

## JUDGMENT

R v MANUEL ALVAREZ GAYO

R v PRION LTD

6 November 2000

This case relates to three charges against the Master of the Fishing Vessel Mila, Manuel Alvarez Gayo (hereinafter, for avoidance of doubt, referred to as the Captain) and three charges against the Falkland Island registered company Prion Ltd (hereinafter referred to as Prion). The charges are not joint but are heard together sequentially. Only two charges out of the three were put to the Captain and Prion.

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### **The Charges re: The Captain**

1. That during the period 29 August 2000 to 9 September 2000 in the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) statistical area 58.5.2 being the Master of the Falkland Islands Fishing Vessel Mila you did use the said fishing vessel for fishing in CCAMLR waters without the authority of a CCAMLR fishing licence. Contrary to Section 4(2) of the Fishing (CCAMLR) Ordinance 1999 - Falkland Islands legislation.

2. An identical charge relating to 10 September 2000.

### **The Charges re: Prion**

3. That during the period 29 August 2000 to 9 September 2000 in the Convention on the Conservation of Antarctic Marine Living Resources (hereinafter referred to as CCAMLR) statistical area 58.5.2 being the owner of the Falkland Islands Fishing

Vessel Mila you did use the said Fishing Vessel for fishing in CCAMLR waters without the authority of a CCAMLR fishing licence. Contrary to Section 4(2) of the Fishing (CCAMLR) Ordinance 1999.

4. An identical charge relating to 10 September 2000.

Each charge attracts a penalty of a fine of up to £250,000, forfeiture and disqualification orders. Prion, through Mr Hugh Ferguson, pleaded guilty to the offences and the Captain, who remained unrepresented until the afternoon of 1 November 2000, also pleaded guilty.

The facts of the case were outlined by the Crown and I shall briefly summarise those facts. I repeat, guilty pleas were entered by both defendants and therefore it is unnecessary to rehearse every fact whether agreed, uncontested or irrelevant that was raised.

The Fishing Vessel Mila is a long liner registered in Stanley, Falkland Islands. It has a licence to fish on the High Seas granted by the Falkland Islands Government. It is not licensed for CCAMLR waters. It is owned by Prion of Stanley and, according to the Companies Register, the shareholders are Mr Michael Summers, Falkland Islands with a 25.1% share and Freiremar S.A. with a 74.9% share of Spain (the ownership of the vessel as initially stated turned out to be inaccurate, the principal shareholder being Centropesca S.A. of Las Palmas, Spain rather than Freiremar). The court was not informed as to whether the percentage shares remain the same, nor was the court

informed of the date of incorporation of the company, or the date of the change in share ownership and why.

On 3 August 2000 the Mila left Cape Town, South Africa to fish on the High Seas which would have been a legal activity, this intent has been demonstrated and admitted to be totally false.

The court was told that on the evening of Sunday 10 September 2000 the licensed Australian Fishing Trawler Austral Leader located a contact by radar. The contact was approximately 38 nautical miles from Heard Island in the Southern Indian Ocean and 162 nautical miles inside the eastern boundary of the Australian fishing zone. The contact appeared to be heading in a north-westerly direction at a speed of 1.5 knots from which the Master of the Austral Leader assumed it may have been a fishing vessel in the act of fishing. The contact maintained a speed and direction for approximately 15 minutes then altered course in a south-westerly direction for 10 minutes before altering course to the east and increasing its speed to about 11 knots (I have reservations about the directions given to the court – the chart plotter for the 10 September 2000 shows an almost parallel line covering two journeys between 0200 hours and 1200 hours. Surely a course north-west and return on a south-west bearing would create a widening angle, not a parallel line). Regardless, this area is part of the CCAMLR division 58.5.2. The Fisheries Observer on the Austral Leader was called to the bridge. The Master of the Austral Leader established radio contact with the vessel and when requested to identify itself a response from the other vessel was “*Fogo Uruguay Montevideo*”. The radio operator on this other vessel understood that he was in Australian waters but stressed that the vessel was in transit to Williams Bank

to go fishing. When asked "*have you had good fishing*" the response was "*no understand*". When the Austral Leader identified themselves as Australian the radio operator on board the other vessel was reluctant to continue with any further conversation. The operator would not correctly identify the name of the vessel when asked several times to do so. The Austral Leader pursued the vessel as it steamed at about 11 knots for 2 hours in an attempt to make a positive identification. Once closed to approximately 150 to 200 metres, the Observer on board Austral Leader noted and videoed the call sign, port of registry and vessel distinguishing number all of which had partially been obscured by canvas and/or sheet awnings. It is not denied that the vessel was the Mila. The photography exhibited in court made that fact abundantly clear and witnesses were not required to prove the fact, nor is it denied that fishing gear including many kilometres of long line fishing line, floats, hooks, swivels, anchors and branch lines together with a radio beacon and red strobe light was recovered by the crew of Austral Leader in the area 58.5.2 allegedly coming from the Mila.

