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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 106/93

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BETWEEN INTERNATIONAL LEAGUE FOR THE PROTECTION OF HORSES (NEW ZEALAND) INCORPORATED, a duly incorporated society with its registered office at Hamilton

Appellant

A N D HER MAJESTY'S ATTORNEY-GENERAL, on behalf of firstly DENIS MARSHALL the Minister of Conservation, secondly THE SECRETARY FOR INTERNAL AFFAIRS, and thirdly THE DIRECTOR-GENERAL OF CONSERVATION

Respondents

Coram: Cooke P.
Richardson J.
McKay J.

Hearing: 31 May 1993

Counsel: R.S. Garbett for Appellant
K. Robinson and A. MacPherson for Respondents

Judgment: 31 May 1993

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal from a judgment of Gallen J., delivered on 14 May 1993, dismissing an application for judicial review of a decision by the Director-General of Conservation under s.54 of the Wildlife Act 1953. The proposal to which the proceedings relate is for the removal from a basin in the Kaimanawa ranges, known as the Awaputu, of wild horses for the purposes of

taking them off the land and offering them for sale. If sale does not eventuate, unfortunately they will have to be killed.

There is some urgency because it was originally considered that the mares in foal should not be disturbed later than 31 May, but we are informed that the National Animal Ethics Advisory Committee, appointed under the code of ethical conduct of the Department of Conservation, has now advised that it is safe to carry out the project if it can be completed before the end of June. Even so it is a project which in the interests of the animals themselves obviously should not be conducted in a hasty and unnecessarily disturbing manner, so it is desirable that this Court give an immediate decision as we are now doing.

Wild horses have been in existence in the Kaimanawas for more than 100 years, but the present problem arises from what is said to be a spectacular increase in their numbers. The Department estimates that there may be as many as 1800 and there is evidence that 1100 have actually been counted not long ago. Even the appellants, the International League for the Protection of Horses, accept that there are about 600. The Court is not required and is in no position to adjudicate on the precise figures. The horses are distributed through quite a wide area and of course move about, but various herds centre on particular parts of that wide area. The difficulty is that there is evidence that they are damaging the flora. Dr G.M. Rodgers of Rotorua, Ecological Scientist, gives considerable particulars in an affidavit. We need not refer to it at any length, but note that the principal points are the destruction or degradation of hard tussock grasslands, which in some areas, including the Awaputu basin, has already occurred to a major extent, and also the destruction of or a threat to a number of rare plants. He deposes that horse trampling and grazing is threatening the survival of at least six rare plants in the region, including the probable elimination of one grass species.

The powers which the Director-General invokes by his authorisation issued on or about 19 March 1993, now under attack, derive from s.54, as already mentioned:

> **54. Secretary may authorise hunting or killing of wildlife causing damage** - (1) The Secretary, on being satisfied that injury or damage to any person or to any land or to any stock or crops or to any chattel or to other wildlife has arisen or is likely to arise through the presence on any land of any animals (whether absolutely protected or not), and whether or not the land is a wildlife refuge or a closed game area, may authorise in writing the occupier of the land, or any officer or servant of the Department, or any other person, to hunt or kill, or cause to be hunted or killed, or to catch alive for any specified purpose any such animals, or to take or destroy the eggs of any such animals, subject to such conditions and during such periods as may be specified in the authority.

It is common ground that the reference to the Secretary should now be read as a reference to the Director-General.

The authorisation, which is directed to an operator, namely John Tullock, of Poronui Station, Grazier, and expressed to be 'to capture live horses from the Awaputu Catchment (as outlined on the attached plan) for the purposes referred to in clause C hereinbefore and dispose of them on the following terms and conditions' is challenged as *ultra vires* by the appellant on two broad grounds. An administrative authority must of course act fairly, reasonably and in accordance with law. In this case the argument concentrates on 'reasonably and in accordance with law'.

Mr Garbett, who has appeared today but did not appear in the Court below, has put the case very fully to us. It is convenient first to refer to his arguments on alleged unlawfulness. He made under that head a number of points.

First, he said that to justify the removal of any animal under the section it is necessary for the Director-General to be satisfied that that very animal has caused injury or damage to land or other property or is likely to do so. Such an interpretation would render the section largely unworkable. We have no doubt that it would be an interpretation inconsistent with the purposes of the section and with the injunction of s.5(j) of the Acts Interpretation Act 1924. To give true effect to the intent of the section, it must be sufficient to have regard to the collective activities of animals in a particular area and the effect on the land in question of those activities, considered as a whole. It is not necessary that all the animals in an area should be caught or hunted or killed, nor is it necessary that the authorisation extend to the whole area. Indeed in many cases, of which the present is an example, it may be desirable that action under the section be restricted to a limited group of animals and a limited part of the land. The Awaputu basin, however, is undoubtedly on the evidence one significant part of the area in which the problem of flora damage from the activities of horses has arisen. So far as legality is concerned, the approach of collecting and removing some of them, namely those which happen to be found in the basin at the time when the operation takes place, is entirely within the purview of the statute.

