EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2014-085-013307
[2019] NZDC 2599

BETWEEN	MINISTRY FOR PRIMARY INDUSTRIES Prosecutor
AND	HAWKES BAY SEAFOODS LIMITED First Defendant
	OCEAN ENTERPRISES LIMITED Second Defendant
	ESPLANADE NO. 3 LIMITED Third Defendant
	ANTONINO GIOVANNI D'ESPOSITO Fourth Defendant
	GIANCARLO HAROLD D'ESPOSITO Fifth Defendant
	MARCUS GIUSEPPE D'ESPOSITO Sixth Defendant

CIV-2017-085-000882

AND BETWEEN	EXPLORER FISHING LIMITED First Applicant (FV Pacific Explorer)
	MUTIARA FISHING LIMITED Second Applicant (FV Mutiara II)
	TRIAL B FISHING LIMITED Third Applicant (FV Trial B)
	HAWKES BAY SEAFOODS LIMITED Fourth Applicant (FV Lady Ruth)

BEAULINE INTERNATIONAL (2018) LIMITED
Fifth Applicant (FV Mutiara , FV Pacific Explorer)

AND

MINISTRY FOR PRIMARY INDUSTRIES
Respondent

Hearing: 6, 7, 8 August 2018

Appearances: G J Burston and S A H Bishop for the Prosecutor / Respondent
M S Sullivan for the First, Second, Third and Fourth Defendants and the First, Second, Third and Fourth Applicants
R B Squire QC for the Fifth Defendant
K A van Wijngaarden for the Sixth Defendant
No appearance for the Fifth Applicant

Judgment: 25 February 2019

JUDGMENT OF JUDGE W K HASTINGS

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[1] The six defendants have pleaded guilty to 131 charges under the Fisheries Act 1996. The first defendant, Hawkes Bay Seafoods, is also one of five applicants seeking relief from the effects of the forfeiture of four fishing vessels to the Ministry for Primary Industries (the Ministry or MPI).[1] The sentence to be imposed and the civil actions for relief are related and are therefore considered together in this judgment. I will deal first with the sentence, and then with the relief applications.

[2] The charges to which each defendant has pleaded guilty are as follows.

(a) The first defendant, Hawkes Bay Seafoods Ltd (HBS), is a dealer in fish. It has pleaded guilty to 15 charges of selling underreported Bluenose fish (BNS[2]) contrary to s 232(2) of the Fisheries Act 1996 (FA). The maximum penalty for this offence is a fine not exceeding $250,000 under s 252(3)(n).

(b) The second defendant, Ocean Enterprises Ltd (OEL), is a licensed fish receiver. It has pleaded guilty to 8 charges of making false or misleading statements in Purchase Invoices contrary to s 230(1)(b). The maximum penalty for this offence is a fine not exceeding $250,000 under s 252(3)(m).

(c) The third defendant, Esplanade No. 3 Ltd (Esplanade), is a fishing permit holder. It has pleaded guilty to 13 charges of making false or misleading statements in Catch Landing Returns (CLRs), and 10 charges of making false or misleading statements in Monthly Harvest Returns (MHRs), contrary to s 230(1)(b). The maximum penalty for this offence is a fine not exceeding $250,000 under s 252(3)(m).

(d) The fourth defendant, Antonino (Nino) D'Esposito, is charged as the managing director of HBS and Esplanade. He has pleaded guilty to 9

[1] I have often used acronyms, but acronyms hide words. To make this judgment more accessible to lay readers, I have also occasionally used full words instead of their previously introduced acronyms in an effort to maintain the flow.

[2] Regulation 37 of the Fisheries (Reporting) Regulations 2001 prescribes the use of three-letter codes for each species of fish. These are set out in Schedule 3. A three-letter code followed by a number indicates the Fishing Management Area (FMA) in which the species is caught.

charges in total, being 5 charges under s 246 that as a director of Esplanade, he should have known that the offence of making false or misleading statements in CLRs was to be or was being committed (export events 5, 7, 27, 31/32 and 34, also referred to as the "John Butler events") and failed to take all reasonable steps to prevent or stop it. He has pleaded guilty to 3 charges under s 246 that as a director of Esplanade, he should have known that the offence of making false or misleading statements in MHRs was to be or was being committed and failed to take all reasonable steps to prevent or stop it. He has also pleaded guilty to 1 representative charge under s 246 that as a director of HBS, he should have known that the offence of selling underreported BNS was to be or was being committed and failed to take all reasonable steps to prevent or stop it. The maximum penalty for each of these offences is a fine not exceeding $250,000.

(e) The fifth defendant, Giancarlo (Joe) D'Esposito, is charged as the finance director of HBS, OEL and Esplanade. He did not know of the actual misreporting, but he has pleaded guilty to 38 charges in total, being 8 charges under s 246 that as a director of Esplanade, he should have known that the offence of making false or misleading statements in CLRs was to be or was being committed and failed to take all reasonable steps to prevent or stop it. He has pleaded guilty to 8 charges under s 246 that as a director of OEL, he should have known that the offence of making false or misleading statements in purchase invoices was to be or was being committed and failed to take all reasonable steps to prevent or stop it. He has pleaded guilty to 7 charges under s 246 that as a director of Esplanade, he should have known that the offence of making false or misleading statements in MHRs was to be or was being committed and failed to take all reasonable steps to prevent or stop it. He has also pleaded guilty to 15 charges under s 246 that as a director of HBS, he should have known that the offence of selling underreported BNS was to be or was being committed and failed to take all reasonable steps to prevent or stop it. The maximum penalty for each of these offences is a fine not exceeding $250,000.

(f) The sixth defendant, Marcus D'Esposito, is charged as the general manager of HBS, OEL and Esplanade. He has pleaded guilty to 8 charges of being a party under s 66 of the Crimes Act 1961 to OEL making false or misleading statements in purchase invoices. He has pleaded guilty to 7 charges under s 246 that as a manager of Esplanade, he should have known that the offence of making false or misleading statements in MHRs was to be or was being committed and failed to take all reasonable steps to prevent or stop it. He has pleaded guilty to 8 charges under s 246 that as a manager of Esplanade, he should have known that the offence of making false or misleading statements in CLRs was to be or was being committed and failed to take all reasonable steps to prevent or stop it. He has also pleaded guilty to 15 charges under s 246 that as a manager of HBS, he should have known that the offence of selling underreported BNS was to be or was being committed and failed to take all reasonable steps to prevent or stop it. The maximum penalty for each of these offences is a fine not exceeding $250,000.

[3] The guilty pleas were entered 21 December 2017 and reconfirmed on 21 June 2018.[3] This sentencing has proceeded on the basis of the Memorandum of Understanding between the Ministry and All Respective Defendants (MOU) dated 19 December 2017, the Supplementary Memorandum of Understanding between the Ministry and All Respective Defendants (Supplementary MOU) dated 14 June 2018,

[3] Pleas were entered following 143 hearing days from 1 May 2017 to 21 December 2017 in which appearances were required. Hearing days do not include days during which rulings following voirs dires were written or days during which teleconferences were held. Following the entry of pleas, a dispute arose over the prosecution's sentencing submissions, another dispute arose over the admissibility of additional evidence the prosecution wanted to adduce at sentencing, and the Court of Appeal delivered its decision (in unrelated proceedings) in *D'Esposito v Ministry for Primary Industries* [2017] NZCA 9 on 21 February 2018. Judicial review proceedings were filed in the High Court alleging a cause of action in estoppel to prevent the prosecution from making the disputed sentencing submissions. On 8 March 2018 the defence filed an amended application for leave to withdraw guilty pleas which was opposed by the prosecution, and the prosecution filed a notice of application to amend charges relating to the fourth, fifth and sixth defendants which was opposed by the defence. The Supplementary MOU dated 14 June 2018 recorded that the defence no longer opposed the prosecution's application to amend the charges and that the parties agreed to a Revised Agreed Summary of Facts. The High Court proceedings were discontinued. A hearing was held on 21 June 2018 for the prosecution to withdraw the charges in respect of which leave was earlier granted, to amend some of the charges by consent, and to enter convictions in order to start the clock running on the applications for relief from forfeiture.

the Agreed Supplementary Summary of Facts filed on 20 December 2017, and the Revised Agreed Summary of Facts signed on 15 June 2018.

Methodology

[4] This judgment is in two parts. I will deal first with sentencing, and then with the applications for relief from the forfeiture of four fishing vessels I ordered forfeit to the Crown.

[5] Each charge carries a maximum fine of $250,000. Mathematically, this exposes all of the defendants to notional penalties totalling $32,750,000. Sentencing is not however a purely mathematical calculation at any time, and is particularly not so in the case of fisheries offending involving consideration of fairly complex criteria in both the Fisheries Act 1996 and the Sentencing Act 2002. Nor do the facts of the offending in this case warrant such an approach.

[6] The Ministry became aware of this offending when it compared the quantities of fish caught and landed with the quantities chilled fish that were exported to overseas markets shortly afterwards. It called this investigation "Operation Marquise". After adjusting the comparison to take into account the fact that greenweight is recorded when fish are landed, and that it is the processed weight that is recorded when the fish are sold, the quantities exported appeared to exceed the quantities earlier caught and landed. The prosecution case was therefore framed around "export events" and was based on misreporting in various documents that were legally required to accurately record the quantities of fish involved in each event. There are 20 export events involved in this sentencing. Each export event consisted of an export, or exports in close succession, of chilled fish, following shortly after a landing, or landings in close succession, of fish.

[7] The facts of this offending could be analysed for sentencing purposes in several different ways. For example, the charges relating to the separate documentation required at each stage of processing could be grouped together, but this would not take into account the fact that the downstream misreporting duplicated the original misreporting, and it would run the risk of double-counting, or exaggerating, the culpability of individual defendants involved at each stage of processing who were

closely associated with the corporate defendants. Traditional sentencing methodology, from which I will not depart, requires the Court to assess first, the level of gravity of the offending taking into account case law and the specific matters referred to in each statute. It must then assess the level of culpability of each defendant in the context of the overall offending. To my mind, this is best achieved by considering how the offending actually took place. In this case, the offending took place in 20 identified "events" which can be grouped into the 15 "Marcus D'Esposito events" and the five "John Butler" events.

[8] Grouping the offending into 20 "events", each of which takes into account all of the documentation associated with that event, eliminates the risk of double counting by taking into account what was done, or not done, by each defendant in each event. It also takes into account the downstream duplication of initial misreporting, and permits an assessment of overall culpability that is aligned with the chronology and actual process of how the defendants committed the offending. On this analysis, a notional maximum fine of $250,000 (the maximum penalty for each charge) per event would be appropriate. For the 15 "Marcus D'Esposito" events therefore, a notional maximum fine of $3,750,000 is indicated, and for the five "John Butler" events, the notional maximum fine would be $1,250,000. With respect to the "John Butler" events, consideration must be given to the fact that John Butler's culpability has been assessed and he has been sentenced.[4] The starting point for the "John Butler" events must therefore take into account the degree to which parity with his sentence is warranted. The principle of totality may be applied at this point to ensure the starting point reflects the gravity of the offending, after which the Court can take into account relevant aggravating and mitigating features of each defendant before arriving at the final assessment of the fine for each defendant.

[9] The offending period for the 15 "Marcus D'Esposito events" begins with event 38 and continues to and includes event 77-78[5], covering the period between 27 July 2013 and 10 September 2014. The offending involved the under-reporting of 27 tonnes of BNS greenweight. The fishing vessels *Mutiara II*, *Pacific Explorer*, *Lady Ruth* and *Trial B*, each of which was fishing under Esplanade's fishing permit, were

[4] *MPI v Butler* [2015] NZDC 8042.
[5] Some events were not charged; others were combined into one event.

involved in the landing of the unreported BNS. The five "John Butler events" concern events 5, 7, 27, 31/32 and 34, which extends the period of offending back to 8 November 2012.

[10] In order to assess the gravity of the offending, it is necessary to describe the facts of the offending and to consider the role in the offending played by each defendant.

The Agreed Facts

[11] The HBS group consists of several companies, including HBS, OEL and Esplanade, that operate in the fishing industry. HBS is a retail, wholesale and export seafood company. It is a dealer in fish. It is the sales arm of the HBS group's business. Esplanade holds a commercial fishing permit and as a result is responsible for filing accurate catch effort returns, CLRs and MHRs with the Ministry. OEL is a licensed fish receiver (LFR) and is responsible for completing purchase invoices and filing accurate Licensed Fish Receiver Returns (LFRRs) with the Ministry.

