seized pursuant to section 80 of this Act); and

(ii) Any fish in respect of which the offence was committed (whether or not seized pursuant to section 80 of this Act); and

(iii) Any proceeds from the sale of such fish pursuant to section 80(4) of this Act:

(b) The Court may order that any quota held by the person at the time the offence was committed shall be forfeit to the Crown.

(4) On the conviction of any person for an offence against this Act or any regulations made under this Act for which the maximum penalty is a fine not exceeding $5,000, or on the discharge of any person without conviction pursuant to section 19 of the Criminal Justice Act 1985 in respect of any offence against this Act or any regulations made under this Act, -

(a) Any fish in respect of which the offence was committed (whether or not seized pursuant to section 80 of this Act); and

(b) Any proceeds from the sale of such fish pursuant to section 80(4) of this Act; and

(c) Any illegal fishing gear in respect of which the offence was committed (whether or not seized pursuant to section 80 of this Act), -

shall be forfeit to the Crown, unless the Court for special reasons relating to the offence thinks fit to order otherwise."

(6) Two definitions in s 107B(1) are relevant:

"'Offence relating to returns and records' means an offence against section 66 of this Act or any regulations made under section 89(1)(ka) of this Act; but does not include an offence for which the maximum penalty does not exceed $5,000:

'Property' means any vessel, vehicle or other conveyance, fishing gear, implement, appliance, material, container of goods, or equipment; but does not include quota."

The Fisheries (Reporting) Regulations 1990 (SR 1990/214) made under s 89(1)(ka) of the Act, specify 7 categories of returns, one of which covers catch, effort and landing returns.

Regulation 4(1), (3) and (4) are relevant:

> "(1) Every permit holder who takes fish or on whose behalf fish are taken -
>
> (a) ....
> (b) ....
>
> shall complete and shall furnish to the Director-General catch, effort, and landing returns in respect of fish so taken in accordance with the requirements of these regulations.
>
> (3) A person required to furnish catch, effort, and landing returns shall -
>
> (a) Complete at the end of each day of a fishing trip (or at the end of each day in which more than one trip is made) that section of the return headed 'Catch/Effort Data', in relation to each such day or part day of a fishing trip; and
>
> (b) Complete immediately on landing that section of the return headed 'Catch Landing Data', with the exception of the last 2 columns which shall be completed immediately upon receipt of the necessary information required from a licensed fish receiver.
>
> (4) Subject to any direction of the Director-General under regulation 22 of these regulations, catch, effort, and landing returns for any fishing trip that ends on any day in a calendar month shall be furnished to the appropriate Registrar not later than 15 days after the last day of that calendar month."

"Landing" is defined as meaning, inter alia, "the removal or discharge of fish from any vessel".

"Permit" means a fishing permit issued under s 63 of the Act or a special permit issued under s 64.

Regulation 25 provides for an offence of failing to complete a required return and provides for a penalty of a fine not exceeding $10,000.00.

Counsel referred to four New Zealand decisions in which s 107B had been considered and one Australian case relating to a comparable provision.

In *Kazakos* v *O'Leary* AP 5-11/90, Christchurch Registry, Holland J, 2 May 1990, wh. was in issue was whether a truck was forfeit in consequence of a conviction (amongst others) for failing to comply with the lawful requirement of a fisheries officer. The section was then differently constructed, but the essential words were the same. The section provided for forfeiture "on the conviction of any person for any offence against this Act or any regulation made under this Act of any vessel, vehicle, or other conveyance ... used in respect of the commission of the offence".

Holland J did not have to consider in any detailed way the meaning of the words in the section. The relevant part of his judgment is in short compass:

> "The Judge held that the words "used in respect of the commission of 'the offence' meant 'used with reference to the offence'". For myself I consider it dangerous to depart from the actual words used in the section which are words of common usage. One must ask oneself in relation to the truck, was it used in respect of the commission of any offence of which the appellant had been convicted? One of the lawful requirements of the Fishery Officer under s 79(1)(a) of the Act was to stop any conveyance where the Fishery Officer believed on reasonable grounds that any offence was being or had been committed against the Act or Regulations made under it. Under s 79(1)(b) the Fisheries Officer is entitled to stop and examine any vehicle in the course of the enforcement and administrationn of this Act. I have already held that the circumstances were such as gave the Fisheries Officer the right to stop and search this vehicle, and indeed charge two is the conviction entered in respect thereof. It follows that the truck, at least in relation to that offence, was 'used in respect of the commission of the offence'".

