



**MAGISTRATE'S COURT**  
**FALKLAND ISLANDS**

MC/CRIM/22(b)/15

R

V

SULIVAN SHIPPING SERVICES LIMITED

**Decision on point of law**

1. The Defendant has raised an issue of law in respect of 10 charges brought against the Defendant as charterer of the fishing vessel *Figaro* for offences concerning the false reporting of catch data by the vessel's master, Francisco Perez Baston, contrary to regulation 61(3) of the Fisheries Regulations Order 1987 (FRO 1987).
2. I have received written skeleton arguments from the Defence and the Crown and have heard Counsel Oliver Powell (Defence) and Stuart Walker (Crown).
3. Mr Powell put his argument under three headings. Firstly, he considered the statutory scheme under the Fisheries (Conservation and Management) Ordinance 2005 (FCMO 2005), secondly the FRO 1987 and thirdly the interpretation of section 194 FCMO 2005 in conjunction with the FRO 1987. He noted that section 8 FCMO 2005 sets out the purpose and principle behind the FCMO 2005 and acknowledged that there are two key aspects:
  - (i) utilisation of fisheries resources while ensuring sustainability; and
  - (ii) compliance with international obligations for the conservation and management of fish stocks.
4. It is convenient at this point if I set out section 8 FCMO 2005 in full:

*"(1) The purposes of this Ordinance are-*

- (i) to provide for the utilisation of the fisheries resources of the Falkland Islands while ensuring sustainability; and*
- (ii) to facilitate the compliance by the Falkland Islands with international obligations applying to the Falkland Islands relating to fishing, fishing vessels and the conservation and management of fish, and in particular the obligations under the United Nations Convention on the Law of the Sea of 10th December 1982 and the Agreements.*

*(2) In this Ordinance-*

- (a) "ensuring sustainability" means-*
  - (i) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and*

(ii) *avoiding, remedying, or mitigating adverse effects of fishing on the marine environment so far as it is reasonably practicable to do so;*

(b) *"utilisation" means conserving, using, enhancing, and developing fisheries resources to enable the Government of the Falkland Islands to provide for the social and economic wellbeing of the Falkland Islands, either directly or by contribution to governmental revenues.*

(3) *So that effect may be given to the purposes of this Ordinance, fishing within the fishing waters and the trans-shipment of fish within the fishing waters is prohibited unless it is undertaken-*

(a) *under a licence or permit granted under this Ordinance;*

(b) *in accordance with the applicable provisions of this Ordinance and of any regulations made thereunder, and*

(c) *in accordance with the conditions of the licence or permit."*

5. Mr Powell observed that the FCMO 2005 is divided into 8 parts and Part VII sets out the enforcement provisions, including a number of different offences, such as contravening conditions of a licence, obstructing a fisheries officer, removing fish from traps and, at section 167, using a vessel in fishing waters without a fishing licence. He submitted that the wording of section 167 shows a clear intent to punish those fishing on the High Seas without a licence or scientific permit. The deeming provisions of section 194 serve to attach criminal liability to those who have an operational connection to a particular vessel and section 194(1) applies to master, owner and charterer. It is not necessary to prove any connection between the three of them. Consequently, when the master of *FV Figaro* entered a guilty plea in early June 2016 to an offence under section 167, a strict liability offence by the Defendant was created by the operation of section 194 and the Defendant also entered a guilty plea.

6. For convenience, at this point I set out s194 in full:

*"(1) Where an offence under this Ordinance is proved to have been committed in relation to a fishing vessel or any fishing operation undertaken by a fishing vessel, the owner, charterer, operator and the master of that fishing vessel shall each be deemed to have committed that offence and may be proceeded against in respect of that offence and convicted and sentenced in respect of it accordingly.*

*(2) Except where it is specifically provided by this Ordinance to the contrary, it is not a defence to a prosecution for an offence under this Ordinance for the defendant to prove that he had no knowledge of the act or omission giving rise to the commission of the offence or that the defendant had no reasonable means of preventing the commission of the offence."*

7. Mr Powell went on to distinguish between the engagement of section 194 by the master's conduct under section 167 FCMO 2005 (an offence under primary legislation) and an offence by the master under regulation 61(3) FRO 1987 (subordinate legislation). He said that he had been unable to find any authority that provides for an offence under subordinate legislation which also amounts to an offence under primary legislation.