[12] Nino D'Esposito and his brother Joe D'Esposito were at the relevant times directors of all companies within the HBS group. Nino often liaised with skippers while they were at sea to discuss catch and unloading. He also arranged and facilitated sales to export markets and procured Annual Catch Entitlement (ACE) from iwi and other stakeholders. When interviewed, he denied that any underreporting took place, and that he had any role in underreporting. Joe had day-to-day responsibilities of finance, staff payments, procurement of ACE and oversaw the filing of returns with the Ministry. When he was interviewed, he also denied that any underreporting took place, and that he had any role in underreporting.

[13] Marcus D'Esposito, the son of Nino and nephew of Joe, was the factory manager of OEL and the export business. He had responsibilities including liaising with skippers while they were at sea regarding unloading dates. He also arranged and facilitated sales to export markets, was in charge of the factory, and controlled whether fish received by the HBS group went to export, wholesale, retail or internet sales. He also denied any role in the underreporting of fish by the HBS group.

[14] The HBS group owned approximately 14 vessels that operated under the single fishing permit held by Esplanade. The vessels used in the commission of this offending were the *Mutiara II*, (which was skippered by John Butler on five occasions relating to export events 5, 7, 27, 31/32 and 34); the *Pacific Explorer*; the *Lady Ruth*; and the *Trial B*. The vessels landed fish at the licensed fish receiver, OEL. OEL received them, the relevant documentation was completed, and the fish were transferred to HBS, the dealer in fish. HBS then sold the fish to retail, wholesale and export markets, and also conducted internet sales.

[15] Once the BNS was landed to OEL, Marcus D'Esposito recorded the weight of the fish on a "weigh-in reception sheet". This was an internal HBS document. The weights recorded on this document were, however, the basis for all other amounts of fish that are required to be reported by law under the Quota Management System (QMS). Marcus D'Esposito knew that some of the weights of BNS landed to OEL and recorded in the weigh-in reception sheets were lower than what was actually landed, but he failed to take all reasonable steps to ensure that the true amount of BNS received by OEL was recorded. This meant that the weights of BNS recorded in these weigh-in reception sheets were false or misleading or both. These inaccurate weights were then recorded by OEL in purchase invoices, which are forms prescribed under the Fisheries (Record-Keeping) Regulations 1990. These inaccurate weights then flowed through other documentation in the reporting stream, including CLRs and MHRs.

[16] A skipper, John Butler, pleaded guilty to misreporting the weights of BNS. Esplanade failed to take all reasonable steps to prevent the underreported amounts entering its CLRs. Nino D'Esposito communicated regularly with John Butler when he was at sea. As the director of all the defendant companies, he should have known that the CLR offending in respect of five events (events 5, 7, 27, 31/32 and 34) was to be, or was being, committed by John Butler and he failed to take all reasonable steps to prevent or stop it. Esplanade also underreported the amounts of BNS taken in the relevant calendar months in its MHRs.

[17] The Revised Agreed Summary of Facts also states that John Butler misreported the estimated weight of BNS recorded in Lining Trip Catch Effort Returns (LTCERs) in respect of Events 5, 7, 27, 31/32 and 34. The falsities flowed through to the LFFRs. Neither the LTCERs nor the LFFRs are, however, the subject of these charges.

[18] HBS, in respect of events 38 to 77/78, sold the unreported BNS to Australian customers. Marcus D'Esposito knew that these sales included BNS that was not reported in accordance with the Fisheries Act 1996, but failed to take all reasonable steps to prevent those sales from taking place. Joe D'Esposito did not know of the actual misreporting, but he should have known, as a director and person responsible for monitoring catch against ACE, that the exports contained more BNS than was reported landed, and he failed to take all reasonable steps to prevent those sales. Nino D'Esposito was not aware of the circumstances relating to the misreporting and sale of BNS in respect of events 38 to 77/78, but as the person with overall responsibility for the various company operations, failed to take all reasonable steps to ensure that there were systems in place sufficient to prevent the offending from occurring. Although details of the sales were recorded in export documentation, none of these documents are the subject of any charges.

[19] The defendant companies received advantages from the misreporting. On the basis of the states and prices of BNS sold over the offending period, the value of BNS misreported and sold is calculated to be $253,404.62. Esplanade had limited ACE in respect of BNS2 and BNS3 and as a result avoided deemed value liability for the underreported BNS2 and BNS3. Taking into account the ACE held by the HBS group, the deemed value of BNS2 at $4 to $6 per kg underreported, the deemed value of BNS3 at $10 per kg underreported, and the agreed discrepancy of 27 tonnes of BNS between landings and sales for each of the charged export events, Esplanade's total deemed value liability which was avoided by the underreporting is $218,000.00.

[20] Misreporting of course has consequences. Misreporters obtain a commercial advantage over those who report correctly and misreporting may distort the price of ACE in affected Fishing Management Areas (FMAs). Misreporting also affects the accuracy of stock assessment. If fish management decisions are based on inaccurate information, fish stock could be overfished, diminishing potential long-term benefits

to New Zealand and the fishing industry, or fishstock limits could be unnecessarily restricted, resulting in lost fishing opportunities.

[21] Timothy John Pankhurst, the Chief Executive of Seafood New Zealand, stated in his affidavit that the seafood and fishing industry contributes $1.79 billion in export dollars to the New Zealand economy and employs more than 10,000 people. He stated that not accurately recording the taking and landing of fish reduces the sustainable take, and erodes the biomass of fish stock. He said that the admitted offending undermines the New Zealand seafood and fishing industry's reputation, public confidence and the ability to trade profitably; it undermines the substantial investment that quota holders made every year in managing the fishery; and it makes the science upon which the quota management system is based have less utility and accuracy.

[22] Barry David Torkington, policy advisor for the New Zealand Sport Fishing Council Inc, said in his affidavit that there is a small recreational catch of BNS3, estimated at about 2 tonnes per annum. He stated that BNS is an overfished stock, and in 2012 the recreational daily bag limit was reduced by 75% to reflect the risks faced by continued fishing of BNS. He stated that these conservation measures are undermined by large scale misreporting of the commercial BNS catch. He said that the QMS "relies heavily on honesty." He said that "large scale misreporting of catch weakens the foundation blocks of the QMS", and when MPI loses the confidence of the public, "their ability to manage fisheries is degraded." He also stated that the "impact on the recreational fishing public by commercial non-compliance is unknown".

Starting points

[23] As indicated above, as a general approach to sentencing, it is necessary to determine the gravity or seriousness of the overall offending in the context of the Fisheries Act 1996 and the Sentencing Act 2002. I will then address the culpability of each defendant within that context, and set a starting point for each defendant. The totality principle will then be applied if necessary to ensure the starting points reflect each defendant's culpability. I will then consider aggravating and mitigating factors relevant to each defendant to obtain an end-point fine for each defendant.

[24] I agree with the defence that the number of charges should not skew my assessment of the appropriate starting points, although duration and frequency of the actual offending is a relevant consideration. I also agree that the culpability assessment must take into account the fact that initial inaccuracies in the weigh-in reception sheets flowed through the Solution Multipliers computer system to populate downstream documentation for which other defendants were responsible. It is important therefore to keep in mind the precise nature of the acts done by, and the knowledge, or lack of knowledge, possessed by, the respective defendants when assessing the culpability of each.

[25] There is some distance between the starting and end points suggested by the prosecution, and the end points suggested by the first, second, third, fourth and sixth defendants. The Supplementary MOU records the parties' agreement that the appropriate end point range for fines on a totality basis across all defendants for both the Marcus D'Esposito events and the John Butler events is between $500,000 and $1.5 million. The defence submitted that the total penalty that should be imposed across all defendants is $600,000, of which $200,000 should be allocated to HBS, $140,000 to OEL, $60,000 to Esplanade, and the remaining $200,000 apportioned between Joe, Nino and Marcus D'Esposito. Mr Squire QC submitted that for Joe D'Esposito, a starting point in the region of $60,000 ($40,000 for the CLR offending and $20,000 for the purchase invoice and MHR offending, with no figure specified for the offences of selling unreported BNS) is appropriate, followed by no, or a minimal, uplift for previous convictions in 1994, and a discount between 15% and 20% for his guilty pleas. The prosecution submitted that for the Marcus D'Esposito events, the total end point fines should be $1,387,125, of which $675,000 should be allocated to HBS, $148,500 to OEL, $155,250 to Esplanade, $182,250 to Marcus D'Esposito, $148,500 to Joe D'Esposito, and $77,625 to Nino D'Esposito. The prosecution submitted that an additional $51,750 should be imposed on Esplanade, and an additional $51,750 on Nino D'Esposito, for the John Butler events based on parity with Judge Hobbs' earlier sentencing of John Butler. Judge Hobbs applied the culpability bands set out in *Department of Labour v Hanham & Philp Contractors Ltd & Ors*[6] to assess John Butler's offending at either the top of the low culpability band

[6] *Department of Labour v Hanham & Philp Contractors Ltd & Ors*, HC Christchurch, CRI-2008-409-34 and CRI-2008-408-9, 18 December 2008, at [57] and [58].

or the bottom of the medium culpability band. This brings the prosecution's submission on the total end point fines across all defendants to $1,490,625.

[26] The difference can be attributed in part to differing views between the prosecution and the defence on the extent to which sentencing for Fisheries Act offending is, or has been, somewhat divorced from sentencing for other regulatory offending. The defence submitted that the prosecution's reliance on judgments establishing starting points for offending under the Health and Safety in Employment Act 1992 (*Department of Labour v Hanham & Philp Contractors Ltd & Ors*[7]) , Animal Products Act 1999 (*Ministry for Primary Industries v Bay Cuisine Ltd & Ors*[8], *Ministry for Primary Industries v Fonterra Ltd*[9]), Resource Management Act 1991 (*Maritime New Zealand v Daina Shipping Company*[10]), and the Maritime Act 1994 (*Maritime New Zealand v Prosafe Production Services PTE Limited and Anor*[11]), would result in "a substantial uplift" from previous examples of sentencing under the Fisheries Act 1996. Both the defence and the prosecution referred me to *MAF v Equal Enterprises Limited*[12]. The defence also referred me to *MAF v Anton's Trawling Company Ltd*[13], *MPI v Popowicz & Ors*[14], *Ministry of Fisheries v Aurora Fisheries Limited*[15], *Ministry of Fisheries v Chong Pil Yun and Ors*[16], *Ministry of Fisheries v Don Won Fisheries and Ors*[17] and *Kim v Ministry of Fisheries*[18] in support of their submission.

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[7] *Department of Labour v Hanham & Philp Contractors Ltd & Ors*, HC Christchurch, CRI-2008-409-34 and CRI-2008-408-9, 18 December 2008. Shortly after the sentencing hearing, the High Court released its decision in *Stumpmaster Ltd v Worksafe NZ* [2018] NZHC 2020, which considered culpability bands in the context of offending carrying a maximum fine of $1,500,000 under the Health and Safety at Work Act 2015. Although the dollar amounts pertaining to each band are much larger, the percentage calculations for the low, medium and high culpability bands remain the same as they were in *Hanham*. I will therefore continue to refer to the *Hanham* bands.

[8] *Ministry for Primary Industries v Bay Cuisine Ltd & Ors* [2015] NZDC 13590.

[9] *Ministry for Primary Industries v Fonterra Ltd,* DC Wellington, CRI-2014-085-002986, 4 April 2014.

[10] *Maritime New Zealand v Daina Shipping Company*, DC Tauranga, CRI-2012-070-001872, 26 October 2012.

[11] *Maritime New Zealand v Prosafe Production Services PTE Limited and Anor*, DC New Plymouth, CRI-2008-043-002447, 13 August 2008.

[12] *MAF v Equal Enterprises Limited* [1994] 2 NZLR 473.

[13] *MAF v Anton's Trawling Company Ltd* [2006] DCR 833.

[14] *MPI v Popowicz & Ors*, DC Christchurch, CRI-2007-009-012205, 12 March 2009.

[15] *Ministry of Fisheries v Aurora Fisheries Limited*, DC Wellington, CRI-2010-085-4771, 14 March 2011.