The incident was reported to the Director of Fisheries in the Falkland Islands. The Managing Director of Prion was informed and the vessel was ordered back to the Falkland Islands by the Company via Cape Town arriving in Stanley, Falkland Islands on 21 October 2000. The Mila held approximately 120,000 kilogrammes of *Dissostichus Eleginoides* (Toothfish) together with 2 tonnes of Grenadier.

The sanitised Master's log, the Engineer's log book that tended to confirm the subterfuge and the information contained in the chart plotter, which was recovered by

information technology experts after an inept attempt to delete the same from the system, provided the principal evidence of illegal fishing.

The periods of illegal fishing were alleged to be between 29 August to 9 September 2000, 10 September 2000 and 14 September to 19 September 2000. The last of these three dates is the charge that was not pursued by the Crown and I make no further reference to that allegation. I also accept the pleas made by Mr Ferguson on behalf of Prion and Mr Marlor on behalf of the Captain that the two remaining charges should be seen as a continuing offence. I understand why the prosecution brought two separate charges and on this one point commend them for their thoroughness. However, it is only fair, right and proper to sentence on the basis of a continuing offence of illegal fishing between 29 August and 10 September 2000.

The court takes note of the background to the CCAMLR Convention. The Convention drawn up in May 1980 has 23 member states and provides a legal framework for the management of commercial fisheries South of the Antarctic Convergence.

Fishing is prohibited in CCAMLR waters without a licence. No such licence has been granted to the Mila for the period relating to the charges by the flag state (Falkland Islands) and even if a licence had been granted, CCAMLR conservation measures currently in force in the area 58.5.2 prohibits fishing by long lining, hence a long liner could not have been licensed in the area in any event. The tragedy of man's greed is that although Patagonian Toothfish only became commercially important in the last decade, scientists predict that if illegal fishing continues at the present rate, Toothfish will be commercially extinct in less than 3 years. That in itself is a tragedy and is

compounded by the potential seabird by-catch within the Convention area principally from illegal and unregulated Toothfish fishing leading to some species of albatross and petrels to be threatened with extinction.

### **The Fine**

A financial penalty will be imposed on Prion and the Captain - a maximum of £250,000 is prescribed by the Ordinance for each offence. The penalty must be commensurate with the seriousness of the offence and the offenders financial circumstances and ability to pay. If two offenders have committed the same offence, which is the case here for which they should receive the same punishment, namely a fine, the financial consequences for each will be widely differing. I have heard a great amount of detail about Prion's resources and have had submitted to me an unaudited trading account and balance sheet up to 31 October 2000 introduced by Mr Summers, a Director of Prion whilst giving evidence on oath. Prion's only substantial asset is the Fishing Vessel Mila which is mortgage free. Debts owed by Prion to Freiremar and Centropesca are debits on the balance sheet but it is admitted by Mr Summers that these two companies are interlinked companies, one being an erstwhile shareholder in Prion, the other being a current shareholder in Prion. If they have unsecured debts that is their problem, there is a tangible asset for the taking to pay a financial penalty namely the Mila. It is worthwhile to note that there is only £1,000 of called up share capital at stake, yet the company can trade at a loss of £600,000, however, I am not interested in the financial structuring of Prion, merely it's ability to pay a substantial fine.

Proportioning blame worthiness in this case is not easy. The Captain, not the Fishing Master, is responsible for the vessel. The internal delegation of the chain of command is outside my sphere of competence to adjudicate upon and it is not necessary for me to comment much further, save to reiterate the comments I passed on the morning of 3 November 2000. I find the fact that there are competing commands very disturbing, but apparently this is not unusual in certain fishing companies. It is Señor Manuel Alvarez Gayo who finds himself one of the defendants in this case, not the Fishing Master, and if that Captain is prepared to voyage into prohibited fishing waters and allow his vessel to remain there fishing then he must bear that responsibility, as must the company Prion, although I am persuaded by Mr Summers' evidence that Prion had no immediate knowledge of the illegal act commenced on 29 August 2000.

