IN THE SUPREME COURT OF THE FALKLAND ISLANDS
IN THE MATTER OF AN APPEAL UNDER SECTION 124 OF THE FISHERIES (CONSERVATION AND MANAGEMENT) ORDINANCE 2005

Case Ref: SC/CIV/5/07

BETWEEN:

SOUTH ATLANTIC MARINE SERVICES LIMITED

Appellant

-and-

THE DIRECTOR OF FISHERIES OF THE FALKLAND ISLANDS

Respondent

Hearing: 2 - 4 July 2007

Richard Marlor and John Kimbell for the Appellant

Robert Titterington, Acting Attorney General, for the Respondent.

Judgment

1. This is the first appeal to be brought in the Falklands Supreme Court relating to the Fisheries (Conservation and Management) Ordinance 2005 (the Ordinance). For the purposes of this Judgment it is necessary to summarise its intention, scheme and effect.

2. The stated purpose of the Ordinance is *"to reform and restate the law relating to fisheries resources and fisheries management, control and conservation"* and s.8 (a) states that it is "*to provide for the utilisation of the fisheries resources of the Falkland Islands while ensuring sustainability."* The Policy Memorandum to the Bill describes a change from the relatively short term licence system to a system based on transferable property rights. The property rights relate to the grant of a quota in a particular fishery, which translates into a proportion of the Total Allowable Catch or Total Allowable Effort declared annually for that fishery. As the grant is for a period of 25 years, such a transferable property right is extremely valuable.

3. To be eligible for a grant a company has to be owned by shareholders with Falkland Islands' status and ordinarily resident in the Falkland Islands. Such companies are able to apply to have their name placed on the Eligibility Register.

4. To give effect to the new system, a Director of Fisheries (the Director) is appointed by the Governor. His responsibilities include determining whether a company is qualified to be placed on the Register, and he is empowered to strike a company off the Register if he considers it is no longer eligible, and to revoke a grant if he is not satisfied that a company is properly exploiting its quota.

5. Part V of the Ordinance empowers the Governor to appoint a Disputes Commission (the Commission) which is intended, according to the Policy Memorandum of the Bill, to provide a dispute resolution mechanism which can focus on fisheries issues and deal with them in an expeditious manner. The Commission comprises a Chairman and not more than 7 other members, all of whom are appointed by the Governor.

6. For the purpose of any review, the Commission comprises the Chairman and two members selected by the Chairman. No qualifications, whether legal or fisheries related, are required for appointment to the Commission. Consistent with this, its proceedings are informal, it is not bound by any rules of evidence, and it acts on the best information available, takes into account any uncertainty as to that information and is cautious when that information is uncertain, unreliable or inadequate (s.10). Nevertheless, the Commission is given wide powers when conducting its review. It can require any person to give evidence before it, and to produce documents.

7. The decisions of the Director which are subject to review by the Commission are set out in s.107. Any person aggrieved by such a decision may apply for a review under s.108, and the Director is made a party to the review proceedings and is required to set out the reasons for his decision (s.109). The decisions of the Director subject to review include certain decisions where he has to make a value-judgment, for example under s.33 (2), where he has to decide whether a company has failed properly to exploit its quota to the extent that its grant should be revoked.

8. Having conducted its review, the Commission may affirm, vary or set aside the Director's decision, and substitute its own, in which event it is taken to be the decision of the Director (s.113). Its decision can be appealed on a point of law to the Supreme Court under s.124, and this brings me to the present appeal.

9. Although the point of law raised relates to the interpretation of a particular section of the Ordinance and whether the Disputes Commission was empowered to revisit the quota allocation made by the Director, as argument of the appeal progressed it became clear that the overall scheme leading to the grant of quotas in the Ordinance required consideration, as did the relevant documentation now

collected in a file under tabs A1-26, some of which appeared late in the hearing and was, therefore, not before the Commission. As a result I gave directions permitting further written submissions to be filed following completion of the oral hearing.