[16] *Ministry of Fisheries v Chong Pil Yun and Ors*, DC Christchurch, CRI-2011-009-011296, 21 September 2012.

[17] *Ministry of Fisheries v Don Won Fisheries and Ors*, DC Wellington, 10 October 2001.

[18] *Kim v Ministry of Fisheries* [2014] NZHC 2440.

[27] All sentencing for regulatory offending must take into account both the principles and purposes of sentencing in the Sentencing Act 2002 and the specific objects of the legislation creating the offences. Sentencing for offences under the Fisheries Act 1996 must therefore take into account the objects the Fisheries Act seeks to achieve, but may also consider sentencing for regulatory offending under other legislation by reference, for example, to sentencing methodology under those Acts, and by analogy to aggravating and mitigating factors under those Acts to the extent they are relevant.

[28] The general purposes of sentencing relevant to the establishment of a starting point in this case are denunciation, specific and general deterrence, and accountability.[19] Purposes relevant to Fisheries Act 1996 sentencing are set out in s 254:

> **254 Matters to be taken into account by Court in sentencing**
>
> If any person is convicted of an offence against this Act, the Court shall, in imposing sentence, take into account the purpose of this Act and shall have regard to—
>
> (a) The difficulties inherent in detecting fisheries offences; and
>
> (b) The need to maintain adequate deterrents against the commission of such offences.

[29] The Court must tailor a sentence with respect to each defendant that achieves the general purposes of denunciation, deterrence and accountability, as well as one that has particular regard to the difficulties inherent in detecting fisheries offences, and the need to deter specifically the commission of such offences. The sentence must also take into account the purpose of the Fisheries Act 1996 set out in s 8:

> **8 Purpose**
>
> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
>
> (2) In this Act—
>
> **Ensuring sustainability** means—

[19] The same point was made in similar terms (somewhat inevitably) in *Ministry of Primary Industries v Hasson and Antons Trawling Company Ltd*, DC Wellington, CRNs 1200850019-022, 27 January 2014.

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

Utilisation means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

[30] Finally, aggravating and mitigating factors related to the offending must be assessed in the mix in order to establish a starting point. Fisher J in *Ministry of Agriculture and Fisheries v Lima*[20] stated that the following aggravating features related to the offending are relevant to establishing a starting point:

(a) A high degree of commercialism, as distinct from amateurish or part-time activity.

(b) The involvement of substantial quantities of fish.

(c) The making of substantial profits.

(d) A long-standing, settled pattern of conduct, as distinct from isolated incidents.

(e) Knowledge by the offender that an offence was being committed, especially if accompanied by deliberate attempts at concealment.

[31] Mr Sullivan submitted that the *Hanham* culpability bands used in sentencing for regulatory offences under other legislation have been used in sentencing for offences under the Fisheries Act 1996 in cases such as *MAF v Harvey*[21] and *MPI v Lee*.[22] Nevertheless, Mr Sullivan submitted that the cases that did so are not binding on me, and cited *MPI v Smyth*[23] as an example of Fisheries Act sentencing that assessed degrees of culpability without reference to *Hanham*'s monetary bands. Ms Bishop submitted that the result in *Smyth* was consistent with the *Hanham* approach, in that Judge Zohrab said that high, medium and low levels of fines should match culpability assessed as high, medium or low. This resulted in a starting point in *Smyth*

[20] *Ministry of Agriculture and Fisheries v Lima,* AP 146/93, HC Auckland, AP 146/93, 26 August 1993 at p. 8.
[21] *MAF v Harvey* CRN 1025005849, 20 October 1992.
[22] *MPI v Lee* [2015] DCR 103.
[23] *MPI v Smyth* [2016] NZDC 23761.

of $25,000 for culpability assessed as medium, which also places it in the medium culpability range of *Hanham*.[24]

[32] There are difficulties comparing sentencing outcomes in fisheries cases with those in non-fisheries cases. Apart from *Kim v Ministry of Fisheries* and *Ministry of Primary Industries v Hasson and Antons Trawling Company Ltd,* it is difficult to calculate the fine as a percentage of the maximum penalty in a manner consistent with findings of culpability on the *Hanham* bands. This is also true with respect to the non-fisheries cases supplied. For example, starting points of 75% of the maximum penalty were taken in *Maritime New Zealand v Daina Shipping Company*, *Ministry for Primary Industries v Fonterra Limited,* and *Maritime New Zealand v Prosafe Production Services PTE Limited & Australian Worldwide Exploration Limited.*[25] This would place those fines in the *Hanham* "extremely high culpability" band, yet those cases do not explicitly assess culpability to be in that band.

[33] I accept that many of the end-point fines in the cases cited by Mr Sullivan appear to be lower than many of the end-point fines in the cases cited by Ms Bishop. There is, however, nothing in principle preventing a *Hanham* approach to sentencing, or indeed the similar approach in *Smyth*, from being used in this case to assess overall culpability and then to apportion the overall starting point fine to individual defendants based on an individual assessment of the culpability of each. Indeed, there is much to be said for bringing Fisheries Act sentencing into the fold, provided the unique objects of the Fisheries Act are taken into account. The *Hanham* approach was used in the sentencing of John Butler, whom Mr Squire QC submitted "is properly to be regarded as a co-offender" with respect to the "John Butler" events. In those circumstances, it would be unusual not to use the same approach to sentencing in this case.

[34] I will therefore use the bands described by the High Court in *Hanham & Philp*. The bands were described in the following terms:

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[24] The maximum penalty for the *Smyth* offending was $100,000.

[25] *Maritime New Zealand v Daina Shipping Company* CRI-2012-070-001872, 26 October 2012; *Ministry for Primary Industries v Fonterra Limited* CRI-2014-085-002986, 4 April 2014; *Maritime New Zealand v Prosafe Production Services PTE Limited & Australian Worldwide Exploration Limited* CRI-2008-043-002447, 7 July 2009.

> [57] Accepting that a broad assessment is involved and that sentencing is not a mathematical exercise, starting points should generally be fixed according to the following scale:
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> | | |
> |---|---|
> | Low culpability: | a fine of up to $50,000 |
> | Medium culpability: | a fine of between $50,000 and $100,000 |
> | High culpability: | a fine of between $100,000 and $175,000 |
>
> [58] The figure of $175,000 at the upper end of the high culpability band is not intended to preclude a greater fine up to the statutory maximum. Higher levels may be required in some cases of extremely high culpability.

Taking the dollar amounts as percentages of the maximum available fine, low culpability would attract a fine up to 20% of the maximum available fine. Medium culpability attracts a fine between 20% and 40% of the maximum available fine. High culpability attracts a fine between 40% and 70% of the maximum available fine. Extremely high culpability, on the *Hanham* assessment, attracts a fine above 70% of the maximum available fine.

The "Marcus D'Esposito" events

[35] I turn now to assess the overall culpability and the overall starting point fine. I will deal first with the Marcus D'Esposito events.

Commerciality and profit

[36] Both the corporate structure by which the offending was achieved and the financial gain produced by the offending are relevant to assessing the degree of commerciality and profit as an aggravating factor. The Ministry submitted that this aggravating factor was present to a high level. Twenty-seven tonnes of unreported BNS were sold, which produced a discrepancy in sales of $253,404, thereby avoiding a deemed value liability of $218,000. The Ministry submitted that the closely-held and vertically-integrated nature of the companies facilitated the offending. It submitted that Marcus D'Esposito's control of the weighing-in, his knowledge of the misreporting, and his knowledge of the illegal sale of BNS, is attributable to the three corporate defendants because of his position as a general manager within the HBS group. The Ministry also submitted that Nino and Joe D'Esposito's failure to take all reasonable steps to ensure that BNS was not misreported in the way it was amounts to

"significant culpability" and "shows a poor attitude" towards the need for strict compliance with the QMS reporting regime at the highest levels of the operation.

[37] Mr Squire QC on the other hand submitted that landing fish in excess of ACE does not in itself raise red flags because this practice is legal. It is always open to a fishing company whose catch exceeds the ACE held either to buy more ACE or pay deemed values if more ACE cannot be purchased. Mr Sullivan submitted that these charges arose as a direct consequence of the fact that the defendant companies were engaged in a lawful fishing activity. He submitted that the degree of commercialism in this case is simply a facet of the factual background, rather than an aggravating feature in and of itself.

[38] It is a peculiar aspect of New Zealand's quota management system that it is not against the law to catch and land fish in excess of one's annual catch entitlement, provided the excess is covered with additional ACE purchased elsewhere or a deemed value is paid. Nevertheless, that is the law, and legal fishing practices should not therefore be an aggravating factor in sentencing. It is not the fishing practice that attracts culpability; it is what happened after the fish were landed that is relevant to an assessment of the degree of commerciality arising. When (a) Marcus D'Esposito's knowledge of the misreporting, (b) Joe and Nino D'Esposito's involvement in the procurement of ACE for Esplanade, and (c) their positions within the vertically integrated companies operating at each stage of the process (which indicate that they should have known of the offending and failed to take all reasonable steps to stop it), are considered alongside the quantity of unreported BNS sold, and the financial advantage gained as a result of the offending, I would assess commerciality to be an aggravating factor that exists to a moderate degree, in the upper half of the medium band.

Quantity of fish in the context of the BNS fishery

[39] The quantity of fish involved in the offending was discussed in terms of its contribution to the commerciality of the offending. The quantity of fish involved in this offending was 27 tonnes of BNS. The quantity of fish is also relevant in terms of the size of the fishery and its sustainability.

[40] Twenty-seven tonnes of BNS is much less than the 600 tonnes of Orange Roughy misreported over a similar period in *Ministry of Agriculture and Fisheries v Harbour Inn Seafoods Ltd & Ors*[26] and *Ministry of Agriculture and Fisheries v Equal Enterprise Ltd.*[27] Six hundred tonnes of Orange Roughy constituted less than 5% of the Total Allowable Commercial Catch (TACC) for the species. The BNS fishery however is much smaller. There is some dispute about what percentage of the TACC the agreed underreported amount of BNS constituted. According to the affidavit of [name deleted], Manager of Fisheries Science at MPI, the total allowable catch for BNS2 is currently 247 tonnes, and for BNS3 it is 93 tonnes. The agreed amount of underreporting of BNS2 is approximately eight tonnes, or 3% of the TACC for that quota management area. The agreed amount of underreporting of BNS3 was approximately 19 tonnes, or 20% of the TACC for that quota management area. The combined underreporting of 27 tonnes of BNS2 and BNS3 is approximately 7.9% of the TACC for those two quota management areas. According to the affidavit of R O Boyd, the total amount of misreported BNS represented 1.2% of the total allowable commercial catch for BNS, although it is an open question as to whether a New Zealand wide comparison or an area comparison is the better measure. In his affidavit of 1 August 2018, [the manager of Fisheries Science at MPI] was of the view that it is the latter.

[41] Mr Sullivan submitted that the 27 tonnes of misreported BNS represented less than 1% of the total value of fish sold by HBS group. By that measurement, the quantity of fish is small. But that is not the only way of assessing the significance of the quantity of fish as an aggravating factor. Measured against TACC, the misreported BNS becomes more significant, and simply in terms of weight, 27 tonnes is a substantial quantity of fish. I find this aggravating factor is present in the upper half of the medium band.

Long-standing and settled pattern of conduct

[42] The Ministry submitted that such a pattern of conduct is demonstrated by the occurrence of underreporting of fish landed and exported on a commercial scale

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[26] *Ministry of Agriculture and Fisheries v Harbour Inn Seafoods Ltd & Ors* DC Wellington, CRN 2042005410, 25 March 1994.

[27] *Ministry of Agriculture and Fisheries v Equal Enterprise Ltd* [1994] 2 NZLR 473.

through 15 events over a one year period, and that this happened with the knowledge of Marcus D'Esposito. Mr Sullivan submitted that this cannot be construed as a settled pattern of conduct. He submitted that the offending was committed "by virtue of an underlying systemic failure to accurately record the original weigh-in", which led to the inaccuracies being replicated in subsequent documents. He submitted that "the duration and quantity of the offending is a consequence of the legitimate nature of the operation, rather than an expression of a deliberate course of action."