Bearing in mind the guilty pleas of Prion I need not go into any detail in respect of criminal liability of a company when an offence is committed by an employee acting in the scope of his employment. The company may be prosecuted for the crimes of its officers and employees if the Ordinance creating the offence imposes a liability on the company as well as the employee. Again, I need not concern myself when an employee acts ultra vires of the company's Memorandum or Articles of Association, nor am I concerned with the tortious concept of vicarious liability. The act of the employee in this case is the act of the employer and I feel it prudent to stress it is not Mr Summers who is charged with any offence nor his Spanish colleagues, it is the company Prion who is the employer. If there was any suspicion that any Director could be held personally responsible for the criminal acts of the company or the company's employees no doubt charges would have been brought, charges were not brought. Mr Summers took the stand on oath leaving himself open to cross-

examination and questioning by myself and I wish to make it categorically clear there is no question in the light of Mr Summers' tested evidence of any personal responsibility of the Directors.

The thrust of the mitigation for Prion is that it was unaware of possible illegal fishing until 11 September 2000, some 12 days after the illegal act commenced, and was not aware that the Vessel Monitoring System (the VMS) was not working until 30 August 2000. The Falkland Islands Government Fisheries ceased to receive VMS positions from the Mila soon after she left Cape Town on about 3 August 2000 and I accept what Mr Summers said, that had Prion been informed earlier they would have made efforts to rectify the problem thus preventing the vessel from misreporting its position. That unfortunate breakdown in communication does not alleviate Prion from legal responsibility.

Regretfully, I have not been addressed upon sentencing authorities in respect of CCAMLR offences around the world which although not binding would have been helpful and persuasive. It is rarely appropriate to impose the maximum sentence available for an offence especially in a case where the offender has pleaded guilty and although two separate charges have been laid and pleaded to making a combined possible total fine of £500,000, I have already deemed that the two offences are in reality a continuing offence and my view is that the starting point for a financial penalty is £250,000. I further take into account proportionality and ability to pay. This offence does not fall into the bracket of a genuine mistake or transgression for a short period of time with limited consequences, it was a deliberate act running over a number of days with the potential to produce massive profits for all concerned. I



quote from a recent Judgment I handed down in the case of Her Ching 101 “big stakes make people take big risks and therefore they can expect big penalties when caught”. The appropriate fine would, after trial and a finding of guilt, be £210,000 in respect of Prion.

I give credit to Mr Summers on behalf of Prion that he gave evidence on oath and I accept his version of the facts. If I had not I would reduce the extent of a discount which I will now grant in recognition of that plea of guilty. I take into account that Prion pleaded guilty and indicated that intention at the earliest possible opportunity and co-operated fully with the authorities, albeit the circumstances of this offence made any other plea unrealistic. I therefore impose a punishment upon Prion which is less severe than the punishment I would otherwise have imposed. The extent of the reduction for a guilty plea may be between one quarter and one third of what would otherwise have been the sentence. One third is on the high side but that is the reduction I will make. Therefore the fine will be £140,000. There is the means to pay - the equity in “The Mila”.

I cannot come to the same conclusion so far as means to pay in the case of Señor Manuel Alvarez Gayo, the Captain. No matter how much the guilt has been deflected to the Fishing Master by both Mr Ferguson on behalf of Prion and Mr Marlor on behalf of the Captain, I do not accept that. The Captain is responsible. I am told by Mr Marlor that the Captain is a man of limited means. He earns £1,565 per calendar month with £500 being retained for expenses and £800 per calendar month regular outgoings leaving a balance of some £200 + per calendar month. I hear that the Captain would be entitled to a bonus on the catch. That seems singularly peculiar as

his actions have led to his employers being fined £140,000 together with the loss of a very high percentage of the catch. I deem the Captain to be in law the main culprit in this case. I may have some sympathy for him if what I am told in particular by Mr Marlor is accurate. Perhaps he should have had more courage and told his Fishing Master the difference between legal and illegal fishing and countermanded any direction to fish in a prohibited area. Before taking up his post he could and should have ascertained the chain of command and declined to take responsibility for a ship when his orders could be overridden.

