IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CIV-2021-009-000926
[2021] NZDC 24185

BETWEEN	SANFORD LIMITED Plaintiff
AND	MINISTRY FOR PRIMARY INDUSTRIES Defendant

Hearing: 7 December 2021

Appearances: B Fraser for the Plaintiff
L Matahaere for the Defendant

Judgment: 7 December 2021

ORAL JUDGMENT OF JUDGE T J GILBERT

Introduction

[1] On 23 February this year convictions were entered after guilty pleas against Sanford Limited and both the skipper and first mate of a fishing vessel called the *San Waitaki*. The charges were laid by the Ministry for Primary Industries (**MPI**) under the Fisheries (Benthic Protection Areas) Regulations 2007. Sanford was liable, as the owner of the vessel, for the actions of the skipper and first mate.

[2] In essence, the *San Waitaki,* in both 2017 and 2018, went into the Puysegur benthic protection area and trawled for fish during a total of 12 tows over several days. That was a prohibited activity. The protection area itself had been closed to fishing for about 20 years.

[3] In simplistic terms, at least as I understand it, the offending occurred as a result of the protection area not being entered into mapping equipment on the *San Waitaki*. If it had been, automatic alerts would have registered notifying of the prohibited fishing zone. Thus the fishing was inadvertent and committed unintentionally by the various defendants. However, as Judge O'Driscoll found, in what was a lengthy reserved decision, more could certainly have been done to avoid the offending on the part of the defendants, including Sanford.

[4] In his decision Judge O'Driscoll fined Sanford $36,000 across three representative charges. The maximum penalty in relation to each was $100,000. He fined the skipper, Mr Walker, $11,250, and the first mate, Mr Lash, $5,400.

[5] Judge O'Driscoll declined to find that there were special reasons relating to the offence. This meant that the forfeiture provisions in the Fisheries Act 1996 (the Act) automatically kicked in. The net result of that was forfeiture of the *San Waitaki* and some fishing equipment used in the offending. However, since that point, Sanford has continued using the *San Waitaki* under a user agreement entered into with the Crown pending determination of this application.

[6] Sanford now applies for relief from forfeiture under s 256 of the Act, which is a secondary route to address the potentially blunt tool of forfeiture. Relief from forfeiture can only be ordered to avoid manifest injustice and, as part of that, the Court can order the applicant to pay a sum of money to the Crown, sometimes known as a redemption fee.

[7] The Ministry accepts that relief from forfeiture is required to avoid manifest injustice, and both parties accept that a redemption fee ought to be ordered. Sanford submits the appropriate redemption fee should be $58,105.60. The Ministry submits that the redemption fee should be between $90,000 and $100,000. The key questions for determination by me are:

(a) Is relief from forfeiture appropriate on the basis that forfeiture would be manifestly unjust?

(b) If so what, if any, redemption fee is appropriate.

Process issues

[8] Before turning to the application at hand I want to say something about the process that has been followed.

[9] Traditionally applications for relief from forfeiture have been considered as an adjunct to the sentencing process. That has meant that in previous cases the judge dealing with sentencing has also dealt with applications for relief from forfeiture under s 256, including any redemption fee. However, I am told that a year or so ago an edict was issued by the Ministry of Justice to the effect that applications for relief from forfeiture under s 256 are technically civil proceedings and thus should no longer be considered an adjunct to the sentencing process. I am not sure of the basis for that edict, and neither party could enlighten me.

[10] However, I am sure that requiring the proceedings to be treated as a purely civil matter, entirely distinct from sentencing, has a number of negative consequences:

(a) First, it means that very often the judge dealing with an application for relief from forfeiture under s 256, will not be the judge who dealt with sentencing. That is because many criminal judges do not hold civil designations, to say nothing of the vagaries of judicial rostering. This is undesirable because the judge who dealt with sentencing will have a good factual appreciation of the case, and often have made factual findings. They may also have potentially dealt with a claim that special reasons exist not to forfeit, as was the case here. Thus the sentencing judge will be in a better position to deal with matters than a judge approaching it afresh. By splitting the process in the way that has occurred here there is a substantial loss of time and efficiency.

