FMN 047

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 139/88

722

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an application for review of the exercise or purported exercise of a statutory power of decision under Section 107G Fisheries Act 1983

BETWEEN THE NEW ZEALAND FISHING INDUSTRY ASSOCIATION INCORPORATED

Appellant

A N D THE HONOURABLE COLIN MOYLE

First Respondent

AND HER MAJESTY'S ATTORNEY-GENERAL sued on behalf of the Ministry of Agriculture and Fisheries

Second Respondent

AND HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Third Respondent

Coram: Cooke P.
Richardson J.
McMullin J.
Somers J.
Casey J.

Hearing: 27, 28 and 29 September 1988

Counsel: T.J. Castle and B.A. Scott for Appellant
M.T. Parker for Respondents

Judgment: 2 November 1988

JUDGMENT OF COOKE P.

This case concerns the quota management system for

commercial fishing in New Zealand's 200 mile exclusive economic zone. A system limited to certain deepwater species was introduced in 1982 and four years later a more comprehensive system was enacted by the Fisheries Amendment Act 1986. The system is based on individual transferable quotas. There are permanent or 'perpetual' quotas, allocated initially on the primary basis of catch history, and there are also quotas held on one year (or 'annual') leases, made available when fish stocks allow. The system is partly for controlled conservation but a main purpose is to provide efficient economic use of a national resource and to ensure that those authorised to exploit the resource make appropriate payment to the nation. The difference between what is regarded as a reasonable level of commercial profits and the actual and potential profits in fact earnable has been described as super profits or an economic rent. Government policy is to capture some or perhaps all of this difference. The case centres on the way in which that policy has been implemented.

No capital payments are required under the 1986 Act for quotas. The payment to the Crown is by way of resource rentals, payable irrespective of whether or not the quantity of fish to which the quota relates is taken. Schedule 1B to the Act set out the orginal resource rentals for nine named species of deepwater fish, these being deliberately modest at the start of the comprehensive system, and also specified virtually nominal rentals ($3 per tonne for

'domestic' owners) for any other species or class of fish under the individual transferable quota system. Evidently the Ministry considered that it did not have sufficient data to fix more realistic figures for the unnamed species. Schedule 1C prescribed resource rentals for paua, oysters, scallops and rock lobsters, which were not subject to the quota system. All these rentals were subject to alteration by Order in Council. Considerable increases were made by the Fisheries (Resource Rentals Variation) Order 1987 (S.R. 1987/281), to come into force on 1 October 1987. These increases have been calculated to increase the total rentals from about $16.1 million in the year ended September 1987 to a little over $20.1 million in the year recently ended. In substance $4.004 million is the sum in dispute in these proceedings.

The proceedings are brought by the New Zealand Fishing Industry Association, whose members hold between them about 90 per cent of the issued quota. They are judicial review proceedings, challenging the validity of the 1987 Order in Council and the recommendation by the Minister of Fisheries on which it was based. After a hearing on 28 and 29 July, McGechan J. dismissed the plaintiff's applications in a judgment delivered on 11 August. The Association appeals.

The case turns on s.107G(6) and (7) of the Fisheries Act 1983, inserted by the 1986 Amendment Act. It is as well to reproduce the whole of the section.

107G. Variation of resource rentals by Order in Council - (1) Subject to this section, the Governor-General may, by Order in Council made on the recommendation of the Minister -

(a) Vary the resource rentals specified in Schedule 1B or Schedule 1C of this Act:

(b) Specify resource rentals to be payable in respect of any species or class of fish not previously described by name in Schedule 1B of this Act:

(c) Omit any reference to any species or class of fish and resource rental from Schedule 1C to this Act and insert in Schedule 1B to this Act a reference to that species or class of fish and a resource rental that is no more than 20 percent greater than the resource rental that was payable under Schedule 1C to this Act in respect of that species or class of fish, -

and for those purposes the Governor-General may in that manner amend those Schedules or revoke any such Schedule and substitute a new Schedule.

(2) Not more than one Order in Council shall be made pursuant to this section in respect of any fishing year for any species or class of fish.

(3) Every Order in Council made pursuant to this section shall be made before the commencement of the first fishing year to which it relates and shall come into force on the first fishing day of that year.

(4) Except as provided in subsection (5) of this section, the resource rental in respect of any species or class of fish shall not be increased in respect of any fishing year by more than 20 percent of the resource rental for that species or class of fish in respect of the previous fishing year.

(5) Nothing in subsection (4) of this section shall apply in respect of -

(a) Any species or class of fish that is described by name in Schedule 1B of this Act for the first time (notwithstanding that resource rentals may have been payable under that Schedule in respect of that species or class of fish under the category of any other species or class of fish in respect of which resources rentals are not payable under Schedule 1C to this Act):

(b) The resource rentals payable in respect of any fishing year before the fishing year that commences with the 1st day of October 1991 in respect of any species or class of fish not

described by name in Schedule 1B to this Act and not being fish in respect of which resource rentals are payable under Section 1C to this Act:

(c) The resource rentals payable in respect of any fish that are to be taken using a foreign owned New Zealand fishing vessel.

(6) Before making any recommendation under subsection (1) of this section, the Minister shall advise the Fishing Industry Board and such other persons or organisations as the Minister considers appropriate, of the proposed recommendation and the reasons for it, and shall invite the Board and the persons and organisations (if any) to make submissions to the Minister in respect of the recommendation before such date, being not less than 28 days after the date of the Minister's advice as to the proposed recommendation, as the Minister may specify.

(7) In making any recommendation under subsection (1) of this section the Minister shall have regard to -

(a) The value of individual transferable quotas for the species or class of fish:

(b) The net returns and likely net returns to commercial fishermen for fish caught; including any difference in operating costs of foreign owned New Zealand fishing vessels and other New Zealand fishing vessels:

(c) Any relevant changes in total allowable catches.

(d) Any submissions made to the Minister under subsection (6) of this section:

(e) Such other matters as the Minister considers relevant.

The attack mounted for the Association against the validity of the increased rentals was put in this Court on a basis somewhat less wide than before the High Court Judge. In particular, contentions that the Minister had not given prior advice of and the reasons for his proposed recommendation, as required by subs.(6), were not pursued before us. The remaining grounds contain a good deal of overlapping, as is often the case in administrative law and

as Mr Castle for the Association freely acknowledged here. In various ways they amount to claims that the Minister was in breach of his duty to act fairly, reasonably and in accordance with the law. Those of them calling for particular reference must be dealt with later, but first it is appropriate to repeat the truism that in this as in most administrative law cases an understanding of the facts and the substance of the dispute is crucial.

A careful and fairly detailed account of the history in 1987 is contained in the judgment under appeal. It includes some perceptive comments by the Judge. Because of its length (30 pages) it cannot conveniently be reproduced here, and being essentially factual it is probably unsuitable for law reports; but, for the assistance of anyone closely concerned with the facts of this case, I record that, having read it in the light of the argument and the relevant evidence (all on affidavit or in documents and correspondence), I have not detected any error in it and would gladly adopt it. For the purpose of the present judgment, however, a briefer selection of the main facts is enough.

The Basic History

Under the legislation, any increase in rentals to operate for the fishing year beginning on 1 October 1987 had to be made before that date. In the early months of 1987 both the Ministry and the industry were giving consideration

to the issue. Industry views and action were co-ordinated mainly by the Resource Rental Advisory Committee, comprised of representatives of various organisations within the industry (including the plaintiff) and established by the Fishing Industry Board. A memorandum entitled Fish Resources Rentals: The Fishing Industry Position was issued by the Board on 21 April 1987. It proposed that rentals be related to profitability beyond a base level expressed as a standard percentage of species at port price value. It said that the industry had an expectation of a return on gross assets employed, at current book value, of 40 per cent before tax. It rejected an approach based on traded quota prices, giving reasons against that approach, including 'the prices paid to buy quota will reflect a degree of position taking, grabbing a stake or speculation and cannot be used as a basis to assess average industry profitability'. The paper thus indicates awareness that the traded quota prices approach, which ultimately was to form the basis of the order now under attack, was an unwelcome prospect facing the industry. So the battle lines were in effect drawn by April.

As early as 16 March 1987 the Treasury had proposed to the Minister of Finance that rentals for the principal deepwater species, orange roughy, hoki and squid, be raised in order to 'appropriate the full economic surplus created by the quota. This would raise approximately $70 million per annum in increased resource rentals'. That

recommendation was said to be based on the price for which quotas were being traded, with particular reference to one year quota.

