IN THE SUPREME COURT OF NEW ZEALAND

SC 84/2007
[2007] NZSC 101

BETWEEN	MINISTER OF FISHERIES First Applicant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES Second Applicant
AND	ANTONS TRAWLING COMPANY LIMITED First Respondent
AND	ESPERANCE FISHING CO LIMITED AND ORNEAGAN DEVELOPMENTS LIMITED Second Respondents

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: Solicitor-General D B Collins QC and P A McCarthy for Applicants
F M R Cooke QC and M S Sullivan for Respondents

Judgment: 6 December 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 to the respondents, jointly.

REASONS

[1] This is an application for leave to appeal against interim orders made by the Court of Appeal pursuant to s 8 of the Judicature Amendment Act 1972. The principal effect of those orders is to stay, until trial, the implementation of a decision by the Minister of Fisheries to reduce the Total Allowable Catch and Total

Allowable Commercial Catch for orange roughy in the quota management area called ORH1. That decision adversely affects the respondents who fish commercially under the relevant quota. They are associated in the use of the quota and for convenience are referred to compendiously as "Antons". In the substantive proceedings, which are scheduled for trial on 28 January 2008, Antons challenge the legality of the Minister's decision.

[2] As the orders in issue are interlocutory, the applicant must satisfy this Court not only in respect of at least one of the criteria described in s 13(2) of the Supreme Court Act, but also in respect of s 13(4). That subsection prohibits this Court from granting leave to appeal unless it is satisfied that it is necessary in the interests of justice for this Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

[3] Before a Court can make an interim order under s 8 of the Judicature Amendment Act 1972 it must be satisfied that the order sought is reasonably necessary to preserve the position of the applicant. If that condition is satisfied the Court has a wide discretion to consider all the circumstances of the case, including the apparent strengths or weaknesses of the applicant's claim for review, and all the repercussions, public and private, of granting interim relief.[1]

[4] Antons claim that the interim orders in question were reasonably necessary in order to preserve their economic position was not accepted by the High Court. However, on appeal, the Court of Appeal was:[2]

> … satisfied that there is inevitably a financial detriment to Antons which can only be measured in many tens of thousands of dollars and which could be irretrievable if Antons were to succeed in the substantive hearing.

[5] The Court of Appeal found that Antons has an arguable case, on the question of the validity of the Minister's decision, which is sufficiently cogent to make it reasonable for the decision whether to grant interim relief to depend on a comparison of the adverse consequences for the parties of refusing or granting relief. Of

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1 *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423 at p 430 per Cooke J.

2 *Antons Trawling Ltd v Minister of Fisheries* (Court of Appeal, CA 575/07, 19 November 2007) at para [35].

relevance was the absence of any evidence that orange roughy is under immediate threat.

[6] The Minister's argument in support of this application is essentially to the effect that the method adopted by the Court of Appeal was to apply the conventional test for dealing with applications for interlocutory injunction rather than applying the received test for applications under s 8 of the Judicature Amendment Act 1972. Consequently, submits counsel for the Minister, an issue arises as to whether the *Carlton & United Breweries* test continues to be appropriate.

[7] It is also contended on behalf of the Minister that the scope of relief granted by the Court of Appeal is greater than was required to allow Antons to continue fishing at their usual rate, and that the judgment of that Court raises issues as to the standard of evidence needed to support a conclusion of necessity in terms of s 8.

[8] We do not consider that the decision of the Court of Appeal creates any uncertainty about the appropriate test for s 8 applications. The principles, classically summarised by Cooke J in *Carlton & United Breweries*, are well settled. The Court of Appeal did not purport to deviate from them. It may be that in deciding the case under urgency the Court of Appeal applied the principles in an unconventional order, but that cannot bring this application within the scope of s 13(2) of the Supreme Court Act. Nor does any other issue relied on by the applicant come within s 13(2).

[9] Further, given the proximity of the trial of the substantive proceeding, and the acceptance, noted by the Court of Appeal,[3] that "there is no evidence that orange roughy is under immediate threat", we are not satisfied in terms of s 13(4) of the Supreme Court Act 2003.

[10] The application for leave to appeal is dismissed with costs of $2,500 to the respondents, jointly.

Solicitors:
Crown Law Office, Wellington for Applicants
Oceanlaw, Nelson for Respondents

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3 At para [32].