

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CRI-2019-042-002169
[2020] NZDC 22506**

MINISTRY FOR PRIMARY INDUSTRIES
Prosecutor

v

AMALTAL FISHING CO LTD
Defendant

Hearing: 10 August 2020

Appearances: J Wotton for the Prosecutor
P C Dawson and H M Z Lanham for the Defendant

Judgment: 4 November 2020

RESERVED JUDGMENT OF JUDGE J E RIELLY

Introduction

[1] The defendant company faces a charge of taking or removing marine life, finfish, from the Hikurangi Marine Reserve (“the Hikurangi Reserve”) for commercial purposes without lawful authority or reasonable excuse. The charge is laid pursuant to s 18I(1) of the Marine Reserves Act 1971 (“the Marine Reserves Act”).

Facts

[2] Most of the facts are admitted by agreement pursuant to s 9 of the Evidence Act 2006. In addition, the defence called Mr Hazlett, general manager of the Deep Sea Division of the Talley's Group, to give evidence.

[3] The facts can be summarised as follows.

[4] The defendant, Amaltal Fishing Co Limited ("Amaltal Fishing") is a registered corporation. Amaltal Fishing possesses a New Zealand Fishing Permit issued under the Fisheries Act 1996 ("the Fisheries Act").¹ The permit authorises Amaltal Fishing to lawfully fish in commercial quantities pursuant to the New Zealand Quota Management System. The Amaltal Mariner is a registered New Zealand fishing vessel. The Amaltal Mariner vessel is registered to Amaltal Fishing.²

[5] Amaltal Fishing is wholly owned by Amaltal Corporation Limited ("Amaltal Corporation").³ The Amaltal Corporation is wholly owned by Talley's Group Limited ("Talley's Group").⁴ Talley's Group also wholly owns Talley's Group Management Limited (Talley's Management").⁵

[6] Darryle Saunders ("Mr Saunders") is a skipper employed by the Talley's company structure. Mr Hazlett's evidence was that Talley's Management employs most of the salaried staff within the Talley's Group and its subsidiary.⁶ Mr Hazlett also said in evidence that skippers, such as Mr Saunders, are employees.⁷ Although no contract has been provided to the Court, it appears from Mr Hazlett's evidence that Mr Saunders is employed by Talley's Management.

¹ Exhibit 4, Admission of Agreed Facts.

² Exhibit 5, Admission of Agreed Facts.

³ Amaltal Fishing Co. Limited, company number: 36379. The New Zealand Companies Register records the shareholdings as 100 per cent owned by Amaltal Corporation Limited.

⁴ Amaltal Corporation Limited, company number: 169359. The New Zealand Companies Register records the shareholdings wholly owned by Talley's Group Limited.

⁵ Talley's Group Management Limited, company number: 877214. The New Zealand Companies Register records the shareholdings as 100 per cent owned by Talley's Group Limited.

⁶ Notes of Evidence ("NOE") page 2, line 14.

⁷ NOE page 17, line 4.

[7] On 12 March 2019 Mr Saunders was the master of the Amaltal Mariner. On 12 March 2019 the Amaltal Mariner commenced a fishing trip pursuant to Amaltal Fishing's commercial fishing permit. A catch plan was sent to Mr Saunders, by Talley's Group, the day prior, 11 March 2019.⁸ The catch plan detailed the species and tonnage of fish for the trip. The catch plan included the following wording:

It is the Captains sole responsibility to adhere to all boundaries existing including closed boxes, BPA's, Fisheries Management Areas Lines, EEZ Lines or any other closed or restricted areas.

ENSURE YOU KNOW ALL THE AREAS IN YOUR FISHING ZONE AND THAT THEY ARE ACCURATE ON YOUR PLOTTERS

IF YOU ARE NOT 100% SURE – ASK !!!!