8. Mr Powell also submitted that the wording of regulation 61 FRO 1987 is quite different from section 167 FCMO 2005 and the particulars of the 10 informations for offences under the

FRO 1987 are accordingly drafted differently from that relating to section 167. He contended that regulations 13, 15, 16 FRO 1987 impose specific obligations on the master of a vessel and a failure to fulfil those obligations is a breach of those regulations and an offence created by regulation 61(3). He submitted that the Crown was wrong to say that the Defendant is guilty of the 10 informations because it was the charterer of the *FV Figaro* at the particular time. There are no deeming provision within the FRO 1987 - section 194 is not replicated - and, in the absence of such deeming provisions, section 194 should not apply.

9. Mr Powell pointed to the difference between the wording of regulation 61(1) and that of 61(3). He submitted that it was no accident that regulation 61(1) specifically contains the words "*being the owner, master or charterer of any vessel*" after "*any person who*" but the words "*owner, master or charterer*" are not in regulation 61(3). He argued that if the legislature had intended section 194 FCMO 2005 to apply to all parts of regulation 61, there would be no need for the words "*being the owner, master or charterer of any vessel*" to be included in regulation 61(1).

10. At this point I set out regulation 61 in full:

*"(1) Any person who, being the owner, master or charterer of any vessel or the owner, charterer or pilot in command of any aircraft or owner of any land store or a person engaged as a member of the crew of any vessel who contravenes any provision of Parts I to V or of any licence applicable to such vessel or aircraft commits an offence.*

*Penalty: Level 9*

*(2) Any person who wilfully obstructs the Director or any Fisheries Protection Officer in the performance of any of his functions under these Regulations commits an offence.*

*Penalty: Level 9*

*(3) Any person who provides any information he is required under these Regulations to provide to the Director or to any Fisheries Protection Officer and does so-*

- (i) knowing that information to be false; or*
- (ii) not believing it to be true; or*
- (iii) by suppression or concealment of other information, in such a manner as is calculated to mislead or deceive in a material respect,*

*commits an offence.*

*Penalty: Level 8*

*(4) Any person who wilfully refuses to answer a question which the Director or a Fisheries Protection Officer puts to him in the exercise of his functions under the Ordinance or these Regulations is deemed for the purposes of paragraph (2) of this regulation to have wilfully obstructed the Director or Fisheries Protection Officer in the performance of his duties:*

*Provided that it shall be a defence for any person prosecuted in respect of an offence by virtue of this paragraph to satisfy the court that he reasonably believed that the answer to that question might tend to incriminate him of an offence.*

*(5) Where any act or omission constitutes an offence under the Ordinance as well as an offence under these Regulations a person may be convicted only in respect of one of those offences and may not be convicted of the other, and where in respect of any such act or omission he would be liable on conviction of that offence under the Ordinance to a lesser penalty than that provided by this regulation he shall, on conviction, be liable only to such lesser penalty.”*