In April or early May 1987 the Ministry submitted a paper to the Minister reviewing the legal and factual background and the arguments about different approaches. It included the following paragraph:

> The data available from trading in quota clearly indicate at this time that there are considerable excess profits being made in the industry and that it would not be possible to keep resource rentals at their current levels without causing capitalisation of quota . It is interesting to note that the bulk of the trades are from 'small' operators to the 'larger' operators, the latter clearly being here for the long haul and being involved in an exercise of positioning themselves for the industry of the future.

While recognising that there was little industry experience in trading to date and that therefore the traded prices must be viewed with caution, the Ministry recommended that resource rental for deepwater species be set at 50 per cent of assessed trading price. The Ministry acknowledged that the result was 'an arbitrary figure' and mentioned that for three reasons (bycatch requirements; desire to improve share of market or obtain a position in relation to a particular fishery) traded prices in many cases were higher than the actual value of the quota. They thought that the 50 per cent could apply in principle to inshore species also: but, because the Minister had indicated concern about increasing rentals so soon after the introduction of quotas

'which in itself involved in many cases the reduction of individual catches', the Ministry proposed 20 per cent of traded price for them. Recommendations for rock lobsters and shellfish were said to be based directly on information about net returns and cost of catch, there being no trading figures available as there was no quota. It was also recognised that, because of the 20 per cent limitation in s.107G(4) on increases in rentals for species already specifically named in schedule 1B, legislation might be required.

Annexed to the paper to the Minister were tables including average tender prices for one year rentals of the various species, information as to trading prices of 'perpetual' quotas, and the Ministry's assessment of trading price per tonne. These tables were not sent to the industry, but under cover of a letter signed by the Minister dated 15 May 1987 there was sent to the Board for consideration by the industry a paper representing a somewhat revised version of the Ministry's paper to the Minister and setting out the Minister's proposed recommendations for resource rentals for the 1987/88 year. The reasoning in the paper thus sent by the Minister to the industry was largely verbatim with that of the paper submitted to the Minister by the Ministry, but there was at least one significant change: whereas the 50 per cent figure was retained for deepwater species, 10 per cent of traded price was adopted instead of 20 per cent for inshore

finfish species. Other variations in detail do not seem to me really important for present purposes. The reason for the change to 10 per cent is not given explicitly in any of the evidence. The paper sent to the industry also recognised that amendments to the Act would be necessary, not merely an Order in Council under the Act, to give effect to the Minister's proposals.

The reaction of the industry to the proposed sharp increases was consternation and uproar. There was some talk of civil disobedience. Among other responses a paper dated 9 June 1987, incorporating a commissioned report called the BERL report, was prepared by the Board on behalf of the industry; it was delivered to the Minister on 10 or 11 June 1987. There is evidence that a draft of this paper, dated 3 June 1987, was available to the Ministry before the paper was formally delivered to the Minister: it will be necessary to return to this point. The paper described itself as 'Response by the Fishing Industry under Section 107G(7)(d) of the Fisheries Amendment Act 1986 to the recommendations presented by the Minister of Fisheries, Hon. Colin Moyle, for resource rentals for 1987/88'. It contained forceful arguments against the use of trading or tendering prices as a reliable basis for assessing industry profitability at that stage of the quota system. Annexed to it were several tables. These included extensive particulars of trades and prices and the results of a survey of nine major companies which were said together to account

for 80 per cent of the production of finfish and squid: it was claimed that these showed that the industry's current profitability gave a return on assets at book value of 31.3 per cent before taking into account resource rentals, interest and taxation. The net return after tax but before inflation and interest was put at 8.8 per cent. Many other figures were given.

The Minister met or received representatives of the industry on at least three occasions when they had and took advantage of opportunities of presenting their views on the 50 per cent proposal and the associated proposals, namely on 19 May, 28 May and 11 June 1987. During this period Dr R.L. Allen, deputy group director of the Ministry, wrote a long letter dated 3 June to Mr R. Armitage, assistant general manager of the Board, in response to the industry paper. Mr Allen's letter included the following passage to which I attach some importance, particularly because of the sentence now underlined:

> THE WAY TO MEASURE R/R's - CONSIDERATIONS OF LAW
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> Under "Mechanism Options" [in the industry paper] no reference is made to the requirements of the Fisheries Act 1983 to consider the trading price of quota in the determination of the resource rentals. The Act further requires that the "net returns" of the industry, presumably their normal profitability be taken into account. This was added due to the industry concerns of the use of trading prices alone. Using the trading information correctly, we can obtain the so-called surplus or super profits over and above the normal profitability or appropriate net returns. It is clear from the heavy discounting of

the information that we were also aware of the risks of using it alone and in absolute terms to determine the appropriate increases required to resource rentals.

At the meeting on 10 June 1987 the Minister revealed to the industry representatives that it had been decided not to amend the Act so soon after its passing and that instead he would be proposing increases of 20 per cent (the maximim permissible) in the rentals for deepwater species and shellfish, with no significant change to the proposals for other rentals. In fact he had proposed this in a memorandum for Cabinet apparently prepared on 8 or 9 June; it is an important document and will be quoted in full later. This 'backdown' was greeted with such relief by the industry at the time that the Minister and the Ministry believed that the revised proposals had been agreed to. But when Parliamentary Counsel was instructed to draft the Order in Council he raised the question whether the advice of the proposed recommendation that had been given to the Board in May would pass muster under s.107G(6), as it had included notification of a proposal to amend the Act itself rather than merely a proposal for an Order in Council within the constraints of the existing Act. In view of this doubt Dr Allen, on behalf of the Minister, wrote to the Board on 14 August 1987 formally notifying the proposed new Schedules and the reasons and giving 28 days for a response. It is unnecessary to go into details of the response evoked beyond noting that the industry placed particular weight on a fall

that had occurred in orange roughy export prices and the rise in the New Zealand dollar. Association representatives met the Minister again on 9 September, stressing these developments. The Order in Council was made without any noteworthy change from the proposed recommendations formally notified in August.

Finally it must be noted that after the Order in Council two studies were carried out. One was by the Department of Statistics, as an aid to the industry in preparing submissions on 1988/89 rentals; it assessed an average return for the combined catching and processing sector of the industry in the year ended September 1988 of 3.3 per cent on assets at market value; but this was based on information obtained from fish processors and relating to part of the previous year only. The other, prepared by Jarden & Co. Limited, suggested an appropriate normal profit for the industry of 19.2 per cent. The 3.3 per cent is disputed by the Ministry: a deponent, Mr P.J. Major, calculates a return on assets at market value of 14.3 per cent, if interest is excluded. Nevertheless the Judge said, with justification, that it might well be that in the light of actual experience profitability had been lower than expected by the Minister and the Ministry. These studies are ex post facto, but counsel for the Association relies on them as showing that if the Ministry had made adequate investigation they would have discovered before the Order in

Council that conceptions of current profits based on quota trading prices were fallacious.

The Grounds of Challenge to Validity

As background it is convenient to say at the outset that in his judgment McGechan J. made four general points about s.107G with which I entirely agree and adopt in his own language:

> 1. Section 107G does not in terms direct "consultation". The word does occur elsewhere in the Fisheries Act 1983, for example in ss.6, 8(5) and 10A(1). The procedural directions given by s.107G(6) are very specific. The Minister "shall advise" the persons concerned "of the proposed recommendation and the reasons for it" and "shall invite" those persons "to make submissions" within not less than 28 days. Under s.107G(7) the Minister "shall have regard" to such submissions. The difference is more than one of semantics. A "consultation", as recognised elsewhere in the Act, may involve one action of enquiry and one of response, but just as easily can involve an ongoing dialogue over a protracted period. I refer to the remarks of Morris J. in Fletcher v. Ministry of Town and Country Planning [1974] 2 All E.R. 497, 500:
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> > "Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one."
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> I have little doubt that s.107G(6) was drawn specifically to avoid that risk. The Minister was tied into a scheme which involved only one variation per fishing year, necessarily before 1 October. He was not to be forced past this deadline by some never-ending "consultation", perhaps deliberately protracted. There would be one notification and one finite opportunity to answer: no more. That scheme does not necessarily entitle the Minister to ignore relevant considerations coming to his attention subsequently, under general principles of administrative law, but compliance is sufficient to meet the statutory procedural requirements.

2. Section 107G requires the Minister to formulate "proposed recommendations" before even approaching the industry. Obviously, the legislation expects the Minister to have reached provisional views of his own which could be for promulgation in an Order in Council. He is not expected to approach the industry with an entirely open mind. Indeed, his anticipated state of mind seems to be more one approaching a prima facie case. This feature should not be taken too far. A considered predilection is not to become predetermination. He is directed by s.107G(7) to "have regard" to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is "have regard to" not "give effect to". They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.