I leave open the question as to whether the VMS was switched off or otherwise deliberately disabled or whether it ceased to work for perfectly innocent reasons, but I do ask myself whether any sane person would carry out a long term criminal act whilst open to detection without taking measures to ensure detection was made impossible except by chance. There is no question left open in respect of the sanitised Master's log and deleted chart plotter, there was attempted deception. If the Captain had been a man of means, and taking into account my view of culpability, he would have been fined more than Prion. That is obviously unrealistic bearing in mind the Captain's financial circumstances. It is a duty of the court to investigate the offender's financial circumstances and it is wrong in principle to impose a fine on the assumption that it will be paid by some other person such as a company or the defendant's spouse, friends or family. When an offenders' means are such that it is unrealistic to expect him to pay a fine, it is wrong in principle to attempt to impose some more severe penalty. However, there is nothing wrong in principle with a fine being paid over a period of time longer than one year, provided that it is not an undue burden and too severe a punishment having regard to the nature of the offence and the offender and

where appropriate 3 years payments would not be untoward. Where payment by instalments is ordered, the term of imprisonment which the court is obliged to fix in default should be expressed in default of the fine and not in any one instalment. The Captain Señor Alvarez will pay the sum of £5,000 at the rate of £140 per calendar month, first payment by 4 p.m. Friday 10 November 2000 subsequent payments being made by 4 p.m. on the last working day of each month commencing the end of December 2000 and in default he will go to prison for 3 months. This takes into account a reduction in the possible fine that would have been imposed after a finding of guilt after trial and consideration of the Captain's income and expenditure. Obviously I am mindful that when the Captain leaves the Falkland Islands, and I make no order preventing such departure, the chances of the fine being paid or indeed the ability to enforce payment may become problematical but he will know it is due and this court will make certain that the authorities who have an interest in this case also know that it is due.

### **Forfeiture**

Agreement has been reached between the prosecution and the defence with regard to forfeiture and I sanction that proposal. I gave an indication on 2 November 2000 that the fish caught on the High Seas on passage to Cape Town, namely 19.8 tonnes of toothfish and 2 tonnes of grenadier, could be retained by Prion as I deem the presumption that all fish found in the hold is fish caught in CCAMLR waters rebutted upon the balance of probability. I did ask Mr Summers to produce daily catch reports in respect of the 19.8 tonnes of toothfish and 2 tonnes of grenadier but as the point has now been conceded I waive that requirement. The fish caught subsequent to departure from Cape Town outside the prohibited zone is a more difficult matter to resolve

and I may not have resolved it in favour of Prion. However, a formula has been worked out which I concur with and make an order accordingly. Briefly, it is agreed between the Prosecution and Defence that the vessel was fishing from 18 August to 27 August 2000. Approximately 24 tonnes of fish were caught according to the massaged catch figures. The Crown prefers to take a daily average catch made between 9 June and 12 July 2000 coming to 0.639 tonnes per day and apply that daily figure to the dates 18 to 27 August 2000 producing approximately 7 tonnes. The company proposes a different calculation as the vessel was fishing in a more lucrative area and seeks to reduce the 24 tonnes to 12 tonnes having acknowledged the inaccuracies of the reports. The compromise is that the 7 tonnes the Crown will say is appropriate and the 12 tonnes that Prion is seeking should be added together and divided by 2 coming to 9.5 tonnes, to be added to the undisputed 19.8 tonnes fished in the South-West Atlantic, making a total of 29.3 tonnes of toothfish and 2 tonnes of grenadier. I therefore make a forfeiture order of all the catch in the hold of the Mila except for the said 29.3 tonnes of toothfish and 2 tonnes of grenadier worth a little under £170,000. I give leave to the Crown to make any further application with regard to the mechanics for disposal.

### **Costs**

I indicated in court on Friday 3 November 2000 that I deem Mr Ferguson's application that the costs of the prosecution £2,500 should be borne equally between Prion and the Captain. Both defendants are liable to pay the sum of £1,250 each. Prion has the ability to pay its 50% and will pay £1,250 towards prosecution costs. The Captain does not have the ability to pay anything other than a nominal contribution towards his one half share of the costs and he will be ordered to pay the sum of £100. I have in

mind the Falkland Islands Supreme Court decision of Concar S.A. and the English case of R v Ronson & Parnes but neither were referred to in this case and I exercise my discretion accordingly.