[43] I accept that the initial misreporting was replicated in downstream documents, but the initial reporting combined with its subsequent replication happened 15 times in 12 months, and Marcus D'Esposito played an integral part in the origin of the misreporting at weigh-in. I am left with the fact that the defendants have pleaded to an agreed summary of facts, by which they have acknowledged varying degrees of culpability for offending in events which occurred with some frequency in that 12 month period. This to me represents a settled pattern of conduct in that period. I would assess this aggravating factor to be present to a moderate degree.

Knowledge by the offenders that offences were being committed

[44] Knowledge by offenders that offences were being committed is a significant contributing aggravating factor when ranking individual defendants' culpability. Although it also contributes to an assessment of the gravity of the overall offending, which Ms Bishop submitted is "significant strict liability offending", it is difficult to assign knowledge on its own as an aggravating factor to an overall low, medium or high band. Knowledge differs from defendant to defendant, and with respect to the particular factual matrix of what each defendant actually did, should have done, or failed to do. It should also be noted that in this case, there was no underlying illegal fishing practice.

[45] With respect to each of the individual defendants, the Ministry submitted that this aggravating factor is present in Marcus D'Esposito at a high level. It is an agreed fact that Marcus D'Esposito's culpability "is the highest of all the defendants". He knew of the underreporting of the amount of BNS landed to OEL and controlled the amounts of BNS reported to the Ministry. On occasion he personally recorded these

false or misleading weights himself. He knew the weights of BNS were falsely recorded in the weigh-in reception sheets, that these would cause false or misleading statements to be recorded in the downstream documentation, and that the underreported BNS would be sold to retail, wholesale and export customers. The Ministry submitted that both *Hanham & Philp* and *Daina Shipping* require companies to take responsibility for the acts and omissions of their agents, particularly their managers. Ms Bishop submitted that the Ministry was relying on settled principles of attribution as set out by Tipping J in *Couch v A-G,*[28] that when a human being acts on behalf of a corporation, his or her "conduct and state of mind becomes that of the corporation".

[46] Mr Sullivan submitted that the prosecution's attribution of Marcus D'Esposito's level of culpability to the corporate defendants, based on his level of knowledge that the offending was occurring and failing to take reasonable steps to prevent it, is inconsistent with the terms of the Memorandum of Understanding and the Revised Agreed Summary of Facts by which it was agreed that Marcus D'Esposito's culpability was the highest. He submitted that had the case run its course, the defence would have relied on s 245(3). He also submitted that s 245 concerns liability and should not be used for sentencing. He submitted that the reality is that the two principal controlling minds of the companies, Joe and Nino D'Esposito, did not know the offending was occurring, and as the corporate defendants have pleaded to offending derived from strict liability and a failure to take all reasonable steps, they cannot be sentenced on the basis that their offending incorporated intent and knowledge that offending was occurring.

[47] The position with respect to Marcus D'Esposito is reasonably clear; he had knowledge. The position with respect to Nino and Joe D'Esposito is reasonably clear; neither had knowledge of the offending, but as a result of the positions they held as directors of the companies, or as, in Mr Sullivan's words, "the controlling minds" of the companies, they ought to have known of the offending and failed to take reasonable steps to prevent or stop it. Of the three individual defendants, Marcus D'Esposito is the most culpable based on his knowledge. That knowledge contributes to the

[28] *Couch v A-G* [2010] NZSC 27 at [159].

seriousness of the overall offending to a greater extent than Nino and Joe D'Esposito's lack of knowledge and failure to take reasonable steps.

[48] The contribution that each of the individual defendants made, based on their knowledge, or lack of knowledge, to how each of the corporate defendants actually offended, will contribute to an assessment of the overall seriousness of the offending, as well as to an assessment of the culpability of each corporate defendant. Of the three corporate defendants, I agree with Mr Sullivan that HBS's "overarching control of the vertically-integrated fishing operation, the fact that it is the substantive business within the HBSG, that it was the principal recipient of any advantages accruing from the actual offending, and [that] all of the offending was essentially committed by officers or employees of that company" means that it is the most culpable of the corporate defendants. I also agree with Mr Sullivan that OEL would rank next in terms of culpability, because it was the primary source of the false information at the weigh-ins over which Marcus D'Esposito had control (with his knowledge thus playing a more significant role with respect to the OEL charges), falsities which then cascaded into the subsequent documentation. Esplanade follows OEL because it was required by OEL, the licensed fish receiver, to enter the greenweight figures into its landing returns when the fish was weighed after it was landed.

Level of resulting harm to the Quota Management System and breach of trust

[49] The Ministry submitted that this aggravating factor is present at a high level. Misreporting catch means that fishery management decisions are based on inaccurate information. The BNS fishery may be over-fished as a result, risking the longer-term benefits of a sustainable fishery to the public in general and stakeholders, including iwi-controlled companies holding settlement quota in particular. The price of ACE may be distorted. There are also reputational risks for the industry, especially because the quota management system depends on truthful and accurate reporting. Considerable trust is placed in those who are required to report accurately. The quota management system is therefore vulnerable to a breach of that trust.

[50] Mr Sullivan emphasised that the offending in this case "was of a negligent nature, rather than deliberate", and that when "the fishing activity undertaken is lawful

(only the subsequent reporting thereof has given rise to the charges), the level of seriousness of the offending is not as high as in cases where the underlying activity itself is unlawful." Mr Sullivan submitted that the maximum penalties for each charge "are a clear signal of the importance of compliance with the QMS" but that this offending, "which was not premeditated and collaborative in nature, arose from systemic failings and inherently places the offending at the lower end of the spectrum of culpability."

[51] Harm is essentially a measure of outcome, regardless of how that outcome was achieved. The behaviour involving a breach of the trust which the QMS places in accurate reporting is the means by which harm was achieved. In this case, breach of trust as an aggravating factor weighs most heavily on Marcus D'Esposito. Joe and Nino D'Esposito's failure to take all reasonable steps engages breach of trust, but not to the same extent as Marcus D'Esposito. The outcome however is the same. There was harm to the basis on which the quota management system is operated, and harm in the form of reputational risks to the industry, resulting from the offending. I would assess this to be an aggravating factor that sits very close to, if not at, the start of the high band of culpability.

[52] I do not consider there to be any mitigating factors related to the offending. I turn now to determine overall culpability and starting points.

Overall culpability and starting points

[53] This is strict liability offending. I agree with Mr Sullivan that the lack of knowledge, intent, or premeditation inherent in strict liability offending is relevant to assessing a starting point, but the absence of such things is relevant as an absence of aggravating factors, rather than as a factor that necessarily prevents strict liability offending from entering the higher culpability bands. The presence of other aggravating factors can push strict liability offending into the higher culpability bands. For example, a starting point of 75% of the maximum penalty was adopted for strict liability offending under the Animal Products Act 1999 in *MPI v Fonterra Ltd*.[29] The offending did not involve deliberateness or recklessness, but rather a failure to follow

[29] *MPI v Fonterra Ltd,* DC Wellington, CRI-2014-085-002986, 4 April 2014.

proper procedures. Aggravating factors taken into account included reputational risk and harm to public confidence in the food safety regulation scheme. A starting point of 75% was also adopted in *Maritime New Zealand v Daina Shipping*[30] for strict liability offending involving carelessness under the Resource Management Act 1991. Aggravating features identified included significant environmental harm and harm to the community. The judge said that the starting point left room for more serious cases involving deliberateness or recklessness.

[54] Giving appropriate weight to the aggravating features of this offending identified above, I assess the offending in this case to be towards the higher end of the medium culpability band. This warrants an overall starting point of 33% of the combined available maximum penalty for the Marcus D'Esposito offending, or $1,237,500. Starting with the corporate defendants, I allocate the starting point fine as follows.

[55] For HBS, 40% of the overall starting point is appropriate. Marcus D'Esposito, its factory manager, knew of the sale of the underreported 27 tonnes of BNS and failed to take all reasonable steps to ensure this did not happen. The offending happened in 15 events over 12 months. HBS had overarching control of the vertically-integrated fishing operation, it was the principal recipient of the advantages of the offending, and all of the offending was committed by its officers and employee. The starting point for HBS is $495,000.

[56] For OEL, 20% of the overall starting point is appropriate. OEL was responsible for completing correct purchase invoices. The falsities and subsequent misreporting arose by virtue of deficiencies in its weigh-in process. This meant that OEL misreported the BNS landed and transferred to HBS in 15 events over a period of 12 months. The starting point for OEL is $247,500.

[57] For Esplanade, 10% of the overall starting point is appropriate. Esplanade is the least culpable of the corporate defendants because it was required to enter the

[30] *Maritime New Zealand v Daina Shipping,* DC Tauranga CRI-2012-070-001872, 26 October 2012.

greenweights resulting from the weigh-in process, after the fish was landed. The starting point for Esplanade is $123,750.

[58] For Marcus D'Esposito, 15% of the overall starting point is appropriate. Marcus D'Esposito knew that false weights were being recorded on the weigh-in sheets which were then carried through into the purchase invoices and subsequent documentation. With this knowledge, he failed to take all reasonable steps to prevent or stop the underreporting landed to OEL and the subsequent sales of underreported BNS by HBS. He also entered some of the false weights into the weigh-in sheets himself. By pleading guilty to charges of being a party under s 66 of the Crimes Act 1961 to OEL making false or misleading statements in purchase invoices, on a *Megavitamin Laboratories (NZ) Limited v Commerce Commission*[31] analysis, he has admitted to having given assistance by deliberately filling in the false weights on the weigh-in sheets, to having knowledge that the weights recorded were false, and to intending that his conduct in entering false weights in the weigh-in sheets would assist OEL in making the false statements as to the greenweight of landed BNS in the purchase invoices. The starting point for Marcus D'Esposito is $185,625.

[59] For Joe D'Esposito, 10% of the overall starting point is appropriate. Joe D'Esposito did not know of the actual misreporting, but as director of the corporate defendants with control over their financial affairs and ACE holdings, he should have known that the corporate defendants and Marcus D'Esposito were misreporting the amount of BNS landed and transferred to HBS prior to export, and he failed to take all reasonable steps to prevent or stop their offending. The starting point for Joe D'Esposito is $123,750.

[60] For Nino D'Esposito, 5% of the overall starting point is appropriate. He communicated regularly with skippers and facilitated export sales on behalf of HBS. As the managing director of the corporate defendants, Nino D'Esposito should have known that the corporate defendants were misreporting the BNS and he failed to take all reasonable steps to prevent or stop their offending. The starting point for Nino D'Esposito is $61,875.

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[31] *Megavitamin Laboratories (NZ) Limited v Commerce Commission* (1995) 6 TCLR 231.

[61] I turn now to aggravating and mitigating factors that relate to each defendant.

Previous convictions

[62] The prosecution submits that there should be an uplift of 10% for Ocean Enterprises' convictions in Operation Blue; an uplift of 10% for Joe D'Esposito's convictions in Operation Roundup; and a 15% uplift for the previous convictions for Esplanade and Nino D'Esposito from both Operations Blue and Roundup. Mr Sullivan submitted that Esplanade was not involved in Operation Roundup, but Ms Bishop submitted that Esplanade was then trading under its previously registered name of Harbour City Seafoods.

[63] The certificate of incorporation for Esplanade No 3 Limited states that Shonky Shelf Company No 4 Limited was incorporated on 5 August 1987. Shonky Shelf Company No 4 Limited changed its name to Harbour City Seafoods Limited on 26 November 1987, and changed its name again, to Esplanade No 3 Limited, on 23 March 1994, but it remained the same entity. On that basis, I consider that the convictions registered against Harbour City Seafoods can be considered as the previous convictions of Esplanade.

[64] Mr Sullivan submitted that Operation Roundup[32] involved 700 tonnes of unreported or misreported Orange Roughy and Moki received from three vessels over a period of 15 months from December 1990 to February 1991. Harbour Inn Seafood Export Limited and Harbour City Seafood Limited received end-point fines of $196,215 each. Joe and Nino D'Esposito received end-point fines of $299,970 each. Mr Sullivan submitted that the present offending was "nowhere close to that established in Roundup", and that the Roundup offending was, unlike the present offending, "serious, deliberate and conspiratorial." He submitted that the time that has passed since the Roundup offending speaks more to a propensity not to commit offences.

[32] Reported as *MAF v Harbour Inn Seafood Limited & Ors,* DC Wellington, CRN 2042005410, 25 March 1994.