(b) Second, the requirement to file civil proceedings is much more time consuming necessitating, at least in this case, a statement of claim, a statement of defence, affidavits, case management directions, all of that prior to even allocating a hearing. Those affidavits, at least to some

extent, have had to retrace territory that was clearly covered in the material before the sentencing judge.

(c) Third, I note that there is nothing in the skill set of a civil designated judge that gives them any advantage in dealing with these matters, over judges who are not so designated.

[11] I observe that both parties in this case, MPI and Sanford, consider the edict requiring the filing of civil proceedings to be a significantly retrograde step. Indeed I was told that MPI is sufficiently concerned about it that they are considering trying to instigate legislative change. I do not need to say any more on this in the current context, except that my strong view is that the new process apparently instigated by the Ministry of Justice requiring the filing of civil proceedings, is undesirable for everybody involved, the parties and the judge.

[12] Further, I can see no real reason, at least on the face of it, why what was a well-established and sensible process has been changed. The reality is that sentencing judges deal with forfeiture in a variety of different contexts all the time, and it works well. For example, forfeiture of motor vehicles, drugs related equipment and money, and firearms are a normal adjunct to the sentencing process.

[13] Hopefully from this point forward applications for relief from forfeiture under s 256 of the Act can be dealt with according to the old process, and not via distinct civil proceedings. If that is not possible from a legal standpoint as things currently stand, hopefully legislative amendment can make it so.

This application

[14] I return to the application at hand. In doing so I note that both parties urged me to deal with this notwithstanding the concern that all of us shared about the requirement to file distinct civil proceedings.

[15] When applications for relief from forfeiture are made, s 256(6) requires the Court to determine:

(a) The value of the forfeit property, based on the amount that would be realised if the property was sold at public auction in New Zealand

(b) The nature and extent of the applicant's interest in the property

(c) The cost of the prosecution to the Ministry.

[16] In this case the agreed value of the forfeit property is $20 million in respect of the *San Waitaki* and $5,280 in respect of the fishing gear. It is accepted that Sanford is the unencumbered owner of the property. It is also accepted that the costs associated with the prosecution were $62,979, which included a modest allowance of 10 hours' time for these civil proceedings.

[17] Whilst those costs are not insignificant, there is nothing to suggest that they are anything other than accurate. Given the nature of the prosecution and, notwithstanding the co-operation and early guilty pleas, they also appear to be reasonable costs. Certainly Mr Fraser for Sanford was not able to identify any area of unreasonableness.

[18] Once those matters are determined s 256(7) sets out 11 matters the Court is to have regard to when deciding whether to make an order providing relief from the effects of forfeiture. Whilst there are 11 matters noted in the legislation, in my view, clearly not all of them will be engaged in all cases, a point which the parties agree with. I shall return to these matters soon.

[19] Section 256(8) makes it clear that: "No order shall be made [for relief from forfeiture] unless it is necessary to avoid manifest injustice…" Where relief from forfeiture is granted, s 256(11) provides for the payment of a sum of money to the Crown upon return of the forfeit property, although there is no particular guidance about the calculation of that sum. However, s 256(14) makes it clear that any forfeiture, or any payment of a sum of money upon redemption of forfeit property, is

in addition to and not in substitution for any other penalty that maybe imposed by the Court or by the Fisheries Act.

Statutory factors

[20] I return now to the various factors set out in s 256(7). As noted not all of these factors will necessarily be relevant to every case, and there is a degree of overlap between them. I have combined some of them in the analysis that follows.

Purpose of the Act

[21] The first factor to take into account is the purpose of the Act which is set out in s 8. The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability. "Ensuring sustainability" is further defined to include, amongst other things, avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment.

[22] Sanford argues that the underlying purpose of the regulations, which it submits is to protect benthos, which includes coral sponges and the like, is relevant. I accept that. It seems to me that the protection of the aquatic environment, including benthos, is an important part of this legislative package, and thus the extent to which that environment may or may not have been damaged by the unlawful activity, is correspondingly relevant as reflected in the next factors. However, this protective purpose remains relevant irrespective of actual damage.