10. In the submissions filed by Mr. Kimbell on behalf of the Appellant he points out, in my view correctly, that the Court should proceed with caution when it is asked to consider a point not argued before the Commission based on documentation, some of which was also not before the Commission. However, I am quite satisfied that I am able to consider such documents and their effect on this appeal, and do not believe that the Appellant has been prejudiced, save possibly as to costs, by the fact that the matter was only raised at the appeal hearing, it having now had an opportunity to make further submissions. I am also satisfied that the contents of the documents speak for themselves, so far as the matters I have to decide are concerned, and therefore do not require remittance back to the Commission for factual determination.

11. The appeal before me arises because the Appellant felt aggrieved and this caused it to seek a review. The cause of its grievance can be stated quite shortly. It had, as the Director well knew, lost one of its fishing boats when it caught fire and sank in 1999. It was unable to replace it until 2002. The Appellant contended that, as a result, it was operating one boat short during most of the period of 2000-2003. As the criteria, upon which grant of a company's quota under the new system were based, was its catch track record during precisely those three years, the Appellant's quota was significantly depressed. It contended that public law principles required that the Director make an adjustment to the quota awarded to the Appellant, as to base it on a rigid application of the criteria would be unfair, particularly as the quota percentage, once fixed, would last for a quarter of a century.

12. The Appellant contends that the Commission is empowered to review the Director's assessment of its quota, as it falls within s.107 (a) which enables a review of the Director's decision:

> *"(a) under section 20 as to the person or persons to whom the grant of Individual Transferable Quota or Provisional Quota is made."*
>
> Section 20 (1) states:
>
> "*Where the Director makes a decision as to the person or persons to whom the grant of an Individual Transferable Quota or Provisional Quota is to be made….*

13. The Appellant argues that this makes clear that the Director is the decision maker, and further submits that a grant of a quota cannot be made without the fraction granted being specified. Therefore the percentage granted is intrinsic to

the grant, and is reviewable. It cannot, says Mr. Marlor on behalf of the Appellant, have been the intention of the Ordinance that the review should simply relate to checking the mathematical calculation of the quota as determined from the catch during the criteria years. S.20 must be taken as including a power to review the Director's failure to take into account the special circumstances relating to the Appellant, whether by failing to exercise his discretion or by exercising it in a way that offended natural justice.

14. Mr. Titterington, Acting Attorney General, for the Respondent, disagrees. He submits that the wording of s. 20 (1), and the Commission's power of review based upon it, cannot be interpreted as extending to the decision as to the amount of the quota percentage. The Commission is a creature of statute, and its powers have to be derived from that statute. In effect, he submits, the words "*a decision as to the persons to whom the grant of quota is to be made"* cannot be interpreted to include a discretion as to whether the stated criteria upon which the quota is based should be amended in relation to a particular person. Such a power would have to be specifically given in the Ordinance. The Director is given no discretion in the Ordinance as to the application of the criteria, and such cannot not be the subject of review, whether on public law or any other principles.

15. Therefore, he submits that the Commission's power of review under s.107 (a) is limited to ensuring that the procedural requirements of the Ordinance have been complied with, that the application has been assessed in accordance with the stated criteria, and that there is no error in the resultant calculation. The Commission agreed with him, and this appeal asserts that it was wrong in law to do so as the Director does have a discretion, and s.107 (a) must be interpreted as giving the Commission jurisdiction to review the percentage quota that he allocated to the Appellant.

16. The Director, although charged under s.13 with the implementation of efficient and cost-effective fisheries management on behalf of the Falkland Islands, and empowered, under s.39, to decide the Total Allowable Effort or Total Allowable Catch in relation to each particular stock, which he then has to publish (ss.11 & 12), is not empowered to determine the criteria by which the allocation of the quotas amongst the companies on the Eligibility Register is to be made. Such criteria are obviously crucial, submitted Mr. Titterington, as they determine the value of a company's transferable property right, and are a matter of policy. Indeed, paragraph 31 of the Explanatory Memorandum to the Bill states that the determination of the criteria is a policy matter and that is why they are not laid down in the Bill. Also, it is to be noted that s.6 the Ordinance gives to ExCo the task of conducting a review, at least annually, to determine whether any policy changes are needed in relation to fisheries resources and management, control and conservation. Under s. 61 The Falkland Island Constitution Order 1985 matters of policy are decided by the Governor in consultation with the Executive Council, which he chairs. Mr. Marlor, although agreeing that this may be correct

as to the determination of the general policy as to the criteria, submits that public policy dictates that the Director has a discretion as to the extent to which that general policy is to be applied in relation to any particular grant.

