IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 138/94

IN THE MATTER of an appeal from the determination of the District Court at Auckland

BETWEEN CEDRIC ALLEN CROAD (Ministry of Agriculture & Fisheries)

Appellant

A N D NEIL DOUGLAS HUGHES

Respondent

Hearing: 16 August & 26 September 1994

Counsel: Miss A.L. Pinnock & Miss McFadden for Appellant
Mr K.F. Gould for Respondent

Judgment: 07 OCT 1994

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JUDGMENT OF TEMM J.

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Solicitors: Miss A. Pinnock, Ministry of Agriculture & Fisheries, Auckland

Mr K.F. Gould, Auckland

This is an appeal by way of case stated in respect of a prosecution under the Fisheries Act 1983 in which the presiding Judge in the District Court convicted the respondent of various offences against the Act but declined to make an order for forfeiture in circumstances which will become apparent. Two questions of law have been posed in the case stated; if the first is answered in the affirmative then the second question, in my judgment, becomes of academic interest only.

## BACKGROUND FACTS

The case stated is set out on 12 pages of facts and findings after a prosecution when the respondent pleaded guilty. It is apparent from the sentencing notes that the hearing on the plea in mitigation occupied nearly three hours, so it can fairly be said that the matter was canvassed very thoroughly both by counsel and by the Court.

The respondent is a commercial fisherman working alone from a small 20 foot dory with a truck and trailer worth together approximately $20,000. He has Quota valued, it is said, at $300,000 (including quota for grey mullet) but that is recorded by the Ministry of Agriculture and Fisheries as being in his name. According to counsel the Quota actually belongs to a company called Hughes Fishing Limited but the Ministry has not been notified of that fact as required by s.28Q(2) of the Fisheries Act 1983. It is therefore deemed to be the property of the respondent and liable to be forfeited if he commits a Quota Management offence or an offence relating to returns and records (s.107B(2)).

Although grey mullet is subject to a Quota under the Quota Management Scheme administered by the Ministry under the Act, it is a

species of fish that can be taken in unlimited quantities by amateur fishermen. It is generally regarded as suitable mainly as bait and has a market value of only $2.00 per kilogram or thereabouts.

A commercial fisherman is prohibited by s.67 from selling fish to anyone other than a "licensed fish receiver" (or the Crown) save for small amounts sold directly from his fishing boat at the dockside (s.67(2)). If he sells fish in contravention of s.67(1) he commits "a Quota Management offence" (ss.67, 107B(1)). On the conviction of any person for such an offence any Quota held by that person at the time the offence was committed "shall be forfeited to the Crown unless the Court for special reasons relating to the offence thinks fit to order otherwise" (s.107B(2)). The same consequence applies if a person is convicted of "an offence relating to returns or records". In addition the offender forfeits to the Crown "any property used in the commission of the offence" - in this case the respondent's boat, trailer and truck would all be forfeited along with his fishing quota licence.

On 12 occasions between August and December 1991 the respondent sold grey mullet to persons other than licensed fish receivers in breach of s.67(1). On 10 occasions between September 1991 and March 1992 he made Catch Effort and Landing Returns and Quota Management Reports that were false because he did not record the quantities of fish he had sold in breach of s.67(1). On one occasion he failed altogether to file the necessary return. These transactions involved a fisheries officer who did not reveal his official status and a fishmonger named Lima who sold grey mullet direct to the public from a freezer truck at the roadside. The total value of the fish sold to Mr Lima was $12740; the amount sold on various

dates to the undercover fisheries officer is not stated but the total amount involved, according to the case stated, was "in the order of less than $20,000".

The respondent was fined and ordered to pay costs and fees to a total amount of $28,400 but the Court for "special reasons relating to the offence" saw fit to order that there should not be forfeiture.

The Ministry has appealed by case stated and seeks answers to two questions framed by the learned District Court Judge as follows:

1. Did I err in holding that the four matters namely:

   The relatively small amount of fish
   The type of fish involved
   The fact that the defendant had Quota, and
   The circumstances of the operation

   were "special reasons" in terms of s.107B(2) of the Fisheries Act 1983?

2. In determining whether "special reasons" exist for the purposes of that section;

   (a) Must each individual fact be of a type capable of satisfying the test (even if not of a sufficient degree to do so), or

   (b) May the finding be based on several non-qualifying facts?