[8] On Sunday, 17 March 2019 the Amaltal Mariner was off the south coast of Kaikōura to the east of the Hikurangi Reserve. The Hikurangi Reserve was established in 2014 by the Kaikōura (Te Tai o Marokura) Marine Management Act 2014. The Hikurangi Reserve comprises all of the area described in Schedule 2 of the Kaikōura (Te Tai o Marokura) Marine Management Act.

[9] At 11.42 am on 17 March 2019 the Amaltal Mariner commenced a bottom trawl, approximately 900 metres inside the Hikurangi Reserve. The seafloor was trawled for approximately 10 to 12 minutes and covered a distance of between 1,100 and 1,400 metres. Approximately 104 kgs of fish were reported as caught as a result of this trawl.

[10] Once landed at the port, Talley's Group processed and sold the fish for a sum of \$489.58.

[11] Mr Saunders was charged under s 18I(1) of the Marine Reserves Act. Mr Saunders pleaded guilty and was convicted and sentenced.

[12] Mr Saunders maintained that he was unaware that the Amaltal Mariner was in the Hikurangi Reserve when he commenced trawling. This was because the Hikurangi Reserve was not marked on the Amaltal Mariner's electronic plotters.

⁸ Exhibit 2, Admission of Agreed Facts.

[13] An email was sent by Talley's Nelson compliance manager to the captain of the Amaltal Mariner giving notice of a new marine reserve, the Hikurangi Reserve, on 11 May 2016.⁹ Mr Hazlett's evidence was that on receipt of this notice a master should have been able to plot the reserve on his plotters and chart.¹⁰

[14] Further, the Hikurangi Reserve was recorded on a paper chart (LINZ NZ63) that was aboard the Amaltal Mariner at the relevant time. Following the incursion that is the subject of the charge faced by the defendant company, a branch of either Talley's Group or Talley's Management arranged for the company's vessels' plotters to be updated with the Hikurangi Reserve.¹¹ I infer that the Amaltal Mariner was one of the vessels that was updated in this way. Talley's Group or Talley's Management subsequently went on to upgrade the vessels' electronic systems to include geofencing which generates an alert when a vessel approaches or enters a restricted or closed area.¹²

Division of functions within the Talley's Group

[15] The division of functions between Amaltal Fishing, Amaltal Corporation, Talley's Group and Talley's Management, is central to the present proceedings. From the evidence provided to the Court the division of functions can be described as follows:

- (a) Amaltal Fishing is a commercial fishing arm in the Talley's operation.¹³ Amaltal Fishing owns the relevant fishing permits.¹⁴ Talley's Group owns the Amaltal Mariner.¹⁵ It is Amaltal Mariner that reports the relevant catch as part of their landing reports.¹⁶

⁹ NOE, page 12, lines 1 - 24.

¹⁰ NOE, page 13, line 4.

¹¹ Agreed facts at para (aa).

¹² Agreed facts at para (bb).

¹³ NOE page 4, line 30 – page 5, line 2.

¹⁴ Exhibit 4, Admission of Agreed Facts.

¹⁵ Admission of Agreed Facts.

¹⁶ Exhibit 7.

- (b) Amaltal Corporation owns Amaltal Fishing. There are no other functions conducted by the Amaltal Corporation that are of relevance to these proceedings.
- (c) Talley's Management is the employment arm of the Talley's operation. Talley's Management employs the staff who work for the Talley's Group.¹⁷ This includes the staff aboard the Amaltal Mariner during the period of the alleged offending.¹⁸
- (d) Talley's Group is the operational arm of the Talley's operation. They produce the catch plans and process and sell the fish caught and landed by Amaltal Fishing.¹⁹ Talley's Group are the owner of the necessary fishing information and are responsible for the training of the masters of each vessel.²⁰

[16] In reaching these conclusions on the division of functions, the Court notes Mr Hazlett's evidence that: "Talley's are authorised to fish under the Amaltal permit by Amaltal."²¹ Also relevant is that the landing reports provided to the Court show that the commercial fishing pertaining to the relevant time period was conducted and reported by Amaltal Fishing.²² The landing report dated 20 March 2019 includes the fish taken from the Hikurangi Reserve.²³