3. Section 107G(7) in its direction that the Minister "have regard" to five stated criteria does not direct that any one or more be given greater weight than others. In particular it does not direct that (a) value of ITQ is to have greater or lesser regard paid than (b) net returns and likely net returns. Weight, in the end and provided he observes recognised principles of administrative law, is for the Minister.

4. Section 107G(7) in referring specifically and separately to (a) value of ITQ and (b) net returns and likely net returns to commercial fishermen for fish caught, appears to recognise the possibility for the purpose of s.107G resource rental determination that these two factors <u>can</u> differ. Whatever wider economic theory may say, the statutory distinction clearly implies a view that the one is not necessarily a function of the other or merely two sides of a coin. The statement of both would otherwise be pointless. It would not surprise me if the enactment of both represents a legislative bypassing of an unresolved economic/accounting argument.

The basic principles of administrative law to be brought to bear on this case are in my opinion sufficiently settled to require little or no elaboration. Counsel recognised this in their oral arguments, consuming hardly

any time by citation of authorities. The Minister was bound to act in accordance with law, fairly and reasonably. The threefold duty merges rather than being discrete; as already indicated, the appellant Association relies on all three heads.

I do not wish to add to or repeat the general observations and references to authorities that I have made in such cases as Daganayasi v. Minister of Immigration [1980] 2 N.Z.L.R. 130, Bulk Gas Users Group v. Attorney-General [1983] N.Z.L.R. 129, and Webster v. Auckland Harbour Board [1987] 2 N.Z.L.R. 129. Mistake of fact is among the heads of attack invoked by the plaintiff here. I accept that the relevant considerations which the Minister was bound to take into account included such facts obviously material to the mandatory statutory considerations as were or ought to have been known to himself or the Ministry. That is to say, the duty to consider statutory criteria extends to facts so plainly relevant to those criteria that Parliament would have intended them to be taken into account and a reasonable Minister would not fail to do so. See CREEDNZ Inc. v. Governor-General [1981] 1 N.Z.L.R. 172, 183-3; Ashby v. Minister of Immigration [1981] 1 N.Z.L.R. 222, 225-6. Of course Mr Parker for the respondents is clearly right in his submission, based on Scarman L.J.'s observations in Secretary of State for Education v. Tameside Borough Council [1977] A.C. 1014, 1030, that to jeopardise validity on the ground of mistake

of fact the fact must be an established one or an established and recognised opinion; and that it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may reasonably be held. See also Fowler & Roderique Ltd v. Attorney-General [1987] 2 N.Z.L.R. 56, 77 per Casey J.

With that introduction one can turn more specifically to the contentions for the appellant. They include contentions that the Minister predetermined the issue before the formal notification of the revised proposals in August and at that stage merely went through the motions of inviting and considering submissions from the Board or industry representatives; and that he had failed to have regard to all the considerations prescribed by s.107G(7). There is no doubt about two points. First, the scheme of the section is such that the Minister, being entitled to form a policy and being required to notify his proposed recommendation before finalising it, cannot be expected to act with judicial impartiality: compare CREEDNZ at 178-80, 191-6, 211-4. Secondly, before finally recommending an Order in Council he must nevertheless give genuine and not merely token or (I accept) superficial regard to all the mandatory considerations, including the submissions received.

I have no doubt that in the May-September period the Minister must have given serious and repeated consideration

to the general thrust of the submissions and representations made by the industry - which was that trading prices were an unreliable basis for assessing true profitability. Given the criticism and pressure directed at him and his Ministry, he could hardly have failed to do so. Seeing insufficient reason to conclude that he had irrevocably closed his mind by August, I do not find it necessary to decide whether or not formal notification in that month of his proposal as revised was legally essential. Whether or not it was essential, it was done, and I am satisfied that the industry had ample opportunity to put forward views and factual material and that there was no procedural unfairness or disqualifying predetermination.

Equally clearly, in my opinion, the Minister's final recommendation was reasonable. As to this head it is elementary law that the question is not whether the Court thinks that this view was right or wrong, but whether it was one which a reasonable Minister could take. The statute required him to have regard to all the overlapping matters listed as (a) to (e), but their weight inter se was for him to decide, within the limits of reason. Subject only to that necessary qualification, it is has been said again and again that policy is for the Minister, not the Courts.

The policy that profiteering from a national resource should be prevented, and that in fixing rentals dominant weight should be given to quota trading prices, was one that

the Minister could reasonably adopt. It is true that this might bear hardly on some looking to fishing for their livelihood. Some smaller operators might be forced to sell out. The draft of a paper prepared by Mr Clark and Mr Major of the Ministry for a Workshop at Reykjavik, Iceland, in mid 1988, which was put in evidence, includes two frank recognitions: '... as quota concentrates in fewer hands with the expected restructuring that is, and will continue to be brought about by the QMS, the surveillance and monitoring of the bulk of quota will be easier...' Despite suggestions by counsel for the Association to the contrary, I can see nothing in the Act ruling out such a policy. The question for a Judge is not whether he agrees with it, but whether it is a policy open to the Minister and the Government. In a world of competing theories about economics and the use of national resources, it is not possible to answer that question in the negative.

Net Returns

But there remains what emerged at the hearing in this Court as the point on which this case must turn. While subs.(7) in para.(a) specifically requires the Minister to have regard to the value of individual transferable quotas, para.(b) specifically requires him to have regard also to the net returns and likely net returns to commercial fishermen for fish caught. No doubt, as suggested in Dr Allen's letter of 3 June 1987, para.(b) was included in the

legislation as an assurance to the industry that trading prices alone would not be the criterion. One readily infers as much as a matter of interpretation. In the light of the constant reliance on quota trading prices and the absence from the Minister's and the Ministry's correspondence with the industry and the affidavits of any clear statement or evidence that the Minister had considered net returns as a separate subject, the Association urges strongly that the true inference is that the Minister did not comply with (b).

The onus is on the Association, as the party attacking the validity of the Order in Council, to establish this as a matter of fact; but when the documentary evidence raises a real doubt on the matter very slight evidence may be sufficient to discharge the burden of proof where the facts lie peculiarly within the knowledge of the Minister: Reid v. Rowley [1977] 2 N.Z.L.R. 472, 478.

This ground of challenge illustrates how the heads of invalidity may overlap in administrative law. If there was a failure to have regard to the matters specified in (b), the recommendation would not be in accordance with law and would be vitiated by not taking into account relevant considerations. In view of the obvious importance of net returns, it would also be unreasonable and unfair.

The Court does not have the advantage of an affidavit from the Minister. There is an affidavit by Dr Allen, sworn on 25 July 1988, which includes some claims as to what was

the Minister's view and what he took into account. This kind of opinion or hearsay evidence of what was in the mind of someone else is inadmissible, as pointed out in Fiordland Venison Ltd v. Minister of Agriculture and Fisheries [1978] 2 N.Z.L.R. 341, 345. The draftsman of the affidavit seems to have ignored or overlooked that judgment, although in its general nature that case bears quite a close resemblance to the present one and concerned the same Government Department. The very inclusion of these statements in the affidavit suggests a sense that the Court should be informed of the Minister's thinking. It seems desirable to repeat what was said in Fiordland Venison at 346: '... administrative law is not a formal or technical field, but one in which it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review'. At the same time it has to be noted that even Dr Allen's affidavit stops short of claiming that the Minister gave separate consideration to actual net returns.

In his judgment McGechan J. made the following comments, which again I adopt (subject to one qualification), about the absence of an affidavit from the Minister:

> As seems to have become customary, the Minister himself made no affidavit. Evidence was left to MAF officers. The Minister is entitled to take that

> approach, but it can leave the Court in a position of doubt on matters on which the Minister is best placed to speak. In that situation where possible inferences must be drawn ... they may well be adverse to the Minister.
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> ...
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> There is also room for inference against a Minister who does not trouble or care himself to make an affidavit assisting the Court with his personal recollections. In the end, however, the plaintiff bears an onus to show on the balance of probabilities that the Minister had no regard, i.e. gave no attention and thought to the RRC's and the plaintiff's various submissions.

The last proposition applies of course to the matters specified in (b) as well as to the industry's submissions on those matters; some of the latter fall for specific regard under (d).

The qualification mentioned above is that I am not aware that it has become customary for a Minister to make no affidavit. If a tendency in that direction were to develop, it would be regrettable. Ashby is an example of a case where a frank and helpful affidavit was made. So too in Fowler & Roderique the Minister of Fisheries made an affidavit and the Court obtained some help from it, as appears from the judgment of Somers J. at 71 and 73.

