IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-2016

UNDER	Part 1 of the Judicature Amendment Act 1972
IN THE MATTER OF	An application for review and interim orders
BETWEEN	NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN INCORPORATED First Applicant
AND	CHALLENGER FIN FISHERIES MANAGEMENT COMPANY LIMITED Second Applicant
AND	SOUTH EAST FINFISH MANAGEMENT LIMITED Third Applicant
AND	NORTHERN INSHORE FISHERIES COMPANY LIMITED Fourth Applicant
AND	MINISTER OF FISHERIES First Respondent
AND	CHIEF EXECUTIVE OF MINISTRY OF FISHERIES Second Respondent

Hearing: 26 February 2009

Counsel: B A Scott and G K Rippingale for Applicants
D A Ward for Respondents
D M Salmon for EDS

Judgment: 2 March 2009 at 2.30pm

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 2.30pm on the 2nd day of March 2009.

RESERVED JUDGMENT OF MACKENZIE J

[1] This is an application by Environmental Defence Society Inc. (EDS) to join as a respondent in this proceeding. The proceeding is an application for judicial review against a number of decisions by the Minister of Fisheries imposing restrictions and prohibitions on commercial set net fishing and trawling in various coastal waters. The decisions, which are reflected in a number of regulations promulgated as a consequence, were made under s 15(2) of the Fisheries Act 1996 (the Act) to protect New Zealand's endemic Hector's dolphin. As required under s 12(2) of the Act, the decisions and the reasons for those decisions were promulgated to stakeholders. The making of the decisions followed a consultation process. The decisions affect the commercial operations of the applicants, who have commenced these proceedings by way of judicial review. Certain interim relief was granted by Clifford J on 26 September 2008. The matter has been timetabled towards an urgent hearing. There is currently a fixture for the period 6 to 8 April 2009, though Mr Scott signalled from the bar that there has been some slippage in the timetable and that an alternative fixture in June 2009 may be sought.

[2] The challenge is based on a number of grounds, which are currently set out in an amended statement of claim dated 14 November 2008, though Mr Scott indicated from the bar that amended pleadings are contemplated. The nature of the challenge is illustrated by the following extract from the statement of claim:

> 56 In making the WCNI decisions, the Minister:
>
> 56.1 when assessing whether the prohibitions were necessary to avoid, remedy or mitigate the effect of fishing-related mortality of Hector's dolphins:
>
> (a) failed to assess the extent to which utilisation of fisheries resources threatens the sustainability of the Maui's dolphin population;
>
> (b) failed to evaluate the level of risk of fishing to the Maui's dolphin population;
>
> 56.2 when extending the offshore set net ban between Manganui Buff and Pariokariwa Point from 4nm to 7nm based on research survey sightings:

(a) failed to take into account the best available information in relation to the distribution of Maui's dolphins which indicated that the 4nm set net prohibition was sufficient to avoid the overlap between dolphins and set nets;

(b) failed to adequately assess and be advised of the reliability of the few offshore research survey sightings of dolphins outside 4nm;

56.3 when extending the existing set net prohibition further into the Manukau Harbour:

(a) failed to take into account the best available information in relation to the distribution of Maui's dolphins which indicated that the existing set net prohibition was sufficient to avoid the overlap between dolphins and set nets;

(b) failed to adequately assess and be advised of the reliability of the harbour sightings;

(c) unintentionally prohibited the fishing method of ring-netting, due to it being within the definition of set netting in the Fisheries (Auckland and Kermadec Areas Commercial Fishing) Regulations 1986;

56.4 when prohibiting set netting in the entrance to Raglan and Kaipara harbours, and the lower part of Port Waikato, failed to take into account the best available information in relation to the distribution of Maui's dolphins, which indicated that dolphins were not present in those areas and that there was no material risk from fishing in those areas to the Maui's dolphin;

56.5 when extending the existing trawl prohibition to 4nm offshore (between Manakau Harbour and Port Waikato) and 2nm offshore (between Manganui Bluff and Pariokariwa Point), failed to take into account the best available information which indicated that there was no material risk from trawling to the Maui's dolphin population.

57 As a consequence of the failures and errors set out above, when making the WCNI decisions, the Minister:

57.1 erred in law in his decision that the commercial set net and trawl prohibitions were necessary to avoid, remedy or mitigate the effect of fishing–related mortality of the Maui's dolphin;

57.2 failed to base his decisions on the best available information, contrary to section 10 of the Act;

57.3 acted unreasonably.

[3] There are also allegations of failure to consult adequately with the applicants, that there was a frustration of legislative purpose in that the means adopted by the Minister to protect Hector's dolphins did not have an appropriate legislative basis. There is also a related issue concerning the associated measures to impose levies on the industry to meet the costs of monitoring compliance. The relief sought includes declarations that the various decisions were unlawful, orders setting aside the decisions and the consequent regulations, and directions that the Minister reconsider the matter.