Regretfully I do not deem it appropriate to order the fuel costs and miscellaneous expenses incurred by the Austral Leader and Australian Fisheries Management Authority in the sum of £3,500 to be paid by the defendants. The £3,500 has not been broken down into component parts and submitted to the defendants for scrutiny and objection. The claim for compensation must be for a sum certain and provable. I have no power to earmark where the fine imposed upon Prion and the Captain should end up but I believe that the Falkland Islands Government has a responsibility as a Contracting Party to the CCAMLR Agreement to make sure that any individual or company who assists in the apprehension of thieves should not do so at a consequential loss. That observation applies to any monies secured from the sale of the forfeited catch which again I have no authority to earmark but would mention that no doubt CCAMLR's coffers would welcome the contribution from the sale of forfeited illegally caught fish.

*Since dictating this Judgment on the 5 November 2000 I note with interest a communication I have received from CCAMLR, Hobart, Australia and I quote the relevant sections which appear to be proposals for further discussion rather than enforceable rules.*

*5.2d The Commission (that is CCAMLR) also considered a proposal that parties could transfer into a special fund established by the Secretariat or a national fund*

*whose purposes are consistent with the objectives of the Convention, proceeds from the sale of a catch or shipment of Toothfish sold in the course of legal action.*

*5.2e While there is no agreement on a conservation measure or resolution, the Commission agreed that if a Contracting Party grants a validated Toothfish catch document (DCD) in the course of legal action which results in the sale of a catch or shipment of forfeited Toothfish products after deducting from the proceeds a reasonable amount to compensate for the costs of the sale the legal action and any unpaid fine. The Contracting Party to the extent if domestic legislation allows may transfer the net proceeds to the Secretariat for the payment into the fund established by the Secretariat or into a national fund whose purposes are consistent with the objectives of the Convention.*

It appears I second guessed what the CCAMLR authorities have in mind and would respectfully request the Falkland Islands Government to take due note.

#### **Section 19 Fishing (CCAMLR) Ordinance 1999**

“Where a person is convicted of an offence against this Ordinance the court may, in addition to any other penalty, order that any licence granted under this Ordinance to the convicted person be forfeited, and any fees paid for such licence, and that such person be disqualified from the day of conviction from holding a licence for a period not exceeding 3 years”. Although no licence was granted to the Fishing Vessel Mila to fish in CCAMLR waters, a company is a person, it is a corporate entity and the above quoted section permits disqualification from holding a licence and I read that to

mean whether there is a licence in force at the date of the offence or not. Prion will be disqualified for 2 years from holding a CCAMLR Licence.

Section 21 of Fishing (CCAMLR) Ordinance 1999 allows for detention or forfeiture of a fishing vessel on failure to pay or secure a fine. I order the detention of the Fishing Vessel Mila in the Falkland Islands until the amount of the fine is paid or sufficient security given to the satisfaction of the court. Further, if the fine is not paid or security is not given by 4 p.m. Monday 11 December 2000, the matter shall be brought back to court for Prion to show cause why the vessel Mila and all its equipment used in the Commission of the offences should not be forfeited to the Crown, and if so forfeited be disposed of in such a manner as the Director of Fisheries, acting in his discretion, shall direct. For avoidance of doubt, the £140,000 fine shall be divided equally between the two offences pleaded to by Prion and the £5,000 fine will be proportioned equally between the two offences pleaded to by the Captain.

Finally, I turn again to the case of the Her Ching 101 and reiterate some observations made in that case:-

“The outcome of this decision by the court is yet to impact upon the parties but in reaching a decision as to the appropriate financial penalties to be borne by the two defendants and in what proportion I ask myself two simple questions. What could I do and what should I do? There must be a sense of proportionality of fine to crime coupled with the ability to pay. The crime in my view was serious. Conservation management of a precious resource is paramount. Poaching cannot be tolerated and must be deterred. Therefore, I confirm the penalties are meant to deter illegal fishing and are set at a level so to do. No doubt unscrupulous companies and captains will

continue to poach but if the risk of capture and consequence become unacceptable  
the numbers will drop.

Formal notices of convictions will be drawn up and forwarded to the parties' legal  
representatives.

Wah, 6th November 2000.