One can understand that a Minister may be reluctant to expose himself to cross-examination, but cross-examination is not permitted as of right in judicial review proceedings, and in my opinion the Court should not allow a Minister to be cross-examined in such proceedings

unless this is clearly necessary to enable the case to be disposed of fairly. Compare Goodman Fielder Ltd v. Commerce Commission [1987] 2 N.Z.L.R. 10, 20. Another course open to the Court is simply to decline to allow a Minister's affidavit to be read if he is not willing to be cross-examined. Ultimately the choice is the Minister's. No one can force him to give evidence. But of course our system of government involves the rule of law. When a Minister's handling of a particular matter has naturally given rise to serious doubts about whether he has had regard to the obligations placed on him by Parliament, refraining from being prepared to justify himself in court can serve to strengthen misgivings, as well as rendering the Court's task more difficult. As this case should demonstrate yet again, the Courts recognise that they should not trespass into the legitimate policy sphere of Ministers. The constitutional corollary should be Ministerial candour with the Courts about their policy. This does not seem too much to ask.

Bearing in mind all those considerations, any incipient custom such as the Judge mentions would not be justified.

When asked during the argument what information about net returns was considered by the Minister before his Cabinet paper of 8 or 9 June 1987, counsel for the respondents referred to a draft of the industry paper delivered to the Minister on 10 or 11 June, which draft is

said in Dr Allen's affidavit to have been 'available' before 11 June and bears a note that it was prepared by the Board and the date 3 June 1987. But Dr Allen does not actually say that the draft was placed before the Minister; I agree with Mr Castle that the limited wording of the affidavit would appear to be deliberate and cannot be overlooked. It may well be that the tenor of the draft paper was conveyed to the Minister by officials; the Cabinet paper is at least consistent with this. Still, there is no claim in any affidavit or other document that the Ministry had attempted any analysis of the fairly extensive survey figures in the tables annexed to the industry paper. There would hardly have been time to do so thoroughly in the days between 3 and 9 June, which included a weekend. If any consideration was given by the Minister or Ministry to those tables before the Cabinet paper, the proper inference seems to me to be that it can have been no more than cursory or superficial, not enough in itself to amount to genuine compliance with s.107G(7)(b).

The industry's point based on (b) is a formidable one, but on balance I think that it is just defeated by a fair reading of the Minister's Cabinet paper, in its context and on the true interpretation of the Act. The paper was one of a number for which public interest immunity was originally claimed in this case, but ultimately - and wisely, if I may say so - it was produced for the inspection of the plaintiff and put in evidence. It

provides the best evidence available to the Court of the Minister's state of mind and should be set out in full:

Office of the Minister of Fisheries

MEMORANDUM FOR CABINET

FISHERIES RESOURCE RENTALS 1987/88

Background

1. The Cabinet Committee P87/M15/2 (Budget) of 5 May 1987 approved a proposal for increases in resource rentals based on assessments largely of the traded price of ITQ. This assessment was set for the deepwater species at approximately 50% of the assessed traded price and at 2% for the inshore species. The effect of this proposed increase was assessed at approximately $31.9m but required amendments to the Schedules of the Fisheries Act 1983 to overcome the restrictions in the Act which limited some increases (principally the deepwater species and shellfish) to 20% in any one year.

2. I have put this proposition to the fishing industry and explained the basis upon which the increases were set, namely that the Government was taking a percentage of the "super profits" made by the fishing industry from its privileged access to the commercial fishery by ownership of ITQ. I argued that it was appropriate that the Crown took this excess profit, that the traded price of quota was a proper economic tool to use in assessing such profits and that sufficient discounts had been made to traded prices to allow for justifiable qualification.

3. The industry response is understandably vociferously opposed to the proposition. It has countered with propositions that have sought to demonstrate that industry profitability is not as good as would be shown by the discounted traded prices of quota and that with such proposed increases investment would be curtailed at a time when the industry is adjusting to the new ITQ scheme and is in a rapidly expansion phase.

4. I have assessed the industry response and the implications of seeking to amend the Fisheries Act less than a year after the limits on resource rental

increases were put in place and consider now that whilst it may be economically appropriate to make the increases proposed it would be contrary to good Government to so quickly overturn the legislative provisions.

Proposal

5. I propose therefore, by Order in Council, as is provided for in the Fisheries Act that deepwater and shellfish resource rentals be increased by the maximum allowed in the Act of 20% instead of the higher amounts proposed and that the rates for the inshore species be increased by the amounts already proposed. The latter are modest and generally accepted by the industry.

6. The effect of this changed proposal will be to reduce increased revenue projected at $31.9m down to a projected increase of $3.66m.

7. In addition, however, I propose that it be made quite clear to the industry that resource rentals will be increased year by year within the current legislative provisions until such time as the rentals fully capture the "super profits". This should provide adequate warning to the industry of the need to avoid capitalising the "super profits" into quota trading prices.

Recommendation

8. I recommend that Cabinet:

(a) recind the proposals agreed to by the Cabinet Policy Committee on 5 May;

(b) agree that I bring to Cabinet a proposition to be embodied by Order in Council to increase deepwater species and shellfish by the maximum 20% increase allowed in the Act and for the inshore species to the limits already proposed by the fishing industry.

(c) agree that the Government's intentions to capture fully the "super profits" over time and within current legislative provisions be made clear to the industry.

Minister of Fisheries

The paper does not speak of net returns but of profitability and super profits, which could be understood to include capital profits, but considering in particular paragraphs 2 and 3 I take the Minister to be saying or implying that, to arrive at current profits or net returns, discounts of traded quota prices are justifiable. Presumably factors such as the motives of some buyers of strengthening a foothold in the industry were in mind. At any rate I am not prepared to assume that they were overlooked. Further I take the Minister to be conveying that if the discounts are 'sufficient' the result will be more reliable than any operating figures which the industry had proffered or might proffer, and to be rejecting the industry's 'propositions' accordingly.

The figures in the tables scheduled to the industry paper, which counsel for the respondents did not seek to dispute in this respect during his argument in this Court, show that between December 1986 and April 1987 the volume of trades in proportion to issued quotas were only 0.50 per cent in the case of annual leases (1.21 per cent for all species except hoki) and 4 per cent in the case of 'perpetual' trades (9.42 per cent for all species except hoki). These figures were said to have been taken from Ministry quota trading records. The percentages are so small that they surely had to be viewed as a rather suspect guide. The fact is, however, that the increased rental after the Minister had reduced the increase to the maximum

permitted 20 per cent for named deepwater species was only a minor or small proportion of the annual trading price arrived by the Ministry. For instance, the Ministry had assessed an annual trading price (or value) for orange roughy quota at $570 per tonne, whereas the rental prescribed in the September Order in Council for 'domestic' owners was $120 per tonne. For most of the other species, whether or not subject to the 20 per cent maximum increase, the increased rental was an even smaller proportion of such assessment of the annual trading price as the Ministry had been able to make.

Moreover all the figures fall to be seen in the context that the estimated total value of the catch from the exclusive economic zone, in terms of port price, was $442.7 million in the year 1986-87. A total rental of $20.1 million for 1987-88 seems far from unexpectedly large in such a context. Another obvious factor is that different accounting approaches lead to different percentages when trying to arrive at net returns. In that sense accounting is creative, a point of which the Minister was undoubtedly well aware and illustrated by the conflict in the affidavits about the ex post facto 3.3 per cent.

Section 107G(7) clearly requires the Minister to have regard specifically to net returns, as well as to the value of quotas and the other prescribed criteria. But the legislation does not limit the means by which the Minister

may arrive at an opinion about the level of net returns, nor does it require him to undertake a survey such as might be carried out by a commission or committee of inquiry. I construe it as leaving him free to use any reasonable method of assessing approximate net returns. Once more the question becomes what a reasonable Minister might do. Some would say that his approach was cavalier but, bearing in mind the figures and factors already mentioned, I do not say on balance that the Minister went beyond reasonable bounds.

Mr Castle's submission that such an approach is unduly generous to the Minister certainly causes one to pause; but on reflection I reach the conclusion just expressed. The Minister is entitled to have particular weight attached to the fact that in adhering to the 20 per cent limitation, rather than promoting amending legislation, he modified his original proposals quite dramatically - for which the industry's immediate response was gratitude. Perhaps the imminence of a general election played a part. But in the end I think that the Minister erred on the side of caution and was probably satisfied that the recommended increases were justifiable in the light of probable net returns. By a narrow margin I conclude that this analysis of his presumed approach passes beyond mere speculation and is more probably right than the suggestion that, pursuing an economic theory of the conclusiveness of even sporadic trading quota prices, he gave no real regard to current net

returns. Only to a heavily discounted extent did he treat quota trading prices as a guide to current net returns. Apparently he recognised that the two were by no means automatically opposite sides of the same coin.