Mr Macfarlane submitted that this decision proceeded on the basis that there was a general and temporal connection between the use of the truck and the commission of the offence. I accept that that is a fair description of the position in that case.

The next case chronologically is *R* v *Kakura* (1990) 20 NSWLR 638 (CCA, CA). There the primary Judge had made an order for forfeiture of a fishing boat. The empowering provision was s 13C of the Fisheries Act 1952 (Cwlth). The defendant had been convicted of an offence under s 13(1)(h) of the Act of contravening or failing to comply with a condition of a licence which had been issued in respect of a boat. The conditions

of the licence in issue required the master of the boat to maintain a catch record and to report the numbers of fish and estimated weight of each species of the catch. The accusation was that there had been a failure to comply with those conditions because M. Kahura as the person required to comply understated his catch by 20-30%.

Section 13C of the Act provided for forfeiture following conviction for an offence against s 13 "arising out of [the offender's] having in his possession or in his charge a boat for taking fish" (s 13C(2)) and for any other offence against s 13 (s 13C(1)). In the former case forfeiture could be ordered of a boat "in relation to which the offence is committed" and in the latter "a boat ... or equipment used in the commission of the offence".

Gleeson CJ, in whose judgment the other members of the Court concurred, expressed his essential conclusion briefly:

> "Even allowing for the fact that what is involved is a question of construction of a penal provision, and that it is to be interpreted accordingly (*Murphy* v *Farmer* (1988) 165 CLR 19), I can see no justification for reading s 13C(2) in such a way that it applies only to cases where being in possession or charge of a boat is an element of the offence as defined by the statute. In my view the subsection directs attention to the facts of the case and raises for consideration the question whether a particular offence can fairly be said to have arisen out of the offender's having in his possession or in his charge a boat for taking fish."

Gleeson CJ then went on to refer to the approach postulated by the primary Judge, Wood J, which was to consider the question whether in the present case there was a sufficient connection between the circumstances that the accused was in charge of the vessel and the offences which he committed to produce the result that the offences could be said to have arisen out of his having charge of the boat. The Chief Justice then went on to express his final conclusion:

> "The substance of his offences was that, being a person acting on behalf of the licensee of the fishing vessel, which licence authorised the use of the vessel to take fish, on condition that the catch was correctly recorded and reported, he acted in breach of the condition by sending in false reports of the catch and not keeping the necessary records. In my view, those offences arose out of his having in his charge a boat for taking fish."

In *Ministry of Agriculture and Fisheries* v *Kiely*, District Court, Christchurch, CRN 1009022279, Green DCJ, 28 November 1991, the Court was determining whether an order should be made that property not be forfeited under s 107B(2) in its current form. The substance of the offence of which the defendant was convicted was a failure immediately on landing to complete the required section of the catch, landing and effort return.

The facts were that the defendant landed 14 bins of fish from a registered fishing vessel. It was ascertained as he left the wharf that he had not made the required entry in respect of that landing. The Ministry submitted that the fishing vessel was used in the commission of the offence. The Judge held that it was not for the Court in the prosecution to determine whether or not property was used in the commission of the offence, but that in dealing with the question of special reasons could draw a conclusion whether the forfeiture of particular property was reasonably likely to occur.

The offence involved failure to complete part of the return when required and the Judge commented that as a matter of logic it was difficult to conceive that in respect of an offence of omission any property could be used in the omission.

