IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV 2019-485-752
[2020] NZHC 741

UNDER	the Judicial Review Procedures Act 2016 and Part 30 of the High Court Rules 2016
IN THE MATTER OF	an application for judicial review under sections 13 and 20 of the Fisheries Act 1996
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATION Applicant
AND	MINISTER OF FISHERIES Respondent

Hearing: 19 March 2020

Counsel: S R Gepp for Applicant
N C Anderson and K F Gaskell for Respondent (abides)
J P Ferguson and T T H Hullena for Te Ohu Kai Moana Trustee Limited
B A Scott and B J McIntosh for Fisheries Inshore New Zealand

Judgment: 9 April 2020

JUDGMENT OF MALLON J

Introduction

[1] The applicant (Forest & Bird) seeks to judicially review a decision of the first respondent (the Minister of Fisheries). The decision concerns the setting of the Total Allowable Catch (TAC) and the Total Allowable Commercial Catch (TACC) for East Coast tarakihi (TAR) fish stocks, known as Quota Management Areas (QMAs) TAR 1, 2, 3 and 7. The decision was made in September 2019 and related to the fishing year commencing 1 October 2019.

[2] Fisheries Inshore New Zealand Limited (Fisheries Inshore) and Te Ohu Kai Moana Trustee Limited (Te Ohu) apply to be joined as respondents to the proceeding. Forest & Bird opposes the application and says they should instead be joined as interveners. The issue for determination is whether Fisheries Inshore and Te Ohu should be able to participate as respondents or as interveners.

Factual background

[3] Tarakihi is a species of fish that is managed under the Fisheries Act 1996. A primary mechanism for managing the sustainability of fisheries is by the Minister setting the TAC and TACC for each fish stock. The TACC is the proportion of the TAC which can be harvested by commercial fishers, once allowances have been made for non-commercial catch and other forms of mortality.

[4] Quota is allocated in the form of quota shares to quota owners. Quota shares generate an Annual Catch Entitlement (ACE) for commercial fishers under their fishing permits. The amount of ACE that can be caught is a function of the TACC. Currently, there are approximately 164 quota owners with tarakihi quota shares in the eastern tarakihi fish stocks and 199 commercial fishing permit holders who catch those entitlements utilising ACE.

[5] Fisheries Inshore represents quota owners and ACE fishers across all the primary inshore fish stocks including tarakihi. Amongst other things, Fisheries Inshore routinely makes submissions in response to consultation proposals from government. The Minister has an obligation to consult with organisations the Minister considers to be representative of classes of persons having an interest in the stock.[1]

[6] Te Ohu is the trustee of Te Ohu Kai Moana, a trust established under the Māori Fisheries Act 2004.[2] Following the fisheries settlement reached between Crown and Māori in 1992, the Crown transferred assets to Te Ohu (or its predecessors) for the benefit of iwi and Māori. This included the transfer of quota shares (Settlement Quota)

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1 Fisheries Act 1996, s 12.
2 Māori Fisheries Act 2004, ss 31, 32 and 33.

in fishstocks.[3] Te Ohu is required to allocate and transfer the Settlement Quota to iwi and, pending such allocation and transfer, to hold and manage the settlement assets.[4]

[7] Te Ohu's functions include funding research into sustainable fisheries and protecting and enhancing the interests of iwi and Māori in fisheries, fishing and fishing related activities. It actively engages in the review of sustainability measures by Fisheries New Zealand (a business unit within the Ministry of Primary Industries). This review forms part of the Minister of Fisheries' decision-making process in setting TAC and TACC for each fishing year. Te Ohu also makes submissions to the Minister on these matters. The Minister consults with Te Ohu as a body representative of Māori interests in the fishstock or the effects on the aquatic environment.[5]

[8] Te Ohu also has a direct proprietary role in the East Coast tarahiki quota. It holds quota in TAR 1 for Ngāi Tai and Te Whānau a Apanui, in TAR 2 for Te Whānau a Apanui, Ngāti Porou, Rongowhakaata, Te Aitanga a Mahaki, Te Atiawa (Wellington) and Ngāti Toa, and in TAR 7 for Ngāi Tahu, Rangitāne o Wairau and Ngāti Toa.

[9] From April to September 2018 Fisheries New Zealand consulted on three options to rebuild East Coast tarahiki stock.[6] This was based on a 2017 stock assessment. On 19 September 2018 the Minister decided on a TACC reduction of 20 per cent as part of a phased approach to rebuilding stock over a number of years.