[17] Although the Talley's Group owns the parent company of Amaltal Fishing and owns the company that employs the crews, Talley's Management, it is clear that it was Amaltal Fishing, and not Talley's Group, that were the fishing enterprise operating at the relevant time. This is consistent with Mr Hazlett's evidence that the Talley's Group made a conscious decision to continue to use Amaltal Fishing as the commercial fishing arm of their operation:²⁴

¹⁷ NOE page 2, lines 14-15.

¹⁸ NOE page 6, line 32.

¹⁹ Admission of Agreed Facts, at (v).

²⁰ NOE, page 11, line 18-21; NOE Page 16, line 30-32.

²¹ NOE, page 4, line 18.

²² Exhibit 7, Admission of Agreed Facts.

²³ Exhibit 7, Admission of Agreed Facts.

²⁴ NOE page 4 line 31 – page 5 line 2

So when the company became owned by Talley's, we maintained the fishing permits in Amaltal to have continuity in what is called the catch history. The catch history is used by the government for allocation of any new quotas or it can be used for the allocation of any new quotas and so we maintain that catch history within Amaltal.

[18] Within the Talley's Group, the operational management functions for the fleet of fishing vessels owned by Talley's (and its subsidiaries) are delegated to the vessel managers. The vessel managers are in charge of the vessels and provide the day-to-day instructions to the masters.²⁵ The masters (or captains) of the vessels, such as Mr Saunders, are responsible for the on-the-ground management of the vessels. It is Mr Hazlett's evidence:²⁶

They [Masters] are in charge of the vessel, we will direct them to an area and we will authorise them to catch quota within that area but where they go within that area is up to themselves and up to their discretion and so they need to be sure that they know where all those charts are, all those lines are.

Submissions on behalf of the Ministry for Primary Industries

[19] The prosecution submissions can be summarised as follows:

- (a) The offence under s 18I(1) of the Marine Reserves Act is one of strict liability and the prosecution is not required to prove intention or knowledge. The prosecution is only required to prove the absence of lawful authority or reasonable excuse where there is an evidential basis for such a defence. This, they submit, does not apply on the facts of this case.
- (b) In order to take fish for commercial sale, a fishing permit must be held. They submit that as a matter of law, Amaltal Fishing took all fish caught on the fishing trip, including that taken from within the Hikurangi Reserve.
- (c) The fact that the Talley's Group own the vessel and employ Mr Saunders is not relevant. The offence is one of taking for

²⁵ NOE, page 7 line 13-15.

²⁶ NOE, page 10 lines 33 - page 11 line 3.

commercial purposes. It is material that Amaltal Fishing were lawfully conducting a commercial fishing exercise at the relevant time.

- (d) The actions of the master of the Amaltal Mariner must be treated as the actions of Amaltal Fishing.

Submissions on behalf of the defendant

[20] The defendant's submissions can be summarised as follows:

- (a) The scheme of the Marine Reserves Act does not authorise the casting of a wide net of attribution beyond the "controlling mind", or directors, of Amaltal Fishing.
- (b) Vicarious liability is rarely applied in the common law, and it is not appropriate to do so in this case.
- (c) In the alternative, if the Marine Reserves Act authorises attribution, or vicarious liability, at the time Mr Saunders took fish from the marine reserve he was not acting with the authority of, or for, Amaltal Fishing.
- (d) The offence should not be determined within the Fisheries Act regime and the provisions of that Act do not have any bearing on Marine Reserves Act offending.
- (e) It is not significant that Amaltal Fishing were fishing pursuant to a lawful fishing permit issued under the authority of the Fisheries Act. Further, the fact that the Amaltal Mariner is registered to Amaltal Fishing does not render Mr Saunders its agent at the time the fish was unlawfully taken from the marine reserve.