[65] With respect to Operation Blue in 2009, Mr Squire QC submitted that Joe D'Esposito was not involved in it and has no previous convictions arising from it. Mr Sullivan submitted that pleas were entered to regulatory offences in Operation Blue "at the very lowest end of seriousness and culpability." Ms Bishop submitted that Nino D'Esposito, as director of OEL and Esplanade, was convicted of making a false or misleading statement in an unloading docket, Esplanade of making a false or misleading statement in an MHR, and OEL of making a false or misleading statement in an LFRR and a purchase invoice.

[66] Both sets of offending relate to strict liability misreporting offending. The Operations Roundup and Blue convictions are therefore relevant. Unlike this case where, except for Marcus D'Esposito, actual knowledge is not admitted, Judge Unwin described the Roundup offending as consisting of "a long standing pattern of conduct and there was full knowledge of the illegal activity accompanied by deliberate attempts at concealment." The presence of knowledge of the underlying illegal activity in Operation Roundup, combined with the passage of time, diminish to some extent the relevance of the Roundup convictions as an aggravating factor in this case. The Operation Blue offending was of a similar nature and more recent, but on a much smaller scale.

[67] I would therefore uplift the starting point for OEL by 5% or $12,375 for its previous convictions for similar offending in Operation Blue. An uplift of 5% or $6,187 is warranted for Joe D'Esposito's previous convictions for relevant offending in Operation Roundup. An uplift of 7.5% is warranted for Nino D'Esposito's and Esplanade's previous convictions in both Operations Roundup and Blue. For Nino D'Esposito, this is $4,640. For Esplanade the uplift is $9,281.

Previous good character

[68] Marcus D'Esposito has no previous convictions. This warrants a discount of 10% or $18,562.

Steps taken since

[69] The HBS group has appointed Josh Te Kaat to provide an independent and ongoing review of the effectiveness of the companies' compliance procedures and to detect deficiencies. Mr Sullivan submitted that the HBS group has particularly reviewed its practices at weigh-in. Ms van Wijngaarden submitted that this is the most significant change for Marcus D'Esposito because he will be able to use Josh Te Kaat "as a sounding board on some of the more complex technical issues surrounding fisheries and animal product compliance." Ms Bishop submitted that this is an example of a reasonable step the HBS group should have taken but did not take earlier, particularly in light of their convictions in Operations Roundup and Blue. Nevertheless, positive steps have been taken, perhaps a little late for some, but the steps taken show that the defendants have taken the opportunity to learn from this prosecution. A discount of 2.5% is warranted for steps taken subsequently.

Impact of forfeiture

[70] Four vessels are forfeit to the Crown. I determine the redemption payments later in the civil section of this judgment. Section 256(14) of the Fisheries Act states that "any forfeiture under any of sections 255A to 255D, or any payment of a sum of money or delivery of property under subsection (7), to persons claiming an interest, shall be in addition to, and not in substitution for, any other penalty that may be imposed by the court or by this Act."

[71] Mr Sullivan submitted that the quantum of the redemption fee is relevant to the overall assessment of whether the ultimate penalties are excessive and therefore unjust. He also submitted that the redemption payments remain relevant to the defendants' ability to pay the fines. Ms Bishop submitted that the vessels have been returned to the offenders under user agreements and have been able to generate revenue. She also submitted that the extent to which forfeiture can be taken into account will be limited to a proportion of what is ordered by way of redemption payments.

[72] In *Tapsell v R,*[33] the Court of Appeal considered whether forfeiture should be taken into account when setting a fine for offending that included six charges of making a false statement under s 231(1) of the Fisheries Act 1996. *Tapsell* concerned the requirement in s 10B of the Sentencing Act 2002 that an instrument forfeiture order must be considered when setting a fine. Although the present case does not concern an instrument forfeiture order as defined in the Sentencing Act 2002 and there is strictly speaking no conflict with s 256(14), arguably the principle is the same. The Court of Appeal said:

> In our view, the appropriate reconciliation of the two potentially conflicting provisions is that the Court must take into account the forfeiture as required by s 10B(1)(b) of the Sentencing Act. In deciding the weight to be given to that matter, the Court must take into account not only the matters referred to in s 10B(2) of the Sentencing Act but also the direction in s 256(14) of the Act that the forfeiture is intended to operate in addition to any penalty which the Court may impose. Approaching the matter in that way is likely to mean that the value of the property forfeited will carry little weight in the sentencing exercise, unless there are particular consequences of the forfeiture for the offender which would make the sentence otherwise unjust in the particular circumstances of that offender.

[73] I consider therefore that forfeiture is a matter that can be taken into account when setting a fine, but that the direction in s 256(14) makes it unlikely to carry much weight. Forfeiture can also be considered, and may carry more weight, after the level of fine has been established, when the sentencing judge considers the ability of the offender to pay under s 40 of the Sentencing Act 2002, and as a final check when considering the extent to which the total package of fine and forfeiture reflects the overall culpability of the offending.

[74] In this case, there is an agreement as to the upper limit of the overall fines that should be imposed, and Mr Sullivan stated that "it is not suggested by the defendants that the defendants are impecunious or that they are incapable of meeting the fines." There is also agreement as to the approximate level of payment required to release the forfeit vessels back to their former owners. In these circumstances, the direction in s 256(14) that any redemption payment is in addition to and cannot be in substitution for, a fine, has particular significance. Although forfeiture can be considered a relevant mitigating factor when setting a fine, I do not consider it to carry any weight in

[33] *Tapsell v R* [2014] NZCA 122 at [45].

circumstances where agreement has been reached on both the available fine and the available redemption payment. I also consider that the direction in s 256(14) has more force, and the redemption payment's weight as a mitigating factor in sentencing is diminished, when the redemption payment is significantly less than the fine, and is therefore more capable of being applied "in addition to" the fine. Finally, this result is consistent with the general rule discussed below that civil forfeiture orders do not warrant a discount at sentencing. For these reasons, there will be no discount for the impact of forfeiture.

Impact of CPRA proceedings

[75] The Commissioner of Police instituted proceedings in the High Court under the Criminal Proceeds (Recovery) Act 2011 (CPRA). Following resolution of this prosecution, the CPRA proceedings were settled on the basis that the defendants will pay to the Crown $253,404.62, which represents the total value of the misreported fish that was sold. Mr Sullivan submitted that fines should take into account the fact that the Crown is otherwise recovering in civil proceedings the value of the misreported fish.

[76] Ms Bishop submitted that a discount for the CPRA proceedings is inappropriate. In *R v Henderson,*[34] the Court of Appeal said that as a general rule, civil forfeiture orders (as distinct from instrument forfeiture orders) do not warrant a discount at sentencing:

> [42] Having regard to all the factors, we conclude that as a general rule civil forfeiture orders do not warrant a discount in sentencing. Significantly, the same approach was taken by this Court in *R v Brough* when considering the previous legislative scheme under the Proceeds of Crimes Act 1991.
>
> [43] We have used the phrase "as a general rule" advisedly. That is because in *Brough*, this court acknowledged that credit might be given at sentencing on account of forfeiture in exceptional circumstances. …

[77] I do not consider the Crown's recovery of profits created by offending a "windfall to the Crown", or a "double up", as Mr Sullivan submitted. The value of the misreported fish is value the defendants would not otherwise have had but for the

[34] *R v Henderson* [2017] NZCA 605 at [42] and [43].

offending. The purpose of the sentencing process is denunciation, specific and general deterrence and accountability for the harm caused by the offending. Nor do I see any exceptional circumstances, a very high bar, in this case that would warrant a discount for the impact of the CPRA proceedings. There will be no discount for the impact of the CPRA proceedings.

Guilty pleas

[78] Ms Bishop submitted that no discount should be available for the defendants' guilty pleas. She submitted that the charges to which the defendants have pleaded have not changed since they were filed after 13 of the original 33 events were withdrawn. The pleas came almost half-way through "one of the most protracted criminal trials in New Zealand history". And by acknowledging their guilt, Ms Bishop submitted the defendants have acknowledged the "incredible nature of their defence." She submitted as an alternative that if there is to be a discount, it should not exceed 10% for these reasons.

[79] Mr Sullivan submitted that the full discount of 25% should be given. He submitted that the original 391 charges were reduced to 131, and the basis on which the prosecution opened was "essentially abandoned". He submitted that had it not been for the change in pleas, "the defended case would likely not have concluded until August/September of this year [2018]". On this reckoning, Mr Sullivan estimated that if the trial had run its course, it would have run for 16 or 17 months, a far cry from the 16 weeks originally estimated. Mr Sullivan submitted that the "entry of pleas and resolution of the various matters in dispute has led to a colossal saving of public resources."

[80] Ms Bishop took issue with Mr Sullivan's position that the Crown had shifted its theory of the case. While this was true to some extent, she submitted that both parties have had to shift their positions. She also submitted that while the prosecution underestimated the length of the trial, the defence contributed to its length as well by means of lengthy cross-examinations, legal arguments requiring extensive mid-trial voir dires and the like. Ms Bishop submitted that as the defence case became clearer during its cross-examination of prosecution witnesses, an obligation arose on the part

of the prosecution to respond to those issues in re-examination, and with more prosecution witnesses giving evidence-in-chief about those issues.

[81] This prosecution has evolved, but it has not evolved into something "completely different" as was the case in *MPI v Bay Cuisine Limited and Ors*.[35] The pleas came late, just before Christmas 2017, in a trial that started on 1 May 2017. But I accept Mr Sullivan's submission that the resolution (which became subject to a considerable amount of post-resolution negotiation and litigation in two Courts) led to a significant saving of public resources in this Court. Past practice is the best predictor of future practice, which to my mind demonstrates that there is some truth in Mr Sullivan's prediction. Balancing the public expenditure to date against the amount of public expenditure that would have arisen had the trial run its full course, I consider a discount of 15% for the guilty pleas to be appropriate.

[82] For the Marcus D'Esposito events, this brings me to the following end points. For HBS, a fine of $410,232; for OEL, a fine of $215,373; for Esplanade, a fine of $110,251; for Marcus D'Esposito, a fine of $126,639; for Joe D'Esposito, a fine of $106,686; and for Nino D'Esposito, a fine of $55,126.

The "John Butler" events

[83] I turn now to set a starting point for the five "John Butler" events. Mr Sullivan and Mr Squire QC submitted that the findings made by Judge Hobbs in his sentencing of John Butler should be the starting point for both the John Butler and Marcus D'Esposito events. Section 8(e) of the Sentencing Act 2002 states that the Court "must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances". Although I am not bound by Judge Hobbs's assessment of John Butler's culpability, I do not necessarily disagree with it, and appreciate that I must take into account "the general desirability" of consistency.

[35] *MPI v Bay Cuisine Limited and Ors* [2015] NZDC 13590 at [29].

[84] John Butler was sentenced on the basis that he knew the correct amounts of fish he caught, and that he deliberately made false entries into five CLRs. He did so for personal benefit and pecuniary gain. He was sentenced on the basis that he misreported 9.6 tonnes of BNS over a period of seven months. There is no agreement as to whether the fish were in fact received into OEL and thus part of the broader offending in the Marcus D'Esposito events. Mr Sullivan and Mr Squire QC submitted that none of the aggravating features of John Butler's offending were present in Esplanade's or Nino D'Esposito's offending. By pleading guilty, Esplanade acknowledged that it failed to take all reasonable steps to ensure the falsities entered by John Butler were detected and corrected before submitting the returns. Mr Sullivan also submitted that Nino D'Esposito did not know of Mr Butler's offending, but on the basis of his daily interactions with the vessel, there were aspects of the vessel's activities and reporting that should have alerted him to the fact "that something was amiss".

[85] Ms Bishop did not accept that Nino D'Esposito's and Esplanade's offending sat at a lower level than that of John Butler. She submitted that these are strict liability charges "designed specifically to encourage companies and Directors to proactively take steps to discharge their obligations" and that "they should be held no less culpable than their employee". She submitted that the starting point adopted by Judge Hobbs of $50,000 (on a finding of culpability sitting on the boundary between the low and medium bands) acknowledged that John Butler "played a part in a wider operation and offending on a larger scale, rather than directing the misreporting." She submitted that adopting the same starting point for Nino D'Esposito and Esplanade achieves parity and takes into account the fact that Nino D'Esposito regularly communicated with John Butler while he was at sea.