[10] In May 2019 Fisheries Inshore, Te Ohu and Southern Inshore Fisheries provided a stock rebuild plan (the Industry Rebuild Plan) to Fisheries New Zealand. This was the industry's proposal about how tarakihi stocks could be rebuilt and maintained. In June 2019 Fisheries New Zealand released an initial position paper for consultation as part of the 2019 sustainability review. This had three options:

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3 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

4 Māori Fisheries Act, s 34 and 130.

5 Fisheries Act, s 5: the Minister is required to act in a manner consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

6 Option 1: Reducing TAC by 55 per cent, projecting a ten year period to rebuild stock; option 2: reducing TAC by 35 per cent, projecting a 20 year period to rebuild stock; and option 3: reducing TAC by 20 per cent, with no determination as to the period to rebuild stock.

(a) Option 1: TACC reduction of 31 per cent, with a 50 per cent probability of achieving a target of 40 per cent spawning biomass level (SBL) within 12 years;

(b) Option 2: TACC reduction of 35 per cent, with a 50 per cent probability of achieving a target of 40 percent SBL within 11 years; and

(c) Option 3: Implementing the Industry Rebuild Plan with no TAC or TACC reductions, with the aim of achieving a 35 per cent SBL within 20 years.

[11] On 26 July 2019 Te Ohu, Fisheries Inshore and Southern Inshore Fisheries made a joint submission on these options. Te Ohu also made its own submission on the same date, as did Forest & Bird. On 30 August 2019 Fisheries New Zealand provided its final advice paper to the Minister on the sustainability and related measures for stock for the 1 October 2019 fishing year. This included the three options that were in the June 2019 initial position paper. As a result of consultation, it included a fourth option. This involved a TACC reduction of 10 per cent combined with the Industry Rebuild Plan, with the aim of achieving a 40 per cent SBL within 20 years.[7]

[12] By letter dated 27 September 2019, the Minister advised that he had decided on this fourth option. The 10 per cent reduction together with the Industry Rebuild Plan was in addition to the 20 per cent reduction made in the previous year. The Minister said his decision reflected his understanding of the economic impacts on fishers, their families and the regional communities where they operate, balanced against his responsibility to ensure the sustainability of the fishery.

The Fisheries Act

[13] Part 3 of the Fisheries Act concerns "sustainability measures". It includes sections 11, 12 and 13.

[14] Section 11(1) provides:

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[7] Without the actions provided for in the Industry Rebuild Plan, the rebuild period would be 25 years.

11 Sustainability measures

(1) The Minister may, from time to time, set or vary any sustainability measure for 1 or more stocks or areas, after taking into account-

(a) any effects of fishing on any stock and the aquatic environment; and

(b) any existing controls under this Act that apply to the stock or area concerned; and

(c) the natural variability of the stock concerned.

…

[15] Section 13 provides:

13 Total allowable catch

(1) Subject to this section, the Minister shall, by notice in the *Gazette*, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.

(2) The Minister shall set a total allowable catch that-

…

(b) enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered –

(i) in a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and

(ii) within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock …

…

[16] Section 12 contains the Minister's obligation to consult on decisions made under s 11 and 13.

The pleading

[17] Forest & Bird's statement of claim has six causes of action. The first cause of action alleges the Minister did not vary TAC to enable the level of East Coast tarakihi to be altered within a period appropriate to the stock. It alleges the Minister made an error of law by approaching his decision under s 13(2) of the Fisheries Act as a balance between sustainability and socio-economic considerations when:

(a) under s 13(2)(b)(ii), sustainability is a bottom line that does not involve balancing competing considerations; and

(b) socio-economic considerations are not relevant to the period appropriate to the stock determined under s 13(2)(b)(ii).

[18] The second cause of action also alleges the Minister made an error of law. It alleges the Minister did not vary the TAC in a way that "will, in terms of probability of achievement, enable the level of East Coast tarakihi to be altered within a period appropriate to the stock". It alleges there is at most a 50 per cent probability of achieving the target of 40 per cent SBI within the time period and this is partly because it depends on the successful implementation of voluntary management measures. It alleges a probability of 50 per cent at most is not consistent with a mandatory requirement to set a TAC that will enable the target to be achieved within a reasonable time.