Issues

[21] The following issues are addressed.

- (a) Is s 18I(1) of the Marine Reserves Act a strict liability offence? If not, what is the mens rea component of the offence?
- (b) What is the relevance of the Fisheries Act to offences against the Marine Reserves Act?
- (c) Can the actions of Mr Saunders be attributed to Amaltal Fishing?
- (d) Is Amaltal Fishing vicariously liable for the actions of Mr Saunders?

(a) Is s 18I(1) of the Marine Reserves Act a strict liability offence? If not, what is the mens rea component of the offence?

The law

[22] The starting point for construing provisions creating criminal liability is that an offence requires mens rea as an essential component of criminal liability, absent a contrary statutory indication or an overriding judicial history.²⁷ The extent of any mens rea is determined by the statutory language of the offence provision.

[23] The High Court in *Lawrie v the Department of Conservation* considered whether offending against s 18I(3) of the Marine Reserves Act was to be applied on a strict liability basis. The High Court found that the District Court had erred in applying the principles of *MacKenzie v Civil Aviation Department* to s 18I(3)(d) of the Marine Reserves Act:

[9] I do not consider that the principles in *MacKenzie v Civil Aviation Department* and what is commonly known as “the *MacKenzie* defence” apply to this case in any direct way. This is because the relevant section in *MacKenzie v Civil Aviation Department* did not contain any words relating to fault or mens rea in relation to the relevant defendant in that case. It was therefore necessary in *MacKenzie* to consider whether the intention of the legislature was to impose absolute or strict liability, and the Court of Appeal concluded that the legislature did not intend the offence to be of absolute liability, and that exculpation could be established if there was an absence of fault (p 42). The case against Mr Lawrie is different because it is specifically stated in s 18I(3)(b) of the Act that the offending must take place “without lawful authority or reasonable excuse”. There is, therefore, a mens rea

²⁷ *Shark Experience Ltd v PauaMac5 Inc* [2019] NZSC 111, at [53] referring also to *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 664 per Cooke P and Richardson J.

component actually included in the charge. This charge is not an absolute or strict liability offence, and *MacKenzie* does not apply.

[24] The Court went on to note that s 67(8) of the Summary Proceedings Act (now repealed) applied to the offending. The High Court found that the effect of the language of s 18I(3) of the Marine Reserves Act and s 67(8) of the Summary Proceedings Act was to establish an affirmative onus on the defendant to establish, on the balance of probabilities, a reasonable excuse.

[25] Since the repeal of s 67(8) of the Summary Proceedings Act, it is now accepted that it is for the prosecution to prove the absence of lawful authority or reasonable excuse beyond reasonable doubt, once the issue is raised by the defendant.

[26] The prosecution highlights that when s 18I was inserted by the Fisheries Act, the phrase “being knowingly within the boundaries of any marine reserve” was removed. This, the prosecution submit, supports an interpretation that parliament intended to remove any mens rea component from offending against s 18I of the Marine Reserves Act.

Discussion

[27] Despite the repeal of s 67(8) of the Summary Proceedings Act, the reasoning in *Lawrie v the Department of Conservation* remains applicable to offending against s 18I of the Marine Reserves Act.

[28] Applying *Lawrie v the Department of Conservation*, the words “without lawful authority or reasonable excuse” in s 18I(1) of the Marine Reserves Act import a mens rea component into the offence. The mens rea component imported into s 18I(1), is one short of “full mens rea”, it is one where (once raised by the defence) the prosecution must establish “neglect” by virtue of absence of a reasonable excuse.²⁸

[29] It follows that parliament did not remove the mens rea component entirely when they amended the offence provisions of the Marine Reserves Act. The effect of

²⁸ *Ministry of Agriculture v Pandey* HC Wanganui AP 3/98 at [14].

the removal of “knowingly” was to downgrade the mens rea of the offence from one of full mens rea, to a partial mens rea.