[4] EDS seeks to be joined as a respondent, on the following grounds:

> 1. The EDS is an organisation concerned with the promotion and development of high quality environmental management policy based on best available research to ensure the protection of natural resources and biodiversity, including the sustainable management of lakes, costal [*sic*] waters and oceans. Because of this the EDS has a significant interest in the outcome of the proceeding.
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> 2. The presence of EDS before the Court will assist the Court and is necessary to enable the Court to effectually and completely settle all questions involved in the proceeding.
>
> 3. The EDS' interests will be directly, indirectly and/or potentially impacted by the proceedings.
>
> 4. It is in the interest of justice that the EDS be joined to the proceeding.

[5] The nature of the involvement sought by EDS is set out in more detail in the memorandum of counsel filed when the application was filed.

> 3. EDS applies to be joined as a respondent *inter alia* on the grounds (i) that it has an interest in the proceedings (based on its conservation mandate) and (ii) that its presence will assist the Court.
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> 4. The first of those grounds is supported by the affidavit of Mr Taylor.
>
> 5. The second arises out of the nature of the proceedings and the arguments being advanced by the Applicants. The Applicants allege various breaches of section 10 of the Fisheries Act 1996 by the Minister. Section 10 requires the Minister to make decisions based on the 'best available information".
>
> 6. It seems clear from the Applicants' pleading that the Applicants will argue that the scientific platform for the Minister's decision was not premised on the "best available information" and that there is

contrary evidence/science which the Minister failed to take into account.

7. EDS submits that it can assist the Court to assess the merit of these positions. EDS has access to material and evidence that will bear on the pleaded issues in this proceeding. This includes evidence as to the state of scientific understanding of the issues in New Zealand and potentially abroad.

8. The affidavit of Associate Professor Dawson illustrates to some degree the type of expertise and evidence available. The affidavit is inevitably vague as the Applicants have not yet filed their evidence. Once that is filed, if EDS is joined to this proceeding it would intend to file a more detailed affidavit from Associate Professor Dawson and possibly other New Zealand scientists addressing the issue in this proceeding. It is possible, depending on what is filed by the Applicants, that foreign scientific evidence may also be presented.

Mr Salmon amplified on those grounds in submissions at this hearing.

[6] The applicants oppose joinder. They say:

3.1 EDS does not have a relevant interest in the proceeding, in particular:

(a) EDS did not make submissions in the various consultation processes relating to the Threat Management Plan for Hector's dolphins, which is the subject of this application for review;

(b) EDS has not made submissions in any other consultation processes relating to Hector's dolphins.

3.2 EDS' interests will not be directly, indirectly or potentially impacted by the proceedings.

3.3 The presence of EDS is not necessary to enable the Court to determine the matters at issue in these proceedings.

3.4 The expert witness proposed to be engaged by EDS to provide an independent assessment of the evidence to assist the Court in the event EDS in joined, Associated Professor Stephen Dawson, is not an independent expert and is a well-known advocate for the nationwide prohibition of fishing by the method of set netting.

3.5 The joinder of EDS to the proceeding may materially impact on the Court's timetable, the fixture timing and/or duration.

3.6 The joinder of EDS is not in the interests of justice.

[7] The respondents do not oppose the application, and abide the decision of the Court on it.

[8] It is common ground that power to join EDS as a party exists under both r 4.56 of the High Court Rules and s 10 of the Judicature Amendment Act 1972 (JAA). It is also common ground that the application for joinder may be made by a non party or intervener. *Hallam v Ryan* [1989] 3 PRNZ 132. The ultimate test, under r 4.56, is whether "the person's presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding". The learned authors of McGechan at paragraph HR4.56.10 express the view that "where a jurisdiction exists, the tendency is to exercise in favour of joinder" – *Mainzeal Corporation Ltd v Contractors Bonding Ltd* [1989] 2 PRNZ 47. Under s 10 of the JAA, there is no explicit statement of the principles to be applied and the cases reflect a wide range of potentially relevant factors, arising from the wide range of matters which may be the subject of judicial review.

[9] It is clear from the application that the role which EDS seeks to play in the proceedings involves adducing scientific evidence in relation to the relevant matters. That makes it necessary to consider the extent to which issues on which scientific evidence may potentially be relevant will arise for decision in these proceedings. Judicial review is, as has often been stated, different from an appeal on the merits. The merits of the decision are not generally in issue. The focus of the Court on judicial review is usually on the decision making process rather than on the substantive decision itself. Many of the allegations in the statement of claim appear on their face to suggest that the challenge here may come close to the border line between judicial review and appeal. Mr Scott submits that the terms of s 10 of the Act requiring the Minister to base decisions on the best available information, make relevant a sharper focus on the material on which the decisions were based than might otherwise be the case. I must proceed on this application on the basis that the potentially relevant issues are those raised by the statement of claim. That makes it necessary to consider more closely the extent to which scientific evidence on the underlying issues involved in the Minister's decisions may be relevant.