Reference was made to the decision in *R* v *Kakura* and in particular to a passage in the decision of Wood J, the Judge of first instance. The whole text of that judgment is not available to me, but Judge Green has recorded that Wood J had said:

> "The question then is whether the boat or equipment was 'used in the commission of the offence' [of inaccurately reporting the catch in breach of the licence provisions]. This expression seems to me to involve an involvement of the boat in the offence in a temporal sense. In my view the vessel can properly be said, in this case, to have been used in the commission of the offence since it was the catches made by it which called for recording and reporting. Had it not been used to catch the fish no obligation to record or report and no offence would have arisen."

Judge Green agreed that to be liable for forfeiture as property used in the commission of the offence the boat must be involved in a temporal sense in the commission of the offence, the reason being that importing a temporal sense into an offence isolates the time frame within which the elements must be found. The essence of the Judge's decision is found in the particular case in these passages:

"In the matter before me use had been made of the boat to catch the fish, to carr them to Akaroa and to unload the fish from it. At the stage of landing the fish no requirements then existed to complete any return. That obligation only came into existence when the fish had been landed and the boat was no longer involved. The obligation to record fell completely outside the time frame of any usage of the boat as the legal obligation to complete the section of the form arose immediately upon landing the fish. To put it another way at no stage were the use of the boat and the obligation to record contemporaneous.

To revert to the judgment of Wood J, I am with respect unable to agree that the previous usage of the boat to catch the fish creating the obligation to report which was breached can be usage linked with the boat. It falls outside the temporal rule he propounded."

The Judge felt that the vessel in that case could not reasonably be forfeited as property used in the commission of the offence.

In *Ministry of Agriculture and Fisheries* v *Fearnley* District Court, Christchurch, CRN 1028003504-23, Strettell DCJ, dealt with the question of forfeiture as a consequence of charges under s 93 of the Act of failing to supply catch, effort and landing returns, charges under s 96(b) of making a material omission by failing to record all Blue Warehou and charges under s 96(b) as a licenced fish receiver of making a false return by misstating the species received.

The Judge approached the jurisdiction of the Court to consider forfeiture as Judge Green had and considered the question whether any property used in the commission of the offence should be seen to include the boats used to catch the fish. His Honour noted that the offences are complete on failure to return the necessary record correctly completed upon the 15th day after the relevant month and concluded that the use of the boat in each of the series of offences was distanced in time from the commission of the offence.

The Crown's argument was that the vessels were the "lynchpin that subsequently permitted the offence to take place" and that accordingly there was a direct link between the vessels used and the subsequent offence.

His Honour referred to *R* v *Kakura* and *Ministry of Agriculture and Fisheries* v *Kieley* and adopted and followed the conclusions of Wood J and Green DCJ that there had to be

an involvement of the boat in a temporal sense in the commission of the offence, and that there was not in the instant case.

The learned Judge commented that the purpose of s 107B(2) is to ensure that gear used during the commission of the offence must be forfeited (which, with respect, I think is too narrow a view of the legislative intention) and proceeded:

> "Looking at the facts of these offences and considering the time of the commission of the offence and the use of the boat in a temporal sense the timing of the commission of these offences vary but could be as far away from the use of the boat to the commission of the offence as a month plus fourteen days.
>
> Can it then be argued that the use of the boat was itself used in respect of the commission of the offence? From a proximity or temporal viewpoint it could not.
>
> While s 107(b) is clear and pointed in the mandatory forfeiture provision that property used in the commission shall be forfeited, I cannot import into the words 'in respect of' in s 107(b) the extended and meaning of the words urged on me by Mr Sandston, the phrase emphasises that the property liable for forfeiture is that used in the commission of the offence (to state the obvious) but in my view nothing more. Having considered the factual circumstances and the submissions by counsel relating to these offences and having considered the case law submitted I adopt the reasoning of both Mr Justice Wood and Judge Green in the decisions previously mentioned and consider that the boat was not used in the commission of the offence and therefore not liable to forfeiture.
>
> Indeed one could go so far as to say that the offences do not in any way relate to the use of the boat in respect of the commission of the offences. The offences are offences of record where the ingredients of the offence relate to the holding of a permit or being a licensed fish receiver (ss 93 and 96 and Regulations 6 and 10) and failing to supply a nil return.
>
> The use of the boat plays no part in the commission of the offences at all and for that reason again forfeiture is not a consideration."