[30] In *Lawrie v the Department of Conservation* the High Court commented on the availability of an excuse of “mistake” of boundary:

[17] ... A mistake by a defendant as to whether an area is Reserve or not Reserve, could constitute a reasonable excuse if the mistake itself was reasonable.

[31] It does not appear that any lawful authority or reasonable excuse has been raised by the defendant. In these circumstances there is no obligation on the prosecution to rebut the reasonableness of any excuse as none has been advanced.

(b) What is the relevance of the Fisheries Act to offending against the Marine Reserves Act?

The law

[32] The Marine Reserves Act was enacted in 1971. The purpose of the Act is provided for in s 3 of the Act:

3 Marine reserves to be maintained in natural state, and public to have right of entry

(1) It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.

(2) It is hereby further declared that, having regard to the general purpose specified in subsection (1), marine reserves shall be so administered and maintained under the provisions of this Act that—

(a) they shall be preserved as far as possible in their natural state:

(b) the marine life of the reserves shall as far as possible be protected and preserved:

(c) the value of the marine reserves as the natural habitat of marine life shall as far as possible be maintained:

- (d) subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the marine life or for the welfare in general of the reserves, the public shall have freedom of access and entry to the reserves, so that they may enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat.

[33] The overarching purpose of the Marine Reserve Act is the preservation and protection of the unique characteristics of the marine environment.

[34] In contrast, s 8 of the Fisheries Act provides the purpose of the Fisheries Act regime:

8 Purpose

- (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

[35] The overarching purpose of the Fisheries Act is to provide for the ongoing availability of fisheries stock, and their continued sustainable utilisation. In enacting the Fisheries Act, parliament made a conscious decision to exclude environmental principles, highlighting that those principles were adequately provided for in the Marine Reserves Act and other environmentally focused legislation:²⁹

We do not support the inclusion of such principles in the environmental principles clause. These values are provided for explicitly in other legislation, such as the RMA, Marine Reserves Act 1971, Marine Mammals Protection Act 1978 and the Wildlife Act 1953. Their inclusion into the environmental principles would introduce a range of non-utilisation values into the Bill and significantly undermine the interface with other statutes. The current interface reflects acceptance that fishing, like other activities, can be curtailed under the RMA and other statutes, on the basis of effects on matters such as intrinsic and amenity values.

[36] The Fisheries Act also substantially amended the Marine Reserves Act. This included the insertion of a new offence provision, s 18I of the Marine Reserves Act. The amendments to the Marine Reserves Act were described by parliament as enacted to “better provide for protection of marine areas”.³⁰

²⁹ Fisheries Bill 1996 No. 63-2, as reported from the Primary Production Committee, at viii.

³⁰ Fisheries Bill 1996 No. 63-2, as reported from the Primary Production Committee, at vi.

Discussion

[37] The Marine Reserves Act sits within the same legislative scheme as the Fisheries Act, however, serves a distinct purpose – the preservation and protection of the marine environment. The focus of the marine reserves’ regime is on preservation, and not utilisation, of fisheries.

[38] The interpretation and application of s 18I(1) should occur with reference to the scheme and purpose of the Marine Reserves Act, which, as noted, is distinctly different from the Fisheries Act.

[39] The Fisheries Act regime, including the attribution provisions and commercial permitting regime, are only of minor relevance to offending against s 18I(1) of the Marine Reserves Act.

(c) Can the actions of Mr Saunders be attributed to Amaltal Fishing?

The law

[40] A corporation is “a person” for the purpose of offending against s 18I of the Marine Reserves Act.³¹ In order for a corporation to be held criminally liable, the actions of human actors must be imputed on to the corporation.³² This is described as the rules of attribution. Unlike under the Fisheries Act, there is no attribution provision in the Marine Reserves Act.³³ It follows that the matter is to be determined by the common law of attribution.