11. Mr Powell next submitted that regulation 61(3) FRO 1987 is inconsistent with s194 FCMO 2005 and, because of the provisions of section 224(1) FCMO 2005, could not continue in force after the repeal of the Fishing Ordinances 1986 to 1991. He noted that section 224(1) provides that any regulations made under the repealed Fishing Ordinances shall, in so far as not inconsistent with the FCMO 2005, continue in force until revoked by regulations made under section 223 FCMO 2005. Accordingly, if there is an inconsistency between regulation 61(3) FRO 1987 and section 194 FCMO 2005, they could not co-exist and the informations should be dismissed.
12. He also submitted that whether the Court applies a strict or a purposive approach to section 194 and its application to regulation 61, the answer would be the same. In his view the repeated use of the word “*master*” in regulations 13, 15 and 16 FRO 1987 shows a clear express intention that the offences would apply to the master of the vessel alone and it would not be open to the Crown to expand them to include owners and charterers. In his submission, regulation 61(1) does allow such expansion; by contrast, regulation 61(3) does not. A purposive approach would fail to make any person other than the master liable as regulations 13, 15 and 16 were drafted to catch masters who did not adhere to their obligations and the purpose must have been to hold masters to account and punish them alone for the offending.
13. Mr Powell’s final point was that there is a tension between section 194 FCMO 2005 and regulation 61(3) FRO 1987 and, in accordance with the principle that the penal status of a particular act should be construed strictly in favour of a defendant, any ambiguity must be resolved in this Defendant’s favour. Mr Powell cited *R v Cuthbertson* [1980] 3WLR 89.
14. For the Crown, Mr Walker argued that the issue boils down to statutory interpretation. He questioned whether the words in section 194 “*an offence under this Ordinance*” could be limited in their effect to offences contained in sections in the Ordinance itself and submitted that “*under this Ordinance*” applies equally to offences contained in the FCMO 2005 and to those under any regulations created or preserved under it. He submitted that section 193 is an interpreting provision, declaratory in its nature, and talks to the whole of Part VIII and, therefore, relates to section 194 and provides the clear answer as to how to read section 194.
15. He advanced that the division of the FCMO 2005 into parts which are then split into a number of sub-headings is of significance in the interpretation of the Ordinance. Section 194 appears under the sub-heading “*Provisions in relation to offences*” which runs from section 193 through to section 207. He directed the Court’s attention to section 193(7)(b) which he argued was a crystal clear declaration “*that an offence under this Ordinance*” is declared to include a reference to an offence created by regulations under the FCMO 2005.
16. As to the effect of the word “*created*” in section 193(7)(b) FCMO 2005, Mr Walker submitted that it should be interpreted as encompassing the older regulations (FRO 1987)

preserved under the provisions of section 224(2)(b) FCMO 2005 and so keep them validly in force.

17. For ease, I set out section 193(7):

*“A reference in this Part-*

*(a) to engaging in conduct includes a reference to failing or refusing to engage in conduct;*

*(b) to an offence under this Ordinance, without prejudice to the generality of the effect of the definition of "this Ordinance" in section 3, is declared to include a reference to an offence created by regulations under this Ordinance.”*

18. In rebutting Mr Powell’s argument that there is a tension between section 194 FCMO 2005 and regulation 61(3) and the principles of interpretation are in favour of the Defendant, Mr Walker denied that a distinction could be drawn between owners, charterers and operators guilty by virtue of section 194, whether of offences under section 167 or regulation 61(3). He submitted that the principles of interpretation could operate entirely fairly on a correct interpretation of both the FCMO 2005 and the FRO 1987. He cited the reference to the master in section 194 by which the master is made criminally liable whether or not he has knowledge of the act or omission giving rise to the offence. He submitted that an offence under regulation 61(3) could be committed by a person other than the master and section 194 was designed to stop a master hiding behind a defence that he did not make the report himself and, therefore, could not be guilty of an offence under the FRO 1987. He argued that whether old regulations were preserved – as with the FRO 1987 – or newly created under the FCMO 2005, the position would be the same and such regulations would have, and were meant to have, the benefit of section 193(7)(b) FCMO 2005.