The third New Zealand decision is *Ministry of Fisheries* v *Harvey* CRN 1025005849 District Court, Invercargill, 20 October 1992, Moran DCJ. The defendant was charged with knowingly making a false statement in a Catch Effort and Landing Return and with knowingly disposing of fish taken by him in his capacity as a commercial fisherman other than to a licensed fish receiver, the latter being a quota management offence.

The question posed by the Judge in his decision was whether the fishing vessel used by the defendant to catch the fish the subject of all informations was liable to be forfeit to the Crown. The vessel in that case was not owned by the defendant, but by another.

Judge Moran referred to the decisions in *Fearnley* and *Kiely*, and to the temporal test applied in them, but then turned his attention to the significance of the words "in respect of" in the statutory phrase "used in respect of the commission of the offence" and compared s 107B with s 80 which authorises seizure. In s 80 the relevant words are "vessel, vehicle ... fishing gear ... goods or equipment which ... is being or has been used ... in the commission of an offence ...".

Judge Moran held that when attention is directed to the words "in respect of", the issue is "one of relationship between the use of the property and the acts, omissions and intentions which constitute the commission of the offence".

The Judge went on to say that whether such relationship exists of sufficient proximity to trigger the forfeiture provisions of s 107B must, in his view, involve considerations wider than the temporal test adopted in *Kiely* and in *Fearnley*. He said "the concept of proximity is wider than time frame".

The situation being dealt with by the Judge was one in which the relevant entries were made at some undetermined time after the landing of fish on 12 October, the return having been signed on 13 November 1990, one month after the fishing trip to which the return related. The fishing vessel had been used to catch the species to which the return related and the Judge concluded that it was not reasonably possible to exclude that it could be said the fishing vessel was used in respect of the commission of the offence of making the false statements in the return. The Judge's final statement of his conclusion on this point was:

> "Could it be said that the fishing vessel was used in respect of the commission of the offence of making the false statements in the return? That reasonable possibility cannot be excluded.
>
> It is true that, in the context of the above charge, the use of the vessel to catch and land the fish had ended before the false entries were made in the return. It is also true that the entries were made at a place other than on board the vessel; probably at the defendant's home. Notwithstanding that the commission of the offence was removed from the use of the vessel both as to time and place there

remains a relationship between the two events which might reasonably be seen to be sufficiently proximate to trigger the forfeiture provisions of section 107B.

The Quota Management System depends for its efficacy upon accurate and truthful statements in Catch Effort Landing Returns.

Information is required in respect of each fishing trip. That information includes the species and quantity of fish caught, the method by which they were caught, the effort expended in catching them, the state in which they were landed, the number, type and weight of the containers in which they were landed and the quota registration number against which they were caught.

In short, the return requires information relating not only to the fish but also to the fishing. The use of the fishing vessel is an integral part of the fishing trip to which the Catch Effort Landing Return relates.

Indeed, the nature of the reporting obligations varies according to the dimensions of the vessel. ... There is thus a direct relationship between the fishing vessel used to catch fish and the nature of the reporting obligations.

I, therefore, conclude that there is a very real possibility that the fishing vessel will be forfeit to the Crown upon conviction of the defendant of any of the three offences relating to returns and records."

I agree with respect with Judge Moran's view that attention must be paid to the words used in the statute, the point made by Holland J in *Kazakos*, and that is particularly so when in provisions in the statute dealing with related matters, seizure and forfeiture, the legislature has used the different expressions, "in" and "in respect of".

"The words 'in respect of' are difficult of definition but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer": *Trustees Executors & Agency Co Ltd* v *Reilly* [1941] VLR 110, 111. That dictum has been adopted in a number of Australian decisions - see *Frost* v *Customs Collector* (1985) 63 ALR 297 (FCA) at 308, but with the rider added by Mason J in *State Government Insurance Office (QLD)* v *Rees* (1979) 144 CLR 549 at 561 "but, as with other words and expressions, the meaning to be ascribed to 'in respect of' depends very much on the context in which it is found".