That conclusion negates both the argument for the industry that the Minister did not have genuine regard to the matters prescribed in s.107G(7)(b) and the related argument of mistake of fact. In principle I have already accepted the approach of counsel for the respondents to the ground of error of fact. Applying the principle here, I think that there are too many inconclusive and arguable matters affecting all the figures put forward for the industry, both before and after the Order in Council, to make it safe to find that the Minister acted on a material mistake of fact.

McGechan J. ended his judgment by standing back and looking at the whole case from the perspective of unreasonableness and unfairness. From that perspective he thought that the situation was not one crying out for judicial intervention. I agree with that final approach and that result.

The Court being unanimous the appeal is dismissed, with $5000 costs to the respondents.

R B Cooke P.

Solicitors:
Perry Castle, Wellington, for Appellant
Crown Law Office, Wellington, for Respondents

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 139/88

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an application for review of the exercise or purported exercise of a statutory power (of decision) under Section 107G Fisheries Act 1983

BETWEEN THE NEW ZEALAND FISHING INDUSTRY ASSOCIATION INCORPORATED

Appellant

AND THE HONOURABLE COLIN MOYLE

First Respondent

AND HER MAJESTY'S ATTORNEY-GENERAL sued on behalf of the Ministry of Agriculture & Fisheries

Second Respondent

AND HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Third Respondent

Coram: Cooke P
Richardson J
McMullin J
Somers J
Casey J

Hearing: 27, 28, and 29 September 1988

Counsel: T.J. Castle and B.A. Scott for Appellant
M.T. Parker for First, Second and Third Respondents

Judgment: 2 November 1988

JUDGMENT OF RICHARDSON J

This appeal is against the dismissal by McGechan J of an application for judicial review of the exercise by the Minister of Fisheries of his statutory powers under s.107G of the Fisheries Act 1983 in relation to the making of the Fisheries (Resource Rentals Variation) Order 1987.

It is well settled that the jurisdiction to grant declaratory relief may be invoked when the person to whom a statutory power of decision is entrusted fails to act in the exercise of the power in conformity with the proper legal standards. The Court exercises a review not an appeal function. The concern is with the process of decision making. It is not part of the Court's function to consider what decision should have been made. The outcome of the exercise of the statutory power is material only if it leads to the conclusion that the power itself has been misused, that the process has failed. I mention this obvious limitation on the jurisdiction of the Courts only as a reminder that the voluminous material in this and other such cases bearing on the pros and cons of particular decisions is properly directed only to the consideration of the process of decision making.

Issues on Appeal

The points of appeal advanced 6 grounds in support of the appeal. They were -

1. The Minister acted in breach of the 'consultation' requirements of S.107G(6).

2. The Minister failed to consider and/or have proper regard to the matters contained in S.107G(7).

3. The Minister predetermined prior to consultation the recommendations he proposed to make to the Governor-General in Council.

4. The Minister did not act reasonably in coming to and making his proposed recommendation under S.107G(6).

5 When making his recommendation under S.107G(6) the Minister was labouring under a mistake of fact.

6. Alternatively the Minister erred in law in accepting or assuming that the value of individual transferable quotas and net profitability were 'two sides of the same coin'.

The sixth was not pursued in argument and I propose to consider the submissions that were made under two broad heads: first, failure to consult and predetermination; and, second, limitations in the factual material considered by the Minister in the exercise of statutory powers.

Failure to consult: the legal test here

Although referred to loosely in argument as a failure to consult, the statutory requirement is not expressed in the language of consultation and it was not suggested that the Minister was obliged to do more than the statute expressly required. That obligation arises under s.107G. Subsection (1) of that section provides for the specification and variation of resource rentals by the Governor-General in Council on recommendation of the Minister, and ss.(6) and (7) go on to provide -

(6) Before making any recommendation under subsection (1) of this section, the Minister shall advise the Fishing Industry Board and such other persons or organisations as the Minister considers appropriate, of the proposed recommendation and the reasons for it, and shall invite the Board and the persons and organisations (if any) to make submissions to the Minister in respect of the recommendation before such date, being not less than 28 days after the date of the Minister's advice as to the proposed recommendation, as the Minister may specify.

(7) In making any recommendation under subsection (1) of this section the Minister shall have regard to -

(a) The value of individual transferable quotas for the species or class of fish:

(b) The net returns and likely net returns to commercial fishermen for fish caught; including any difference in operating costs of foreign owned New Zealand fishing vessels and other New Zealand fishing vessels:

(c) Any relevant changes in total allowable catches:

(d) Any submissions made to the Minister under subsection (6) of this section:

(e) Such other matters as the Minister considers relevant.

The requirement is thus that the Minister 'advise' the Fishing Industry Board and others the Minister considers appropriate of the proposed recommendation and the reasons for it, 'invite' submissions in respect of the recommendation and 'have regard to' any submissions so made. It does not require the Minister to arrive at the recommendation to the Governor-General in Council in consultation with the Board or any one in the industry, or that the Minister meet with anyone in the industry. The Minister simply has to consider and weigh any such submissions in the balance along with other factors referred to in ss. (7) in deciding what recommendation to make under ss.(1).

Predetermination: the legal test here

Mr Castle's basic submission on this branch of the case was that by the time, in August 1987, when the Minister through the Ministry invited submissions and then in early September when the Minister had discussions with the industry representatives, he had already decided on his recommendation.

To consider that submission in context it is necessary to determine what constitutes impermissible predetermination on the part of the Minister when inviting and having regard to submissions and generally in reaching a decision under ss. (7).

It is obvious from the scheme of the section that the Minister must have formed some views before he approaches the Board and others in the industry. He has to have proceeded sufficiently in his thinking to have arrived at a proposed recommendation which he announces to the industry along with the reasons for it. It is not expected under the statutory scheme that the Minister will come to the submissions with a blank mind uninfluenced by his previous consideration of the matters involved. The submission process gives interested parties an opportunity to comment on his proposals and the Minister must genuinely apply his mind to their comments. In Creednz Inc v Governor-General [1981] 1 NZLR 172 where a similar question arose, I concluded at p.194 that -

> Before the decision can be set aside on the grounds of disqualifying bias it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions.

Consultation and predetermination: the factual position

On the material before us I am not persuaded that the Minister either failed to consult in the sense of having regard to the submissions or, what is really putting the same point another way, that he was not open to persuasion and simply went through the motions.

The initial proposal of the Minister was sent by the Minister to the Fishing Industry Board on 15 May 1987. The Board, constituted under the Fishing Industry Board Act 1963, has wide functions and powers including promoting the fishing industry in New Zealand and coordination within the industry; and, materially for present purposes, reporting to the Minister on movements in costs or prices or other factors likely to prejudice the economic stability of the industry (s.10). Its membership is representative of the various sectors of the industry (s.3) and for obvious liaison purposes includes the Director-General of Agriculture and Fisheries or his nominee. Having regard to its membership and statutory functions it is understandable why s.107G should provide for the Minister's proposed recommendation to go to the Board and why the Minister in his letter of 15 May noted his understanding that the Board's Resource Rentals Committee

would act as the forum for discussion of resource rentals proposals and that this was acceptable to other industry organisations.

The accompanying paper for industry consultation canvassed various questions at some length and recommended substantial increases in resource rentals. For most species the new rentals could have been fixed under existing legislation by Order in Council but, for those species such as orange roughy and hoki where there was a 20% ceiling on increases, the proposals would have required amendment to the statute itself.

The industry responded immediately, publicly and critically to the proposals and representatives met with the Minister on 19 May when he explained the reasoning behind his recommendations. The appellant Association's own record of that turbulent meeting noted that the overall effect of the proposals was to raise resource rentals to the order of $60m with increases for in-shore species being based on 10% of the quota traded prices and for deep water species 50% of those prices with paua and lobster providing the exception. The industry had obviously studied the proposals with some care and it was recorded that Mr Barratt, who later gave evidence for the Association, said that the increases would have the effect of reducing the industry's net return on investment from its (then) present 13% to 6.5%. According to the Association's record the Minister responded to earlier criticism of the proposal by emphasising that it was

a consultation/negotiation and therefore the recommendations were not set in concrete. He also said that he would accept information from the industry which might show that the additional rentals proposed would total more than the extra $32m to $35m his advisers had estimated.

Following the meeting the industry mounted a press and public relations campaign and at the same time there were extensive discussions both within the Resource Rentals Committee of the Board (of which the Director-General's nominee was a member) and more widely within the industry and the Ministry. Representatives of the Association met again with the Minister on 28 May. A substantial draft response to the Minister's proposals was available by 3 June and in final form dated 9 June it was submitted to the Minister on 10 June ahead of a meeting between the Minister and the industry scheduled for 11 June. However, by 8 June he had decided to modify the proposal in the light of the substantial criticisms that had been made and were likely to continue in the lead up to the general election and he presented a paper to Cabinet on that date.