[10] The allegations of failure to take into account the best available information on various aspects do potentially, on one view of them, suggest that in evidence on those matters, giving information which was not before the Minister, might be sought to be adduced by the applicants. Mr Scott advised that the applicants'

evidence is not yet finalised. Without expressing any view at all to the admissibility of further scientific evidence additional to that before the Minister, I proceed on the basis of that possibility. If there were such evidence, then some testing of that evidence, possibly by adducing other evidence, might be appropriate. If that were the case, then the question is whether the Court is likely to be assisted by allowing EDS to adduce scientific evidence. Mr Taylor, the Executive Director of EDS, says that one of the significant factors that influenced EDS to seek leave to join in this proceeding is that the applicants have directly put in issue whether the Minister used the best available information and that EDS considers that the evidential basic of the applicants' proceedings is scientifically unsound. He says that EDS has access to and knowledge of evidence that will assist the Court to appreciate the best available evidence in policy development in this area and that it has knowledge of the latest leading relevant research and has contact with leading scientists in the area who can provide an independent assessment of the evidence which the applicants argue was relevant to the issue but not considered by the Minister.

[11] The applicants submit that EDS is not neutral on the issues involved, and that any assistance which it provided would be from the stand point of EDS' publicly stated position of support for measures for the protection of dolphins. I do not consider that it is necessary for EDS to demonstrate that the role which it would adopt would be a neutral one. The Court may be assisted by partisan involvement. The adversarial nature of litigation means that the Court is generally assisted to reach a decision by hearing partisan views on all sides of a relevant issue. Accordingly I do not at this stage need to examine whether any evidence adduced by EDS will be independent, as I do not regard independence as a necessary condition of joinder.

[12] That however is not of itself sufficient to justify the joinder of EDS in these proceedings. The question whether the Court will be assisted must be influenced by the extent to which the respondents might be expected to deal with any scientific evidence which the applicants may adduce. The nature of these proceedings is such that the respondents could be expected to take an active part in defending the Minister's decisions. The respondents are not in the position of an independent tribunal which has determined something in the nature of a lis between parties, where the defence of that decision in judicial review proceedings would ordinarily be

left to the parties, with the decision maker taking a neutral stance. Here, the Minister could be expected to mount a defence to any evidential challenge to the information on which his decision was based. The Court is unlikely to be left with a vacuum if EDS is not a party. That weighs against the joinder.

[13] A further relevant consideration is that the decisions here followed a consultation process in which EDS did not participate. Mr Taylor acknowledges that EDS did not make submissions at the consultation stage, but says that EDS' understanding is that at that stage the Minister was presented with solid science and the best available information. The fact that EDS chose not to participate at the consultation stage is, in my view, a consideration which weighs heavily against allowing EDS to become involved at this stage. Other parties did make submissions at the consultation stage, but have not sought involvement in these proceedings. Service on them has not been ordered. It would not be appropriate to allow a party who did not participate in that process to join in these proceedings, without allowing a similar opportunity to those who did participate. It would not be practicable to provide such an opportunity within the existing time frame for these proceedings. Nor would it be appropriate to permit any delay on this account. The interim relief which has been granted requires that these proceedings be heard as soon as possible.

[14] A further relevant consideration in determining whether EDS ought to be allowed to participate is the relief which the applicant seeks. The relief sought is the setting aside of the decisions, and reconsideration. If the applicant were successful in having the decisions set aside, then an order directing reconsideration by the Minister would be inevitable. That means that the underlying issues would again require consideration. So the decision of the Court would not be the last word on whatever underlying scientific issues may arise at the hearing. That factor too, points against allowing participation by EDS at this stage.

[15] The applicants also submit, in very strong terms, that EDS should not be permitted to join in the proceedings, in that the evidence which it proposes to call is not independent. In view of the clear conclusion which I have reached, on the grounds which I have already discussed, that an order joining EDS is not appropriate, it is unnecessary for me to deal in detail with that issue. In the

circumstances, it is better that I do not. I mention only one aspect. It is clear from the submissions before me that, if one witness whom EDS has signalled an intention to call, Dr Dawson, is called, then it could be expected that there would be a considerable focus at the hearing on issues of independence, impartiality, and credibility. The very fact of such a challenge, quite apart from the merits of it, is relevant. This is an application for judicial review which ought, in the usual way, to be dealt with on affidavit evidence, with cross-examination at a minimum. I consider that this would be more difficult to achieve if Dr Dawson were called. Mr Salmon submitted that Dr Dawson is not necessarily a witness who will be called, nor, if he is called, would he necessarily be the only witness. However, the risk of a significant diversion of the focus of these proceedings from the essential issues cannot be excluded. Because I have reached a clear view, for the reasons given, that an order for joinder is not appropriate, I need not consider further the implications of this risk.

[16] For these reasons, EDS' application for joinder is refused.

[17] Costs are reserved. I indicate a preliminary view that both applicants and respondents should have costs, the applicants on a 2B basis, treating EDS' application as an interlocutory application, and the respondent should have costs for appearance but not for preparation. If the parties are unable to resolve costs in the light of this indication, memoranda may be submitted.

"A D MacKenzie J"

Solicitors: Chapman Tripp, Wellington for Applicants
Crown Law Office, Wellington for Respondents
Lee Salmon Long, Auckland for EDS