## THE LAW

It is clear that the phrase "special circumstances relating to the offence" means something out of the ordinary, even exceptional, that is not found in the common run of cases and must relate to facts which constitute

the offence as distinct from relating to the offender (*MAF v Schofield* [1990] 1 NZLR 210, 221). As a result the interpretation of this important phrase in the context of any particular case requires the Court to put to one side as irrelevant anything that relates to the offender.

For example in this case it is irrelevant that the offender having failed to record landing a little over $12,000 worth of bait fish and having sold it to persons who are not licensed to buy it, has been penalised by fines and costs to the extent of over $28,000 and now risks being further penalised by the loss of his Quota, his boat, his gear, his trailer and his truck - said to be worth in total over $320,000. While those matters are relevant to the offender they are not relevant to the offence. The learned Judge correctly categorised those matters when reaching his decision and put them to one side.

Similarly, the Judge did not take into account as being irrelevant, the fact that the respondent had left school at 15 years of age, was now about 30 years old, was "one of life's battlers", and probably regarded record-keeping as being about as important as taking tea and cucumber sandwiches. Now he knows different. His whole livelihood is imperilled, but that is quite beside the point.

What the Judge did take into account were the following matters:

1. "The relatively small amount of fish". This is a reference to his finding that the total value of fish involved was less than $20,000 as compared with other cases where the value and quantities have been very significantly higher.

That seems to me to be an aspect of the matter "relating to the offence" and was a relevant factor in deciding whether "special reasons" existed.

2. "The type of fish that were involved". This refers to the fact that the respondent sold grey mullet, a low value bait fish.

The Judge expressly noted that the species was "not of either export or consumer/table demand". Allied to this was the reality that amateur fishermen can take unlimited quantities of this species and that although governed by the Quota Management Scheme the place of grey mullet in the fishing industry is not significant. This too is a relevant factor in deciding whether "special reasons" existed.

3. "The fact that (the respondent) had Quota" (for grey mullet).

I gather from the case stated that the Judge in the Court below saw this as distinguishing the case from others where fishermen have caught and sold fish for which they had no Quota allocated and which they had no right to take. By contrast the respondent had the right to take the fish. His wrongdoing was in failing to sell it through the proper channels, and in failing to keep proper records of his transactions.

These two characteristics - the species involved and the Quota giving the respondent the right to catch it - led to the conclusion that "the overall major objectives of the protection of the New Zealand fishery were not thwarted".

I am not prepared to say that that was an irrelevant matter. The whole purpose and scope of the Fisheries Act is to protect an important

natural resource. The management of that resource depends fundamentally on record keeping - Catch and Effort Landing Returns and Quota Management Reports - which supply the basic information on which the Quota Management Scheme operates.

This particular offending by the respondent did not undermine the Quota Management Scheme in any significant way because grey mullet is of minor importance, as demonstrated by its small value and its general use only for bait.

4. "The circumstances of the operation" - a reference to the scale of the respondent's business, working alone from a small dory.

I interpret this as a reference to the absence of any organised unlawful activity, often found in cases of this kind and sometimes involving a dozen or more people all participating and taking fish, selling the catch and distributing it frequently in different parts of the country. The Judge's assessment of the offending (with which I do not disagree) was that, by comparison with "the common run of cases" it was a petty kind of offending that did no harm to the Quota Management Scheme.

This fourth consideration overlaps with the first listed above ("the relatively small amount of fish") but it is not surprising in matters of this kind that various factors tend to merge to some extent. However I take the view that there is a distinction to be drawn between the amount or value of the fish involved in wrong-doing and the scale of the commercial operation in question.

Each of these four considerations was relevant in deciding the central question as to whether statutory forfeiture should be allowed to occur automatically or whether the Court should stop that process by an order that the assets were not to be forfeited.

Much emphasis was placed in the argument of counsel for the Ministry on the limited and restricted meaning of "special reasons" but the learned Judge expressly referred to the *Schofield* case in which this principle was first expounded and did not overlook it in reaching his conclusion.

Because I am not persuaded that the considerations taken into account by the learned Judge were irrelevant in deciding whether to exercise the statutory discretion, I rule that the answer to Question One on the case stated must be "No".