Mr Macfarlane made the point that the first offence in this case was not an offence "relating to records and returns" because the offence charged was an offence under s 96(b), not one under s 66 or under any regulation.

Mr Rea resisted that argument strenuously submitting (correctly) that s 66 does not in itself declare anything to be an offence; it simply sets out the requirement that identifiec classes of persons shall keep such records and furnish such returns as may be required by or under regulations made under the Act to assist the management and conservation of any resources. Section 93 provides generally that an offence is committed if there is contravention of or failure to observe the Act. Section 97 makes a similar provision in respect of failure to provide records or refusal to furnish returns or making false or misleading statements in returns. In my view for prosecution of "an offence under s 66 or any regulations made under s 89(1)(ka)" of the Act recourse would have to be had to s 66 and s 93 (for example, for a failure to keep records), or s 96(a) for failure to provide records or returns, or s 96(b) for falsity in the required returns. In my view whichever of ss 93 or 96 is relied on failure to keep or furnish returns or honest returns is properly described as an offence under s 66. The words "an offence under s 66 or any regulations made under s 89(1)(ka)" must be read as referring to an offence relating to what is required to be done by s 66 or the regulations. In my view making a false return is just as much such an offence as not making a return at all.

Whether an offence is or is not one relating to returns and records does not affect the construction of the forfeiture provision which would cover a fishing vessel since the wording in that respect is the same in s 107B(2) and (3).

It is also clear that an offence of making a false statement in a return is committed effectively when the return is made because that is when the false or misleading statement becomes material. Reference to s 66(1) makes it clear that the legislature contemplated that returns might be required in respect of all stages of the process from catch to sale. The obligation to make a catch, effort and landing return may be fulfilled at any time up to 15 days after the last day of the calendar month in which the fishing trip to which the return refers (Regulation 4(4)). In any event the whole of the information required by the form will not be completed until the licensed fish receiver has supplied the information about fish landed which has to come from him (Regulation 4(3)(b)). The return in this case was apparently completed on 3 March 1991 and furnished at or after that date (the date given for the offence being between 2 March 1991 and 29 march 1991) i.e. at least 29 days between landing and the making of the false statement.

Mr Macfarlane submitted:

(1) that the words in s 107B(2) required consideration of the time and physical natur of the offence because of the words "property" and "used" and that "use" must involve a time of use. He submitted that the judgments in *Kazakos, Kiely* and *Fearnley* were correct in requiring a temporal connection between the use of the property and the commission of the offence, and that the wider view taken in *Harvey* was not correct;

(2) that the obligation to complete and furnish a return precedes the incurring of any liability for a reporting offence, and when fish are taken that obligation always came later. Accordingly the use of fish catching equipment would almost always have ceased by the time it became possible to record what was caught, and that will certainly be the case when what is in issue, as here, is providing a return of what was taken and landed;

(3) in this case the facts relied upon by the Director-General occurred in Napier some four weeks after the discharge of fish in Wellington.

Accordingly, Mr Macfarlane submitted it would be surprising if the vessel could be regarded as used in the commission of the offence. At best, he submitted, whatever instrument was used to complete the form would be covered by s 107B(2) or (3); if a wider view was taken the area of forfeiture would be very wide: the vehicle which took fuel to the vessel for the trip, the vehicle which took the fish from the wharf, the bins and even the office where the return was prepared (so long as it was not realty) could be forfeit; which he submitted would be an absurd result.

Applying the test of temporal connection between the use of the vessel and the commission of the offence, Mr Macfarlane submitted that there was none to be discerned.

Further Mr Macfarlane submitted that when the words "in respect of" are considered in the whole context of s 107B(2) (or (3)) they have been used in (2)(b) and (c) in respect of the forfeiture of fish or the proceeds of sale of fish to show a specific connection between the fish and the offence. Section 107B(2) and (3)(a) it was submitted do not exhibit that direct connection leaving a case of ambiguity where the choice should be against forfeiture: *Millar* v *Ministry of Transport* [1986] 1 NZLR at 668 and 673.

It was submitted that these considerations lead to a sufficiency of connection being required between the property and the commission of the offence but not so wide as to be beyond the purpose and contemplation of the legislation and that there was not sufficient here.