[19] The third cause of action concerns the use of a government policy document, called the Harvest Strategy Standard, which is used to guide decisions under the Fisheries Act. It alleges:

(a) Fisheries New Zealand's advice to the Minister included option 4 to recognise social, cultural and economic factors. In giving that advice, Fisheries New Zealand wrongly understood that the Harvest Strategy Standard did not take these factors into account in setting the target level timeframes with an acceptable probability. The Minister's advice was based on a mistake of fact, being Fisheries New Zealand's incorrect advice.

(b) The Harvest Strategy Standard specifies that 70 per cent was the minimum standard for the acceptable probability of rebuild for the East Coast tarakihi because of the level of depletion of the stock. The Minister failed to have regard to a relevant consideration, namely this minimum standard, when setting TAC with a 50 per cent probability of achieving the target within the rebuild time frame.

[20] The fourth cause of action alleges the Industry Rebuild Plan was an irrelevant consideration because:

(a) it is not a social or economic factor and is not a relevant consideration under s 13;

(b) it relies on voluntary adherence by industry participants and is therefore not sufficiently certain to be a relevant consideration under s 13;

(c) section 13 requires that the TAC be the mechanism by which the stock is restored and the Industry Rebuild Plan cannot be used in its place.

[21] The fifth cause of action alleges the Minister's decision was unreasonable, given his decision in 2018 that the appropriate period for rebuilding the stock was ten years, when the suite of voluntary measures by industry could achieve at best a 20 year rebuild period.

[22] The sixth cause of action alleges that the 2019 TACC decisions were consequently affected by the material errors made in setting the TAC.

The jurisdiction

Joinder as party

[23] Procedural provisions for judicial review applications are set out in the Judicial Review Procedure Act 2016. Section 9(1) of this Act provides that the persons who must be named as a respondent are: the person whose act or omission is the subject of the application; and if the application relates to any decision made in proceedings,

every party to the proceedings. As the Minister's decision was not made in a proceeding, Forest & Bird was required only to name the Minister as the respondent.

[24] However, s 14 of the Judicial Review Procedure Act 2016 provides, amongst other things, that a Judge may direct a person to be named as a respondent at any time before the hearing of the judicial review application. No express criteria for the exercise of this power are stipulated.

[25] There is also jurisdiction under the High Court Rules 2016 to join a party.[8] Rule 4.1 provides that parties joined to a proceeding "must be limited, so far as practicable, to … persons whose presence before the court is necessary to justly determine the issues arising". To that end, rule 4.56(1) provides that, at any stage of a proceeding, a Judge may order that a party be named as a defendant because "the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding". Rule 4.56(2) provides that an order may be made on terms the court considers just.

[26] The power in s 14 on its terms is therefore broader than that in the High Court Rules, but regard is had to those rules.[9] In *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* the High Court summarised the relevant principles in judicial review proceedings as follows:[10]

> (1) It is not possible and would be inappropriate to lay down any general propositions which would apply to all cases of this kind.
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> (2) To the extent that it is possible to articulate useful guidelines, it may well be appropriate to join a party, where that party's interests are directly or indirectly effected, or possibly even where that party has a distinctly arguable case to be so affected. This is because it would then be unjust to decide such issues in their absence.
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> (3) The decision making process does not finish at that point. Joinder is not an all or nothing thing. The court should, in fairness to the plaintiff, who after all is having another party interposed in proceedings properly commenced by him or her, consider whether the joinder should be for all or only some purposes. Essentially the court

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8 Pursuant to r 1.4, the High Court Rules 2016 apply to all civil proceedings subject to, amongst other things, any statute that prescribes the practice and procedure of the court in a proceeding under that statute.

9 Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [JR14.03].

10 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* (2002) 16 PRNZ 501 at [14].

> has to align the interest sought to be protected with what it is that the fresh defendant, or representative, should be permitted to address. …

[27] A Full Court of the High Court endorsed these principles in the judicial review context in *Wilson v Attorney-General* as follows:[11]

> [20] Emerging from the cases is that joinder is appropriate where the party's interests are, or may be, directly or indirectly affected by the judicial review application. In such situations, it would be unjust to decide the issues in the absence of the party so affected, or potentially affected. As Hammond J pointed out in *Westhaven Shellfish Ltd* … "joinder is not all or nothing". Fairness to the plaintiff, who is having another party interposed in his proceeding, demands that the Court consider whether the joinder should be for all or only limited purposes. The level of participation should be only what is necessary to protect the interests of the party being added.