[41] Counsel have identified the leading decisions on criminal attribution in New Zealand as *Cullen v R* and *Meridian Global Funds Management Asia v Securities Commission*.³⁴ While counsel are largely in agreement about the rules surrounding criminal attribution, their application to this case are at issue.

³¹ Section 29, Interpretation Act 1999, “*person* includes a corporation sole, a body corporate, and an unincorporated body”.

³² *Cullen v R* [2015] NZSC 73, at [36].

³³ Fisheries Act 1996, ss 244-246.

³⁴ *Cullen v R*, above n 32; and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).

[42] The relevant principles of criminal attribution can be described as follows:

- (a) The starting point of attribution is the “controlling mind” or directors of the company are those whose actions are attributable to the company.³⁵
- (b) The “controlling mind” presumption is particularly strong for offences which require a full mens rea.³⁶
- (c) Where applying the “controlling mind” presumption would defeat the purpose of the legislative scheme, the Court must fashion a special rule of attribution.³⁷
- (d) In determining whose acts are intended to be counted as those of the company, the Court should look to the legislative scheme giving rise to the offence and its policy.³⁸
- (e) The company’s constitution and delegation of functions are relevant to the Court’s enquiry.
- (f) The employment relationship, and designated authority from the employer as a result of that employment relationship, is relevant to determining whose acts and omissions are attributable to the company.³⁹
- (g) Whether an employer benefits from the actions of the employee may be relevant to the scope of attribution.⁴⁰
- (h) Any consequences of conviction that are part of the statutory scheme may be relevant to determining the extent of the scope of attribution.⁴¹

³⁵ *Cullen*, above n 32, at [36].

³⁶ *St Regis Paper Co Ltd v R* [2011] EWCA Crim 2527.

³⁷ *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 32, at 12.

³⁸ *Meridian*, above n 37, at 12.

³⁹ *Linework Ltd v Department v Labour* [2001] 2 NZLR 639.

⁴⁰ *Moir Farms (Maimai) Ltd v Department of Conservation* [2011] NZAR 694, at [45].

⁴¹ *Cullen v R*, above n 32, at [38].

Discussion

Does the scope of attribution in s 18I(1) of the Marine Reserves Act extend beyond the “controlling mind”?

[43] My view is that parliament intended that s 18I(1) of the Marine Reserves Act was to apply to both companies and natural persons. I hold that view for the following reasons:

- (a) The Interpretation Act defines “person” to include corporates. Unless otherwise specified, this is the applicable definition for person in s 18I(1).
- (b) The maximum penalty for offending against s 18I(1) is three months’ imprisonment or \$250,000. This maximum fine is consistent with that which would be payable by a company (and not an individual) in other regulatory offences.⁴²
- (c) Most commercial activity in New Zealand occurs through companies. It would be an odd outcome if the phrase “commercial purposes” did not include the country’s key commercial actors, companies.
- (d) It is the commercial taking of fish, through activities such as trawling, that has the most significant effect on the marine life of a marine reserve. It is large commercial fishing operations that have the technology and means to fish in this manner. As noted, the purpose of the Marine Reserves Act is to preserve and protect distinctive marine life. This purpose is best achieved by deterring corporates from the commercial taking of species within a marine reserve.
- (e) The forfeiture provisions of the Marine Reserves Act do not provide any guidance on the interpretation of s 18I(1) of the Act.

⁴² Section 224, Food Act 2014, s 99, Wine Act 2003; s 65, Outer Space and High-altitude Activities Act 2017, s 64, Railways Act 2005 (there are many others).

[44] Having found that 18I(1) was intended to include corporates, I turn to consider the application of the “controlling mind” presumption.

[45] It is my view that to apply the “controlling mind” presumption to s 18I(1) would run contrary to the purpose and scheme of the Marine Reserves Act. It is clear that in enacting the Marine Reserves Act parliament intended to take a strict approach to enforcing the boundaries and requirements of marine reserves. This is evident in the wide-ranging powers given to rangers under ss 18 and 18A of the Act and the inclusion of a presumption of “commercial purposes” contained in s 18I(6) of the Act.