For present purposes it is sufficient to note the Minister's modification of the earlier proposal. It was that the rentals for the specified species should be fixed at the 20% increase level allowable without amending the legislation. With some minor modifications agreed by the Minister it was the June amendment to the May proposals that was reflected in the Order in Council ultimately made on

21 September 1987 and in the result the actual increase in resource rentals for the new year was estimated at $4m. An industry delegation met with the Minister again on 11 June. In the course of the report to its members later that day on what was clearly regarded as a highly satisfactory result the Association noted that thanks were due to the Minister and his staff for the manner in which the consultations had been conducted and that this, combined with the outcome, restored faith in the consultative mechanism.

However, between June and September there was a further development on which the Association relies. It seems that when asked to approve the Order in Council Parliamentary Counsel queried whether the May-June round satisfied the requirements of s.107G since the Minister's initial proposal contemplated legislation and was not simply in terms of the existing legislation. That led to a letter of 14 August by the Ministry on behalf of the Minister advising the Board formally of the Minister's proposed recommendation by way of variations to resource rentals by Order in Council and inviting an early response. Schedules containing the proposed resource rentals were attached and it was added that reasons for increased rentals had been given above. That reference was to the earlier mention in the letter of the consultation process and the ensuing modification of the original proposal. While the letter of 14 August did not go into the detail of the earlier paper of 15 May and the exchanges which ensued, the Board and the Association must have understood from the letter of 14 August what were

the reasons for the proposed recommendation. And the final paragraph of the letter was a clear invitation to make submissions even though it was recognised, in view of the previous exchanges, that there would be little more, if anything, for the industry to add. Indeed, the Board responded on 20 August advising it had no further submissions to make. As it happened the Association and the Board did make some further submissions centering largely on the exchange rate and the United States market factors which the Minister then discussed with the Ministry. Those submissions did not lead him to change his mind in any respect and the Order in Council was made on 21 September.

Against that background, I am satisfied that there is no substance in the contention that the Minister failed to meet his statutory obligations to advise the industry of his proposed recommendations and the reasons for them, to invite submissions and to have regard to those submissions. For the same reasons I am satisfied that the contention that he had a mindset which was not open to persuasion and simply went through the motions in this process with the industry is also lacking in any substance.

The Minister's exercise of the statutory discretion

In exercising the statutory discretion under s.107G to make a recommendation to the Governor-General in Council for variation of resource rentals the Minister must act in terms of the criteria laid down in the legislation.

The complaint made against the Minister in this case is in essence that he failed to give proper regard to the considerations specified in ss.(7). It is not argued that he took extraneous considerations into account. What is said is that in the way he approached the matter he did not satisfy himself that the facts on which the exercise of the discretion existed were properly taken into account. At the heart of the argument for the Association is the proposition that the only reasonable inference which can be drawn from the evidence in the case is that the Minister did not take reasonable steps to acquaint himself with relevant information necessary to enable him to assess the application of the statutory criteria under ss.(7) so as to arrive at a proper judgment; and in particular that, in failing to direct himself adequately in relation to para (b) factors, he allowed the decision to be overwhelmed by the consideration of para (a) factors.

Essentially the same point was advanced in the separate but associated submission that the Minister laboured under a mistake of fact or, rather, two mistakes of fact. One was that the Minister regarded the criteria under (a) and (b) respectively of s.107G(7) as different sides of the same coin with net returns from fishing being reflected in the value of individual transferable quotas. The other was that the industry had earned super profits such as could sustain very substantial increases in resource rentals. The Association argued that the Minister did not undertake a weighing exercise balancing (b) against (a) because, on his

view, net profits and super profits of the industry were reflected in the value of individual transferable quotas.

For reasons I can state fairly shortly, I am not persuaded that these allegations or assumptions are warranted.

Before turning to the factual material there are two matters I should mention. First, what ss.(7) requires is that in making a recommendation under ss.(1) the Minister should have regard under (a) to the value of individual transferable quotas for the species or class of fish, and, under (b), to the net returns and likely net returns to commercial fishermen for fish caught. The Minister need not have all that material available and in mind when he advises the Board of the proposed recommendation under ss.(6). He may receive, and may expect to receive, material in the submission process to which he may then have regard in terms of ss.(7)(a) and (b) as well as under (d).

Second, in Fiordland Venison Ltd v Minister of Agriculture and Fisheries [1978] 2 NZLR 341, and again in Creednz, it was stressed that in this class of case it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the Minister or authority whose decision is under review. In this case a departmental official made a lengthy affidavit in the course of which he said what he claimed was in the Minister's mind in considering and making the recommendation. Hearsay evidence of that kind should not have been tendered

and I have put it to one side. What is desired is a record of what material was put before the Minister in the course of events and on which he made his decision rather than for the Court to have to scramble through a mass of material or be forced to try to draw inferences from inadequate information. A Minister may choose to make an affidavit as to the approach he or she took. That decision is for the Minister. However, if that course is not followed, it is a matter of drawing the appropriate inferences from the material shown to be before the Minister at the relevant times and any admissible evidence (such as in correspondence and in records of meetings) of the Minister's consideration of the matter.

Factual material considered by the Minister

The Minister's proposed recommendation for resource rentals for the 1987/1988 fishing year referred to the Fishing Industry Board on 15 May 1987 placed very substantial emphasis on traded values of individual transferable quotas as justifying the proposed rental regime. The pure economic argument for that view was succinctly expressed by Treasury in its report of 16 March 1987 and was not disputed by counsel for the Association on the argument of the appeal. It is that the setting of the total allowable catch below the level which the fishing industry would otherwise be prepared to catch leads to quota having an intrinsic scarcity value. It is an unearned surplus because quotas were not purchased from the Crown but were simply allocated

largely on catch history. The Crown is entitled to appropriate the unearned surplus associated with the intrinsic scarcity value of quota through resource rentals. If this is not done the unearned annual surplus will be capitalised into the value of the quota and lead some fishermen to pay large lump sums to buy quota from other fishermen. As a result, it will be difficult to appropriate the surplus in the future, since it would subsequently penalise those who had already bought quota from other fishermen. In order to appropriate the full surplus, resource rentals should be raised by the amount that a one year quota is traded for.

The ultimate Treasury proposal would have increased rentals to $77m. But, as noted earlier, the proposal actually made was for an increase to about $60m and in the end the Minister's recommendation as reflected in the Order in Council increased rentals by $4m to $20m. The clearest evidence of the Minister's modified approach following the exchanges with the industry in May and June 1987 is contained in the Minister's memorandum to Cabinet of 8 June 1987. But before turning to that decision some reference should be made to the Minister's paper to the Board of 15 May. All the emphasis in that paper was on the traded value of quotas. Indeed, referring to five year tenders for deep water species the Minister stated -

> These amounts represent the returns being made by the catching sector in excess of those required to meet fixed and variable costs of catching, the return on "capital" employed by the owner and the cost associated with the risk involved for enterprises operating in this industry.

He went on to identify arguments against simply translating the traded quota information into the new rental figures. Amongst those identified were the uncertainties existing in the industry, the paucity of data - volumes were low in the case of many species and overall amounted to only .5% of total quota in the case of annual lease trades and 4% for perpetual trades and the trading prices did not show a consistent pattern - and the fact that the bulk of trades were from small to larger operators suggesting that larger operators were positioning themselves in the industry for the longer term. Although the emphasis was on traded values for quota and the new rentals proposed were expressed by reference to traded values, there was a separate heading in the paper 'Net Returns to Fishermen' under which it was noted that for both net returns and likely net returns port prices must be evaluated in relation to the cost of fishing. Some general observations on revenue and costs were made and it was added that, while net returns information was available from studies of rock lobster and scallop fisheries (where there was no trading information) which was used to assess the proposed rentals, there was a paucity of such data for other species.

The memorandum from the Minister which went to Cabinet on 8 June clearly reflected the Minister's assessment of both the content and the tone of the industry responses to the initial proposals. It also contained his recommendation for a very substantial reduction in the proposed rentals. Paras 2, 3 and 4 state -

2. I have put this proposition to the fishing industry and explained the basis upon which the increases were set, namely that the Government was taking a percentage of the "super profits" made by the fishing industry from its privileged access to the commercial fishery by ownership of ITQ. I argued that it was appropriate that the Crown took this excess profit, that the traded price of quota was a proper economic tool to use in assessing such profits and that sufficient discounts had been made to traded prices to allow for justifiable qualification.

3. The industry response is understandably vociferously opposed to the proposition. It has countered with propositions that have sought to demonstrate that industry profitability is not as good as would be shown by the discounted traded prices of quota and that with such proposed increases investment would be curtailed at a time when the industry is adjusting to the new ITQ scheme and is in a rapidly expansion (sic) phase.