Intervener

[28] In addition to the powers to join a party as a respondent, the Court may grant leave to a non-party to intervene in a proceeding under its inherent jurisdiction and pursuant to the general power in r 7.43A of the High Court Rules to make directions for the conduct of the hearing.[12] The Court in *Aotearoa Water Action Incorporated v Canterbury Regional Council* summarised the exercise of this jurisdiction in judicial review applications as follows:[13]

> [5] … As one commentator puts it, interveners "may assist the court in proceedings raising questions of public interest or otherwise likely to have significant precedent effects". In recent times, applications to intervene have been granted in judicial review cases considering, among other issues, voluntary euthanasia, teaching Christianity in public schools, and decisions made by the Minister under the Canterbury Earthquake Recovery Act 2011. (footnote omitted.)

[29] The discretionary power to grant leave should be exercised with restraint to avoid the risk of expanding issues, elongating the hearing and increasing the costs of litigation.[14]

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11 *Wilson v Attorney-General* [2010] NZAR 509. See also *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177 at [15].

12 *McGechan on Procedure*, above n 9, HR7.43A.01.

13 *Aotearoa Water Action Incorporated v Canterbury Regional Council* [2019] NZHC 3187.

14 *C v Accident Compensation Corporation* [2013] NZCA 34 at [12], cited in *McGechan on Procedure*, above n 9 at HR7.43A.01.

The difference

[30] A respondent who is added to proceedings has all rights that any party has in the first instance proceeding and in any appeal. In contrast, an intervener has no right to make oral submissions (it is a matter for the Court whether they may do this), has no right to make interlocutory applications, has no right of appeal and must generally bear their own costs. It is the right of appeal that is of particular importance to Fisheries Inshore and Te Ohu.

Examples

[31] The parties have referred to a number of cases in support of their respective positions. Some of the cases referred to by Forest & Bird are not judicial review proceedings and apply a test for joinder that requires a party to be directly affected by an order made in the proceeding.[15] Some of them are intervener cases and again are less relevant because Forest & Bird accepts that Fisheries Inshore and Te Ohu should be permitted to intervene.[16]

[32] As set out above, the test for joinder in judicial review applications is broader than that which applies in other civil proceedings. *Deadman v Luxton* discusses that this reflects that there is more scope in judicial review proceedings for the rights of others to be affected.[17] While it will depend on the nature of the decision and the grounds of review involved:[18]

> … frequently the challenge to the exercise of the statutory power or decision of a public body will have consequential effects upon others who obtained beneficial entitlements or expectations following upon the exercise of such power.

[33] Fisheries Inshore submits cases involving judicial review of decisions by the Minister of Fisheries are more relevant. In addition to *Deadman*, some examples are:

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15 *Penang Mining Co Ltd v Choong Sam* (1969) 2 MLJ 52 (PC); *Mainzeal Corporation Ltd v Contractors Bonding Ltd* HC Auckland CL 154/88, 10 February 1989; and *Capital and Merchant Finance Ltd* (*in rec and in liq*) *v Perpetual Trust Ltd* [2014] NZHC 3205.

16 *Diagnostic Medlab Ltd v Auckland District Health Board* HC Auckland CIV 2006-404-4724, 18 October 2006 albeit that at [19]-[25] the Judge discussed *Westhaven Shellfish Ltd*, above n 10, and preferred the approach in *Wellington International Airport Ltd v Commerce Commission* HC Wellington CP151/02, 19 July 2002 where the Court applied the test of requiring a direct effect.

17 *Deadman v Luxton* HC Wellington CP71/99, 4 May 1999.

18 At 6.

(a) *New Zealand Recreational Fishing Council Inc v Minister of Fisheries*.[19] This proceeding concerned the Minister's decisions in 2004 and 2005 allocating the TAC and TACC for the kahawai species. The claim was brought by the recreational fishers but the commercial interests, Sanford Ltd, Sealord Group Ltd, and Pelagic & Tuna New Zealand Ltd, were joined as additional respondents or counterclaim applicants without objection.

(b) *Greenpeace New Zealand Ltd v Minister of Fisheries*.[20] This was a judicial review of the Minister's decision on the TACC of orange roughy for the 1993/94 year. The New Zealand Fishing Industry Association Inc, the Exploratory Fishing Company (ORH 3B) Ltd and the New Zealand Fishing Industry Board were all additional respondents.