I have come to the conclusion that Judge Moran's view is to be preferred (although I do not wholly disagree with Judge Green and Judge Strettel) and that the vessel is within the range of the forfeiture provisions even when the return is made after the fish are landed from the vessel and in a place distant from where the vessel is at the of making the return or was at the time of the landing. I do so by reference to these considerations: First, the "commission of the offence" must encompass in an offence of making a false return a number of acts in sequence: the taking of any quantity of fish of particular species, the landing of those fish, the recording of the required information in respect of those fish and the making of a false return of the quantity or kind of fish taken or landed (or in this case, taken *and* landed). In any defended prosecution the Crown would have to prove some or all of those matters. A significant factor in any prosecution related to returns is the amount and kind of fish taken from the sea and then and thereafter not properly dealt with. There is a clear pointer to that in s 107B(2)(b) and (c) and s 107B(3)(a)(ii) and (iii). That significance is consistent with the purpose of the Act as derived from its long title: "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 fisheries waters".

Second, in my view the words "in respect of the commission of the offence" are, consistently with the purpose of the Act and its provisions, wider in meaning than "in the commission of the offence". That is a construction which accords with s 5(j) of the Acts Interpretation Act i.e. one which will best ensure the attainment of the object of the Act, which may be, and in my view clearly is, "to prevent or punish the doing of [what Parliament] deems contrary to the public good".

Third, there is a time element necessarily involved in the word "used", but the period it encompasses covers all the elements which would have to be proved i.e. from the time the fish were taken from the water. Thus I agree with the decisions in *Kiely* and *Fearnley* that such an element has to be shown but not that it must be as narrowly confined as was done in those decisions. A broader approach to the time issue is quite consistent with a fair connection between the particular offence and the use of the vessel when what is involved in the offence is analysed. There is, in my view no justification for requiring contemporaneity between the use of property and only one of a number of activities necessarily involved if the relevant offence is to have been committed.

Fourth, in respect of elements other than temporal encompassed by the word "used", there must be reasonably discernible a direct involvement of the property in issue as an instrument in the matters which would have to be proved to establish the offence. This

consideration should remove room for the absurdities which Mr Macfarlane postulated t arise.

Fifth, it is clear that the legislature has intended severe and wide-ranging penalties to apply in respect of offences: under s 107 a fine of up to $250,000.00 for an offence against the Act, and for a continuing offence a fine not exceeding $1,000.00 per day in addition, to which will be added, unless the Court thinks otherwise for special reasons relating to the offence, forfeitures of property, fish, proceeds of the sale of fish and in some cases any quota held by the offender at the time the offence was committed. Quota is a valuable commodity, loss of which may destroy the fisher's business. There is nothing to suggest that Parliament intended the exposure to penalties to be limited to gear or to diminish as fish were moved along the chain between the point of taking and disposal, which is the stage at which the reward for breaching the law could be expected to come to the offender's hand. That is part of the context in respect of which the particular words have to be considered.

Accordingly, in my judgment, the vessel "Garraway" was in the circumstances as they were put before me forfeit under s 107B(2) and would have been forfeit if the case had been within s 107B(3).

I do not consider it is possible to make such a declaration in respect of the conviction relating to the licenced fish receiver's return because the facts on the basis of which the company was alleged to be a party to what I take to have been Mr Muollo's offence as a principal have not been established in any way in this proceeding. In that situation it is not possible to determine that the vessel can be said to have been "used" in respect of the offence.

In the circumstances of the case, the costs of the proceeding are to be borne entirely by the plaintiff which wished to establish the correct interpretation of the law..

I record that Mr Macfarlane broached an argument that s 21 of the New Zealand Bill of Rights Act 1990 affected the approach to construction. The section relates to unreasonable search or seizure and I intend no discourtesy to him in saying that in my view it has no bearing on the construction of a provision as to forfeiture which passes title after a conviction has been entered.

I express my thanks to both counsel for their assistance, but especially to Mr Macfarlane for his readiness to assist the Court.

D.P. Neazor J

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