19. As my first step in my consideration of the issue of interpretation of the written law of the Falkland Islands, I turn to the Interpretation and General Clauses Ordinance 1997 (IGCO 1977) which came into force 11<sup>th</sup> July 1977. I pause here to observe that the IGCO 1977 contains several provisions, important to the interpretation of the written law of the Falkland Islands, which have no equivalent in the Interpretation Act 1978. In section 17 IGCO 1977, the general principle of interpretation is set out:

*“A written law of the Falkland Islands shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of such written law according to its true intent, meaning and spirit.”*

*“Written law of the Falkland Islands” is defined in section 4 IGCO 1977 as “any Ordinance of the Falkland Islands and any subsidiary legislation”*

I also note that section 16(3) IGCO 1977 deals with marginal notes and section headings and this is relevant to a point put forward by Mr Walker and referred to in paragraph 15 above. Section 16(3) reads:

*“A marginal note to any provision of any written law of the Falkland Islands and a section heading or note to any provision contained in the Revised Edition of the Laws shall not have any legislative effect and shall not in any way vary, limit or extend the interpretation of any such provision.”*

20. Of further particular assistance in this case are sections 30, 31, and 32 IGCO 1977 which deal with subsidiary legislation in these terms:

*“ 30. Where an Ordinance confers power on any authority to make subsidiary legislation, the following provisions shall have effect with reference to the making thereof:*

*(a) when any subsidiary legislation purports to be made in exercise of a particular power or powers, it shall be deemed also to be made in exercise of all other powers thereunto enabling;*

*(b) no subsidiary legislation shall be inconsistent with the provisions of any Ordinance;*

*(c) ...*

*(d) where any Ordinance confers power on any authority to make subsidiary legislation for any general purpose, and also for any special purpose incidental thereto, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;*

*(e) ...*

*(f) ...*

*(g) ...*

*31. Subsidiary legislation shall be judicially noticed.*

*32. Where any Ordinance confers power to make any subsidiary legislation, expressions used in the subsidiary legislation shall have the same meaning as in the Ordinance conferring the power, and any reference in such subsidiary legislation to "the Ordinance" shall be construed as a reference to the Ordinance conferring the power to make such subsidiary legislation.”*

21. I shall deal now with the status of the FRO 1987. It came into existence as an order made by the Governor on 17<sup>th</sup> December 1987 (SR & O no. 24 of 1987) in exercise of his powers under section 20 Fisheries (Conservation and Management) Ordinance 1986 and came into force on 1<sup>st</sup> January 1988. A fundamental question is whether or not the provisions of section 224(2)(b) FCMO 2005 are sufficient to make the FRO 1987 “regulations under the Ordinance” for the purposes of sections 193(7)(b) and section 194 FCMO 2005.

22. I find section 224(2)(b) FCMO 2005 entirely clear that the legislative purpose of that section is to preserve the FRO 1987 until it is revoked by new regulations made under section 223 FCMO 2005. No new regulations have yet been made and the FCMO 2005 remains unchanged apart from amendments effected by the Fisheries (Conservation and Management) (Amendment) Ordinance 2015. These did not affect section 224 FCMO 2005.

23. I note section 27(2) IGCO 1977 which says:

*“Where an Ordinance repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, in so far as any subsidiary legislation made or other thing done under the enactment so repealed, or having effect as if so made or*

*done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision.”*

24. The question then arises as to whether or not the FRO 1987 is “subsidiary legislation” within the meaning of section 27(2) IGCO 1987. This question is answered by the definition of “subsidiary legislation” and “regulations” in section 4 IGCO 1977:

*“subsidiary legislation” and “regulations” means any proclamation, rule, regulation, order, resolution, notice, rule of court, by-law or other instrument made under or by virtue of any Ordinance and having legislative effect.”*

25. Therefore, the provisions of section 224(2)(b) FCMO 2005, when properly construed, give FRO 1987 the status of regulations made under the FCMO 2005. FRO 1987 is properly subsidiary legislation to be interpreted in accordance with sections 30 and 32 IGCO 1977. I find there to be no real doubt that the FRO 1987 are regulations made under the FCMO 2005.