The effect of the offence/offence type on the aquatic environment in which the vessel was operating

[23] Sanford submits that the impact on the aquatic environment in this case would have been relatively minimal. It submits that the Puysegur BPA environment itself was only included as a benthic protection area for representative/geographic spread purposes, and not because of any particular significance. Further, it submits that there is no real evidence of particular damage being caused by trawling in the environment. This is reflected in the fact that when the trawl nets were hauled in, no benthos was noted.

[24] MPI does not accept this submission and has filed evidence from experts. It submits that trawling in the area will have inevitably caused some damage. Research shows that only larger benthos tends to get dredged up in trawl nets, and so the lack of benthos is not necessarily an indication of lack of damage.

[25] I do not think I can look behind the legislation and essentially deem the Puysegur BPA as being of less value than other such protection areas. The reality is that the legislature has included it as an area to be protected, and I must treat it as such.

[26] I accept there was no benthos hauled onto the *San Waitaki* in its trawl nets. However, the expert evidence clearly indicates this does not mean there was no damage. On the contrary, having regard to that evidence, to say nothing of common sense, trawling on the bottom of any aquatic environment with heavy trawl nets must cause some damage.

[27] In this case it seems that the 12 tows conducted by the *San Waitaki* may have contacted about five per cent of the protection area floor, which had not been fished for some 20 years previously. In light of all of this I accept that at least some damage will have been caused over what, cumulatively, was a reasonably substantial protected area.

The effect of the offence/offending type on other fishes or for the fish stock in respect of which the offence occurred

[28] MPI accepts that whilst fish were caught, there will have been no material impact on the fish stock in the area. The reality is that when considered against the quota for the targeted species, a small amount was caught. However, MPI submitted that some reputational damage will have been suffered by the fishing industry generally as a result of the unlawful activity.

[29] Sanford does not accept this submission saying there is no evidential foundation for it, and I tend to agree. At a very general level any industry-based offending does not reflect positively on that industry. But the reality is that this was inadvertent offending, and if there was any reputational damage, it would have been minor, in my view.

Social and economic effects of forfeiture on Sanford and its employees

[30] The evidence is that the *San Waitaki* is worth $20 million and employs 50 fishers per voyage working in two swings. Forfeiture of such a substantial asset would have an obvious negative economic impact on Sanford and, by extension, those people who are employed on it.

[31] MPI takes no issue with this, and it is this fact which, it seems to me, largely accounts for the lack of opposition to relief from forfeiture being granted. Simply put, forfeiture of the asset would be disproportionate to the offending which, whilst it does no credit for Sanford and could have been avoided, was nonetheless unintentional.

Effect of this type of offending on fisheries management and administration systems

[32] The parties agree that this factor is not relevant in this case.

The previous offending history of Sanford

[33] Sanford has no previous convictions for this type of offending in the past. I was told it does have some convictions for unrelated offending, although the precise nature and number of those convictions was not available to me. Whatever the case, I accept that Sanford's position on its relief from forfeiture application is not made worse by its prior history.

The economic benefits that accrued to Sanford as a result of the offending

[34] I was told that the fish that was caught in 2018 in the protected area was seized by MPI and sold for approximately $150,000. Accordingly, there was no economic benefit to Sanford from that offending, but I do not consider seizure of the catch that was unlawfully taken can be properly described as a loss to Sanford. It was never entitled to take those fish. In any event, this statutory factor requires me to look at realised economic benefits, not losses.

[35] The offending in 2017 was not picked up until after the unlawfully taken catch from the benthic protection area had been sold. The evidence was that the value of this fish was approximately $13,500. Accordingly, it seems to me, that that does constitute an economic benefit to Sanford, and I will return to that later.

Prevalence of this type of offending

[36] I was told that this was the third prosecution for offending under the Fisheries (Benthic Protection Areas) Regulations. Neither parties submitted this type of offending was particularly prevalent, although clearly it is not a completely novel offence either. If an offending type was particularly prevalent, this would intuitively indicate that relief from forfeiture ought to be more difficult to obtain, because of a particular need for deterrence. This may also be relevant to setting the redemption fee in the event that relief from forfeiture was granted.