[46] In most commercial fishing operations it is not the directors of the company that are the ones in charge of the vessel, those functions are delegated to the company’s agents. The key agent in this commercial relationship is the skipper or master. To take the interpretation proposed by the defendant, that attribution for the purposes of s 18I(1) is limited to the “controlling mind”, would be to limit s 18I(1) so greatly in scope that it would be rendered largely ineffective. This is inconsistent with the strict enforcement approach taken by parliament in wording the Marine Reserves Act.

[47] The defendant raises that a possible consequence of extending the scope of attribution beyond the “controlling mind”, is that the defendant may be unfairly prohibited from receiving a High Seas Permit under s 113H of the Fisheries Act. On this I note three points:

- (a) Section 113H does not provide that there is any automatic prohibition. The decision to grant a permit is at the discretion of the Chief Executive. Therefore, receipt of a permit is contingent on Amaltal Fishing applying for a permit and the Chief Executive exercising their discretion in Amaltal Fishing’s favour. There is no evidence before the Court that an automatic consequence of conviction is that a permit would not be granted.
- (b) The prohibition allows the Chief Executive to have regard to not only the conviction history of the corporate, but also to the history of any vessel operator or master. This consequence would occur irrespective

of whether the defendant company is held criminally liable, by virtue of Mr Saunders' conviction as the master of the Amaltal Mariner.

- (c) It is Mr Hazlett's evidence that Talley's Group only continued to utilise Amaltal Fishing in order to maintain its "catch history" for the purpose of quota allocation. Decisions of the Chief Executive under s 113H of the Fisheries Act do not require reference to a corporate's positive catch history. Therefore, there would be nothing preventing Talley's Group from applying for a permit under s 113H of the Act if Amaltal Fishing is convicted. I am therefore of the view that this potential consequence has limited relevance to the Court's enquiry into attribution in this case.

Does the scope of attribution extend beyond the employer and employee relationship?

[48] The cases provided by both prosecution and defence are limited to attribution in employee and employer relationships. The defence reminds the Court that at no point was Mr Saunders employed by the defendant company.

[49] The defence submits that the Court should interpret the reference to "agent" in the case law as synonymous with "employee". I do not accept this submission. In the context of commercial proceedings, the Court of Appeal articulated the following general principles of attribution:⁴³

[236] First some generalities. Where B was the employee of A and was relevantly acting in the course of that employment, B's actions or knowledge will readily be attributed to A. Where B was acting as the agent of A, attribution is sometimes appropriate. And where B was either an independent contractor (where the underlying relationship is commercial or economic) or simply a volunteer (in a social or family context) B's actions or knowledge will seldom be attributed to A.

[237] On a strict approach to agency, B is A's agent if authorised by A to act on its behalf so as to affect A's relationship with third parties. But it is important to recognise that an inquiry into the legal ability of B to affect A's relationships with third parties is often of only collateral significance to the question whether B's actions or knowledge should be attributed to A.

⁴³ *Bartle v GE Guardians* [2010] NZCCLR 36.

[50] The position articulated by the Court of Appeal is of general, and not limited application, and can be applied to attribution of the actus reus and mens rea in criminal cases.

Can attribution be applied in this case?

[51] I have formed the view that the master of the Amaltal Mariner, Mr Saunders, was acting as an agent for Amaltal Fishing. This is for two reasons.

[52] Firstly, Mr Saunders was in charge of the direction, navigation and operation of the Amaltal Mariner while on the relevant fishing expedition. The Amaltal Mariner is a fishing vessel that is registered to Amaltal Fishing.