[86] I agree with Ms Bishop about the desirability of parity. Section 245(2) of the Fisheries Act 1996 deems the acts and omissions of John Butler to be those of the company, but as with any sentencing, the acts and omissions that constitute the offending of each separate defendant must be considered when assessing the culpability of each. What John Butler did is one part of that assessment, but another part of the assessment is what Esplanade and Nino D'Esposito did, and failed to do to prevent or stop the offending, with the level of knowledge they had. While s 245

deems John Butler's acts to be those of the company, sentencing of the company and its director must also take into account the company's and its director's level of knowledge, acts and omissions that contribute to an assessment of their culpability. In other words, s 245 does not trump consideration of the factual matrix of the offending; at sentencing, facts that are relevant to the culpability of the company and its director must also be considered.

[87] In this case, John Butler's offending can be considered to be an aggravating factor in the offending of Nino D'Esposito and Esplanade. What diminishes the significance of it as an aggravating factor is Nino D'Esposito's absence of knowledge, when compared with John Butler's actual knowledge based on his presence on the vessel, when it was catching the fish. His frequent communications with John Butler however should have alerted him that, in Mr Sullivan's words, "something was amiss". Esplanade's culpability lies in its failure to take all reasonable steps to ensure the falsities entered by John Butler into the CLRs were detected and corrected before it submitted the returns.

[88] To achieve parity with respect to the starting point, I will begin my calculation of the starting point at $50,000 for each of Nino D'Esposito and Esplanade, but then reduce it to reflect the absence of the aggravating factors that were present in John Butler's offending, namely his knowledge of what he was catching and the deliberateness of his misreporting and concealment. Tempering the amount of the reduction for Esplanade is the provision that deems the acts which contribute to Mr Butler's higher culpability to be the acts of the company, and its systemic failure to take steps to prevent the misreporting. Tempering the amount of the reduction for Nino D'Esposito is the fact that having been in frequent contact with John Butler, he should have known something was amiss. I would therefore set the starting point for both Nino D'Esposito and Esplanade in the low culpability band at $35,000.

[89] I will then apply the uplifts for previous convictions on the same basis as the Marcus D'Esposito events. The uplift for each is $2,625.

[90] Both defendants are entitled to the same percentage discounts as they received with respect to the Marcus D'Esposito events for steps taken as part of the HBS group

since the offending and their guilty pleas. These discounts were 2.5% (or $940) for steps taken since the offending, and 15% (or $5,502) for the guilty pleas. This brings me to an end-point fine of $31,183 for each of Esplanade and Nino D'Esposito, which will be cumulative on their fines for the Marcus D'Esposito events.

Financial capacity

[91] Section 40 of the Sentencing Act 2002 requires the Court to take into account the financial capacity of the offenders when setting the fines. I have read the declarations of means upon which Mr Sullivan based his submission that the defendants "are not of unlimited means" and do not fall into the category of "super rich such that the level of penalties would have no meaningful impact on their ability to pay." Ms van Wijngaarden has made me particularly aware of the impact fines will have on Marcus D'Esposito and his young family. The notion of a fine having a meaningful impact directly engages s 8(g) of the Sentencing Act 2002 which requires the sentence to be the least restrictive sentence that is appropriate in the circumstances. The least restrictive sentence in the context of this offending is a fine within the agreed parameters. "Appropriate in the circumstances" in the context of a fine for regulatory offending means that the sentence must be the least restrictive sentence that has "bite"; it would not be appropriate to interpret that provision of the Sentencing Act to require a fine at "licence fee" level. The circumstances of fineable regulatory offences, particularly those offences created by legislation with specific objects or purposes related to the regulated field, make fines that "bite" appropriate to recognise those specific objects.

[92] The defendants do not suggest that they are impecunious or that they are incapable of meeting the fines. The range of available fines has been agreed. There is nothing before me that would indicate the defendants lack the ability to pay an appropriate level of fine within that range.

End-point fines

[93] In summary, the fines calculations are as follows:

	HBS	OEL	ESP	MARCUS D'ESPOSITO	JOE D'ESPOSITO	NINO D'ESPOSITO
Starting point	$495,000	$247,500	$123,750	$185,625	$123,750	$61,875
Previous history		$12,375	$9,281		$6,187	$4,640
Good character				($18,562)		
Steps taken	($12,375)	($6,496)	($3,325)	($4,076)	($3,248)	($1,662)
Guilty pleas	($72,393)	($38,006)	($19,455)	($22,348)	($19,003)	($9,727)
Butler			$31,183			$31,183
End point	$410,232	$215,373	$141,434	$126,639	$106,686	$86,309

Other matters

[94] The parties have agreed that Esplanade has a deemed value liability to the Ministry of $218,000. The parties have agreed that in light of *Ministry of Fisheries v Williams,*[36] banning does not arise in respect of the defendant companies. No order under s 257 is therefore required. The parties have also agreed to let all costs associated with the conduct of the trial, including pre-trial matters, lie where they fall.

[95] I turn now to the applications for relief from forfeiture.

The applications for relief from forfeiture

[96] Convictions were entered, and the forfeiture of the fishing vessels *Lady Ruth*, *Mutiara II*, *Pacific Explorer* and *Trial B,* occurred on 21 June 2018. The former owners of the vessels, Explorer Fishing Limited (in respect of the *Pacific Explorer*), Mutiara Fishing Limited (in respect of the *Mutiara II*), Trial B Fishing Limited (in respect of the *Trial B*), Hawkes Bay Seafoods Limited (in respect of the *Lady Ruth*), have applied for relief from the effects of forfeiture. Although not a former owner, Beauline International (2018) Ltd has also made an application with respect to the *Mutiara II* and the *Pacific Explorer*. The relief sought by the former owners of the vessels is the return to them of all the forfeit property following payment to the Crown of a sum of money. Beauline supports the return of the vessels to their former owners because it gives them the greatest opportunity to recover payments for goods they supplied in 2017, after the offending occurred. Beauline did not therefore supply

[36] *Ministry of Fisheries v Williams*, HC Whangarei, AP 06/03, 13 November 2003.

goods that were used in the commission of the offences, and accepted that the debt of $130,000 owed to them probably does not constitute a legal or equitable interest in the forfeit property. They accept that the application for relief from forfeiture process is not a debt recovery process.

[97] Applications for relief from forfeiture are determined under s 256 of the Fisheries Act 1996 which provides as follows:

> **256 Provisions relating to forfeit property**
>
> (1) In this section, unless the context otherwise requires,—
>
> **forfeit property** means any—
>
> (a) fish and any proceeds from the sale of such fish; or
>
> (b) property used in the commission of the offence; or
>
> (c) quota—
>
> forfeit to the Crown under any of sections 255A to 255D
>
> **interest** means,—
>
> (a) in the case of quota, an interest in the quota that is recorded on the Quota Register at the time of the forfeiture:
>
> (b) in the case of a foreign vessel, a foreign-owned New Zealand fishing vessel, or a foreign-operated fish carrier,—
>
> (i) ownership; and
>
> (ii) an interest, as determined by the Employment Relations Authority or any court, that any fishing crew have in unpaid wages; and
>
> (iii) an interest in costs incurred by a third party (other than the employer) to provide for the support and repatriation of foreign crew employed on the vessel:
>
> (c) in the case of other forfeit property, a legal or equitable interest in that forfeit property that existed at the time of the forfeiture; but does not include any interest (other than an interest referred to in paragraph (b)) in a foreign vessel, a foreign-owned New Zealand fishing vessel, or a foreign-operated fish carrier.
>
> (2) Where—
>
> (a) the forfeiture occurs under any of sections 255B to 255D; and

(b) the forfeit property has a total estimated value of $200 or more,—

the chief executive must, within 10 working days after the date of the forfeiture, publicly notify the details of the forfeit property, and the right of any person to apply to the court for relief from the effects of forfeiture.

(3) Any person claiming an interest in any forfeit property may, within 35 working days after the date of the forfeiture or within such further period before the property is disposed of as the court may allow, apply to the court for relief from the effect of forfeiture on that interest.

(4) Every application under subsection (3) shall contain sufficient information to identify the interest and the property in which it is claimed, and shall include—

(a) a full description of the forfeit property in which the interest is claimed, including reference to any registration or serial number; and

(b) full details of the interest or interests claimed, including—

(i) whether the interest is legal or equitable; and

(ii) whether the interest is by way of security or otherwise; and

(iii) if the interest is by way of security, details of the security arrangement and any other property included in that arrangement; and

(iv) whether the interest is noted on any register maintained pursuant to statute; and

(v) any other interests in the property known to the applicant; and

(c) [Repealed]

(d) the applicant's estimate of the value of the forfeit property and of the value of the claimed interest.

(5) The court shall hear all applications in respect of the same property together, unless it considers that it would not be in the interests of justice to do so.

(6) The court shall, in respect of every application made under subsection (3),—

(a) determine the value of the forfeit property, being the amount the property would realise if sold at public auction in New Zealand; and

(b) determine the nature, extent, and, if possible, the value of any applicant's interest in the property; and

(c) [Repealed]

(d) determine the cost to the Ministry of the prosecution of the offence which resulted in the forfeiture, and the seizure, holding, and anticipated cost of disposal of the forfeit property, including the court proceedings in respect of that seizure, holding, and disposal.

(7) Having determined the matters specified in subsection (6), the court may, after having regard to—

(a) the purpose of this Act; and

(b) the effect of the offence from which the forfeiture arose on the aquatic environment from which the fish, aquatic life, or seaweed was taken or in which the vessel was operating; and

(c) the effect of the offence from which the forfeiture arose on other fishers (whether commercial or otherwise) fishing in the area or for the stock in respect of which the offence occurred; and

(d) the effect of offending of the type from which the forfeiture arose on the relevant aquatic environment; and

(e) the effect of offending of the type from which the forfeiture arose on other fishers (whether commercial or otherwise) fishing in the area or for the stock in respect of which the offence occurred; and

(f) the social and economic effects on the person who owned the property or quota, and on persons employed by that person, of non-release of the property or quota; and

(g) the effect of offending of the type from which the forfeiture arose on fisheries management and administration systems (including the keeping of records and the providing of returns); and

(h) the previous offending history (if any) of the person from whose conviction the forfeiture arose; and

(i) the economic benefits that accrued or might have accrued to the owners of the property or quota through the commission of the offence; and

(j) the prevalence of offending of the type from which the forfeiture arose; and

(k) the cost to the Ministry of the prosecution of the offence which resulted in the forfeiture, and the seizure, holding, and anticipated cost of disposal of the property or quota, including

the court proceedings in respect of that seizure, holding, and disposal,—

and, subject to subsection (8), make an order or orders providing relief (either in whole or part) from the effect of forfeiture on any of the interests determined under subsection (6).

(8) No order shall be made under subsection (7) unless—

(a) it is necessary to avoid manifest injustice or to satisfy an interest referred to in paragraph (b)(ii) or (iii) of the definition of interest in subsection (1).

(b) [Repealed]

(9) [Repealed]

(10) [Repealed]

(11) Without limiting subsection (7), any order under that subsection may order 1 or more of the following:

(a) the retention of the forfeit property by the Crown:

(b) the return of some or all of the forfeit property to the owner at the time of forfeiture, with or without the prior payment to the Crown of a sum of money:

(c) the sale of some or all of the forfeit property, with directions as to the manner of sale and dispersal of proceeds:

(d) the delivery of some or all of the forfeit property to a person with an interest in the property, with or without directions as to payment of a sum of money to specified persons (including the Crown) prior to such delivery:

(e) the reinstatement (notwithstanding the forfeiture) of any interest that was forfeit or cancelled as a result of a forfeiture.

(11A) If the court makes an order under subsection (11) that relates to settlement quota, the person taking possession of that quota by order of the court may only dispose of the quota in accordance with sections 161 (except subsection (2)) and 163 of the Maori Fisheries Act 2004, as if he or she were a mandated iwi organisation.

(12) This section does not require the Crown to pay, or secure the payment of, any sum of money to any person claiming an interest in forfeit property, other than the net proceeds of sale of forfeit property under a court order made under subsection (7).

(13) For the purpose of assisting the court in determining any application for relief, the chief executive and any employee or agent of the Ministry is entitled to appear before the court and be heard.