4. I have assessed the industry response and the implications of seeking to amend the Fisheries Act less than a year after the limits on resource rental increases were put in place and consider now that whilst it may be economically appropriate to make the increases proposed it would be contrary to good Government to so quickly overturn the legislative provisions.

Mr Castle, for the appellant, submitted that in repeating in para 2 the proposition that super profits were made by the industry from access to commercial fishing by ownership of individual transferable quotas the Minister was wrongly treating net returns as being reflected in the traded prices for the quotas. But in economic analysis the value of an income producing asset is the net value of expected returns less expected costs over the life of the asset. I am not persuaded that if the data on traded quota were adequate, comprehensive and consistent it would not be a sufficient indicator of commercial profitability under (b). The presence of both (a) and (b) in ss.(7) does not

itself deny that possibility: para (b) was necessary to cover species not already subject to the quota regime. And where both are considered it was for the Minister to decide what weighting to give one as against the other.

However, that argument need not be pursued because it is clear from para 3 considered against the factual background up to that date that the Minister had material relevant to para (b) to which he had regard in proposing the new resource rentals. The industry response to which the Minister referred in paras 3 and 4 had stressed the effect on the financial viability and the commercial profitability of the previously proposed rentals. At the meeting with the Minister on 19 May, as earlier noted a representative of the Association said that the proposed rental regime would have the effect of reducing the industry's net return on investment from 13% to 6.5% and the meeting ended with an undertaking by the Ministry to supply the Board with all the models, data, assumptions, trading and figures which underpinned the Minister's proposals.

There was a further industry meeting with the Minister on 11 June when the 48 page formal response of the industry through the Board was presented to the Minister. Part way through the meeting the Minister announced his modified proposals which were greeted with much satisfaction. The draft of 3 June of the Board's response had been received by the Group Director of the Ministry who was a member of the Board. Regrettably it is not clear from the voluminous

affidavits of Ministry officials whether the Minister actually had and considered the draft before submitting his own memorandum to Cabinet on 8 June. All that is said, following a bare reference to two letters received in the Minister's office from two fishing groups, is that a draft copy of the Board's submission was also available and then, in the next paragraph in the affidavit, that the Minister had received submissions from the industry which, among other things, dealt with the question of net returns. It would perhaps be extraordinary if the officials had not briefed the Minister on the forthcoming industry response but it would be unsafe to speculate in these circumstances where it would have been so simple to spell out exactly what material the Minister actually had put to him for consideration yet the Ministry has elected to leave the matter up in the air. Even so, I consider it clear enough from the Minister's memorandum to Cabinet and the Association's record of the meeting with the Minister on 19 May that he was well aware of industry concerns as to the impact of the original proposal on the net returns and likely net returns from commercial fishing.

Further, the matter does not rest there for the recommendation which resulted in the Order in Council was not made until September after the Board had been asked for any further submissions it wished to make. At that stage it must be accepted that the Minister had had regard to the detailed submissions made by the Board in June which stressed factors bearing on the net returns and likely net

returns from commercial fishing. And, again as earlier noted, the Association and the Board did make some further submissions largely concerning exchange rate and United States market factors directed to net returns and likely net returns which the Minister considered, along with advice on those matters from officials, but without changing his mind.

Mistake of fact

It will be apparent from these conclusions that I reject the argument for the Association that the Minister laboured under a mistake of fact in the two areas relied on in the Association's submissions. That being so, I express no views as to mistake of fact as a ground for granting relief in judicial review proceedings. In Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 149 I refrained from doing so noting that the law bearing on the question could not be said to be in a settled state. Eight years later that is still the position and I prefer to leave the whole question open until it is necessary to decide it.

Solicitors

Perry Castle, Wellington, for Appellant
Crown Law Office, Wellington, for First, Second and Third Respondents

IN THE COURT OF APPEAL OF NEW ZEALAND CA. 139/88

UNDER The Judicature Amendment Act 1972

IN THE MATTER OF an application for review of the exercise or purported exercise of a statutory power (of decision) under section 107G Fisheries Act 1983

BETWEEN THE NEW ZEALAND FISHING INDUSTRY ASSOCIATION INCORPORATED

Appellant

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Third Respondent

Coram Cooke P
Richardson J
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Somers J
Casey J

Hearing 27, 28 and 29 September 1988

Counsel T.J. Castle and B.A. Scott for appellant
M.T. Parker for respondents

Judgment 2 November 1988

JUDGMENT OF McMULLIN J

This case turns on the questioned validity of an Order

in Council made pursuant to s.107G of the Fisheries Act 1983 and involves an examination of that section which was inserted into the Act by s.28 of the Fisheries Amendment Act 1986. Part IIA of the principal Act (enacted by the Fisheries Amendment Act 1986) is concerned with the administration and control of commercial fishing in the 200 mile exclusive economic zone established for New Zealand by the Territorial Sea and Exclusive Economic Zone Act 1977. Part I of this last enactment extended the territorial waters of New Zealand from three miles to twelve miles from the coast. Part II established the exclusive economic zone, declared seas in that zone to be part of New Zealand fisheries waters and gave the Minister of Fisheries power to determine the total allowable catch of fish within that zone and the proportions of it which New Zealand fishing craft and foreign fishing craft should be allowed to take.

The amendment to the Fisheries Act 1986 effected by s.107G is directed at the control of commercial fishing within the exclusive economic zone by means of a system of quota management. The system seeks to effect a balance between the exploitation of the fisheries resources for gain and the preservation of sufficient breeding stocks to ensure the continuation of species in the future. It does this by permitting the commercial use of the fishing resources within the zone to ensure both a financial gain for commercial fishermen and a return for the Government which has control of the zone, while at the same time ensuring

that the resource is not depleted by the pressures which would otherwise be put upon it by uncontrolled fishing.

The State's entitlement is ensured by the provision of resource rentals payable for the quota allocated to individual fishermen, whether or not they catch the full amount of the allocated quota. The applicable rentals for listed species are set out in Schedule 1B of the Second Schedule to the 1986 Act, but the rentals are subject to an alteration by Order in Council. Such an alteration was made by the Fisheries (Resource Rentals Variation) Order 1987 (SR.1987/281) which came into force on 1 October 1987. This Order in Council, Mr Castle informed the Court, had the effect of increasing the total annual rentals within the zone from $16.1 million to $20.1 million.

Section 107G of the Fisheries Act is set out in the judgment of Cooke P. It is necessary to refer only to ss.(6) and (7) of it. They are at the heart of this case.

> ss(6) Before making any recommendation under subsection (1) of this section, the Minister shall advise the Fishing Industry Board and such other persons or organisations as the Minister considers appropriate, of the proposed recommendation and the reasons for it, and shall invite the Board and the persons and organisations (if any) to make submissions to the Minister in respect of the recommendation before such date, being not less than 28 days after the date of the Minister's advice as to the proposed recommendation, as the Minister may specify.
>
> ss(7) In making any recommendation under subsection (1) of this section the Minister shall have regard to -
>
> (a) The value of individual transferable quotas for the species or class of fish:

(b) The net returns and likely net returns to commercial fishermen for fish caught; including any difference in operating costs of foreign owned New Zealand fishing vessels and other New Zealand fishing vessels:

(c) Any relevant changes in total allowable catches.

(d) Any submissions made to the Minister under subsection (6) of this section:

(e) Such other matters as the Minister considers relevant.

I am satisfied, generally for the reasons given by Cooke P and Richardson J in their judgments, that the Order in Council made by the Minister and the recommendations upon which it was based cannot be impugned and for that reason it is unnecessary to enter upon a general discussion of the case.

There are, however, two matters on which I wish to make particular comment. By way of introduction to them I refer to s.107G(6) which, in summary, makes it obligatory for the Minister to advise the Fishing Industry Board and other persons of the recommendation he proposes to make to the Governor-General for a variation of the rentals, and to invite the Board to make submissions on that recommendation within 28 days. Subsection (7) requires the Minister in making that recommendation to have regard to the four matters specified in paras (a) to (d) of the subsection and the fifth more general matter mentioned in para (e). But for ss.(6) and (7) and the restrictions on the frequency of variation imposed by ss.(2) and (3) and the limitation on the increase imposed by ss.(4), the Minister's power to make

the recommendation would be largely unfettered. This brings me to the first point.