26. I move on to consider whether or not the offences with which the Defendant is charged are ‘created’ by regulations under the FCMO 2005. I am satisfied that the word “created” in section 193(7)(b) FCMO 2005 has no special meaning and it simply means made or brought into being.

27. The Defence has urged that the absence of the words “being the owner, master or charterer of any vessel” in regulation 61(3) FRO 1987 but the inclusion of those words in regulation 61(1) indicates a different intention by the legislature as to the person to whom regulation 61(3) applies. In other words, it is urged that the strict liability provisions of section 194 FCMO 2005 should not extend to owners, operators and charterers for offences under regulation 61(3). In response, the Crown has pointed out that regulation 61(3) does not refer to the master of a vessel but to “any person who provides information...” and has suggested that the person who makes the report to the Director of Fisheries may be someone other than the master.

28. I note that section 91 FCMO 2005 contains a statutory requirement for persons other than masters to provide returns and information to the Director of Fisheries. Section 91 FCMO 2005 says:

*“91. (1) The following persons shall keep such accounts and records, and provide to the Director such returns and information, as may be required by or under regulations made under this Ordinance-*

- a) holders of scientific permits or fishing licences entitling the holder to take fish;*
- b) owners, caveators and mortgagees of Individual Transferable Quota, and owners and caveators of Provisional Quota and Catch Entitlements;*
- c) owners, charterers, operators and masters of Falkland Islands fishing vessels;*
- d) owners and persons in charge of any premises where fish are received, purchased, stored, transported, processed, sold or otherwise disposed of;*
- e) persons engaged in the receiving, purchasing, transporting, processing, storage, sale or disposal of fish;*
- f) holders of high seas fishing licences issued under section 130.”*

However, I note that this requirement to provide returns and information is not under the FRO 1987 but under the FCMO 2005 whereas regulations 15 and 16 FRO 1987 specifically refer to the master making reports.

29. In addition, section 49(1) FCMO 2005 allows for Regulations made under section 223 FCMO 2005 to require *“the holders of fishing concessions to...furnish returns containing information in relation to the taking of fish...and the course or position at regular intervals inside or outside the fishing waters of the fishing vessels to which the fishing concessions relate”* and, at section 49(3) it is stated that *“it is a condition of a fishing concession that the holder of the fishing concession shall comply with the requirements of any regulations made by virtue of subsection (1)”*. The term *“fishing concession”* is defined in s2 FCMO 2005 as meaning *“any fishing right and any permit or licence, other than a fish receiver permit, granted under this Ordinance”*.
30. As I have already stated (paragraph 19 above), general principles of interpretation are set out in section 17 IGCO 1977. The object of FCMO 2005 and its *“spirit”* are clearly enunciated in section 8 FCMO 2005. It follows that in all matters relating to FCMO 2005 *“such fair, large and liberal”* construction and interpretation must be applied to achieve the objects set out in section 8 FCMO 2005.
31. These general principles come into play in my consideration of the point on the extension of the provisions of section 194 FCMO 2005 into the FRO 1987 to create a strict liability for owners, operators, charterers and masters under the FRO 1987. Having concluded that the FRO 1987 are regulations made under the FCMO 2005 (see paragraph 25 above), and taking account of the objects set out in section 8 FCMO 2005 and also those of section 17 IGCO 1977, I also conclude that the strict liability for owners, operators, charterers and masters under section 194 FCMO extends to the FRO 1987 and, by virtue of section 193(7)(b) FCMO 2005, each may be proceeded against in respect of an offence under FRO 1987. I find that the use of the word *“person”* in regulations 61(2) and 61(3) does not conflict with the strict liability provisions of section 194 FCMO 2005 and the omission of any reference to owner, charterer or operator is of no consequence as section 193(7)(b) FCMO 2005 applies. Accordingly, I find that the Defendant is properly charged.

Dated: 7<sup>th</sup> July 2016

*Clare Faulstich*

Senior Magistrate