Mr Garbett pointed out that it does not follow that the operation will be efficacious. There is admittedly a considerable element of experiment about it but again we can find nothing in the section to prevent the carrying out of an experiment which could well be a less drastic way of giving effect to the purpose of the section than more wholesale activity.

Counsel also contended that the basic purposes of the Wildlife Act had been lost sight of. Plainly those purposes include the protection of wildlife - 'protection and control of wild animals and birds' is the expression used in the long

title - but the word 'control' is to be noted; and it is also obvious that in s.54 there is recognition by the legislature that the protection of land may be an important consideration. We accept that, in exercising the powers under that section, the Director-General should bear in mind any detrimental effect on the animals and the general objectives of the Act so far as they relate to the protection of animals. That means, as counsel for the Attorney-General has submitted, that something of a balancing exercise is called for. But there is nothing to suggest that in this instance the Director-General did not do exactly that. His affidavit shows that he and his department were well alive to the conflicting considerations of preserving the flora and avoiding unnecessary injury or disturbance to the horses. We see no ground upon which the Court could hold that the balancing exercise has not been properly and responsibly carried out.

The last submission for the appellant was that the catching alive of the horses in the basin would not be for any specific purpose within the meaning of s.54(1), but the purpose is plainly that they be removed from the land in order to protect it better, to reduce the numbers of horses remaining in the area generally; and that in itself is clearly a specified purpose. The regrettable possible consequence that animals may be killed if sales do not eventuate is in fact within the contemplation of the section, but is quite properly treated by the Director-General as something which may unfortunately be involved in the project, rather than being its specified purpose. Again we see no ground on which anything *ultra vires* can be identified.

The other broad head of argument relates to unreasonableness. To a considerable extent that has already been disposed of by what we have said about balance. It is of course no part of the Court's function to act as an appellate authority from the Director-General's decision. It is part of the Court's function to

ensure that his decision is one reasonably open to him on the material before him, and we are satisfied that this decision does meet that test. For the appellant it was suggested that the Director-General had taken irrelevant considerations into account - a point going to lawfulness also. The point arising here is that, in a departmental report annexed to his affidavit and dated 22 July 1992, there is a passage referring to various risks posed by the horses extending beyond damage to the Kaimanawa land:

> It is doubtful that horses were having any impact on natural values, land ownership and public safety in 1981. The exponential increase in the horse population since protection has resulted in a population that is now having a significant but localised detrimental impact on conservation values, primarily indigenous flora. Horses could invade Tongariro National Park or Kaimanawa Forest Park, from the protection area. They pose a risk to the safety of motorists on State Highway 1 and will soon reach a population level that is incompatible with Army training activities. Conversely there is public interest in these horses; they have some aesthetic and scientific value and in some areas may actually enhance native vegetation by selectively grazing invasive exotic weeds and grasses.

It may well be that some of the matters referred to there, particularly risks to the safety of motorists and incompatibility with Army training activities and even the mere possibility of invasion of the Tongariro National Park or the Kaimanawa Forest Park, would be outside the scope of the section. We assume that to be so. But in his affidavit the Director-General has stated unequivocally, after referring to the land over which the horses were roaming:

> The possible interference by the horses with Army operations did not influence my decision to remove the horses. Such a consideration was irrelevant to the criteria specified in s.54(1) of the Wildlife Act. Nor was mere trespass of the horses onto farm land regarded by me as a relevant factor. I considered damage to the land as the relevant consideration.

There is no evidence upon which the Court could reject that passage in his affidavit, nor was there any reason for him to deal more specifically with the other topics mentioned in the departmental letter. We note that the matters specifically referred to by the Director-General in that paragraph of his affidavit were those which appeared to be raised by the appellant's pleadings in the High Court. Viewed then as an exercise of his power under s.54 of the Wildlife Act, the authorisation has not been shown to be either unreasonable or unlawful.

In the course of the argument in this Court there was raised for the first time a suggestion that the proposal might not be carried out in compliance with the Animals Protection Act 1960, The Animals Protection (Codes of Ethical Conduct) Regulations 1987, and the code issued thereunder of 1 September 1987. That point was not pleaded nor adverted to at all in argument in the High Court. Mr Robinson for the respondent has informed us that should any further authority or other step be required to comply with the Animals Protection legislation or the sub-legislation before the project is entered into, then the necessary step will be taken. In those circumstances the Court sees no basis for entertaining the point that has been raised somewhat belatedly.

For those reasons we are in general agreement with the judgment of Gallen J. and the appeal must be dismissed.

The Court recognises that in the normal course costs follow the event and, if the application is pressed, the Attorney-General may well be entitled to an order. On the other hand it is plainly a case where the appellant has been acting *bona fide* for reasons of what it regards as the public interest and is a worthy cause, and we propose simply to reserve the matter of costs. If it is desired on reflection to pursue an application, a written memorandum may be lodged.

R J Cooke P.

Solicitors:
McKinnon Garbett, Hamilton, for Appellant
Crown Law Office, Wellington, for Respondents