Cost of the prosecution

[37] The costs associated with the prosecution must be taken into account. Exactly what is a cost associated with a prosecution is broadly expressed. Where forfeiture occurs, ordinarily the asset is sold, and the benefit of that sale accrues to the Crown, which may assist in defraying any prosecution expenses and, in some cases, potentially yield a windfall to the Crown.

[38] Where relief from forfeiture is sought under s 256, as is the case here, clearly costs are relevant. If relief is granted, obviously the Crown will not get any benefit of the sale of the asset to offset its costs.

[39] It seems clear to me that the legislature intended the redemption fee to provide an alternate mechanism for potentially reimbursing costs. This stands to reason because the taxpayer, via MPI, has had to expend resources in the form of time and money to bring a defendant's offending to account.

[40] I do not suggest that in all cases the redemption fee must meet all costs. Each case will obviously turn on its own facts. But in a case such as this where Sanford is a major corporate that is clearly well positioned financially, it is difficult to see why it

should not, at a minimum, meet the costs of the prosecution. As noted above, the total cost associated with this prosecution, and related proceedings, are $62,979.28. Sanford noted that this was somewhat higher than previous cases, however, could not point to any aspect which was unreasonable.

Relief from forfeiture

[41] Having regard to all of these matters that I have discussed, I am satisfied that relief from forfeiture is appropriate. As I have noted above a $20 million fishing vessel is at stake. It would, in my view, be manifestly unjust for such a valuable asset to be forfeit in the circumstances of this underlying offending which, as I have noted already, was not intentional.

[42] The question then turns to what, if any, redemption fee should be payable by Sanford to MPI, or to the Crown, prior to release of the asset back to Sanford.

Redemption fee

[43] Sanford accepts that a redemption fee should be paid, as does MPI. The focus of both written and oral submissions was on exactly how much that fee should be. Sanford submitted that a similar methodology should be used to that adopted by Judge Ruth in *Ministry for Primary Industries v Sealord Group Ltd*.[1] There Judge Ruth was dealing with the same type of application I am, although he enjoyed the advantage of being the sentencing judge under the old process.

[44] The offending in *Ministry for Primary Industries v Sealord Group Ltd* was similar in many ways to the current offending. It involved an unintentional breach of the benthic protection regime. Approximately one tonne of benthos was dredged to the surface, arguably indicating greater actual damage to the environment than was caused in this case. However, the offending was more limited in scope because in the case I am considering, the offending spanned two periods in 2017 and 2018 involving some 12 tows.

[1] *Ministry for Primary Industries v Sealord Group Ltd* [2020] NZDC 26659

[45] Judge Ruth was dealing with a vessel valued at approximately $24 million. Having heard submissions he imposed a redemption fee which was two per cent of the first million dollars, that is $20,000, and 0.2 per cent of the remaining $23 million, that is $46,000. This totalled $66,000. In that case the total cost associated with the prosecution were, in round terms, $37,000, which left what Judge Ruth described as the "truly redemptive aspect" of the fee being $29,000. He noted that was not dissimilar to the end fine of $24,000 that he had imposed.

[46] In other cases that I was provided the redemption fees varied widely and there has been no real consistency in the methodology used for setting such fees. Both parties accept, though, that the *Ministry for Primary Industries v Sealord Group Ltd* case is the closest one to the current case in terms of underlying offending and in terms of the value of the fishing asset that had been forfeit.

[47] Taking the *San Waitaki* value at $20 million, if I factor in two per cent for the first million dollars, that is $20,000, and 0.2 per cent for the remaining $19 million, that is $38,000, the total would be $58,000, plus another very modest allowance for the value of the trawl gear that was seized - 0.2 per cent of that value of $5,280 equates to $105.60. All of that equals a total of $58,105.60, which is the redemption fee Sanford invites me to impose.

[48] MPI, however, submits that is too simplistic. It focuses only on the value of the asset that was forfeit and does not take account of matters such as different prosecution costs and the like, or many of the factors that are noted in s 256(7).

[49] At the end of the day it seems to me that fixing a redemption fee in these circumstances is far from a precise task. There is no set formula for calculating such a fee, although I accept that the factors set out in s 256(7), so far as they are relevant, will be helpful in informing the amount.