Breach of Consultation requirements of S.107G

This matter is to be considered against the background of the detailed analysis McGechan J made of what passed between the Ministry and the industry. In summary by letter dated 15 May 1987 the Minister sent a paper to the industry setting out his recommendations for resource rentals for the 1987/88 year. This contemplated an amendment to the Act, not merely an alteration to the rentals by Order in Council, and evoked a strong outcry from the industry which on 10 June 1987 delivered a paper which was its response to the proposed recommendations. On 11 June the Minister and officials met the Resource Rentals Committee. The Minister opened the meeting by saying that it was part of the consultation process; that he now had the benefit of further information from industry sources, intended to modify the Government's proposal, hear what the industry had to say and tell them what had been devised. Each side entered into the ensuing discussions before the meeting was terminated. The proposals subsequently announced pleased the industry. It greeted the news with relief. On 11 June the Minister made a press release. It stated that there was room for further discussions on measuring profitability and that the data was less than adequate to support all the arguments raised. The Minister and officials believed that

the industry agreed to the revised resource rentals he stated on 11 June. On 7 July the schedules were sent to Parliamentary counsel with a request to draft an Order in Council. He queried whether the proposals might not need an amendment to the Act, not merely an Order in Council. On 14 August a Ministry official on the Minister's behalf wrote to the Board notifying them of the new figures and allowing 28 days for reply. The Order in Council was made, substantially in terms of the letter of 14 August 1987.

The appellant submitted that the Minister had not complied with s.107G(6) because by 11 June 1987 he had what was called a mind-set and that what he did thereafter fell short of the consultative procedure envisaged by s.107G(6). This submission requires too much to be read into the subsection. The industry may have envisaged more of an on-going process than actually took place but what the industry was entitled to was determined by s.107G. A feature of s.107G is that the alteration to existing resource rentals must be made within a time frame, the end of which is set by ss.(3). It must be made and come into operation before the commencement of the fishing year and come into force on the first fishing day of that year. Necessarily, the interchange of views between the Minister and the industry had to occur before that date. Section 107G does not contemplate ongoing discussions. What it requires of the Minister is that he should:

(a) advise the Fishing Industry Board of his proposed recommendation and the reasons for it;

(b) invite the Board to make submissions to him; and,

(c) having regard to those submissions, make his recommendations to the Governor-General.

In brief, on the one hand there is a duty on the Minister to advise the interested parties of what he has in mind; on the other, a duty on him to receive and have regard to what those interested parties have to say in reply. The underlined words are important. They require an open and receptive mind which is none the less free to disregard the submissions made if other relevant considerations require it. Such a procedure can conveniently be called a consultation of the kind described by Bucknill LJ in Rollo v. Minister of Town and Country Planning [1948] 1 All ER 13 at 17 in the following terms:

> A certain amount has been said as to what consultation means. In my view, as junior counsel for the Minister said, it means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.

On 11 June the Minister's mind was not closed. He was still prepared to heed the industry's advice and he did not make a final decision until July when the matter was sent on to Parliamentary counsel. While the procedure did not follow the course the industry contemplated, it met the requirements of s.107G(7).

No Affidavit from the Minister

The second point relates to the complaint that the Minister failed to make an affidavit in the proceedings as to what factors he took into account in making his recommendation. Instead Dr Allen, a senior Ministry official who was responsible for advising the Minister, made an affidavit. It is obvious from Dr Allen's affidavit that he played a prominent part in making recommendations to the Minister for the setting of resource rentals for the year 1987/88 and he set these out in a memorandum for the Minister. The memorandum highlighted as a material consideration the value at which individual quotas were being transferred, a matter which the Ministry officials thought to be the most important consideration of all but the importance of which, the industry argues, was given unwarranted weight. After detailing what thereafter passed between the Ministry and the industry officials, Dr Allen said:

> I considered and advised the Minister that the factors which were apparent were simply indicators of the volatility of the industry but that there was nothing to suggest that the decisions in regard to resource rental variations should be changed.

While Dr Allen's affidavit is a useful history of what took place and provides a background to events, it is nonetheless the case that he is not the alter ego of the Minister and cannot answer for him. It was proper for him to record what he thought and advised. But ss.(6) and (7)

do not make a Ministry official the person responsible for the making of the recommendation. It is the Minister who must have regard to the five matters set out in ss.(7) in doing that. While he is entitled to act on the advice of his officials, and may generally be expected to do so, it does not necessarily follow that factors which the officials consider significant are the factors which the Act makes relevant, or that the weighting they would give these matters is the weighting the Minister would or should give them after receiving the industry submissions. As mentioned, the obligation to have regard to the several matters mentioned in ss.(7) is an obligation placed by the statute on the Minister alone. Accordingly, while the Minister is under no obligation, statutory or otherwise, to make an affidavit to the Court in proceedings for judicial review where his recommendation, or an Order in Council or other step taken in consequence of it, is challenged in the proceedings, there is a real risk that if a Minister does not himself make an affidavit setting out the matters to which he has had regard, affidavits from the opposing party may, in the absence of an affidavit from a Minister, justify the drawing of other inferences and carry the day against him.

In some cases there will be much to be said for the view expressed by Lord Diplock in Bushell v. Secretary of State for the Environment [1980] 2 All ER 608, 613: "The collective knowledge, technical as well as factual, of the civil servants in the Department and their collective

expertise are to be regarded as the Minister's own knowledge, his own expertise.". But where, as is the case with s.107(6) and (7), it is the Minister's own recommendation which must be made in the light of specific statutory criteria, I do not think that the knowledge of any number of civil servants and their collective expertise can be a substitute for the Minister's own recommendation. In Creednz Inc v. Governor-General [1981] 1 NZLR 172, a case involving the National Development Act 1979, neither the then Minister of Energy nor any departmental officials made an affidavit in response to detailed affidavits filed on behalf of the applicant with regard to considerations made relevant by s.3 of the National Development Act, and, as well, discovery of relevant Crown documents was initially resisted although in the end a Cabinet paper was made available to the Court. It was there contended by the applicant that the body of evidence contained in the applicant's supporting affidavits was such that the inference to be drawn was that the Cabinet and Executive Council could not have taken the relevant statutory criteria into account. However, in that case there were reports of Ministerial comments contained in newspapers (introduced into the case by the applicant for other reasons) which provided a sufficient indication that the Crown had considered all material relevant to the construction of the project with which the case was concerned.

The position taken in Creednz may be contrasted with that taken in Ashby v. Minister of Immigration [1981] 1 NZLR 222

and that taken in Fowler and Roderique v. Attorney-General [1987] 2 NZLR 56. In each of these cases, the Minister concerned made an affidavit.

Where judicial review is sought of a decision which is required to be made by a specified person and based on matters detailed in a statute, it is as well that the person upon whom the decision making duty is placed, be it Minister or official, should make an affidavit if the propriety of his decision is questioned. The choice is his but, in the absence of such, the party seeking review may have sufficient material before the Court to justify the drawing of an inference that attention to the relevant matters has not been given. However, in the present case there is the Cabinet minute which was produced for the inspection of the applicant. This document, which is set out in the judgment of McGechan J, is enough to persuade me that in the round the Minister did not step outside the matters to which he was obliged to have regard by ss.(7). It would not be surprising if the Minister gave some of these matters a different weighting than would be given to them by the industry. But the Minister was entitled to weigh them as he saw fit so long as he considered them all.

For these reasons I would dismiss the appeal.

Solicitors:

Perry Castle, Wellington, for Appellant
Crown Law Office, Wellington, for First, Second and Third Respondents

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 139/88

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an application for review of the exercise or purported exercise of a statutory power (of decision) under Section 107G Fisheries Act 1983

BETWEEN THE NEW ZEALAND FISHING INDUSTRY ASSOCIATION INCORPORATED

Appellant

AND THE HONOURABLE COLIN MOYLE

First Respondent

AND HER MAJESTY'S ATTORNEY-GENERAL sued on behalf of the Ministry of Agriculture & Fisheries

Second Respondent

AND HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Third Respondent

Coram: Cooke P
Richardson J
McMullin J
Somers J
Casey J

Hearing: 27, 28, and 29 September 1988

Counsel: T.J. Castle and B.A. Scott for Appellant
M.T. Parker for First, Second and Third Respondents

Judgment: 2 November 1988

JUDGMENT OF SOMERS J

I have had the advantage of reading the judgment of Richardson J in draft. I agree with it and, for the reasons which he gives, would dismiss the appeal.

Solicitors
Perry Castle, Wellington, for Appellant
Crown Law Office, Wellington, for First, Second and Third Respondents

FMN 047

IN THE COURT OF APPEAL OF NEW ZEALAND CA 139/88

UNDER the Judicature Amendment Act 1978

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M T Parker for First, Second and Third Respondents

Judgment: 2 November 1988

JUDGMENT OF CASEY J

I have read the judgment proposed by the President with which I agree and have nothing further to add.

M.E. Casey J