(c) *Westhaven Shellfish Ltd.*[21] In this case the Court accepted that Southern Clams Ltd, which had harvesting rights for cockles in the same area, was appropriately joined as a party, although it was confined to submissions on relief.

[34] I agree that the fisheries examples are of some assistance. Overall, however, whether a party should be joined as a respondent requires a fact specific assessment of what is just in light of the act or omission in respect of which judicial review is sought and their participation is limited to what is necessary given that party's interest.

Assessment

[35] Forest & Bird refers to its claim. The first and second causes of action concern the correct interpretation of s 13. The third cause of action concerns whether, having decided to take into account the Harvest Strategy Standard guidelines, the Minister did so correctly. The fourth cause of action directly concerns the Industry Rebuild Plan

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19 *New Zealand Recreational Fishing Council Inc v Minister of Fisheries* HC Auckland CIV 2005-404-4495, 11 July 2007.

20 *Greenpeace New Zealand Ltd v Minister of Fisheries* HC Wellington CP492/93, 27 November 1995.

21 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries*, above n 10, at [19].

but is on the narrow point of whether it can be taken into account when setting the TAC. The fifth cause of action concerns the reasonableness of the Minister's decision against the backdrop of what was decided in 2018. The sixth cause of action concerns the consequences on TACC if the alleged errors in the other causes of action are made out.

[36] Forest & Bird submit these are all narrow grounds of review that go to the lawfulness of the Minister's decision. It submits Fisheries Inshore and Te Ohu have not shown why their interests are not adequately protected by the Minister's defence of the proceeding. It is concerned the parties will extend the narrow grounds of review to a broader range of fisheries management considerations.

[37] Forest & Bird submits that the public has an interest in the purpose of the Fisheries Act "to provide for the utilisation of fisheries resources while ensuring sustainability" and the Minister's function in setting the 'size of the pie' which gives effect to this purpose.[22] It submits the size of quota, in which it accepts Te Ohu has a direct interest, depends on the size of the pie but says this is not a direct effect. It says those with a licence to exploit fisheries do not have greater standing than those with a public interest in the sustainability of fisheries.

[38] I consider the interests which Fisheries Inshore and Te Ohu represent, and Te Ohu directly as a quota holder, are affected by the outcome of the judicial review. If Forest & Bird's submissions are accepted, voluntary industry measures will not be relevant to the Minister's decision under s 13. That would undercut the success Fisheries Inshore and Te Ohu had in the 2019 review and through the consultation process in having the Minister take into account the Industry Rebuild Plan. It is the industry (as represented by Fisheries Inshore and Te Ohu) that has a particular interest in maintaining its success on this matter.

[39] More generally, the Court will make a decision on how s 13 is to be interpreted and, if Forest & Bird is successful, that interpretation will govern the setting of the TAC and, consequently the TACC. This will affect those with quota entitlements. Forest & Bird accepts that Fisheries Inshore and Te Ohu have a sufficient interest to

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[22] Fisheries Act, s 8.

intervene. The issue is whether Fisheries Inshore and Te Ohu should be denied the right to appeal if the High Court agrees with Forest & Bird's position. It is conceivable that the Minister might decide not to appeal the High Court decision, but Fisheries Inshore and Te Ohu might wish to do so. I consider their interests are sufficiently affected that they should be able to bring an appeal.

[40] In my view, Forest & Bird's concern that the issues on the review may become too broad can be controlled through the exercise of discipline from the experienced counsel representing Fisheries Inshore and Te Ohu. They intend to act collaboratively and to avoid duplication. They can be expected to do so.

[41] I conclude it is just for Fisheries Inshore and Te Ohu to be joined as respondents rather than to simply to intervene. Given the narrow and overlapping grounds of review and Fisheries Inshore and Te Ohu's interest in them, and the collaboration between them to ensure focus and to avoid duplication, I do not consider it is necessary to limit the scope of their participation as respondents at this point.

Result

[42] The applications by Te Ohu and Fisheries Inshore to join as respondents are granted.

[43] Costs are reserved. The parties did not resist this. I consider they are better determined in the context of the substantive judicial review when the outcome of Forest & Bird's claim will be determined, Te Ohu and Fisheries Inshore's input into that outcome will be clear and Forest & Bird's public interest role can be considered. These factors constitute special reasons not to fix costs on the joinder application at this time.

Mallon J