[50] I note at this point that I do not accept Sanford's submission that in setting a redemption fee the Court must not take into account the need for deterrence. That submission is based on the reasoning of Judge McDonald in *Sanderson v Ministry of Fisheries*, where his Honour held that deterrence formed no part of applications under

s 256.[2] Judge McDonald specifically stated at paragraph [22] that: "Unless deterrence can be sheeted home under [one of the 11 factors in subsection (7)] then it is not a matter I can have account of."

[51] With respect, it seems to me that the forfeiture regime has an important deterrent quality to it. If it is not, at least in part, to deter breaches of the Act, and associated regulations, it is difficult to see what its purpose is. Mr Fraser, for Sanford, was not able to point to any other obvious purpose.

[52] In any event, when one considers the factors listed in s 256(7), several appear clearly linked, at least indirectly, to the notion of deterrence. For example, the existence of relevant previous convictions may call for a deterrent response on forfeiture. Similarly, the prevalence of the particular type of offence that brings a defendant before the Court may do likewise. I also consider that reference to the protective purpose of the Act may call, at least indirectly, for the invocation of deterrence.

[53] The short point is that I consider that the general concept of deterrence is linked to the forfeiture regime, even if only indirectly through the various factors set out in s 256(7). By extension I think it must be linked to the setting of any redemption fee where relief from forfeiture is granted.

[54] I return now to the setting of the redemption fee in this case. As a starting point I consider that the reasonable costs associated with the prosecution, and ancillary proceedings, need to be factored in. In this case that totals, in round terms, $63,000. I consider those costs should be borne by Sanford in the circumstances of this case, rather than by the taxpayer.

[55] I also consider that I should take into account that approximately $13,500 worth of fish was caught during the 2017 offending, and in fact sold by Sanford. Ordinarily that catch would have been forfeit to the Crown, but because the offending did not come to light until after the fish were sold, that is an unjustified economic benefit that has accrued to Sanford.

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[2] *Sanderson v Ministry of Fisheries* DC Whangarei CRI-2005-027-002371, 8 June 2007

[56] Taking the value of the fish that was sold, alongside the costs of prosecution, the total comes to approximately $76,500. I consider that to be an absolute baseline in the circumstances of this case.

[57] The question then is whether an additional "truly redemptive" component to use the phrase coined by Judge Ruth should be added. That may well help to take account of all of the other factors in s 256(7). That is because the $76,500 I have identified so far only really takes account of two factors, namely cost of prosecution and the economic benefit to Sanford. In my view there is a need for a further redemptive component. In *Ministry for Primary Industries v Sealord Group Ltd* the "truly redemptive component", to use Judge Ruth's phrase again, was $29,000 in circumstances that bore similarities to this case, and which had yielded an end fine of $24,000.

[58] If I added the same amount here of $29,000, it would come to $105,500. If I scaled it up proportionately to take account of the 50 per cent greater fine imposed by Judge O'Driscoll, than that imposed by Judge Ruth, it would amount to another $43,500, yielding an end redemption figure of $120,000.

[59] What all this demonstrates is that setting a redemption fee is a difficult and somewhat arbitrary exercise which can be shaped in many different ways. I consider that a sole focus on the value of the asset, though, is not the appropriate way to set a redemption fee, as was suggested to me by Sanford.

[60] What I am going to do, bearing everything in mind, is order a redemption fee of $100,000. That takes account of the $63,000 in prosecution costs, the $13,500 in fish that was caught in the protection area and sold by Sanford, and an additional component of $23,500 reflecting all the other factors in s 256(7).

[61] Whilst that is not an insignificant sum, it sets the overall redemption payment at 0.5 per cent of the value of the forfeit property, which in turn returns 99.5 per cent of the value of the vessel to Sanford, alongside the fishing gear. I consider that this appropriately balances all the factors I need to take into account and is a reasonable

fee to relieve the manifest injustice that would be associated with forfeiture of the entire property.

[62] So in summary the forfeit property comprising the *San Waitaki* and the fishing gear is to be returned to Sanford upon payment of $100,000 to the Crown. Finally, the parties were agreed that no further costs award for these civil proceedings was needed. Those costs will lie where they fall.

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Judge TJ Gilbert
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 13/12/2021