This conclusion makes the second question redundant but because the Ministry put some importance on the matter I should express my view, if only to acknowledge the careful argument presented.

Counsel sought to distinguish between "special circumstances" and "special reasons". The first of those two phrases is to be found in the Transport Act 1962, the Criminal Justice Act 1985 and other statutes. It is a phrase that often appears in a provision creating a judicial discretion.

But the second of those two phrases "special reasons" is said to be narrower in its scope than "special circumstances". Counsel relied on the dictionary definition of "special reasons" - "a statement of some fact (real or alleged) employed as an argument to justify or condemn some act, prove or

disprove some assertion, idea or belief" - as contrasted with "circumstance" defined as "that which surrounds materially, morally or logically" or "that which stands around or surrounds, the totality of surrounding things". While the two words are distinct and different in their meanings it does not necessarily follow that a "circumstance" or a group of circumstances cannot become a "reason" for doing something or refraining from doing something. It is more to the point that some circumstances are legally irrelevant and neither alone nor in combination with other equally irrelevant circumstances can they ever amount to a "reason" within the meaning of s.107B(2). For example in this context any circumstance relating to the offender, but not to the offence, is legally irrelevant.

Hence it seems to me that counsel for the Ministry was correct in submitting that "if a special reason is not of the type which can possibly qualify, either because the reason is not special at all or because it is not related to the offence, then that (particular) reason fails the test".

But it does not logically follow from that proposition that "each individual factor advanced as special reasons under s.107B is required to be of the required type". That may be correct if by "the required type" counsel meant something that related to the offence, but it is not correct to argue that every "factor" so advanced must be "out of the ordinary, even exceptional, not found in the common run of cases" as laid down in ***MAF v Schofield***.

In my judgment if the "factor" (I prefer "circumstance") being considered by the Court is related to the offence, and together with any other relevant consideration (or circumstance) combines to reach a stage

where there is a reason that can properly be described as "special" within the definition ascribed to that word by Fraser J. in ***Schofield***, then that will satisfy the test in s.107B(2).

The test is relevance. No matter how many circumstances come into consideration, whether singly or in combination, they can never amount to a special reason if they are irrelevant. It is in this sense that the judgment in ***Martin v A.C.C.*** (M.692/83, Auckland Registry, 13 May 1983, Eichelbaum J.) must be read. That is particularly true of the passage relied upon by the Ministry in which the learned Judge said speaking of "special reasons" in the context of the Transport Act:

> "... In appropriate cases I do not doubt that special reasons may be found in a combination of matters. I think too that in a case where special reasons are found to exist the Court may be moved to exercise its discretion in favour of the offender because of the combined weight of a number of factors, but I find it much more difficult, if it be possible at all, to envisage a case where, after examining and discarding a number of separate factors, none of which in the Court's opinion are capable of amounting to special reasons, the Court may nevertheless properly conclude that the combination of those rejected factors may be so regarded..."

With all respect to the learned Judge in adopting that observation as to the interpretation of the section with which he was concerned, I take the view that if a Court is considering whether a special reason exists under s.107B(2) of the Fisheries Act 1983, the Court must take into account all relevant circumstances relating to the offending and then decide whether individually or in combination it is proper to say that a special reason exists within the narrow and restricted meaning given to that phrase in that particular section.

Counsel for the Ministry argued also that because the section refers to "special reasons relating to the offence", that a single special reason

could not justify use of the statutory discretion. I find nothing in the way the section is drafted (apart from the use of the plural) or in the way it fits into the Act as a whole that would limit the Court's power to act if the Court were to be satisfied that a single reason relating to the offence existed and that it was properly to be categorised as a special reason justifying an order against forfeiture.

It seems to me that reason and common sense both require the plural "reasons" to be read in the singular if need be, and express statutory authority for that course is to be found in the Acts Interpretation Act 1908 (s.4).

If I were required to answer Question Two in the case stated then my answer would again be in the negative as regards 2(a), and in the affirmative in answer to 2(b) provided that "non-qualifying" is read as meaning "relevant" as defined above.

There will be an order for costs in favour of the respondent. Counsel may submit a memorandum if consent cannot be reached. Memoranda must be filed by 14 October next.