17. Mr Titterington, in support of his denial that the Director is given any discretion under the Ordinance, further submits that the documentation reveals that at no time did the Director contend that he had, let alone purported to exercise, any discretion in the matter.

18. I, therefore, now turn to consider that documentation and the further written submissions relating to it.

19. It is clear that during 2006 the Director canvassed the companies' views as to the criteria to be adopted, and that there were divergent views as to what the criteria should be. Having done so, on 26 October 2006 he sent a report to ExCo containing his recommendation as to the criteria, namely the catch track record in the three years 2000-2003, and set out his reasons for that recommendation (A1). He, therefore, clearly believed that determination of the criteria was a matter of policy and not something that he could decide. Once decided, it was then his duty was to determine the quota of each company based on the criteria, and publish the grants that he intended to make, and, under s.19 (3), the criteria that he had used, as well as giving notice of the right to seek a review under s.108.

20. ExCo published an action Minute (A2) setting out the criteria, and the Director then published the criteria (A3). However, before assessing the quotas based on the criteria, he made a further report to ExCo on 14 December 2006 (A4). Here he set out the Appellant's contention that it should be treated as a special case by reason of it having lost its vessel in March 1999 and that some adjustment should be made to its track record to reflect this. His recommendation was that no adjustment to the criteria should be made in the particular case, but he was obviously leaving it to ExCo to decide. It is submitted that the very fact that the Director placed this paper before ExCo, in which he refers to the general policy having been formally decided, reveals that he believed that a discretion to part from that general policy existed. I do not accept that. I consider that this document shows that the Director appreciated that he had no discretion and that, for the Appellant to be treated as a special case, the criteria would have to be adjusted, which he had no power to do.

21. ExCo decided that there should be no adjustment to the criteria and published an action minute to that effect (A5). The Director informed David Eynon of the Appellant of this decision and correspondence between them followed, in which the Director pointed out that nothing could be done unless the allocation policy was revisited (see e-mail of 9 January 2007 at B19). He also pointed out in his letter of 18 January 2007 (A16) that no allocation scheme was

going to satisfy everyone, and that a different policy, such as charging for the grants, could have been far less advantageous.

22. The Director then informed the companies by e-mail of 19 January 2007, subsequently published on 31 January in the Gazette, of their quotas assessed on the said criteria, under which the Appellant's fraction was 15.30% in respect of Squid and Restricted Finfish and 22.21% of Restricted Finfish stocks. Mr. Eynon then wrote to the Governor in his capacity as Chairman of ExCo (A18), copying it to ExCo members, pointing out the extent to which the Appellant had been disadvantaged. That letter was sent to the Director who, having consulted the Attorney General, on 31 January 2007 sent a memorandum to the Governor (A22) in which he set out two options: Option A was to retain the criteria unadjusted, Option B was to make a concession in the Appellant's case. Again his recommendation was to maintaining Option A.

23. It will be noted that throughout this documentation there is no suggestion that the Director himself had a discretion as to the criteria that he had to apply, or to make any adjustment in a particular case.

24. Towards the end of the hearing the Respondent disclosed an e-mail (A21) dated 2 February 2007 from the Governor to the Director in the following terms:

> "*Thank you for your advice on this. You will see that the Councillors and I think it right to stick with the original ExCo decision (Option A). Grateful if you would now reply to the SAMS letter, informing them of the ExCo consideration of their letter and advising them of their rights. Thanks. Alan Huckle."*

. This the Director did by an e-mail of 6 February (A26).