> (14) Any forfeiture under any of sections 255A to 255D, or any payment of a sum of money or delivery of property under subsection (7), to persons claiming an interest, shall be in addition to, and not in substitution for, any other penalty that may be imposed by the court or by this Act.

[98] The legislation requires the Court to determine three things as the first step before an order can be made:

(a) the value of the forfeit property;

(b) the nature, extent and value of the applicant's interest in that property; and

(c) the cost to the Ministry of the prosecution of the offence which resulted in forfeiture; the anticipated cost of seizing, holding and disposing of the property including the cost of Court proceedings in respect of the seizure, holding and disposal.

[99] The second step requires the Court to consider the 11 matters listed in s 156(7) before making an order for relief from the effect of forfeiture. Such an order must not be made unless it is "necessary to avoid manifest injustice" in the terms of s 156(8). In their Supplementary MOU, the parties record their agreement that it would be manifestly unjust for the vessels to remain permanently forfeit to the Crown, and that they should be returned upon prior payment of a sum of money. If the application for relief is granted, the parties have also agreed that the appropriate range of the payment ordered should be 10% to 30% of the valuations of the vessels obtained by the Ministry. The valuation of the *Mutiara II* is disputed.

[100] I turn first to consider the value of the forfeit property.

The value of the forfeit property

[101] Section 256(6)(a) requires the Court to determine the value of the property "being the amount the property would realise if sold at public auction in New Zealand". The values obtained by the Ministry were determined by John Kearns of Seaboats New Zealand Limited. He was of the opinion that the "open market value"

as of 8 February 2018 "between a willing buyer and a willing seller" for the *Mutiara II* was "approximately" $400,000. He was of the opinion that the "open market value" as of 9 February 2018 "between a willing buyer and a willing seller" for the *Trial B* was "approximately" between $250,000 and $260,000. In his opinion, the "open market value" for the *Lady Ruth* as of 7 March 2018 "between a willing buyer and a willing seller" was between $210,000 and $220,000. Finally, with respect to the *Pacific Explorer*, Mr Kearns said that "it is a difficult task finding helpful comparisons in the New Zealand market in an effort to arrive at a fair market value." After taking into account the current marine market, and "after consultation with my colleagues", it was his opinion that the "open market value" of the *Pacific Explorer* as of 8 February 2018, "between a willing buyer and a willing seller" was "approximately" $1,000,000.

[102] There is a dispute about the value of the *Pacific Explorer*. Mr Sullivan submitted that the vessel was purchased in 2013 for $700,000. He submitted that even allowing for subsequent improvements including the installation of auto-lining, the *Pacific Explorer* "has had a hard working life and there is no reason that its value should have substantially increased in the intervening period. He submitted that that the 2013 purchase price "is likely to be closer to the value that might be realised at public auction than the amount set out in the Crown's valuation". Mr Sullivan's submissions relied on an affidavit from [accountant 1], the accountant for HBS, who deposed that the Pacific Explorer was insured for $800,000 under the terms of the user agreement. He said it was in reasonable condition for its age and would most likely sell for "about the same amount it was purchased for". Mr Burston submitted that after written submissions had been filed, he was provided with a copy of the valuation of the *Pacific Explorer* done by Maritime International for HBS in 2013. It was valued then at $1,300,000.

[103] There is also a dispute about the basis of the valuations. Section 256 requires the value to be determined as if the property were sold "at public auction". The valuations appear to use the words "open market value", "fair market value" and value "as between a willing buyer and willing seller" interchangeably. Mr Sullivan submitted that "public auctions of forfeited property are likely to attract a substantially lower value than a willing buyer/willing seller situation." He submitted that "any potential difference" between the Crown valuations and the test in s 256(6) "can be

adequately addressed by setting relief at the lowest end of the 10%-30% range agreed to by the parties."

[104] Mr Burston relied on an affidavit from Geoffrey Fraser, the managing director of Seaboats New Zealand Limited. He deposed that the phrase "open market between a willing buyer and a willing seller" includes sales by auction. He said that "an auction would not affect the amount paid for a vessel when there is a willing purchaser and seller and is a sales avenue we would consider in selling a vessel along with tender or listing any vessel." Mr Burston submitted on that basis that the expert evidence as to the market value of the Pacific Explorer is the best evidence of what the vessel would obtain if it were sold at public auction.

[105] It appears to me that Mr Sullivan's submission was less concerned with whether or not the phrase "open market between a willing buyer and a willing seller" includes auctions. His concern was that an auction of forfeit property is different from an auction of property between a willing buyer and a willing seller because those in attendance know the property being auctioned has been forfeit. In such a situation, the former owner could be considered to be a reluctant third party, the seller very willing to sell, and the buyer willing to bid low. In other words, the fact of forfeiture is a relevant consideration when establishing the amount the property would realise if sold at public auction.

[106] Valuation is not an exact science. Indeed, it is probably not a science at all. It is an opinion based on a number of facts and nuanced assessments, all of which are changeable depending on the general economic climate on the day of the imagined sale, who attends the sale, how extensively it has been advertised, knowledge of the circumstances of the sale, the timing of the auction and how many other similar items are sold at the same time. The fact that the property offered for sale has been forfeit, and that there is knowledge of this fact amongst bidders, are merely two of the many factors that could affect its sale price and thus a valuation opinion. In the absence of qualified expert opinion to the contrary, I am not therefore inclined to second-guess an expert who has given his opinions based on his training and experience, and, in the case of the *Pacific Explorer*, after consulting with his colleagues, as to the values of these vessels.

[107] I therefore accept the valuations as the best evidence of the value of the vessels. I determine the value of the *Lady Ruth* to be $210,000; the value of the *Trial B* to be $250,000; the value of the *Mutiara II* to be $400,000; and the value of the *Pacific Explorer* to be $1,000,000. In total, the value of the forfeit property is $1,860,000.

The nature, extent and value of each applicant's interest in the property

[108] Explorer Fishing Limited, Mutiara Fishing Limited, Trial B Fishing Limited, and Hawkes Bay Seafoods Limited each had 100% legal ownership of their respective vessels at the time of the offending. Beauline International (2018) Limited has not shown that it has any interest in any of the forfeit vessels.

The cost of the prosecution

[109] Mr Sullivan submitted that having agreed that costs will lie where they fall, the prosecution's "costs in respect of the prosecution of the offences is not relevant to the determination of these applications". The words of s 256(6) are, however, mandatory. Notwithstanding the agreement as to costs, there can be no contracting out by the parties of the mandatory provisions imposed on the Court. The cost of the prosecution is therefore a relevant mandatory consideration.

[110] On the basis of the affidavit of Stephen Ham, the investigation manager of the Central Regions investigation team at the Ministry, Mr Burston submitted that the cost to the Ministry before the charges were filed was $475,855, and after the charges were filed, $1,911,669.98, for a total in excess of $2,300,000.

[111] Having determined the value of the forfeit property, the interest of the applicants in the forfeit property, and the cost of the prosecution, the Court may make an order for relief after having regard to the 11 matters listed in s 256(7), to which I now turn.

Consideration of the 11 matters listed in s 256(7)

[112] The list of matters set out in s 256(7) is not exhaustive. Circumstances related to the offending may also be considered under s 256 even though no specific reference

is made to such circumstances in s 256(7). The Court of Appeal said in *MPI v Sajo Oyang Corporation*[37] that

> [48] … We do not regard the list of factors specified in subs (7) as an exhaustive list and, in any event, such factors may be taken into account in the overall assessment of whether the applicant has established manifest injustice.

Although the prosecution and the defence have agreed that there would be a manifest injustice if the vessels were not returned on payment of a redemption fee to the Crown, consideration of the matters in 256 and the circumstances of the offending is useful to determine the amount of the redemption payment within the agreed limits.

Section 256(7)(a) and (g) – the purpose of the Act and the effect of offending of this type on fisheries management

[113] As discussed above in the penalty section of this judgment, the purpose of the Fisheries Act 1996 is to provide for the utilisation of fisheries resources while ensuring sustainability. "In effect," submitted Mr Sullivan, "fisheries are to be utilised, but sustainability is to be ensured." He submitted that it is "undeniably the case that effective management of fisheries resources under the scheme of the Act requires fishers to accurately report fish taken" and accepted that "in a broad sense" the applicants accept that the offending undermined the purpose of the Act.

[114] The purpose of the Act is carried out by means of the Quota Management System. The QMS requires fishers to accurately record the fish taken in the appropriate quota management area. Failure to do so can have serious implications on the setting of Total Allowable Commercial Catch levels and the conservation of sustainable levels of fish stocks. Unreported catch cannot be taken into account in scientific analysis of fish stocks or in decisions to increase or decrease catch levels. Mr Sullivan submitted that the specific impact of the offending on the sustainability of the BNS fishery would have been "no different than the effect of any other commercial fishing permitted under the current fishery management regime" because of the availability of deemed value payments to the Crown for fish caught without sufficient ACE, or the availability of ACE purchased from other sources to cover fish caught in excess of the fisher's ACE holdings. He submitted that the impact on the

[37] *MPI v Sajo Oyang Corporation* [2014] NZCA 46 at [48].

fishery therefore would have been the same whether the fish were misreported or properly reported. He submitted that the principal impact of the offending was "economic/financial in nature, not resource based."

[115] In his affidavit of 1 August 2018, [the Manager of Fisheries Science at the Ministry for Primary Industries], disagreed that the direct impacts would be the same whether the fish were misreported or properly reported. He said inaccurate reporting directly affects scientific analyses of whether a fish stock is depleting or rebuilding. He said inaccurate reporting also does not allow fisheries management to determine whether other controls such as deemed value rates are "incentivising fishers to balance catch against ACE and ensure the integrity of TACCs".

[116] I accept Mr Sullivan's submission that this is a factor that must be given appropriate weight in the context of a relief application against forfeiture that is automatically applied to a broad range of offences. But the mechanism by which the purposes of the Fisheries Act are achieved depends on fishers who utilise the resource making accurate returns so that the resource remains sustainable. Inaccurate reporting inevitably and detrimentally affects both the quality of the data upon which stock assessment and management decisions are made, and the extent to which the purposes of the Fisheries Act achieved.

Section 256(7)(b) and (d) – the effect of this offending and offending of this type on the aquatic environment

[117] Turning to the effect that these offences and offending of this nature have on the aquatic environment from which the fish were taken, the TACC for BNS2 for each of the 2012/13 and 2013/14 fishing years was 438 tonnes. In 2012/13, the reported catch of BNS2 was 449 tonnes, or 103% of TACC. In 2013/14, the reported catch was 435 tonnes, or 99% of TACC. The BNS2 fishery was therefore slightly over-caught in 2012/13, and marginally under-caught in 2013/14. The TACC for BNS3 in each of 2012/13 and 2013/14 was 171 tonnes. In 2012/13, the reported catch of BNS3 was 245 tonnes, or 143% of TACC. In 2013/14, the reported catch was 240 tonnes, or 140% of TACC. The BNS3 fishery was therefore significantly over-caught in both years. Mr Sullivan submitted that if there is a single BNS stock in New Zealand waters, which some recent information suggests, the misreported fish in this case

represents 1.2% of the combined TACC of 2,200 tonnes for all areas. He submitted that the offending giving rise to forfeiture "would have had little or no additional impact on the aquatic environment over and above that which the commercial fishery for this species usually has."

[118] [The Manager of Fisheries Science at MPI] deposed "that the effects on the aquatic environment from this offending or offending of its type are generally difficult to quantify." [The Manager of Fisheries Science at MPI] stated that the latest information does suggest, but does not conclude, that there is a single stock of BNS in New Zealand waters, but he disagrees that the effect of this offending must be taken in the context of New Zealand-wide catches. He said comparisons in the context of the areas where the offending occurred rather than across all areas "are entirely appropriate" where assumptions about biological stock structure are considered to be a major source of uncertainty. [The Manager of Fisheries Science at MPI] also deposed that the 2011 assessment resulted in an 80% reduction of TACCs compared with the limits in place before 2008. He said "it is likely to take significant time for the stock to rebuild and it is important that catches stay within limits to ensure the rebuild stays on track and the risk for further declines is minimised."

[119] [The Manager of Fisheries Science at MPI] said that fishery management decisions based on inaccurate information "jeopardise not only the fish stock itself but any interdependent species." Those interdependent species include the black petrel in FMA2, which is assessed to be at very high risk in the Seabird Risk Assessment.