[53] Section 103(2)(a) of the Fisheries Act requires vessels to be registered to an “operator”. An operator is defined in s 2 of the Fisheries Act as:

operator, in relation to a vessel, means the person who, by virtue of ownership, a lease, a sublease, a charter, a subcharter, or otherwise, for the time being has lawful possession and control of the vessel

[54] While the vessel may have been owned by Talley’s Group (or one of its subsidiaries) it is clear from the vessel registration that the relevant operator, and only corporate with lawful possession and control of the Amaltal Mariner, was Amaltal Fishing. It therefore follows that while acting as master of the Amaltal Mariner, Mr Saunders must have been acting as the agent for Amaltal Fishing.

[55] Secondly, while Mr Saunders was aboard the Amaltal Mariner he was fishing pursuant to a commercial fishing permit held by Amaltal Fishing. While Mr Saunders was acting on instructions from the Talley’s Group, and utilising their fishing technology, it was Amaltal Fishing that were the only body capable of giving Mr Saunders lawful authority to commercially fish.

[56] If Mr Saunders was not acting as an agent for Amaltal Fishing during this expedition, then there would have been no ostensible authority for the crew aboard the Amaltal Mariner to commercially fish during their expedition. This was clearly not the case. In my view this agency extended to when Mr Saunders commenced the trawl

of the Hikurangi Reserve, as it was Amaltal Fishing, and not Talley's Group, that reported the catch once landed. This reported catch included the fish taken from the Hikurangi Reserve.

[57] In summary, while he was master of the Amaltal Mariner and trawling the Hikurangi Reserve, Mr Saunders was acting within the scope of his agency for Amaltal Fishing.

[58] Having found Mr Saunders was an agent for Amaltal Fishing, it is necessary to decide whether the legislative scheme of the Marine Reserves Act allows attribution of the actus reus and mens rea of the offence from agents such as Mr Saunders.

[59] In my view, the reasons for extending the scope of attribution beyond the controlling mind of a corporation as discussed at paragraphs [43]-[47], apply equally to agency arrangements such as the one here. My interpretation of the parliamentary intent is that the actions of the skipper of a vessel can and should be attributed to the vessel's operator. This applies regardless of the employment arrangement.

[60] In the context of increasingly complicated limited liability company structures, it is important that the integrity of the Marine Reserves Act is maintained. It would be an unfortunate outcome at law if the consequences intended by parliament could be evaded based on advanced company structures.

[61] For these reasons, I am of the view that the charge is proved on the basis of attribution. However, as it has been raised, I will also briefly address vicarious liability in the context of this case.

(d) Is Amaltal Fishing vicariously liable for the actions of Mr Saunders?

[62] The principles of vicarious liability are similar in nature to those of attribution. The distinction was discussed by the Court in *Moir Farms (Maimai) Ltd v Department of Conservation*.⁴⁴

⁴⁴ *Moir Farms (Maimai) Ltd v Department of Conservation* [2011] NZAR 694.

In the case of an offence of strict liability vicarious liability could only arise if the employee is acting within the scope of his or her employment. In that situation the company is held to be responsible for the actions of the employee. That can be compared with direct attribution where the actions of the human agency are identified as the actions of the company itself. In other words, the mind of the person acting is construed as the mind of the company.

[63] Vicarious liability is most common in offences that are strict liability in nature. My finding is that this offence is not a strict liability offence. It is unclear whether it is appropriate to impose vicarious liability when the offence is not a strict liability offence.

[64] A case referred to by counsel, *Department of Conservation v Thompson & Waide*, held that vicarious liability applied to offending against s 18I(1) of the Act. However, the case concerned a direct employer/employee relationship. The parties are in agreement that no New Zealand case has recognised vicarious liability beyond the orthodox employment relationship.

[65] Having already found that the charge is proved against the defendant company on the basis of attribution, I do not consider it necessary to consider vicarious liability and its application to this case any further.

Conclusion

[66] For the reasons I have given I find the defendant company, Amaltal Fishing, guilty of the charge of taking or removing marine life, finfish, from the Hikurangi Reserve for commercial purposes without lawful authority or reasonable excuse.

J E Rielly
District Court Judge