Golden Bay AMAs A STEP CLOSER?

BY JUSTINE INNS, BA, LLB SOLICITOR WITH OCEANLAW NEW ZEALAND

Yet another chapter in the saga of the three interim Aquaculture Management Areas in Golden and Tasman Bays was written in early April, with the release of a Court of Appeal decision dismissing a series of appeals against an earlier ruling of the High Court in respect of the conduct of the Undue Adverse Effects test. It appears that the various episodes of litigation in respect of these AMAs may now be the longest running of any aquaculture litigation in the country, having commenced in the mid to late 1990s.

The UAE phase of the story began in November 2008, when the chief executive of the Ministry of Fisheries (now the Ministry for Primary Industries), released an "aquaculture decision" representing the results of his UAE assessment in respect of the interim AMAs. The effect of that decision was that a small area (200ha) would be reserved due to effects on fisheries resources (i.e. declined), with remaining areas either approved as free of a UAE, or subject to reservation in respect of a potential UAE on the scallop fishery.

The UAE decision was appealed by both the Challenger Scallop Enhancement Company and by those aquaculture applicants who would be negatively impacted by the reservations. In the course of the High Court hearing of these challenges, the Ministry conceded that the chief executive's application of the "Scallop Model" for assessing effects on that fishery (particularly for ranking subzones of the interim AMAs in terms of their relative effects) had been flawed. It was therefore agreed between the parties that the aquaculture decision had been made in error and would have to be re-made.

The focus of the proceedings shifted to other issues in respect of the UAE decision, which were the subject of an Interim Decision by Clifford J in June 2011. That decision upheld the chief executive's reasoning, though it did conclude that if the available information did not provide a rational basis for ranking the interim AMAs so as to maximise the space available for aquaculture, he would be entitled to allocate the available space between the various applicants on a pro rata basis.

The only issues in which the Court disagreed with the approach taken by the fisheries chief executive were those relating to the assessment of cumulative effects, with Clifford J finding that the chief executive had erred in three respects:

- He was wrong to regard fishing as being potentially displaced from the whole of each interim AMAs and should, instead, have considered the area of each interim AMA likely to be actually occupied by aquaculture activities.
- In respect of previous aquaculture activities, he should have undertaken a factual assessment of the extent of previous aquaculture activities, not simply the extent to which they had been approved, e.g. Where aquaculture activities have not been commenced, despite having been approved for many years, the chief executive could conclude that those activities had no possibility of having an adverse effect on fishing.
- He was wrong to take account of the area of marine farms that were in existence when scallops were introduced to the QMS in 1992.

Before the UAE decision could be re-made by the fisheries chief executive, the High Court's Interim Decision was appealed by several of the parties. Most of the issues that had been raised by the parties in the High Court were canvassed again in the Court of Appeal in November 2012, which released its decision, dismissing all of the appeals in early April.

It is understood that MPI has begun updating the information considered previously by the Ministry of Fishery's chief executive and consulting with affected parties, with a view to having the chief executive release a fresh UAE decision before the end of the year. That decision will be impacted by 2011 amendments to the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, so that any areas of the interim AMAs that are determined to be subject to a reservation in favour of commercial fishing (and in respect of which no aquaculture agreements are reached between applicants and affected quota owners) will not be deleted from the interim AMAs. Rather, the applicants will have the option of having the appropriate level of compensation payable to quota owners arbitrated.

However, once the UAE decision is re-made, and before any compensation arbitration can commence, the Tasman District Council must allow six months (extendable in some circumstances) for the Maori Commercial Aquaculture Trust and iwi to agree with applicants on a representative 20 percent of all space in the interim AMAs to be transferred to the Trust in satisfaction of the Crown's settlement obligations. If agreement is not reached in that period, the Council must undertake the identification of the settlement 20 percent of space and issue the Trust authorisations in respect of the settlement space.

Following identification of the settlement of 20 percent, and assuming at least some parts of the interim AMAs are determined to be subject to reservations in favour of commercial fishing, the applicants and the Trust/iwi can seek to negotiate aquaculture agreements with quota owners and/or refer the level of compensation payable to arbitration. Only once those issues are resolved can applications be made for coastal permits.

So the release of the Court of Appeal's decision represents a step forward, and the 2011 introduction of arbitration of levels of compensation to be paid to those affected by a UAE creates a clear pathway forward for the interim AMAs, but aquaculture applicants still have some way to go.