[120] [The Manager of Fisheries Science at MPI]'s affidavits show that the misreporting took place at a time when the BNS fishery was stressed. What added to the stress was the ministerial decision to lower the deemed value for BNS landed to the Chatham Islands. That decision diminished the disincentivising purpose of deemed values for fish caught without ACE and landed to the Chathams, but that is not a decision that can be sheeted home to the applicants. Although that decision seems to be at odds with other steps taken to facilitate the recovery of the BNS fishery, such as lowering the TACCs, landing fish without ACE to the Chathams to take advantage of lower deemed values was legal. It is the misreporting of 27 tonnes of BNS (plus the 9.6 tonnes associated with the John Butler events) that must be the focus

of the enquiry into the effects of the offending on the aquatic environment. The unreported fish would not have been able to be incorporated into scientific advice provided to Ministers. This increased the risk to the stressed BNS fishery's sustainability.

Section 256(7)(c) and (e) – the effect of this offending and offending of this type on other fishers

[121] Mr Sullivan submitted that "it is difficult to see how, in any direct sense, the offending in this case could have had an impact on other commercial fishers" given that the TACCs for BNS2 and BNS3 were 99% to 143% caught over the relevant years. He also submitted that logically, substantial misreporting of a particular fishery could have a significant impact on other commercial fishers, but that did not hold in this case because the scale of misreporting was "dwarfed by the level of lawful overfishing" and the level of misreporting was "well within the constraints of the fishery."

[122] [The Manager of Fisheries Science at MPI], by way of contrast, said that he considered the effects on other commercial fishers "to be one of the greatest effects of this offending and offending of this type." He said that "operating outside of the system by not reporting catch undermines parts of the industry that have been abiding with the law and facing the added costs that have resulted from the management measures." He also said that misreporting adversely affects the reputation of the fishing industry and New Zealand's fishery management system.

[123] I consider that the reputational interests of the New Zealand fishing industry and the fishery management system are engaged by this misreporting, and misreporting generally. Sustainably caught fish have value, and misreporting that undermines the reliability of scientific data used to manage a fishery diminishes the reliability of the management decisions taken to ensure that fishery's sustainability.

Section 256(7)(f) – social and economic effects on the applicants if the vessels were not released

[124] The Court must have regard to the social and economic effects on the owners on the non-release of the vessels. The parties have agreed that the vessels are to be returned on payment of a monetary sum. Having accepted the parties' agreement,

there is no risk that the vessels will not be returned, but I will record that the economic effects of forfeiture without their return to the former owners would be the value of the vessels and the value of their revenue producing capacity. Not returning the vessels would also affect employment at the HBS factory and on the vessels, as well as the growth of economic opportunities which are the result of joint efforts between HBS, Ngati Kahungunu and Chatham Islands iwi.

Section 256(7)(h) – previous conviction histories of the applicants

[125] This provision requires consideration of the previous conviction history (if any) of "the person from whose conviction the forfeiture arose". Mr Burston submitted that the absence of conviction histories for three of the applicant companies that own forfeit vessels should be given little significance because of their shareholders' and directors' conviction histories. Mr Sullivan submitted two of the defendants in the proceedings from which the forfeiture in this case arose, Joe D'Esposito and Nino D'Esposito, have previous convictions for fisheries offences. Joe D'Esposito has convictions arising from Operation Roundup; Nino D'Esposito and Esplanade have convictions arising from Operations Roundup and Blue. In total, Nino D'Esposito has 100 convictions, 95 of which are for Fisheries Act offences for which he has received numerous fines; Joe D'Esposito has 96 convictions for Fisheries Act offending for which has received numerous fines; Esplanade has 23; and HBS has seven.

Section 256(7)(i) – economic gains to the applicants from the offending

[126] Under s 256(7)(i), the Court must consider the economic benefits that accrued or might have accrued to the owners of the property through the commission of the offence. Mr Sullivan was concerned about double counting because economic gain has been considered when setting the fine. It is however, repeated as one of the factors I must consider in this list, and I will give it appropriate weight. The advantages gained from the offending have also been agreed and are set out above. In short, Esplanade had limited ACE in respect of BNS2 and BNS3, and avoided deemed value liability for the underreported BNS2 and BNS3. The agreed discrepancy of 27 tonnes is based on the discrepancies between landings and sales for each of the export events subject to these charges. Esplanade faces a total deemed value liability of $218,000. The

value of the exported fish landed but not reported is calculated based on the states and prices of BNS sold over the offending period. The total value of BNS misreported and sold is agreed to be $253,404.62.

Section 256(7)(j) – prevalence of misreporting

[127] Neither the prosecution nor the defence had much to say about the prevalence of offending of the type from which the forfeiture arose. Mr Burston submitted that quantifying the prevalence of misreporting in QMS returns is challenging because it is an "extremely difficult type of offending to detect, investigate and prosecute." Mr Sullivan submitted that without access to actual prosecution figures, all he could reasonably submit is that "the prevalence of this type of offending is likely to be low." In light of these submissions, no determination can be made as to the prevalence of this type of offending.

Section 256(7)(k) – cost of the prosecution

[128] As indicated above, the cost to the Ministry of the prosecution is in excess of $2,300,000.

The order for relief

[129] The Ministry accepts that not returning the forfeit vessels to their former owners would result in manifest injustice. Having determined the value of the vessels, the applicants' interests in the vessels, and the cost of the prosecution; and having considered the 11 matters listed in s 256(7); the issue is at what level within the agreed range of 10% to 30% of the value of the vessels, the payments should be set to release the vessels. Mr Burston submitted that the matter for consideration is best expressed as "the least degree of relief necessary to alleviate manifest injustice, while properly balancing the matters to which the Court must have regard."

[130] Mr Sullivan submitted setting redemption fees at greater than 10% of the market value of the vessels "would add another substantial layer of penalty that in all the circumstances of this case would be excessive and inappropriate." Mr Sullivan cautioned, again, against double-counting matters that have already been taken into

account in setting the fine, and that the redemption payments should be limited to what are appropriate to avoid manifest injustice. I note that Judge Davidson made an order that $40,000 be paid to the Crown for the release of the *Mutiara II* following the conviction of John Butler in respect of his CLR offending. That is 10% of the value of the *Mutiara II*. Although it is one of the vessels being considered in this case, I note that the precise quantum of the redemption payment was determined by agreement, the order does not appear to involve consideration of the matters in s 256(7), and it relates to offending on a more limited scale. To the extent that the fact of agreement is relevant, in this case there is agreement that the redemption payments fall within an agreed range of 10% to 30% of the value of each vessel.

[131] There was some discussion about the whether or not deterrence should be considered in setting the redemption payments. The structure of s 256(7), by requiring separate consideration of matters related to the "offence from which the forfeiture arose" and "offending of the type from which the forfeiture arose", would appear to engage, respectively, specific and general deterrence. Many of the subject-matters listed in s 256(7) such as, for example, "the prevalence of offending of the type from which the forfeiture arose" would also appear to engage deterrence. In *Daleszak v MPI,*[38] the legislative history of s 256 was considered. In the 1983 Act, the Minister, not the Court, had the power to consider forfeiture. Deterrence, now a matter for the Court at sentencing, was a matter the Minister could take into account on forfeiture. By transferring consideration of forfeiture from the Minister to the Court, Andrews J concluded that Parliament "intended to remove deterrence as a discretionary factor to be considered at the stage of an application for relief, and intended it to be a factor required to be considered at sentencing." Andrews J relied on the presence of deterrence in s 254 which sets out the matters to be taken into account by the Court in sentencing, and the absence of any specific reference to deterrence in s 256 which deals with forfeiture.

[132] Mr Burston sought to distinguish *Daleszak* on the basis that it presumed the list of matters in s 256(7) was exhaustive. That presumption has now been overturned by *MPI v Sajo Oyang Corporation*[39] which means matters other than those listed can

[38] *Daleszak v MPI* [2013] NZHC 2602 at [25] and [36].
[39] *MPI v Sajo Oyang Corporation* [2014] NZCA 46 at [48].

be considered. This does not necessarily mean however that deterrence can, or should, be imported as a matter to be considered when deciding whether or not to make an order for relief from the effects of forfeiture. To my mind, I do not think deterrence needs to be imported into s 256(7) because it is inherent in both the subject-matter and the structure of s 256(7). Consideration of the matters listed in s 256(7) effectively forces consideration of deterrence, without using the word,[40] in the specific context of the relevant matters listed, rather than as a general principle at sentencing as required by s 254(b). The matters listed in s 256(7) are both more specific and cover a broader range of specific subjects that are relevant as particular aspects of deterrence than the general concept of deterrence expressed in s 254(b).

[133] There is not much daylight between the test embraced by Mr Sullivan and that expressed by Mr Burston; both involve assessing the proportionality of the effects of forfeiture in light of the extent of the offending. The tools that are used to assess that proportionality are found in s 256(7). It is apparent after a consideration of the matters referred to in s 256(7) that the mechanism by which the purposes of the Fisheries Act are achieved depends on fishers making accurate reports. Inaccurate reporting adversely affects the quality of the data used to manage fish stocks, thereby undermining achievement of the Fisheries Act's purposes. It also undermines those parts of the industry that have complied with the law, the reputation of the fishing industry, and the reputation of the fishery management system. The principals of the applicants have a history of convictions for fisheries offences, and gained economic benefit from this offending. The misreporting took place at a time when the BNS fishery was stressed. Offending of this nature is difficult to detect because it relies on accurate self-reporting, and the cost of this prosecution to the taxpayer was $2,300,000. After taking into account these matters, I do not consider that setting the redemption payments at 22.5% of the value of the vessels is disproportionate. This returns 77.5% of the value of the vessels to the applicants. I consider a payment at that level to be the minimum degree of relief necessary to alleviate manifest injustice, having considered the matters in s 256(7).

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[40] Parliament appears to have required the Courts to "think things, not words". See Oliver Wendell Holmes Jr., "Law in Science and Science in Law", 12 Harv. L. Rev. 443, 460 (1899). I acknowledge Duke University Professor Jeff Powell's encouragement to think that this Holmes exhortation continues to be of practical application.

[134] I therefore order relief from the effects of forfeiture as follows. I order the return of the *Mutiara II* on payment of $90,000; the return of the *Trial B* on payment of $56,250; the return of the *Lady Ruth* on payment of $47,250; and the return of the *Pacific Explorer* on payment of $225,000. The sum of these redemption payments is $418,500.

Fines and redemption payments considered together

[135] The sum of the fines against the six defendants is $1,086,673. The sum of the payments the applicants must make to obtain relief from the forfeiture of their vessels is $418,500. With respect to the fines, relief from forfeiture was considered when they were set. Having considered s 40 of the Sentencing Act 2002, the defendants appear able to pay them. With respect to the redemption payments, they sit within the agreed range and are the minimum amounts required to alleviate manifest injustice. In light of s 256(14) and the redemption fees that have been determined, I do not consider the redemption payments make the overall sentence unjust in the particular circumstances of this case. I consider that the overall sentence reflects the culpability of the offending. There is no need to recalibrate the redemption payments in light of the fine to achieve proportionality. Considered together, both the fines and the redemption payments adequately reflect the overall seriousness of the offending.

Ancillary orders

[136] I confirm the order I made on 21 June 2018 as per paragraphs 9.1 to 9.4 of the Supplementary MOU. It is made permanent.

[137] I permanently suppress paragraphs 48 and 49 of the sentencing submissions filed on behalf of Marcus D'Esposito.

[138] I order the affidavits of [accountant 1] dated 20 July 2018 and 25 July 2018, any attachment or annexure to those affidavits, and any record of evidence arising out of cross examination of the deponent is to be accessed only with the permission of a Judge under rules 5 and 11 of the District Court (Access to Court Documents) Rules 2017.

[139] I order the release of the forfeit fishing vessels conditional on payment of the redemption fees specified in para [134] of this judgment within 10 working days of the date of this judgment. The Ministry for Primary Industries is ordered to release the vessels to the respective applicants within two working days after payment of the redemption fees is confirmed to have been received by the Crown.

[140] There will be no costs order. Costs will lie where they fall, as agreed.

W K Hastings
District Court Judge