25. Mr. Titterington submits that the Governor's e-mail is clearly a direction by him to the Director, which direction the latter was obliged to carry out by virtue of s.4 (5) the Ordinance which states.

> "*In the carrying out of his responsibilities and in the performance of his functions under this Ordinance the Director shall act in accordance with any directions, not inconsistent with this Ordinance, which the Governor acting in his discretion may give to him.*"

26. He also points out when exercising any function acting in his discretion the Governor is not obliged to consult with the Executive Council (see sections 61(1) and (2) (c) of the Falkland Islands Constitution Order 1985-97), and therefore there was no obligation upon him to do so before issuing such a direction, although he obviously could consult Members of Executive Council and others, if he wished to do so.

27. Mr. Kimbell, in his written submissions, accepts that, if the e-mail does constitute such a direction, then the Director was obliged to follow it, and his doing so is not reviewable. He submits, however, that if that is its nature and effect, then why did the Memorandum of 31 January 2007 and, by implication, the e-mail of 2 February 2007 canvass the possibility of the Appellant seeking a review under s107 (a). The Respondent did not assert that the prospect of such a review was negated by such a direction before the Commission, and no affidavit evidence either before the Commission or myself makes such an assertion, unlike in R v Director of Fisheries of South Georgia and the South Sandwich Islands, ex parte Quark Fishing Limited (2002) FILR 163 ('Quark No. 1"). There the question arose as to whether the Director of Fisheries for SGSSI had been given advice or a direction by the Commissioner under s.4 (2) of the Fisheries (Conservation and Management) Ordinance 2000. At page 182 of his Judgment Chief Justice Wood said:

> "I am not of the view that an instruction…need take any particular form. Whilst in an ideal world such a requirement would have simplified matters for the court, I readily accept that the process of government cannot in most cases be operated by the giving of "orders" in a formal manner or specifically in writing."

28. I respectfully agree with Chief Justice Wood and, whilst I have sympathy with the Appellant in having this document produced and this point taken so late in the appeal, that cannot alter the nature and effect of the contents of the e-mail. I am quite satisfied that the contents of that e-mail evidence that the Governor had decided to accept the advice that what he refers to as Option A should be the criteria, and constitute a direction to the Director which left him no doubt that he had to follow the direction and to apply Option A in the Appellant's case. That being so, I am unable to find other than that such constituted a direction within s.4 (5), and the Director was obliged to follow it, which he did. The determination of the criteria was clearly a matter of policy and, having been directed by the Governor to adhere to it, the Director had no discretion to vary its application, and therefore the Commission had no power to review his actions in carrying out that direction, and that is sufficient to determine this appeal.

29. However, even if no such direction had been given, I am unable to accept the submissions that the Ordinance can be interpreted as giving the Director a personal discretion as to the application of the policy in a particular case, or that the wording of s. 20 (1) can be interpreted as giving the Commission a power to review any such discretion under s.107 (a).

30. For all of these reasons, I answer the point of law as to whether the Commission has jurisdiction to review the percentage quota allocated to the Applicant in the negative.

31. Where the Commission does have a power of review, however, I accept Mr. Marlor's submission that the Commission should not feel constrained in doing so by lack of legal or fisheries expertise. The Commission is not starting afresh, but is examining the decision taken by the Director and his reasons for his decision, and the representations of the aggrieved and, in the light of all the information before it, decides whether to uphold or come to a different decision. In doing this I consider the Commission's belief, as set out in its Reasons, that to review such a decision would require consideration of the whole fisheries conservation and management policy, or the same knowledge, training and expertise in fisheries matters as the Director, to be misconceived. It is often the case that lay persons, exercising a quasi-judicial function, have to make decisions in areas where they personally have no expertise, but that does not, and should not, inhibit them form reaching a common sense and fair decision based on the material placed before them.

32. It was agreed that any order as to costs arising from my Judgment should be determined after hearing further admissions, which I will hear in a teleconference, as which time I will also hear any submissions in respect of the stayed leave for Judicial Review application.

Christopher Gardner QC
Chief Justice
3 August 2007